

Complaint

IN THE MATTER OF

SUN ELECTRIC CORPORATION

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL
TRADE COMMISSION ACT*Docket 8659. Complaint, April 26, 1965—Decision, April 14, 1966*

Order dismissing a complaint against a Chicago, Ill., manufacturer of automotive testing equipment, charging that it had illegally suppressed competition in the repair of such equipment, the allegations not sustained by evidence.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act (U.S.C., Title 15, Sec. 45) and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the corporation named in the caption hereof, and more particularly described and referred to hereafter as respondent, has violated the provisions of Section 5 of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in respect thereto as follows:

PARAGRAPH 1. Respondent, Sun Electric Corporation, is a corporation organized and existing under the laws of the State of Delaware, with its general office and place of business located at 6323 Avondale Avenue, Chicago, Illinois.

PAR. 2. Respondent is now and for many years has been engaged in the manufacture, distribution and sale of automotive and aircraft testing equipment, electronic equipment, and parts and accessories necessary thereto. Respondent sells automotive testing equipment manufactured by it directly to garages, service stations and others engaged in the repair of automobiles through its general office in Chicago, Illinois, and through numerous branch offices located in various States of the United States. Respondent is the dominant manufacturer of automotive testing equipment in the United States, and its sales of such equipment in the United States are substantial. During the period 1959-1963, respondent's sales of automotive testing equipment ranged from \$5,000,000 to \$7,000,000 annually.

PAR. 3. Respondent is also engaged in the repair of automotive testing equipment manufactured by it. Respondent maintains re-

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pair facilities at its factory located in Chicago, Illinois, and has established and maintains approximately twenty-six factory branches located in various States of the United States. Such factory service branches are the only places operated, maintained or authorized by respondent for the repair of its automotive testing equipment.

PAR. 4. Respondent, in the course and conduct of its business as described above, is now and for many years has been engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act. Respondent causes its automotive testing equipment, parts and accessories to be transported from its manufacturing plant located in Chicago, Illinois, to users of such equipment located in various States of the United States and the District of Columbia; and causes its automotive testing equipment, parts and accessories to be transported from its manufacturing plant to its sales offices and factory service branches located in various States of the United States for sale to customers and to users of respondent's equipment located in various States of the United States and the District of Columbia.

PAR. 5. Respondent, in the course and conduct of its business as described above, has been and is now in substantial competition with others in the manufacture, distribution and sale of automotive testing equipment, and, except to the extent that competition has been hindered and suppressed by virtue of the acts and practices described below, has been and is now in substantial competition with others in the repair of respondent's automotive testing equipment.

PAR. 6. Respondent, in the course and conduct of its business as described above, has refused and continues to refuse to sell parts and accessories for its automotive testing equipment to persons and firms engaged in the business of repairing automotive testing equipment. Respondent has also refused and continues to refuse to furnish to persons and firms engaged in the repair of automotive testing equipment diagrams, schematics or similar documents showing the make-up of its automotive testing equipment.

PAR. 7. The effects of the acts and practices of respondent as hereinabove alleged, among others, are as follows:

1. Independent repairmen have been prevented and hindered from engaging in the business of repairing respondent's automotive testing equipment.
2. The ability of independent repairmen to compete with res-

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pondent in the repair of respondent's automotive testing equipment has been injured, lessened, prevented or destroyed.

3. Respondent has obtained, or attempted to obtain, a monopoly in the repair of its automotive testing equipment.

4. Owners and users of respondent's automotive testing equipment have been deprived of their freedom of choice in the selection of a repair agency.

5. The ability of small businessmen, as represented by the independent repairmen referred to herein, to flourish and grow has been hindered, lessened or destroyed.

PAR. 8. The aforesaid acts and practices of respondent have a tendency to unduly hinder competition and have injured, hindered, suppressed, lessened or eliminated actual and potential competition in the repair of respondent's automotive testing equipment, and have created, or may tend to create, a monopoly in the repair of respondent's automotive testing equipment. Said acts and practices, therefore, are to the prejudice and injury of the public and respondent's competitors in the field of automotive testing equipment repair and constitute unfair methods of competition in commerce or unfair acts and practices in commerce, within the intent and meaning of Section 5 of the Federal Trade Commission Act.

Mr. Lowell E. Miller and Mr. John Ohanian for the Commission.

Sonnenschein, Levinson, Carlin, Nath & Rosenthal, Chicago, Ill., for respondent.

INITIAL DECISION BY EDGAR A. BUTTLE, HEARING EXAMINER

NOVEMBER 9, 1965

The complaint herein was issued by the Federal Trade Commission on April 26, 1965. Answer was filed by respondent on May 25, 1965. A prehearing conference was held in Washington, D.C., on June 29, 1965. Hearings commenced in New York City on July 14, 1965, and concluded in Chicago, Illinois, on July 22, 1965.

The complaint charges respondent, a corporation engaged in the business of manufacturing and selling automotive testing equipment, parts and accessories, and the business of repairing automotive testing equipment manufactured by it, refuses and has refused to sell repair parts and accessories for its automotive testing equipment to persons and firms engaged in the business of

repairing automotive testing equipment, and refuses and has refused to furnish to such repairmen diagrams, schematics or similar documents showing the make-up of its automotive testing equipment. It is alleged that the effects of such acts and practices, among others, are to hinder and prevent automotive testing equipment repairmen from engaging in the business of repairing respondent's automotive testing equipment; to injure, lessen, prevent or destroy the ability of such repairmen to compete with respondent in the repair of its automotive testing equipment; to deprive owners and users of respondent's automotive testing equipment of their freedom of choice in the selection of a repair agency; and that respondent has obtained, or attempted to obtain, a monopoly in the repair of its automotive testing equipment.

FINDINGS OF FACT

1. Sun Electric Corporation, respondent herein, is a corporation organized and existing under the laws of the State of Delaware, with its general office and place of business located at 6323 Avondale Avenue, Chicago, Illinois.¹

2. Respondent, inter alia, is now and for many years has been engaged in the manufacture, distribution and sale of automotive and aircraft testing equipment, electronic equipment, and parts and accessories necessary thereto.²

3. The automotive testing equipment manufactured and sold by respondent consists primarily of electronic equipment designed for the purpose of determining the operating conditions of automobile engines and automotive fuel, ignition, starting and charging systems. It is used by persons and firms, such as automobile dealer repair shops, automobile motor tune-up shops and service stations, engaged in the business of repairing and servicing automobiles.³

4. Automotive testing equipment is manufactured by respondent in the United States at factories located in Chicago, Illinois, and Bellwood, Illinois, and is sold in all areas of the United States and the District of Columbia through twenty-seven (27) sales offices located in various states of the United States and approximately two hundred and fifty (250) sales representatives located in all states of the United States.⁴

¹ Admitted, Answer, par. 1; also stated to be unobjectionable by respondent at page 10 of its memorandum in response to complaint counsel's "Proposed Findings, Conclusions, Order and Argument of Law in Support Thereof."

² Admitted, Answer, par. 2.

³ See CX 4, 5; Tr. 123, 156.

⁴ See Tr. 138-9, 743; CX 4, 5, 7.

5. In addition to its two manufacturing plants in the Chicago, Illinois area, respondent operates two manufacturing plants in foreign countries. Respondent's automotive testing equipment is sold in foreign countries through authorized distributors located in all principal countries of the world.⁵

6. Respondent additionally is and has been engaged in the business of repairing automotive testing equipment manufactured by it. In the conduct of such repair business, respondent operates and maintains, as part of Sun Electric Corporation, twenty-six (26) factory service branches located throughout the United States.⁶

7. Respondent, in the course and conduct of its business of selling automotive testing equipment and repairing automotive testing equipment manufactured by it, causes its automotive testing equipment, parts and accessories to be transported from its manufacturing plant in Chicago, Illinois, to its various sales offices and factory service branches. Respondent, in the course and conduct of its business of selling automotive testing equipment and repairing such equipment, is and has been engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act.⁷

8. During the period 1960-1964, respondent's sales within the United States of automotive testing equipment manufactured by it were substantial and were as follows:

Fiscal 1960—	\$4,816,169.18
" 1961—	4,355,820.30
" 1962—	5,338,168.16
" 1963—	6,228,034.44
" 1964—	6,875,903.17

Respondent's sales increased by more than thirty (30) per cent within this five-year period.⁸

9. Respondent concedes it is a major manufacturer of automotive testing equipment.⁹

10. The total dollar volume of repair work, including parts and labor, done at respondent's service branches for the years 1963 and 1964, respectively, were as follows:

⁵ See Tr. 161; CX 5.

