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.

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.

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. Wilheim,* 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 of 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 violaton 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 occuring 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.

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[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]

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[8] 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

[8] 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

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[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 chose 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 pursuade 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).

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[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 gorging 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 advising[13] 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 than 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 sent 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 progam"). [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 Keel[19]; 14550–60 Langham; 13510 Magures; 17233 Martin; 16338 Metcalfe; 14971 Miller[20]; 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 Jones[21]; 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 repondents' 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 Tabokin[22]; 15676 Pruitt[23]; 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 terrritory, a total of between 5 and 10 since 1963.)

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[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,

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[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 Byron[29]; 12435 Coppola; 15340–46 Elias; 12077 Galloway[30]; 12493–94, 12515 Hodd; 16142–43 Hudson; 15424 Jeter[31]; 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 Pennet: 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 be 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 HOFE 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 HOFE, 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 businessperson[38] 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 Otarion 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 dealers[39]; 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 fron 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* CSCPF 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 parts[41] 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 files[46] 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 users[48] 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 incompetancy 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

to be most productive of sales. Other promotions designed to obtain leads of prospects by the dealer were also suggested by the Regional Manager.

If such efforts did not result in what the HOFE considered adequate market penetration, or if the dealer would not cooperate in implementing the suggested programs, including the development of a "manpower organization", the HOFE would state that anything less that 100 percent potential was unsatisfactory[49] and that unless potential **[69]**was obtained Beltone would have to terminate the dealer (6115–16 D. Smith; *see* 5134 D. Barnow; *see also* RX 20Z; CX 50, 67, 72, 82, 473, 492, 501, 506).

Usually those dealers who were not financially successful were in arrears in their accounts with Beltone. The reasons given for terminating a dealer were several. It was considered a reason when a dealer, after Beltone had made every reasonable effort to try to help him, was selling so few Beltone hearing aids in the area of primary marketing responsibility that Beltone felt it couldn't continue to do business with him[50] (*see* CX 137, 190, 502; 6143 D. Smith).

However, termination was never taken lightly. It is hard to install a new dealer and dealer inductions constitute a tremendous investment in time and effort of the Regional Manager (6143, 6195, 6328 D. Smith).

50. The record shows that a dealer's sales of other brand hearing aid instruments was a factor that would be taken into consideration in terminations. Ex-HOFE Griffith explained (1804):

> If you have a dealer who in the company's mind is disloyal, if there are other grounds for termination such as poor sales performance, that dealer would be more apt to be terminated if he were handling a competitive hearing aid than had he not been handling a competitive hearing aid.

Griffith made a similar statement to a Beltone dealer (*see* 1634 Lathrop). HOFE Selznick told Sable "we know it is illegal for us to [terminate] on that basis, but we will find a reason" (1089, 1154 Sable).

In 1973 Beltone dealer Davis was terminated (RX 40A–B). In 1972 HOFE Sivek asked Davis why he was not selling more Beltone hearing aids and Davis replied he was selling other brands (8780–85). Sivek told Davis that unless he changed his policies with respect to

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[49] *See* CX 33, 41, 63, 77 (HOFE Sauls), CX 39, 53, 54, 70, 80 (HOFE Schaller), CX 42 (HOFE Griffith), CX 47, 82 (HOFE Childers), CX 48 (Westmoreland), CX 49, (HOFE Nelson), CX 50, 504, 505 (HOFE Jones), CX 67 (D. Smith, Director of Marketing), CX 71, 471 (HOFE Selznick), CX 72 (HOFE Shymanik), CX 364 (HOFE Klein), CX 379 (HOFE Freeman), CX 492, 500 (HOFE Nealon).

[50] Additional grounds for termination were failure to return IRR cards (CX 137, 317); failure to submit guarantee registration cards (CX 317); failure to maintain a current account (CX 317, 503) or alleged unethical practices (CX 317).

other brands, Davis' lead flow would be cut and he would be replaced (4295 Davis; *see also* 2586 Musselman). Davis' lead flow was drastically reduced, [70]and he was terminated (4295 Davis; 8798–8808, 8784 Sivek; RX 41A–B). Davis was terminated on the grounds of low production (RX 40A–C).

In 1971, Beltone terminated Beltone dealer Taylor on the grounds of inadequate market penetration (10047–48 Wofford, Jr.; 1945 Taylor). HOFE Griffith had attempted to persuade Taylor not to sell other brands (1767 Griffith; 1950, 2015 Taylor; *see* 9922–23 Wofford, Jr.). D. Barnow also discussed with Taylor his sale of other brands and said: ". . . you really give me no choice. We could either cancel you or open another office down the street. . ." (1955 Taylor). Shortly before Taylor's termination D. Barnow noted that Taylor "still continued to sell multi-line hearing aids" (1955 Taylor).

Dealer Archer, who was terminated by Beltone in 1967, had, before his appointment as an authorized Beltone dealer, been a multi-line dealer. He was told by his HOFE Fogg to dispose of his existing stock of other brands and to handle Beltone only (2359–60 Archer). After he opened another office outside his "area" in which he sold another brand and after he was admonished for such sales he was terminated for refusal to return IRR cards and file guarantee registrations (1856–58 Griffith; 2317–22, 2382–84 Archer; 1640–43, 1688–89 Lathrop; *see* RX 51).

In 1970, Beltone terminated its dealer H. Smith on the grounds of customer complaints and failure to send IRR cards and guarantee registrations to Beltone (*see* CX 317 A–B). For some time prior to termination he was known by Beltone and other Beltone dealers to be selling other brands (8464–65 Sauls; 632–34, 717 Plyler; 502–03 Wagner), and HOFE Sauls and Division Manager Shymanik both discussed H. Smith's lack of loyalty (774–79, 954, 782–792, 795–96 H. Smith). Beltone, thereafter, accused H. Smith of selling Zeniths representing them as Beltones (6888–93 Matoba; 5881 D. Smith). Shymanik told dealer Wagner that he had just cancelled H. Smith for handling other brands (502–03).

In addition to termination of dealers who sold other brands, Beltone received the resignation of dealer Ziegler after he was confronted by HOFE Selznick and Shymanik on the subject of other brands (*see* 1434–39, 1554–62 Ziegler; CX 387). Dealer Johnson, who was at one time a Beltone Division Manager, sold his business to dealer Benoit after [71]Beltone threatened his termination for low production. Johnson was openly engaged in the sale of other brands (1785, 1803–08 Griffith; 2098–2101 Benoit; 10030, 10162 Wofford, Jr.).

Beltone also terminated several dealers after it learned that they had "transshipped" or "wholesaled" new Beltone hearing aids to ex-Beltone dealers. Laird was terminated after his sales to LePera were traced by serial number and shortly after D. Smith telephoned and complained about such transshipment (2498, 2501 Laird; 1810–13 Griffith; 6446 D. Smith). Shortly after dealer Jeffrey's aids transshipped to ex-Beltone dealer Peters were traced, he was terminated (10669 Schaller; 2242–47, 2298–2301 Peters; 2456–58 Jeffrey).

Moreover, dealers Taylor, Archer and Plyler were reluctant to send in names of their customers to Beltone because they felt their customer names were their confidential property and didn't want them turned over to another dealer (1972–73 Taylor; 2337 Archer; 656 Plyler; 4343–44 Davis; 10058–60 Wofford, Jr.). Nonsubmission of names was a basis for termination of dealers (RX 20Z; 10055–58, 10060 Wofford, Jr.).

Finally, sales in another dealer's area was a constant source of friction between dealer Musselman, his neighboring Beltone dealer Settles, and several Beltone HOFEs and company officials. Difficulties engendered between Beltone dealers in Pennsylvania and the state officials resulting from Musselman's extra-territorial activities arose before Musselman was terminated on the grounds that he had stopped doing business with Beltone (*see* CX 181, 330 RX 42). Actually, Beltone had refused to sell Beltone instruments to Musselman except on a cash-with-order basis (*see* 8852, 8915 Sivek).

51. Beltone's right to terminate the dealer agreement on short notice with or without cause is inherently coercive and unreasonable. The Beltone dealer, pursuant to the other provisions of the dealer agreement and other requirements imposed by Beltone, is committed to a close identification with the Beltone name. His trade style is "Beltone Hearing Aid Service", and most of his customers are Beltone users. His business telephone is usually listed under the Beltone name, and his testing and fitting equipment provided on loan or rental by Beltone (4715–16 D. Barnow). In training consultants, as well as in setting up an office and a service center program, the dealer makes quite a monetary investment in his hearing aid business. **[72]**

Upon termination the dealer stands in a position to lose his business investment. Pursuant to the provisions of the dealer agreement he must cease *all* use of the Beltone name including the use of the telephone listed thereunder in the telephone directory. In addition, all loan and rental equipment must be returned to Beltone. Beltone has a list of the dealer's Beltone customer-users, which it can make available to a successor dealer who would have the right to use

the Beltone name including the trade style Beltone Hearing Aid Service (8915–20 Sivek).

In its business relationship with dealers, Beltone overtly has used the threat of termination to effect the business policies challenged in this proceeding. In addition, the dealer's actions in adhering to those policies must also be viewed in light of Beltone's right to terminate. The inherently coercive threat of termination is found to have a substantial bearing on the dealer's acquiesence to conduct his business in line with Beltone's philosophies, which have resulted in the anticompetitive behavior challenged in this proceeding.

About Post-Termination Matters

Beltone's form dealer agreement contains several provisions covering post-termination activities of an ex-dealer. For example, Article 16 provides in pertinent part (CX 401 B):

> . . . BELTONE shall have the option, at the time of notice of termination of this Agreement by either party or within thirty (30) days after said notice, of purchasing from DEALER at BELTONE's then-current prices, any unsold, unused, BELTONE Products which DEALER may have on hand.

Beltone exercises this option (2385–86 Archer; 2081 Taylor; RX 40 B; RX 42 B; CX 503 B).

Beltone's form dealer agreement also contains a post-termination ban on using the "Beltone" name in any advertising. In pertinent part, Article 12 provides (CX 401 B):

> . . . With regard to advertising, DEALER shall not advertise, after termination of this agreement any BELTONE Products, new or used, or BELTONE Repair service. [73]

Beltone has enforced this provision (CX 352, 495).[51] After Ziegler's resignation, Ziegler was visited by Mr. Wilheim, Beltone's attorney, about a sign in Ziegler's window that read (CX 389; Phy. Exh. 1):

CLEARANCE SALE
RECONDITIONED AIDS

MAICO	BELTONE	SONOTONE
ZENITH		
ELECTONES	$20.00 up	
AND MORE		
ENDS APRIL 30		

Reference was also made to a letter Ziegler had sent to his customers in which the word "Beltone" appeared, and to an equipment bag

[51] In addition Beltone's attorney wrote to terminated dealers warning them against doing anything that may be detrimental to the good name of Beltone, as provided in the dealer agreement (*see* Art. 8, CX 401).

found in Ziegler's shop containing a faded reference to Beltone (CX 388). Ziegler testified (1622):

> . . . if we [Phil and Greg Ziegler] didn't stop using that name in any way whatsoever . . . if one thing was ever found in our office, with the word Beltone, on it, that you [Beltone's attorney] would sue us in federal court . . . in such a way that we would never be able to go in the hearing aid business again.[52]

Ziegler further testified that after this incident he stopped using the Beltone name (1500–01).[53]

Most Beltone dealers trade under the Beltone name using styles such as Beltone Hearing Aid Service.[54] Beltone encourages the use of such a business name (CX 28Z120; [74]4769 D. Barnow) and cooperative advertising credit is granted towards the purchase of outside display signs carrying such a name (CX 28Z124–Z125). As dealer Wofford, Sr. explained, the Beltone dealer wants to use the Beltone name in his trade style (*see* 15805). The dealer agreement, however, reserves absolutely all rights to the Beltone name to Beltone, and on termination, the ex-dealer must cease using such a name style (*see* Art. 12, CX 401 B). The replacement dealer, however, can use the same trade style, and he is usually located in the vicinity of the ex-dealer (2175 Benoit; 8836 Sivek; 7263, 7266–67 Westmoreland; 9468 Selznick).

In addition, as found above (Finding 33, *supra*) Beltone refused to make factory repairs on out-of-warranty aids sent in by ex-Beltone dealers, and although it made in-warranty repairs, it returned the repaired instrument to the user along with a notice that the new authorized dealer was available to service the user.

Appendix "A" to the dealer agreement (*see* Appendix B, *infra*) contains three letters signed in blank by the dealer at the outset of his dealership. The first letter, addressed to the "Office of the Building" directs the addressee to "immediately cancel and remove" at the dealer's expense all listings and signs that include the name "Beltone".

The second letter advises the addressee that the dealer no longer has the right to use the name "Beltone" in any advertisement or in any media in contact with the public.

The third letter, addressed to the "Telephone Company" in addition to relinquishing the right to the name Beltone in all directory listings, directs that the Telephone Company transfer

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[52] This testimony was given during Mr. Wilheim's persistent cross-examination of Ziegler (1620–22).

[53] *See* 1980 Taylor; 11487–92 Gorlin; CX 514, 515.

[54] Article 2 of the form dealer agreement provides in pertinent part (CX 401 A): "BELTONE grants to DEALER the right during the term hereof, to use the trademark, 'BELTONE,' only in a manner approved, in writing, by BELTONE and such use shall cease within thirty (30) days of DEALER's receipt of written notice from BELTONE. DEALER shall never incorporate under any trade name or style using said trandemark. . . ."

telephone service to Beltone Electronics Corporation or if "such transfer can not be accomplished, we direct that such service be cancelled immediately."

There is no evidence that Beltone ever used the third letter to cancel an ex-dealer's telephone number. But the power to accomplish this was assumed at the outset of the dealership (*see* 14909–91 Ziegler).

About the Effects of Beltone's Practices on Competition, Dealers and Users

53. It is further found that respondents' practices as found above actually have the effect of, or have the tendency and capacity of, hindering, suppressing or eliminating competition as alleged in the nine subparagraphs of paragraph twelve of the complaint (*see supra* at p. 7). **[75]**

54. Having found that respondents require their authorized dealers to handle only Beltone hearing aids in their retail sales of new hearing aids, a requirement that most Beltone dealers obey, it follows that competing manufacturers are foreclosed by respondents' practices from selling to these dealers. In fact, representatives of competing manufacturers testified that they were unable to sell their hearing aids to Beltone dealers (3917–20 Skadegard; 4260–62 Sturtz; 3731–33 Saad). The record shows that the independent hearing aid dealers are the principal source through which consumers obtain hearing aids. Accordingly, respondents' practices do, and have the tendency and capacity to, hinder and suppress competition for the custom of Beltone dealers.

55. Having found that respondents require that their authorized dealers sell Beltone products only within a designated area, that they appoint only one dealer in each area, they sell Beltone products only to their authorized dealers, and that their dealers do not solicit business outside their designated area, it follows that competition among dealers selling Beltone products has been eliminated as a result of respondents' practices.

56. In addition to restricting their dealers to sales within designated areas, respondents also prohibit them from wholesaling or transshipping new Beltone hearing aids to non-Beltone dealers. This deprives the Beltone dealers of their freedom to select their customers.

57. By requiring their dealers to submit guarantee registration forms for all new Beltone hearing aids sold, a form that contains among other information the name and address of the customer, and by subsequently retaining a list of said names and addresses that may be, and in certain cases has been, delivered over to another

Beltone dealer or rented to firms in businesses other than the hearing aid business, respondents have deprived their dealers of freedom to maintain a confidential list of their customers, which, the record shows, is one of the most valuable assets of a retail hearing aid dealer's business.

58. By preventing Beltone dealers from handling other brands of new hearing aids, respondents prevent their dealers from competing with other dealers in the sale of non-Beltone hearing aids. **[76]**

59. By requiring their dealers to handle only Beltone hearing aids in the retail of new hearing aids and by restricting sales to Beltone "leads" in Beltone hearing aids, respondents have deprived their dealers of their freedom to act in the best interest of the hearing impaired public. The record shows that from time to time Beltone did not have in its line certain features found in competitive brands, features that were subsequently incorporated into Beltone's line, and features that were best suited for some prospective users' hearing problems. In addition, the record shows that certain competitive hearing aids of quality comparable to Beltone products cost less at wholesale and were retailed at a lower price than the Beltone hearing aid. Because fitting the proper hearing aid is admittedly an art wherein the subjective response of the customer is involved, restriction on the aids a dealer carries has the tendency and capacity to deprive the dealer of freedom to act in the best interest of the hearing impaired public. In those situations where a dealer might otherwise be inclined to fit a competing brand, the "potential" system might affect his choice of the instrument to fit on a prospective user. This, in addition, may have the tendency and capacity to restrict a dealer's freedom to act in the best interest of the hearing impaired public.[55]

60. On the other hand these restrictions on the dealers have, for the same reasons set forth in the preceding paragraph, the tendency and capacity to deprive the consumers of their right to fair and impartial recommendations from dealers in their selection of hearing aids for the alleviation of their hearing impairment.

61. It follows that consumers have been deprived of the benefits of free competition. In addition to restraints on the fair and impartial recommendations of dealers as to the best fittings available, respondents practices do, and have the tendency and capacity to, hinder and suppress price competition among Beltone dealers,

[55] It should be noted that respondents' refusal to sell to nonauthorized dealers and their restrictions on Beltone dealers' wholesaling or transshipping Beltone hearing aids to non-Beltone dealers, has the tendency and capacity to deprive those non-Beltone dealers of their freedom to act in the best interests of the hearing impaired public and deprive the consumers of their right to a fair and impartial recommendation from non-Beltone dealers in the selection of hearing aids for the alleviation of their hearing impairment (*see* CX 162, 164, 169).

and price competition among different brands of hearing aids. The record shows that most Beltone dealers set the retail prices according to their overhead and other expenses and profit, without [77]taking into consideration the prices of competing brands or the prices on Beltone hearing aids offered by other Beltone dealers. In addition, where a dealer carries only one line, the prospective consumer does not have the benefit of a choice of comparable instruments according to price. The hearing impaired public, of which the substantial majority are over 60 years of age, is not likely to engage in comparison shopping. The record shows that Beltone dealers did not advertise the retail prices of Beltone hearing aids.

62. Finally, respondents' refusal to sell Beltone repair parts to anyone except Beltone authorized dealers may have the tendency and capacity to deprive others engaged in repairing and servicing hearing aids of competition with respondents or their authorized dealers in the repair and service of Beltone hearing aids.

Although the findings as to the effects upon competition, dealers and the public coincide to some extent with the opinion given by Dr. Bruce Owen (4537–42), his testimony was not afforded any probative weight. He had no first hand knowledge of the hearing aid industry (4506) and he based his conclusions only on selected portions of the record comprising the case-in-chief. The opinion testimony of Dr. Leon Moses (17677–856), who also had no advance knowledge of the hearing aid industry (17569), has been considered and rejected, in that it is in part based upon data not made available to counsel supporting the complaint or the Administrative Law Judge. Moreover, most of the basic assumptions of Dr. Moses are contrary to the facts demonstrated on the record considered as a whole and the reasonable inferences that may be drawn therefrom.

DISCUSSION

Jurisdiction

Beltone engages in substantial business activities "in commerce" as "commerce" is defined in the Federal Trade Commission Act. A manufacturer that distributes its goods across state lines is subject to Commission jurisdiction, regardless of the exact point that title thereto passes. *Carter Carburetor Corp. v. Federal Trade Commission,* 112 F.2d 722, 730 (8th Cir. 1940). All essential elements of agreements or understandings relating to such interstate transactions are also "in commerce" within the meaning of the Act. *See United States v. South-Eastern Underwriters Ass'n,* 322 U.S. 533 (1944); *Holland*

Furnace Corp. v. Federal Trade Commission, 269 F.2d 203 (7th Cir. 1959), *cert. denied,* 361 U.S. 932. [78]

Insofar as the individual respondents were the top policy-making executives of a close family held and run company engaged "in commerce", they are also subject to the Commission's jurisdiction. *See e.g., Fred Meyer, Inc. v. Federal Trade Commission,* 359 F.2d 351 (9th Cir. 1966), *reversed on other grounds,* 390 U.S. 341 (1968); *Surf Sales Co. v. Federal Trade Commission,* 259 F.2d 744 (7th Cir. 1958).

Individual Responsibility For the Acts of the Corporation

The individual respondents, in their individual capacities, are responsible for the acts and practices of the corporation that are challenged in this proceeding. The record is clear that the respondents, individually and collectively, developed the sales practices and methods of competition which are challenged in the complaint, and at all times had the power to control, and did supervise, the said acts and practices. The individual respondents' contention that they are not engaged in the business of selling and distributing hearing aids is of no moment in a case brought under Section 5 of the Federal Trade Commission Act. The statute goes to the acts and practices and the methods of competition involved.

Responsibility For the Acts and Practices of Employees

Respondents do not argue that any act or practice of Beltone employees, especially the HOFEs in their contacts with authorized Beltone dealers, is not the responsibility of Beltone or the individual respondents. Unlike the usual situation where salesmen may be independent contractors, HOFEs are admittedly Beltone employees whose offices are technically located in Chicago at the plant. Their activities are closely monitored by the individual respondents and other officers and officials of Beltone. Under the circumstances, Beltone and the individual respondents were fully aware of their activities. Moreover, the specific instructions the HOFEs received in their meetings with the individual respondents and in the manuals or procedural guides prepared under the authority or supervision of the individual respondents, clearly demonstrate that their actions were approved and adopted as the actions of respondents.

Section 5 of the Federal Trade Commission Act and Respondents' Acts and Practices and Methods of Competition

At the outset, it should be emphasized that this case arises under the provisions of Section 5 of the Federal Trade Commission Act. Unlike the so-called "antitrust" statutes that regulate conduct that has been shown to have a specific result, under Section 5 conduct not heretofore declared illegal may be defined and stopped by an order

[79]to cease and desist. *See Federal Trade Commission v. Sperry & Hutchinson Co.,* 405 U.S. 233 (1972). This view is not unique; the legislative purpose in creating the Federal Trade Commission was to entrust in an expert body the task of defining those practices in their incipiency, which, if left unregulated, probably would result in a substantial lessening of competition or in a monoply. Of course the entire concept of the antitrust laws in particular is to keep free those natural competitive forces that insure to the consumer the best possible product at the lowest possible price. The allegations of the complaint in this case should be measured with this view in mind, and not necessarily by the rigid molds of cases brought under more specific statutes such as the Clayton Act and the Sherman Act.

Territorial Restraints

Although a manufacturer (seller) may select his customers in such a way that, as a result, they do not compete in the resale of his products, any collateral restriction imposed on the buyer by the seller relating to the territorial area in which, or to the customers to whom, the buyer makes resales, is suspect as being an incipient threat to free competition. In *United States v. Arnold, Schwinn & Co.,* 388 U.S. 365, 382 (1967), the Supreme Court held that vertically imposed territorial restraints were illegal under the Sherman Act without regard to whether the understandings are expressed or silent:

> Once the manufacturer has parted with title and risk, he has parted with dominion over the product, and his effort thereafter to restrict territory or persons to whom the product may be transferred—whether by explicit agreement or by silent combination or understanding with his vendee—is a *per se* violation of §1 of the Sherman Act.

Respondents argue that the dealers are independent businessmen who make their own decisions as to how to conduct their businesses, that there is nothing in the dealer agreement that requires that they sell only in their respective designated areas and that there is no testimony that respondents have informed authorized dealers that "you must stay in that area of marketing responsibility or your dealership agreement with Beltone will be terminated" (Resp. Ans. Br., par. 16). This is [80]the extent of their defense to the charges of the complaint; nowhere in their proposed findings or answering brief do they discuss this case in the light of the public policy as announced in the cases on the subject of exclusive territories.

But there can be no doubt from a reading of the dealer agreement and Beltone's announced policy of not establishing more than one Beltone authorized dealer in a particular area (designated), that it is Beltone's wish that its dealers have territorial exclusivity. Fulfill-

ment of this wish would be defeated if in fact dealers did engage in extra-territorial sales. From the dealers' actions, first, in not soliciting extra-territorial business, second, in adopting respondents' suggestion of considering that they must actually service the customers to whom they sell, and third, in considering their own areas to be exclusive, it is clear that both respondents and the dealers consider and intend that the territories be exclusive.

Actually, the Beltone dealers had little choice except to adhere to Beltone's wishes in the matter. Their dealer agreements were actually in existence at Beltone's sufference and could be terminated at any time. The parties to such an agreement, where the dealer has everything at stake, and Beltone not very much, are not equal bargainers.

Accordingly, such an understanding, whether by explicit agreement or by silent combination, which results in territorial restrictions that contravene the policies of Section 1 of the Sherman Act, violates Section 5 of the Federal Trade Commission Act. Clearly, respondents have accomplished actual territorial exclusivity for their dealers and all the resulting anticompetitive effects and benefits concomitent therewith.

Product Restraints

In *Federal Trade Commission v. Brown Shoe Co.,* 384 U.S. 316, 321 (1966) the Supreme Court held that a manufacturer of shoes engaged in conduct which could be prohibited under Section 5 of the Federal Trade Commission Act when it engaged in a program whereby its retailers were required to concentrate on reselling the manufacturer's line of products and to refrain from carrying conflicting lines. The Court said that such conduct "obviously conflicts with the central policy of both § 1 of the Sherman Act and § 3 of the Clayton Act." [81]

Respondents argue that their dealers are independent businessmen "in the fullest sense of that phrase" (Resp. Ans. Br. par. 12), that each and every dealer presented by respondent testified that he or she, operating a retail hearing aid business as an independent businessman, sold whatever brand or brands of hearing aids he desired to offer for sale (*Ibid.*), and that the dealer agreement did not require that a dealer handle Beltone products exclusively (*Id.* at par. 10).

