

Complaint

94 F.T.C.

IN THE MATTER OF
BRUNSWICK CORPORATION, ET AL.

ORDER ON REMAND, OPINION, ETC., IN REGARD TO ALLEGED
VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT
AND SEC. 7 OF THE CLAYTON ACT

Docket 9028. Complaint April 15, 1975—Order, Nov. 9, 1979*

This order remands the matter to the administrative law judge for additional evidence on the question of formulating an appropriate remedy in the case.

Appearances

For the Commission: *Hugh F. Bangasser, Jeffrey F. Shaw and Geoffrey S. Walker.*

For the respondents: *Patrick W. O'Brien and Kenneth J. Jureck, Mayer, Brown & Platt, Chicago, Ill., Arthur S. Katayama, Mori & Katayama, Los Angeles, Calif. and James H. Wehrenberg, Skokie, Ill.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Brunswick Corporation, Yamaha Motor Co., Ltd., and Mariner Corp., corporations subject to the jurisdiction of the Commission, have violated and are violating the provisions of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, and Section 7 of the Clayton Act, 15 U.S.C. 18, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint and states its charges as follows:

I

RESPONDENTS

A. Brunswick Corporation

1. Respondent, Brunswick Corporation ("Brunswick"), is a corporation organized, existing and doing business under the laws of the State of Delaware with its principal office and place of business at Brunswick Center, One Brunswick Plaza, Skokie, Illinois.

2. Respondent is a diversified manufacturer and marketer of medical products and numerous recreational items, including outboard and stern drive motors, snowmobiles and bowling equipment. For fiscal

* Complaint reported as amended by Commission orders dated March 19 and May 6, 1976.

year 1973, Brunswick's net sales exceeded \$683 million. Net income was \$39 million, and assets totaled \$550 million in that year. [2]

3. In 1961, Brunswick acquired Kiekhaefer Corporation, now the Mercury Marine Division ("Mercury"), which was and is principally engaged in the production and marketing of marine engines, including the "Mercury" line of outboard motors. Mercury's dollar and unit volume of outboard motor sales in 1973 exceeded 130,000 units and \$80 million, respectively. Mercury is the second largest outboard motor manufacturer in the United States.

4. Mercury manufactures and sells in the United States and sells throughout the world outboard motors ranging from 4 to 150 horsepower.

5. At all times relevant herein, Brunswick, through Mercury, has sold and shipped outboard motors in interstate commerce and engaged in "commerce" within the meaning of the Clayton Act, as amended, and has been a corporation whose business has been in or has affected "commerce" within the meaning of the Federal Trade Commission Act, as amended.

B. Yamaha Motor Co., Ltd.

6. Yamaha Motor Co., Ltd. ("Yamaha") is a corporation duly organized and existing under the laws of Japan, having its principal place of business in Japan. Yamaha is a substantial marketer of recreational equipment throughout the world. Yamaha's sales in 1972 were \$660 million. At least 64% of Yamaha's output is exported.

7. Yamaha produced outboard motors at Yamaha facilities until 1970, when it acquired a controlling interest in Sanshin Kogyo Co. ("Sanshin"), a Japanese company. At that time it transferred the Yamaha outboard motor manufacturing facilities to Sanshin, which currently produces all outboard motors for sale under the "Yamaha" label. Just prior to the joint venture with Brunswick, Sanshin had developed 8 horsepower models up to 25 horsepower and had announced a new 50 horsepower engine. In the year ending June 1971, Sanshin produced approximately 75,000 outboard motors for Yamaha, of which 25,000 were exported.

8. Between 1967 and 1969, through the Yamaha International Corporation, a corporation organized, existing and doing business under the laws of the United States, and a subsidiary of Nippon Gakki Co., Ltd., the parent company of Yamaha, Yamaha exported a small number of low horsepower outboard motors into the United States. In 1971-72, Yamaha sold a limited number of low horsepower outboard motors to Sears, Roebuck and Co. under the "Sears" label. [3]

9. Yamaha distributes motorcycles and snowmobiles in the United

States through the Yamaha International Corporation. Both products were introduced to the United States market with only a small number of low horsepower rated models. Subsequent to entry, Yamaha has expanded the number of available models and has developed a network of motorcycles and snowmobile dealers to carry these products. The dealership service personnel are capable of servicing the basic power units of the Yamaha motorcycle, snowmobile and outboard motor.

10. Yamaha competes with Mercury for the sale of outboard motors in several geographic markets other than the United States, including Japan and Europe. In 1972, Yamaha accounted for 80% of all outboard motors sold in Japan. It also claims to be the second largest marketer of low horsepower outboard motors in Europe.

11. Yamaha was one of the most likely potential entrants into the United States market for outboard motors prior to entering into the joint venture agreement.

12. At all times relevant herein, Yamaha has been engaged in commerce as "commerce" is defined in the Clayton Act, as amended, and has been a corporation whose business has been in or has affected "commerce" within the meaning of the Federal Trade Commission Act, as amended, by virtue of, among other things, (a) shipping and selling outboard motors, motorcycles and snowmobiles to and within the United States through the affiliate corporation; (b) negotiating terms of the joint venture agreement within the United States; and (c) receiving partial fulfillment of the terms of the agreement within the United States.

C. Mariner Corp.

13. Respondent Mariner Corp. ("Mariner") is a corporation organized, existing and doing business under the laws of the State of Delaware with its principal office and place of business at 1939 Pioneer Road, Fond du Lac, Wisconsin. Between 1972 and 1974, Mariner operated under the corporate name of Mercury Marine International Co.

14. At all times relevant herein, Mariner Corp. has been engaged in commerce as "commerce" is defined in the Clayton Act, as amended, and has been a corporation whose business has been in or has affected "commerce" within the meaning of the Federal Trade Commission Act, as amended. [4]

II

THE TRANSACTION

15. On November 21, 1972, Brunswick entered into an agreement to

purchase, for approximately \$1.4 million, 62,000 shares, amounting to 38%, of newly issued stock of Sanshin. The 62,000 shares were transferred to Mariner which was formed for this purpose.

16. Pursuant to the agreement, Sanshin would continue to manufacture outboard motors for sale to Yamaha for exclusive distribution in Japan; to export and sell to Mariner for exclusive distribution in North America and Australia; and to sell the balance to a proposed equally-owned joint venture sales company for distribution in the rest of the world under the "Mariner" trademark and in those countries mutually agreed upon, under the "Yamaha" trademark. Yamaha and Mercury intended eventually to increase the number of models Sanshin offered to include an outboard motor in excess of 140 horsepower.

17. The agreement provided that Yamaha would not manufacture any marine engines the same as those manufactured by Mercury.

18. Mercury and Yamaha, by means of licensing arrangements, also agreed to exchange patents and technological information relating to marine engines, other two-cycle engines and diecasting and low pressure casting techniques.

19. The licensing arrangements include, among others, the following provisions:

2.1 (a) Mercury hereby grants to Yamaha a non-exclusive, world-wide license to use the Mercury Technical Information to make, use and sell goods of all kinds and descriptions except those which are competitive to the goods manufactured by Mercury as of the date of the execution of this Agreement.

(b) Yamaha hereby grants to Mercury a non-exclusive, world-wide license to use the Yamaha Technical Information to make, use and sell goods of all kinds and descriptions except those which are competitive to the goods manufactured by Yamaha as of the date of the execution of this Agreement. [5]

* * * * *

6.7 Because of the difficulty of identifying when a product incorporates part of the Yamaha Technical Information, in order to induce Yamaha to enter into this Agreement in its capacity as licensor, and because it presently has no intention of producing such goods, Mercury agrees not to manufacture any product competitive to those manufactured by Yamaha at the date of the execution of this agreement, notwithstanding the foregoing, Mercury may manufacture snowmobiles.

20. The agreement further provided that it would be in effect for a period of ten years unless notice of termination was given by either party to the other three years prior to the expiration of the initial term or any extension thereof.

III

TRADE AND COMMERCE

21. The relevant geographic market involved in this complaint is the United States as a whole.

22. Outboard motors is the relevant product market. Outboard motors over and under 20 horsepower are the relevant submarkets.

23. The United States outboard motor industry is significant. In 1973, 585,000 outboard motors were sold to consumers with a retail value of approximately \$501.3 million.

24. The outboard motor industry is highly concentrated, with the top two firms accounting for approximately 71% of the total shipments in 1971, 1972 and 1973, by units sold. The low and high horsepower submarkets account for 62% and 38% of the total unit sales respectively. Concentration within both submarkets is excessive. The top two firms account for approximately 63% of the low horsepower submarket and 89% of the high horsepower submarket.

25. Mercury is the second largest manufacturer of outboard motors in the United States. In 1972, it accounted for approximately 21% of total unit sales in the United States, 16% of the low horsepower submarket, and 30% of the high horsepower submarket. [6]

26. Historically, the outboard motor industry has been marked by a lack of significant entry and a declining number of firms. Since 1950, three different firms have occupied the third-ranked position in the industry. Two of these firms have ceased production of outboard motors. The barriers to entry into this industry are significant and have remained so over time.

IV

EFFECTS OF JOINT VENTURE

27. The effects of the joint venture agreement may be substantially to lessen competition or to tend to create a monopoly in the manufacture and/or marketing of outboard motors, components, parts and accessories to consumers throughout the United States, in violation of Section 7 of the Clayton Act, 15 U.S.C. 18, and the Federal Trade Commission Act, 15 U.S.C. 45, in the following ways among others:

(a) Substantial potential competition between Brunswick, Yamaha, and Mariner has been, or may be eliminated;

(b) The combination of Yamaha with Brunswick and Mariner may tend to:

- i. increase barriers to entry of new and effective competition in the relevant market within the United States;
- ii. increase previously existing high levels of concentration in the United States; and
- iii. precipitate additional acquisitions or mergers in the United States between other outboard marine engine manufacturers and marketers which effect may be to eliminate actual and potential competition; [7]

(c) Manufacturers and marketers of outboard marine engines may have been denied the benefits of free and open competition to their detriment and to the detriment of the general purchasing public and ultimate consumer.

V

VIOLATION

28. The joint venture agreement, by eliminating Yamaha as one of a few likely entrants into the United States outboard motor market, constitutes a violation of Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act.

29. The joint venture agreement constitutes an unreasonable agreement in restraint of trade in violation of Section 5 of the Federal Trade Commission Act.

INITIAL DECISION BY JAMES P. TIMONY, ADMINISTRATIVE LAW
JUDGE

MAY 2, 1977

PRELIMINARY STATEMENT

By a Federal Trade Commission complaint issued on April 15, 1975, respondents Brunswick Corporation ("Brunswick"), Yamaha Motor Co., Ltd. ("Yamaha"), (a Japanese company), and Brunswick's wholly-owned subsidiary Mariner Corp. ("Mariner") [2] are charged with violation of Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, by a transaction involving a joint venture agreement.

The complaint alleges that, pursuant to the agreement, Brunswick and Yamaha divided controlling interest in another Japanese company, Sanshin Kogyo Co., Ltd. ("Sanshin"), which would manufacture outboard motors in Japan under the "Mariner" trademark for distribution in the United States, among other places, by Mariner; and Yamaha agreed not to sell "Yamaha" trademark outboard motors in

those places reserved for Mariner. The complaint further alleges that the agreement provides, among other things, that Yamaha would not manufacture any marine engine the same as those manufactured by Mercury and that licensing arrangements pursuant to the joint venture agreement provide that Mercury agrees not to manufacture any product competitive with those manufactured by Yamaha except snowmobiles.

The complaint alleges that the relevant product market is outboard motors, and relevant submarkets are outboard motors over and under 20 horsepower.

The complaint alleges that the effects of the joint venture may be substantially to lessen competition or to tend to create a monopoly in the manufacturing and/or marketing of outboard motors in the United States in the following ways:

(a) Substantial potential competition between Brunswick, Yamaha and Mariner may be eliminated;

(b) The combination of Yamaha with Brunswick and Mariner may tend to:

i. increase barriers to entry of new effective competition in the relevant market in the United States;

ii. increase previously existing high levels of concentration in the United States; and

iii. precipitate additional acquisitions or mergers in the United States between other outboard marine engine manufacturers and marketers, which effect may be to eliminate actual and potential competition;

(c) Manufacturers and marketers of outboard marine engines may have been denied the benefits of free and open competition to their detriment and to the detriment of the general purchasing public and ultimate consumer. [3]

By answers filed on June 10, 1975, and July 22, 1975, respondents Brunswick and Mariner and respondent Yamaha admitted in part and denied in part the various allegations of the complaint; Yamaha also denied personal jurisdiction and moved for a determination of the jurisdictional issue.

By order dated March 19, 1976, the complaint was amended to substitute Mariner Corp. as a respondent in the place of Mariner International Co. By an order dated April 9, 1976, the Commission remanded to the administrative law judge a certified motion to amend the complaint by adding "affecting" commerce language to the jurisdictional allegations of the complaint. By order dated April 12, 1976, I was substituted as administrative law judge because of the heavy workload of the former administrative law judge. By order

dated May 6, 1976, the complaint was amended to include "affecting" commerce language in the jurisdictional allegations. Respondent Yamaha thereafter withdrew its motion to dismiss based on jurisdictional issues. Numerous discovery pleadings were filed, the record showing 49 orders entered in this docket.

Hearings started on October 5, 1976, in Washington, D.C., and were resumed in Honolulu, Hawaii, upon the unopposed motion by respondent Yamaha for the testimony of officers of Yamaha who came from Japan for the hearings. The defense case started in Honolulu and concluded on December 21, 1976, in Washington, D.C., where the record was closed. The record consists of 866 pages of testimony and 165 exhibits, many multi-paged. On February 7, 1977, the parties filed proposed findings and *in camera* proposed findings. On February 22, 1977, the parties filed reply briefs.

This proceeding is before me upon the amended complaint, answers, testimony and other evidence, proposed findings of fact and conclusions and briefs filed by complaint counsel and counsel for respondents. These submissions by the parties have been given careful consideration and, to the extent not adopted by this decision in the form proposed or in substance, are rejected as not supported by the record or as immaterial. Any motions not heretofore or herein specifically ruled upon, either directly or by the necessary effect of the conclusions in this decision, are hereby denied. The findings of fact made herein are based on a review of the entire record and upon a consideration of the demeanor of the witnesses who gave testimony in this proceeding. [4]

The findings of fact include reference to the principal supporting evidentiary items in the record. Such references are intended to serve as convenient guides to the testimony and exhibits supporting the findings of fact, but do not necessarily represent complete summaries of the evidence considered in arriving at such findings. The following abbreviations have been used:

- CX — Commission's Exhibit, followed by number of exhibit being referenced.
- BX — Respondents Brunswick and Mariner's Exhibit, followed by number of exhibit being referenced.
- YX — Respondent Yamaha's Exhibit, followed by letter of exhibit being referenced.
- Tr. — Transcript, preceded by the name of the witness, followed by the page number.

Brunswick Admissions - Answer of Brunswick Corporation to
Complaint Counsel's Initial Request for Admissions - 9/18/75.

**Yamaha Admissions - Yamaha Answers to Request for Admissions
9/10/75.**

Stipulation No. 2 - Dated 11/3/76.

FINDINGS OF FACT

I. Identity and Business of Respondents

A. Brunswick Corporation

1. Brunswick Corporation ("Brunswick") is a corporation organized, existing and doing business under the laws of the State of Delaware with its principal office and place of business at Brunswick Center, One Brunswick Plaza, Skokie, Illinois. (Complaint, ¶ 1; Brunswick Amended Ans., ¶ 1.) [5]

2. Brunswick is a diversified manufacturer and marketer of medical products and numerous recreational items, including outboard and stern drive motors, snowmobiles, and bowling equipment. For fiscal year 1973, Brunswick's net sales exceeded \$683 million. Net income was \$39 million, and assets totalled \$550 million in that year. (Complaint, ¶ 2; Brunswick Amended Ans., ¶ 2.)

3. In 1961, Brunswick acquired Kiekhaefer Corporation, now the Mercury Marine Division ("Mercury"),¹ which was and is principally engaged in the production and marketing of marine engines, including the "Mercury" line of outboard motors. Mercury manufactures and sells outboard motors, stern drives and inboard marine engines and snowmobiles. (Complaint, ¶ 3; Brunswick Amended Ans., ¶ 3; Anderegg, Tr. 186.)

4. In 1972, Brunswick, through its Mercury division sold approximately 114,000 outboard motors in the United States. (Brunswick Amended Ans., ¶ 25.) Mercury's dollar value and unit volume of outboard motor sales in 1973 exceeded \$80 million and 130,000 units respectively. Mercury is the second largest outboard motor manufacturer in the United States. (Complaint, ¶ 3; Brunswick Amended Ans., ¶¶ 3 and 25.)