⁶ Admitted, Answer, par. 3; CX 7; Tr. 146, 743.

⁷ Admitted, Answer, par. 4.

⁸ See CX 10; Tr. 127-8, 734. Battery chargers are included in the line of automotive testing equipment manufactured and sold by respondent. Tr. 173; CX 4, 5; RX 18. Respondent's sales of battery chargers, which are included in these sales figures, were: 1960-\$377,817; 1961-\$381,188; 1962-\$397,735; 1963-\$385,418; 1964-\$295,415. Tr. 735.

⁹ See page 10 of respondent's reply to complaint counsel's proposed findings; also see Tr. 427, 464; CX 5, pp. 2-13; CX 15, pp. 134-135; CX 17, 23; Tr. 152-153, 427, 462-463; CX 24; Tr. 478, 464, 346, 372.

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Fiscal 1963—\$789,519.08

Fiscal 1964— 703,945.26 ¹⁰

11. The revenue received by respondent from its business of repairing automotive testing equipment manufactured by it is substantial and constitutes an important source of revenue to Sun.¹¹

12. Sun concedes that it refuses, and has refused, to sell repair parts and accessories for its automotive testing equipment to persons and firms engaged in the business of repairing automotive testing equipment who do not own the equipment. However, Sun does not refuse to sell such repair parts and accessories to owners of the equipment for which the part is ordered, irrespective of the occupation of the owner. For example, Sun sells repair parts to companies engaged in reconditioning automotive testing equipment as long as they own the equipment.¹²

13. Refusal to sell repair and replacement parts to automotive testing equipment repairmen and repair shops inhibits, to a degree unestablished by the evidence, repairmen and repair shops from repairing automotive testing equipment manufactured by respondent. As hereinafter indicated, the inconvenience proved does not appear to be unsurmountable or competitively material. Respondent does not compete for repair work other than on its own equipment.¹³

14. From its inception, Sun's method of distributing automotive testing equipment has been by direct sales to the users of the equipment, that is, the automotive service trade.¹⁴

15. In that connection, Sun employs approximately 250 sales representatives located throughout the United States. The full time of these representatives is devoted to sales and promotion of Sun automotive testing equipment.¹⁵

16. As part of their duties, Sun sales representatives conduct training sessions to instruct customers (and their personnel) in the use of the equipment. Because of the complexity of some of this equipment, Sun regards such training sessions as essential to achieve customer satisfaction.¹⁶

17. Sun has established repair facilities at its various branches throughout the United States for several reasons evidenced:

(a) The repair facilities are essential in order to achieve qual-

¹⁰ See CX 11, CX 12.

¹¹ See Tr. 744-745.

¹² See Tr. 753, 204, 256, 510, 538, 550, 619, 692, 720.

¹³ See Tr. 180; CX 8, CX 9.

¹⁴ Answer, par. 2; Tr. 138-139, 742-743.

¹⁵ See Tr. 139, 743; CX 5, p. 1.

¹⁶ See Tr. 139, 178-179; CX 5, p. 1.

ity control of Sun's automotive testing equipment. Special expertise and training are necessary to repair such equipment. In addition, such equipment must be calibrated when it is repaired, and special calibrating equipment is required for this purpose. Sun has designed special calibration equipment, which is calibrated to standards of the United States Bureau of Standards, for its repair facilities to use in repairing Sun automotive testing equipment. Such special calibration equipment, in Sun's view, is essential for the proper repair of automotive testing equipment.

(b) Sun assumes that the loyalty of a repairman is important in protecting the quality reputation of the company. Therefore, Sun does not encourage repairs of Sun equipment by persons who are affiliated with concerns handling competitive equipment, and who therefore owe their allegiance to someone other than Sun.

(c) Sun pioneered the one-year warranty in this field. In order to provide meaningful warranty service with the least delay to the customer, Sun deems it necessary to locate repair facilities reasonably close to the owners of the equipment.

(d) In order to gain repeat sales, Sun decided to maintain customer contact after the sale and to assure customer satisfaction. As the president of Sun testified:

In the course of repairs, it sometimes becomes evident that there might be an advantage to approach the owner of the equipment and induce him to purchase new equipment. We, of course, would like to have these particular sales leads. If Sun equipment would be repaired by an organization which owes its allegiance to another brand line, the sales leads would not come to Sun Electric Company. So there is another good reason why we feel that the repairs form an important part of our marketing function.

(e) The repair facilities provide a feed-back of information concerning possible weaknesses in design to engineering personnel for evaluation and guidance in designing and improving future models.

(f) The repair facilities are an important source of revenue to Sun, not only in helping to defray the costs of maintaining factory service branches to facilitate the handling of in-warranty repairs, but also as an independent source of business.¹⁷

18. Sun's policy is to sell repair parts and accessories to any owner of Sun equipment whether he purchased the equipment from Sun or bought it secondhand. In accordance with that policy, when a request is received for parts from someone (such as a re-

¹⁷ See Tr. 440, 826, 746-747, 181, 441, 542, 618, 711, 746-747, 752-753, 182, 755, 758, 756, 744, 180, 744, 757, 744-745, 180, 744-745.

pairman) who is not an owner of Sun equipment, he is advised that Sun's policy is to sell parts to the owner of the equipment.¹⁸

19. Sun does in fact sell a substantial volume of repair parts and accessories to owners of Sun automotive testing equipment. Included among the owners of Sun equipment to whom Sun sells repair parts are companies engaged in reconditioning automotive testing equipment.¹⁹

20. Sun does not require that Sun personnel install the parts which are sold to owners of Sun equipment. Sun does not require that any other repair services pertaining to such equipment must be performed by Sun personnel.²⁰

21. Sun's policy with respect to the sale of repair parts and accessories, like its practice of establishing and maintaining its own repair facilities, is based partly on its desire to develop and maintain the quality reputation of the company's products. Moreover, this policy is also an integral part of Sun's basic marketing policy to sell directly to the ultimate user of the product.

Sun also concedes that, to the extent that repairmen could, and do, compete with Sun, Sun would be aiding its competitors and "cutting its own throat" by selling repair parts to such repairmen. Such competition exists only in a limited sense, however, since Sun repairs only Sun automotive testing equipment and neither solicits nor performs repair services on automotive testing equipment of any other manufacturer.²¹ Sun provides "schematics" for its own use exclusively and "pictorials" as guides incident to equipment repair.

22. Sun's "schematics" are the drawings which Sun prepares for the purpose of manufacturing its various products. Sun's research and development program in its automotive division costs over \$300,000 a year. Each "schematic" reflects the result of all of Sun's engineering and research on the particular product. The schematics contain complete information necessary to manufacture the product, and are in such detail that an existing or potential competitor would be enabled to build equipment identical to the Sun product. Sun automotive testing equipment is virtually unprotected by patents. As a result, Sun equipment is often copied and reproduced by other manufacturers. Sun considers that any disclosure of its "schematics" would be "handing on a silver platter to all existing and potential competitors the net result of our

¹⁸ See Tr. 156, 753; Answer, par. 6; CX 9, CX 27; Tr. 753-754.

¹⁹ See RX 8, 9, 10; Tr. 200-201, 753.

²⁰ Answer, par. 6; Tr. 754.

