

IN THE MATTER OF
BELTONE HEARING AID COMPANY

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

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

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

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

INITIAL DECISION BY EARL J. KOLB, HEARING EXAMINER

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

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

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

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

FINDINGS AS TO THE FACTS.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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sales of hearing aids of these five companies in 1951 amounted to \$16,248,764.00, which is 72.81 percent of the total industry sale of hearing aids in that year. The sales volume for these five hearing aid companies as shown by the record are as follows:

	Beltone	Dictograph	Maico	Zenith ¹
1950.....	\$2,090,938	\$3,561,234	\$1,139,362	\$1,980,297
1951.....	2,178,822	2,974,385	1,162,941	2,786,273
1952.....	2,177,250	3,126,282	1,165,463	3,535,426
1953.....	2,164,581	3,035,670	1,275,152	3,708,098

Sonotone sales of hearing aids for the year 1951 were \$7,146,343.00.¹

PAR. 13. On a percentage basis, the percentage of sales of hearing aids by the various leading companies, as reflected by comparison of the individual company sales to the Bureau of Census figures, are as follows:

	Sonotone	Zenith	Dictograph	Beltone	Maico
1950.....		8.58	15.43	9.06	4.93
1951.....	¹ 16.01	12.48	13.32	9.76	5.21
1952.....		13.32	14.8	10.3	5.52

¹ Sonotone figures represent sales by means of its employees direct to the user. The figures for the other companies are total sales to distributors for resale to users. For purposes of comparison, the Sonotone figures should be reduced by 50 percent to make them comparable with the sale price to distributors shown for the other companies. Zenith figures are taken from Respondent's Exhibits 17 and 18.

The companies listed above, who make use of exclusive dealing contracts with their distributors; namely, Dictograph, Beltone and Maico, represent approximately 30 percent of the entire sales of the whole industry.

PAR. 14. The exact number of independent hearing aid dealers in the United States is rather confused in this record. Witness Grover Cleveland Coil, estimated that there would be 2,000 to 3,000 qualified dealers. As this witness testified that a drug store with a hearing aid department would be a qualified dealer, it is impossible from his testimony to determine the number of independent hearing aid dealers as distinguished from drug stores, optical shops and department stores. Witness David H. Barnow, General Sales Manager and Vice President of respondent, testified that there were approximately 3,000 hearing aid dealers, exclusive of outlets such as drug stores, optical shops, etc. Although the record shows that Sonotone, Beltone, Dictograph and Maico sold to approximately 1,000 dealers, Barnow testified that these four companies would account for approximately 1,150 of the estimated dealers, leaving a balance of approximately 1,900 dealers distributed

among the remaining 30 manufacturers of hearing aids. As he arrived at this latter figure by estimating the number of dealers sold by these 30 hearing aid companies, which for the most part were multiple line dealers, this would result in a considerable amount of duplication, and would prohibit an exact estimate being made because of such duplication. If consideration is given to the fact that Beltone, Dictograph, Maico, Sonotone and Zenith do 72.81 percent of total industry sales and that the remaining manufacturers of hearing aids sell principally to drug stores, optical shops and similar outlets, it readily becomes apparent that the estimate of 1,900 dealers is greatly exaggerated and would serve no basis for a finding as to the number of dealers.

PAR. 15. Considering the record as a whole, including the percentage of industry sales made by respondent and its three competitors—Sonotone, Dictograph and Maico—which, together, comprised 60 percent of the total industry sales in 1951, the Hearing Examiner is of the opinion, and so finds, that respondent's distributors constitute a substantial segment of the outlets for the sale of hearing aids and supply coverage for the more important trade areas of the United States. In such segment, the respondent has effectively established a monopoly. Competing manufacturers of hearing aids have suffered substantial injury in the form of loss of sales and inadequate distribution of their competing products as the result of respondent's requirements that its distributors and dealers handle only the products manufactured and sold by the respondent, and such competing manufacturers have been forced to sell less desirable outlets for their products such as drug stores, optical stores and similar outlets. Furthermore, the tendency and capacity of these practices to create a monopoly in the respondent and a limited number of its competitors is demonstrated by the following chart showing the hearing aid outlets in 74 cities throughout the United States, in each one of which there is located a Beltone distributor.