5. Mercury manufactures and sells in the United States and sells throughout the world outboard motors ranging from 4 to 175 horsepower. (Complaint, ¶ 4; Brunswick Amended Ans., ¶ 4; BX 26.) At least from 1971 to date, Mercury has sold outboard motors in Canada, Australia, Europe and Japan. (CX 97D-I, 101A-B.)

6. In the course and conduct of its business, Brunswick, at all times relevant to the complaint, has sold and shipped outboard motors in

¹ "Mercury" as used hereinafter in this decision means respondent Brunswick.

interstate commerce, has engaged in interstate commerce and has been a corporation whose business has been in or has affected interstate commerce. (Complaint, ¶ 5; Brunswick Amended Ans., ¶ 5.)

B. Mariner Corporation

7. Respondent Mariner Corporation ("Mariner") is a corporation organized, existing and doing business under the laws of the State of Delaware with its principal office and place of business at 1939 Pioneer Road, Fond du Lac, Wisconsin. (Complaint, ¶ 13; Brunswick Amended Ans., ¶ 13; Anderegg, Tr. 190.) [6]

8. Mariner is a wholly-owned subsidiary of Brunswick. (Brunswick Amended Ans., ¶ 15; Anderegg, Tr. 192.) Mariner was formed to become a joint venture partner with Yamaha Motor Company, Ltd. and a world-wide distribution organization for marketing the joint venture products known as "Mariner" outboard motors. (Brunswick Response to Complaint Counsel's Discovery Request, 12/8/75, ¶ 4(c); Anderegg, Tr. 191.) Mariner was formed on December 27, 1972. (*Ibid.*)

9. Between December 27, 1972, and May 15, 1974, Mariner operated under the corporate name of Mercury Marine International Company. (Brunswick Amended Ans., ¶ 13.) From May 15, 1974, to June 17, 1974, Mariner operated under the name Mariner International Corporation, and on that date, its name was changed to Mariner Corporation and it became a holding company. A new firm was formed to handle distribution. (Response of Brunswick to Complaint Counsel's Discovery Request, 12/8/75, ¶ 4(a); Anderegg, Tr. 184-85, 210.)

10. Mariner International Co. is a wholly-owned subsidiary of Mariner, organized in 1974 to handle the world-wide marketing of "Mariner" brand outboard motors. (Anderegg, Tr. 184-85.) The President of both Mariner and Mariner International Co. is Mr. Robert Anderegg. (Anderegg, Tr. 185.)

11. In 1973, the principal assets of Mariner were 62,000 shares of stock of Sanshin Kogyo Co., Ltd. (Brunswick Amended Ans., ¶ 15; Anderegg, Tr. 185, 191.) Acquisition of these shares was the result of the joint venture between Brunswick and Yamaha Motor Company, Ltd. (See *infra*, Finding 37.)

12. From 1973 through 1976, officers of Mariner have been members of the Board of Directors of Sanshin Kogyo Co., Ltd. As Board members, these officers attended meetings in Japan in 1973 and 1974 regarding the business of Mariner. (Anderegg, Tr. 184, 194, 196-97.)

13. During 1973, Mariner communicated, on the average, weekly with Japan (*i.e.*, Yamaha Motor Co., Ltd. and/or Sanshin Kogyo Co., Ltd.) by telex, telephone and mail communications regarding the joint

venture and marketing of "Mariner" brand outboard motors. In mid-1974, the frequency of these communications increased to a daily basis. (Anderegg, Tr. 198-99.)

14. Mariner filed annual reports for 1973 and 1974 with the Japanese Government. A law firm located in Japan was utilized to assist Mariner in the preparation of these reports. (Anderegg, Tr. 204.) [7]

15. In the course and conduct of its business during 1974 and 1975, Mariner sold outboard motors in Asia, Europe, Latin America, North America, the South Pacific, the Middle East, New Zealand and Australia. (CX 99A and C; BX 25A-B, W, Z, Z-4, Z-7; Anderegg, Tr. 208-09, 774-75.)

16. In mid-1975, Mariner began promoting the "Mariner" brand of outboard motors in the United States. (Brunswick Amended Ans., ¶ 14.) In late 1976, Mariner commenced importing Mariner outboard motors for sale in the continental United States. (BX 25Z-2, Z-4, Z-7.)

17. Mariner has been and is engaged in interstate commerce and has been and is affecting interstate commerce. (Brunswick Amended Ans., ¶ 14.)

C. Yamaha Motor Co., Ltd.

18. Respondent Yamaha Motor Co., Ltd ("Yamaha") is a corporation organized and existing under the laws of Japan and has its principal place of business in Japan. (Complaint, ¶ 6; Yamaha Amended Ans., ¶ 1.)

19. Yamaha was incorporated in Japan in 1955; its main investor was Nippon Gakki Co., Ltd., a Japanese corporation which manufactures musical products and sporting goods. Prior to Yamaha's incorporation, Nippon Gakki had started a trial production of motorcycles. When Nippon Gakki decided to go into real production, Yamaha was incorporated separately for that purpose. (Eguchi, Tr. 684, 648-49.) In October 1972, Nippon Gakki was the largest individual stockholder of Yamaha stock with 39.11%. The second largest stockholder held 5.03%. (CX 105, 116P.)

20. Since 1961, Yamaha has manufactured and/or sold snowmobiles, motorcycles and spare parts to Yamaha International Corporation, which in turn distributes said products in the United States. (Complaint, ¶ 9; Yamaha Amended Ans., ¶ 4, Hudson, Tr. 732.) In 1972, Yamaha manufactured and/or sold for export motorcycles, snowmobiles, outboard motors and fiberglass boats. (Eguchi, Tr. 644, 646-47.)

21. In 1972, Yamaha's total sales in dollar value were approximately \$405 million (Yamaha Amended Ans., ¶ 1; Eguchi, Tr. 647.) Approximately 70% of these sales were accounted for by export sales

and approximately 40% of Yamaha's total sales were made for export to the United States. (Eguchi, Tr. 647.)

22. As stated in a 1972 Business Report to Stockholders, Yamaha's export sales in yen for the fiscal year amounted to about 70% of the total sales. Of Yamaha's export sales, about 78% was in motorcycles, 3% in boats and outboard motors, and 18% in snowmobiles, parts and other items. (CX 114D.) [8]

23. In 1974, Yamaha's total sales were approximately \$500 million. (Eguchi, Tr. 647-48.) The present total sales volume of Yamaha-brand products is approximately \$650 million annually. (Yamaha Admissions, ¶ 1.)

24. At all times relevant herein, Yamaha has been engaged in commerce as "commerce" is defined in the Clayton Act, as amended, and has been a corporation whose business has been in or has affected "commerce" within the meaning of the Federal Trade Commission Act, as amended. (Complaint, ¶ 12; Yamaha Amended Ans., ¶ 7.)

D. Sanshin Kogyo Co., Ltd.

25. Sanshin Kogyo Co., Ltd. ("Sanshin"), a Japanese corporation, was established on February 22, 1960, and its principal office is in Hamamatsu City, Japan. (Yamaha Motion to Dismiss, 10/20/75, ¶ 2.)

26. Yamaha produced outboard motors at Yamaha facilities until May 1969 when it purchased control of Sanshin by acquiring 60% of the stock of Sanshin. After the stock acquisition, Yamaha transferred all of its tools for making outboards to Sanshin and continued distributing "Yamaha" brand outboards made thereafter by Sanshin. (Yamaha Motion to Dismiss, ¶ 2; Yamaha Admission, ¶ 51; Yamaha Amended Ans., ¶ 2; CX 1A, 9D, 9I, 13B; Eguchi, Tr. 645-46, 666.)

27. Since 1969, Sanshin has produced all "Yamaha" brand outboard motors. (Yamaha, Amended Ans., ¶ 2; Eguchi, Tr. 665-67; Anderegg, Tr. 772; CX 1A.) In the year ending June 1971, Sanshin produced approximately 75,000 outboard motors for Yamaha, of which 25,000 were exported. (Complaint, ¶ 7; Yamaha Amended Ans., ¶ 2.) In 1973, Sanshin produced approximately 80,000 outboard motor units. (Eguchi, Tr. 669.)

E. Yamaha International Corporation

28. Yamaha International Corporation ("YIC") is a California corporation with its principal place of business in Buena Park, California. (Yamaha Amended Ans., ¶ 3.) [9]

29. YIC was incorporated in 1960 as a wholly-owned subsidiary of Nippon Gakki. (Complaint, ¶ 8; Yamaha Amended Ans., ¶ 3; Hudson,

Tr. 729.) YIC was incorporated to distribute musical instruments manufactured by Nippon Gakki, and motorized products manufactured by Yamaha in the United States. (Yamaha Admissions, ¶ 13; Eguchi, Tr. 653-54.)

30. Before YIC was incorporated in 1960, exports of Yamaha-manufactured products were handled by the International Department of Nippon Gakki. (Stipulation No. 2, #16.) From 1960 to November 1973, YIC was the exclusive distributor for Nippon Gakki in the United States. (Hudson, Tr. 743-44.) From 1961 to date, YIC has been the exclusive distributor of Yamaha products in the continental United States (YX A; Callaway, Tr. 257; Eguchi, Tr. 660; Hudson, Tr. 732-33, 739-40, 744.)

31. In 1972 and 1976, approximately 90% of YIC's sales consisted of Nippon Gakki and Yamaha products. In both 1972 and 1976, two-thirds of that 90% consisted of products manufactured by Yamaha. (Hudson, Tr. 742-44.)

32. YIC is the only corporation licensed by Nippon Gakki, who own the "Yamaha" brand trademark, to use such trademark in the United States. (YX B2; YX B10.) YIC is also authorized to relicense or sublicense others, such as independent dealers, to use the trademark in connection with the sale of Yamaha products. (Hudson, Tr. 738.)

33. From 1961 to date, Yamaha and YIC have, by telephone, telex, mail and other means, communicated with each other in excess of 500 times each year. Such communications have included, but are not limited to, marketing studies, engineering reports, suggestions by either party for improvements to Yamaha-manufactured products, sales reports, warranty and service information. (Stipulation No. 2, #5.)

34. From 1964 to date, Yamaha has sent personnel to various points in the United States to assist YIC in the inspection and testing of Yamaha-manufactured products distributed by YIC in the United States. (Stipulation No. 2, #7.) [10]

35. From 1964 to date, Yamaha has sent service technicians and engineering personnel to YIC to assist with technical design and mechanical problems relating to Yamaha-manufactured products. (Stipulation No. 2, # 8.)

II. The Transaction

36. From late 1971 to March 1972, Mercury and Yamaha conducted negotiations regarding a possible joint venture for the production and marketing of outboard motors. A memorandum of understanding was concluded March 9, 1972. (CX 10A - 10E.) The parties agreed to create "a new manufacturing joint venture to be established in Japan

between Yamaha Co. . . . through its subsidiary Sanshin Industries Co., Ltd. . . . and Mercury Marine Division of Brunswick Corporation. . . . through a subsidiary to be formed and to be named Mercury Marine International Co. [Mariner]." (CX 10B.)

37. On November 21, 1972, Brunswick entered into a joint venture agreement with Yamaha wherein it was provided that Mariner would purchase 62,000 shares of newly issued shares of Sanshin stock for approximately \$1.4 million. (Brunswick Amended Ans., ¶ 15; Yamaha Amended Ans. ¶ 9.)

38. With the purchase of Sanshin stock, Mariner and Yamaha each owned 38% of the total outstanding stock of Sanshin: the remaining 24% of the Sanshin stock is held by individual Japanese shareholders. (Brunswick Amended Ans., ¶ 15; Yamaha Amended Ans., ¶ 9.)

39. The joint venture agreement provided that the corporate name of Sanshin would be changed in due course to Mercury-Yamaha Mfg. Co., Ltd., or some other corporate name as agreed upon by the parties which would contain reference to both Yamaha and Mercury. (CX 10.)

40. The joint venture agreement gives Yamaha the right to appoint six of Sanshin's eleven directors, the remaining directors to be appointed by Mariner. The President of Sanshin is appointed by Yamaha from among the directors it nominates. (CX 1H.) Passage of corporate resolutions in specific areas requires an affirmative vote of seven directors; all other corporate resolutions can be adopted by a majority vote provided a quorum of seven directors is present at a Sanshin Board meeting. (CX 1H - 1J.) [11]

41. An operating committee composed of two Yamaha appointed directors or their representatives and two Mariner appointed directors was provided for in the joint venture agreement. The operating committee was to meet regularly to review major operating and policy matters. Matters on which no agreement could be reached were to be referred to the Board of Directors of Sanshin for resolution. (CX 1J.)

42. The joint venture agreement will remain in effect for a period of 10 years after the Sanshin stock purchase. Unless notice of termination is given by either party three years prior to the expiration of the initial term, or any extended term, the agreement is automatically extended for three year periods, subject to any necessary Japanese Government approvals. (CX 1R; Brunswick Amended Ans., ¶ 20; Yamaha Amended Ans., ¶ 13.)

43. Article 8.4 of the joint venture agreement provided that Sanshin would continue to manufacture outboard motors under the "Yamaha" label for sale to Yamaha for exclusive distribution in Japan. Outboard motors produced by Sanshin bearing the "Mariner" label would be sold to Mariner for exclusive distribution in North America

and Australia. The balance of the Sanshin-produced outboard motors would be sold to a proposed equally-owned joint venture sales company for distribution in the rest of the world under the "Mariner" trademark and, in those countries mutually agreed upon, under the "Yamaha" trademark. (CX 1K - 1L.)

44. In October 1973, Yamaha and Mariner amended certain provisions of the joint venture agreement. They agreed that it was inappropriate to attempt to form a joint venture sales company for marketing Sanshin products in certain areas of the world and that, therefore, both partners would be free to conduct their own independent marketing programs in those territories which the joint venture agreement contemplated would be served by a joint venture sales company. (CX 78A.) The term "North America" as used in the joint venture agreement was clarified to include Canada, the United States of America, and the United States of Mexico. (CX 78C.) The parties further agreed that Mariner would have the exclusive right to sell in North America the products of Sanshin and/or marine engines purchased from Mercury. In the case of Mexico, however, Yamaha could continue to sell the existing outboard motors selected by the Mexican Government for their fishing program. The parties also agreed that New Zealand would be included in the exclusive territory of Mariner. (CX 78C.) [12]

45. Under Article 8.1 of the joint venture agreement, Yamaha and Mariner have been and are the only purchasers of products which Sanshin manufactures. (CX 1K.) Yamaha sells Sanshin-made products under the trademark "Yamaha" and/or other agreed upon trademarks; Mariner sells Sanshin-made products under the trademark "Mariner" and/or other agreed upon trademarks. (CX 1L.) Pursuant to the joint venture agreement, export procedures and shipments of Sanshin products are executed exclusively through Yamaha. (CX 1K.)

46. In May 1973, Mercury and Yamaha agreed that Sanshin would produce the jointly developed small horsepower outboard motors such as the 6 and 9.8 h.p. for sale by Mercury using the "Mercury" trademark. (CX 75B.) No such sales occurred. (Resp.'s Reply, p. 29.)

47. Mercury and Yamaha incorporated in the joint venture agreement licensing arrangements whereby they agreed to exchange between themselves, and provide to Sanshin, patents and technical information relating to marine engines, other two-cycle engines and die cast and low pressure die casting techniques. (CX 1M - 1N; Brunswick Amended Ans., ¶ 18; Yamaha Amended Ans., ¶ 12.)

48. Pursuant to the joint venture agreement, the parties entered into a technical assistance agreement between Yamaha and Mercury which included, among others, the following provisions:

2.1 (a) Mercury hereby grants to Yamaha a non-exclusive, world-wide license to use the Mercury Technical Information to make, use and sell goods of all kinds and descriptions except those which are competitive to the goods manufactured by Mercury as of the date of the execution of this Agreement.

(b) Yamaha hereby grants to Mercury a non-exclusive, world-wide license to use the Yamaha Technical Information to make, use and sell goods of all kinds and descriptions except those which are competitive to the goods manufactured by Yamaha as of the date of the execution of this Agreement.

(CX 1Z-30)

* * * * *

[13] 6.7 Because of the difficulty of identifying when a product of Mercury incorporates part of the Yamaha Technical Information, in order to induce Yamaha to enter into this Agreement in its capacity as licensor, and because it presently has no intention of producing such goods, Mercury agrees not to manufacture any product competitive to those manufactured by Yamaha at the date of the execution of this Agreement, notwithstanding the foregoing, Mercury may manufacture snowmobiles.