²¹ See Tr. 182, 755, 758; Answer, par. 6; Tr. 743, 180-181, 745.

research and engineering program. . . .” Therefore, Sun considers its schematics to be proprietary and confidential information which they do not distribute outside of the company.²²

23. In contrast to Sun “schematics,” Sun “pictorials” consist of a photograph of the particular unit and its internal components, showing their physical location and identifying marks, a bill of materials or parts list, a detailed wiring diagram, and test and calibration procedures. The pictorials are prepared from certain portions of the schematics for the same product—namely, the wiring diagram and the list of materials. The pictorials are prepared specifically for the purpose of enabling Sun personnel at Sun repair branches to repair the equipment and are complete with respect to any information that repairmen might need. These pictorials are also distributed to owners of equipment upon request and without charge. They are not, however, distributed to nonowners.²³

24. The principal difference between Sun’s schematics and its pictorials is that the schematics indicate how the unit and its parts are made, whereas the pictorials identify the parts and how to place them. On the other hand, the pictorial is more detailed than the schematics from a servicing standpoint. The pictorial shows voltage measurements and sign waves; in addition, the pictorials clarify polarity of component parts, what the controls are, their function in the circuit, and switch positions.²⁴

Automotive Testing Equipment Defined

25. Sun does not manufacture all types of “automotive testing equipment.” However, Sun considers each of the products described in its catalog as “automotive testing equipment.” Complaint counsel stated that in their opinion there are certain items in CX 5 which are not automotive testing equipment, but never identified such items. Presumably, however, complaint counsel’s reference was to battery chargers.²⁵

26. On the basis of both the evidence of record and the stipulations of counsel, battery chargers are properly included in the category of “automotive testing equipment.”

Complaint counsel represented at a prehearing conference, which was held to narrow and clarify the issues, that “the bat-

²² See Tr. 766; RX 15; Tr. 767, 766, 789, 790-791, 767, 768.

²³ See RX 16; Tr. 798-799, 768-769, 796; cf. RX 15; 766, 796, 768, 796-797; Answer, par. 6; Tr. 772.

²⁴ See Tr. 769, 800.

²⁵ See CX 5; Tr. 127; 110, 91-92.

tery charger . . . normally in the trade, as I understand it, is included in this field." Subsequently, however, complaint counsel stated that he "did not consider battery chargers personally as automotive testing equipment." Nevertheless, he offered CX 10 in evidence and stipulated to its accuracy. That document, prepared by complaint counsel, sets forth sales of "Automotive Testing Equipment" by Sun and includes (as complaint counsel presumably knew when he offered it in evidence) sales of battery chargers by Sun. It was subsequently stipulated that "the total sales figures appearing upon Commission Exhibit 10 are total sales by Sun Electric Corporation of automotive testing equipment within the United States." It was also stipulated that two other Commission exhibits (CX 11 and CX 12) represented "the repair work done by Sun Electric Corporation on automotive testing equipment at the places indicated." These exhibits include repairs of battery chargers. Similarly, it was stipulated that another exhibit, Commission Exhibit 13, "includes all the repair parts for automotive testing equipment which are sold by Sun" as of June 18, 1965. This document contains the repair parts for Sun battery chargers.

Other evidence also shows that battery chargers are regarded as "automotive testing equipment" in the industry. For example, a catalog published by Snap-On Tools Corporation identifies battery chargers as "test equipment." Another Commission witness, Mr. Mayers, testified that he repaired nothing but automotive testing equipment, that he repaired battery chargers, and that he recognized battery chargers as part of the automotive testing equipment line.

The evidence also shows that battery chargers are actually used for testing purposes.²⁶

27. Complaint counsel initially took the position that Sun tachometers mounted in automobiles were automotive testing equipment. Shortly thereafter, however, complaint counsel reversed his position, and stated that such tachometers should not be included. This is in accord with the testimony of a Sun witness, who took the position that its tachometers mounted on automobiles were not automotive testing equipment, but that other tachometers manufactured by Sun are considered as automotive testing equipment.²⁷

²⁶ See Tr. 54-55, 91-92, 127-128, 734, 135; CX 13; Tr. 136-137; CX 13, pp. 57, 61, 66, CX 15, inside front cover; Tr. 405-406, 216, 458; RX 3, 5, 18.

²⁷ See Tr. 86, 107, 102; CX 5, p. 21; Tr. 102.

28. Mr. McCreery, the witness for Snap-On Tools Corporation, testified that the only items that he termed testing equipment were the items contained on pages 128-135 of the Snap-On catalog. He defined testing equipment in terms of how big a sale it is, and not the function it performs; and he also limited his definition to "electrical testing equipment." Nevertheless, it is clear that other items contained in Commission Exhibit 15 must also be regarded as automotive testing equipment: for example, wheel alignment equipment consists entirely of gauges for determining the alignment of wheels on automobiles, and constitutes "automotive testing equipment"; battery chargers and growlers are characterized by the company itself as "test equipment"; likewise, leak testers and similar "hand tools" are probably automotive testing equipment, although not so considered by Mr. McCreery. It should also be noted that Mr. McCreery acknowledged that "each company may have a particular concept of what it regards as testing equipment."²⁸

29. Mr. Potter, of Marquette Corporation, stated that the Marquette catalog did not include all types of automotive testing equipment manufactured by Marquette. Growlers are included as automotive testing equipment by Marquette, but apparently not by Snap-On Tools.²⁹ The variability in manufacturers classification of testing equipment is uncontradicted.

Relevant Markets

30. The record is completely devoid of any evidence showing any industry, or relevant market, in terms of dollar volume. Complaint counsel stated that there are no industry-wide figures available, and did not even attempt to establish what such figures might be.³⁰

31. However, the record does contain evidence as to the large number of manufacturers of automotive testing equipment.

Mr. Glendon, of Sun, testified, without contradiction, that there are upwards of 200 manufacturers of automotive testing equipment in the United States.

Mr. Trent, a Commission witness, testified that he repairs auto-

²⁸ See CX 15; Tr. 400, 402, 401-402; CX 15, inside front cover; Tr. 404-406, 402. It is also noted that CX 15 shows other items which test various parts of automobiles. For example, a battery cell tester on page 127 is designed for various tests; wheel balancers on pages 124-125 determine whether and where a wheel is unbalanced; circuit and spark testers are shown on page 87; a leak tester is shown on page 86; a tension gauge on page 81 is said to be used for "testing the tension of distributor points . . . and for a pulling test . . ."; oil pressure gauge sets on page 53 are stated to be to "reveal inside troubles . . . spot oil leaks, pressure leaks, faulty Servo pistons, clogged screens, etc."

²⁹ See CX 23; Tr. 462-463, 490-492, 399; cf. CX 15, p. 127.

³⁰ See Tr. 470.

motive testing equipment bearing 26 specified different brand names, and stated that "there are so many I can't be expected to answer, or write down a list . . ."

Mr. Donahue, a Commission witness, testified that there are many companies selling automotive testing equipment of a type similar to that sold by Allen.

Mr. Potter, a Commission witness, testified that, in addition to the companies that manufacture oscilloscope equipment, "there are many others that have hand-held [automotive testing] equipment . . . too numerous to mention."³¹

32. Mr. Glendon also testified that Sun probably has thousands of competitors in the sale of automotive testing equipment; and that these competitors include *inter alia* Ford Motor Company, Esso, American Oil Company, Sears Roebuck, Montgomery Ward, and thousands of others.

Mr. McCreery, a Commission witness, testified that Snap-On Tools has 1100-1200 dealers who sell automotive testing equipment to the garage trade.

Mr. Potter testified that Marquette automotive testing equipment is sold to the garage and service station trade by 1500-2000 distributors.

Mr. Malik testified that there are literally thousands of companies who sell automotive testing equipment to the garage trade.³²

33. Mr. Donahue testified that there are about 100 repairmen of automotive testing equipment that have been authorized to repair Allen equipment.

Mr. Potter testified that there are some 50 repair depots authorized by Marquette, in addition to Marquette's 15 factory service centers.

Mr. Malik, of Sun, testified that there are so many companies engaged in repairing automotive testing equipment that a comprehensive survey is impossible.³³

34. The record contains no probative evidence of the volume of retail sales of any other manufacturer of automotive testing equipment. The uncorroborated summaries of sales by Snap-On, Allen and Marquette were admitted only for the limited purpose of showing that Sun is a major manufacturer of automotive testing equipment. In any event, those figures do not evidence the size or relative position of any concern that sells in a market which is

³¹ See Tr. 172, 283-287, 427, 464.

³² See Tr. 149, 164-166, 386, 484, 749-750.

³³ See Tr. 437, 751.

relevant in this case. Sales by those manufacturers are to the wholesale market; the sales of Sun are to the retail market.³⁴ Moreover, the sales figures submitted by Snap-On and Marquette are inadequate to show their size or market position, since they do not include sales of all automotive testing equipment manufactured by the company. Marquette's figures do not even purport to be sales of automotive testing equipment, but only sales of "engine analyzing equipment." Comparisons therefore have dubious probative weight.