As pointed out in the discussion about territorial restrictions, Beltone's dealers, although technically independent businessmen and women in that they are not agents or employees of Beltone, are not independent of Beltone insofar as making business decisions. Their business choices to carry only Beltone hearing aids are made

in response to Beltone's announced policy of single-line merchandising, the requirements of the dealer agreement that a dealer promote Beltones, achieve potential and sell only Beltones to Beltone "leads", together with the actions overtly taken by Beltone to encourage dealers to be single-line dealers, including pressure from HOFEs to sell only Beltones, and threats of termination. In effect, as found above, Beltone requires the dealers to carry, in new hearing aids, Beltone products only.

Beltone's practices violate the central policy of the antitrust laws by having the tendency and capacity to foreclose Beltone's competitors from selling to authorized dealers and thus violate Section 5 of the Federal Trade Commission Act. *See L.G. Balfour Co. v. Federal Trade* Commission, 442 F.2d 1, 20–21 (7th Cir. 1971).

Customer Restraints

As pointed out in the discussion on territorial restraints, any restriction by the seller on the persons to whom a buyer of his products can sell the products is suspect under the antitrust laws. *See United States v. Arnold, Schwinn & Co., supra.*

As already noted, the Beltone dealer is under coercive pressure not to do anything that would defeat Beltone's general policies of doing business. Certainly wholesaling and transshipping new Beltone hearing aids to non-Beltone dealers would tend to circumvent the exclusive territory arrangement. Beltone's policies of prohibiting transshipping and wholesaling and of exclusive territories, together with its actions to insure adherence to these policies, tracing aids through registration cards and refusing to provide [82]repair service to other than Beltone dealers, have the tendency and capacity to restrain such sales and, accordingly, violate the policies of the antitrust laws and Section 5 of the Federal Trade Commission Act.

Refusal To Deal

Generally, a seller may select his customers and, accordingly, may refuse to do business with certain potential customers. But such refusal to deal must not have any ulterior purpose or be a part of a plan or program that otherwise contravenes the policies of the antitrust laws. *See United States v. Parke, Davis & Co.,* 362 U.S. 29 (1960).

Respondents' practices of refusing to sell to, or provide repair service for, anyone other than an authorized dealer, in effect, insure that Beltone's basic business policy of having only one Beltone dealer in any designated area is not circumvented by another dealer's having the wherewithall to compete. These practices supplement Beltone's policies of territorial exclusivity, exclusive dealing and

restriction on resales by Beltone dealers to non-Beltone dealers. The fact that non-Beltone dealers cannot have nondiscriminatory direct access to repair parts and services has a tendency and capacity to foreclose them from competing with Beltone dealers in the service of Beltone products and Beltone users.

Such practices, having direct anticompetitive effects, contravene antitrust policy and violate Section 5 of the Federal Trade Commission Act.

Names of Users

Misappropriation by a seller of the business property of a buyer in order to engage in a combined attempt with a competitor of the buyer to capture his customers is an unfair trade practice. *See Peerless Dental Supply Co. v. Weber Dental Mfg. Co.,* 299 F. Supp. 331 (1969 E.D. Pa.).

Respondents argue that there is no evidence to show that they had access to or received all the names and addresses of their dealers' customers, that pursuant to the dealer agreement they have reserved to themselves the unrestricted use of names submitted on guarantee registrations,[56] and that their use of said names was for legitimate purposes. **[83]**

Respondents' requirement that the dealers submit the names and addresses of their customers is a factor to be considered in connection with respondents' ability to get the dealer to abide by Beltone's wishes as to how the dealer does business, including territorial exclusivity and customer selection. The further question here is whether, standing alone, the requirement is unlawful under Section 5 of the Federal Trade Commission Act, and whether respondents' uses of said lists (supplying names to succeeding dealers or renting names to companies outside the hearing aid industry) are "unfair" within the meaning of Section 5 of the Act.

Almost all of the dealers testified that the requirement that they send in the guarantee registration form existed to insure that the user obtained a factory warranty and that if the responsibility for submitting the required information was left up to the users, many of them would not send in the forms. Some dealers thought the requirement was to insure that the user had received a new instrument.

Names and addresses of users are a valuable business asset to the dealer. In addition, the user's relationship to the dealer is in the nature of a doctor-patient relationship and, especially where a doctor

[56] The provision granting to respondents the unrestricted use of the names submitted by its dealers was first incorporated into the dealer agreement in the 1971 form of agreement (CX 398).

or clinical referral to the dealer is involved, should be considered somewhat confidential.

Of course, there would appear to be nothing wrong if the dealer voluntarily submitted the names of his customers to Beltone for legitimate reasons, such as direct mail advertising when the dealer knows in advance the exact use, including the advertising copy to be sent. But under the terms of the dealer agreement, such a submission is *required* and Beltone dictates, unilaterally, the use it may make of the names. In these circumstances, such a requirement is an interference with the dealer's property rights and is an unfair practice under Section 5 of the Federal Trade Commission Act.

Moreover, respondents' practice of supplying the names to a competing dealer upon the termination of one of its dealers is clearly a misappropriation of the terminated dealer's property and is an "unfair" practice under Section 5 of the Federal Trade Commission Act. Similarly, respondents' mailing of the "Dear Friend" letter in which it announces the appointment of a Beltone dealer in competition with the dealer who submitted the names is also an "unfair" practice insofar as it misappropriates the dealer's property. [84]

Finally, rental of a user's name is unfair to both the dealer and the user, absent consent from each of them. *See* Commission Opinion, *Beneficial Corp.,* Docket No. 8922, 86 F.T.C. 119 at 158 (1975).

Respondents point out that their rental program ceased in 1973. However, voluntary discontinuance does not estop the Commission from issuing an appropriate cease and desist order, especially where such discontinuance is in the face of Commission investigation or formal proceeding by way of complaint. *Clinton Watch Co. v. Federal Trade Commission,* 291 F.2d 838, 841 (7th Cir. 1961), *cert. denied,* 368 U.S. 952 (1962); *Zale Corporation and Corrigan - Republic, Inc. v. Federal Trade Commission,* 473 F.2d 1317 (5th Cir. 1973).

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of respondents Beltone, S. Posen, D. Barnow and C. Barnow.

2. This proceeding is in the public interest. The Commission so determined upon the assumption of jurisdiction through issuance of the complaint. *American Airlines, Inc. v. North American Airlines, Inc.,* 351 U.S. 79, 83 (1956). Nothing in the record or findings requires a different determination. *See Federal Trade Commission v. Klesner,* 280 U.S. 19 (1929).

3. The individual respondents formulated, directed and con-

trolled the acts and practices of the corporate respondent, including the acts and practices found herein.

4. Respondents engaged in the following acts and practices as alleged in the complaint:

A. They required their selected dealers to sell Beltone products within assigned geographic territories;

B. They required their selected dealers to deal exclusively in Beltone hearing aids;

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

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

E. They appropriated and used for their own purposes the names and addresses of their dealers' customers. **[85]**

5. The aforesaid acts and practices of respondents, taken either individually or collectively, when considered with other practices, are oppressive, coercive and unfair, and actually, or have the tendency and capacity to, hinder, suppress or eliminate competition, are to the prejudice and injury of the public, and constitute unfair methods of competiton and unfair acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

REMEDY

The Commission is vested with broad discretion in determining the type of order necessary to insure discontinuance of the unlawful practices found. *Federal Trade Commission v. Colgate-Palmolive Co.,* 380 U.S. 374, 392 (1965). The Commission's discretion is limited only by the requirement that the remedy be reasonably related to the unlawful practices found. *Jacob Siegel Co. v. Federal Trade Commission,* 327 U.S. 608, 613 (1946); *Niresk Industries, Inc. v. Federal Trade Commission,* 278 F.2d 337, 343 (7th Cir. 1960), *cert. denied,* 364 U.S. 883. The Commission is not limited to prohibiting the illegal practices in the exact form in which they were found to have been employed in the past and may close all roads to the prohibited goal. *Federal Trade Commission v. Ruberoid Co.,* 343 U.S. 470, 473 (1952); *Federal Trade Commission v. National Lead Co.,* 352 U.S. 419 (1957).

Counsel supporting the complaint have proposed an order to cease and desist that is significantly broader in scope than the proposed order which accompanied the complaint, and which contains numerous language modifications.

In their proposed findings respondents did not address themselves

to the terms of the proposed order that accompanied the complaint and in their answering brief they did not comment on complaint counsel's modification and additions thereto except to pray that the complaint be dismissed.

Upon consideration of complaint counsel's modification and additions to the proposed order in view of the findings as to the facts, the applicable law and legal conclusions and the ultimate conclusions in this Initial Decision, I am of the opinion that most of them should be incorporated into the order that is required by those findings and conclusions. **[86]**

Paragraphs 13 and 14 of the proposed order (pars. 14 and 15 of the order which follows) contain provisions substantially identical to those in the Commission order in *Adolph Coors Co.*, 83 F.T.C. 32 (1973). These paragraphs delineate the exact procedures and grounds on which terminations may be accomplished, including provisions for arbitration. The Tenth Circuit struck these provisions from the Commission's order in *Coors. Adolph Coors Co. v. Federal Trade Commission,* 497 F.2d 1178 (1974).[57] In pertinent part, the Court stated *(Id.* at 1188–89):

> The Commission held that Coors used the threat of speedy termination to force its distributors into anticompetitive behavior. There is substantial evidence in the record to support the Commission's holding.
>
> Coors has the right to terminate distributors according to the contract provisions which the distributors have agreed to. *Bushie v. Stenocord Corporation,* 460 F.2d 116 (9th Cir. 1972). However, it may not use the contract termination provisions to force its distributors into anticompetitive behavior.
>
> The Law Judge was correct in stating that the termination provisions of Coors and its distributors, based upon their contractual obligations, are a matter of private contract and are not subject to interference by third parties. The termination provisions are reasonable but may not be used by Coors to force any unlawful conduct. Therefore the Commission's attempt to rewrite Coors' contract termination provisions in paragraphs 12 and 13 of its Order must be set aside. The contract termination provisions do not violate Section 5 of the Federal Trade Commission Act.

In the context of the present case, however, the termination provisions in the dealer agreements that are presently in effect are not reasonable because in the context of the relationship between Beltone and its dealers they are inherently coercive. This coercive threat of termination **[87]**along with the substantial business rights of the dealer that it would erase is found to have a direct bearing on the dealer's acquiesence to conduct his business in line with Beltone's philosophies, resulting in the anticompetitive conduct and

[57] The Commission's petition for a writ of certiorari to the Supreme Court was denied. 419 U.S. 1105 (1975).

behavior violative of Section 5 of the Federal Trade Commission Act. *See Federal Trade Commission v. Texaco,* 393 U.S. 223 (1968).

The cases clearly hold that the Commission may issue orders that in effect cancel or modify contractural provisions which effectuate the unfair trade practices. *Atlantic Refining Co. v. Federal Trade Commission,* 381 U.S. 357, 376–377 (1965); *L. G. Balfour Co. v. Federal Trade Commission,* 442 F.2d 1, 23 (7th Cir. 1971). Terminating outstanding contracts has long been considered a proper remedy in antitrust cases. *See United States v. International Boxing Club of New York, Inc.,* 171 F. Supp. 841, 842 (S.D.N.Y. 1957), *affirmed,* 358 U.S. 242 (1959).[58]

There is no doubt that the Commission may prohibit respondents from terminating their dealers, except as permitted in an order to cease and desist.

I agree with complaint counsel that a prohibition against respondents' use of "potentials" or "quotas" in any form should be added to the order. As found herein, respondents have used such figures, which they increased substantially over the years, as a standard to measure whether the dealer is adequately penetrating the market, and have used failure to so do, *i.e.,* to reach 100 percent of potential, as a ground for termination. Apparently, complaint counsel inadvertently omitted such a paragraph from their proposed order (Compare Pro. Find. p. 254 with proposed order paragraph 10). The following paragraph will be inserted into the order:

10. Stating to dealers, in any manner, a specific number or percent that can be equated to the number of new hearing aids the dealer must purchase from Beltone or resell for any given period of time. [88]

Of course nothing in this paragraph is intended to prohibit respondents from reporting or stating the actual total of sales made by a dealer in the past.

Complaint counsel also propose that paragraph 2 be modified to provide that Beltone products or repair services be made available to dealers or persons engaged in the repair of hearing aids on nondiscriminatory terms, and that the "100 mile" proviso be dropped because Beltone sells nationwide. These proposed changes are adopted. In addition complaint counsel would eliminate all provisions relating to the qualifications required of dealers to whom it sells or, alternatively, if Beltone retains any such subjective qualification requirements, they be limited in applicability to dealers

[58] It should be noted that there are many other provisions of the dealers' agreement that must be stricken or modified under the terms of this order.

in states that do not have licensing. In my opinion the latter is more appropriate.

I agree with complaint counsel that the proviso relating to alternate available sources of supply for Beltone products from existing dealers should be deleted. The subparagraphs of paragraph 2 will be relettered and renumbered to make future references more exact.

Complaint counsel also propose that paragraph 7, which relates to the submission of customer lists, be modified to specifically provide for full disclosure, free and informed consent, and a cooling-off period before any consent can be sought, before respondents can use the customer lists for any purpose. This change appears appropriate.

Although respondents have not engaged in "price fixing" such a practice was not necessary to avoid "price cutting" or price competition in view of the territorial exclusivity required by respondents and practiced by the dealers. The record shows that there was almost no actual competition among Beltone dealers and Beltone's only concern about pricing was to prevent "price gorging." However, because Beltone will now be required to sell Beltone products and services to any qualified dealer requesting same, a prohibition against Beltone's interference with dealer retail pricing would now appear to be very appropriate as being a "road block to a prohibited goal." Paragraph 5 of the order contains such a prohibition.

The other paragraphs of the order (pars. 1, 3, 4, 6, 8, 9, 11, 12, 13) appear to directly correspond to the practices in which respondents were found to be engaged and which resulted in the illegal trade restraints, and, in my opinion, they are appropriate. Complaint counsel **[89]**have also made numerous word changes in the language of their proposed order which seem to clarify its terms without making substantive change. Complaint counsel's revised language will be adopted.

Finally, the order should run against the individual respondents in their individual capacities. The record clearly demonstrates their direct involvement in all aspects of the activities challenged in this matter, notwithstanding a prior proceeding and order which related generally to some identical practices. Although it would appear remote that these individuals would engage in the hearing aid business outside of the structure of the corporate respondent, it does impose upon them the duty, insofar as they are involved in Beltone's operations, to effect and not hinder compliance with any order that may ultimately become "final" in this matter, within the meaning of Section 5(1) of the Federal Trade Commission Act.

ORDER

I.

It is ordered, That respondents Beltone Electronics Corporation, a corporation, its subsidiaries, successors, assigns, its officers, and Sam Posen and David H. Barnow, individually and as officers of said corporation, its directors, and Chester K. Barnow, individually and as a director of said corporation, and respondents' agents, representatives and employees, directly or indirectly, or through any corporate or other device, in connection with the manufacturing, distribution, advertising, offering for sale, sale or repair of their own brand name or trademark hearing aids, or related products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from: **[90]**

1. Entering into, maintaining, preserving, or enforcing, by refusal to sell or repair, setting of sales quota or equivalent thereof, termination or threat thereof, communicated suggestion, expectation or request, or in any other manner, any arrangement or method of doing business with a dealer of hearing aids and/or accessories which has the purpose or effect of precluding or preventing a dealer from selling the product of one or more other hearing aid manufacturers;

2. (a) Refusing to make available on nondiscriminatory terms, prices and conditions of sale promptly upon request:

(1) a hearing aid, accessory or any written materials necessary to fit and sell such hearing aid or accessory, to any dealer engaged in the sale of hearing aids;

(2) a repair or replacement part or any written materials necessary to repair or replace such hearing aid, to any person engaged in the repair of hearing aids when requested for such purpose, if respondents make repair or replacement parts available to any dealer for such purpose; and

(3) factory repair service when requested by any dealer who sold such aid; **[91]**

(b) *Provided, however,* only with respect to dealers located in states which do not license hearing aid dealers and if no other provision of this order is violated thereby:

(1) respondents may require as a condition to the availability directly from them of any of their products, that the dealer referred to in 2(a) above has received instruction or met standards necessary for the fitting and servicing of respondents' hearing aids which are

required at that time of all then existing dealers of respondents' products so long as such instruction, if made available to any dealer, is made available by respondents on equal terms to all dealers wanting to deal in respondents' product,

(2) respondents may refuse to make available directly from them any of their products to any dealer or person on grounds related to that dealer's or person's professional competence or ethical conduct, so long as such refusals are uniformly made where such grounds exist. **[92]**

3. Entering into, maintaining, preserving, or enforcing, by refusal to sell or repair, setting of sales quota or equivalent thereof, termination or threat thereof, communicated suggestion, expectation or request, report of sale, warranty limitation, use of names or addresses of a dealer's customers, use of areas of primary marketing responsibility or the equivalent thereof, or in any other manner, any arrangement or method of doing business which has the purpose or effect of restricting or limiting;

(a) the territory or area in which a dealer of respondents' hearing aids advertises, offers for sale, sells or repairs such products, or

(b) the persons with whom a dealer of respondents' hearing aids deals;

4. Failing to return any hearing aid submitted to respondents for repair directly to the person who submitted such product for repair, unless otherwise instructed in writing by such person;

5. Fixing, establishing, stabilizing, maintaining or suggesting the prices at which a dealer of respondents' hearing aids may or shall advertise, offer for sale, or sell to the public, or a person repairing respondents' hearing aids may repair, such products; **[93]**

6. Requiring that a dealer participating in respondents' cooperative advertising program must not state or imply, in such cooperative advertisements, that the dealer also deals in other brands of hearing aids; *provided, however,* that respondents may continue to prohibit in such cooperative advertisement that stating of other brand names of hearing aids;

7. Requiring or coercing a dealer to submit to respondents the names or addresses of any customers of the dealer or, with respect to such customer names or addresses obtained from a dealer, maintaining, using, publishing or disseminating them for any purpose, without securing the free and informed written consent of the dealer for each such purpose based upon full disclosure to the dealer of the specific uses and disseminations which would be made of the customer names. No such consent shall be sought for at least two

hundred and forty (240) days from the date of respondents' initial inventory shipment of hearing aids to a new dealer or, in the case of an existing dealer, at least sixty (60) days after service on the dealer of this Order and letter set forth on page 99 [94]hereof. The names and addresses of a dealer's customers shall not be used for the benefit of another dealer without the free and informed consent, immediately prior to such use, of the dealer whose customer names are to be used, or unless the dealer has completely abandoned the dealership. The names and addresses of users of Beltone hearing aids shall not, without the user's free and informed consent, be sold, rented, leased or otherwise transferred to firms or persons not engaged in the hearing aid business;

8. Preventing any dealer by contract or agreement from using respondents' product (brand) name in connection with the advertising, offering for sale, sale or repair of any respondents' products, except that respondents may protect their rights in such name recognized at law;

9. Failing to include and deliver with any hearing aids sold by respondents any express product warranty for such product provided to the user.

10. Stating to dealers, in any manner, a specific number or percent that can be equated to the number of new hearing aids the dealer must purchase from Beltone or resell for any given period of time; [95]

11. Requiring that dealers transfer their telephone number to the corporate respondent or to such person as it may specify; or that dealers agree to the cancellation of their telephone number;

12. Requiring that respondents have the option of purchasing from a dealer any hearing aids or related products purchased from respondents which the dealer has in inventory;

13. Hindering, suppressing or eliminating competition or attempting to hinder, suppress or eliminate competition between or among dealers handling respondents' hearing aids or related products;

14. Terminating any dealer agreement unless and until the respondents have pursued the following procedure:

A. Termination With Cause

(a) The corporate respondent has given the dealer sixty days' notice of its intention to terminate the agreement with the dealer;

(b) Said notice, referred to in (a) above, will include in writing an assurance that the contract is being terminated in good faith and for material violation of one or more contract provisions which are relevant to the effective [96]operation of the dealership. Said notice

shall further provide a list of the specific reasons for which the dealership is being terminated;

(c) Said notice will include the assurance that the dealer may sell his interest to a third party during the sixty days, subject to the corporate respondent's approval of the buyer as a satisfactory dealer of its products and the further assurance that approval will not be unreasonably withheld;

(d) Said notice will also include the statement that the dealer has the right to have the contract termination reviewed in an arbitration proceeding as hereinafter provided, to ascertain whether the termination has been made otherwise than in good faith and otherwise than for material violation of one or more contract provisions which are relevant to the effective operation of the dealership.

B. Termination Without Cause

(a) The corporate respondent has given the dealer one hundred and eighty days' notice of its intention to cancel its agreement with the dealer; **[97]**

(b) Said notice, referred to in (a) above, will include in writing an assurance that the contract is being terminated in good faith. Said notice shall further provide a list of the specific reasons for which the dealership agreement is being terminated;

(c) Said notice will include the assurance that the dealer may sell his interest to a third party during the one hundred and eighty days subject to the corporate respondent's approval of the buyer as a satisfactory dealer of its products, and the further assurance that approval will not be unreasonably withheld;

(d) Said notice will also include the statement that the dealer has the right to have the contract termination reviewed in an arbitration proceeding as hereinafter provided to ascertain whether the termination has been made otherwise than in good faith.

15. *It is further ordered,* That the corporate respondent, within three (3) months from the date this Order becomes final, shall provide for arbitration, in the city in which a dealer resides, by an independent and neutral arbitrator, to determine in the case of any **[98]**announced termination, and upon the request of a dealer, whether or not said termination is made in good faith (in the case of termination without cause) or whether or not said termination is made in good faith and for material violation of one or more contract provisions which are revelant to the effective operation of the dealership (in the case of termination with cause). The arbitrator shall find that a termination of any dealer agreement is not made in

good faith if the arbitrator finds that the termination would constitute a violation of the antitrust laws or this Order.

All costs of arbitration, except for the dealer's attorney's fees, shall be borne by the corporate respondent, *provided, however,* if in the course of the arbitration proceeding it is determined by the arbitrator that the dealer's claims are not brought in good faith, the dealer shall bear the costs of arbitration other than respondent's attorney's fees. The dealer's right to arbitration shall be conspicuously noted in all present and future dealership agreements.

II.

It is further ordered, That respondents shall:

(a) Forthwith distribute a copy of this Order to each of the corporate respondent's operating divisions, to its present corporate officers and to its present sales and repair personnel, and shall secure from each **[99]**such officer, employee or other person, a signed statement acknowledging receipt of said Order;

(b) Within thirty (30) days after service upon them of this Order, distribute a copy of the following letter to each of their existing hearing aid dealers and to every person known to be engaged in the repair of respondents' products;

(LETTER TO HEARING AID DEALERS)

(Official Stationery of Beltone
Electronics Corporation)

Date

Dear :

The Federal Trade Commission has entered an order against the Beltone Electronics Corporation, which obligates the company not to impose various restrictions upon dealers or to engage in certain other practices. A copy of the pertinent provisions of the Order is enclosed for your careful examination. If in the future you believe that any of its terms have been violated, the details may be reported in writing to:

Federal Trade Commission
Bureau of Competition
Washington, D.C. 20580

We welcome the opportunity to do business with you on terms which are in accordance with the letter and the spirit of the Federal

Trade Commission Order.

Very truly yours,
(Name)
President
Beltone Electronics Corporation.

Enclosure

[100](c) Within sixty (60) days after service upon them of this Order, place a full-page advertisement in a trade journal or publication with circulation among hearing aid dealers, which advertisement shall clearly and conspicuously disclose the provisions of Part I of this Order;

(d) Within one hundred and twenty (120) days after service upon them of this Order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this Order, including a list of all dealers and other persons on whom they have served a copy of Appendix A, and a copy of the publication which includes respondents' advertisement required by this Order;

(e) For a period of ten (10) years from the date hereof establish and maintain a file of all records referring or relating to respondents' refusal to sell to any hearing aid dealer, or person engaged in the business of repairing hearing aids, which file must contain a record of a communication to such dealers or persons explaining respondents' refusal to sell, and which file will be made available for Commission inspection on reasonable notice; and annually, for a period of five (5) years from the date hereof, submit [101]a report to the Commission listing the names of all dealers or persons with whom respondents have refused to deal over the preceding year, a description of the reason for the refusal, and the date of the refusal;

(f) Notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of this Order.

III.

It is further ordered, That the individual respondents named herein promptly notify the Commission of the discontinuance of their present business or employment and of their affiliation with a

new business or employement. Such notice shall include respondents' current business address and a statement as to the nature of the business or employment in which they are engaged, as well as a description of their duties and responsibilities.