(CX 1Z-39) 5C

(See also, Brunswick Amended Ans., ¶ 19; Yamaha Amended Ans., ¶ 12.)

49. Yamaha and Mercury also agreed to provide technical assistance by assisting, advising and cooperating via technical experts with each other's technical personnel in "the development, designing, research, manufacture, experimenting, quality control, and servicing of the licensee's products and in plant layout, and the selection of the machinery, tools and equipment necessary or desirable for the manufacture of said products." (CX 1Z-31.)

50. Mercury and Yamaha also agreed to permit each other's technical personnel to inspect their plants and agreed to provide instruction to such personnel concerning the processes, procedures, operating manuals and methods used by the licensor in the manufacture of its products falling within the scope of the licenses granted. (CX 1Z-32.)

51. The parties agreed that the technology exchanged would have no assigned value. (CX 9E; but see Finding 194.) Under Article 5 of Exhibit D to the joint venture agreement, Mercury and Yamaha agreed to pay an annual royalty of \$25,000 to each other for the licenses granted in Section 2.1 of the technical assistance agreement. (CX 1Z-33.)

52. Technical assistance agreements were also executed between Yamaha and Sanshin and between Mercury and Sanshin in accord with provisions of the joint venture agreement. These agreements provided that Mercury and Yamaha would disclose and license to Sanshin any and all Mercury or Yamaha patents, utility models, designs (and all

applications for such patents, utility models and designs), technical knowledge, specifications, standards, data, operating manuals and experience applicable to the development, designing, research, manufacture, experimenting, quality control and servicing of marine engines, whether Mercury or Yamaha owned or possessed the information at the time the technical assistance agreements became effective or later developed or acquired it during the term of the agreements. (CX 1Z-5 - 1Z-7, 1Z-18 - 1Z-19.) [14]

53. The parties agreed in Article 10.1 of the joint venture agreement that Yamaha may not "directly or indirectly manufacture marine engines the same as or substantially the same as those which are or will be manufactured by Sanshin," and may not "purchase for resale such marine engines from any third party." Provision was made, however, for Yamaha's continued purchase for resale in Japan of marine engines which Yamaha purchased and sold as of the date of the agreement and any other marine engines subsequently agreed upon by the parties. (CX 1M.)

54. Yamaha and Mercury agreed that an engineering group was to be established at Sanshin with responsibility for the design and development of all Sanshin products. (CX 1M.) Yamaha further agreed to assist Sanshin in securing personnel for the outboard motor engineering group. (CX 1 O.)

55. Prior to the joint venture with Brunswick, neither Yamaha nor Sanshin attempted to buy outboard motor technology from any other outboard motor manufacturers. (Eguchi, Tr. 63.) When McCulloch stopped producing outboards in April 1969, they offered to transfer their complete engineering technology, plant and equipment to Yamaha. After consideration, this offer was declined. (CX 79C, 90L; see Finding 77.)

56. Between 1970 and 1972, Yamaha conducted product development on outboard motors for Sanshin which did not have a research and development department. Such research and development included the improvement of existing outboard motors in performance, primarily, and also the development of new motors to be added to the Yamaha line of outboard motors. (Eguchi, Tr. 671.)

57. In 1974, the Research and Development Department of Sanshin was created pursuant to the joint venture. Most of the personnel of this department were transferred from Yamaha. (Eguchi, Tr. 673.)

58. All technical assistance agreements entered pursuant to the joint venture, unless sooner terminated or extended by the joint venture agreement, remain in effect for ten years. Absent notification six months prior to the expiration of the initial term or any renewal period, the agreements are automatically renewed for three year

periods, subject to necessary approvals by the Japanese Government. (CX 1Z-13, 1Z-25, 1Z-41.) [15]

59. Absent a breach of the joint venture agreement or insolvency of one of the parties, upon termination of the technical assistance agreements, "the rights and licenses granted to each licensee pertaining to Patents etc., shall in principle be revoked" (CX 1Z-36, 1Z-10, 1Z-21.) Upon termination, rights and licenses granted between Yamaha and Mercury will be renewed, at reasonable cost, upon written request of the licensee. (CX 1Z-36.) Licenses between Yamaha and Sanshin and between Mercury and Sanshin may be renewed after deliberation between the parties to the license regarding the terms and conditions of such renewals. (CX 1Z-10, 1Z-21.)

60. Absent a breach of the joint venture agreement or insolvency of one of the parties, the ownership of technical information other than patents, etc., exchanged pursuant to the technical assistance agreements becomes the joint property of the parties to the agreement and thereafter may be used for any purpose whatever without obtaining the consent of the licensor. (CX 1Z-36, 1Z-10, 1Z-21.)

III. Relevant Geographic Market

61. The relevant geographic market is the United States. (Complaint, ¶ 21; Brunswick Amended Ans., ¶ 21; Yamaha Amended Ans., ¶ 14.)

IV. The Outboard Motor Industry

62. The manufacture of an outboard motor² is a highly complex process. (BX 12R.) Fundamentally, an outboard motor is composed of three basic parts: (1) an electrical system which gives ignition and in some instances provides recharging capability for the battery; (2) a basic powerhead which is comprised of a cylinder block and associated crank-shaft, connecting rods and reciprocating parts for housing components; and (3) a lower unit or leg which is principally comprised of a gear train and propeller, some method of attachment to the transom, a fuel supply, and remote electrical, shift and throttle controls in some models. (Dillon, Tr. 292-93.) [16]

63. Outboard motors are used for a wide range of water-related activities including fishing, hunting, water skiing, cruising and commercial purposes. (CX 90G, 90Z-46, 90Z-52; Strang, Tr. 386.)

64. Between 1963 and 1972, sales of outboards in the U.S. rose by 10.9% compounded annually. During the same period, the compounded

² The relevant product in this proceeding does not include electric outboard motors, inboard/outboard motors or stern drive motors. (Stipulation, Tr. 169.)

annual growth rate for consumer durable spending was 9.3% and for leisure durable expenditures 9.8%. (BX 12H.)

65. Sales, both domestic and foreign, by United States outboard motor manufacturers have increased annually. In 1965, 393,000 United States-made outboard motors, with a dollar value of \$183 million, were sold. (BX 12I.) By 1971, the industry had grown to the point of 514,375 units sold, with a total dollar value of \$231,443,271. (CX 92 - 96.) In 1972, 554,019 outboard motors were sold by United States manufacturers, with factory sales of \$271,320,036. (CX 92 - 96.) In 1973, 585,000 outboard motor units were sold by the United States outboard motor industry, with a retail value of approximately \$501,300,000. (Yamaha Amended Ans., ¶ 16.)

66. The United States outboard motor market is and, at all times relevant herein, has been the largest market for outboard motors in the world. (Stipulation No. 2, ¶ 21; Yamaha Admissions, ¶ 45; BX 12T.)

67. In 1973, imports were insignificant in the United States market and were expected to remain so. (BX 12F.) Foreign manufacturers have not been a factor in the United States outboard motor market. (Anderegg, Tr. 797.)

68. Europe, Canada, Australia, and the Far East, principally Japan, are the most important foreign markets. (BX 12T.) Foreign sales accounted for approximately 35% of the world-wide total in 1972 and were expected to increase as foreign demand grew. The "Andresen Report," a securities research report prepared for Outboard Marine Corporation (OMC) entitled "The Marine Industry and Outboard Marine Corporation" dated January 1973 (BX 12A - 12SS), stated that the foreign outboard motor market was growing as fast as the U.S. market and predicted that, for 1973, foreign unit sales would increase by 6% and dollar value sales by 12%. (BX 12E, 12 O.) [17]

69. The average horsepower of outboard motors sold in foreign markets is significantly lower than the domestic average because "foreign market development is about seven to eight years behind that of the United States." (BX 12T.)

70. The "Andresen Report" concluded that the "United States Outboard Motor Industry" was believed to offer long-term revenues and earnings growth as well as rising return on investment with revenues of the industry growing by at least 12% during 1973. (BX 12E.) The report predicted that there would be an increase in sales of outboard motors between 1972 and 1974 at 16.1% compound annual rate of growth. (BX 12K.) The report estimated that in 1973, domestic outboard motor unit sales would increase by 7.5% and dollar value sales by 18.3%. (BX 12 O.)

71. In 1971, Mercury was expanding its outboard motor production

to meet the demands for outboard motors in the United States. (Anderegg, Tr. 799.) Despite this activity, in February 1973, a Mercury study stated "Mercury Marine has, for the past several years, been plagued by a general inability to supply market demands for our marine products." (CX 71D.) Mariner's present promotional literature states that: "[O]ver the past several years demand had exceeded supply in the industry." (BX 25Z-73.)

72. Beginning with the early 50's, the outboard motor industry in the United States has witnessed a transition from low horsepower motors to larger, more sophisticated engines capable of powering larger and heavier boats. (BX 12A, 12E, 12M, 26; Dillon, Tr. 284-87.) The top horsepower for outboards sold in this country went from 25 h.p. in 1953 to 200 h.p. in 1976. (BX 26.) This trend enhances long-term industry growth potential in that high horsepower engines are more profitable than smaller outboards and wear out faster. (BX 12A, 12E.) In 1972, approximately 75% of outboard motor unit sales were for replacement purposes. (BX 12M.)

73. The manufacture and sale of outboard motors has been highly profitable. (BX 12; CX 71D.) For example, in 1973 the "Andresen Report" estimated OMC's total non-marine sales at about \$114 million, with a pre-tax profit of \$3.9 million. On total marine sales of \$330 million, the report estimated OMC's profit at \$58.2 million. (BX 12GG.) About one-third of OMC's outboard sales and 40% of the profit from these sales came from foreign sales. (BX 12 O.) [18]

74. Mercury's sales have increased from \$21,749,000 in 1961 to \$82,737,000 in 1973. (CX 100E.) Mercury's 1973 division earnings totalled \$9,888,000 on net sales of \$82,737,000. For 1972, division earnings totalled \$8,650,000 on net sales of \$65,686,000. (CX 100E.)

75. The "Andresen Report" estimated OMC's marine products division profitability as follows: for 1971, sales were \$259.5 million with a pre-tax profit of \$45.7 million, resulting in a margin of 17.6%. For 1972, OMC sales were estimated at \$290.6 million with a pre-tax profit of \$53.7 million, for a margin of 18.4%. For 1973, the report estimated OMC sales at \$330.0 million with a pre-tax profit of \$58.2 million, resulting in a margin of 17.6%. (BX 12GG.)

76. OMC's return on average investment from 1970 through 1972, as reflected in the following chart, also attests to the profitability of outboard motor sales (CX 123C - 123E):

Return on Average Investment

	1970	1971	1972
Johnson Division	26.0%	35.3%	43.3%
Evinrude Division	19.0%	36.3%	38.5%

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77. "Historically, the outboard motor industry has been marked by a lack of significant entry and a declining number of firms." (Yamaha Amended Ans., ¶ 19.) During the period 1955-1965, competitors in the United States outboard motor industry included OMC, Mercury, Scott-Atwater, McCulloch, West Bend, Eska, Clinton and Martin. (Dillon, Tr. 283-85, 291; Anderegg, Tr. 766, 806.) During this period, Martin and Scott-Atwater exited the outboard motor industry. (Dillon, Tr. 285, 291.) In 1969, McCulloch also exited the outboard motor industry. (CX 90L; Dillon, Tr. 291; Anderegg, Tr. 766.) In 1965, Chrysler acquired all of the assets of West Bend's outboard motor operations (Dillon, Tr. 282.) [19]

78. Between 1965 and 1970, there were only minor fluctuations in Mercury's market share in the outboard motor industry. (Anderegg, Tr. 784.) Market shares of the principal domestic competitors, as evidenced by the following charts, remained relatively stable from 1971 to 1973 (CX 92 - 96):

Market Shares By Units Sold

	1971	1972	1973
OMC	49.1%	50.3%	50.3%
Mercury	20.0%	19.8%	22.6%
Chrysler	8.6%	8.6%	7.8%
Eska	18.4%	15.6%	14.2%
Clinton	3.9%	5.65%	5.1%

[20] *Market Shares by Dollar Volume*

	1971	1972	1973
OMC	58.3%	59.3%	59.0%
Mercury	25.1%	24.2%	26.0%
Chrysler	11.6%	11.6%	10.2%
Eska	4.0%	3.4%	3.4%
Clinton	0.9%	1.5%	1.4%

79. The top two outboard motor manufacturing companies account for in excess of 70% of outboard motor units sold. (Yamaha Amended Ans., ¶ 17.) In 1972, Mercury accounted for approximately 21% of the total unit sales of outboard motors in the United States. (Yamaha Amended Ans., ¶ 18.)

80. Barriers to entry into the outboard motor industry are significant and have remained so over time. (Yamaha Amended Ans., ¶ 19.) "[B]arriers to effective entry into the United States market for outboard motors on a competitive basis are presently significant." (Brunswick Amended Ans., ¶ 26.)

81. Barriers to entry into the United States outboard motor market include capital costs, technology and know-how, and, in addition, for the market in which high horsepower outboard motors are sold, the need to produce and sell a broad line of horsepower engines and the need to develop a sales and service network. (Findings 99, 105; CX 79F; BX 12F, 12Q - 12R, 12V; Strang, Tr. 457.) [21]

82. A market study of the United States outboard motor industry prepared for American Honda in 1969 concluded that:

[t]he outboard motor industry is composed of two distinctly separate, but overlapping market segments; one for lower horsepower motors, usually under 20 hp, and one for higher horsepower motors, usually over 20 hp. (CX 90G.)

V. Relevant Product Markets

A. Low Horsepower³ Gasoline Outboard Motors

83. A definite market for low horsepower motors, usually 20 h.p. and under, exists in the United States outboard motor industry. (CX 90G; Stipulation No. 2, #22.)

84. In 1972, OMC, Mercury, Chrysler, Clinton and Eska⁴ sold low horsepower outboard motors in the United States. Although OMC, Mercury and Chrysler also produced outboards in the high horsepower range, Eska and Clinton did not. (CX 92B, 96B; Dillon, Tr. 308; Strang, Tr. 336; Kascel, Tr. 623-24.)

85. OMC, Mercury and Eska considered OMC, Mercury, Eska, Chrysler and Clinton as competitors in 1972. (CX 72A, 73E, 109E - 109F; Strang, Tr. 336; Kascel, Tr. 610.)

86. The 20 h.p. and under market shares of the principal United States competitors were (CX 92 - 96):⁵

³ This delineation is not clear-cut since "overlapping" exists between the low and high horsepower segments of the industry. (CX 90G.) The President of OMC feels the low market is 25 h.p. and below. (Strang, Tr. 386, 438.) In an internal Yamaha memorandum, the low horsepower market was described as "less than 25 horsepower." (CX 15B.) In January 1972, Mercury looked at motors 25 h.p. and under as the "low horsepower offerings." (CX 8A, 8D.) There appears to be a trend to polarization of the two categories. (CX 90G.)

⁴ Eska does not manufacture outboard motors, but merely assembles them from components purchased from various manufacturers. (Kascel, Tr. 609.) [22]

⁵ These figures reflect all 20 h.p. and under outboard motor sales by United States manufacturers. No figures are available in the record which show how much of the total sales were foreign sales.

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Market Share by Unit Volume

	1971	1972	1973
OMC	39.1%	40.2%	39.7%
Mercury	16.9%	15.5%	19.3%
Chrysler	6.1%	5.8%	4.9%
Eska	31.2%	28.2%	29.6%
Clinton	6.6%	10.2%	9.5%

[23] Market Share by Dollar Volume

	1972	1973 5
OMC	50.5%	49.0%
Mercury	20.6%	24.6%
Chrysler	9.3%	6.8%
Eska	13.5%	14.0%
Clinton	6.1%	5.6%

87. In the early 70's, Honda commenced selling a low horsepower motor in the United States. (Strang, Tr. 471.) Two to three years ago, Volvo also entered this market. (Strang, Tr. 470.) Suzuki/Arctic Cat now sells outboards in the low horsepower United States market. (Strang, Tr. 459.) Despite these foreign entries, no foreign manufacturer is considered a factor in the United States to date. (Anderegg, Tr. 797.)

88. A Mariner marketing outline presentation for 1977 describes a United States outboard motor market which includes the "Big 3" (OMC, Mercury and Chrysler) and also Eska, Spirit, British Seagull, Honda, and Volvo Penta. (BX 25Z-70.)