City	Population	Total outlets	Exclusive dealers	Other dealers	Other outlets
Abilene, Tex.	45,570	3	2		1
Albany, N. Y.	134,995	8	4	2	2
Albuquerque, N. Mex.	96,815	5	3	2	
Allentown, Pa.	106,756	8	4	4	
Altoona, Pa.	77,177	7	4	3	
Amarillo, Tex.	74,246	5	3	1	1
Anderson, Ind.	46,820	3	2	1	
Annapolis, Md.	10,047	1			
Asheville, N. C.	53,000	5	2	2	1
Atlanta, Ga.	331,314	8	4	4	
Augusta, Ga.	71,508	4	3	1	
Austin, Tex.	132,459	7	4	3	
Beaumont, Tex.	94,014	6	4	1	1
Billings, Mont.	31,834	4	3	1	

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City	Popula- tion	Total outlets	Exclusive dealers	Other dealers	Other outlets
Birmingham, Ala.	326,037	7	3	3	1
Boise, Idaho	34,393	7	3	3	1
Cedar Rapids, Iowa	72,296	6	4	2	
Champaign-Urbana, Ill.	{39,563} {22,834}	5	3		2
Charleston, S. C.	70,174	4	2	2	
Charleston, W. Va.	73,501	7	3	1	3
Charlotte, N. C.	134,042	8	4	2	2
Chattanooga, Tenn.	131,041	7	3	3	1
Columbus, Ga.	79,611	2	2		
Corpus Christi, Tex.	108,287	7	4	2	1
Davenport, Iowa	74,549	8	4	4	
Duluth, Minn.	104,511	8	4	2	2
Easton, Pa.	35,632	5	3	1	1
Eau Claire, Wis.	36,058	6	3	2	1
El Paso, Tex.	130,485	6	3	3	
Erie, Pa.	130,803	7	4	2	1
Everett, Wash.	33,849	6	3	2	1
Flint, Mich.	163,143	6	4	2	
Fresno, Calif.	91,669	9	4	4	1
Grand Rapids, Mich.	176,515	8	4	3	
Greensboro, N. C.	74,389	4	2		2
Jacksonville, Fla.	204,517	7	4	2	1
Johnstown, Pa.	63,232	6	4	2	
Joplin, Mo.	38,711	6	4	1	1
Knoxville, Tenn.	124,769	7	4	2	1
Lansing, Mich.	92,129	8	4	4	
Little Rock, Ark.	102,213	7	4	3	
Lubbock, Tex.	71,747	5	3	2	
Macon, Ga.	70,252	3	2	1	
Mobile, Ala.	129,009	6	4	2	
Muskegon, Mich.	48,429	2	1	1	
Nashville, Tenn.	174,307	8	3	5	
New London, Conn.	30,551	4	2		2
Norfolk, Va.	213,513	8	4	3	1
Orlando, Fla.	52,367	7	4	3	
Portland, Maine	77,634	5	3	2	
Raleigh, N. C.	65,679	6	4		2
Rapid City, S. Dak.	25,310	3	2	1	
Reading, Pa.	109,320	7	4	3	
Reno, Nev.	32,497	2	1		1
Richmond, Calif.	99,545	4	2		2
Richmond, Va.	230,310	10	4	5	1
Rochester, Minn.	29,885	7	4	3	
Rockford, Ill.	92,927	8	4	4	
Saginaw, Mich.	92,918	4	2	2	
Schenectady, N. Y.	91,785	7	4	2	1
Scranton, Pa.	125,536	5	3	1	1
Shreveport, La.	127,206	8	4	3	1
Sioux City, Iowa	83,991	7	4	2	1
Springfield, Ill.	81,628	7	3	4	
Springfield, Mass.	162,399	9	4	5	
Syracuse, N. Y.	220,583	9	4	4	1
Tampa, Fla.	124,681	6	4	1	1
Tulsa, Okla.	152,740	6	4	2	
Utica, N. Y.	101,531	7	4	2	1
Waco, Tex.	84,706	6	4	1	1
Watertown, N. Y.	34,350	5	3	2	
Wichita, Kans.	168,279	5	3	2	
Wilkes-Barre, Pa.	76,826	8	4	3	1
Winston-Salem, N. C.	87,811	6	3	2	1

The Acousticon dealer in Wichita, Kans., carries one additional make.

The Beltone dealer in Portland, Maine, carries one additional make.

The Maico dealer in Birmingham and Charleston each carries two additional makes, and the Maico dealer in Nashville carries one additional make.

Corpus Christi, Tex., has one exclusive Maico dealer, and one other dealer who carries Maico as one of two makes.

Reference to the above table would indicate that should two other manufacturers follow respondent's example and tie up two additional jobbers in each of these cities by exclusive dealing contracts it would create a monopoly and result in the exclusion of all other hearing aid manufacturers from approximately two-thirds of the cities listed.

PAR. 16. The respondent has based its defense on a number of economic factors and public interest as a justification of the continued use of its exclusive dealing contract—

(1) It was contended that respondent's written franchise agreements had no effect upon respondent's sales. In 1949 unit sales of respondent were the highest in its history, when only 50 percent of respondent's distributors had entered into written franchise agreements. The record shows, however, that respondent claimed as early as 1948 that 95 percent of its dealers were required to deal exclusively in Beltone hearing aids.¹ In view of this, unit sales have no relationship to franchise agreements. Furthermore, while respondent has shown some decrease in unit sales, it has not shown a corresponding decrease in dollar volume, and respondent has continued to maintain its position in the industry and, in fact, during the years 1950 to 1952 has increased its percentage of total industry sales.