APPENDIX A

Appendix A

Conduct of Respondents' Dealer Witnesses *
Re Other Brand and Out-of-Territory Sales

Dealer Name and Location	Whether 100% Exclusive Dealer	Approximate Percent or Number of Other Brand Sales	Circumstances of Other Brand Sales	Advertising or Open Display of Other Brands	Out-of-Territory Sales ** Whether Actively Solicits Outside of Territory	Out-of-Territory Sales ** Circumstances of Out-of-Territory Sales
C. Allen Eau Claire, WI	No (17040)	Sold 1 Starkey, 6 Oticon, 1 Qualitone of 547 aids in 1974 (17087) None from 1960-1973 (17040; 17086-88)	On professional referral (17041)	-	No (17043; 17089)	None (17092-93; 17089-90)
L. Azar Huntsville, AL	Yes (15881)	N/A	N/A	N/A	No (15883)	5 or 6 in 13 years (15926)
L. Bain Riverside, CA	No (9016)	"Primarily" Beltone (9016)	Professional referral, customer preference (9017)	No (9023)	Yes (9027)	"Occasionally" sell in San Diego Co., Orange Co., and "sell a lot" in San Bernardino Co. (9028)
W. Beattie Saginaw, MI	No (17379-80)	3 of 375 in 1970 3 of 375 in 1971 4 of 375 in 1972 Some years none (17413-14)	Result of M.D. or clinic referrals (17380)	No (17414)	No (17383)	4 or 5 per year "at most" (17416) out of 375 (17413)

* Respondents have held out these 70 witnesses to be a representative cross-section of existing Beltone dealers (Tr. 14910, 18376).

** Sales which physically took place outside of a dealer's "area of primary marketing responsibility." Sales where an out-of-territory customer, often a visitor, purchases an aid while in the dealer's in-territory office or service center are not included.

Dealer Name and Location	Whether 100% Exclusive Dealer	Approximate Percent or Number of Other Brand Sales	Circumstances of Other Brand Sales	Advertising or Open Display of Other Brands	Out-of-Territory Sales: Whether Actively Solicits Outside of Territory	Out-of-Territory Sales: Circumstances of Out-of-Territory Sales
G. Bissel Houston TX	No (15192)	30-35 of 4000-5000 aids (15233) Started other brands in 1972 (15228)	On professional referral (15191)	No (15222)	No (15196, 15234)	"Occasions" on customer or professional referral (15194-96)
R. Bourgeois Albany, NY	Yes (12901)	N/A	N/A	N/A	No (12905)	Never sold outside (12905)
D. Bruner, Sr. Olympia, WA	Yes (14692)	N/A	N/A	N/A	No (14689, 14693)	Never extra-territorially (14686, 14693)
M. Burak San Diego, CA	No (13905)	40 of 1400 (13974) "Close to 100% Beltone" (13905)	Clinic referrals and customer preference (13906, 13920)	No (13975)	Yes (13925, 13927)	41 of 1400 (13975)
Bakersfield, CA	No (13905)	-	-	-	-	-
Los Angeles, CA	-	-	-	-	-	-
H. Cato Clarksburg, WV	Yes (11913)	N/A	N/A	N/A	No (11938-39)	Only on personal (family) referrals (11938-39)
Greensboro, NC	No (11927)	5% (11980)	Only on clinical referrals (11927)	No (11980-81)	-	-
A. Coppola Orange, NJ	Yes (12435, 12441)	N/A	N/A	N/A	Yes (12467)	On direct personal referral (12442, 12467)
Hudson County, NY	Yes (12435)	N/A	N/A	N/A	-	A "few" (12436)

Dealer Name and Location	Whether 100% Exclusive Dealer	Approximate Percent or Number of Other Brand Sales	Circumstances of Other Brand Sales	Advertising or Open Display of Other Brands	Out-of-Territory Sales: Whether Actively Solicits Outside of Territory	Out-of-Territory Sales: Circumstances of Out-of-Territory Sales
R. Culver Van Nuys, CA	No (14036)	30-50 of 2500 in last 4 years. No other brands in first 5 years (14085)	On professional referral; recently stopped (14037-38)	No (14137), except for poster for one year (14138)	Unclear; turns extra-territorial leads over to competitors (14041-42, 14121, 14124, 14126)	On personal referral (14041)
R. Durbin Dallas, TX	No (17136)	Two sales of other brands from 1969 to present (17136)	Customer request (17136)	-	No (17135)	No extra-territorial sales (17139)
J. Elias Memphis, TN	Yes (15346)	N/A	N/A	N/A	No (15340)	Might have "Stepped over the line" (15340)
Little Rock, AR	Yes (15340)	N/A	N/A	N/A	No (15349)	-
D. Galloway Rochester, NY	Yes (12077)	N/A	N/A	N/A	Yes (12090-92)	Cannot give estimate of extra-territorial sales (12142-44)
H. Gilliam Texarkana, AR	Yes (15495)	N/A	N/A	N/A	No (15496, 15498)	None (15496)

Dealer Name and Location	Whether 100% Exclusive Dealer	Approximate Percent or Number of Other Brand Sales	Circumstances of Other Brand Sales	Advertising or Open Display of Other Brands	Out-of-Territory Sales: Whether Actively Solicits Outside of Territory	Out-of-Territory Sales: Circumstances of Out-of-Territory Sales
E. Glaspie Pontiac, MI	No (17883)	5 or 6 aids in five years (17936-37)	In Pontiac sold "a few" Starkey aids which were in stock when three competitive offices were purchased (17892, 17895)	-	No (17935)	Referrals in neighboring areas (17935-36)
Port Huron, MI	Yes (17883)	N/A	N/A	N/A	No (17884)	None (17884)
H. Gorlin Miami, FL	No(11424)	5-10% (11424)	Prescription referral and where necessary for configuration of user's ear (11425, 11474)	No (11474)	No, only as result of personal referral (11428) and leads from in-territory newspaper ads which also circulate outside (11465-67)	-
B. Harlow Newport News, VA	No (13002)	1 Rexton, 2 Oticons, 3 Starkey from 1968 to present (13003, 13058-59)	On clinic referral (12985, 13003) and needs of patient (13003)	-	No (13009)	No more than 9 times from 1968 to present (13059-60, 13002)
H. Hood Atlanta, GA	Yes (12515)	N/A	N/A	N/A	No (12512)	2 sales by salesmen contra to instructions (12519)
Quincy, IL	Yes (12494)	N/A	N/A	N/A	No (12495-96)	None (12495-96)

Dealer Name and Location	Whether 100% Exclusive Dealer	Approximate Percent or Number of Other Brand Sales	Circumstances of Other Brand Sales	Advertising or Open Display of Other Brands	Out-of-Territory Sales: Whether Actively Solicits Outside of Territory	Out-of-Territory Sales: Circumstances of Out-of-Territory Sales
L. Hudson Bowling Green, Ky.	Yes (16142-43)	N/A	N/A	N/A	No (16150-154)	Less than 1% in 1971 and not more than 2% in 1972 (16184-86, 16201) Sends referrals located outside of territory to neighboring dealer (16150)
J. Hulser W. Hartford, CT	No (12034)	3 aids sold last year (12034); none from 1965 to 1974 (12025, 12027)	Bone conduction aids at customer request (12034)	-	No, only on referral (12035, 12037)	-
J. Ivy Glassboro, NJ	No (12727)	"Primarily" Beltone (12727)	Only on clinic referrals (12729-30)	-	Yes (12734)	30 of 329 in 1972 (12766)
F. Jeter Jackson, MS	Yes (15424)	N/A	N/A	N/A	No (15427)	By inadvertence or customer request (15427)
R. Johnson Corbin, KY	Yes (12333)	N/A	N/A	N/A	No (12335-36)	None (12335-36)
D. Jones St. Louis, MO	Yes (15598)	N/A	N/A	N/A	No (15611)	One half of 1% (15643)

Dealer Name and Location	Whether 100% Exclusive Dealer	Approximate Percent or Number of Other Brand Sales	Circumstances of Other Brand Sales	Advertising or Open Display of Other Brands	Out-of-Territory Sales: Whether Actively Solicits Outside of Territory	Out-of-Territory Sales: Circumstances of Out-of-Territory Sales
S. Kaufman Chicago, IL	No (9610)	"Moderate" volume of other brands (9611). 80 of 255 in 1974 (9666).	Professional referral, customer preference, Beltone unsuitable (9611-12, 9670)	Yes (9613)	Yes (9607). But not before 1972 See CX 475b	-
J. Keel Columbus, GA	Yes, since 1963 (12796, 12794, 12797)	N/A	Experimented with selling other brands for only 2-3 months prior to 1963 (12792-93)	Yes, until 2 years ago (12832-33) (inconsistent)	No (12798).	Never sold outside (12798)
R. Kindopp Eugene, OR	No (14780)	"Very few" (14781, 14795) Exclusively Beltone until 90 days before testimony (14780-81)	Sold Starkey because of ear mold (14780-81)	-	No. Consultants are instructed to stay within territory (14794)	Limited sales to users on rural mail route which overlaps another dealer's territory (14793), and to personal friends (14790)
R. LaMontagne Springfield, IL	No (18043)	3 Oticon, 2 Starkey throughout entire dealership (18044-46, 18091). Sold 300 aids in 1974 (18093)	Customer preference or the nature of hearing loss when a Beltone could not correct problem (18044-46)	-	Unclear (18047) Advertising leads, personal referral	6 out of 300 in 1974 (18092-93) Normally less than 3% (18094)

Dealer Name and Location	Whether 100% Exclusive Dealer	Approximate Percent Number o. Other Brand Sales	Circumstances of Other Brand Sales	Advertising or Open Display of Other Brands	Whether Actively Solicits Outside of Territory	Circumstances of Out-of-Territory Sales
C. Langham Denver, CO	Yes (14556)	N/A	N/A	N/A	No (14560)	Never sold outside (14560)
G. Laster Deerfield, IL	No (18289)	25 Starkeys in past year out of 275-285 aids; less than 5 Oticons in past 5 years; 2 Widex throughout dealership; 2 Maico in past 5 years (18335)	Clinic referral and customer preference (18291-93)	-	No (18294)	"Very seldom" (18295)
M. Levy Knoxville, TN	No (13206)	"Rare occasions" (13206) Has sold 6 Starkeys in last 2 years (13208) None before (13208)	When a customer's needs could not be met by Beltone aid (13206). Most sold within past 2 years.	-	No (13209-10, 13289)	"On rare occasions it probably happened." (13209), e.g., family referral (13210).
B. Lipin New Haven, CT	No (11099)	10 of 365 - 1970 15 of 480 - 1971 30 of 495 - 1972 40 of 480 - 1973 30 of 480 - 1974 (11172-75)	On professional referral (11099) and customer request (11102)	No (11172)	No (11181-11182).	Sells out of territory only as result of professional or personal referral (11112) Sends fair leads to appropriate dealer (11182)
G. Lucas Springfield, MA	Yes (11698)	N/A	N/A	N/A	Yes. (11705-07)	Does not advertise (11730, 11756) nor maintain office outside (11790)

Dealer Name and Location	Whether 100% Exclusive Dealer	Approximate Percent or Number of Other Brand Sales	Circumstances of Other Brand Sales	Advertising or Open Display of Other Brands	Out-of-Territory Sales: Whether Actively Solicits Outside of Territory	Out-of-Territory Sales: Circumstances of Out-of-Territory Sales
L. Madsen Provo UT	No (14881)	5-10% non-Beltone (14881)	Started 2 1/2 years ago. Needs lower priced aids to compete for welfare or state rehab.; referrals; cosmetic and fitting reasons (14881-82, 14885, 14887)	No ad in phone book but has store display (14946-47)	No. (14891)	Only on personal referral (14891) Twice throughout dealership (14949)
G. Magurea Sacramento, CA	No (13504)	7 of 600 in 1972 7 of 800 in 1974 (13540)	On clinic referral (13506)	-	No. (13510)	None (13510)
R. Martin Milwaukee, WI	Yes (17225)	N/A	N/A	N/A	No (17233)	None (17233)
Datona Beach-Eau Gallie, FL	Yes (17232-33)	N/A	N/A	N/A	No (17234)	None (17234)
H. Mattingly Huntington, WV	Yes (11016)	N/A	N/A	N/A	Not clear in transcript (11019-20)	-
B. McCurdy Roanoke, VA	Yes (11264, 11266)	N/A	N/A	N/A	No (11370)	Only by direct referral from customer, usually a close friend or relative (11267)

Dealer Name and Location	Whether 100% Exclusive Dealer	Approximate Percent or Number of Other Brand Sales	Circumstances of Other Brand Sales	Advertising or Open Display of Other Brands	Out-of-Territory Sales: Whether Actively Solicits Outside of Territory	Out-of-Territory Sales: Circumstances of Out-of-Territory Sales
D. McMillan Evansville, IN	No (122227)	Only 2 non-Beltone aids sold from Beltone office (12226-27); 570 aids in 1972 and 531 aids in 1974	Specifically requested by a customer (12228); owned Zenith dealership for a short while which was run separately in another office (12224-27, 12200, 12268)	No (12268)	No (12230, 12232-33)	"Isolated cases" (12232)
W. Metcalfe Oklahoma City, OK	No (16332)	One sale of another brand (CX 600)(16332)	Professional referral (16332)	-	No (16338-39)	One aid on referral (16338)
L. Miller Casper, WY	Yes (14967)	N/A	N/A	N/A	No (14971)	Never sold outside (14971)
W. Mitsdarffer LaSalle, IL	Yes (17489)	N/A	N/A	N/A	No (17490)	One sale (17490)
Joliet, IL	No (17478)	2 aids (17478)	Professional referrals (17478)	-	No (17480-82)	One sale (17481-82)
W. Morris Reno, NV	Yes (13565)	N/A	N/A	N/A	No (13570)	Never sells outside (13570)
M. Moses Cedar Rapids, IA	No (17288)	6 of 1100 in last 5 years (17328, 17336-39)	Audiologist referrals (17289)	-	No (17349)	Under 5% (17342) on user request (17294) and with agreement of neighboring dealers (17361)

Dealer Name and Location	Whether 100% Exclusive Dealer	Approximate Percent or Number of Other Brand Sales	Circumstances of Other Brand Sales	Advertising or Open Display of Other Brands	Out of Territory Sales: Whether Actively Solicits Outside of Territory	Out of Territory Sales: Circumstances of Out-of-Territory Sales
P. Ostrowitz Bloomington, IN	No (18112)	Less than 5 of 300 (18143)	Referrals (18112)	No (18144)	No (18117)	Less than 5 of 300 (18151, 18143) on personal referral (18117)
E. Owenby Tucson, AZ	No (14234)	"Primarily" Beltone, other brands from time to time (14234)	Purchased other brands for comparison or customer preference (14234-35)	No (14305)	No (14236-37)	Less than 10 of 328 per year (14292); only on referral (14237)
C. Partin Florence, AL	Yes (16466)	N/A	N/A	N/A	No (16464)	None (16464)
J. Paul Fresno, CA	No (13659)	"Seldom" (13661-62)	Referral or customer request (13659)	No (13718)	No (13664)	Never sells outside (13665)
J. Pannette Johnsonburg, PA	No (13149)	"Negligible" for each year of dealership (13176)	At customer request (13149)		No. Personal referrals to family members and the like (13151-52)	Sold only 5 aids outside of territory in all years as consultant or dealer (13151)

Dealer Name and Location	Whether 100% Exclusive Dealer	Approximate Percent or Number of Other Brand Sales	Circumstances of Other Brand Sales	Advertising or Open Display of Other Brands	Out-of-Territory Sales: Whether Actively Solicits Outside of Territory	Out-of-Territory Sales: Circumstances of Out-of-Territory Sales
R. Perisho Escondido, CA	No (14344)	1 Zenith and 4-5 Starkey out of 825 (14363-64, 14344-45)	Referral and customer preference (14345). Started in 1974 (14362). Recently stopped selling others (14346)	-	No (14347)	1 of 825 (14363-65)
Fond du Lac, WI	No (14331)	One sale of another brand (14331)	Customer request (14332)	-	No (14334)	Sale to relative (14334, 14336)
J. Pierson Central Pt., MI	No (15024)	Sold about 26 Audivox aids left in stock when he became a Beltone dealer after quitting Audivox (15024). Sold about 20 out of 1100 aids throughout course of Beltone dealership (15024, 15026, 15072)	Had consultant who was familiar with Starkey aids. No longer selling them (15026, 15031)	No (15072)	No (15034)	Never sold outside (15034)
J. Proctor Pasadena, CA	No (15111)	Less than 25 of 775 in last 5 years (15151-52)	On professional referral (15111)	No (15161)	No (15125)	"Once in a while". Less than 5% (15155-56) where referral (15124-25)

Dealer Name Location	Whether 100% Exclusive Dealer	Approximate Percent or Number of Other Brand Sales	Circumstances of Other Brand Sales	Advertising or Open Display of Other Brands	Out-of-Territory Sales: Whether Actively Solicits Outside of Territory	Out-of-Territory Sales: Circumstances of Out-of-Territory Sales
S. Rabinowitz Norfolk, VA	No (13467)	Roughly 12 out of 700-800 (13487)	Sold Fidelity and Oticon on clinic referral (13467)	-	No (13470)	Never sold outside territory (13470)
Chicago, IL	Yes (13452)	N/A	N/A	N/A	No (13452)	None (13452)
J. Rawlings Cape Girardeau, MO	Yes (16526)	N/A	N/A	N/A	No (16529) Forwards all out of territory leads generated by advertising to appropriate Beltone dealer (16550-0 - 50-R)	None (16529)
W. Rice Wichita, KS	Yes (16267)	N/A	N/A	N/A	No (16270)	"Less than one hundreth of 1%" (16,279C)

Dealer Name and Location	Whether 100% Exclusive Dealer	Approximate Percent or Number of Other Brand Sales	Circumstances of Other Brand Sales	Advertising or Open Display of Other Brands	Out-of-Territory Sales: Whether Actively Solicits Outside of Territory	Out-of-Territory Sales: Circumstances of Out of Territory Sales
G. St. James Providence, RI	No (12653)	Has sold 1 other brand aid in the past five years (12690-93)	-	No (12692)	No. At state fairs with agreement of neighboring dealers and personal referrals (12695)	"Infrequent" (12695)
R. Scheutzow Canton, OH	No (13379)	"Occasionally". (13379) 10-15 Oticons in past two years and before then 1 Siemens in 1966 (13410) Sold 700 aids in 1974 (13407)	Sold one Oticon on M.D. referral. Also a few on clinic referral. (13380)	No (13411)	Yes (13388)	5% (13414, 13416)
S. Sloane Bridgeport, CT	No (10933)	25 out of 900 in 1972 (10959)	As result of clinic referrals (10966)	No (10960)	Yes (10940)	-
D. Sturtz Port Huron, MI	Yes (17960, 17964)	N/A	N/A	N/A	No (17967)	On personal referral (17967)
C. Tabokin Clarksburg, WV	Yes (13090)	N/A	N/A	N/A	No (13096-99)	3 or 4 sales (13096)
M. Tabor Wyandotte, MI	Yes (18209)	N/A	N/A	N/A	Unclear	On referral (18213); 10% (18257) and in answer to newspaper ads that overlap territory (18260)

Dealer Name and Location	Whether 100% Exclusive Dealer	Approximate Percent or Number of Other Brand Sales	Circumstances of Other Brand Sales	Advertising or Open Display of Other Brands	Out-of-Territory Sales: Whether Actively Solicits Outside of Territory	Out-of-Territory Sales: Circumstances of Out of Territory Sales
L. Thibault McAllen, TX	Yes (15962)	N/A	N/A	N/A	No (15962)	Once in Texas (15962)
Wilmington, DE	Yes (15953)	N/A	N/A	N/A	-	Twice in Delaware (15954)
A. Truitt	Yes (15680)	N/A	N/A	N/A	No. (15677)	Only on personal referral (15676); "considerably less than 1%" of sales since 1970 (15702-03)
J. Tsekurus St. Louis, MO	No (15263)	10 throughout St. Louis dealership (15316)	Sold Fidelity for a short time until Beltone produced comparable aid. Now sells only Beltone. (15263-66, 15269-71)	-	No (15275)	-
Milwaukee, WI	Yes (15249)	N/A	N/A	N/A	No (15252)	-
B. Ugoretz Baltimore, MD	No (11585)	Less than 5% (11585)	Sold Fidelity and Dahlberg because preferred by customer (11585)	No (11620)	No, but will sell outside on personal referrals (11589)	7-10% (11591)
R. Wheeler Burlington, VT	Yes (13317)	N/A	N/A	N/A	No (13318)	Never gone outside (13318)

Dealer Name and Location	Whether 100% Exclusive Dealer	Approximate Percent or Number of Other Brand Sales	Circumstances of Other Brand Sales	Advertising or Open Display of Other Brands	Out-of-Territory Sales: Whether Actively Solicits Outside of Territory	Out-of-Territory Sales: Circumstances of Out of Territory Sales
B. Wofford, Jr. Chicago, IL	No (10091)	"Primarily" Beltone. Occasionally sells Siemens and Radioear (10091)	Referrals from government agencies (10092-93)	No (10117)	Yes (10091, 10233-34)	Does sell outside substantially (10091)
B. Wofford, Sr. Hot Springs, AR	Yes (15764)	N/A	N/A	N/A	No (15774)	Will follow rural mail route (15773)
M. Yarlott Napa, CA	No (13810)	4 times a year. (13812)	Clinic referrals (13810)	No (13856-57)	No (13807)	-

Summary of Other Brand Sales

Percentage	Number of Dealerships
100%	41
99	21
98	3
97	5
95	5
69	1
"seldom"	1
"primarily"	4
unknown	2
	83

APPENDIX B

BELTONE
ELECTRONICS CORPORATION
CHICAGO, ILLINOIS

FRANCHISE

THIS AGREEMENT, by and between Beltone Electronics Corporation, an Illinois corporation with principal offices at 4201 West Victoria Street, Chicago, Illinois, hereinafter called "BELTONE", and Hearing Aid Services, Inc. d/b/a Beltone Hearing Aid Service, Winchester, Virginia hereinafter called "DEALER";

WITNESS:

WHEREAS, BELTONE engages in the manufacture and sale, at wholesale, of hearing aids, batteries, hearing test equipment, and related articles, hereinafter called "BELTONE Products"; and

WHEREAS DEALER desires to sell, at retail, BELTONE Products;

NOW, THEREFORE, in consideration of the mutual covenants and understandings set forth hereinafter, and the faithful performance thereof by the respective parties, BELTONE and DEALER hereby agree, as follows:

Article 1. BELTONE hereby appoints DEALER a retail DEALER for the sale of BELTONE Products within the following area of primary marketing resposibility: In the State of Virginia, the Counties of Clarke, Fauquier, Frederick, Loudoun, Prince William, Rappahannock, Shenandoah, Warren and Winchester City. In the State of West Virginia, the Counties of Berkeley, Jefferson and Morgan. In the State of Maryland, the Counties of Frederick and Washington. 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.

Article 2. BELTONE grants to DEALER the right during the term hereof to use the trademark, "BELTONE", but only in a manner approved, in writing, by BELTONE and such use shall cease within thirty (30) days of DEALER's receipt of written notice from BELTONE. DEALER shall never incorporate under any trade name or style using said trademark. DEALER shall not use any name or business style suggesting or indicating that he operates a BELTONE branch office or subsidiary, and he shall take such affirmative steps, as BELTONE may direct, in writing, to advise the public of his independent status.

Article 3. BELTONE shall sell to DEALER, and DEALER shall pay for ordered BELTONE Products at prices and on such other terms established by BELTONE. All orders shall be subject to acceptance by BELTONE at Chicago and shall be shipped f.o.b. BELTONE's factory. BELTONE shall not be responsible or liable for failure to make delivery because of an act of God, unavailability of supplies or materials, government regulations, laws, accidents, or any condition not within BELTONE's exclusive control.

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.

Article 5. DEALER shall promptly register with BELTONE, on forms supplied by BELTONE, each BELTONE Product sold, giving the purchaser's full name and address, purchase date, serial number of the purchased instrument, and other information required from time to time. BELTONE shall have no obligation under its guarantee program, unless and until such forms are received by it in conformance with requirements that BELTONE may, from time to time, prescribe in its DEALER procedure manual or otherwise. Nothing contained in this Article shall deprive BELTONE of any rights which it may have if DEALER fails to comply with his obligations hereunder, including the right to terminate this Agreement forthwith.

Article 6. 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.

Article 7. 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.

Article 8. 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.

Article 9. 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.

Article 10. This Agreement has been entered into by BELTONE in reliance upon DEALER's personal integrity, ability, and full time participation in the retail hearing aid business. The obligations and benefits hereof shall not be assigned, transferred, or sold, in whole or in part, by DEALER to any person, firm, corporation, or other entity, whether or not DEALER or any of his employees or agents have any interest in connection therewith. This Agreement shall automatically terminate on DEALER's death. No branch office, sub-dealership, or retail location other than that set forth herein shall be established by DEALER without BELTONE's prior written consent.

Article 11. DEALER shall save harmless and indemnify BELTONE from and against any and all losses, expenses, judgments, claims, costs (including attorneys' fees), and damages arising out of or in connection with any lawsuit in which BELTONE is named as a defendant and which is based upon allegations of misconduct or negligence by DEALER or any of his employees, agents,

or representatives. DEALER shall carry general liability and malpractice insurance in an amount sufficient to cover his normal business operations and shall insure all BELTONE Products in his possession, either on loan or rental from BELTONE, for their current value. BELTONE shall carry product liability insurance and shall save harmless and indemnify DEALER against all claims for patent infringement arising out of his sale of BELTONE Products.