89. The primary use for outboard motors 20 h.p. and under is for fishing, hunting, and moving sailboats in or out of marinas. (CX 90J, 90Z-46, 90Z-52; BX 3A; BX 12Q; Dillon, Tr. 304; Strang, Tr. 386; Kascel, Tr. 611.)

90. Small outboard motors up to 20 or 25 h.p. are used on boats of up to roughly 14 feet. (Strang, Tr. 386.) Such low horsepower engines are generally portable, weighing somewhat less than 80 or 90 pounds and are clamped rather than permanently affixed to the transom of a boat. (BX 24, [Bradley] pp. 51-53; Dillon, Tr. 305; Strang, Tr. 387-88; Kascel, Tr. 612.) [24]

91. Low horsepower outboard motors generally have manual rewind starters and a steering handle. These features do not appear in high horsepower outboard motors. (Dillon, Tr. 306; Strang, Tr. 387.)

92. Chrysler and OMC use a number of production lines in manufacturing low horsepower outboard motors. (Dillon, Tr. 301-02; Strang, Tr. 389-91.) Mr. Strang, the President and General Manager of OMC, testified, however, that, in 1972, a manufacturer could have assembled outboard motors from 2 h.p. to either 25 or 40 h.p. on one assembly line. Low horsepower outboard assembly lines utilize clamp screws rather than bolts to hold the engines in place and require less vertical space on the conveyors than high horsepower assembly lines. Small engines, due to their portability, can also be moved by hand within the factory, whereas equipment is necessary to move larger outboard engines. (Strang, Tr. 392-94.)

93. Prices on low horsepower outboard motors are substantially lower than prices for high horsepower outboard motors. (CX 97; BX 25X.) For example, the 1977 model Mariner 20 h.p. outboard has a listed retail price of \$875, while the 60 h.p. was listed at \$1,670. (BX 25X.)

94. Prior to the initiation of price controls in late 1971, OMC low horsepower outboard motor prices were not affected by the prices of high horsepower outboard motors. (Strang, Tr. 397.)

95. Eska, during the last 5-6 years, has reduced OMC's share of the low horsepower outboard market. (Strang, Tr. 337, 476, 540-41.) As a result of the inroads being made by Eska in this market, "OMC has initiated . . . a program for the design and development of a low-cost engine to be competitive with the ESKA in price range." (Strang, Tr. 550.)

96. In 1967, Yamaha requested YIC to prepare a report on the possibility of marketing Yamaha-manufactured outboard motors by YIC in the United States, which report was prepared and sent by YIC to Yamaha. (Stipulation No. 2, #9.) This report noted that "generally speaking price competition is quite severe in the market of smaller outboard motors." (BX 3D.) [25]

97. United States manufacturers sell low horsepower outboard motors to mass merchandisers under private labels, and to marine dealers⁶ under brand labels. OMC and Mercury sell all outboard motors manufactured by them exclusively to marine dealers. (Strang, Tr. 421; Kascel, Tr. 611.) Prior to 1965, OMC sold private label outboards to mass merchandisers, as well as its "Evinrude" and "Johnson" brands to marine dealers. (Strang, Tr. 422.) Chrysler sells outboard motors to both marine dealers and mass merchandisers. (CX 94E; Dillon, Tr. 290-91, 308, 310.) Chrysler's private label outboards contain essentially the

⁶ The term "marine dealer" refers to a dealer selling a full horsepower range of outboard motors as well as boats, trailers, and accessories. In addition, many sporting goods or hardware stores may stock part of a line of outboard motors for resale. (CX 90Z-19; Strang, Tr. 424.)

same powerhead and major components as its "Chrysler" label outboard motors. (Dillon, Tr. 312.) Eska and Clinton sell all outboard motors manufactured or assembled by them exclusively through mass merchandisers such as Sears, Penneys, Western Auto and other large chains and dealers. (BX 24, [Bradley] p. 28; Dillon, Tr. 311; Strang, Tr. 337, 423; Kascel, Tr. 608-10, 619.)

98. Low horsepower outboard motors sold through mass merchandisers compete with outboard motors of comparable horsepower sold through marine dealers. (BX 24, [Bradley] p. 33; Brunswick Admissions, pp. 20-21.)

B. High Horsepower Gasoline Outboard Motors

99. A recognized market exists for high horsepower motors, usually over 20 h.p. (CX 90G.) Existence of this separate market was explicitly noted in the "Andresen Report" which stated (BX 12R):

Market entry appears to be further restricted when the large horsepower market is examined. Only OM, Brunswick, and Chrysler Corporation are producing high quality, larger horsepower motors in quantity. OM produces over half of these engines and the Mercury division of Brunswick produces 30%. Chrysler has been able to make only narrow inroads into this market. Furthermore, the need for the broad distribution and highly skilled service should serve to protect the domestic higher horsepower market from foreign competition. [26]

100. In 1972, OMC, Mercury and Chrysler were the only United States manufacturers selling high horsepower outboard motors up to 150 h.p. in the United States. (CX 90Z-4; BX 26; Dillon, Tr. 308; Strang, Tr. 336.)

101. The above 20 h.p. market shares of the principal United States competitors were (CX 92 - 94):⁷

Market Share by Unit Volume

	1971	1972	1973
OMC	63.4%	62.8%	62.4%
Mercury	24.5%	25.1%	26.4%
Chrysler	12.1%	12.1%	11.2%

Market Share by Dollar Volume

	1972	1973
OMC	61.9%	62.0%
Mercury	25.8%	26.8%
Chrysler	12.3%	11.2% ⁵

⁷ These figures reflect both domestic and foreign sales of high horsepower outboards by United States

[27] 102. High horsepower outboard motors are used for sport and recreation, such as for water skiing or cruising. (CX 90Z-46, 90Z-52; Dillon, Tr. 304-05; Strang, Tr. 386.)

103. Outboard motors ranging from 30 to approximately 65 h.p. are used on boats up to 16 or 17 feet. Outboard motors of 70 h.p. and above are used on boats from 17 to 18 feet and up. (Strang, Tr. 386-87.) High horsepower outboards are bolted onto the boats rather than clamped to the boat transom. (Strang, Tr. 392-93.) Outboard motors of 35 h.p. and above are generally not portable. (Dillon, Tr. 305-06.) For example, Mariner's 85 h.p. outboard motor weighs approximately 254 pounds. (BX 25Z-30.) Generally, moving heavier, high horsepower outboard motors requires two people and may require special equipment, such as a forklift truck. (Dillon, Tr. 323-24.)

104. Outboard motors in the 35-65 h.p. range generally come equipped with electric starters, as opposed to manual (or rope recoil) starters, commonly found in the 20 h.p. and below category. (Dillon, Tr. 306-07.) Optional front controls rather than steering handles are also normal equipment on high horsepower outboard motors. (Dillon, Tr. 306.)

105. Advanced technology and know-how are required in the manufacture of high horsepower outboard motors. (Strang, Tr. 457.) Efficiency in fuel consumption, increased weight of larger engines and manufacturing techniques such as die casting, require greater technical innovation and development in manufacturing high horsepower outboard motors. (Alexander, Tr. 848-50.) Features such as jet prop exhaust and capacitor discharge ignition, which are important on larger outboards, were developed and adopted by Mercury, OMC and Chrysler to make their products more saleable. (Strang, Tr. 431; Alexander, Tr. 836-38, 840.) OMC, Mercury and Chrysler have competed intensely in offering such product features. (Strang, Tr. 432-33, 450.)⁸ [28]

106. Many of the component parts of an outboard motor are die cast. (CX 112 [Alexander] Z-18.) Yamaha motorcycles have been die cast. However, since motorcycles do not use propellers or gear cases, Mercury's know-how in die casting these, could benefit Yamaha. (Alexander, Tr. 841.)

107. Aluminum castings used in outboard motors are frequently made through high pressure die casting, the main system used in the

⁸ The record does not contain figures as to the amount spent by OMC, Mercury or Chrysler on research and development of their respective outboard motor lines. From 1966 to 1975, OMC's research and development budget increased from \$8.3 million to an estimated \$20.7 million. These figures, however, reflect research and development expenditures for OMC's entire line of products, which includes lawn mowers, snowmobiles and other durable goods. (BX 12FF, 12 OO, 12 PP.)

United States. A high pressure die casting machine contains a metal mold into which molten aluminum is injected at a pressure of 3,000 to 4,000 pounds per square inch. It is chilled in the water-cooled die, the die is then opened and the casting removed. (CX 112 [Alexander] Z-18; Strang, Tr. 413.) High pressure die casting techniques and processes have been well known in the United States for many years. (Strang, Tr. 414.) In 1972, there were many high pressure die casting vendors in the United States. (Strang, Tr. 414-15.)

108. In low pressure die casting, molten aluminum is inhaled into a die by a ceramic straw. After a few seconds to solidify, the vacuum creating the inhalation is turned off and the die is opened. Although low pressure die casting is a slower process, it produces a high quality casting which can be heat treated for high strengths during the casting process. (CX 112 [Alexander] Z-19, 112Z-20; Strang, Tr. 413-14.)

109. Jet prop exhaust, or "through-the-hub" exhaust, refers to the piping of the exhaust from the engine out through the center of the propeller hub, instead of breaking the exhaust down through a snout behind and above the propeller, which is the conventional way to put exhaust into the water. Jet prop results in better silencing and reducing the drag of the lower unit through the water by not forcing the water to close in behind the propeller hub, but rather by filling what would otherwise be a low pressure area downstream of the propeller exhaust. This results in slightly higher top speed and improved fuel economy because of the slight drag reduction. (CX 112 [Anderegg] Z-2, 112Z-3.)

110. The real advantage of the through-the-hub exhaust system appears on outboards that are capable of running a boat at higher speeds. (Strang, Tr. 404.) Where speed is important, it is desirable to eliminate the drag caused by propeller hub vortex. On small engines which run more slowly, it is not as important, and since it is more costly, there is a trade-off between a selling feature and the cost of the selling feature. (Strang, Tr. 523-24.) [29]

111. Jet prop exhaust tends to be used in high horsepower outboard motors because it is more advantageous on higher speed boats, those that run 25 and 30 miles an hour. It is perhaps less of an advantage on low speed boats. (CX 112 [Alexander] Z-6.)

112. The fundamentals of the whole jet prop exhaust system were explained in a now expired 1921 patent. (Strang, Tr. 401.) Mercury has incorporated this feature in all its outboard motors. (CX 112 [Alexander] Z-3 - 112Z-4.) OMC has incorporated jet prop exhaust on newly developed or retooled models. OMC does not believe the added cost of this feature is warranted on some of its smaller engines. (Strang, Tr. 403-04; CX 112 [Alexander] Z-3, 112Z-4.) Neither Chrysler nor Eska

have incorporated jet prop exhaust on their outboards. (Dillon, Tr. 316; Kascel, Tr. 614.) The Yamaha 50 h.p. outboard displayed at the 1972 Tokyo Boat Show did not have jet prop exhaust. (CX 107 0.)

113. Capacitor discharge ignition ("CDI") is a form of electronic ignition system wherein an electrical capacitor is charged and subsequently discharged through a pulse transformer to produce a very rapid voltage rise in the spark plug. CDI allows use of surface gap spark plugs which eliminates oil fouling or lead fouling of the spark plugs and prevents misfiring of the spark plugs. (CX 112 [Alexander] R.) CDI can be used in any internal combustion engine. (Strang, Tr. 408.)

114. CDI is important in the larger size outboard motor over 25 h.p. This is because the high horsepower engines work harder to produce power, the breaking effect of pressure is higher, and the danger of pre-ignition is higher. (CX 112 [Alexander] Y.)

115. In 1972, there were many companies offering CDI systems for sale. (Dillon, Tr. 318; Strang, Tr. 408.) Some CDI systems were displayed at the 1972 Tokyo Boat Show. (Strang, Tr. 408.)

116. In 1972, all OMC larger outboard motors (50 h.p. and above) had CDI. (Strang, Tr. 407.) OMC outboard motors below 50 h.p. did not have CDI for several reasons: (1) some were older models which had not been updated, in part because CDI is not as critical to a small engine as it is to a large one; the small engines are not as prone to pre-ignition damage as large engines; (2) the cost of CDI ignition is higher than inductive ignition; therefore, on the small engines, where cost is a greater factor, OMC chose to remain with the inductive style ignition system. (Strang, Tr. 407-08.) [30]

117. Prior to the joint venture, Yamaha did not have CDI in its outboard motors. In upgrading the quality of the outboards to be produced by Sanshin, Mercury and Yamaha agreed that Yamaha would procure a CDI system from Japanese ignition system makers who could provide the CDI system in Japan. Mercury's first approach was to test, evaluate and qualify the Japanese ignition systems provided by Yamaha. As a second approach, Mercury and Yamaha discussed the possibility of Mercury supplying its own CDI system to Yamaha both for Sanshin-produced outboard motors as well as Yamaha motorcycles. (CX 112 [Alexander] W; CX 18D.)

118. In 1972, there were no significant patents relating to lower units of outboard motors. (Strang, Tr. 411.) A great deal of information relating to lower unit technology is available free of charge from United States Government sources as well as private institutes. (Strang, Tr. 411, 520-21.)

119. High horsepower outboards must be produced on a separate

assembly line from low h.p. outboards. Since outboard motors over 25 or 40 h.p. are bolted onto the boat, the assembly lines for these motors must be able to handle an engine which is bolted in place. Large outboard motors also require more vertical space on the conveyors, larger test tanks and hoists or other equipment to move these heavier engines within the factory. (Strang, Tr. 392-94.)

120. OMC prices of high horsepower outboard motors are not affected by prices set for low horsepower motors. (Strang, Tr. 397.) The President of OMC testified on this subject (Strang, Tr. 537):

Q. What competitors' prices have you seen, Mr. Strang?

A. We normally look at Chrysler's Mercury's, and this year, unfortunately, Mariner's prices came too late for us to compare.

121. Since at least 1968, the majority of dollar growth in the outboard motor industry has been in the high horsepower market. (BX 12P; Alexander, Tr. 838.) Although fewer high horsepower units are sold, the profit per unit increases with high horsepower outboards. (Strang, Tr. 425-26; Anderegg, Tr. 795.) Outboards of 45 h.p. and higher wear out much faster than lower horsepower engines, since they are often used in salt water, and at full throttle. (BX 12Q.) They therefore have to be replaced more often. [31]

122. In 1972, outboard motors 20 h.p. and over accounted for \$126,766,453 or over 78% of OMC's \$160,967,371 total domestic outboard "factory value." (CX 93D, 93E.) In 1972, \$26,149,000 or over 83% of Chrysler's \$31,407,000 total sales were attributable to 20 h.p. and over outboard motors. (CX 94B.) During the same year, \$52,840,000 or over 80% of Mercury's \$65,686,000 total sales were attributable to 20 h.p. and over outboard motors. (CX 92B.)

123. OMC and Mercury sell all outboard motors manufactured by them exclusively through marine dealers. (Strang, Tr. 423; Kascel, Tr. 611.) With the exception of a comparatively few 35 to 55 h.p. private label outboards, Chrysler sells the high horsepower outboards manufactured by it through marine dealers. (CX 94D, 94E; Dillon, Tr. 290-91, 308, 310.)

124. Sales of high horsepower outboard engines to consumers is a more complex business and requires more skill and service than sales of low horsepower outboards and are therefore handled through marine dealers. (BX 24 [Bradley], pp. 12-13.) The "Andresen Report" in analyzing the distribution channel of high horsepower outboards stated: "Because of their need for skilled service and their large size, higher horsepower motors will probably continue to be distributed through marine dealers." (BX 12Q.)

125. As of 1969, there were an estimated 11,000 retail marine

dealers in the United States. Of these, 91% were said to carry one or more lines of outboard motors in their product inventory. (CX 90Z-19.) The other 9% carried boats and accessories but no outboard motors. In 1971, Mercury sold outboard motors through approximately 2,500 to 3,000 marine dealers. (Anderegg, Tr. 768.) In 1972, OMC sold outboard motors through approximately 5,000 marine dealers, with 90% of the dealers handling only OMC's Johnson or Evinrude brand outboards. (Strang, Tr. 336, 532.)

126. Marine dealers feel they need a full line of outboard motors which includes both low and high horsepower models in order to offer the widest possible range of choice to potential customers. (Strang, Tr. 428; Anderegg, Tr. 795.) Although this full line can be obtained by carrying two brands (Strang, Tr. 505-06), it is difficult to deal in more than one brand. (Eguchi, Tr. 696.)