(2) It was contended that respondent's exclusive dealing contracts had no effect on competition for the reason that the number of hearing aid manufacturers has increased from approximately 15 in 1943 to approximately 35 in 1953; that competitors were free to train their own distributors; and that respondent's distributors were free to cancel their contracts and take on other hearing aids. Such increase as has taken place has not affected either respondent's position in the market or its share of total industry sales, nor has there been any appreciable exodus of respondent's dealers, and competitors have been forced to sell their hearing aids in less desirable markets, such as drug stores, optical shops, etc. As stated by the Supreme Court in *Standard Oil v. United States*; 337 U.S. 293, pp. 311, 314—

We are dealing here with a particular form of agreement specified by § 3 and not with different arrangements, by way of integration or otherwise, that may tend to lessen competition. To interpret that section as requiring proof that competition has actually diminished would make its very explicitness a means of conferring immunity upon the practices which it singles out. Congress has authoritatively determined that those practices are detrimental where their effect may be to lessen competition.

* * * * *

It cannot be gainsaid that observance by a dealer of his requirements contract with Standard does effectively foreclose whatever opportunity there might be for competing suppliers to attract his patronage, and it is clear that the affected proportion of retail sales of petroleum products is substantial. In view of the widespread adoption of such contracts by Standard's competitors and the availability of alternative ways of obtaining an assured market, evidence that competitive activity has not actually declined is inconclusive. Standard's use of the contracts creates just such a potential clog on competition as it was the purpose of § 3 to remove wherever, were it to become actual, it would impede a substantial amount of competitive activity.

¹ Commission's Exhibits 11-F and 8-F.

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(3) It was further contended that respondent's hearing aids are highly complex electronic devices and that respondent has contributed to new advances and inventions in the electronic field, together with many technological improvements and has spent large sums of money in advertising its hearing aids and has built up a considerable amount of good will, which constitutes a strong business justification for a hearing aid manufacturer to restrict his dealers to handle only its line of hearing aids. While the hearing aids manufactured and sold by respondent cover a variety of responses and are adaptable to various degrees of hearing loss, there are also other competing manufacturers whose hearing aids cover a variety of responses and which are adaptable to various degrees of hearing loss. This identical defense was discussed by the United States Circuit Court of Appeals for the Second Circuit in *Dictograph Products, Inc., v. Federal Trade Commission* decided December 15, 1954, 217 F. 2d 821.

Preliminarily, it should be noted that potential or even probable adverse effects upon petitioner's business alone is not a sufficient basis for withholding injunctive relief. Were we to hold otherwise, we would quite effectually draw the teeth of Section 3 and of the anti-trust laws generally. It appears self evident that any prohibition upon behavior which stifles competition will necessarily inure to the immediate economic disadvantage of the individual or business organization engaging in that behavior.

(4) It was further contended by the respondent that there was a justification in the use of the exclusive dealing contract as it permitted the rendering of better service to the dealer and a supplying to him of advertising assistance and leads without the necessity of a dealer carrying a large inventory. By so doing, respondent further contended that this enabled the dealer to give better service to the hard-of-hearing public. The relative merits of respondent's hearing aids or its fitting techniques does not constitute a defense to this proceeding. No matter how compelling the advantage of handling the respondent's products might be either to the distributor or his customer this does not justify the evasion or violation of the statutory provisions dealing with exclusive dealing contracts. While the distributor is engaged in an entirely private business and has a right to freely exercise his own independent discretion as to parties with whom he will deal or stop dealing for reasons sufficient unto himself, this right should be left to the dealer free of any contractual requirement to deal only in respondent's products.

CONCLUSIONS

1. The distributors' and dealers' contracts and agreements and methods of sale as hereinbefore described constitute sales or contracts for sale of respondent's hearing aids on the condition, agreement or understanding that the purchasers thereof shall not deal in similar products sold and distributed by competitors of respondent.

2. Distributors who have executed written contracts with respondent suffer substantial injury to their respective businesses, because of the fact that they are foreclosed from making any independent judgment or decision as to what products they shall handle and sell in their business enterprises and lose substantial sales because they are unable to carry and sell competitive hearing aids.

3. Distributors who refuse to abide by respondent's exclusive dealing policy and insist on carrying competitive hearing aids and who are, therefore, discontinued by respondent as such distributors for no other reason, are injured in their businesses because of the fact that they are unable to make the normal sales which they would ordinarily make of respondent's products, solely because they refuse to handle respondent's products exclusively.