Article 12. DEALER acknowledges that BELTONE is exclusive owner of all right, title, and interest in and to the trademark, "BELTONE", and any other marks which may be used, from time to time during the term hereof, in connection with BELTONE Products and BELTONE Services, and in and to any registrations thereof. DEALER shall acquire no rights in any of said marks by reason of this Agreement or his activities hereunder. DEALER shall do nothing to impair BELTONE's ownership of said marks. Upon the termination of this Agreement, however occurring, DEALER shall cease all use of said marks, including, without limitation, use in his trade name, telephone directories, building directories, advertising, letterheads, literature, signs, listings on office doors and windows, and in any other media of contact with the public. With regard to advertising, DEALER shall not advertise, after termination of this Agreement, any BELTONE Products, new or used, or BELTONE repair service. However, if BELTONE fails to exercise the option set forth in Article 16 hereof and DEALER has not otherwise disposed of the products covered by said option, DEALER shall have the right to advertise said products for a period of thirty (30) days from the date of termination.

Article 13. To insure compliance with his obligations hereunder, DEALER has signed and delivered to BELTONE certain letters set forth in Appendix "A" hereto, and hereby authorizes BELTONE, upon termination of this Agreement, however occurring, to fill in all blanks in said letters, as BELTONE may see fit, and to mail said letters to the designated addressees. DEALER shall be liable for any attorneys' fees and other expenses, which BELTONE may incur in enforcing this Agreement.

Article 14. The waiver by either party hereto of any breach or alleged breach of any provision hereof shall not be construed to be a waiver of any concurrent, prior, or succeeding breach of said provision or any other provision hereof. The invalidity of any provision or provisions hereof shall not, in any way, affect the validity of any other provision hereof or the validity of this Agreement absent such invalid provision or provisions. This Agreement shall, in all respects, be interpreted, construed, and governed by the laws of the State of Illinois.

Article 15. 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. Any notice required to be sent to a party under this Article shall be sent, by certified mail, to said party's address specified hereinabove or to his last known business address and shall be effective upon his receipt thereof. Delivery of any such notice shall be presumed to have been made, in any event, by not later than five (5) days after mailing date. DEALER shall make no contracts or commitments, during the thirty (30) day notice period, involving a continued use of the trademark, "BELTONE", by DEALER, including, for example, contracts for telephone directory listings.

Article 16. 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, either on loan or rental from BELTONE, shall be returned to

BELTONE immediately. BELTONE shall have the option, at the time of notice of termination of this Agreement by either party or within thirty (30) days after said notice, of purchasing from DEALER, at BELTONE's then-current invoice prices, any unsold, unused, BELTONE Products which DEALER may then have on hand. Further, anything herein to the contrary notwithstanding, in the event that this Agreement is terminated by at least thirty (30) days prior written notice as provided in Article 15 hereof, Beltone shall be required to sell to DEALER during said period of notice only such BELTONE Products, as Beltone may, in its sole discretion, deem to be DEALER's normal requirements, such sales to be made on C.O.D. or cash with order basis, provided, however, that all outstanding balances due to BELTONE have been paid in full. BELTONE shall be under no obligation to repair any BELTONE Products sent to it by DEALER after the date of termination, other than its obligation to the user under its then-current guarantee policies and procedures.

Article 17. All prior agreements between the parties hereto are hereby cancelled.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement at Chicago, Illinois, to be effective as of the day and year set out below.

Date: August 18, 1969

_____ BELTONE ELECTRONICS CORPORATION

DEALER's Firm Name

By _____ By _____

Authorized Signature

_____ _____

Witness: Witness:

Appendix "A"

Office of the Building Date _____

_____

_____

Gentlemen:

We hereby direct you to immediately cancel and remove, at our expense, any of our listings which include the registered trademark, "Beltone", owned by Beltone Electronics Corporation, Chicago, Illinois, from any office directories, bulletin boards, doors, windows, or signs in or attached to the building. Our right to use the trademark has now been terminated.

Very truly yours,
/s/ Hearing Aid Services, Inc.

_____

/s/ E. Allen Thomas - Pres.

_____

Date _____

Gentlemen:

This is to advise you that we no longer have the right to use the registered trademark, "Beltone", in any manner or form in our firm name, in advertising, or in any media of contact with the public. That right, which was granted to us by Beltone

Electronics Corporation, Chicago, Illinois, the owner of the trademark, has now been terminated.

Very truly yours,
/s/ Hearing Aid Services, Inc.

/s/ E. Allen Thomas - Pres.

Appendix "A"

_____ Date _____

Telephone Company

_____

Gentlemen:

We hereby relinquish the right to use, in any way, the registered trademark, "Beltone", in telephone listings or advertisements in any future directories, alphabetical or classified, and direct you to cancel any existing orders from us for such use in any unpublished directories. That right, which was granted to us by Beltone Electronics Corporation, Chicago, Illinois, the owner of the trademark, has now been terminated.

We hereby direct you to transfer the telephone service under telephone number _____ to Beltone Electronics Corporation or to such person, as it may specify. If, for any reason, such transfer can not be accomplished, we direct that such service be cancelled immediately.

Please refund to us any balance remaining in our account.

Very truly yours,
/s/ Hearing Aid Services, Inc.

/s/ E. Allen Thomas - Pres.

ASSIGNMENT

For valuable consideration, receipt of which is hereby acknowledged, and pursuant to the terms of his Beltone Franchise Agreement, the undersigned hereby assigns and transfers to Beltone Electronics Corporation, or its nominee, his entire right, title, and interest in and to the trade style, _____and any other trade style which includes the name, "Beltone", together with all registrations and listings of any said trade style wherever made.

/s/ E. Allen Thomas, Pres.

(Dealer's Signature)

APPENDIX C

Glossary

Authorized dealer or *Beltone dealer* – a hearing aid dealer who, pursuant to a "franchise" agreement or a "dealer agreement" has been appointed by Beltone as a retail dealer for the sale of Beltone products.

HOFE – acronym for Home Office Field Executive - a Beltone employee such as a

Regional Manager or a Division Manager who regularly contacts dealers at the dealers' places of business.

Lead – Beltone lead – the name and address of a prospective purchaser obtained by Beltone through its national advertising and supplied to a dealer.

HAIC – acronym for Hearing Aid Industry Conference – an association of manufacturers, importers, and suppliers of hearing aids, components thereof, and accessories.

consultant – a hearing aid salesman employed by a hearing aid dealer.

area of primary marketing responsibility – the geographic area set forth in the Beltone "franchise" agreement or "dealer agreement" appointing a dealer as a Beltone dealer.

manpower – utilization of consultants by a hearing aid dealer to make house calls on prospects.

"Dear Friend" letter – a letter that Beltone sends to all Beltone users in a particular geographic area announcing the appointment of a Beltone dealer in that area.

PAQ technique – a particular sales presentation that Beltone teaches to Beltone dealers and their consultants.

guarantee registration card – an "IBM" type card that the dealer sends to Beltone giving pertinent information about the sale of a new Beltone hearing aid.

binaural fitting – a fitting of hearing aids for both ears of a user.

"open" area – a geographic area not formally assigned to a Beltone dealer pursuant to a "franchise" agreement or "dealer agreement".

Selectometer – a master hearing aid used to determine the hearing aid to be fitted on a customer.

AVC, AGC – Automatic Volume Control, Automatic Gain Control.

OPINION OF THE COMMISSION

BY CLANTON, *Commissioner:*

A. *Introduction*

In this non-price vertical restraints case, Beltone Electronics Corporation, a manufacturer of hearing aids, is charged with imposing territorial and customer restrictions and exclusive dealing requirements upon its dealers. By way of introduction, we note that our concern with this company's distributional practices has a rather protracted history. In a previous proceeding, 52 F.T.C. 830 (1956), the Commission found that Beltone's written agreements with its dealers not to sell the products of other hearing aid manufacturers violated Section 3 of the Clayton Act, 15 U.S.C. 14. The order in that case prohibited Beltone from making future sales on such a condition or "understanding." Shortly thereafter, Beltone reformed its dealer relationships in a manner that appeared at the time to conform with the law. But the apparent conformity did not seem to endure, concerns arose anew and another case was brought in 1973—the one before us now, involving more than exclusive dealing.

As we describe more fully below, the record here indicates that, although unwritten, there exists between Beltone and its distribu-

tors understandings which amount to exclusive dealing and territorial and customer restraints. Nevertheless, since the earlier 1956 proceeding, the law concerning such vertical arrangements has [2] undergone considerable evolution, with the most significant development being the Supreme Court's ruling in *Continental T.V., Inc., v. GTE-Sylvania, Inc.,* 433 U.S. 36 (1977). Our analysis of the issues, in accordance with *Sylvania* principles, convinces us that the restraints in question do not violate the antitrust laws. Before proceeding to that analysis, however, we must describe the parties, the relevant markets and the proceedings below.

1) *Respondents And The Markets*

Respondent, Beltone Electronics Corporation (hereinafter "Beltone"), is a close corporation owned during the period relevant to these proceedings almost entirely by four individuals who were members of a single family. Beltone is incorporated under the laws of the state of Illinois, with its principal office and place of business at 4201 West Victoria Street, Chicago, Illinois. (ID 8)[1]

Beltone is engaged in the manufacture and sale, principally at wholesale to retail dealers, of "Beltone" hearing aids, as well as hearing aid accessories, batteries, and testing equipment. In the course of this business, Beltone ships its products to dealers throughout the United States and engages in national advertising. Thus, Beltone is engaged in "commerce" as the term is used in the Federal Trade Commission Act, 15 U.S.C. 45, and the practices alleged in the complaint in this matter are in or affecting "commerce." (ID 11)

In addition to Beltone, the complaint also named as respondents three individuals, Sam Posen, David H. Barnow and Chester K. Barnow, all officers or directors and principal shareholders of Beltone. On May 17, 1980, without opposition from complaint counsel, the administrative law judge ordered that the complaint be dismissed as to Chester K. Barnow and David H. Barnow. The ALJ recommends that the Commission uphold that order of dismissal (OR

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[1] The following abbreviations will be used in this opinion:

ID	- Initial Decision page number
IDF	- Initial Decision finding number
OR	- Order on Remand page number
ORF	- Order on Remand finding number
Tr.	- Transcript page number
CX	- Complaint Counsel's exhibit number
RX	- Respondent's exhibit number
RAB	- Respondent's Appeal Brief on Remand
CAB	- Complaint Counsel's Answering Brief on Remand
RRB	- Respondent's Reply Brief on Remand
COAB	- Complaint Counsel's Original Answering Brief

27), and we do so here. Since Mr. Sam Posen, the remaining individual respondent, is deceased, the Commission hereby dismisses the complaint as to him as well.

There is no dispute about the relevant product and geographic markets in this case. Beltone admits that it is engaged in commerce in the manufacture, distribution, sale and repair of hearing aids and related products. (ID 11) The relevant geographic market in which to judge the effects of the practices at issue is the United States as a whole. [3]

2) *The Charges And Proceedings Below*

Our analysis of the rather complex legal issues is facilitated greatly by a fairly full explanation of the precise acts and practices under scrutiny in this proceeding. On May 8, 1973, the Commission issued a complaint charging the respondents with unfair methods of competition and unfair acts and practices in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. In particular, the complaint alleged that the respondents have imposed upon Beltone dealers *non-price* vertical restraints which

a) require that dealers sell Beltone products only within assigned geographic territories;

b) require that dealers sell Beltone products exclusively;

c) prohibit dealers from selling Beltone products to unauthorized dealers;

d) prevent others from dealing in Beltone products; and

e) appropriate and use for respondents' own purposes the names and addresses of dealers' own customers. (Complaint Para. 10, ID 3–4)

In addition, respondent was charged with certain unfair acts and practices associated with the contractual consequences of dealer termination, including requiring the return of the names of all Beltone product users and prohibiting the dealer from either using his inventory or advertising Beltone products. (Complaint Para. 11)

On September 2, 1976, Administrative Law Judge Miles J. Brown issued his Initial Decision, concluding that respondents had engaged in each of the enumerated acts and practices (ID 84), that the acts and practices restrained intrabrand competition and, following *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), that the acts and practices were unlawful *per se* and constituted unfair methods of competition and unfair acts and practices in commerce in violation of Section 5. (ID 85) Specifically, he found unlawful foreclosure of other manufacturers from access to Beltone dealers and territorial and customer restrictions that produced *per se* illegal

effects on intrabrand competition. He found a) that Beltone's prices are insulated from competition and b) that the quality of hearing care (a concept discussed below) suffers because Beltone dealers are prevented from fitting their customers with other brands of hearing aids that may be more appropriate. (IDF 59) Further, the ALJ found that Beltone's requirement that terminated dealers remit to Beltone their leads and customer names constituted an unfair trade practice. (ID 82–83) Accordingly, the ALJ issued an order requiring respondents to cease and desist from engaging in these practices and to take certain affirmative steps to prevent their recurrence and remedy their effects. Respondents appealed from the Initial Decision. [4]

After the Commission had received the parties' briefs on appeal and had heard oral argument, but before the Commission had issued a final order in this matter, the United States Supreme Court decided *Continental T.V., Inc., v. GTE-Sylvania, Inc.,* 433 U.S. 36 (1977). That opinion reversed *Schwinn* and held that non-price vertical restraints were not *per se* unlawful but should be judged instead by a rule-of-reason analysis, which takes into account effects on interbrand competition as well as intrabrand competition. Accordingly, the Commission remanded this matter for additional hearings.

On remand, the ALJ confirmed his earlier inference that respondent has indeed imposed each of the alleged restraints and confined himself to collecting evidence of their effects on interbrand competition, of which he acknowledged that the record contains very little. To identify interbrand effects, he analyzed the testimony of eight competing hearing aid manufacturers, with particular attention to entry barriers, the extent of any foreclosure, and the overall economic performance of these firms, including their methods of distribution and pricing. After performing this analysis, the ALJ concluded that the restrictions in question produce adverse effects on both intrabrand and interbrand competition and that they are neither justified by legitimate business purposes nor procompetitive. (OR 25–28)

Respondent now appeals from both the Initial Decision and the ALJ's further findings of fact and conclusions of law.

3) *The Nature And Structure Of The Market For Hearing Aids*

The market for hearing aids is distinctive in many respects. The hearing aid industry possesses many of the characteristics of a health-care service industry, in which the quality of care received depends upon a number of provider services, including testing, fitting and post-fitting consultation to insure the user the maximum

benefit from a hearing aid. (OR 22) Additional services include education and diagnosis of the hearing-impaired individual. These services are generally provided by retail sellers of hearing aids and are usually not priced separately from the hearing instruments.

The record indicates that in 1972, there were about 2.3 million hearing aid users in the United States and an estimated 7.7 million hard-of-hearing persons not using hearing aids. (ID 18) As one might expect, the ALJ found that the vast majority of these hearing-impaired persons are over 60 years of age and less mobile than the population at large. (ID 22)

Because hard-of-hearing persons may tend to hide their handicap rather than seek assistance, the marketing of hearing aids frequently depends upon the discovery and testing of the hearing-impaired and the development of pre-sale and post-sale rapport with the user. Consequently, the hearing aid industry is service-intensive at the [5] retail level. Because hearing aids are generally thought unattractive, call attention to a physical impairment and are associated with aging, normal marketing methods may not result in sales. Dealers must work with potential users before the sale to convince them of the advantages of wearing hearing aids and to achieve proper fitting of appropriate equipment; after the sale dealers follow up to counsel customers on the use of their aids, since hearing aids do not result in immediate improvement of hearing. (CAB 4; Tr. 19828) As is often true in health-care situations, hearing aid purchasers cannot determine for themselves the extent of their hearing loss; instead, they must rely upon hearing aid dealers or professionals to advise them about their hearing impairment and appropriate corrective measures. (OR 22; Tr. 19148).

Fundamentally, this case involves the manner in which Beltone has chosen to market its hearing aids to the hearing-impaired population. Generally speaking, throughout the relevant period, there have been two principal methods of selling hearing aids. They are the more traditional "lead-advertising" method—once the dominant form of marketing and still used by Beltone—and the more recently emerging "professional-referral" method.

Since its founding, Beltone has placed considerable reliance upon the lead-advertising, or "case-finding", method, by which advertisements are placed in local, regional and national media to attract the attention of interested hearing-impaired persons. Such potential customers remove a coupon from the ad and return it to Beltone which, in turn, sends the name and address of the person to the Beltone dealer assigned to the appropriate territory. Each Beltone dealer is to follow up such an inquiry with a personal call upon the

responding customer and to provide him or her with testing and information about hearing impairment and hearing aids. The dealer also requests that the person come to his shop for more thorough fitting of a suitable Beltone hearing aid. In this manner, Beltone acquires "information" about potential customers and seeks out the hearing-impaired. To supplement the leads obtained by the manufacturer, some hearing aid dealers—including Beltone's—do local lead-generation advertising on their own or with a manufacturer's cooperative advertising assistance. (ID 21)

Despite the importance attached to case-finding by Beltone in these proceedings, no Beltone dealer relies exclusively upon manufacturer leads for his business. Dealer-initiated advertising, for example, which is funded by cooperative assistance from Beltone, accounts for a substantial share of Beltone's sales. The ALJ found that Beltone leads (in conjunction with dealer leads) account for only about 25% of its sales. (IDF 48) The remaining sources of respondent's sales include walk-ins, referrals from users, referrals from professionals and user repurchases (an undetermined percentage of which are derived from national leads in the first instance). It is important to lay out such facts in order to lend proper perspective to the high value attributed to lead generation by Beltone. It should also be noted that only [6]about 5% of Beltone's leads result in sales of hearing aids. (CAB 53) For several reasons discussed below, reliance upon the lead-advertising method has recently declined and professional referral has become increasingly important.

The professional-referral method of marketing entails the recommendation of a specific brand of hearing aid to a hearing-impaired person by a hearing professional—a physician or an audiologist. (ID 21) A hearing professional often fits a patient with a hearing aid model from an office inventory of various brands and models, usually left as promotional samples by manufacturers' sales representatives, but the professional usually does not sell the equipment. Instead, he prescribes a particular instrument which the user purchases from a licensed dealer in that brand. When a hearing aid dealer receives an order for a hearing aid specified by a hearing professional, he must treat it as a prescription and may not substitute any other type or brand of product. Consequently, most of the marketing efforts of firms using this method have shifted toward persuasion of hearing professionals and away from direct persuasion of users. Significant impetus was given to this shift in 1977 when the Food and Drug Administration formally ruled that all hearing aid dispensers must advise prospective purchasers to obtain a hearing examination by a physician prior to purchasing a hearing aid. (ORF 12) While the

customer may, under the FDA rule, decline to obtain the examination, he or she must execute a waiver before the hearing aid dealer is permitted to fit and sell an aid. As a result, the trend toward professional referrals is expected to become even stronger. As of 1980, about 40% of all hearing aids were sold through professional referrals (ORF 13), with higher percentages in urban areas.

Beltone has recently attempted to penetrate the professional-referral market but has not yet been successful, in part apparently because audiologists and physicians disfavor companies that sell hearing aids through lead advertising. (ORF 17) Beltone estimates that less than 10% of its aids are presently sold through professional referrals (OR 13–14), compared with the industry-wide share of 40%. Even so, it should be noted that the share of Beltone's sales derived from professional referrals is not *de minimis* and is not very much less than the lowest estimate of its sales attributable directly to national leads. (IDF 48)

More is said later in this opinion about the peculiar marketing needs of hearing aid manufacturers as we evaluate the purposes and reasonableness of Beltone's distributional restraints. But even at the outset, it is clear that certain quasi-medical peculiarities of the product market must be taken into account in such analysis. For example, the ALJ found that despite the substantial retail price of hearing aids, customers (at least first-time users) generally do little or no comparison shopping. (IDF 61) Assuming for the moment that this finding is correct, it suggests that this market may be characterized by significant non-price forms of competition. [7]

Before turning to those market dynamics, a brief word about the structure of this market is appropriate. There are about fifty hearing aid manufacturers selling products in this country, with the top four firms accounting for approximately 50% of U.S. sales and the top eight accounting for approximately 70%. As indicated above, these hearing aid manufacturers compete with each other for the patronage of hearing aid dispensers and for the recommendations of hearing professionals. (ORF 17) Almost all states now have licensing laws governing dispensers of hearing aids, with some states requiring continuous training for them. Apparently, all licensed hearing aid dealers have the basic competence and equipment required to fit virtually any brand of hearing aid (ORF 27), although many dealers do not sell all of the major brands.

B. *ALJ Findings and Conclusions*

1) *Exclusive Dealing*

As mentioned, the Commission found in 1956 that Beltone had

made written contracts for the sale of hearing aids on the condition that its dealers not sell or deal in similar products of competitors, in violation of Section 3 of the Clayton Act. Thereafter, Beltone amended its dealership agreement, purportedly cancelling the unlawful provisions. In doing so, however, Beltone urged its dealers to continue their exclusive attention to one line of products. (ID 14–16) In the present adjudication, the ALJ concluded that Beltone has created an atmosphere of intimidation and coercion which has produced *de facto* exclusive dealing as well as territorial and customer restrictions, even without express agreement. (ID 72)

Beltone's exclusive dealing policy has been sustained primarily through the efforts of supervisory personnel known as "home office field executives," or "HOFEs." While HOFEs have been instructed by Beltone that they may not explicitly require a dealer either to sell Beltone products exclusively or to sell only in his "Area of Primary Marketing Responsibility" (or "APMR"), HOFEs have been permitted to discuss with dealers the value of carrying a single product line and of providing optimal service to customers within an APMR. HOFEs also discuss with dealers the possibility of termination and, while HOFEs have been instructed that terminations cannot be based upon dealers' sales of other manufacturers' products or sales outside APMRs, permissible grounds for termination include "inadequate market penetration." [8]

Beltone dealers are given sales goals, referred to as "potential," for their APMRs. Dealers understand that they are expected to meet these goals as *de facto* quotas, and bonuses are awarded to HOFEs who succeed in raising dealers' levels of potential. (ID 38) The ALJ concluded that Beltone has used the failure to meet potential as a device for terminating or threatening to terminate dealers who breached its exclusivity policy and as a "club to force dealers to adhere to its single-line policy." (ID 39) He also found that the constant pressure to increase their potential caused some dealers to fit a Beltone hearing aid when they knew that another brand would better correct a customer's hearing impairment. *Id.* Several dealers testified that potential simply could not be met unless a dealer devoted his full efforts to promoting Beltone sales and that dealers were advised to stop selling other brands in order to meet potential. *Id.* The HOFEs constantly stressed dealer "loyalty" to Beltone, which ideally manifested itself as a preference for carrying only Beltone products. And, in fact, Beltone's desire that its dealers sell only a single line of products has been predominately honored.

Beltone denies on appeal that exclusive dealing is required of its dealers and contends that the voluntary decision by the majority of

its dealers to devote primary attention to Beltone products is not legally equivalent to exclusive dealing. In support of this contention, respondent points to testimony of dealers, cited by the ALJ (ID 49–50), who believe they provide better service to the hearing-impaired public and keener interbrand competition with full line of a single manufacturer's products. Also, officials of some of Beltone's competitors testified that their wholesale sales representatives do not even try to sell to Beltone dealers because the latter are uninterested in carrying other brands and seem satisfied to deal only in Beltone products. (ID 51) Beltone denies that dealers were coerced into this primary allegiance and it denies having terminated any dealer for failing to meet potential. Beltone further contends that it is legally permissible for a manufacturer to ask dealers to devote their primary efforts to its product. (RAB 19).[2] At bottom, though, Beltone argues that its alleged exclusivity policy produces no measurable adverse effect upon interbrand competition and is, therefore, not unlawful. **[9]**

As our review of the law will show, the extent of vertical foreclosure has been and remains an important consideration in judging the competitive effects of exclusive dealing. Although the precise degree of vertical foreclosure caused by Beltone's exclusive dealing is not clear from the record, some estimates are available. The ALJ noted in 1976 that Beltone had 370 dealers (ID 23), and in its brief respondent states that it now has 430 (RAB 33), but the number of dealers for all brands in the United States is not certain. A Beltone official testified in 1976 that there were 5,000 dealers nationwide employing 10,000 "consultants" (dealers' salesmen). Beltone's brief also employs the figure 5000. (RAB 32) But other evidence suggests that there were only 5,700 dealers and consultants combined. (RX 85, ID 20, 23) Using the universe figure of 5000, Beltone's dealers constituted only about 7–8% of the nation's hearing aid dealers. Using another basis for measuring foreclosure, the ALJ found that in 1977 Beltone accounted for about 16% of domestic hearing aid sales (in units). (ORF 3)

On remand, the ALJ supplemented his findings with a number of recent developments relating to entry into manufacturing and retailing. He found that, despite Beltone's vertical restraints, barriers to entry into the hearing aid manufacturing are low, as illustrated by the successful entry of Starkey and Nu-Ear since 1972.

[2] Citing *Dilion Materials Handling, Inc. v. Albion Industries*, 567 F.2d 1299 (5th Cir.), *cert. denied*, 439 U.S. 832 (1978), and *United States v. J.I. Case Co.*, 101 F. Supp. 856 (D. Minn. 1951).