127. Marine dealer contracts for outboard motors are generally renewable on an annual basis. (Strang, Tr. 429; Anderegg, Tr. 779.) There is a continual dealer turnover, and OMC, Mercury and Chrysler compete vigorously for new dealers. (Strang, Tr. 432-33; Anderegg, Tr. 798.) [32]

VI. Brunswick and the Joint Venture

A. Brunswick's Objectives

128. Mercury's share of the outboard motor market reached a plateau between 1965 and 1970 after which only minor fluctuations in market share occurred. (Finding 76; Anderegg, Tr. 784.) In 1970, Mercury began planning and discussion of a second line of outboard motors which it hoped would be the means whereby it could increase its market share. (Anderegg, Tr. 769-70; CX 13A.) Sometime in 1970 or early 1971 the decision was made to proceed with this second line of outboard motors. (Anderegg, Tr. 188.)

129. The basic reason that Mercury decided on a second brand was that Mercury hoped that production of a second brand would provide an opportunity to broaden its dealer base by increasing the number of marine dealers selling Mercury products and thereby increase its earnings. (Anderegg, Tr. 770.) With a second line, Mercury could supply dealers located next door to existing Mercury dealers, and thereby increase the number of dealers it sells to. (Anderegg, Tr. 770.) As of 1972, many voids existed in the marine dealership network and a new line could help to fill such voids. (Anderegg, Tr. 245; CX 8E.)

130. When formulating plans for a second line, Mercury also felt this line might be used as a vehicle by which Mercury could enter some markets in which it was not then selling, such as private labeling for

mass merchandisers or discount stores. (Anderegg, Tr. 794; CX 7C, 8E, 13A, 17.) Mr. Anderegg and Mr. Reichert, the President and Chairman of Mariner, respectively, believed the domestic United States market in 1972 could support a new major brand of outboard motors which initially could be sold through camper retailers, sporting goods stores, fishing and tackle outlets, camping outlets and fishing outlets. (Anderegg, Tr. 239; CX 7D, 8D; Brunswick Admissions, No. 6, p. 6.)⁹ [33]

131. In addition, Mr. Reichert, who is also President of the Mercury Marine Division of Brunswick, summarized the "compelling reasons why new entry . . . should be successful" (CX 8A):

From both a "defensive" and "offensive" viewpoint, it is obvious that we (Mercury) need new, simple, low cost, low horsepower offerings. So, too, do all of the other U.S. marine manufacturers. Everyone is vulnerable and using the approach of market segmentation any new entry will start in the low horsepower area. It is not unlike the automotive industry and the price which they paid to foreign firms for abandoning the low price, compact market. We can expect a similar foreign challenge—with or without us. Add to this the global opportunities for low horsepower engines resulting from less availability and higher cost for fuel, as well as different usage of the product.

132. Mercury's second line of outboard motors could be used as a means of meeting already existing competition as well as foreclosing entry by foreign outboard motor manufacturers in the low horsepower market (CX 2A):

Our [Mercury's] marketing people can use a second line of engines competitively against Johnson and Evinrude. A low-priced line strong in the low horsepower area could additionally compete with small engines being produced not only in Japan but in Italy, Yugoslavia and Sweden as well. Traditionally, newcomers start with small engines and move up in horsepower and it benefits us to make it harder for these newcomers to prosper.

B. Joint Venture as Alternative to Additional Production Facilities

133. When the decision was made for Mercury to have a second line, production facilities were being utilized to the fullest and large amounts of capital were being put in to expand the existing capability of Mercury, so it was not practical to add a second line production on top of the manufacturing capability of Mercury itself. (Anderegg, Tr. 771; CX 71D; Finding 71.) [34]

134. The record contains little direct evidence going to the issue of the feasibility of Mercury building new production facilities to provide its projected second line of outboard motors. In February 1973, a Mercury "MerCruiser Plant Justification" study proposed construction

⁹ The economic outlook subsequently changed and the second line "Mariner" could not, from a cost standpoint, be sold through private labelers and mass merchandisers. (CX 108H - 108L.) See Finding 147.

of a new plant for manufacturing and distributing all its inboard marine engines to be completed by 1977 at a total project cost of approximately \$25 million. (CX 71B, 71F, 71H.) Completion of this new plant would "release a portion of our vital parts making capacity for the production of 50 plus horsepower outboards" (CX 71E.) The record does not reflect if, or how much, this transfer of production capacity would alleviate Mercury's inability to provide all outboard motor needs; nor is it possible to determine if similar costs and time would be incurred in building a new outboard motor production facility.

135. Current plans to prepare Mercury plants to be in a position to provide both the Mercury and Mariner lines of outboard motors by 1979 or 1980 suggest that within five years Mercury's production capacity can be increased to handle the second line. (CX 81A, 82B - 82C, 82G.) In the event the joint venture terminates, the only source being considered to provide the Mariner line is Mercury. (Anderegg, Tr. 792; CX 82C.) Mercury manufacturing has been instructed to plan for the production of both Mercury and Mariner products should the joint venture end. (Anderegg, Tr. 792.) The 1975 objectives prepared by Mariner's President states that by the end of 1979 it is "not only desirable but absolutely essential that we be positioned to source the entire Mariner line from Mercury plants" (CX 81A.)

C. Selection of Yamaha as Joint Venture Partner

136. The search for a source for Mercury's second line of outboard motors began in late 1971. (Anderegg, Tr. 771-72.) In describing this search, Mr. Anderegg testified:

We went to look at companies that were in the outboard motor business and we looked primarily in Japan. We visited Japan and talked to several companies that were then building outboards.

They were in the business, they had two-cycle technology. And they might be logical partners for Mercury and become the source of this product. (Tr. 771; see also CX 5A, 7A.) [35]

137. Mercury expected that its joint venture partner would put its existing outboard business into the joint venture. (CX 5A.)

138. Mercury initiated discussions with Yamaha regarding a possible joint venture in 1971. (CX 7C, 79C; Stipulation, Tr. 678.) Yamaha at this time had strong distribution capabilities for outboard motors in some parts of the world (CX 9D) and, in 1972, had more experience in outboard motor engineering and manufacturing than any other Japanese outboard motor manufacturer. (Yamaha Admissions, ¶ 48.) At the investigational hearings, Mercury's President stated that

Yamaha was the strongest joint venture partner among possible joint venture partners looked at by Mercury. (Brunswick Admissions, pp. 12-13.)

139. Mercury favored Yamaha as a joint venture partner because of its technical competence and the broad base it could provide from which to launch a second line of outboard motors. (CX 9C, 13B.) The new "Mariner" product produced by such a joint venture also "would benefit from the backing of both of our well-known names in the marine field. It would not be like a new company, unknown in the industry, trying to introduce a fourth major outboard line . . ." (CX 9C.)

140. Yamaha and Brunswick each brought to the joint venture assistance in and guarantees for raising funds. (CX 1 O, 79D.)

141. In 1972, Mercury executives believed Mercury could also benefit technically from a joint venture with Yamaha. (Alexander, Tr. 829-30.) Mr. Reichert, Mercury's President, recognized this anticipated technological benefit during the investigational hearings when he stated:

They [Yamaha] had technology that came from the motorcycle business. You may or may not know Yamaha motorcycle is a two-cycle engine so they had engine technology from the two-cycle from the motorcycle business which we felt was particularly applicable to the lower or smaller horsepower, if you will, from, oh, 25 horsepower down kind of thing. (Brunswick Admissions, p. 12.) [36]

142. Some technology involved in manufacturing the powerheads in motorcycles can be applied to the manufacturing of powerheads for outboard motors. (Yamaha Admissions, ¶ 49.) OMC frequently purchases motorcycles of various makes and models, disassembles and examines them in order to study their manufacturing and design techniques for anything that might be applicable to outboard motors. When Mr. Strang was at Mercury, Mercury also purchased motorcycles for the same purpose. (Strang, Tr. 373.)

143. Loop-scavenged engine design is an example of the application of motorcycle engine design to outboard motor design. Outboard motors had traditionally been cross-scavenged. When OMC wanted to produce a loop-scavenged outboard motor, it obtained a good general picture of this type of engine design from motorcycles. (Strang, Tr. 374.) In the loop-scavenged engine in its most basic form, the cylinder has essentially three parts. The fresh charge enters the cylinder in two streams which are directed and rise within the cylinder to a focal point, then reverse over the top of the cylinder and go out through the exhaust port, forming a loop, hence the name "loop-scavenged." "Since the directed ports control the entering airstream, the piston doesn't

need a deflector on top of it and can be flat or slightly crowned." (Strang, Tr. 483-84.)

144. In January 1973, after the joint venture agreement was entered and in furtherance of the exchange of technical information between Yamaha and Mercury, Mr. Alexander took two top Mercury engineers to tour the Yamaha plants. Mercury was interested in many things that Yamaha was doing with the motorcycle engine that might be applicable to future outboard motors, such as chrome plating technology, whereby chromium is plated directly on an aluminum cylinder bore which eliminates the need for a cast iron cylinder liner. This process not only saves weight but perhaps even costs less in the long run. It improves the cooling of the piston because it eliminates the surrounding layer of cast iron the piston has to cool through to get to the waterjet. (Alexander, Tr. 855.)

145. Mercury has recently examined Yamaha's piston ring motorcycle technology which maintains a seal and prevents the piston from overheating. (Alexander, Tr. 855.) Overheating has been a problem for Mercury in its high horsepower engines. Mercury is presently developmentally testing a Yamaha-styled piston ring to solve its piston heating problems in the Mercury 175 h.p. outboard motor. (Alexander, Tr. 855-56.) [37]

146. In 1971, Mercury's then President, Mr. Abernathy, believed a joint venture with Yamaha also would move Mercury rapidly from a weak position to a strong position in the Japanese marine market. (CX 2A.)

D. Delayed Entry by Joint Venture

147. In early 1972, Mercury hoped to start producing a second line of outboards through the proposed joint venture in about one year. (CX 8E). In July 1972, Mercury planned to start marketing Mariner outboards in the United States by the start of calendar year 1974 (CX 16A - 16B), and to start private label sales by the start of calendar year 1975. (CX 16B.) During 1972 and 1973, spiraling inflation in Japan and the weakening of the dollar in relation to the yen eliminated the cost advantage of manufacturing in Japan and prevented entry of Mariner outboards into the United States market unless they were to be sold at a loss. (BX 1H.) In addition, the top of the Mariner line was a 55 h.p. outboard and Mariner thought that they could not successfully recruit a dealer organization without a larger outboard. (Anderegg, Tr. 776.)

148. In 1976, Mariner was able to get from Mercury an 85 h.p. model with the prospect of higher horsepower models to come. (Anderegg, Tr. 776.) Mariner had franchised 51 marine dealers, in an 11-state area in the north central part of the United States, and finally

introduced the Mariner line in September 1976. (Anderegg, Tr. 774.) Mariner planned for a network of 250 to 300 dealers by the end of 1977. (BX 25Z-70.) Mariner's line includes outboards of 2, 3.5, 5, 8, 15, 20, 28, 60, and 85 h.p. (BX 25Z-30.)

149. Mariner decided to come into the United States market as the fifth major brand, alongside Johnson, Evinrude, Mercury and Chrysler. (Anderegg, Tr. 777.) For this reason, Mariner did not want its line in the marine dealer's shop as a second line to another brand. (CX 108T.) The Mariner line of outboards was intended to compete to some extent with the Mercury line, although the breadth of the line would not be as great. (CX 8B.) Mariner hoped to form a network of exclusive marine dealers in the United States "by switching competitive dealers (except Mercury) and developing new marine dealers." (CX 108S.) None of the present 51 Mariner dealers switched from another manufacturer. (Anderegg, Tr. 813.) [38]

150. Mariner outboards have a retail price 5% to 8% lower than comparative outboards sold by OMC, Mercury and Chrysler. (BX 25Z-78; BX 25B.)

VII. Yamaha's Interest in United States Outboard Motor Market

151. In 1964, a director of Yamaha visited the United States to view the market situation for outboard motors. (Yamaha Admissions, ¶ 75.) Prior to the joint venture, Yamaha twice exported outboard motors for sale in the United States. It first attempted to sell its outboard motors through YIC in 1968. In 1971 and 1972, Yamaha sold five hundred 1.5 h.p. outboard motors to Sears for private label sale in the United States. (Eguchi, Tr. 693.)

A. Yamaha's 1968 Entry

152. In 1968, YIC prepared for Yamaha an outboard engine market analysis for the United States. (CX 67A - 67C.) The report studied geographical areas in the United States in which Yamaha might be able to gain market share. (CX 67B.)

153. In a news release dated March 5, 1968, YIC announced the introduction of Yamaha outboard motors for sale in the United States through YIC. (CX 61.) Yamaha planned to market their outboard motors through marine outlets and, to some extent, through Yamaha motorcycle dealers. (CX 61.)

154. In 1968, YIC imported from Yamaha 1700 low horsepower engines (3.5 h.p., 5 h.p. and 7.5 h.p.) and attempted to sell them in this country. (CX 68.) About 900 of these motors were delivered to dealers

and 800 returned to Yamaha unsold. As of January 1969, retail sales to customers amounted to about 20% to 30% of the dealers' stock. "Most of them are still on the dealer's floor, especially the motorcycle dealers are carrying most of their units and they are requesting Yamaha to buy back those units." (BX 5A.)

155. Among the reasons that this 1968 attempt failed were that the United States market preferred water-cooled and two-cylinder engines, and Yamaha motors were air-cooled and single engine. (Eguchi, Tr. 695; see CX 68 for other deficiencies.) [39]

B. Yamaha Sales to Sears

156. In 1971-1972, Yamaha sold about five hundred 1.5 h.p. outboard motors to Sears under the "Sears" label for marketing in the United States. (Eguchi, Tr. 693; BX 24 [Bradley], p.8.) Sears purchased only the 1.5 h.p. motor because the other outboards offered by Yamaha were too expensive. (BX 24 [Bradley], pp. 30-31.)

157. Sears did not purchase from Yamaha after 1972 because the Yamaha outboards were not selling well enough. (BX 24 [Bradley], p. 36.) The reason for the failure to sell was that the outboards were too expensive (BX 24 [Bradley], p. 37) and were better than they needed to be for the Sears market. (BX 24 [Bradley], pp. 17-18.)

158. Sears then got a 1.2 h.p. outboard motor from Tanaka. (BX 24 [Bradley], p. 37.) It is a slightly lighter, less expensive outboard than the Yamaha, but the quality is fairly close. (BX 24 [Bradley], p. 46.)

C. Yamaha's Plans To Enter the United States Markets

159. In June 1969, Yamaha developed a plan for a 25 h.p. outboard motor because of a request by Sears, Roebuck and Co. and because of the need for a motor big enough for water skiing. It was to go into production in May 1971. (CX 24D.)

160. In 1970, Yamaha planned for the development of a 40 h.p. outboard motor. (CX 25, 26.) The plan stated, "in the export sector, this engine is a part of the plan to set up a distribution chain featuring a line of merchandise covering 1.5 to 40 horsepower." (CX 26D.) Yamaha compared its proposed 40 h.p. model with the similar OMC, Chrysler and Mercury models. (CX 26G.)

161. A Yamaha development plan in November 1971 for a 6 h.p. outboard motor stated that: "... this is the model which can be exported to the United States as the major model; it can also be used to expand the European market, emphasizing Yamaha characteristics in performance and in quality." (CX 20D.) This horsepower model was scheduled to go into production in March 1973. (CX 20D.) "As an export

item into the United States, this is a new model." (CX 20D.) Features to be included in this 6 h.p. model included a water-cooled, two-cylinder engine, separate gas tank, water pollution control, noise and vibration counter measures and CDI. (CX 20D-20E.) Yamaha [40] planned to "hasten to develop this as a model which can advance into the American market. . . ." (CX 20G.) The Yamaha plan further stated, ". . . this model is to be designed from scrap both in the basic specification and in graphic design, and is to become a model which can squarely face the competitive models by the three majors of outboards OMC, Mercury, Chrys.). Additionally, we must incorporate characteristically Yamaha traits of performance and quality." (CX 20G.)