4. The acts and practices and policy of the respondent, relative to exclusive dealing, adversely affects the ability of competitive manufacturers and suppliers to sell hearing aids to independent distributors under contract with respondent and deprives such manufacturers and suppliers of an equal opportunity to obtain the business of such distributors and such practices restrain, restrict and lessen the market for the sale of such products of such competing manufacturers and suppliers.

5. The dollar volume of such products annually sold by respondent to its distributors under restrictive conditions, understandings and agreements is substantial and has materially lessened competitive sales in each of the trade areas covered by respondent's distributors, and respondent, during all the times mentioned herein, would have been, and would now be, in free and open competition in the sale of similar merchandise in commerce in said trade areas were it not for the suppression of such competition by such restrictive policy and practices and conditions, understandings and agreements imposed upon its distributors as hereinbefore found.

6. The acts and practices of respondent as hereinbefore found are all to the injury and prejudice of the respondent's competitors

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and of the public, and have the tendency to, and have, hindered and prevented competition in the sale of the products sold by the respondent, and has a tendency to, and has, obstructed and restrained such competition in commerce.

7. The effect of the sale and contracts for sale of hearing aids on the condition, agreement or understanding that the purchasers thereof shall not sell or deal in similar products of competitors may be, and has been, to substantially lessen competition and to tend to create a monopoly in respondent in the sale of such hearing aids.

8. The acts and practices of the respondent, as herein found, in selling and making contracts for 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 constitute a violation of Section 3 of the Clayton Act.

ORDER

It is ordered, That respondent Beltone Hearing Aid Company, a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of hearing aids or other similar or related products in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

1. Selling or making any contract or agreement for the sale of any such products on the condition, agreement or understanding that the purchaser thereof shall not use, or 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 of 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.

ON APPEAL FROM INITIAL DECISION

Per Curiam:

The Commission is of the opinion that the issues raised by this appeal are substantially the same as those decided in *Dictograph Products, Inc. v. Federal Trade Commission*, 217 F. 2d 821 (C.C.A. 2, 1954), certiorari denied, 349 U.S. 940, and in *Anchor Serum Company v. Federal Trade Commission*, 217 F. 2d 867 (C.C.A. 7, 1954).

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Accordingly, upon the basis of our review of the whole record herein, respondent's appeal is denied and the initial decision is adopted as the decision of the Commission.

Commissioner Kern did not participate in the decision of this matter.

FINAL ORDER

Respondent Beltone Hearing Aid Company filed on May 23, 1955, its appeal from the initial decision of the hearing examiner in this proceeding; and the matter having been heard by the Commission on briefs and oral argument; and the Commission having rendered its decision denying the appeal and adopting the initial decision as the decision of the Commission:

It is ordered, That respondent Beltone Hearing Aid Company shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which it has complied with the order contained in said initial decision.

Commissioner Kern not participating.

IN THE MATTER OF
CARL DRATH TRADING AS BROADWAY GIFT COMPANY

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION
OF THE FEDERAL TRADE COMMISSION ACT

Docket 6185. Complaint, Feb. 24, 1954—Decision, Feb. 16, 1956

Order requiring an individual in New York City to cease furnishing to members of the public who were prospective representatives and operators, push and pull cards and instructions for the sale of his watches, cameras, novelties, household articles, and other merchandise to the public by means of a lottery scheme.

Mr. J. W. Brookfield, Jr. for the Commission.

Mr. Horace J. Donnelly, Jr., of Washington, D. C., for respondent.

INITIAL DECISION BY WILLIAM L. PACK, HEARING EXAMINER

1. The complaint in this matter charges respondent with violation of the Federal Trade Commission Act through the use of lottery schemes or games of chance in the sale and distribution of his merchandise. After the filing of respondent's answer to the complaint, hearings were held at which testimony and other evidence were offered in support of the complaint (no evidence being offered by respondent), and such testimony and other evidence were duly recorded and filed in the office of the Commission. The matter is now before the hearing examiner for final consideration on the complaint, answer, evidence, oral argument of counsel and proposed findings and conclusions submitted by counsel. Having duly considered the matter, the examiner finds that the proceeding is in the interest of the public and makes the following findings as to the facts, conclusions drawn therefrom, and order.

2. Respondent Carl Drath is an individual trading as Broadway Gift Company, with his office and principal place of business at 121 East 24th Street, New York, New York. He is engaged in the sale and distribution in commerce, as that term is defined in the Federal Trade Commission Act, of numerous and varied items of merchandise including, among others, cameras, watches, jewelry, safety razors, and various household and toilet articles.

3. Most of respondent's sales are made through members of the public. Upon obtaining the names and addresses of individuals, members of the public, who are regarded by him as prospective distributors of his merchandise, respondent mails to such persons