At least since the Commission's initiative against exclusive dealing in this industry,[3] all firms have experienced easier access to licensed hearing aid dealers, even including Beltone's dealers.[4] (OR 15) All of the manufacturers now have many outlets, most of them sell to any qualified dealer, (ORF 8) and almost all of them promote their products through professionals and by local advertising [10]that emphasizes dealer services.[5] (OR 15–17) Foreign competition has been vigorous in the last decade, with firms like Siemens and Oticon taking market share away from previously dominant domestic firms.[6] (OR 7, 15) Siemens and Oticon have both grown rapidly and foreign firms now collectively account for about 34% of the market. (OR 7) Some domestic firms' shares have held constant in the 1970's while others have declined. Beltone's experience during this period of entry and growth by other firms is quite clear. Even though it remains the largest firm, Beltone has seen its share of sales slip from 21% in 1972 to 16% in 1977 (OR 15), and it suffered operating losses from 1976 through 1979. (OR 13, RAB 38)

While the ALJ acknowledged that the degree of foreclosure caused by Beltone's exclusive dealing is not great and that "it is difficult to see any direct adverse effect on interbrand competition at the dealer level," (OR 23) he concluded that Beltone's *de facto* exclusivity is unlawful because it raises entry barriers and exacerbates the loss of intrabrand competition caused by customer and territorial restrictions. (OR 24–25) Despite the elusiveness of clear adverse effects from respondent's exclusive dealing, the law judge thought it at least clear that the restriction yields no positive or procompetitive effects. Because of the "peculiar characteristics of this industry," (OR 24) the ALJ concluded that any degree of foreclosure of competitors aborts any possible interbrand benefits that might flow from the restraint. (OR 25)

2) *Territorial and Customer Restrictions*

The ALJ also concluded that Beltone has required its dealers to sell only within exclusively assigned territories except where a

[3] In the last decade, the Commission has obtained consent orders from the following companies: *Sonotone Corp.*, 82 F.T.C. 1802 (1973); *Radioear Corp.*, 82 F.T.C. 1830 (1973); *Dahlberg Electronics, Inc.*, 84 F.T.C. 222 (1974); *Maico Hearing Instruments, Inc.*, 88 F.T.C. 214 (1976).

[4] The products of Oticon, Nu-Ear and Starkey collectively account for 6–7% of Beltone dealers' sales. (OR 21) Further, several manufacturers, including Siemens, testified that they have had no trouble finding outlets and have sold to Beltone dealers. (OR 11) As many as 193 Beltone dealers are on record as having bought and sold other brands. (ORF 35)

[5] As of 1980, the following firms attributed the following percentages of their total hearing aid sales to professional referrals: Dahlberg, 35%; Danavox, 40%; Oticon, 40%. The modern attitude of many firms toward lead advertising is negative: Dahlberg discounts its reliance upon it, and Audiotone and Danavox do not use it because of the professional aversion to the practice. (OR 8)

[6] The foreign firms are recognized for their superior equipment, which undoubtedly accounts for some of their success. (OR 7)

dealer has a referral to an outside sale from one of his customers and where post-sale service of the outside customer can be performed by the dealer making the sale. (ID 45) Despite the lack of an express grant of exclusive territories, the ALJ found that the constant emphasis on potential, coupled with a prohibition on branch offices and a policy of supplying leads located only within a dealer's [11] territory, resulted in a *de facto* understanding of territorial exclusivity. In addition, dealers are required to turn over to Beltone any self-generated leads located outside their territories, even if those leads are developed through their own local advertising. He cited testimony by dealers who understand that Beltone will protect their territories from encroachment; in fact, some of those dealers have assisted in policing extraterritorial sales. (ID 45)

The ALJ found further that Beltone dealers understand that they may not sell products to wholesalers or to unauthorized dealers. In support of this, he cited evidence that Beltone has kept records on sales locations and service responsibilities, and has refused to perform out-of-warranty repairs requested by unauthorized dealers. (ID 62)

Beltone denies that it has required or coerced dealers to confine their sales to assigned territories, even though dealers may have respected each others' sales regions. (RAB 21) In Beltone's view, the record shows significant sales by dealers outside their APMRs. Further, it contends there have been no terminations for extra-terrritorial sales between 1973 and 1977. But beyond this, Beltone argues that areas of primary responsibility, even when combined with sales quotas, are not equivalent in law to "airtight" territorial restrictions. (RAB 22) Beltone likewise denies the existence of customer restrictions, arguing that some dealers have sold to wholesalers. Respondent points to the testimony of certain dealers who refused on their own initiative to sell to unauthorized dealers because of their concerns about improper service of the equipment and denigration of Beltone's reputation. (RAB 23) In any event, Beltone argues that it has a lawful right to focus its distribution efforts on the retail, and not the wholesale, level.

3) *Overall Effects Of The Combined Restraints*

The ALJ drew several conclusions about the overall effects of Beltone's combined restrictions. He concluded that Beltone has eliminated intrabrand competition and has effected the following unreasonable restraints on interbrand competition: a substantial portion of the hearing aid market has been foreclosed to competitors,

barriers to entry into retailing and manufacturing have been raised,[7] Beltone has been insulated from price competition, and customers of Beltone dealers are unable to obtain other, perhaps superior, brands of hearing aids. (OR 27–28) However, he found no adverse effects on the quality of the products, dealer support or services to users. (OR 25) The law judge rejected respondent's proffered justifications, saying 1) that Beltone's lead-advertising system [12]reaches no demographic group different from those reached by other firms using other marketing methods, 2) that the training received by Beltone dealers is unexceptional, and 3) that the level of dealer competence to perform repair services is competitively unimportant, since most hearing aid repairs are done by the manufacturer at the factory. (OR 20)

The ALJ based his findings at least partially on evidence that Beltone dealers look primarily to their own costs in setting retail prices. (ID 32, 76–77) Some manufacturers testified that they look at competitors' prices when setting wholesale prices but not at Beltone. (OR 7, 11) Other firms, Beltone and Dahlberg, indicated that they do not look to competitors when setting wholesale prices. (OR 8, 11) Some firms now sell to wholesalers and use quantity discounts to promote sales, while Beltone does not. (OR 16) The record shows only that Beltone hearing aids are priced higher than some brands (TR. 19060) but lower than others. (TR. 20221–22, 20295) The record contains no other evidence of price effects, such as comparisons of the price movements of different brands, cost/profit analyses or strategic planning documents.[8] As for retail-level price competition, while Audiotone and Dahlberg officials testified that hearing-aid customers engage in price-shopping, (OR 9–10) the ALJ concluded otherwise. (OR 22, IDF 61)

According to a theory advanced by complaint counsel, Beltone has taken itself out of competition at the wholesale level—where the demand is quite price-elastic—through exclusive dealing, yet has been able to capitalize on the relative price-inelasticity of demand at the retail level—due to the fact that customers generally do not select their own products—thus allowing the firm to sell its equipment at "excessive" prices.[9] In support of this contention, they cite the testimony of Dahlberg, a major competitor, that its [13] wholesale prices fell immediately after a Commission consent order banned its exclusive dealing. In response, Beltone asserts that there

[7] At another point in his decision, the ALJ found that barriers to entry into both manufacturing and retailing of hearing aids are low. (ORF 6)

[8] The ALJ rejected the testimony of both parties' expert witnesses. (OR 24, ID 77)

[9] Complaint counsel also contend that the territorial restrictions prevent competition among Beltone dealers which might otherwise drive down Beltone's retail prices.

is no evidence that its prices are "high" by any standard, and it emphasizes that its prices include the costs of various services which the prices of other brands may not. Respondent also points to a qualification in the Dahlberg experience: while Mr. Dahlberg testified that after the consent order his company's wholesale prices on hearing aids dropped, he emphasized that the "real price" increased because "the dealer got less . . . software"—in other words, the dealer received fewer valuable support services.[10]

Respondent's justification defense rests heavily on the premise that if it is not allowed to stress dealer attention to APMRs and primary devotion to Beltone leads, the lead-advertising system will not work efficiently, due in part to a free-rider problem affecting dealer incentives.[11] Beltone denies that it requires dealers to sell only Beltone products; what it does require is that dealers sell only Beltone products to Beltone's leads and that the dealers devote their primary energies to promotion of Beltone products, principally through the pursuit of leads. Beltone frankly acknowledges that its dealers are influenced by the incentives built into its marketing system but claims that the freedom of its dealers to sell non-Beltone products is no more constrained than the freedom of other manufacturers' dealers when they respond to equally strong, but different, incentives (such as travel prizes). Regardless of the characterization of these arrangements—as incentives or restraints—respondent ultimately defends its distributional system on grounds that the net effect is not anticompetitive or unlawful under a rule of reason. **[14]**

Complaint counsel, of course, take the opposite view, urging that respondent's restraints are not at all necessary for the preservation of the lead generation system, amount to more than mere selective distribution, depend heavily upon intrabrand restrictions as pay-offs for exclusivity, and produce adverse effects on competition that are not offset by any procompetitive interbrand efficiencies. (CAB 44) They agree with the ALJ that Beltone is insulated from interbrand price competition, and they note that this effect can be seen most clearly in the elimination of competition between non-Beltone dealers and any given Beltone dealer in the region outside the latter's APMR. (CAB 8) As for the foreclosure effect of respondent's

[10] Mr. Dahlberg testified: ". . . the dispener, and . . . the manufacturer . . ., doesn't just sell a hearing aid. He sells a hearing system. And the person we sell it to is part of the system. It is the hardware, it is the ear mold made by a third party usually, it is the interface between the hardware and the user, it is acquainting . . . the user with the hardware; it is re-educating him. Because if he hasn't heard for 30 years, it's re-educating him with the sound he had forgot—he had lost the memory of sound." (Tr. 18729) Testifying about the services that his company dropped, Mr. Dahlberg said, "In an economic crunch, the businessman sheds those costs that will least affect his business. They may be the very things that are most helpful to the user." (Tr. 18732)

[11] Much is made of this linkage between lead generation and the use of these restraints even though lead generation accounts for only a portion of Beltone's sales. Nevertheless, respondent apparently believes that portion constitutes a critical margin that permits the firm to "survive." (RAB 48)

exclusive dealing, complaint counsel acknowledge that barriers to entry are low in this market but insist that they have been lowered only by the Commission's previous consent orders prohibiting exclusive dealing, which only Beltone continues to practice through the coercive use of "potential." (CAB 36) Complaint counsel urge rejection of respondent's justifications, saying that there is no free-riding in hearing aid distribution a) because there is so little retail-level price shopping (as distinguished from wholesale-level competition) and b) because dealers place local advertisements which stress the service and quality of the individual dealer rather than national brand names (and are therefore not susceptible to free riding). (CAB 45)

Complaint counsel attack Beltone's primary justification by saying that selective distribution is not a prerequisite to case-finding and that other manufacturers engage in case-finding and dealer lead development without exclusive dealing in territorial restraints. Complaint counsel propose that by eliminating selective distribution Beltone could still advertise for leads and simply distribute them to its dealers. (CAB 51) According to complaint counsel, Beltone's restraints are unnecessary to create dealer incentives to develop Beltone's leads because it is in the dealers' self-interest to pursue promising leads; in fact, dealers do their own case-finding, which complaint counsel contend is more productive than Beltone's national lead generation. In short, complaint counsel attempt to show that the procompetitive effect of unrestrained dealer lead generation is greater than the procompetitive effect of Beltone's lead generation using the restraints, and thus that Beltone's restraints are not justified. (CAB 54)

Beltone's response to this is to reassert that free-riding is a real threat to the proper promotion of its leads, as evidenced by the testimony of one manufacturer that had to abandon national lead generation when it could no longer employ vertical restraints. (RRB 44) The ultimate result of permitting such free-riding, in Beltone's view, will be an overall reduction in the incentive of all of its dealers to exert the effort required to turn a lead into a sale. Although Beltone denies that it engages in exclusive dealing, it does claim that it is necessary to require dealers to sell Beltone products to Beltone leads. (RRB 46) Respondent urges that the national lead advertising program is not workable without its restraints, which Beltone characterizes as areas of [15]primary marketing responsibility and selective distribution. Without these requirements, respondent claims, it would have no assurance of dealer efforts to follow-up leads, due to the effects of free-riding. (RAB 51) Loss of dealer sales

margins would result in reductions in dealership manpower and a decline in the level of service provided by its dealers. (RAB 52) Dealers will advertise less if they expect reduced sales probabilities in their marketing areas, and ultimately free-riding or the threat of it will destroy Beltone's business, respondent contends. (RAB 54) Any limitation on its use of vertical restraints will result in a loss of the effectiveness and efficiency of its whole case-finding effort, on which it concentrates more heavily than any other manufacturer to attract first-time users. (RAB 53)

C. *Commission Findings on Existence of Restraints*

We preface our own findings from this voluminous record[12] with some observations about the changes in the market since the complaint was issued. When this complaint was brought, exclusive dealing appeared to be employed by most of the major hearing aid firms; thus, any new entrant was foreclosed from a substantial majority of the hearing aid dealer population. At that time, professional referrals did not account for a large percentage of hearing aid sales. Today, it is estimated that 40% of all hearing aid sales occur through professional referrals. (ORF 13) In the interim, several new firms have entered the market and grown rapidly to become market leaders. As far as the record discloses, only Beltone arguably continues to employ exclusive dealing; in so doing, it engages about 7 or 8% of the dealers. Multi-line dealers are now the rule rather than the exception, and the evidence indicates that neither established firms nor new entrants have experienced difficulty in finding dealer outlets for their products. Even Beltone has not been completely immune to the trends that have occurred since this case was first brought. Whether as a result of this proceeding, changing market conditions (including professional referrals), or a combination of the two, about 6–7% of Beltone dealers' sales are of other brands. **[16]**

Focusing first on Beltone's territorial policy, we believe that the testimony supports a finding that Beltone sought to maintain territorial exclusivity and that its dealers generally respected each others' territories and rarely sold outside their APMRs or to unauthorized dealers. Although the territorial limitation has not operated in an "airtight" fashion, it is nonetheless effectively eliminated opportunities for competitive activity by Beltone dealers

[12] The trial record reached a volume of over 20,000 pages of testimony by dealers and manufacturing witnesses.

outside their assigned areas. Several selections from the extensive anecdotal evidence bear this out.[13] Although some dealers testified in support of Beltone that they advertised and sold outside their territories without adverse consequences,[14] we conclude that the bulk of the dealer testimony (ID 39–45) shows that dealers understand that they are to sell only within assigned territories. While there was no express agreement to that effect,[15] the pressure to achieve potential, Beltone's distribution of leads only to assigned dealers, and Beltone's policing of sales, all reinforce the dealers' awareness of their territorial exclusivity. (ID 42) We also find that Beltone dealers understand that they are not to sell products to unauthorized dealers or wholesalers, an understanding that is reinforced by Beltone's practice of requiring dealers to file guarantee registration cards and of refusing to do non-warranty repairs on equipment submitted by unauthorized licensed dealers. (ID 58–61) [17]

Turning now to exclusive dealing, we find numerous accounts of dealers who were pressured by HOFEs and threatened with termination for non-Beltone sales; yet few actual terminations were recorded.[16] Nonetheless, our review of the testimony indicates that most dealers who sold competing brands did so on referrals only, although some dealt in other brands for certain specific purposes. In most of the latter cases, either the customers requested another brand or the dealer felt that the Beltone units had failed to correct the impairment.[17] The weight of this testimony establishes that [18]Beltone,

[13] For example, one typical dealer sold outside his APMR only on direct referral. (Tr. 11112) Another testified that he did not sell outside his territory for fear that Beltone would have reprimanded and possibly terminated him. (Tr. 2228) To another dealer, staying in one's territory was an "unwritten law." (ID 44)

[14] One dealer, for example, said that he did not confine his sales, that he advertised city-wide and that Beltone never objected. (Tr. 9607) The ALJ reviewed similar testimony from other dealers. (ID 41)

[15] In the absence of an express agreement imposing vertical restraints, a course of dealing between a seller and buyer may "ripen into an implied or informal agreement or understanding." *Dillon Materials Handling, Inc. v. Albion Industries,* 567 F.2d 1299, 1302 (5th Cir.), *cert. denied,* 439 U.S. 832 (1978), *quoting McElhenney Co. v. Western Auto Supply Co.,* 269 F.2d 332, 337 (4th Cir. 1959). Even so, in *Dillon,* the court found insufficient evidence of such a course of dealing in plaintiff's description of conversations with the defendant's representatives.

[16] One dealer testified that he was terminated for not selling enough Beltone aids. (Tr. 502) Another was terminated after his sales of non-Beltone increased. (Tr. 581) Still another was terminated for failure to sell his potential. (Tr. 2091) Yet another who was terminated claimed that he sold only one non-Beltone on a non-referral basis. (Tr. 4292) One Beltone HOFE told of terminating a dealer for sales of non-Beltones to Beltone leads and for failure to return guarantee registration cards. (Tr. 10160) Another HOFE said that Beltone had instructed him that proof of sale of another brand to a Beltone lead was grounds for termination; he explained that, of those dealers performing poorly, the ones handling competing brands were more likely to be terminated. (Tr. 1785)

[17] For example, one dealer sold a non-Beltone product when two Beltone products had failed to correct a severe hearing loss. (Tr. 1196) Another testified that he began carrying other brands in order to insure the best fit for the customer; he was subsequently terminated. (Tr. 2442) Other dealers who sold non-Beltone on a basis other than referral did so for the following reasons: a customer wanted a feature unavailable in the Beltone line, and a customer was not satisfied with the Beltone aid initially fitted (Tr 17138); a hearing loss was too great for Beltone's line (Tr. 13002); the customer had a preference for a certain fitting unavailable in the Beltone line (Tr. 18043); comparable aids in the Beltone line were not as cosmetically appealing (Tr. 11585; Tr. 12034); customers occasionally requested a particular brand they had seen or heard of or previously used (Tr. 12226, 13175, 14234, 14345); where a dealer sold an occasional non-Beltone, the decision was a combination of his judgment and the

(Continued)

through its HOFEs, used pressure to achieve potential in order to induce dealers to patronize Beltone products exclusively.

Having found that Beltone imposed restrictions effectively amounting to territorial exclusivity and exclusive dealing, we next address the legality of these restraints. We will first consider the relevant case law, which has evolved along somewhat separate paths for these practices, and then analyze the competitive effects in the hearing aid market.

D. *Legal Discussion*

1) *Decisional Precedent*

a) Territorial Restraints

The modern law of vertically-imposed territorial restraints begins with the Supreme Court's opinion in *Continental TV, Inc. v. GTE-Sylvania, Inc.*, 433 U.S. 36 (1977). Prior to *Sylvania,* the law had been the *per se* rule enunciated in *United States v. Arnold Schwinn & Co.*, 388 U.S. 365, 379 (1967):

> Under the Sherman Act, it is unreasonable without more for a manufacturer to seek to restrict and confine areas or persons with whom an article may be traded after the manufacturer has departed with dominion over it . . . .

The *Sylvania* Court expressly overruled *Schwinn* and established a rule of reason for all types of non-price vertically-imposed dealer restrictions. It acknowledged that

> the market impact of vertical restricitions is complex because of their potential for a simultaneous reduction of intrabrand competition and stimulation of interbrand competition. 433 U.S. at 51 [19]

Several types of marketing or distributional "efficiencies" resulting from vertical restraints are cited in *Sylvania* as forms of non-price interbrand competition. As the Court put it,

> Economists have identified a number of ways in which manufacturers can use such restrictions to compete more effectively against other manufacturers. [citation omitted] For example, new manufacturers and manufacturers entering new markets can use the restrictions in order to induce competent and aggressive retailers to make the kind of investment of capital and labor that is often required in the distribution of products unknown to the consumer. Established manufacturers can use them to induce retailers to engage in promotional activities or to provide service and repair facilities necessary to the efficient marketing of their products.

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customer's request (Tr. 13206); one dealer sold an Oticon to see if it performed better than a Beltone, but concluded that it did not (Tr. 13002); and a dealer has sold one Starkey model that he believes is superior to the comparable Beltone aid. (Tr. 14780)

The availability and quality of such services affect a manufacturer's goodwill and the competitiveness of his product. Because of market imperfections such as the so-called "free-rider" effect, these services might not be provided by retailers in a purely competitive situation, despite the fact that each retailer's benefit would be greater if all provided the services than if none did. 433 U.S. at 54–55.

Moreover, the *Sylvania* Court recognized that vertical restraints

may increase output by including demand-creating activity by dealers . . . that outweighs the additional sales that would result from lower prices brought about by dealers' price competition. 433 U.S. at 69 (J. White, concurring). [20]

Thus, the *Sylvania* Court acknowledged the value of non-price forms of interbrand competition, which can be induced through vertical restraints.

At the outset, Beltone's territorial limitation should be properly characterized. Strictly speaking, areas of primary marketing responsibility, without more, are not equivalent to airtight territorial restrictions, *Plastic Packaging Materials, Inc. v. Dow Chemical Co.*, 327 F. Supp. 213, 225 (E.D. Pa. 1971). But it is clear that Beltone's APMRs, as enforced, go beyond mere areas of primary emphasis. Although they are not completely airtight, they have been sufficiently restrictive to inhibit effective competition by Beltone dealers outside their assigned areas. Even so, the lesson of *Sylvania* is that we should judge the overall effects of the restraint by a rule of reason.[18]

Much of the recent law of vertical restraints was made by the Federal Trade Commission under the pre-*Sylvania* standards. Even prior to *Sylvania,* however, the Commission recognized that in some circumstances there may be procompetitive purposes to territorial restraints. For example, in *Adolph Coors Co.,* the Commission described, but reserved judgment on, the following possibility:

Where the manufacturer seeking to impose vertical restraints lacks appreciable market power, it is argued that the [21]damage to intrabrand competition resulting from the vertical restraints may be outweighed by the impetus to interbrand competition resulting from strengthening of the failing or entering firm as a competitive factor in the market. 83 F.T.C. 32, 195 (1974).

The *Coors* opinion itself reflected the impact of two appellate court decisions pre-dating *Schwinn* that had reversed Commission findings of liability for territorial restraints because the Commission had failed to demonstrate that the restrictions were unreasonable under the circumstances. We mention these earlier cases briefly here

[18] Professor Scherer has observed that: "The blunting of intrabrand price competition does not necessarily arouse concern as long as interbrand competition remains vigorous. Whether this condition is satisfied depends mainly upon how entry opportunities are affected." F.M. Scherer, Industrial Market Structure and Economic Performance 587 (2d ed., 1980).

because they seem to possess renewed analytical value since *Sylvania.* In *Snap-On Tools Corp. v. Federal Trade Commission,* the court noted

> that there are certain advantages to a manufacturer . . . in requiring an exclusive territorial arrangement with its dealers which promotes . . . in a broad, meaningful way, competition between it and other manufacturers of similar products, and which therefore justify a minimal curtailment of intrabrand competition among its dealers. 321 F.2d 825, 831–32 (7th Cir. 1963).

The Seventh Circuit was persuaded that the territorial restraint in question was essential to the respondent's particular method of marketing.[19] Another factor influencing the court was that Snap-On-Tools had no monopoly power in the hand tool industry, a market [22]comprised of approximately eighty firms.[20]

The most recent Commission opinion dealing with vertical restraints is *Amway Corp., Inc.,et al.,* 93 F.T.C. 618 (1979). In that case, even though the Commission found *per se* liability under Section 5 for resale price maintenance, it applied a different test, with different results, to Amway's non-price distributional "rules." The Commission found that Amway's rule requiring a buyer's exclusive commitment to one distributor yielded certain efficiencies. The non-price restriction enhanced demand for Amway products, in part because it allowed customers to receive services that were unavailable in stores. When analyzed under a rule of reason, the restriction in question was found to be reasonably related to Amway's ability to recruit distributors and to induce them to provide the requisite services essential to the success of Amway's "unique distribution system." *Id.* at 727.

In recent judicial applications of *Sylvania*'s rule of reason, the courts have demanded more rigorous analysis of the competitive effects of non-price vertical restraints. *Donald B. Rice Tire Co. v. Michelin Tire Co.,* 483 F. Supp. 750 (D. Md. 1980), *aff'd,* 638 F.2d 15 (4th Cir.), *cert. denied,* 102 S.Ct. 324 (1981), involved contract clauses

[19] The court agreed with the hearing examiner that:

> . . . [T]he practice of exclusive territories for its dealers appears to be the only way in which respondent can be assured that sales territories will be adequately worked, that periodic calls will be made on customers, and that satisfactory service will be rendered customers. *Snap-On-Tools Corp. v. Federal Trade Commission,* 321 F.2d 825, 832 (7th Cir. 1963).