Mr. Donahue testified that Allen is the world's leading manufacturer of automotive testing servicing equipment; that no other manufacturer has as complete a line as Allen; that Ford and Lincoln-Mercury have equipped about 90% of their new car dealers with the Allen engine analyzer; and that all of the companies are stronger in one area than another.

Mr. Potter testified that Marquette claims to be the industry's number one in the battery charger line.³⁵

35. The record does not contain any probative evidence showing the degree of concentration in any relevant market. Without evidence of total size of an industry, or the number of concerns and their relative market position, including the position of Sun, in the industry, the degree of concentration cannot be determined. To the extent that any evidence on the subject was adduced, the record strongly suggests a lack of concentration (whatever market is conjectured to be relevant).

36. Similarly, no finding can be made as to Sun's position in any relevant market without evidence of the size of the market.

37. The parties do agree, however, that Sun is engaged in substantial competition with others in the manufacture, distribution, sale and repair of automotive testing equipment.³⁶

Availability of Repair Parts

38. Approximately 90% of the repair parts for Sun automotive testing equipment are available from other sources.

Mr. Glendon testified that it was his understanding that 80% to 90% or 95% of the parts that go into Sun equipment, with the exception of Sun meters, can be purchased from an electrical supply distributor.

³⁴ In this regard, it is noted that complaint counsel took the position that comparative data, relating the wholesale sales to Sun's retail sales, was irrelevant to the case. (Tr. 448, 486.)

³⁵ See Tr. 399-407, 462-463, 489-492; CX 24; Tr. 453, 427, 451, 428-429, 490.

³⁶ Complaint, par. 5; Answer, par. 5.

Mr. McCreery of Snap-On Tools testified that many of the component parts are standard units that can be purchased from any electronic supply company.

Mr. Turner admitted that "there is a good share of parts that can be purchased locally from supply houses."

Mr. Bender admitted that resistors and condensers used in the repair of Sun equipment are standard items.

Mr. Weston testified that approximately 90% of the parts used in the repair of Sun equipment can be secured elsewhere. He testified, for example, that in the SS 60 scope, one of the most sophisticated units of automotive testing equipment made by Sun, only eight of the 284 parts in the unit could not be readily purchased from other sources; and of these eight parts, seven (all except the transformer) could be fabricated if a replacement were necessary.³⁷

39. Parts are available from various other sources, in addition to electronic supply houses:

(a) Some parts are obtained from the manufacturer that supplies Sun with the part.

(b) Parts obtained from other manufacturers of automotive testing equipment can be substituted in Sun equipment.

(c) Parts are obtained through the owner of Sun equipment or by using the letterhead of an owner.

(d) Case parts can be fabricated.³⁸

40. The only parts not generally available from other sources are meters, transformers and two lead terminations. Less than 10% of all repair jobs require the use of these parts. Moreover, defective meters can be repaired and need not be replaced in every instance; there might be a replacement on the market for a transformer; and the unique lead terminations are only two out of several hundred leads used on Sun equipment.³⁹

41. In 1963 Sun reduced its prices on repair parts for its automotive testing equipment by approximately 25%. The purpose of this reduction was to make Sun's prices competitive; that is, to bring them in line with prices available to the public from other suppliers of equivalent parts.⁴⁰ This is also indicative of the competitive market in which Sun finds itself.

³⁷ See Tr. 183, 391, 512, 701, 805; RX 15, 16, 17 for id.; Tr. 805.

³⁸ See Tr. 254, 549, 256-257, 550, 714-715, 805.

³⁹ See Tr. 807, 810-812; cf. Tr. 531, 805, 819.

⁴⁰ See Tr. 760-761.

Necessity For and Availability of Schematics and Pictorials

42. Schematics or pictorials are not always essential in order to repair automotive testing equipment, although they do simplify and expedite such repairs.

Mr. Mayers, a Commission witness, testified that you can make repairs without the use of schematics, "but it is the long way around. . . ."

Mr. Trent, a Commission witness, testified that he has been able to make repairs to Sun equipment without the use of pictorials or schematics, at a cost in time; that he could make the repairs if he got the parts, but it would take longer without the schematics or pictorials.

Mr. McCreery, a Commission witness, testified that schematics were not necessary in order to make repairs to testing equipment, and that the values of components are not necessary.

Although Mr. Turner, a Commission witness, testified that a schematic is "very necessary to know what the different parts are, where they belong, and the capacity of them," he also testified that until the latter part of 1964 he was able to repair Sun equipment without schematics or pictorials.

Mr. Bender, a Commission witness, testified that schematics "make it easier is the main thing." Anyone with time can trace out a print and repair the equipment.⁴¹

43. The lack of requests to other manufacturers for schematics also demonstrates that they are not necessary to repair automotive testing equipment. Mr. McCreery testified that, to the best of his knowledge, Snap-On Tools has never been requested to provide a schematic to an independent repairman, and they evidently have never done so. Mr. Donahue, also a Commission witness, similarly testified that Allen has never had a request for a schematic from a repairman.⁴²

44. The comparable repair guide issued by Sun—which it calls a "pictorial"—contains the information Commission witnesses suggested was necessary to make repairs in that it also contains calibration procedures and voltage measurements and sign waves. Sun's "pictorial" is more detailed and contains more information than an equivalent Marquette "schematic."⁴³

45. Sun "pictorials" can be obtained by any "independent" re-

⁴¹ See Tr. 225, 265, 267, 389-393, 514, 521, 703.

⁴² See Tr. 394, 441.

⁴³ See Finding 23, *supra*; Tr. 206-207, 262-263, 514, 524, 389-390, 439-440, 459, 481, 703; RX 16; Tr. 799, 800; RX 6, 16; Tr. 800-803.

pairman from the owner of the equipment. No witness testified that he was unable to obtain a "pictorial" in this manner.⁴⁴

Effect of Sun's Policy on Independent Repairmen

46. Many of the so-called independent repairmen represent one or more manufacturers of competitive automotive testing equipment as their "authorized service representative."⁴⁵

47. The principal portion of the business of these repairmen comes through jobbers, who sell other brands of automotive testing equipment in direct competition with Sun.

Mr. Trent testified that he obtains his business through approximately 20 distributors of automotive testing equipment who sell their products to garages, service stations, and truck fleets.

Mr. Ury testified that he repairs automotive testing equipment "for the jobbers" and for customers to whom he has sold automotive testing equipment.

Mr. Turner testified that 90% of his business is with jobbers, and that he rents part of his building to an Allen factory representative and does repair work for the customers of that representative.⁴⁶

48. Many of the repairmen testified that they also sell competitive brands of automotive testing equipment themselves.

Mr. Mayers testified that his sales of new automotive testing equipment—principally Allen equipment—comprise 25% of his entire business. He also testified that he takes in Sun equipment as trade-ins on new Allen equipment. The remaining 75% of his business is in repairs.

Mr. Trent testified that he sells equipment on occasion, but that it is not his practice because that would put him in competition with his customers and affect his repair business.

Mr. Shapiro testified that he sells automotive electrical equipment to garages, service stations, automobile dealers, and industrial outfits.

Mr. Ury testified that he sells automotive testing equipment of many different brands.

Mr. Myers testified that he sells Allen and Marquette equipment.⁴⁷

⁴⁴ See Tr. 772.

⁴⁵ The only possible exception, Mr. Shapiro, testified that he repairs numerous makes of automotive testing equipment (Tr. 292) but did not specifically state that he is an "authorized service representative" of those manufacturers. (Tr. 291-293.) Mayers, Tr. 204; Trent, Tr. 252-253; Ury, Tr. 294; Turner, Tr. 507; Scherrer, Tr. 534; Myers, Tr. 541-544; Alpert, Tr. 617-618; Bender, Tr. 690; Foulk, Tr. 710-711.

⁴⁶ See Tr. 252-253, 294, 526, 525.

⁴⁷ See Tr. 214, 222, 206, 279, 291, 310-310A, 565-566.

49. So-called "independent" repairmen do repair Sun automotive testing equipment to an undetermined extent.

Mr. Trent testified that he repairs Sun timing lights and tach-dwell testers.

Mr. Ury testified that other companies engage in repairing Sun automotive testing equipment, that ATECO is the principal one in the New York metropolitan area, and that ATECO has been able to repair all Sun equipment sent to them.

Mr. Myers testified that he repairs some Sun automotive testing equipment.