162. In November 1971, Yamaha prepared a development plan for a 10 h.p. outboard motor to be exported for sale to the United States and Europe. (CX 22A - 22M.) The Yamaha 10 h.p. outboard motor was scheduled to go into production in January 1973. (CX 22D.) That plan stated, "as a Yamaha merchandise mainstay in the United States, both in performance and quality construction, this engine should be suitable to the United States . . . [i]n terms of the U.S. market, this is a new edition." (CX 22D.) Features of the 10 h.p. outboard motor include a water-cooled, two-cylinder engine, separate fuel tanks, water pollution measures, and CDI. (CX 22D - 22E.) Yamaha showed great interest in the United States market. "Development of a 9.5 h.p. outboard is a must when we think in terms of expansion into the U.S. market. This will become a major drawing card." (CX 22G.) "In order to plan for Yamaha outboard market expansion and increase in sales, we have to plan for expansion into the U.S. market which is the place for outboards. In the U.S., the most popular outboard models are in the 9.5 h.p. class, occupying about 22% of the total demand." (CX 22F.) "To advance into the market built by the world's three largest makers, namely OMC, Mercury and Chrysler, and to squarely compete with their 9.5 h.p. class products, our product will have to have advance merchandising characteristics (such as performance, quality and dependability). . . ." (CX 22G.) The plan recognized, however, that this competition would cause severe problems in terms of cost: "[A]t the same time we are placed in an ever increasingly severe situation in terms of cost-competitiveness as well." (CX 22G.)

163. In July 1971, Yamaha completed a development plan for a 45 h.p. outboard motor. (CX 27, 28.) The plan recommended intended production of the 45 h.p. model in October 1972 for export to Europe and contemplated future export to the U.S. (CX 28B.) The report stated, "it seems that there is an urgent need for development of a high horsepower model of 40-45 h.p. category as a major drawing card among the Yamaha outboards, after the completion of the 25 h.p. P 450

project . . . also, as a drawing card in our advance into the export (overseas) trade." (CX 28D.) [41]

In the United States, the 1970 outboard motor sales statistics broken down according to horsepower rates indicates that over 30% of the total sales was in the 45 h.p. or higher category. So, the 45 h.p. machine occupies considerable share. (CX 28D, 28G.)

VIII. Yamaha's Capacity To Enter the United States Markets

164. In 1968, Yamaha offered four outboard motor models which were air-cooled, single-cylinder engines. (Eguchi, Tr. 667, 695.) After 1968, Yamaha developed two-cylinder, water-cooled outboard motors. (Eguchi, Tr. 702.) By 1971, Yamaha had developed six models up to 15 h.p., which included two-cylinder, water-cooled models; by 1972, Yamaha had developed eight models up to 25 h.p. (Yamaha Amended Ans., ¶ 2; CX 3.) By 1972, Yamaha had both water and air-cooled outboard motors which were manufactured by Sanshin. (Eguchi, Tr. 669-70.) In 1972, Sanshin manufactured all component parts of Yamaha brand outboard motors. (Eguchi, Tr. 672.)

165. Charles G. Strang, President of OMC, testified concerning the 25 h.p. outboard motor developed by Yamaha in 1971 (Tr. 346-50):

Q. You testified that you knew that Yamaha was a strong competitor in Europe. When did you become aware that Yamaha was a strong competitor in Europe, Mr. Strang?

A. I became very vigorously aware of it in the fall of 1971.

Q. And what happened then?

A. We have sales meetings in Europe every fall, which I attend, and we attended the sales meetings in October.

* * * * *

THE WITNESS: And it was brought to our attention by our distributors in Europe that Yamaha was making inroads in Europe.

* * * * *

[42] Q. Now, do you recall what Yamaha's marketing practices in Europe were that were mentioned at this meeting you attended in October or the late fall of 1971?

* * * * *

A. These were sales meetings attended by our European distributors and one subject brought up was the activity of Yamaha in particular in Europe, and our distributors were reporting this to those of us from OMC headquarters.

And they were talking specifically of Yamaha's practices of varying the price to get the dealer, and being willing to go to what they termed any length to be able to establish a dual dealership with an OMC franchised dealer.

* * * * *

Q. Did you do anything in response to these field reports?

A. Yes. The reports were specifically aimed or vociferous, I should say, about a 25-horsepower engine that Yamaha had, and we decided to get ahold of one of those engines and find out about it, and through our Evinrude and Johnson Distributor in Japan, we were able to obtain one.

Q. This was a 25-horsepower Yamaha outboard motor?

A. Yes.

Q. Did you test it?

A. Yes.

Q. Where?

A. In our engineering facilities at Waukegan.

Q. Do you recall when?

A. It was sometime in the winter of '71, '72. [43]

Q. Did you ever see this test report?

A. Yes.

Q. Did you ever see the engine torn down and disassembled?

A. Yes, I did.

Q. What were your conclusions from the test report and your personal observations?

A. An excellent engine, styled, shall we say, very closely after the Outboard Marine product and a very good performer in both speed and fuel economy.

Q. In your opinion, was that suitable for marketing in the US, then?

A. Yes.

Q. How did it compare with the Johnson, Evinrude and Mercury outboards of comparable horsepower, then?

A. Unfortunately, it out-performed both of them.

166. Mr. Strang went to the Tokyo Boat Show in the fall of 1972 and was surprised to see the emphasis on larger and better outboard motors. In a summary of his trip he reported (CX 107B - 107C):

The thing that was new here at this show, was the entry of many of the top motorcycle makers and other well-known firms into the outboard business and in larger sizes.

For instance, not too long ago, last fall, in fact, Yamaha, a big motorcycle maker, who is also the world's largest maker of pianos of all things, came forth with a new 25 horsepower outboard. As some of you know, we got a sample of that, and ran it, and found it to be a very fine engine capable of out-performing not only our own 25, but Mercury's, and being a topnotch, ultra-modern outboard - no cheap junky. Well, we, of course, have been concerned about that Yamaha 25, so you can imagine my feeling when I got to the show and found five other new 25 horsepower outboards on exhibit from such manufacturers as Kawasaki, the big motorcycle maker, Tohatsu, Suzuki, another of the big motorcycle makers, Yamato, and our friends at Yanmar showed a new 25 horsepower version of their rotary Wankel outboard. [44]

As I say, these are not second-rate economy machines, but they are top-notch, ultra-modern machines, and in those areas where we competed head-on, we find that they can come in with prices approximately 20% below ours, which gives a little idea of the way we have to go.

167. The 1972 OMC test report of the Yamaha 25 h.p. outboard motor (CX 89) shows that the Yamaha 25 h.p. model was considerably superior in horsepower over the entire operating range from 3,000 to

6,000 RPM to both the Mercury and OMC tested engines. (Strang, Tr. 354.) The test report also showed that with a light load, namely one man, the Yamaha 25 h.p. engine pushed a boat at roughly a mile and a half faster than an OMC engine. (Strang, Tr. 356.) The Yamaha engine also got much better gas mileage than the OMC engine, getting almost twice as many miles per gallon at 15 m.p.h. (CX 89D.)

168. Mercury tested the Yamaha 25 h.p. outboard motor, and in a report dated May 25, 1973, the Mercury engineer felt that the motor moved test boats as well as the competitive Mercury motor; that it resisted salt water corrosion well; that spark plug life was very good for a standard ignition system (it lacked a CDI); and that the manual rewind starter was simpler and better than the Mercury starter. However, the engineer reported, among other slighter defects, an aggravating problem with the Yamaha 25 was that it broke propeller shear pins, as many as three a day and that: "A Mercury owner would really appreciate his rubber clutch propeller if he would test drive a Yamaha for a few hours." (CX 42C - 42H.)

169. Pursuant to the engineering agreement signed by Yamaha and Brunswick in November 1972, Yamaha agreed to send samples of outboard motors to Mercury for testing. (BX 21.) The general evaluation (excluding idle) by Mercury engineers of eight Yamaha engines (2, 3.5, 5, 8, 12, 15, 20 and 25 h.p.) in September 1973, rated three "good," three "fair," and two "poor." (CX 53.) This report was very critical of the idle of the motors. One Mercury engineer reported his first impression (CX 48):

They perform quite well and would be as good as any other low feature engine on the market. They are easy to operate, responsive and surprisingly quiet. There is one great problem, however, with the 12, 15 and to some extent the 20 h.p. engines. The problem is extremely rough idle. While the engine does not seem to be missing, it shakes so badly it seems as though the engine and boat are both going to come unglued. . . . I don't feel we can sell the 12 or 15 h.p. engines until that [45] condition is cured. We could live with the 20 h.p. but it could use some work also.

170. Yamaha had a 55 h.p. outboard motor at the 1972 Tokyo Boat Show. It was a prototype and was not made available for inspection as were other Yamaha outboards. It lacked through-the-hub (jet prop) exhaust. (Strang, Tr. 446-47.) At the 1973 Tokyo Boat Show, the Yamaha 55 h.p. still was not available for inspection. It now had through-the-hub exhaust. (Strang, Tr. 448.) Yamaha sold 109 of these outboard motors in Japan in 1973 and 585 in 1974. (CX 98A.) OMC tested this motor in 1974 and Mr. Strang testified that it was a "very nice engine, very good performer. . . ." (Strang, Tr. 449.) However, as soon as Mariner saw the costs of the motor they urged a cost reduction study since it "could not be sold competitively at a satisfactory profit."

In 1974, Sanshin and Mariner conducted a cost study resulting in changes for reduction of costs on production of this motor, including the addition of an American-made starter motor and Mercury capacitor discharge ignition. (BX 17A - 17B.)

171. Yamaha needed a 55 h.p. outboard motor to successfully come into the United States market in 1972. (Eguchi, Tr. 699.) Sanshin built the first models for sale by Mariner in mid-1974, but by that time costs had spiraled in Japan and Mariner thought they could not successfully recruit a marine dealer organization with a line that went up only to 55 h.p. Mariner got a 85 h.p. model from Mercury in 1976 and entered the United States market. (Anderegg, Tr. 776.)

172. The two-cycle technology expertise of Yamaha in snowmobiles and motorcycles would be an advantage to Yamaha in marketing outboard motors. (CX 76C; Strang, Tr. 375-76.) A journeyman mechanic who is able to repair the powerhead unit of the Yamaha-manufactured motorcycle is also able to repair the powerhead unit of the Yamaha-manufactured snowmobile. (Stipulation No. 2.) Dealers skilled in repairing two-cycle motorcycles could repair two-cycle outboards. (Strang, Tr. 372, 378; see Finding 181.)

173. In 1972, Yamaha was selling outboard motors throughout the world, with the exception of the United States. (CX 15B - 15C.) It sold in Europe, Canada, South East Asia, Africa, the Middle East, Oceania (Australia and New Zealand) and in Central and South America. (CX 15B - 15D; Eguchi, Tr. 664.) Europe, Canada, Australia and the Far East (principally Japan) constituted the most important foreign markets. (BX 12T.) [46]

174. By 1972, Yamaha had about 70% of the Japanese outboard motor market. (CX 5B, 59A.)

175. During 1972, the horsepower range of outboard motors sold by Yamaha in Japan ranged from 2 through 25 h.p. (CX 111B.) In 1971, Yamaha exported over 25,000 outboard motors ranging in horsepower from 2 through 25 h.p. (CX 15A; Eguchi, Tr. 661.)

176. Yamaha-manufactured motorcycles were first marketed in the United States in 1959. By 1974, over 30 models of "Yamaha" motorcycles were being sold by YIC in the United States. (Stipulation No. 2, #25, #27.) YIC developed a network of retail dealers in the United States for "Yamaha" motorcycles. (Yamaha Supplemental Admissions, p. 3, 6/18/76.) In 1974, approximately 20% of all motorcycles sold in the United States were "Yamaha" motorcycles distributed by YIC. (Stipulation No. 2, #28.)

177. Yamaha also manufactures snowmobiles, which were first sold by YIC in the United States in 1968. (Stipulation No. 2, #30.) By 1974,

eleven or twelve models of Yamaha brand snowmobiles were sold by YIC. (Stipulation No. 2, #32.)

178. "Yamaha" brand name recognition is important to Yamaha and YIC for the successful marketing of "Yamaha" products in the United States. (Stipulation No. 2, #23.) From 1964 to date, YIC has been able to gain name recognition in the United States for "Yamaha" brand products through consumer and trade advertising. (Stipulation No. 2, #24.)

179. In 1972, some "Yamaha" brand franchised dealers in the United States sold both "Yamaha" motorcycles and snowmobiles. (Stipulation No. 2, #33.)

180. In 1972, OMC sold both snowmobiles and outboard motors. Snowmobile and outboard motor dealerships are compatible in that both are two-cycle engines and use numerous common parts. The outboard motor dealer is in a good position to service both snowmobiles and outboard motors. A line of snowmobiles give a marine dealer a year-round business—he can sell snowmobiles in the winter and outboard motors in the summer. (Strang, Tr. 375.) [47]

181. Motorcycle dealers are skilled in servicing two-cycle engines which are common to outboard motors and motorcycles. (Strang, Tr. 372.) Motorcycle dealers could provide a way for Yamaha to enter the United States market initially. (Strang, Tr. 372-73; CX 79J, 90Z-60, 108T.) Motorcycle dealers are not prime distributors of outboard motors, however, unless they are marine dealers, carrying boats and accessories as well as a full line of accessories. (Eguchi, Tr. 696-97; Strang, Tr. 373.) The main reason for this is that the sales seasons for motorcycles and outboard motors coincide (CX 90Z-61), whereas the season for snowmobiles is complementary to those products. (Strang, Tr. 375; Anderegg, Tr. 796.)

IX. Yamaha and the Joint Venture

A. Yamaha's Position on the Edge of the Market

182. Prior to the joint venture, Yamaha had a relatively simple, economical low horsepower line, suitable for salt water and used primarily for commercial fishing and transportation. In 1972, Yamaha's largest outboard motor was 25 h.p. (BX 1K; Eguchi, Tr. 669.) Many of the parts of the Yamaha outboards were stainless steel to prevent corrosion, since they were constructed for salt water use. (CX 42G.) Low horsepower outboards in the United States, by contrast, are used mostly on lakes, rivers and streams and rarely in salt water. (BX 3A, 12Q.) This is one of the reasons that the Yamaha low horsepower

motors were too costly to compete in the United States market. (BX 24 [Bradley], pp. 36-37.)

183. The Yamaha brand of outboard motors sold in Japan and Europe were, in 1972, low horsepower motors, lacking the power and features which were common on outboard motors sold for pleasure boating in the United States. (Alexander, Tr. 834-35; BX 1K.)

184. Yamaha went into the European outboard market in 1968. (Eguchi, Tr. 660.) Because Europeans have less disposable income and smaller cars (for boat towing), and due to the cost of fuel, the European outboard motor market favors a lower horsepower engine. (Strang, Tr. 452.) Outboards of less than 25 h.p. comprise 75% of that market. (CX 15B). By 1972, Yamaha had 12% of the low horsepower market in Europe, and was second to OMC. (CX 15B.) [48]

185. Yamaha's outboard motors suit the market in Japan, Southeast Asia, Africa, Oceania (New Zealand and Australia), and Central and South America. (CX 15B - 15D.) These markets call for simple, less costly motors with few features which are used primarily for commercial fishing and transportation. (BX 20E.)

186. From its attempt to penetrate the United States outboard motor market in 1968, Yamaha learned the value of a full line and marine dealers in this market. (BX 8F, 8J.) Mr. Eguchi, Managing Director of Yamaha, testified on this subject (Tr. 695-96):

Q. Can you tell me, sir, why it is that Yamaha Motor—well, Yamaha, as you have testified, selects marine dealers through which to sell its products rather than in some other way?

A. Outboard motor market is pretty well established market already, and those products are handled by marine dealers, and unless you go to marine dealers you will have no access, practically, to the marine product customers.

Q. Now, sir, you've testified that Yamaha had by 1972 increased its range of models to include a 25 horsepower model?

A. Yes.

Q. And you have testified that—and Yamaha has increased its horsepower models since then, has it not?

A. We increased up to 55 since then.

Q. Yes, sir.

Now, based upon your experience, Mr. Eguchi, why is it that a company does that? Namely, expands its line of outboard motors. What's the business reason for that effort?

A. When you try to be one of the top class outboard manufacturers, you have to have a full range of the models, so naturally we want to develop more or bigger horsepower motors in our line. [49]

Q. What effect, if any, sir, in obtaining marine dealers for your product does having a broad line have?

A. Every top-class outboard motor manufacturer has its own full line, and for the dealers, marine dealers, unless they have full line of the products they cannot operate successfully its marine business. And if you only have a certain limited models, the dealer has to go to somebody else to get the rest of the models in the lineup, and that is pretty difficult to divide the sources of the products by category.

187. Most consumers are conditioned to purchase outboard motors from marine dealers. (CX 90Z-61, 90Z-62.) They often buy outboard motors at the same time and place that they buy other hunting, boating and/or fishing gear. (CX 90Z-61.)