The court also agreed that, in the absence of exclusive territories, it would be almost impossible to determine the particular dealer to whom credit for certain sales was due, which would result in "confusion and chaos." *Id.*

[20] The court also rejected the Commission's finding that, even if the territorial restriction was not unreasonable standing alone, it was unreasonable as an integral part of a system of four types of restrictions. *Id.*

Similarly, in *Sandura Co. v. Federal Trade Commission,* 339 F.2d 847 (6th Cir. 1964), the court held that a manufacturer's assigned territories were economically justified. The system in question there had been initiated to allow the company to attract distributors when it was near bankruptcy and it was perpetuated in order to induce distributor advertising, upon which the firm was heavily dependent as a small firm in a highly concentrated market.

limiting dealers' sales to specified locations and banning dealer pick-up of tires at warehouses outside their assigned areas. Citing *Sylvania*'s recognition of the marketing efficiencies that may result from vertical restraints—such as inducing retailers to engage in promotional activity and to provide service and repair facilities—the district court held that the defendant had used its location restriction to achieve a legitimate purpose, *i.e.,* to sell tires only through dealers who provided specialized services. In addition, the court held that Michelin's 7.9% share of the market did not confer market power, even though Michelin may have possessed some market power in earlier years when it introduced the radial tire. 483 F. Supp. at 761. **[23]**

Other courts have made the point that, to be successful, plaintiffs must establish the overall unreasonableness of the challenged restrictions. In one case, the court observed that vertical restraints might have increased rather than injured competition, since services were an important feature of competition in that market. *Red Diamond Supply v. Liquid Carbonic Corp.,* 637 F.2d 1001, 1006 (5th Cir. 1981). The court also found no evidence of market concentration or market power possessed by the defendant, evidence that, if established, might have suggested that the intrabrand restrictions were adversely affecting interbrand competition. *Id.* at 1005–06. To the same effect is *Cowley v. Braden Industries Inc.,* 613 F.2d 751 (9th Cir.), *cert. denied,* 446 U.S. 965 (1980), in which the court found restraints reasonable in the absence of evidence of injury to interbrand competition and because of the plaintiffs' failure to show any "effective, alternative means to maintain an efficient distributor system." *Id.* at 755.[21]

Complaint counsel have cited *Eiberger v. Sony Corp. of America,* 622 F.2d 1068 (2d Cir. 1980), for the propositions that a) vertical restraints can be deemed unreasonable even if they eliminate or lessen *only* intrabrand competition, and b) the mere provision of some dealer services does not necessarily validate an unreasonable restraint. It is true that, in *Eiberger,* the Second Circuit indeed found no basis in *Sylvania* for the position that adverse intrabrand effects alone cannot support a violation of Section 1 of the Sherman Act. *Id.* at 1081. In striking down Sony's imposition of "warranty fees" on sales outside "territories of primary concentration," the court found the fees bore no relationship to the asserted objective of getting dealers to perform warranty services. In short, the court concluded

[21] *See also, Eastern Scientific Co. v. Wild Hierbrugg Instruments,* 572 F.2d 883 (D.C. Cir. 1978), in which even territorial restrictions enforced by minimum resale prices for sales outside the territories were said to have no greater anticompetitive impact than a purely non-price-oriented policy of territorial restraints, which should be judged by a rule of reason.

that the sole purpose of the warranty fee system was to enforce territorial divisions and customer restrictions. Yet, while giving great weight to intrabrand effects, the court nevertheless did not ignore interbrand effects. Specifically, the court indicated that the restraints appeared to increase prices, not only at the intrabrand level but also in relation to interbrand competition,[22] and it **[24]** considered, but rejected on evidentiary grounds, defendant's claim of being a new entrant. In addition, in evaluating the proffered justifications, the court seemed to believe that the restraints were imposed more for the protection of the dealers than for Sony's benefit, a factor that, if true, would transform the vertical character of the restraints into horizontal arrangements. At bottom, however, the court's consideration of interbrand effects appears largely limited to determining whether the restraints exerted a procompetitive influence on interbrand competition, and not whether there were adverse interbrand effects.

The *Eiberger* decision must be read in conjunction with a contemporaneous opinion by another panel of the Second Circuit, *Borger v. Yamaha International Corp.*, 625 F.2d 390 (2d Cir. 1980). There, the Second Circuit held it reversible error for a jury to be instructed to find Yamaha liable for violating Section 1 solely on the basis of a purpose to restrict intrabrand competition, without a finding of either purpose or effect relating to interbrand competition.[23] The *Borger* court analyzed the *Oreck* decision, n. 23 *supra,* which was distinguished in *Eiberger,* and reaffirmed *Sylvania*'s emphasis on interbrand effects. *Id.* at 396–97.[24] **[25]**

From this review of the case law, it is quite evident that the courts in the post-*Sylvania* era have closely adhered to the Supreme Court's concern with the effect of vertical restrictions on interbrand competition. It is also clear that in analyzing the effects of vertical restraints, the courts have regarded market definition as a crucial

[22] Higher intrabrand prices, of course, do not necessarily mean that the restraints are anticompetitive since the restrictions, by inducing more information and services, add value to the ultimate product offered for sale.

[23] The question of whether intrabrand injury alone can sustain a Sherman Act violation appears to have split the Court of Appeals for the Second Circuit. In *Oreck Corp. v. Whirlpool Corp.*, 563 F.2d 54, 58 (2d Cir. 1977), the trial court had instructed the jury that if it found an agreement between Whirlpool and Sears to exclude Oreck (a distributor competing with Sears), it could find a violation based upon the unreasonable intrabrand purpose and effect, without more. A divided panel of the court of appeals reversed, holding that the plaintiff had to show that the net effect of such conspiratorial conduct was anticompetitive in the market as a whole. *Id.* The court *en banc* upheld the panel majority, 579 F.2d 126, 133 (2d Cir.), *cert. denied,* 439 U.S. 946 (1978).

Recently, while characterizing the view of the Fifth and Ninth Circuits as holding that the balance tips in the defendant's favor if the plaintiff fails to show that the defendant has significant market power—and adopting this view as its own—the Court of Appeals for the Seventh Circuit observed that "[t]he Second Circuit seems divided on the question. Compare *Oreck Corp. v. Whirlpool Corp.* (citation omitted) with *Eiberger* (citation omitted)." *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 1982-2 Trade Cases (CCH) ¶64,744 at 71, 609 (7th Cir. May 21, 1982).

[24] Other courts have taken a similar view of the importance of interbrand effects. *Copy-Data Systems, Inc. v. Toshiba America, Inc.*, 633 F.2d 405 (2d Cir. 1981); *Muenster Butane, Inc. v. Stewart Co.*, 651 F.2d 292 (5th Cir. 1981); *Abadir v. First Mississippi Corp.*, 651 F.2d 422 (5th Cir. 1981.).

prerequisite. *See Tampa Electric Co. v. Nashville Coal Co.,* 365 U.S. 320, 327–29 (1961). At the same time, the courts are not accepting unquestioningly the business justifications advanced in support of particular restraints, *e.g., Donald B. Rice Tire Co.; Eiberger.* What is less clear is the kind of competitive analysis that should be undertaken in individual cases, including the process of balancing intrabrand and interbrand effects. Some courts have looked to such interbrand considerations as market concentration and firm market power, *e.g., Red Diamond, Muenster Butane, Inc., Donald B. Rice Co.,* and *Valley Liquors, Inc. v. Renfield Importers, Ltd.,* 1982–2 Trade Cases (CCH) ¶64,744 at 71,609 (7th Cir. May 21, 1982), but the substance and procedural posture of many of the cases have not always necessitated a detailed competitive analysis. We will examine these issues more fully below in the context of this case.

b) Exclusive Dealing

Exclusive dealing arrangements may, as here, take the form of a contract under which a purchaser promises not to buy products from the seller's competitors, or it may take the form of a requirements contract. Unlike territorial restraints, exclusive dealing has at no time been considered *per se* illegal, although the standards of proof have not always been especially stringent. This approach simply reflects the courts' long-standing recognition that exclusive dealing may have procompetitive effects and purposes. *Standard Oil Company of California v. United States,* 337 U.S. 293, 306–7 (1949); *Tampa Electric Co. v. Nashville Coal Co.,* 365 U.S. 320, 329 (1961).

Since the earliest cases on exclusive dealing arrangements, the emphasis has been mainly on the degree of market foreclosure caused by the restrictions. Although the courts have not relied exclusively on foreclosure as a test of competitive effect, they have consistently focused on it. During the early judicial development of the law on this particular vertical restraint, violations were established with only a minimal showing that a substantial amount of commerce was involved in the contracts. More recently, however, the courts have employed a fuller rule-of-reason analysis, which takes into account not only the market share of the firm but the dynamic nature of the market in which the foreclosure occurs. **[26]**

In its earliest case under Section 3 of the Clayton Act, the Supreme Court considered a manufacturer's requirement that distributors, who constituted 40% of the retail outlets for the product, refrain from handling competing manufacturers' products. Without lengthy explanation, the Court announced that the test for exclusive dealing was whether the foreclosure would "probably lessen competition or

create an actual tendency to monopoly." The Court also made the following observation:

> That [Section 3] was not intended to reach every remote lessening of competition is shown in the requirement that such lessening must be substantial. *Standard Fashion Co. v. Magrane-Houston Co.,* 258 U.S. 346, 357 (1922)

The Court decided that a 40% foreclosure of the outlets available to pattern manufacturers would clearly have the prohibited "substantial" effect.[25]

Later, in a landmark opinion on Section 3, the Court searched painstakingly for a rule of law that would permit more comprehensive analysis of the competitive effects of particular practices covered by that statute. *Standard Oil Company of California v. United States,* 337 U.S. 293 (1949), [hereinafter *"SOCAL"*] involved requirements contracts between a gasoline refiner and independent service stations. The issue was whether, when applied to requirements contracts, the "lessening of competition" clause in Section 3 required a showing of probable diminution of competitive activity or merely a showing that a substantial portion of commerce was "affected" (meaning "involved"). Facing the Court was the recent Section 3 precedent of *International Salt Co. v. United States,* 332 U.S. 392, 396 (1947), which rested a violation for tying arrangements on a "substantial foreclosure of a volume of business that is not insignificant." In an effort to craft a separate analysis for requirements contracts, the five-member majority reviewed all eight of the Court's prior decisions on Section 3. In five of those, violations were found, three of which involved tying arrangements[26] and two of which involved requirements contracts.[27] But the Court found nothing in those precedents that would justify confinement of the *International Salt* standard to tying agreements. The restricions in each of those **[27]**cases quite clearly affected a significant part of the market—with foreclosures ranging from 100% to about 40%.[28] 337 U.S. at 302. The fact that SOCAL's market share was not as great as the shares in the earlier cases, however, did not reduce antitrust concern, in the view of the Court, since SOCAL might have

[25] This early opinion of the Court has been criticized for its failure to provide "either an exposition of the dynamic consequences of arrangements like the one before it or implications about where the borderlines between legality and illegality may lie." L. Sullivan, *Antitrust* 472 (1977).

[26] *United Shoe Machinery Corp. v. United States,* 258 U.S. 451 (1922); *International Business Machines Corp. v. United States,* 298 U.S. 131 (1936); *International Salt Co. v. United States,* 332 U.S. 392 (1947).

[27] *Fashion Originators Guild of America v. FTC,* 312 U.S. 457 (1941); *Standard Fashion Co. v. Magrane-Houston Co.,* 258 U.S. 346 (1922).

[28] Although there were no findings of foreclosure levels in any of the cases which were dismissed, in each one the Court found that the tie-ins or exclusive contracts produced no conceivable illegal effect. *FTC v. Sinclair Refining Co.,* 261 U.S. 463 (1923) (limiting gasoline sold through pumps); *Pick Mfg. Co. v. General Motors Corp.,* 80 F.2d 641 (7th Cir. 1935), *aff'd,* 299 U.S. 3 (1936). (limiting dealers to GM parts).

maintained its share, however small, by the use of vertical restraints, forestalling the loss of market share to new entrants. If such were the case, said the Court, the efficiencies that SOCAL had achieved through its requirements contracts might not save it from liability. 337 U.S. at 309. Thus, finding the absence of market dominance an unreliable indicator and ultimately deciding that "serious difficulties" attended "various tests of the economic usefulness or restrictive effect of requirements contracts," *Id.* at 308, the Court concluded

> that the qualifying clause of §3 is satisfied by proof that competition has been foreclosed in a substantial share of the line of commerce. *Id.* at 314.

Applying this test to the evidence that SOCAL accounted for 23% of the gasoline sales in the relevant market and that its requirements contracts tied up 16% of the independent stations, which sold 6.7% of the gasoline in the market, the Court found a violation of Section 3.[29] [28]

The *SOCAL* substantiality test prevailed until it was reexamined by the Supreme Court in 1961.[30] One of the most significant lower court applications of the test arose out of a Commission decision very similar to the instant case, and it is instructive to contrast its perspective with more recent views of vertical restraints. In *Dictagraph Products,* 50 F.T.C. 281, 295 (1953), *aff'd sub nom., Dictagraph Products v. Federal Trade Commission,* 217 F.2d 821 (2d Cir. 1954), the Commission found that a hearing aid firm's contracts prohibiting its dealers from selling competing brands of products, enforced by intimidation and actual terminations which triggered one-year covenants not to engage in the hearing aid business, tied up a substantial fraction of the established retail outlets (22%), affected a substantial volume of business and tended substantially to lessen competition, all in violation of Section 3 of the Clayton Act. Dictagraph was one of the top three firms in the market and, according to the Commission, it controlled a "substantial number" of dealers and had probably maintained its market position over time by use of exclusive dealing. Even so, overall interbrand competition had actually increased in the relevant period, in that the number of manufacturers had increased, and new entrants had experienced no trouble establishing themselves with dealers.

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[29] Of interest to us in the present case is the way that the method of competitive analysis began to evolve from that in *Standard Fashion.* Although ultimately adopting a simplified legal standard, the Court in *SOCAL* considered a broader range of structural features of a well-defined relevant market, including the fact that SOCAL's six major competitors, accounting for 42% of the market, also employed exclusive dealing (requirements) contracts, while only 2% of the independent stations in the market operated split (multi-brand) pumps. *Standard Oil Company of California v. United States,* 337 U.S. 293, 295–96 (1949).

[30] *See Tampa Electric Co. v. Nashville Coal Co.,* 365 U.S. 320 (1961).

Reviewing the Commission's decision, the court of appeals held that it was never appropriate to consider business justifications for vertical restrictions under Section 3. 217 F.2d at 824 *et seq.* Dictagraph had raised as a justification for its restraints the need to protect its investment in engineering and research (as well as goodwill and reputation) and its attention to the individual needs of hard-of-hearing persons through product improvement and training. It argued that the quality of its services to the public would be diminished if its dealers were allowed to [29]devote less than full attention to Dictagraph products.[31] *Id.* at 824–5. The court in *Dictagraph* found *SOCAL* totally dispositive of the proffered justification defense, since in its view *SOCAL* had implicitly affirmed the lower court's exclusion of evidence of the economic merits of SOCAL's marketing system, *i.e.,* evidence of efficiencies. *Id.* at 825. The court also rejected Dictagraph's "public interest" justification, which was based on benefits rendered to the hard-of-hearing through Dictagraph's services. Nonetheless, the court made the following observation about Dictagraph's claim that it needed the restraints in order to protect investments in customer lists and company leads:

> The furnishing to petitioner's distributors of names and addresses of users of the Acousticon hearing aid in their territories, together with additional names and addresses of prospects obtained through the use of various advertising media . . . would seem to be the legitimate property of petitioner. Nothing in the cease and desist order now before us for review would seem to prevent petitioner from protecting itself against the use of such data and material in the sale of the products of competitors. *Id.* at 829.

This acknowledgement is noteworthy, for it touched some of the very issues before us now. The court seemed to recognize that in limited circumstances it is justifiable for a manufacturer to [30]fashion its distribution system in a manner that protects its competitive interests.[32]

In the exclusive dealing cases that followed *SOCAL,* the demarca-

[31] In its *Dictagraph* opinion, the Commission made several findings about the hearing aid market that are comparable to the present case:

> The nature of this market is such that to sell effectively potential users of hearing aids must be sought out and convinced of the advantages of hearing aids to them . . . many persons will not shop for this product. Well-established distributor accounts . . . concentrate their sales forces on locating and selling such potential users. In this manner a market is reached which is not accessible to accounts selling across the counter only. 50 F.T.C. at 294.

[32] Even contemporaneously with the *Dictagraph* opinion, the Commisson seemed to recognize that application of a quantitative substantiality test should be tempered by analysis of dynamic factors affecting the significance of the foreclosure. In a companion case, *The Maico Co., Inc.,* 50 F.T.C. 485 (1953), the ALJ had excluded evidence of an increase in the number of competitors, an increase in the volume of competitors' business, a decline in the respondent's small market share. The Commission remanded his finding of a Section 3 violation for consideration of such evidence, saying that only exclusive dealing that lessens or will probably lessen competition is unreasonable or unlawful. *Id.* at 488

tion between lawful and unlawful percentages of market foreclosure varied, rendering the substantiality "rule" quite imprecise. In *Mytinger & Casselberry, Inc. v. Federal Trade Commission,* 57 F.T.C. 717 (1960), *aff'd,* 301 F.2d 534 (D.C. Cir. 1962), foreclosures of 61%, 34% or 8.6% of the three product markets alleged were all regarded as "substantial." The Commission held that Section 5 required only a showing of *potential* to impede a substantial percentage of the relevant lines of commerce. The affirming court distinguished that test from either a showing based upon "the mere volume of business" or a showing based upon "the actual impact which a . . . contract has on competition." 301 F.2d at 537–38. Although the Supreme Court had decided *Tampa Electric, infra,* by then, the *Mytinger & Casselberry* court simply distinguished Tampa Electric's foreclosure of only 0.77% from Mytinger & Casselberry's 8.6% or more. *Id.* at 539.

The Supreme Court reconsidered its quantitative substantiality test in *Tampa Electric Co. v. Nashville Coal Co.,* 365 U.S. 320 (1961), which involved a declaratory judgment and enforcement action on a requirements contract. After reviewing its earlier decisions, the Court characterized the substantiality test in the following fashion:

> it is necessary to weigh the probable effect of the contract on the relevant area of effective competition, taking into account the relative strength of the parties, the proportionate volume of commerce involved in relation to [31]the total volume of commerce in the relevant market area, and the probable immediate and future effects which pre-emption of that share of the market might have on effective competition therein. *Id.* at 329.

Applying the test to the Tampa Electric contract, the Court found that the arrangement foreclosed only 0.77% of the relevant market, a clearly insubstantial amount. In so holding, the Court noted that the respondent coal company was not a dominant seller nor was there an industrywide practice of exclusive dealing, features which distinguished the case from the *Standard Fashion* or *Standard Oil* cases. The Court also took into account particular features of the market that made the contractual arrangement efficient and desirable. *Id.* at 334.

While *Tampa Electric* emphasized the importance of market definition and expanded somewhat the range of analysis of exclusive dealing, it provided little specific guidance about either the threshold percentage of foreclosure that should trigger antitrust concern or the relative importance of other market considerations. The analysis of lower court decisions following *Tampa Electric* is complicated to some extent by a line of cases that might be read to establish under Section 5 a different rule than that under Section 3.

Perhaps the most significant of these cases was the earliest, *Brown Shoe Co., Inc.*, 62 F.T.C. 679 (1963), *rev'd sub nom. Brown Shoe Co. v. Federal Trade Commission,* 339 F.2d 45 (8th Cir. 1964), *rev'd* 384 U.S. 316 (1966). In that case, Brown's franchise program required retailers to devote their primary attention to Brown's lines of shoes and to sell no "conflicting" lines. Customers who agreed to the exclusive dealing program were rewarded with "special treatment" from the manufacturer, which included architectural plans, field representative services, merchandising records sales training, accounting assistance, displays and national meetings. The Commission determined that Brown's competitors had been foreclosed from that portion of the dealer market represented by Brown's 766 dealers and that the foreclosure was significant. Brown argued that its dealers accounted for only 1% of the nation's 70,000 retail shoe stores and that, by *Tampa Electric* standards, such foreclosure was insignificant. The Commission's response to this, which was upheld, was simply that *Tampa Electric* was distinguishable as a Section 3 case, with a higher standard of proof than that required by Section 5. But even this seeming departure from the *Tampa Electric* Section 3 test is ambiguous since the Commission was also influenced **[32]**by the shoe industry's structure[33] and by a recent Supreme Court decision condemning a 1% vertical foreclosure resulting from a Brown Shoe merger.[34]

Little further precision was added to the concept of "substantial foreclosure" in subsequent Commission cases. In *Luria Bros and Co., Inc. v. Federal Trade Commission,* 389 F.2d 847 (3d Cir.), *cert. denied,* 393 U.S. 475 (1968), an exclusive scrap iron broker unlawfully foreclosed either 21% or 34% of the business of steel mills, depending upon the market definition, but the charge there hinged on an incipient Sherman Act violation, and Clayton Section 3 standards were not mentioned by the court. In *L.G. Balfour Co. v. Federal Trade Commission,* 442 F.2d 1 (7th Cir. 1971), exclusive dealing contracts with 90% of the buyers in the relevant market were found to confer unlawful monopoly power, but the reviewing court reserved judgment on whether the arrangements would violate Section 5 absent the showing of monopoly power. And in *Adolph Coors Co.,* 83 F.T.C. 32 (1974), *aff'd sub nom. Adolph Coors Co. v. Federal Trade Commission,* 497 F.2d 1178 (10th Cir.), *cert. denied,* 419 U.S. 1105 (1974), which involved both exclusive dealing and territorial restrictions adjunct to price fixing, the Commisison

[33] Among about 1000 manufacturers, the five largest held 24% of the market. Brown ranked second or third, and the trend was toward vertical integration or foreclosure of small firms' access to retail outlets by larger firms' franchise programs. 62 F.T.C. at 719.

[34] *Brown Shoe Co. v. United States,* 370 U.S. 294 (1962).

dispensed with finding the percentage of outlets foreclosed, holding that under Section 5, when a firm has market power—as Coors did—it cannot lawfully foreclose competitors from outlets.[35]

Looking at more recent exclusive dealing cases decided under Section 3, we find only a slightly clearer dividing line between lawful and unlawful foreclosure. In one, foreclosure of 10–15% of the dealer population was sufficient to withstand a motion for a directed verdict, although in the court's view that level of foreclosure did not "compel a finding of substantiality" and might [33]be proven insignificant. *Cornwell Quality Tools Co. v. CTS Co., Inc.*, 446 F.2d 825 (9th Cir. 1971).[36] In another, the district court had found a foreclosure of 14.7% substantial and unlawful, but the appellate court reversed on the lower court's failure to consider whether the impaired competition was significant within the total context of interbrand competition in the industry. *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230 (3d Cir. 1975).[37] The court indicated that Holiday Inns' 14.7% foreclosure might violate Section 3 standards, but it could not say because of the evidentiary deficiencies.[38] Other courts have held that foreclosures of less than 1%, *Magnus Petroleum Co., Inc. v. Skelly Oil Co.*, 599 F.2d 196, 204 (7th Cir. 1979), and less than 5%, *JBL Enterprises, Inc. v. Jirmack Enterprises, Inc.*, 509 F.Supp. 357, 379 (N.D. Cal. 1981), were insufficient to violate Section 3. Additionally, in a Section 1 case, the court found that a 24% foreclosure of the relevant market and a continuing pattern of obtaining exclusive contracts of unreasonable duration constituted an unreasonable restraint of trade. *Twin City Sportservice, Inc. v. Charles O. Finley & Co., Inc.*, 676 F.2d 1291 (9th Cir. 1982). [34]

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[35] Citing only *Federal Trade Commission v. Brown Shoe Co.*, 384 U.S. 316 (1966), the court of appeals affirmed the Commission's conclusions on exclusive dealing. *Adolph Coors Co. v. Federal Trade Commission*, 497 F.2d 1178 (10th Cir.), *cert. denied*, 419 U.S. 1105 (1974).

[36] More recently, Section 3 exclusive dealing charges have withstood a motion to dismiss because the court saw possibility of foreclosure of 100% of the relevant market as it was defined. *Perington Wholesale, Inc. v. Burger King Corp.*, 631 F.2d 1369, 1375 (10th Cir. 1979).

[37] Significantly, the district court had failed to consider the size and number of firms in the market, the foreclosure effect on other firms, the use of the restraint throughout the industry, or the economic justifications for the restraint.

[38] Because Section 3 of the Clayton Act applies only to sales of goods, not services, the plaintiff in this case charged only that the exclusive dealing violated Section 1 of the Sherman Act. Nevertheless, Clayton Section 3 standards were compared. While the appellate court did not find a violation on the basis of the foreclosure alone, it nonetheless found Holiday Inns liable under Section 1 for the combination of exclusive dealing and reservation of certain towns for company-owned motels.

It should be noted that the court in *Holiday Inns* would not require a firm to use the least restrictive vertical restraint to achieve its purposes. In its view, the test should be whether the restriction is "fairly necessary" under all the circumstances or whether it exceeds the limits of restraint "reasonably necessary" to protect the defendant. *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230, 1248–49 (3d Cir. 1975). The court distinguished holdings of other circuits to the contrary, *Siegel v. Chicken Delight, Inc.*, 448 F.2d 43 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972), and *Copper Liquor, Inc. v. Adolph Coors Co.*, 506 F.2d 934 (5th Cir. 1975), both of which involved *per se* illegal restraints.

It is rather obvious from this survey that the foreclosure standards for judging exclusive dealing are not well settled. And, even if a relatively clear foreclosure guideline had been established before *Sylvania,* today it would remain only one of several variables to be weighed in the rule-of-reason analysis now applied to all nonprice vertical restraints, under both Section 3 of the Clayton Act and Section 5 of the FTC Act. More specifically, a proper analysis of exclusive dealing arrangements should take into account market definition, the amount of foreclosure in the relevant markets, the duration of the contracts,[39] the extent to which entry is deterred, and the reasonable justifications, if any, for the exclusivity.

If, as the precedents seem to suggest, the degree of foreclosure caused by the exclusivity indicates without serious doubt that the party imposing exclusive contracts possesses substantial market power, then that foreclosure will be a more significant factor of the case against the restraint. Where the degree of foreclosure is less substantial, other measures of market performance are more likely to determine the overall effect of the restraint on competition. As we note below, because Beltone's degree of foreclosure is neither clearly *de minimis* nor clearly indicative of significant market power, it is necessary for us to undertake a fuller analysis of complaint counsel's proof relating to other market factors and respondent's proffered justifications. **[35]**

Having reviewed the relevant case law on exclusive dealing and territorial restrictions, we turn our attention to consideration of the competitive effects in the hearing aid market. The analysis that follows takes account of the recent literature on the subject of vertical restraints as well as the current judicial framework.