Mr. Bender testified that he does minor repairs of Sun automotive testing equipment where parts are not required.

Mr. Foulk repairs Sun equipment where it takes a standard industrial part which can be substituted. He has also obtained parts for Sun equipment through the owner of the equipment, and repaired the equipment in that manner.⁴⁸

50. There also appears to be some question whether persons engaged in the repair of automotive testing equipment would solicit repairs of Sun equipment even if they were able to obtain parts and pictorials from Sun, unless they were also able to purchase the parts at a discount.

Mr. Turner, for example, testified that he did not solicit—and in fact turned down—repairs of Sun equipment, even during the period that he was able to get Sun parts, because they could only be purchased by him at list price. Profit in the repair business, according to Mr. Turner, depends upon being able to make a profit on the sale of parts, which he could not make since he bought the parts at retail.

Mr. Ury also testified that he would be interested in repairing Sun equipment only if he could get a discount on the parts and a wiring diagram. The evidence is clear, however, that the unavailability of repair parts and pictorials to nonowners of Sun's automotive testing equipment creates an inconvenience for independent repairmen. Such inconvenience, however, has not been shown by substantial evidence to be materially inhibitive of competition, or injurious thereto.⁴⁹

SUN OWNERS FREE CHOICE

51. Complaint counsel called as witnesses three persons to testify concerning their experiences as owners or users of Sun auto-

⁴⁸ See Tr. 254, 296, 305-306, 546, 692, 718-719, 714-715.

⁴⁹ See Tr. 509, 516-517, 561-562, 303.

motive testing equipment. The testimony of these three witnesses lends no support whatever to the allegation of the complaint that owners are deprived of freedom of choice in the selection of a repair agency, aside from the conceded policy of the respondent, which does not materially encumber free choice.

52. Among the foregoing witnesses Mr. Shirk is the service manager of one division of a Volkswagen dealership in Milwaukee. Mr. Shirk does not own the equipment about which he testified and did not testify on behalf of the owner, his employer. The crux of his testimony is that he has left a machine valued at \$885 "setting against the wall" because it would cost \$60 to have the unit repaired by Sun. But he also testified that he had never tried to have the unit repaired by anyone else.⁵⁰

53. Mr. Besasie, also not an owner of Sun automotive testing equipment at the present time testified that at one time he bought a used Sun motor tester, which included a battery charger unit, and that he sent the battery charger to Sun for repairs. Prior to sending the battery charger to Sun, he called two other concerns who said "they don't care to repair them."⁵¹

54. Mr. Langlois is the only witness called by complaint counsel who testified that he currently owns Sun automotive testing equipment. He testified that an independent repair firm has repaired Sun equipment for him. His testimony was simply that he decided that he wanted to deal with Mr. Turner, and did. There is no testimony that Mr. Langlois has been deprived of a free choice; on the contrary, he exercised his free choice and sent the equipment to Turner. In addition, he has exercised his free choice by repairing Sun equipment himself whenever he can, and in that connection he has purchased numerous repair parts from Sun.⁵²

CONCLUSIONS

The crux of the theory of complaint counsels' case is concisely, clearly, and well stated at pages 33-35 of their reply to respondent's Proposed Findings of Fact, Conclusions of Law and Brief. It is as follows:

The evidence in this record shows that respondent has established a substantial monopoly in the service and repair of Sun brand automotive testing equipment throughout the United States. Respondent's monopoly was established through the imposition of unreasonable trade restraints on both

⁵⁰ See Tr. 675, 669-670, 672, 671.

⁵¹ See Tr. 643-646.

⁵² See Tr. 594-595, 599, 601; RX 8, 9, 10.

independent repairmen engaged in the repair of automotive testing equipment of all types and brands and, in addition, upon owners of Sun brand automotive testing equipment who have been deprived of any choice in selecting a repair facility, and have been forced to send their defective equipment to the respondent for repair. The unreasonable restraints established by the respondent were created by respondent's refusal to sell repair parts and to provide pictorials to independent repairmen. Without respondent's exclusionary practices, independent repairmen would be able to service and repair Sun brand automotive testing equipment and to compete with the respondent in this line of commerce. Owners and users of Sun brand equipment would be free to select a repair facility of their choice on the basis of a competitive market considering cost, service, convenience, etc.

Counsel supporting the complaint believe that the factual and legal issues in the present matter are analogous to those in *Federal Trade Commission v. Motion Picture Advertising Service Co., Inc.*, 334 U.S. 392 (1952). While that case relates to the use of long-term exclusive dealing contracts to restrain competition and impose a monopoly and the present case relates to a refusal to deal, which forecloses competition by independent repairmen and compels owners of Sun brand automotive testing equipment to send their equipment to the respondent for service and repair, the same legal considerations are applicable to both cases. In the cited case the Supreme Court said:

. . . The vice of the exclusive contract in this particular field is in its tendency to restrain competition and to develop a monopoly in violation of the Sherman Act. And when the Sherman Act is involved the crucial fact is the impact of the particular practice on competition not the label that it carries. See *United States v. Masonite Corp.*, 316 U.S. 265, 280, 62 S. Ct. 1070, 1078, 86 L. Ed. 1461.

The Commission found in the present case that respondent's exclusive contracts unreasonably restrain competition and tend to monopoly. Those findings are supported by substantial evidence. This is not a situation where by the nature of the market there is room for newcomers, irrespective of the existing restrictive practices. The number of outlets for the films is quite limited. And due to the exclusive contracts, respondent and the three other major companies have foreclosed to competitors 75% of all available outlets for this business throughout the United States. It is, we think, plain from the Commission's findings that a device which has sewed up a market so tightly for the benefit of a few falls within the prohibitions of the Sherman Act and is therefore an "unfair method of competition" within the meaning of §5 of the Federal Trade Commission Act.

. . . The precise impact of a particular practice on the trade is for the Commission, not the courts, to determine. The point where a method of competition becomes "unfair" within the meaning of the Act will often turn on the exigencies of a particular situation, trade practices, or the practical requirements of the business in question.

The "Unfair methods of competition", which are condemned by §5(a) of the Act, are not confined to those that were illegal at common law or that were condemned by the Sherman Act, 15 U.S.C.A. §§ 1-7, 15 note. *Federal Trade Commission v. Keppel & Bro.*, 291 U.S. 304, 54 S. Ct. 423, 78 L. Ed. 814. Congress advisedly left the concept flexible to be defined with particularity by the myriad of cases from the field of business. *Id.*, 291 U.S. at pages 310-312, 54 S. Ct. at pages 425-426. It is also clear that the Federal Trade Commission Act was designed to supplement and bolster the Sherman Act and the Clayton Act, see *Federal Trade Commission v. Beechnut Co.*, 257 U.S. 441, 453, 42 S. Ct. 150, 154, 66 L. Ed. 307—to stop in their incipiency acts and practices which, when full blown, would violate those Acts, see *Fashion Originators' Guild v. Federal Trade Commission*, 312 U.S. 457, 463, 466, 61 S. Ct. 703, 706, 707, 85 L. Ed. 949, as well as to condemn as 'unfair method of competition' existing violations of them. See *Federal Trade Commission v. Cement Institute*, 333 U.S. 683, 691, 68 S. Ct. 793, 798, 92 L. Ed. 1009.

The difficulty with the foregoing "Conclusion" reached by complaint counsel is they assume to begin with that proof of monopoly power has been established. If this were so, the potentiality of monopolization might possibly result in the imposition of a competitive effect, even from a minor restraint such as inconvenience relating to a small segment of the over-all automotive testing equipment repair market. The evidence adduced with regard to the alleged restraint here is not only barren of proof by implication or otherwise that a monopoly was established by respondent's restraint, but it is also barren of proof that the restraint, if any, standing alone was of such materiality as to justify a conclusion that competitive injury or monopolization could conceivably result therefrom.

The case involves a naked unilateral refusal to sell, as enunciated by Sun's policy, without more. It is not alleged that respondent has conspired or combined with anyone, or acted other than unilaterally, in refusing to sell its parts and accessories to persons other than its customers.

Nor is there any issue concerning any alleged refusal to deal with price cutters. Nor is it alleged that Sun has refused to deal with one member of a class while discriminatorily continuing to engage in business with other members of the class; Sun has simply limited its market to only one class of customer—namely, the users of its equipment.