188. Motorcycle dealers, while able to repair two-cycle engines like most outboards, do not offer long-term promise for entry to the United States outboard markets. (CX 90Z-60 - 90Z-61.) The seasons for outboards and motorcycles coincide, and they both would compete for a dealer's floor space, inventory investment and merchandising. (CX 90Z-6, 90Z-46, 90Z-61.) Yamaha based its 1968 attempted United States market penetration on sales through 70 motorcycle dealers and 30 marine dealers. This attempt failed "especially" through the motorcycle dealers. (BX 5A.)

B. Benefits to Yamaha from Joint Venture

189. Yamaha believed that the joint venture was advantageous to it. Yamaha would receive the designing and manufacturing techniques for high performance outboard motors, especially large engines over 50 h.p. The increase in production would lead to production rationalization and total cost reduction. And, in addition, because of the joint venture, Yamaha would finally be in the United States outboard market, though not with the "Yamaha" brand. (BX 8B.) [50]

190. The disadvantages considered by Yamaha in determining whether to attempt entry on its own included the lack of a full line, high costs, the need for a network of marine dealers, and the present inability to meet the particular needs of the market for power and performance. (BX 8F.)

191. Yamaha wanted to avoid the price and cost competition existing in the low horsepower outboard market in the United States. (BX 3D, 3E.) The high horsepower outboards, with higher prices and more accessories, generate higher profits. (BX 12CC.) Yamaha wanted to enter the high horsepower outboard market in the United States as a top class manufacturer. (Eguchi, Tr. 696.)

192. Yamaha regarded the joint venture as an alternative to entering the United States market under the Yamaha brand. Yamaha had determined that it would take much time to develop high horsepower outboard motors and the full line necessary to enter the market. Yamaha was not considering entering on its own in the near future and had no concrete plan to do so. (BX 8D - 8E; Alexander, Tr. 856-58.)

193. After the unsuccessful attempts to enter the United States market in 1968 and 1971, Yamaha engineers continued their interest in developing outboard motors which would sell in the United States

market. (BX 5B; CX 19 - 28.) The engineers had a plan to develop a line of pleasure-type outboards from 3 h.p. to 45 h.p. suitable for sale in the United States and Europe. (CX 5B.) In 1971, Yamaha engineers planned to redesign their 10 h.p. outboard motor to include features such as CDI and jet prop exhaust. (CX 22D - 22E.) In 1975, Mariner engineers reported the history of this project:

Yamaha designed and developed a 10 h.p. engine during the past several years but dropped it (after tooling partially completed) because of high manufacturing costs. This spring MIC [Mariner] Engineering made a study of the engine and set a tentative reduction of \$50.00 in manufacturing costs. At MIC instigations, the program was started again with a thorough redesign of the engine in mind to produce both 10 h.p. and 15 h.p. models and to reduce cost. At present, Japanese engineers are in our office doing the redesign work under MIC guidance. . . . (BX 17B.) [51]

194. Mr. Charles F. Alexander, Jr., Mercury's Vice President in Charge of Engineering, testified about Yamaha's lack of readiness to enter the United States outboard motor market in 1972 and the benefits it obtained from the joint venture (Tr. 856-58):

Q. Mr. Alexander, with respect to the technology that Mercury transferred to Yamaha that you testified to involving the CDI and the jet prop and the rest of it, could you put a dollar value on what that information or technology is worth?

A. No, I don't think I could. But I know that it saved Yamaha a lot of time. I know that it brings them very rapidly up to the state of the art, and has to be worth an awful lot of money to them as a possible future manufacturer in this business.

I don't think we would sell it to anyone, because it's worth too much.

Q. You are saying it is worth more than a million dollars?

A. Oh, of course.

Q. Would it be worth \$25 million?

A. I can't put a value on it, but when you are in a business of hundreds of millions of dollars a year, and you give away the essential technical information that enables somebody else to get up to your state of the art, it has to be worth quite a bit.

Q. Speaking about the state of the art, what was Yamaha's posture with respect to the state of the art in 1972 with respect to outboard motors?

A. At the time they had a low-powered line of outboards, not particularly different from several others in the world. They had basically copied as best they could OMC models in the lower end of the horsepower range.

They certainly would not have been able to be a factor at that time in the U.S. market, because they did not have the product. [52]

Q. Would you say that by virtue of this input of technology they have advanced their known state of the art by several years?

A. I am sure that they have saved a lot of time in getting up to date and being in a position to be competitive in this market.

Q. Could you give us, when you say "save time" could you measure that in either months or years or days?

A. It is hard to do, because they did not have an outboard engineering organization that even understood the problems. If you said they would have had to first develop the organization and then the product line, I don't know.

It would have to take them at least two or three times as long as with our help, and

we probably saved them some field disasters and some recalls, because when you try to plunge headlong into these things you sometimes make mistakes.

And then you have massive recalls which hurt the image as well as cost money.

195. Yamaha and Sanshin obtained valuable know-how from Mercury after the joint venture agreement. Mr. Alexander testified about this subject (Tr. 830-33):

Q. When was the first point in time that Mercury began exchanging technology with Yamaha after the execution of the joint venture agreement?

A. It was in January, 1973.

Q. What were the circumstances of that exchange?

A. We invited Yamaha engineering people to send representatives to Oshkosh, design engineering people, so that we could work closely with them on the design of certain new outboards that Sanshin would make that would be suitable for sale in the U.S. market, and it would upgrade the line both in horsepower and in features to be more like the currently successful U.S. outboard companies. [53]

Q. What kinds of information did you make available to these Yamaha engineers?

A. We decided that we could not simply mail them a bunch of drawings and patents, that we had to get them to come to Oshkosh so that we could teach them from Mercury drawings how to design these features into the new outboards.

So we rented space in the University of Wisconsin, Oshkosh, space for them to live, space for them to work. And we assigned people full-time to work with them.

I, personally, participated in this and they were there for several months, four, five, six months, with drawing boards that we moved into this dormitory area, which was part of the university.

We brought our drawings out and we had their designers at the board, because they had to make Japanese notations in the drawings.

They had to make the drawings so they could use them in Japan, and we knew we could not do that. We wanted to be sure that the information from our drawings was properly put on their drawings to adapt it to their engines, their powerhead part.

Our contribution was primarily below the powerhead. The Yamaha people know very well how to make an engine, although they did not know everything that was required of a two-cycle engine to be an outboard.

For example, they did not have the engines idling slowly enough and consistently enough. But basically they had good engine technology.

What we were contributing was the rest of the outboard motor, which is, perhaps, half of the package, the propeller and the gear case, the under-carriage, the rubber mounts, to make the engine push the boat properly.

So we worked with them for several months, as I said, in the design of new outboard motors which would eventually get into production in Sanshin for Mariner and also for Yamaha. [54]

Q. How many engineers came from Japan? Do you have any idea?

A. I think there were six or eight; something like that.

Q. These drawings and this know-how that you exchanged with Yamaha, is that information generally public? Is it made available to the trade or anything?

A. No, not at all.

Q. That is proprietary information?

A. Sure. It is all the know-how that goes into our outboard motors, some of which is patented, but most of which is simply trade secrets, know-how, little things you do to make things work properly.

C. Future Unilateral Entry by Yamaha

196. The joint venture is unlikely to last beyond the ten-year term specified in the agreement. Yamaha's management has stated publicly that the reason Yamaha entered the venture was to benefit from Mercury technology and know-how, which will be gained during the ten-year period. Development of high horsepower models by Sanshin has not been practical due to high cost of development and tooling, and Mariner has obtained these models from Mercury. This is a signal to Yamaha that Mariner considers the joint venture a short-term arrangement. Once the notice of termination is given, three years prior to the ten-year term, it is likely that the joint venture will not continue past the notice date and dissolution will take place at that time. (BX 1 O - 1P.)

197. The joint venture agreement has facilitated future (post joint venture) unilateral entry by Yamaha into the United States outboard motor markets. Yamaha and Sanshin have received valuable technology and know-how from Mercury. (Alexander, Tr. 856-58.) This exchange has saved Yamaha much time in developing high horsepower outboards and a full line necessary to enter the United States markets. (BX 8E; Alexander, Tr. 856-58.) [55]

198. Except for Mariner's 85 h.p. outboard, which is made by Mercury, Mariner outboards made by Sanshin are identical to Yamaha outboards except for color and decal. (Respondents' Proposed Finding III(9)(b)(i); Complaint Counsel's Reply Brief, p. 21.) The 51 Mariner dealers franchised so far have signed a one-year franchise. (Anderegg, Tr. 779.) If the joint venture ends, they may be targets to become Yamaha dealers in the future if Yamaha enters the United States markets. (Anderegg, Tr. 798.)

199. The structure of the joint venture may end upon notice to terminate from either party in May 1979: ". . . it is likely that if such notice is given, there would be an agreement not to continue the joint venture subsequent to 1979 and an orderly dissolution would take place at that time." (CX 108 O.) Mercury manufacturing facilities have been instructed to include in its planning the production of the full requirements of both Mercury and Mariner by that time. (Anderegg, Tr. 792; CX 81A, 84A.)

X. Yamaha as a Perceived Potential Entrant

200. In 1972, Mr. Strang, the President of OMC, visited the 1972 Tokyo Boat Show and reported that Yamaha was a potential entrant into the United States outboard motor markets. (CX 107B-107C.) (See Finding 166.)

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201. Mr. Strang's notes at the 1972 Tokyo Boat Show indicated that Tohatsu was a potential entrant into the United States outboard motor markets (CX 107H):

Tohatsu . . . They, too, as I said showed a new 25 horsepower engine and 23 1/2 cubic inches, which tops a line of 4 horsepower, 5, 8, 9.8, 12 and 18 horsepower engines. It follows the U.S. pattern very closely even to marketing their own outboard oil, their own remote controls and everything that the U.S. outboard companies do. And, as you can see, their display is completely modern and the equivalent of anything that Chrysler, Mercury or ourselves might have. One thing significant was pointed out to me here by Mr. Yuano of our distributors, and that was that all of the literature at this show covering the outboards was printed in English for the first time in this particular show, presumably as part of their preparations for launching a world-wide sales assault. [56]

202. Mr. Strang's notes of the 1972 Tokyo Boat Show indicate that Kawasaki was a potential entrant into the United States outboard motor markets (CX 107I, 107K):

Kawasaki . . . This, too, was a shaker. . . .

* * * * *

Now they introduced two new models, 15 and 25 horsepower engines at roughly 16 and 25 cubic inches each, and here they are, the black engines up there. It was interesting. While most of the Japanese makers have chosen to, shall we say, duplicate the OMC engines both in design and styling, Kawasaki, instead, chose to follow the Mercury line of styling, and as you can see, they have even taken the plack [*sic*] paint, although they have highlighted it with a slash of orange on the side. The engines here - there are 2, 15-horse engines here and 2, 25-horse engines shown. These were so new that they didn't even have prices on them yet, but this is the start of their new line - they've retained their old line of 2 1/2 horsepower, 5 horsepower and 7 horsepower engines, topping it with these two new models. You can see there is trouble coming there.

203. Mr. Strang's notes of the 1972 Tokyo Boat Show indicate that Yamato was a potential entrant into the United States outboard motor markets (CX 107H - 107I):

Yamato

More important to us at this show was the engine just to the left of the racing engine, and that is Yamato's new 25 horsepower engine, which was indeed again a very modern, well developed, well styled and very professional looking 25 horse twin. Perhaps more importantly, behind the 25 on the far side of those boats, you can just see the power heads of their other new entry in the field. It is a 3 cylinder, 55 horsepower engine, very similar in appearance to our own 3 cylinder engine, and very similar in design. They did a good job on it, the best that I could see, and were kind enough to take the engine cover off and I could get a good look at it. I was so impressed with both of these engines that I asked our people to get one of each for us for engineering tests. These people are relatively small, but they have a lot of know-how [57] in the outboard field from their racing background. There is no question that they could be a real problem if they really get into the marketing aspects of this thing.

204. Mr. Strang's notes of the 1972 Tokyo Boat Show described Japanese competition as having "wiped out the rest of the world's motorcycle industry" and concluded (CX 107V - 107W):

Needless to say, we don't want this to happen to OMC and we have to take steps to see that it doesn't - and it's going to be no small problem between the government intervention over there, to assist in the growth of this export market, and between the labor situation which they have there, the rates that they pay their workers and the productivity of the workers. Yamaha, for instance, pays its workers a flat monthly salary with no incentive pay and feel that what they call their nationalistic drive takes care of the incentive. That's very hard to compete against, and the government thing makes it almost impossible. So it behooves us, in our plan of work, and we should keep it in mind at the rest of this meeting and all of our future planning meetings that we have to keep all our product development ready for the Japanese invasion. The only way we are going to be able to fight it, it would appear, is by keeping ahead of them in products and by keeping ahead of them in manufacturing; hopefully, by keeping a step ahead of them in marketing techniques. I know this is not a very pleasant picture that I've painted before we get into this thing, but let's be blunt about it. We have to take steps to stay alive - and - with that grim warning - let's go on to the rest of the agenda.

205. OMC's initial reaction to the 1972 Tokyo Boat Show and its test report on the Yamaha 25 h.p. outboard motor was to improve the quality of its own 25 h.p. outboard motor. Mr. Strang, President of OMC, testified on this subject (Tr. 361-64):

Q. What was the reaction of OMC to the test report and to your report of the Tokyo Boat Show? [58]

A. The initial reaction was that we obviously needed a better engine in the 25-horsepower range to compete with the Yamaha that was then in existence. And we took steps to initiate the engineering and manufacturing of a better engine.

Q. What exactly did you do to upgrade the OMC 25-horsepower?

A. We started out on the premise that we would merely increase the bore a little bit and tune it a little more highly. As time wore on, we made sizeable changes to the engine and it eventually wound up as virtually a new engine of larger piston displacement.

Q. After you had accomplished this upgrading of the OMC 25 horsepower, was its performance comparable to that of the Yamaha outboard you had tested?

A. Yes.

* * * * *

Q. Did you improve the OMC outboard for sale in the US?

A. Essentially, we tried to sell the same engines all over the world, so, yes.

Q. So is the improved OMC 25 horsepower for sale in Europe the same as the one for sale in the US?

A. Yes.

Q. Did you plan to effect any of these improvements to the OMC outboards before you saw the test report on the Yamaha 25-horsepower—

* * * * *

A. . . .

We had no plans to upgrade the 25-horsepower engine until the Yamaha came along.
[59]

206. In October 1972, after he saw the test report on the Yamaha 25 h.p. outboard, Mr. Strang, of OMC, called for a five-year projection of the effect on OMC's sales and earnings which would result from the possibility of Yamaha's entry into the United States with outboard motors. (Strang, Tr. 365.) The projection was based on the "arbitrary assumption that activity of Japanese outboard manufacturers would reduce [OMC's] world-wide sales below what we had otherwise forecast in the 50 horsepower and under category." (BX 23.)¹⁰

207. OMC's reaction clearly was for defense of its position in the United States as well as Europe. (Strang, Tr. 383-84):

Q. Mr. Strang, Did you have more concern about any one of the outboard motor exhibitors at the 1972 Tokyo Boat Show than others?

* * * * *

THE WITNESS: Yes, we were most concerned about Yamaha.

By Mr. Dolan:

Q. And what was the nature of that concern, sir?

A. We had been stung by them abroad and we were very fearful of an invasion of the US market.

Q. Is that one of the reasons why you upgraded the OMC 25-horsepower outboard?

* * * * *

THE WITNESS: Since our engines are basically sold all over the world, we were improving the 25-horsepower outboard for defensive purposes in the US as well as abroad. [60]

208. Mr. Strang testified about the most likely entrants into the United States outboard motor markets (Strang, Tr. 338, 340):

Q. In 1972, were there, in your opinion, likely entrants into the manufacture and sale of outboard motors in the US?

* * * * *

THE WITNESS: I can't really say there was any likelihood of manufacture in the US. There was certainly the likelihood of sale in the US.

Q. And who would this be, Mr. Strang?

A. Foreign producers such as Volvo, Carniti, the Japanese manufacturers such as Yamaha, Suzuki, Kawasaki and Tohatsu.

209. The President of Eska believed in 1972 that potential entrants

¹⁰ BX 23 was prepared on June 9, 1975, to describe the 1972 projection.

into the United States outboard motor market included Yamaha, Volvo, Suzuki and TAS. (Kascel, Tr. 615-17.)