2) *Analysis of Competitive Effects*

In returning to a rule of reason analysis for non-price vertical restraints,[40] the *Sylvania* decision emphasized two points: (1) that all such restraints, regardless of form,[41] can serve legitimate procompetitive purposes, and (2) that interbrand considerations are of primary

[39] The length of time that competitors are foreclosed by exclusive transactions has been an important element in the evaluation of such contracts. Professor Sullivan, for example, believes that the longer the exclusive dealing arrangement, the more likely it is that its restrictiveness outweighs any efficiencies or justifications associated with it. L. Sullivan, Handbook of the Law of Antitrust 485–86 (1977). In a recent decision, exclusive contracts longer than ten years were deemed unreasonable in terms of foreclosure and duration and unjustified by a need to recapture investments. *Twin City Sportservice, Inc. v. Charles O. Finley & Co., Inc.,* 676 F.2d 1291, 1305 (9th Cir. 1982). *But see Tampa Electric Co. v. Nashville Coal Co.,* 365 U.S. 320, 334 (1961), in which the Supreme Court indicated that a 20-year contract could be reasonable.

[40] *See White Motor Co. v. United States,* 372 U.S. 253 (1963).

[41] While the *Sylvania* Court recognized the potential of non-price vertical restraints, it noted the different treatment of price restrictions. "The *per se* illegality of price restrictions has been established firmly for many years and involves significantly different questions of analysis and policy." *Continental T.V., Inc. v. GTE-Sylvania, Inc.,* 433 U.S. 36, 51 n. 18 (1977).

importance. However, in the aftermath of that decision, several unanswered questions remain. For example, what significance should attach to the degree to which vertical restraints inhibit competition? What are the most relevant interbrand considerations? How do we balance intrabrand and interbrand effects? As discussed previously, these and other issues have been addressed to some extent in lower court decisions interpreting *Sylvania* and by a variety of commentators.

Recent literature reflects diverging views over how to structure the rule of reason analysis called for in *Sylvania.* Some commentators urge continued close scrutiny of vertical restraints, believing that excessive promotion of non-price competition bears many of the characteristics of cartel-like behavior,[42] that well-established firms and less complex products do not require the support of severe distribution restraints[43] and [36]that less restrictive alternatives are frequently available.[44]

Other commentators advocate a much more lenient approach toward vertical restraints.[45] Under this view, a manufacturer, acting in its own interest, will restrict dealer competition only to the extent necessary to induce the optimal level of servies—that is, to ensure that non-price competitive efforts by distributors will increase until the marginal cost of those efforts matches the associated increment in resale price. Instead of restricting output, these commentators contend that distributional restraints generally enhance output by encouraging more intensive market penetration and demand-generating activities.[46] They also decry efforts to search for less restrictive alternatives as essentially fruitless second-guessing that will only result in the substitution of less efficient marketing schemes. Under this approach, the only real concern of vertical restraints is whether they contribute to dealer or manufacturer cartels. Where that occurs, the proper approach according to these commentators is to

[42] Pitofsky, The *Sylvania* Case: Antitrust Analysis of Non-Price Vertical Restictions, 78 Col. L. Rev. 1, 19 (1978).

[43] *Id.* at 20. Professor and former Commissioner Pitofsky holds the view that some vertical restraints may produce sufficient demonstrable economic harm to be regarded as *per se* illegal, notwithstanding *Sylvania.*

[44] L. Sullivan, Handbook of the Law of Antitrust 414 (1977). From Sullivan's point of view, a manufacturer could achieve any marketing goal, such as the provision of services at the dealer level, by means less restrictive than vertical restraints.

[45] R. Bork, The Antitrust Paradox 288 (1978); Posner, The Next Step in the Antitrust Treatment of Restrictive Distribution: *Per Se* Legality, 48 Chi. L. Rev. 1 (1981). Both of these commentators would treat distributional restraints as *per se* legal. In the absence of *per se* legality, Professor, and now Judge, Posner would favor antitrust scrutiny only for vertical restraints employed by firms possessing significant market power. *Id.* at 6.

[46] This view contrasts sharply with an earlier belief that vertical restrictions encouraged wasteful forms of promotion that reinforced artificial product differentiation and inelasticity of demand for the promoted products. Posner, The Rule of Reason and the Economic Approach: Reflections on the *Sylvania* Decision, 45 Chi. L. Rev. 1, 4 (1977). *See* Comanor, Vertical Territorial and Customer Restrictions: *White Motor* and Its Aftermath, 81 Harv. L. Rev. 1419 (1968); *see also* Sullivan at 414.

proceed under a conventional conspiracy theory, not to rely on any kind of vertical analysis.

Another approach advanced is to treat vertical restraints as presumptively legal, unless it can be shown that the restrictions are being used strategically to increase competitors' costs.[47] Such a showing, presumably, could be made only with respect to **[37]** dominant or colluding firms, since all others attempting such strategies would fail. This view is premised on the primacy of a manufacturer's interest in influencing the level of services provided by its dealers. And, since a manufacturer cannot assuredly satisfy all customer preferences for different levels of service, it should have the right to satisfy the largest number if that is what it (the manufacturer) regards as the efficient thing to do.[48] One reason why a manufacturer may regard a system of vertical restraints as efficient is that the arrangements may economize the "transaction costs" of product distribution, such as dissemination of information to exploit and market a new technology.[49] Other distribution efficiencies may include (a) insuring continued product quality after the sale, and (b) avoidance of the costs of policing contracts with dealers to perform specific pre-sale or post-sale services.

From the brief foregoing review, it is clear that commentators on the *Sylvania* decision have no unanimous view of the relative weights to be afforded intrabrand and interbrand considerations in a rule of reason analysis of non-price vertical restraints. Most recognize that these restrictions can enhance competition, at least under certain circumstances, with the principal areas of disagreement centering on the significance of the competitive impact and the suitability of alternative distribution strategies. Our analysis below will focus on interbrand effects and the contribution (positive or negative) that the restraints at issue here make to that level of competition.

In considering the negative impact on interbrand competition in this context, it is important to clarify that what we are concerned about are horizontal effects at either the manufacturer or dealer level. These effects can be manifested in several ways: a) as actual collusion among competitors which increases prices and restricts

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[47] Williamson, Assessing Vertical Market Restraints: Antitrust Ramifications of the Transactions Cost Approach, 127 Pa. L. Rev. 953, 993 (1979).

[48] By contrast, Sullivan would leave the matter entirely to the marketplace and let customers choose among competing levels of dealer service, despite a manufacturer's specific interbrand competitive goals. Sullivan at 414.

[49] If customers were fully knowledgeable about a product's attributes, the manufacturer could simply announce that it was available and all who have a need or desire for it would come to transact business. But no such perfect knowledge exists. Instead, a premium price which covers the costs of dealer services is often justified when a customer's time in coming to and completing that transaction is economized, when his search time is reduced and when the product is reliably serviced. *See* Williamson, Assessing Vertical Market Restraints: Antitrust Ramifications of the Transactions Cost Approach, 127 Pa. L. Rev. 953, 976–77 (1979).

output; b) as an increased likelihood of anticompetitive interdependent behavior or oligopolistic pricing which yields results similar to collusion; or c) as enhancement or creation of market power on the part of one or more sellers. [38]

The most extreme case—where restraints directly facilitate horizontal collusion—can often be dealt with as a traditional horizontal conspiracy, as noted above. An example would be a dealer-inspired cartel which is manifested in the form of vertical territorial restrictions.

The second category of effects—where vertical restraints increase the likelihood of collusion or interdependent behavior—may not be amendable to horizontal price-fixing theories, because the restraints contribute to interdependent behavior in subtler ways than cartels.[50] Such effects may occur in markets which are conducive to coordinated behavior. Factors such as concentration, barriers to entry, the homogeneity of products, the degree of excess capacity and the growth in demand will help to indicate the degree to which the market is susceptible to anticompetitive interdependent behavior. Where such conducive market conditions are shown, the legality of the restraints will depend upon the degree to which intrabrand competition is restrained and whether that loss contributes to or is otherwise significant in light of the extent of interbrand competition. If interbrand competition is vigorous, as evidenced by a large number of sellers, modest or low levels of concentration, and modest or low barriers to entry, the loss of intrabrand competition is not likely to be significant. On the other hand, if markets are highly concentrated, barriers to entry are high and other factors indicate a market highly susceptible to interdependent behavior or collusion, even less than airtight territorial restrictions, for example, might harm competition. [39]

In the third category of cases, typically exclusive dealing situations, we are concerned primarily with restraints that may increase the costs of entry and reduce opportunities for new entrants to distribute their products, making it more difficult to open up less-than-competitive markets. If barriers to entry are heightened in this way, vertical restraints may preserve or enhance the market power of existing firms and shelter or facilitate collusion or coordinated

[50] The more hostile antitrust treatment of resale price maintenance is premised on the greater potential for that practice to facilitate price monitoring and coordination at the interbrand level. In addition, it has been argued that resale price maintenance promotes distributional inefficiency by encouraging proliferation of outlets without regard to economies of scale or other cost considerations. Fair Trade Laws: Hearings on S. 408 (Consumer Goods Pricing Act of 1975) Before the Subcommittee on Antitrust and Monopolies of the Senate Committee on the Judiciary, 94th Cong., 1st Sess. 49 (1975) (Statement of Thomas Gale Moore). For a contrasting view, *see* Posner, n. 45 *supra* at 9, who suggests that territorial restrictions have, if anything, a greater adverse effect on intrabrand competition than fixing the price at which a distributor may resell a manufacturer's product.

behavior. Again, as in this case of the other potential adverse effects, the likelihood that a vertical restraint will have this power-enhancing or strategic effect on interbrand competition will turn in part on reasonable inferences drawn from interbrand characteristics of that market.

To summarize, it is not sufficient for a party challenging a vertical restraint to show only a resultant loss of intrabrand competition. Rather, current judicial precedent indicates that the party must show that the restraint also has a probable adverse effect on interbrand competition. Of course, as suggested here, that showing will, in many instances, be based upon or inferred from market conditions indicative of limited interbrand competition. We will shortly illustrate in our analysis some interbrand market features that provide a basis for such a determination. If a showing of adverse interbrand effects has been made, then the party defending the restraint may attempt to show some reasonable justification or offsetting benefit that promotes interbrand competition.

As for the other side of the inquiry—whether the restraints promote competition—some commentators argue that little inquiry is required, since all vertical restraints inherently serve to stimulate additional dealer services.[51] To be sure, the *Sylvania* Court suggests that different kinds of vertical restraints simply reflect different ways of achieving the same objective. Yet, the Court also made clear that a rule of reason analysis requires a balancing of the competitive merits and demerits of a particular restraint, a process that implicity requires some consideration of the justifications advanced in support of the restraint.

We believe there are two basic reasons for examining the asserted efficiencies or competitive benefits of a restraint. First, such a review will help to reveal whether the restraint is really serving the manufacturer's interests or, instead, is being imposed at the behest of a dealer cartel. The absence of any strong relationship [40] between the practice and the manufacturer's arguable need for the scheme may evince the existence of a dealer-inspired plan to restrict competition.[52] A second reason for examining the proffered justifications is to ascertain their relative significance vis-a-vis any countervailing negative effects of the restraints on interbrand competition.

[51] Posner, The Rule of Reason and The Economic Approach: Relflections on the *Sylvania* Decision, 45 Chi. L. Rev. 1, 17 (1977). Another commentator would permit a defendant to rebut charges of substantial lessening of intrabrand competition by showing a reasonable purpose to enhance distributional efficiency, with a presumption that an economically efficient result would obtain. Bohling, A Simplified Rule of Reason for Vertical Restraints: Integrating Social Goals, Economic Analysis and *Sylvania*, 64 Iowa L. Rev. 461, 513 (1979).

[52] *See Eiberger v. Sony Corp. of America*, 622 F.2d 1068 (2d Cir. 1978), where the court appeared to be concerned about the possibility of cartel influence, although it did not find that the restriction in question was adopted primarily at the behest of dealers.

If the restraints in question are producing adverse interbrand effects, it is especially important to determine the value of the restrictions to the manufacturer's marketing system.

In evaluating the competitive benefits of vertical restraints, we do not suggest that the search should focus on whether a less restrictive method of distribution is available. *Sylvania* clearly does not contemplate such an approach and it undoubtedly would prove elusive in any event. A comparison of alternatives may be useful in particular cases, but the emphasis appropriately belongs on the overall reasonableness of the challenged restraint, not whether some hypothetically less restrictive scheme could be devised.[53]

It is also useful to point out in connection with the issue of competitive justifications, that the *Sylvania* Court did not suggest that intrabrand restraints would be available only to new market entrants or firms introducing new products. As the Court noted, established firms too can benefit from the service-inducing characteristics of vertical restraints. 433 U.S. at 55. Of course, there is far less reason to question the distributional practices of a new entrant, but the competitive virtues of a vertical restraint are not limited to proof that the restraint in question actually reduced concentration or produced other measurable changes in market structure.

Finally, in weighing the potentially diverse effects of a distributional restriction, it should be recognized that the process is not conducive to fine line drawing. Given the limited state of knowledge (especially empirical information) we now have about the actual effects of these practices on competition, it seems desirable to require reasonably clear evidence of probable overall competitive harm before condemning their use in a particular case. With this perspective in mind we turn to the specific facts of this case. [41]

a) Exclusive Dealing and Territorial Restraints

As we discussed previously, Beltone has engaged in practices which, for all intents and purposes, amount to exclusive dealing and exclusive territories. In theory, to the extent that other manufacturers seek to enter the market or expand, and must rely upon the patronage of existing licensed hearing aid dealers, they would be foreclosed from a portion of the market. Entry barriers, accordingly, would be heightened to that extent. However, as the record reveals, the foreclosure in this case affects only about 7 or 8% of the dealers, or about 16% of sales, which actually overstates the exclusivity, since other manufacturers' products have accounted for at least 6 or

[53] *Continental T.V., Inc. v. GTE-Sylvania, Inc.*, 433 U.S. at 58; *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d at 1248-49.

7% of Beltone dealers' sales. Moreover, Beltone's dealership contracts are terminable by either party on 30-days written notice. While the sacrifice made by dealers upon termination is substantial, as we discuss further below, this escape valve dilutes somewhat the limitation on other manufacturers' access to Beltone dealers.

If we were to rely only on static foreclosure effects, the percentages involved might trigger liability under some of the precedents reviewed above. Put differently, if quantitative foreclosure levels are the primary consideration, the amounts involved here are not clearly insignificant, as measured by previous judicial tests. But, following *Sylvania,* a closer look at the dynamics of the affected market is clearly in order. Are barriers to entry effectively raised by the foreclosure? Are competitors effectively inhibited from pursuing other distribution channels? Have rivals been driven from the market or had their costs of reaching potential customers increased as a result of Beltone's practices? In this case, some of the answers to these questions seem quite clear: other firms have recently entered the market or grown vigorously, in part at the expense of the older firms. The new entrants have experienced little difficulty in finding distributors, and their extensive reliance on professional referrals minimizes their dependence on the kind of lead-searching that Beltone dealers rely upon. The trend toward professional referrals shows no sign of abating, thus suggesting that whatever temporary negative effects may arise from Beltone's exclusive dealing are unlikely to persist for long.

Although Beltone is still the leading firm in the market, its share dropped from 21% to 16% over a five-year period from 1972 to 1977. To be sure, Beltone's marketing methods, coupled with restricted customer mobility, may serve to differentiate respondent's products from those of its competitors and confer upon the firm a limited degree of market power. Nevertheless, Beltone's market share is slipping and, as we point out below, its distribution scheme, which ostensibly circumscribes consumer choice, nonetheless seeks to reach previously untapped markets. Under these circumstances, we cannot conclude that the practices in question unreasonably preserve or enhance Beltone's market position. [42]

Moreover, Beltone's exclusive dealing and territorial restraints do not appear to have furthered overt collusion or other forms of interdependent behavior in the market. Interbrand competition appears quite rigorous, with the rank order of the major firms in active flux.[54] At one time, exclusive dealing was arguably practiced

[54] While the four-firm and eight-firm concentration ratios remained nearly constant between 1972 and 1977, the composition of the top group of firms has changed substantially. Oticon, ranked seventh in 1970 with 4% of the

(Continued)

by the major firms in this market, a fact suggesting either that the practice involved efficiencies or that it was collusively adopted to block entry. Complaint counsel claim that the changes that have occurred in the market are largely due to several Commission consent orders, which precluded a number of major industry members from using exclusive dealing.[55] Were that the only explanation for recent market trends, the case would be closer, but the evidence indicates that the rapid entry and growth of new firms in the market have been stimulated by independent factors, including regulations issued by the Food and Drug Administration that encourage the growing practice of professional referrals.[56] In fact, the firms entering the market in recent years appear to be doing so on their own without the necessity for reliance on distributors unleashed by the Commission orders.[57]

As to the hearing aid market's potential for collusion or coordination, available economic literature on the subject suggests several factors that may help to reveal whether a market is susceptible to this problem.[58] These factors [43]include the number of sellers in the market, the degree of concentration, product homogeneity, time required for market entry, demand trends and the ratio of fixed to variable costs, among others. While it is not possible on this record to evaluate fully each of these factors, the evidence does suggest that market conditions in the hearing aid industry are not highly concentrated, but the number of sellers in the market is increasing, not decreasing. Moreover, the products and terms of sale offered are quite heterogeneous.[59] Also, entry is not especially difficult, a factor that reduces the potential rewards of inter-firm coordination. Although demand is finite, limited by the number of hearing impaired persons in the country, the market has not yet been fully tapped, as evidenced by the growth of new firms and the substantial number of hearing-impaired individuals without hearing aids. The market does not appear to be characterized by stagnant or falling demand that may make collusion—either express or tacit—more profitable. Nor is the industry characterized by high fixed costs, a

market, rose to third with 10% in 1977; Starkey, which entered the market in 1972, was second with 13% in 1977; the shares of Dahlberg, Audiotone and Qualitone have remained relatively constant since 1970; sales by Maico and Zenetron have declined; and Nu-Ear and Siemens have grown significantly. (ORF 3, 4)

[55] *Sonotone Corp.*, 82 F.T.C. 1802 (1973); *Radioear Corp.*, 82 F.T.C. 1830 (1973); *Dahlberg Electronics, Inc.*, 84 F.T.C. 222 (1974); *Maico Hearing Instruments, Inc.*, 88 F.T.C. 214 (1976).

[56] 42 Fed. Reg. 9295 (1978); ORF 12.

[57] OR 6, 7, 8, 9; RRB 30.

[58] *See, e.g.*, R. Posner, Antitrust Law: An Economic Perspective 55-61 (1976); Hay and Kelley, An Empirical Survey of Price Fixing Conspiracies, 17 Journal of Law and Economics 14-17 (1974).

[59] Collusion is most likely when the costs, market shares, buyers, capacity, products, sales terms and business objectives of the industry members are identical, or at least very similar. The evidence here reveals a fair degree of diversity among hearing aid manufacturers and dealers on many of these points. (OR 5-13)

condition that may enhance the incentive to collude, especially when demand is down and there is over-capacity. Finally, there is some demand inelasticity in the market, another indicium of a market's potential for collaboration. Simply put, there are no good substitutes for hearing aids and customers are not highly price sensitive. However, the peculiarities of this market suggest that the emphasis on non-price competition is less a sign of competitive weakness than it is a response to the special needs of buyers.

By this analysis, we do not suggest that review of a market's susceptibility to collusion will be dispositive, or even necessary, in all vertical restraint cases. As reflected in the literature on the subject, there is much still to be learned about this issue, and the predictability of any given factor is by no means well established. Nevertheless, this kind of analysis can serve to supplement consideration of market share data and other structural trends, as we have done here. For the hearing aid market, our examination indicates that interbrand competition is quite active and that complaint counsel have failed to prove that Beltone's restraints have significantly impaired competition at that level. Complaint counsel, in fact, have not really suggested that Beltone's restraints facilitate interbrand coordination; rather their theory is that the restraints enhance Beltone's market power and substantially restrict [44]consumer choice at the interbrand level. Complaint counsel also claim that the territorial and customer restrictions are imposed primarily as a form of compensation for having to limit their product line to Beltone hearing aids. As we have discussed previously, the evidence on market power reveals that the restrictions have not prevented Beltone's market share and profits from being eroded substantially in recent years.

In this complex service-oriented market, it is not very enlightening merely to compare Beltone's average wholesale or retail prices to average prices of other manufacturers or dealers, since much of the competition takes non-price forms. Of course, if such a comparison showed that Beltone were able to command inordinately higher prices with no apparent justification, we would look further into Beltone's probable market power, but the record before us is insufficient to support such an inference. Beltone's market postion has steadily declined in the late 1970s and seems likely to continue doing so. Beltone's restraints do not seem to confer upon it any significant market power, and respondent has shown no ability or inclination to use its restraints strategically to injure its rivals, as far as this record reveals.

Finally, there is no evidence that Beltone's restraints have

facilitated cartel conduct at the dealer level, or that these restraints have been imposed primarily for the benefit of the dealers as complaint counsel contend. As we discuss in connection with the justifications for the restraints, Beltone's marketing plan is reasonably related to its stated interbrand competitive objectives. It appears to have been unilaterally designed and does not amount to a pretext for dealer collusion or cartelization.[60]

Turning next to the intrabrand effects, Beltone's territorial and customer restrictions certainly, in theory, inhibit intrabrand competition. Although the restrictions have not been completely airtight, they largely eliminate opportunities for price and non-price competition among Beltone dealers in a market characterized by customer immobility and limited price shopping. Absent territorial restrictions, it is argued, non-price intrabrand competition (*e.g.* more convenient hearing aid adjustments) might increase. Several dealers testified that, if permitted, they would have established additional service locations in adjacent territories. Further, some manufacturers [45]expressed the view that more service locations would benefit hearing aid users suffering from restricted mobility, if the new locations provided more convenient access.[61] Apart from this limited evidence on non-price competition, complaint counsel have not shown in this record whether this peculiar market lends itself to, or would have experienced, any significant degree of price competition. Some of the evidence indicates that hearing aid users do shop around for prices,[62] while other evidence suggests that there is little shopping of any kind. After weighing this evidence, the ALJ concluded that there is little likelihood of significant price shopping at the retail level in this market. (ID 77, OR 22) We think the

[60] *Compare Cernuto, Inc. v. United Cabinet Corp.*, 595 F.2d 164, 168 (3d Cir. 1979), in which it was noted that if a manufacturer imposes a restraint or terminates a dealer at the request of another dealer, then the restraint becomes primarily horizontal in that the dealer is seeking to suppress competition at its level with the aid of a cooperating common supplier. *See also United States v. General Motors Corp.*, 384 U.S. 127 (1966). Likewise, the court in *Eiberger v. Sony Corp. of America*, 622 F.2d 1068, 1077 n. 12 (2d Cir. 1980) expressed keen interest in, although it did not review, the evidence supporting the lower court's finding of a conspiracy among dealers to divide territories and eliminate price competition.

[61] For example, the president of Danavox noted that having more than one dealer in an area "affords the impaired individual a choice" of sources of assistance. (Tr. 19231) The president of Zenetron also testified that the accessibility afforded by multiple dealers is important to an aged population with reduced mobility, who are likely to seek service from the nearest dealer rather than the one who sold the instrument. (Tr. 18973; *see also* Tr. 19093) A related interbrand feature of multiple dealerships was described by officials of Danavox and Maico, who believe that they maximize their chances of winning professional referrals by having more than one dealer in an area and thereby providing customers with better opportunities for proper post-sale service. (Tr. 19231; Tr. 299-300)

[62] Three manufacturing witnesses expressed, albeit cursorily, the view that there is price competition among dealers at the retail level and that hearing aid customers shop for the best prices. Mr. Dahlberg, president of Dahlberg Electronics, said that he "knows for a fact" there is "a lot of price-shopping," and thinks there has been for 35 years. (Tr. 18699) Mr. James Keyes, president of Audiotone division of Lear Siegler, was "sure" there is price-shopping by hearing aid customers, and price competition among dealers, "to some degree." (Tr. 19131-32) And Mr. Helmut Ermann, president of Siemens Hearing Instruments, Inc., said more obliquely that one benefit of having multiple Siemens dealers in a town (*i.e.*, no territorial restriction) is that the customer can shop for a hearing aid. (Tr. 19158)

evidence demonstrates some lessening of intrabrand competition, although in terms of price competition perhaps not to the degree that occurs in other markets. All vertical restraints, of course, by their very nature occasion some reduction in intrabrand competition, so that the extent of the restriction is significant primarily in terms of its interbrand effects, including any positive effects, an issue which we will now take up. **[46]**

As previously described, Beltone defends its distribution practices on the grounds that they stimulate more intensive search efforts by dealers in a market where potential customers are difficult to locate and less susceptible to traditional marketing techniques. In the absence of success with professional referrals, respondent claims that it must preserve its case-finding system—which relies upon both national lead advertising and dealer advertising supported by cooperative ad allowances—to assure that dealers supply the information and educational services necessary to attract prospective purchasers. To abolish this system, respondent contends, would dilute the effectiveness of its lead advertising programs and encourage non-service-oriented dealers to free ride on the substantial investment of those dealers who undertake the costly and painstaking process of identifying and following up leads.