Further, no issue of monopoly is presented here. Complaint counsel has not even defined a relevant market in which any monopoly might exist.

Whatever relevant market might conceivably be drawn in this

case, there is completely lacking any evidence with respect to monopolization. There is no evidence of the size of any industry, except that there are upwards of 200 manufacturers of automotive testing equipment in the United States and thousands of distributors selling such equipment.⁵³ There is no relevant evidence of the size of any concerns in any industry (except Sun).⁵⁴ There is no evidence of the degree of concentration of any industry. There is no evidence of Sun's position in any industry. The record does not "reveal even the most basic information concerning the structure of the industry." *Rural Gas Service Inc.* 59 F.T.C. 912, 918 (1961); cf. *U.S. v. Charles Pfizer Co., Inc.*, 1965 Trade Cases, par. 71, 445 (E.D. N.Y.).

The allegation of the complaint that Sun is the "dominant" manufacturer of automotive testing equipment is not supported by the evidence. Moreover, the allegation of "dominance" is not an allegation of monopoly power. As pointed out in *Bailey's Bakery, Ltd. v. Continental Baking Company*, 235 F. Supp. 705, 718 (D. Hawaii 1964): "The possession of monopoly power is something other than the status in a market of a dominant firm. The dominant firm may have neither the power to exclude competitors, nor the power to fix prices."

In the instant case, there is no evidence whatever that Sun has the power to exclude competition in any market or to control prices in any market. Indeed, the complaint itself expressly acknowledges that there is "substantial competition" in the manufacture, distribution and sale of automotive testing equipment.⁵⁵

Nor is there any evidence of any intent to monopolize any market. As the Supreme Court said in *Times Picayune Publishing*

⁵³ See Tr. 172, 149. In addition, there are probably thousands of concerns engaged in the repair of automotive testing equipment. Allen Electric alone has approximately 100 authorized repair agencies (Tr. 437), and Marquette has 50 authorized service depots in addition to its own factory service centers (Tr. 479-480). But there is no evidence of the size of any market in terms of dollar volume.

⁵⁴ The sales figures of Allen, Marquette, and Snap-On prove nothing. First, the testimony in respect thereto showed that there is a complete lack of consistency and certainty as to what is or is not automotive testing equipment; in respect to both Snap-On and Marquette the sales figures do not even include sales of all products considered by the company itself to be test equipment (Tr. 339-407, 462-3, 489-492). Marquette's figures do not purport to be their sales of automotive testing equipment, but only sales of "engine analyzing equipment" (CX 24). Secondly, the figures do not show sales in the same market as that in which Sun sells; all three of those companies sell at *wholesale* to distributors whereas Sun sells exclusively at *retail* to the users of the equipment. Thirdly, the amounts of their wholesale sales (at substantial discounts from list) are not related to the amounts of Sun's retail sales (at list) and cannot be compared. Indeed, complaint counsel stated that such comparative data would be irrelevant (Tr. 448, 486). Finally, the sales data is of no relevance except for purposes of comparison with *total* industry sales, and no such comparative data was presented.

⁵⁵ See Complaint, par. 5.

Company v. United States, 345 U.S. 594, 626 (1953): "An insufficient showing of specific intent vitiates this part of the government case A specific intent to destroy competition or build monopoly is essential to guilt for the mere attempt now charged."

Complaint counsel has taken the position that the illegality of Sun's policy can be established by simply proving the refusal to sell and showing that it has some effect on independent repairment. At the prehearing conference, during the discussion of Sun's policy of selling only to owners of its equipment, the following colloquy took place:⁵⁶

HEARING EXAMINER BUTTLE: And this is the only market they are willing to seek insofar as their repair parts are concerned. In other words, you have to have their testing equipment to get the repair parts. Mr. Pollock says that this is perfectly proper. There is nothing illegal about it. And you say it is illegal for them to restrict the market in this respect insofar as that issue is concerned. Is that your position?

Mr. Miller: Because of the effects, yes, sir . . .

The Alleged Effects Have Not Been Proved

Reiterating complaint counsel's position, the crucial factual issues, aside from unproved monopolization, are (1) whether the effect of the policy has been to preclude independent repairmen from repairing Sun's automotive testing equipment, and (2) whether the effect has been to deprive the owners of Sun equipment of a freedom of choice as to repairmen that they wish to utilize.⁵⁷

As to the first issue, complaint counsel has failed to prove its allegation that independent repairmen have been precluded from repairing Sun equipment, and the evidence is directly to the contrary.

Some independent repairmen still repair all types of Sun equipment; others repair some but not all types. Parts needed for the repair of Sun equipment can be and are obtained from various sources: the owner of the equipment can procure the part from Sun for the repairman; some repairmen have obtained parts by using the letterhead of an owner; equivalent parts from other manufacturers of automotive testing equipment can be substituted; parts can be obtained from the source from which Sun procures the part; parts can be obtained from electronic supply houses; and certain parts can be fabricated.⁵⁸

⁵⁶ See Tr. 12-13.

⁵⁷ See Tr. 8-9.

⁵⁸ See Tr. 296, 305-306, 254, 546, 692; Answer, par. 6; RX 8, 9, 10; Tr. 182-184, 254, 257, 391, 512, 536, 549-550, 559-560, 714-715, 804-819.

The record is equally clear that Sun's policy of refusing to distribute its "pictorial" to independent repairmen has not precluded them from repairing Sun equipment. The pictorials can be obtained from or through an owner of Sun equipment. Moreover, Sun equipment can be and is repaired without the pictorials; pictorials are not necessary but simply expedite the tracing of the problem.⁵⁹

In addition, one of the Commission's own witnesses testified that he did not solicit repairs of Sun equipment even when he was purchasing parts from Sun. Repairmen are interested in repairing Sun equipment only if the parts can be purchased from Sun at a discount and only if the parts can be stocked, since without the profit on parts, and considering the time necessary to send for and get the parts, the repairs are not profitable.⁶⁰

In short, the repairman's objection is not inability, but inconvenience. The testimony is that it is possible to repair Sun equipment, but not profitable. Because of Sun's policy, the independent repairman must exert a minimal extra effort to obtain parts for and locate problems in Sun equipment. But this does not demonstrate that Sun's policy is unlawful. Sun is not obligated to change its traditional marketing methods just for the purpose of making it more convenient for its competitors to compete with Sun.

As to the second issue, the owners of Sun equipment are free to select whomever they choose to repair their equipment. There is no dispute that owners of Sun equipment may and do purchase repair parts and accessories from Sun. Sun imposes no requirement that the parts and accessories sold to owners must be installed by Sun personnel, or that any other repair services must be performed by Sun personnel. The owner may install the parts himself or he may have them installed by anyone he chooses.⁶¹

Moreover, as previously observed, independent repairmen can obtain parts for the repair of Sun equipment from various sources, and they can and do repair Sun equipment. Thus, even without availing themselves of the opportunity to purchase parts from Sun, owners can send their equipment to independent repairmen for repair if the repairman will accept the work. Again, however, the problem is not that repairmen are unable to repair

⁵⁹ See Tr. 265, 521, 703, cf. 389. Mr. Bender testified that schematics "make it easier is the main thing" (Tr. 703).

⁶⁰ See Tr. 509, 517, 303, 701, 717-718.

⁶¹ See Answer, par. 6; RX 8, 9, 10; Tr. 10-11, 754.

Sun equipment; they simply "don't care to repair them," since it is less convenient and less profitable to repair Sun equipment if they have to get the parts from another source than Sun. But this does not establish that owners are deprived of freedom of choice.⁶²

The position taken by complaint counsel is that Sun should be deprived of its right to sell to whomever it chooses so that independent repairmen may have a right to buy from whomever they choose; that Sun should be deprived of its freedom of choice as to the customers to whom it will sell parts so that a customer can have a freedom of choice as to the person from whom it will buy parts.

Complaint counsel's position ignores the fact that a lawful activity is not made unlawful merely because its effect is to make competition inconvenient or more difficult. Nor does such an effect convert the exercise of a fundamental right—the right to select one's customers, the right to determine one's method of distribution—into an unfair method of competition.

It would indeed be a revolutionary concept if, as complaint counsel suggest, a private businessman loses his right to select his own customers merely because some potential customer is inconvenienced or otherwise "injured" by the refusal to sell. For example, no doubt an automobile dealer selling Ramblers might be "injured"—in the sense of losing potential profit—if he were denied a Chevrolet franchise by General Motors. But it certainly does not follow that GM's denial to him of a Chevrolet franchise is unlawful.