Complaint counsel, on the other hand, argue that preservation of the lead system does not justify such severe restrictions on competition and consumer choice. They contend that Beltone has not shown that free riding exists, and they assert that other firms engage in lead-generating activities without resort to similar restraints. Complaint counsel also question the interbrand benefits of Beltone's system, citing the increasing disfavor of lead advertising throughout the rest of the industry. In addition, complaint counsel suggest that dealers have sufficient incentives to engage in adequate search efforts even if Beltone did no national lead advertising. And, complaint counsel claim, given the limited mobility of many elderly hearing aid customers, exclusive dealing prevents those customers from being fitted with the product best suited to their needs.

In evaluating these arguments, we recognize that the industry trend is away from the lead advertising technique, but that trend, by itself, is not cause for prohibiting the restraints in question. We are not interested so much in whether Beltone's practices ultimately help it to prevail in the marketplace; rather, our concern here is whether the restrictions reasonably serve Beltone's market objectives. A comparison of industry practices can help to facilitiate the

analysis. For example, at least one firm dropped its national lead advertising program after entry of a Commission consent order.[63] Two manufacturers no longer rely on leads (OR 10, 11), and other companies which continue to use some lead [47]advertising have less elaborate systems than respondent. Complaint counsel claim that this latter evidence shows that lead advertising can exist without the restraints employed by Beltone, but the evidence cited by complaint counsel reveals only that certain manufacturers make advertising available to their dealers for a fee. (CAB 51; Tr. 18650, 18914, 19120, 19318, 19418)

It can be argued, of course, that the reason for the industry shift is because alternative methods of finding leads and alternative marketing systems, e.g., professional referrals, are more efficient and competitively superior. But the record shows that there are a number of reasons for the shift in marketing methods. As we have previously pointed out, there is little doubt that FDA regulations promoting professional referrals, together with entry by foreign firms, have had a significant influence on competitive behavior in the hearing aid industry. It can also be fairly said that consent orders prohibiting some firms from using the kind of lead system employed by Beltone may have contributed in part to a shift away from this kind of marketing device. Thus, while the evidence on industry trends is by no means conclusive, it certainly does not prove that Beltone's methods are valueless or its justifications are without merit.

Apart from the industry trend, complaint counsel claim that there really is not a free rider problem in the hearing aid market, since there is little comparative shopping, especially on the basis of price. Although price shopping may not be as important in this market as elsewhere, that does not vitiate Beltone's free-rider justification. Respondent not only engages in lead advertising on a national level but also provides substantial cooperative advertising assistance to dealers who promote the Beltone name. As we know, given the peculiarities of this market, including the reluctance of potential hearing aid users to seek out assistance, substantial pre-sale activity is required to penetrate the market effectively. Beltone dealers not providing these pre-sale services might attempt to free ride on those

[63] Dahlberg, a major hearing aid manufacturer, used national lead advertising prior to its consent agreement but abandoned the program thereafter because it allegedly became too difficult to assign leads without territorial exclusivity. Mr. Dahlberg testified that a lead system cannot work on a national scale without the use of areas of primary dealer responsibility. He attributed the market losses experienced by his company after the consent order directly to cessation of his national lead program. He claimed that his company's costs of obtaning leads and identifying hearing-impaired persons were lower, using national advertising, than they were after the consent. (Tr. 18701-02)

who do promote respondent's tradename and expend the effort to locate prospective purchasers.

In addition, because of the potential for overlap or duplication of effort, removal of these restraints may reduce or distort the promotional activities of individual dealers. This effect, while related to the free rider issue, more directly concerns the efficient utilization of each dealer's advertising effort. Greater intrabrand competition reduces the probability of turning any given leads into a sale; the ultimate consequence could be a decreased incentive for dealers to expend time and money to service leads, resulting in a diminution in the overall level of pre-sale promotion and a likely tendency toward "cream-skimming," *i.e.,* pursuing only the most promising leads and leaving other segments of the market unserved. Even under the present system, where incentives are high, only about 5% of leads result in consummated sales. **[48]**

Complaint counsel further contend that Beltone could continue its national lead-advertising system simply by allocating leads to pre-selected dealers and requiring that only Beltone products be sold to those leads. However, even if this approach were feasible for Beltone-generated leads—and another manufacturer's experience provides evidence to the contrary[64]—it would be more difficult for respondent to monitor the sale of non-Beltone products to leads generated by dealers. Thus, to the extent that respondent seeks to protect its investment in lead-promoting activity, at both the national and dealer levels, the restrictions in question have a rational and efficient connection to that objective.

It is also argued that much advertising by dealers is oriented to local service, not brand promotion, and that dealers have adequate incentives to serve all segments of their markets. It is no doubt true that dealer service is an important form of non-price competition and that dealers obviously have some incentives to penetrate their markets. Nevertheless, dealer promotion, if left unchecked, does not necessarily coincide with the interests of individual manufacturers. What is at stake for the manufacturer is to insure that its chosen distributors make the maximum marketing effort on behalf of its particular products. This is not a market where products are homogenous and easily accessible to buyers, with brand recognition and price the principal selling points. Here, the product being sold is a more complicated combination of hardware and service, with considerable education and selling effort required to persuade perspective customers of their need for a hearing aid. Under these

[64] n. 63 *supra.*

circumstances, there is more justification for manufacturers to seek ways of motivating dealers both to seek out potential customers and to emphasize the unique characteristics and advantages of their products.

We recognize, of course, that there are welfare tradeoffs, as complaint counsel contend, if Beltone dealers are limited to selling Beltone products. As the evidence reveals, there are situations where another manufacturer's product may better serve a customer's needs. While exclusive dealing has this arguably adverse effect on consumer welfare, it must be weighed against the potential benefits of Beltone's distribution system in reaching consumers not previously served by other marketing methods.[65] [49]Thus, with respect to Beltone's exclusive dealing, we are faced with a restriction that simultaneously may produce conflicting effects on consumer welfare. Given these potentially counterbalancing but unquantifiable welfare effects, we would be reluctant, other things being equal, to condemn the practice of exclusive dealing. That conclusion is strengthened by the fact that the restraints under scrutiny here have produced no demonstrable adverse effects on interbrand competition.

In short, respondent's practices appear to serve legitimate efficiency or procompetitive purposes. It is possible that less restrictive alternatives could be devised, but as *Sylvania* and other cases suggest, that kind of inquiry is certainly not required as a matter of course in all, or even most, cases. If the restraints in question here harmed interbrand competition, we might appropriately ask whether less restrictive alternatives were feasibly available. But, in the absence of such evidence of interbrand effects, we cannot find that Beltone's distribution practices are unjustified. Nor are we persuaded by arguments that the territorial and customer restrictions simply represent a form of compensation to dealers for their agreement to carry only the Beltone brand. There is evidence indicating that some dealers were especially desirous of maintaining territorial protection (ID 45), but that is not a sufficient reason, by itself, to condemn the practice. Whatever the motivations of particular dealers, the record shows that Beltone viewed the restraints as part of an overall system designed to promote its competitive objectives. This not a situation like the one described in *Cernuto,* n. 60 *supra,* where the manufacturer, in terminating a dealer, appeared to be acting at the sole behest of a competing dealer.

To sum up, we would not find Beltone's foreclosure of 16% of

[65] The ALJ found that Beltone dealers did not serve any demographic group not reached by other marketers. (ORF 21) That fact, even if true, does not undercut the argument that Beltone's distribution system may have reached customers in such groups more effectively than other systems.

market sales or 7 to 8% of dealers clearly lawful if judged solely by the quantitative benchmarks found in prior precedent. Certainly, the percentage of foreclosure here is greater than that in *SOCAL* and *Tampa Electric,* comparable to that in *American Motor Inns, Cornwall Quality Tools* and *Mytinger & Casselberry,* but less than that in *Dictagraph* and *Luria Bros.* In assessing the overall effect of this foreclosure in light of the dynamics of the market, however, we find that interbrand competition is vigorous, that new entry and destabilizing growth have occurred, that no firm has encountered noticeable barriers to entry because of respondent's exclusive dealing and that the market trend toward professional referral is clearly unfavorable to Beltone's competitive position. Moreover, complaint counsel have failed to prove that the restraints have facilitated interdependent behavior or enhanced respondent's market power. In fact, Beltone in recent years has been steadily losing market share. **[50]**

Complaint counsel have asserted that Beltone's restraints should be ruled unlawful even absent any adverse effect on interbrand competition because the restraints eliminate significant intrabrand competition. As discussed previously, we believe that a successful challenge to any vertical restraint requires a showing of an adverse effect on interbrand competition. Furthermore, we find from this record that the territorial restrictions have had only a problematical effect of intrabrand price and non-price competition while contributing in identifiable ways to the achievement of respondent's interbrand competitive objectives. We therefore find that the challenged practices have not unreasonably restrained competition, and we dismiss the complaint as to these issues.

Other Issues

A few final issues remain to be considered. There are two aspects of Beltone's restraints that are not discussed in the appeal from remand, but remain from the initial argument, which we shall describe as the issues of "post-termination restraints" and the "customer lists." First, the complaint charged respondent with imposing certain post-termination restraints, including prohibitions on the dealer's use of the Beltone trademark and, in some cases, his inventory of Beltone products. More importantly, the complaint charged that upon termination, dealers were required to return to Beltone the names of their Beltone customers. These restraints were alleged to be in furtherance of Beltone's overall course of exclusive dealing and territorial exclusivity, themselves either unfair methods of competition or unfair acts or practices. Also, the ALJ found that, at least prior to 1973, Beltone used for its own purposes the names of

its dealers' customers (submitted to Beltone on guarantee registration cards), without the knowledge either of the dealers or the customers. While the law judge drew no specific conclusions with respect to the post-termination restraints, he found the practices involving customer names to be unfair acts or practices within the meaning of Section 5 of the FTC Act. (ID 72–77)

Conduct that is alleged to constitute an unfair act or practice under Section 5 of the FTC Act must meet the criteria of unfairness set forth in the Commission's recent Policy Statement on the subject.[66] In that Statement, the Commission delineated two fundamental inquiries for determining whether a business practice is unfair: 1) whether the practice causes unjustified consumer injury and 2) the extent to which other public policies—be they legislative or judicial—impact upon the practice. On the issue of consumer injury, the Commission emphasized that to justify a finding of unfairness, the injury must satisfy three tests. It must be substantial; it must not be outweighed by any countervailing benefit to consumers or competition yielded by the practice; and it must be an injury that consumers themselves could not have reasonably avoided. **[51]**

Turning first to the post-termination practices, we believe that from an antitrust perspective they must be recognized as being adjunct to Beltone's whole system of vertical restraints, which we have concluded are not unlawful. While these contractual requirements may reinforce the threat of termination, they do not, by themselves, amount to unfair methods of competition under the circumstances of this case. Instead, we find them to be normal incidents of business dealings between a supplier and its distributors, not unrelated to Beltone's lawful right to terminate dealers for cause and to protect its legitimate business interests thereafter. Nor do we find support in the record for complaint counsel's contention, set forth in the appeal prior to remand, that these requirements constitute unfair acts or practices. (COAB 42) Indeed, there is no need for any extensive analysis of the criteria of unfairness described above inasmuch as we find nothing in the record to which they can be applied.

As for customer lists, the ALJ found that a) Beltone's requirement that terminated dealers submit the names and addresses of their customers to Beltone and b) Beltone's use of said lists either to give to succeeding dealers or to rent to companies outside the hearing aid industry were misappropriations of property constituting unfair acts

[66] Commission Statement on the Commission's Consumer Unfairness Jurisdiction, December 17, 1980. See *Horizon Corp.*, 97 F.T.C. 464 (1981).

or practices. (ID 83) The ALJ's theory of unfairness to consumers from the rental of their names derives from his view of the confidential relationship between hearing aid users and dealers, which he compared to the physician-patient relationship. On this premise, he applied the Commission's holding in *Beneficial Corp., et al.,* 86 F.T.C. 119 (1975), *aff'd sub nom. Beneficial Corp. v. Federal Trade Commission,* 542 F.2d 611 (3d Cir. 1976), in which a loan company's solicitation of confidential individual tax information through its tax-preparation arm and its subsequent disclosure of the information to its loan arm without taxpayers' consent was found to be unfair and deceptive. The unfairness found in *Beneficial* was based on a) a breach of the widely recognized and manifested concern for the confidentiality of individual tax information and b) an intentional breach of a fiduciary relationship. Again applying the criteria of unfairness enunciated in the aforementioned Policy Statement, we look at whether the practice causes unjustified consumer injury and how public policies impact upon practice. On this basis, we find *Beneficial* distinguishable and the record lacking. While the relationship between hearing aid users and dealers might bear some of the earmarks of the patient-physician relationship, whatever public policy exists favoring preservation of confidentiality in the user-dealer relationship, it does not nearly approximate the broad policy and statutory mandate that provided the basis for the *Beneficial* decision.[67] Indeed, there is nothing in this record that provides a basis for a finding like that in *Beneficial.* Moreover, any inference of consumer injury—based, for instance, on consumer expectations—is simply **[52]**too speculative to support a finding of unfairness. While we do not necessarily endorse the practice of rental of hearing aid customer names (a practice that ceased in 1973), there is insufficient information in this record upon which to find substantial injury resulting from it.

As for the charge of misappropriating dealers' customer names upon termination, the focus here is upon injury to the dealers. As noted, we have evaluated this requirement as an element of the overall system of restraints, and we have found that Beltone has, at least in part, compensated its dealers for these names through cooperative advertising assistance. It has not been argued, nor did the ALJ conclude, that this practice standing alone has an unreasonable effect on either intrabrand or interbrand competition. Instead, like the other post-termination practices, it only contributes to the

[67] There is also another distinction between *Benefical* and this case. In *Beneficial,* the loan division of respondent had access to all of the financial information contained in individual tax returns. 86 F.T.C. at 169 Here, the only information transmitted was the customer's name.

aura of coercion surrounding the threat of termination. There is no evidence of conspiracy or collusion between Beltone and replacement dealers, as complaint counsel originally contended. (COAB 43) We therefore find the case of *Peerless Dental Supply Co. v. Weber Dental Manufacturing Co.,* 299 F.Supp. 331 (E.D. Pa. 1969), relied upon by the ALJ, inapposite. Further, while there are cases, decided under various state laws dealing with tortious interference with business relations, which confer confidential and protected status upon both manufacturers' and dealers' customer lists under certain circumstances,[68] we do not find support in this record for an independent finding of an unfair method of competition grounded in such principles.

Likewise, applying the previously described consumer unfairness criteria to the misappropriation charge, we cannot say that there is sufficient evidence of substantial injury. Since 1971, Beltone dealers have agreed to this condition as part of their contractual relation with the manufacturer. In this sense, dealers could reasonably avoid injury by refusing to associate with Beltone, [53]although there are costs to existing dealers in ending the relationship. Prior to 1971, there might have been potential for dealer misunderstanding concerning the transfer of customer lists to Beltone upon the dealer's termination. But the record before us is simply inadequate to make a sound determination of the magnitude of consumer (*i.e.,* dealer) injury associated with this practice. Moreover, as we pointed out before, Beltone has an investment in customer names by virtue of its cooperative advertising allowance and other assistance to dealers. Thus, we find a failure of proof that the required relinquishment of customer names upon termination constitutes an unfair act or practice.

Therefore, for all of the reasons expressed herein, we reverse the decision of the administrative law judge and dismiss the complaint.

CONCURRING STATEMENT OF COMMISSIONER BAILEY

The Commission states in this Opinion that even a reasonably "airtight" system of intrabrand non-price distributional restraints is

[68] In *Auburn News Co., Inc. v. Providence Journal Co.,* 504 F.Supp. 292, 304 D.R.I. (1980), *rev'd on other grounds,* 659 F.2d 273 (1st Cir. 1981), distributors successfully enjoined a publisher from using their customer lists. The court recognized that in some circumstances customer lists were confidential and protected from misappropriation. It was significant in that case, however, that the publisher recognized the distributors' proprietary interest in the customer lists. *See also General Business Services, Inc. v. Rouse,* 495 F.Supp. 526 (E.D. Pa. 1980) (former supplier enjoined from using customer lists that were found to be misappropriated trade secrets); *Republic Systems and Programming, Inc. v. Computer Assistance, Inc.,* 322 F.Supp. 619 (D. Conn. 1970) (employer's customer names did not constitute trade secrets to be protected from use by competing former employees).

lawful unless anticompetitive effects of that system are reflected at the interbrand market level[1]. Once we have concluded that this record reveals and essentially competitive interbrand market for hearing aids, not adversely affected by Beltone's system of intrabrand restraints, our concern with those restraints is at an end. In my view, the Commission's additional analysis of Beltone's "justifications" for its system of intrabrand restraints was unnecessary. Any manufacturer can produce an explanation that "justifies" a particular system of distribution, whether those explanations are cast in terms of "efficiencies," "reasonableness" or "procompetitiveness." The apparent purpose for conducting such an analysis was to show the kinds of additional considerations the Commission would examine in some future case where the interbrand competitive picture is of greater concern than it is here.

At the intrabrand level in this case, respondent has established a system of Beltone-only dealers by granting these dealers exclusive territories in which to develop and serve Beltone-cultivated customers whose loyalties to Beltone, once developed, are likely to continue through repeat business for the life of the consumer. Thus, a practical system of exclusive dealing is secured and maintained by the *quid pro quo* of valuable local distributor territorial and customer monopolies.

At the interbrand level, there are approximately 5000 distributors of hearing aids, only 7-8% of which sell Beltone products. Beltone's market share in 1977 was around 16%, down from 21% in 1972. Four-firm and eight-firm concentration has remained at 50% and 70%, respectively, during the relevant period. Beltone has been the leading firm throughout, although the other market leaders have changed place over time. About 35% of the market is now held by foreign firms that were not a major market factor a few years ago. Barriers to the entry of new competition in this industry are low. In addition, in 1977, FDA regulations began requiring hearing aid dealers to inform potential customers of the advisability of seeking a professional hearing test. The result is that professional referrals now account for about 40% of all hearing aid sales, though only about 10% of Beltone's business, which is developed through pre-sale Beltone and Beltone dealer advertising and "case generation" efforts. **[2]**

If the record showed no more than this, I would feel easier with the conclusion that this case be dismissed. As the Commission has found,

[1] The Commission appears to accept the formulation of legal theory offered by respondent and accepted by the ALJ: "The principal question for decision on remand is whether the alleged territorial or customer restrictions have any effect upon interbrand competition in the hearing aid industry." (RAB, 26).

16% is not itself a decisive degree of market foreclosure (or more to the point, market power) sufficient on which to base a finding of liability in light of other market conditions. But this matter is difficult to separate from its historical law enforcement context. The Beltone case is the result of respondent's refusal to submit to a consent order signed by four of its then-major competitors, barring exclusive distributorships in this industry. Between 1973 and 1976, Sonotone, Radioear, Dahlberg and Maico settled Commission complaints against their exclusive distributorships, opening up these distribution systems to the hearing aids of competing manufacturers. Complaint counsel argue—but cannot quantify—that the current "competitive" picture of the interbrand market has resulted from the effects of those consent orders. (CAB, 36–37). There is testimony, for instance, from Oticon, Audiotone, and Starkey that distribution of their products was easier after entry of the Commission consent orders.[2] While the Administrative Law Judge concluded that barriers to the entry of new competition in this market were low, complaint counsel argues that this is only so because of the presumption that existing dealer networks, other than Beltone's, remain open to the distribution of competing hearing aid products (OR, 15; CCAB, 37 n. 34).

The record in this case is also imperfect in demonstrating the interbrand price effects of Beltone's restraints. Complaint counsel argue that there is very little interbrand competition in this market because consumers do not comparison shop and are not sensitive to price differences. Hearing aid prices are not set in consideration of the prices charged others, and Beltone's higher prices are insulated from any competition by its distributional restraints system. The Administrative Law Judge found on remand that Beltone's wholesale prices were higher than those of *some* competing products, (ORF 19 at 18), which could be a competitively suspect result attributable to the protection from competition from competing brands (OR, 25). The ALJ also agreed that Beltone prices were set without consideration for the prices of competitive manufacturers. But the actual evidence on hearing aid prices and details of comparative product pricing generally, is practically nil. There is also no evidence on what portion of Beltone's prices is attributable to the costs associated with the customer-finding and service operations Beltone's distributorship system provides. [3]

Finally, complaint counsel ascribe the decline of Beltone's market position to an overall decline in demand due to inflationary

[2] Oticon distribution was through Dahlberg dealers, and Audiotone has distributed through Maico and Sonotone dealers (CCAB, 37).

pressures in the 1970s on fixed incomes, on Beltone's "late start" in exploiting professional referral sales, and on Beltone's financial commitment to research and development (rather than sales) efforts.

I am left thus with an objective picture of a relatively competitive interbrand hearing aid market, but with the feeling that these competitive conditions may be explained by conditions at work in spite of Beltone's distributional restraints. The elimination of Beltone's restraints would, under this view, facilitate even greater competition. Whatever the truth of the matter, complaint counsel has failed to carry its burden to show an adverse impact on interbrand competition in this case.

While the Supreme Court made it clear that the assessment of non-price vertical restraints primarily should focus on the interbrand competitive level, it did not address in detail the permissible ambit of intrabrand restraints that might inhibit competition between and among a manufacturers' distributors, except to prescribe a Rule of Reason analysis. In the absence of clear instructions on remand of this proceeding,[3] I read complaint counsel as attempting to construct an argument that there was an inhibition on intrabrand competition that could only withstand a vesting of liability if respondent carried a burden of proof in showing offsetting procompetitive interbrand effects of the alleged intrabrand restraint.[4] (In this regard, it is of course complaint counsel's view that Beltone's system of intrabrand restraints protects Beltone from price competition by other hearing aid manufacturers, and that there is very little interbrand price competition in the interbrand market).

The Commission finds, and I agree, that by and large complaint counsel have demonstrated (over vigorous Beltone opposition) that Beltone's system of intrabrand restraints amounts to a form of exclusive dealing through exclusive territories and exclusive access to customers cultivated within those territories. It is [4]conceded by the Commission—and even by respondents (RAB, 43)—that Beltone's restraints inhibit at least some intrabrand competition. But the Commission finds that these restraints are justified—and thus lawful—because they serve legitimate Beltone competitive purposes. That is, the restraints seem justified by the success of Beltone in making out an "efficiencies defense" that explains the restraints in terms of their influence on Beltone's interbrand competitive position. There are inherent dangers in carrying the analysis to this point. The Commission's concern that Beltone's restraints "reason-

[3] 91 F.T.C. 884 (1978).

[4] "A practice is absolutely impermissible under the Rule of Reason if adverse intrabrand effects result and there are not conterbalancing, procompetitive interbrand effects to outweigh, offset or 'check' the adverse effects." (CAB, 27)

ably serve Beltone's market objectives" is the Achilles heel of this decision. Applying a Rule of Reason test in this fashion in order to weigh Beltone's justifications for its system of distributional restraints puts too much faith in Beltone's assertions and leads, I fear, inevitably to a real possibility that complaint counsel will always lose—even if it can get past the interbrand effects hurdle.

In my view what the Commission is actually saying in this case is that complaint counsel simply saddled the wrong horse by basing its legal theory of violation on intrabrand competition and failing to carry a burden of proof to show adverse interbrand competitive effects stemming from intrabrand restraints. Thus, I would have made it clearer that where no adverse interbrand competitive effects are demonstrated, the Commission does not expect the parties also to focus on an agonizing and protracted additional consideration of the specific justifications for a system of intrabrand restraints.

Because the Commission's analysis went beyond the simple assessment of competitive effect at the interbrand level, its Opinion might be read to sanitize a system of airtight intrabrand restraints in all interbrand competitive situations as long as some sort of highly predictable free rider danger or other excuse is thrown up to justify the restrictions. I do not believe this record shows that a system of airtight restraints was reasonably necessary to achieve Beltone's competitive goals. Beltone's lead generation system was not unique to Beltone, and the record shows no practical free rider threat, whether real or theoretical. I believe an analysis of such airtight restraints should await the day when it is necessary to a determination of liability. Then, the burden would be on the respondent to show that the specific pro-competitive consequences of its system of "airtight" restraints outweighed the demonstrated anticompetitive interbrand effects. However, in considering respondent's arguments, the Commission's analysis should be extremely skeptical of makeweight justifications and post-litigation afterthoughts. All that this case should stand for, in my view, is that complaint counsel has failed to carry its burden of proof when it fails to show a negative competitive interbrand effect from Beltone's system of intrabrand non-price vertical restraints.

Final Order

This matter has been heard by the Commission upon the appeal of respondent from the initial decision and order certifying the record on remand and upon the briefs and oral arguments in support of and in opposition to the appeal. For the reasons stated in the accompany-

ing Opinion, the Commission has determined to reverse the initial decision. Respondent's appeal is granted. Accordingly,

It is ordered, That the complaint is dismissed.

It is also ordered, That all motions pending in this matter and not resolved in the accompanying Opinion, with the exception of various [2]motions for extended *in camera* treatment of data which are responded to in a separate Order, are hereby denied.[1]

[1] On October 15, 1981, after the oral argument on the appeal from remand, respondent filed a motion seeking a) to supplement the record with a consultant's report on the hearing aid industry, b) to have referred to an administrative law judge a question regarding discovery of the aforementioned consultant's report and c) to reargue the appeal. Complaint counsel filed timely responses to each portion of respondent's motion. The Commission has considered each of the motions and, finding that respondent has not been prejudiced by any matter raised by those motions and that the questions raised therein are mooted by this Opinion and Order, denies the motions.