As the Commission stated in *Doubleday & Co.*, 50 F.T.C. 263, 266 (1953):

The question for decision is whether this competitive situation results from practices which are violative of law. Competitive disadvantage, in and of itself, does not necessarily create illegality. The fact that the retail bookseller has lost sales to a book club or cannot successfully compete with a book club for the patronage of certain types of readers is of no legal consequence unless this result springs from some improper and unfair act on the part of respondent. "The mere fact that a given method of competition makes it difficult for competitors to do business successfully is not of itself sufficient to brand the method of competition as unlawful and unfair." *Federal Trade Commission v. Paramount Famous-Laskey Corp.*, (C.A. 2 1932), 57 F.2d 152, 157.

This principle is particularly appropriate when the allegedly unfair act consists merely of declining to sell to one's competitors.

⁶² See Tr. 646.

A decision directly in point is *Chamber of Commerce of Minneapolis v. F.T.C.*, 13 F.2d 673 (8th Cir. 1926).

That case involved the refusal of the Chamber of Commerce to furnish its market quotations to competitors. The court held that the Commission's order, which required the furnishing of market quotations to the competitors, was invalid because the refusal was not shown to be an unfair method of competition.⁶³

The court went on to say: ⁶⁴

It would be a strange situation, logically or legally, where one could be compelled to furnish its own property to a competitor to be used as a major weapon of its own destruction Competition is by no means legally free from proper restraint, and it is beyond all reason to require anyone to furnish the means of his own destruction to another who is bent upon accomplishing such destruction.

Similarly, in *F.T.C. v. Sinclair Refining Co.*, 261 U.S. 463, 475-476 (1923), the Supreme Court stated:

The powers of the Commission are limited by the statutes. It has no general authority to compel competition to a common level, to interfere with ordinary business methods or to prescribe arbitrary standards for those engaged in the conflict for advantage called competition. The great purpose of both statutes was to advance public interest by securing fair opportunity for the play of the contending forces ordinarily engendered by an honest desire for gain. And to this end it is essential that those who adventure their time, skill and capital should have large freedom of action in the conduct of their own affairs.

Complaint counsel's "public utility" concept⁶⁵ of free enterprise as applied to the facts of this case, has no support in law. "We have not yet reached the stage where the selection of a trader's customers is made for him by the government." (either directly or indirectly), *Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co.*, 227 Fed. 46, 48 (2d Cir. 1915),⁶⁶ unless the exercised business policy at issue is (1) reflective of an illegal monopolistic tendency, (2) discriminatory and injuriously affects competition, (3) inherently unconscionable or (4) otherwise violative of public policy. See also *F.T.C. v. Raymond Brothers-Clark Co.*, 263

⁶³ See p. 687.

⁶⁴ See p. 688.

⁶⁵ Requiring the doing of business in an enlarged or universal market.

⁶⁶ In that case, the defendant refused to sell its products to retailers or consumers, and sold exclusively to wholesalers. The court said (p. 47): "There is nothing unusual about such a course of business, and certainly it is no offense against common law, statutes, public policy, or good morals for a trader to confine his sales to persons who will buy from him in large quantities." Sun, by comparison, refuses to sell to wholesalers and retailers and sells exclusively to consumers. This is obviously no more offensive than the policy approved in the *Cream of Wheat* case.

U.S. 565 (1924); *Timken Roller Bearing Company v. F.T.C.*, 299 F.2d 839 (6th Cir. 1962), *cert. denied*, 371 U.S. 861 (1962); *Nai-feh v. Ronson Art Metal Works*, 218 F.2d 202 (10th Cir. 1954); *Nelson Radio & Supply Co. v. Motorola*, 200 F.2d 911 (5th Cir. 1952); *Chicago Seating Co. v. S. Karpen & Bros.*, 177 F.2d 863, 866 (7th Cir. 1949); *Brosious v. Pepsi-Cola Co.*, 155 F.2d 99 (3d Cir. 1946); *Mennen Company v. F.T.C.* 288 Fed. 744, 780 (2d Cir. 1923), *cert. denied*, 262 U.S. 759 (1923); *Journal of Commerce Publishing Co. v. Tribune Co.*, 286 Fed. 111 (7th Cir. 1922).

Numerous cases have recognized the right of a private business to select its customers without governmental interference.

The right to select one's customers existed at common law,⁶⁷ is recognized by statute,⁶⁸ and is limited only if the selection is concerted or monopolistic.

In *Times-Picayune Publishing Company v. United States*, 345 U.S. 594, 625 (1953), the Supreme Court stated:

Refusals to sell, without more, do not violate the law. Though group boycotts, or concerted refusals to deal, clearly run afoul of § 1 . . . different criteria have long applied to qualify the rights of an individual seller.

And in *South End Oil Company v. Texaco, Inc.*, 237 F. Supp. 650, 653 (N.D. Ill. 1965), the court said:

In order to maintain a treble damage action for refusing to deal, plaintiff must show either (1) that the refusal is accompanied by unlawful conduct or agreement or (2) that the refusal is designed to create or maintain a monopoly. Absent such a showing, a manufacturer is free to "exercise his own independent discretion as to parties with whom he will deal" and "may announce in advance the circumstances under which he will refuse to sell".

Sun's marketing philosophy of dealing directly with the user is motivated in part, by Sun's desire to protect its reputation for quality, and in part to protect its limited market. Sun's reputation suffers when Sun equipment is repaired by persons unfamiliar with the equipment or unqualified to repair due to lack of proper

⁶⁷ *Green v. Victor Talking Mach. Co.*, 24 F.2d 378 (2d Cir. 1928). Cf. *Dart Drug Corporation v. Parke, Davis & Company*, 221 F. Supp. 948, 949 (D. D.C. 1963) ("At common law any manufacturer or trader had a right to deal or refuse to deal with anyone that he chose, unless indeed he was engaged in a public calling . . ."); *Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co.*, 227 Fed. 46, 49 (2d Cir. 1915) ("Before the Sherman Act it was the law that a trader might reject the offer of a proposing buyer for any reason that appealed to him . . . Neither the Sherman Act, nor any decision of the Supreme Court construing the same, nor the Clayton Act, has changed the law in this particular.").

⁶⁸ Section 2(a) of the Clayton Act (15 U.S.C. 13(a)) states: "[N]othing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade."

equipment or training, or unconcerned with the reputation of the company.⁶⁹

A somewhat analogous problem was presented in *Pick Manufacturing Co. v. General Motors Corporation*, 80 F.2d 641 (7th Cir. 1935), *aff'd*, 299 U.S. 3 (1936). There the court held that a requirement that GM dealers use "genuine" GM repair parts exclusively did not violate section 3 of the Clayton Act. The court held that such a requirement is "entirely appropriate and legitimate . . . and is proper and reasonable in the furtherance and protection of its business." Defective and insufficient repairs, causing unsatisfactory operation, result in blame to the manufacturer and loss of sales. "The preservation of the good will of the public is directly involved."⁷⁰

Refusals to sell in order to protect the quality reputation of the product have also been expressly approved in *Coca-Cola Co. v. J. G. Butler & Sons*, 229 Fed. 224 (E.D. Ark. 1916); *Brosious v. Pepsi-Cola Co.*, 155 F.2d 99 (3d Cir. 1946); and *G. D. Searle & Co. v. Institutional Drug Distributors*, 151 F. Supp. 715 (S.D. Cal. 1957).

Furthermore, according to the complaint,⁷¹ independent repairmen are engaged in "substantial competition" with Sun. Thus, under complaint counsel's "public utility" theory, Sun would be required to sell to its competitors the materials for competing against Sun. Through such sales, Sun would be "cutting its own throat."⁷² As the court said in *Chamber of Commerce of Minneapolis v. F.T.C.*, 13 F.2d 673, 688 (8th Cir. 1926): "It would be a strange situation, logically and legally, where one would be compelled to furnish its own property to a competitor to be used as a major weapon of its own destruction."

There is also substantial evidence in this case to the effect that the so-called "independent repairman" is not always independent. Witnesses testifying herein, engaged in the business of repairing automotive testing equipment, indicated they were the "authorized service representative" for one or more manufacturers of products competitive with Sun products. Furthermore, the principal portion of the business of these repairmen comes through jobbers who sell automotive testing equipment in competition with

⁶⁹ See Tr. 182, 753, 756.

⁷⁰ See also the recent decision by the Commission in *Carvel Corporation*, Docket 8574 (July 19, 1965). A requirement in a franchise agreement prohibiting the sale of non-Carvel products was held to be ancillary to Carvel's purpose of protecting the company's good will and trademark image.

⁷¹ Complaint, par. 5.

⁷² See Tr. 180.

Sun. In addition, most of the witnesses also sell competitive testing equipment themselves. Thus, the loyalty of these repairmen is to manufacturers other than Sun; their interest is in promoting the sale of testing equipment manufactured by others. In the circumstances, it is scarcely surprising that Sun does not choose to have its equipment repaired by the agents and representatives of such other manufacturers.⁷³

The reasonableness of such a position has been pointed out in a number of cases. In *Deltown Foods, Inc. v. Tropicana Products, Inc.*, 219 F. Supp. 887 (S.D. N.Y. 1963), defendants discontinued using plaintiff as a distributor for defendant's orange juice when plaintiff began packaging and selling its own brand of orange juice. In upholding the refusal to sell, the court pointed out "the damage plaintiffs could do to defendants' product by treating it as second best," and accepted defendants' argument that it would be "business suicide" if they continued to sell their orange juice to a distributor who had become a competitor. See, also, *e.g.*, *Blue Bell Co. v. Frontier Refining Co.*, 213 F.2d 354, 358-359 (10th Cir. 1954) ("a mere declination to sell to competitors or to supply retail outlets in a competitive market is not illegal"); *Journal of Commerce Pub. Co. v. Tribune Co.*, 286 Fed. 111, 112 (7th Cir. 1922); *Andrew Jergens Co. v. Woodbury, Inc.*, 271 Fed. 43, 44 (D. Del. 1920); *Camfield Mfg. Co. v. McGraw Electric Co.*, 70 F. Supp. 477, 481 (D. Del. 1947).

With regard to the charge that Sun has refused "to furnish to persons and firms engaged in the repair of automotive testing equipment diagrams, schematics or similar documents showing the make-up of its automotive testing equipment," the evidence is that Sun does not sell any such "diagrams, schematics or similar documents" to anyone. Further more, Sun does not give its schematics to anyone; these consist of manufacturing drawings which Sun regards as highly confidential. Furthermore, Sun does distribute its so-called "pictorials" (which are prepared for use by Sun repair branches) to owners of Sun equipment upon request and without charge. Such a "pictorial" contains a detailed wiring diagram and guide for repair of the particular item of equipment. The illegality of this policy is not apparent.⁷⁴

As heretofore stated, although complaint counsel urge that the factual and legal issues in this case are analogous to "the use of

⁷³ See Tr. 204, 252, 294, 507, 534, 542-544, 617-618, 690, 710-711, 253, 294, 526, 214, 279, 291, 310-310A, 565-566.

⁷⁴ See Complaint, par. 6; Tr. 763-768, 770-771; Answer, par. 6; Tr. 772.

long term exclusive dealing contracts to restrain competition and impose a monopoly," they overlook the fact that the acts and policies of the respondent are unilateral and that evidence of monopoly, probable monopolization from the alleged restraint or even an intent to monopolize, is absent. It is therefore not apparent to the hearing examiner that the facts in the case of *Federal Trade Commission v. Motion Picture Advertising Service Co., Inc.*, 334 U.S. 392 (1952) are analogous as complaint counsel contend.

SUMMARY CONCLUSIONS

1. Sun Electric Corporation is engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act.

2. Counsel supporting the complaint have the burden of proving the allegations of the complaint. (Rules of Practice, section 3.14(a).) The burden has not been met.

3. No monopoly or attempt to monopolize any market has been proved. The record does not reveal even the most basic information concerning the structure of any relevant market. Respondent is engaged in substantial competition with others in the manufacture, distribution and sale of automotive testing equipment and, to the extent that Sun repairs automotive testing equipment, is engaged in competition with others in the repair thereof.

4. Respondent's refusal to sell repair parts and supplies, and to furnish "pictorials," to persons other than owners of respondent's equipment, according to the evidence, is unilateral in nature and without any established intent to monopolize any market.

5. Absent proof of conspiracy or monopolization, respondent has the right to select the class of customers to whom it will sell, and to refuse to sell to persons who are not owners of respondent's equipment. *F.T.C. v. Raymond Brothers-Clark Co.*, 263 U.S. 565 (1924); *Timken Roller Bearing Company v. F.T.C.* 299 F.2d 839 (6th Cir. 1962), *cert. denied*, 371 U.S. 816 (1962); *Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co.*, 227 Fed. 46 (2d Cir. 1915); *South End Oil Company v. Texaco, Inc.*, 237 F. Supp. 650 (N.D. Ill. 1965); *Best Advertising Corporation v. Illinois Bell Telephone Company*, 229 F. Supp. 275 (S.D. Ill. 1964), *aff'd*, 339 F.2d 1009 (7th Cir. 1965).

6. Subject to the foregoing, the effect on competitors of the exercise of this right by respondent does not create illegality. *Doubladay & Co.*, 50 F.T.C. 263 (1953); *Chamber of Commerce of Minneapolis v. F.T.C.*, 13 F.2d 673 (8th Cir. 1926).

7. Respondent, under the facts evidenced in this case, is not re-

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quired to further justify its refusal to sell to persons other than the owners of equipment. *Journal of Commerce Pub. Co. v. Tribune Co.*, 286 Fed. 111 (7th Cir. (1922)); *Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co.*, 227 Fed. 46 (2d Cir. 1915).

8. Moreover, as evidenced herein, Sun's refusal is based in part on recognized reasonable grounds, *i.e.*, to protect the quality reputation of its products, and to avoid "cutting its own throat" competitively. *Pick Mfg. Co. v. General Motors Corp.*, 80 F.2d 641 (7th Cir. 1935), *aff'd*, 299 U.S. 3 (1936); *Deltown Foods, Inc. v. Tropicana Products, Inc.*, 219 F. Supp. 887 (S.D. N.Y. 1963).

9. Respondent's policy, as evidenced herein, with respect to the distribution of schematics and pictorials is not an unfair trade practice. Respondent is not required to disclose its trade secrets contained in its schematics, or to furnish pictorials to its competitors to guide them in competing with respondent.

10. Respondent's traditional method of marketing, as evidenced herein, is not an unfair method of competition, or an unfair act or practice in violation of section 5 of the Federal Trade Commission Act. Accordingly, it is

ORDER

Ordered, That the complaint is herein and hereby dismissed.

ORDER DISMISSING COMPLAINT

This matter is before the Commission on the appeal of counsel supporting the complaint from the hearing examiner's initial decision dismissing the complaint.

The complaint charges respondent, a manufacturer of automotive testing equipment, with refusing to sell parts and accessories for such equipment to persons engaged in the business of repairing automotive testing equipment and with refusing to furnish to such persons diagrams, schematics or similar documents showing the make-up of its equipment, and further charges that the effect of this practice has been to injure the ability of independent repairmen to compete with respondent in repairing respondent's automotive testing equipment and generally to injure, suppress or eliminate actual and potential competition in the repair of such equipment. The hearing examiner has filed an initial decision dismissing the complaint, finding that the allegations concerning the effects of respondent's refusal to deal have not been sustained by the evidence, and further finding that the evidence does not estab-

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lish that respondent has obtained, or attempted to obtain, a monopoly in any market.

The Commission has reviewed the evidence and considered the arguments of the parties and has concluded that the hearing examiner's findings and conclusions of fact are correct and that dismissal of the complaint is proper. The Commission, however, does not consider the initial decision appropriate in all respects to dispose of this matter and has determined that it should be modified by striking therefrom certain conclusions of law.

It is ordered, That the appeal of counsel supporting the complaint be, and it hereby is, denied.

It is further ordered, That the initial decision be modified by striking therefrom conclusions of law beginning on page 594 with the words "The position taken by complaint counsel" and ending on page 600 with the words "section 5 of the Federal Trade Commission Act."

It is further ordered, That the initial decision, as modified by this order, be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That the complaint be, and it hereby is, dismissed.

Commissioner MacIntyre not concurring.