210. In April 1975, the President of Mariner stated that (BX 1N):

For many years there were no real competitors in the outboard field outside the United States, except Yamaha. But there are signs that this is going to change; Volvo-Penta is already mounting a vigorous effort world wide, Renault is attempting to get into the outboard business, Tohatsu and Suzuki are expanding their lines to higher horsepower and are beginning to move out of Japan and there will certainly be others who will make the effort even though they may not succeed. [61]

CONCLUSIONS OF LAW

I. Jurisdiction

The complaint alleges that the joint venture agreement, by eliminating Yamaha as one of the few likely entrants into the United States outboard motor market, constitutes a violation of Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act. Section 7 of the Clayton Act states in part that:

. . . [N]o corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital . . . of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition . . . (Emphasis added.)

The acquired company here, Sanshin, has never by itself engaged in commerce, within the meaning of the statute. Complaint counsel argue, however, that Sanshin is part of a corporate family with Nippon Gakki at the head, Yamaha and YIC as sister corporations, and Sanshin as the offspring of Yamaha. The existence of any such corporate "family" is irrelevant in my opinion. The issue, rather, is whether Sanshin was dominated by Yamaha before the joint venture or by Yamaha and Brunswick (through Mariner¹¹) at the time of the joint venture. Since both Yamaha and Brunswick were in interstate commerce,^{11a} their domination over Sanshin would put that company in commerce. This involves the more familiar doctrine of piercing the corporate veil.

Sanshin, a Japanese corporation, was established in 1960, and its principal office is in Hamamatsu City, Japan. In May 1969, Yamaha purchased control of Sanshin. As a majority shareholder, Yamaha had the power to control Sanshin by, *inter alia*, appointing all of its directors. (CX 1Y.) Yamaha also acquired all the assets of Sanshin and transferred Yamaha tooling and equipment for outboard motor

¹¹ The domination of Mariner by Brunswick was not contested.

^{11a} Findings 6 and 24.

production to the Sanshin plant. (Findings 25-27.) For these reasons, Yamaha dominated Sanshin before the joint venture agreement. [62]

Furthermore, Sanshin was dominated by both Yamaha and Brunswick (through Mariner) at the time of the joint venture agreement. When the memorandum of understanding for the joint venture was signed on March 9, 1972, Yamaha and Brunswick agreed to create a manufacturing joint venture to be established in Japan "between Yamaha Motor Co. . . . through its subsidiary Sanshin Industries, Co., Ltd., and the Mercury Mariner Division of Brunswick Corporation." (Finding 36.)

Yamaha and Mercury agreed that an outboard engineering group was to be established at Sanshin with responsibility for the design and development of all Sanshin products. Yamaha agreed to assist Sanshin in securing personnel for that engineering group. (Finding 54.)

On November 21, 1972, Brunswick entered into the joint venture agreement with Yamaha wherein it was provided that Mercury Marine International Company, a wholly-owned subsidiary of Brunswick, would be formed to purchase 62,000 shares of newly issued stock of Sanshin for \$1.4 million. With the purchase of that stock, Mercury Marine International Company and Yamaha each owned 38% of the outstanding stock of Sanshin. The remaining 24% of the Sanshin stock is held by individual Japanese stockholders. (Findings 37-38.) Since 1972, Sanshin has manufactured outboard motors only for Yamaha or Mariner. (Finding 45.)

The joint venture agreement gives Yamaha the right to appoint six of Sanshin's eleven directors and the right to select the day-to-day operating officers of Sanshin, including the representative director (president) of the company. Mariner is given the right to appoint the other five directors. (Finding 40.) Mariner communicates on a daily basis with Sanshin, by telex, telephone and mail, regarding the joint venture and marketing of "Mariner" brand outboard motors. (Finding 13.)

Sanshin became a new enterprise when the joint venture was formed. Five of its eleven directors were appointed by Mercury. It then obtained technical advice from Mercury. (Finding 197.) Yamaha, through Sanshin, obtained access to the United States market through Mariner's experienced sales force. Upon the signing of the joint venture agreement, Sanshin became the joint venture company, formed by companies engaged in commerce for the purpose of manufacturing outboard motors in Japan for sale, among other places, in the United States by a sales company to be engaged in commerce. [63]

A similar issue was before the Court in *United States v. Penn-Olin*

Chemical Co., 378 U.S. 158 (1964). There, the joint venture company was not engaged in commerce at the time it was formed, but was so engaged at the time of the suit. The Court held that the jurisdictional requirement of Section 7 had been met, *id.* at p. 168:

The test of the section is the effect of the acquisition. Certainly the formation of a joint venture and purchase by the organizers of its stock would substantially lessen competition—indeed foreclose it—as between them, both being engaged in commerce. This would be true whether they were in actual or potential competition with each other and even though the new corporation was formed to create a wholly new enterprise. Realistically, the parents would not compete with their progeny. Moreover, in this case the progeny was organized to further the business of its parents, already in commerce, and the fact that it was organized specifically to engage in commerce should bring it within the coverage of § 7. In addition, long prior to trial Penn-Olin was actually engaged in commerce. To hold that it was not “would be illogical and disrespectful of the plain congressional purpose in amending § 7 . . . [for] it would create a large loophole in a statute designed to close a loophole.” *United States v. Philadelphia National Bank*, 374 U.S. 321, 343 (1963). In any event, Penn-Olin was engaged in commerce at the time of suit and the economic effects of an acquisition are to be measured at that point rather than at the time of acquisition. *United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 607 (1957). The technicality could, therefore, be averted by merely refiling an amended complaint at the time of trial. This would be a useless requirement.

Here, Sanshin was (through domination by Yamaha) engaged in commerce before the joint venture. Furthermore, as the joint venture company, Sanshin was formed by companies engaged in commerce and which appoint *all* of the directors and *all* of the day-to-day operating officers of the company. Sanshin is dominated by Yamaha and Brunswick (and Mariner), and since they are engaged in commerce, so is Sanshin. [64]

Since the joint venture company Sanshin was formed by companies engaged in commerce, for the purpose of manufacturing outboard motors and selling them through a company engaged in commerce, Sanshin was also engaged in commerce. “To hold that it was not ‘would be illogical and disrespectful of the plain congressional purpose in amending § 7 . . . [for] it would create a large loophole in a statute designed to close a loophole.’ ” *United States v. Penn-Olin Chemical Co.*, *supra*.

Even if Sanshin has not engaged in commerce, and Section 7 did not apply here, the complaint also alleges that the joint venture violates Section 5 of the Federal Trade Commission Act. Section 5 was amended on January 4, 1975, to expand the Commission’s jurisdiction to cover violations “affecting” commerce, Section 201(a) of Title II of the Magnuson-Moss Warranty-Federal Trade Commission Improvements Act, Pub. L. 93-637, 15 U.S.C. 45(b). The complaint was amended on May 7, 1976, to allege that the joint venture affected commerce. Although the joint venture took place in 1972, before the amendment,

the effects of a joint venture are weighed at the time of the suit. *United States v. Penn-Olin Chemical Co.*, *supra*; *United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 607 (1957). So the issue is whether the Commission has jurisdiction now, not in 1972. Since the joint venture is affecting commerce in the United States at the time of the suit, the Commission has jurisdiction under Section 5.¹²

II. Line of Commerce

The joint venture in this proceeding would violate Section 7 of the Clayton Act if "*in any line of commerce* in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." (Emphasis added.) The relevant section of the country has been stipulated to be the entire United States. The issues at contest are the lines of commerce and the effects of the transaction upon competition. [65]

In a Section 7 suit, it is necessary first to define lines of commerce for the purpose of evaluating the anti-competitive effect of the proposed acquisition. Line of commerce has been defined to mean the relevant product market. *Brown Shoe Co. v. United States*, 370 U.S. 294, 324 (1962). In determining the outermost boundaries of a product market, analysis should be guided by examination of the reasonable interchangeability of use, or the cross-elasticity of demand, between the product and substitutes for it. *Id.* at p. 325. Lack of interchangeability in use does not automatically bar recognition of a broader line of commerce where, for technical or other reasons, there is commonality in production and distribution resulting in a distinct and recognized "industry" of firms who sell a broad line of products. *Liggett & Myers, Inc.*, Trade Reg. Rep. (1973-76 Transfer Binder) ¶ 21,151 at pp. 21,055-56 (FTC April 29, 1976 [87 F.T.C. 1074 at 1152]) (appeal pending [XIS + D749]); *L. G. Balfour Co. v. FTC*, 442 F.2d 1, 10-12 (7th Cir. 1971). In *British Oxygen Co., Ltd.*, Trade Reg. Rep. (1973-76 Transfer Binder) ¶ 21,063 at p. 20,908 (FTC December 22, 1975 [86 F.T.C. 1241 at 1345]) (appeal pending [XIS + D587]), the Commission held industrial gases to be a relevant market, despite their lack of interchangeability of use, since buyers prefer to get delivery from one supplier,¹³ and technical skills used in production are very similar for many gases.

In the outboard motor industry, except for some overlap near the

¹² In the order of May 7, 1976, I also stated that the Magnuson-Moss amendment has retroactive application, because of the maxim "*Expressio unius est exclusio alterius*." Since Congress specifically excluded retrospective treatment to two parts of the statute, it is implied that the rest of the statute, including the jurisdictional amendment, should be read to apply retrospectively. I found it unnecessary to hold that the amendment applies retroactively since the present effect of the joint venture gives the Commission jurisdiction.

¹³ Another example of looking at the buyers' need in determining market boundaries, is setting "commercial banking" apart as a line of commerce because of the "cluster of products and services" offered in response to "settled consumer preferences." *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 356-57 (1963); *United States v.*

(Continued)

dividing line, there is very little interchangeability of use between high and low horsepower engines. (Findings 89-90, 102-03.) And there is little commonality of production and distribution between them. Advanced technology and know-how and different production facilities are required in the manufacture of high horsepower outboards. (Findings 92, 105-19.) Low horsepower outboards are sold through mass merchandisers. (Finding 97.) By contrast, since selling high horsepower outboards to consumers is a more complex business and requires more skill and service, they are sold almost exclusively through marine dealers. (Findings 124-27.) Because of these variations in the industry, [66] all outboard motors sold in this country do not constitute a relevant product market for the purpose of determining the effect of an acquisition alleged to violate Section 7 of the Clayton Act.¹⁴ Furthermore, an analysis of the differences in the manufacturing and merchandising of low and high horsepower outboard motors, using the criteria specified in *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962), will show that they constitute two separate relevant product markets.

There are distinct differences between the two relevant markets in this case: low horsepower gasoline outboard motors and high horsepower gasoline outboard motors.¹⁵ The products in these markets differ substantially in price. (Findings 93-94, 120.) Manufacturers of low horsepower outboards establish prices for their products without referring to the prices of high horsepower outboards. (Finding 94.) Manufacturers of high horsepower outboard motors establish prices for their products without referring to prices of low horsepower outboards. (Finding 120.) The products are sold to different customers for different uses. (Findings 89, 102.) Small outboards cannot be used for water skiing and pushing large boats, and it is impractical to use large outboards on small boats. Production facilities for the two differ greatly, and the large outboards cannot be made on a production line meant to make small outboards. (Findings 92, 119.) [67]

In *British Oxygen Co., Ltd.*, *supra*, the Commission held that "inhalation anesthesia equipment and accessories" was not a relevant line of commerce, pointing out that a manufacturer of one item within the product grouping could not readily produce other items and there

Connecticut Nat'l Bank, 418 U.S. 656, 660-66 (1974); *United States v. Phillipsburg National Bank & Trust Co.*, 399 U.S. 350, 360 (1970).

¹⁴ The shoe industry has been rejected as a relevant market under Section 7. *Brown Shoe Co. v. United States*, 370 U.S. 294, 299 (1962). The Supreme Court there upheld the district court's finding that there were three markets involved: shoes for men, women and children. *Id.* at 325-28.

¹⁵ There is some overlap in use and characteristics near the dividing line between the two markets. The fact that some of the outboards near this line are limited substitutes for each other does not preclude a finding of distinct markets. *Beatrice Foods Co. v. FTC*, Trade Reg. Rep. (1976-2 Trade Cases) ¶ 61,036, at p. 69,616 (7th Cir. 1976).

was no evidence that manufacturers offered a full line of such products.^{15a} Here, there is a similar lack of production flexibility in the manufacture of all outboard motors. The smaller manufacturers, producing only low horsepower outboards, do not have the capability of producing high horsepower outboards, and they do not offer a full line of outboard motors. (Findings 84, 99, 105.)

The characteristics of large outboards are distinct, requiring advanced technology and know-how. (Findings 105-19.) High horsepower outboards are sold almost exclusively through marine dealers offering a full line of outboard motors, replacement parts and service, as well as boats and accessories. (Findings 97, 123-27.) Low horsepower outboards, by contrast, are also sold by mass merchandisers, hardware stores, sporting goods stores, as well as through private label distribution. (Finding 97.) The barriers to entry to both markets are significant, but, as to the manufacture and sale of large outboards, they are particularly high, and include the requirement of high capital investment and the need for specialized technology, a broad line, and access to distribution through a network of marine dealers offering sales and service at convenient locations and a full line of marine products. (Finding 81.) There is evidence of industry recognition of the division of the markets by horsepower. (Findings 82; 83, footnote #3.)

With the lower barriers to entry in the market for low horsepower outboards and distribution through mass merchandisers, price competition is "quite severe." (Finding 96.) The market for larger outboards with its substantial entry barriers, by contrast, is distinguished by mild price competition and higher profits. (Findings 73-81, 100-01, 121-22.) [68]

All outboard motors are used to propel boats through water and are attached to the back of the boat. In this sense they are related. But the realities of the market place, and this record, show that there are additional factors which determine where to weigh the effects of the joint venture involved in this case, and those factors lead to two markets: (1) low horsepower gasoline outboard motors; and (2) high horsepower gasoline outboard motors.

III. Effects of the Joint Venture on Competition

A. Section 7

The legislative purpose for the amended Section 7 of the Clayton Act was to effect a policy "that corporate growth by internal expansion is socially preferable to growth by acquisition" and to preserve "the

^{15a} Trade Reg. Rep. (1973-76 Transfer Binder) at p. 20,922.

possibility of eventual deconcentration." *United States v. Philadelphia National Bank*, 374 U.S. 321, 365 n.42, 370 (1963). And, "[i]t is the basic premise of [§ 7] that competition will be most vital 'when there are many sellers, none of which has any significant market share.' " *United States v. Aluminum Co. of America*, 377 U.S. 271, 280 (1964). Section 7 was designed not only to arrest monopolistic practices after they are in full swing but also to prevent anticompetitive effects of market power concentration in their incipency. S. Rep. No. 1775 and No. 2734, 81st Cong., 2d Sess., 1950-52 U.S. Cong. Admin. News 4295-98. In *FTC v. Procter & Gamble Co.*, 386 U.S. 568 (1967), the Court held, at p. 577 that:

The core question is whether a merger may substantially lessen competition, and necessarily requires a prediction of the merger's impact on competition, present and future. . . . The section can deal only with the probabilities, not certainties.

But, while Section 7 does not require certainty of anticompetitive effect, "proof of a mere *possibility* of a prohibited restraint or tendency to monopoly will not establish the statutory requirement." *United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 598 (1957). The language of the statute prohibits acquisitions whose effect "may be" substantially to lessen competition. The statute "look[s] not merely to the actual present effect of a merger but instead to its effect upon future competition." *United States v. Von's Grocery Co.*, 384 U.S. 270, 277 (1966). Section 7 [69] prohibits the elimination of potential competition as well as of actual competition. *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 580-81 (1967). *United States v. Phillips Petroleum Co.*, 367 F. Supp. 1226 (C.D. Cal. 1973, *aff'd mem.*, 418 U.S. 906 (1974).

B. Potential Competition

In *General Mills, Inc.*, Trade Reg. Rep. (1973-76 Transfer Binder) ¶ 20,457 (FTC 1973 [83 F.T.C. 696]), the Commission summarized the two theories of injury to competition by removal of a potential entrant by a merger, *supra*, at p. 20,360:

First, the existence of what is *perceived* to be a significant potential competitor at the edge of a concentrated market may act as a restraint upon high prices in that market even though actual entry never occurs or has been internally rejected by management. Removal of one of a few such "perceived" entrants may dilute this competitive force. *United States v. Falstaff Brewing Corp.*, 410 U.S. 526 (1973).

Secondly, aside from whether it is viewed as a potential competitor by firms in the market, elimination of a potential entrant by acquisition of a leading firm in that market

will eliminate the competition that would have been added had the acquiring firm entered the market *de novo* or by toehold acquisition.¹⁶

[70] And the potential competition doctrine has been applied to a joint venture. *United States v. Penn-Olin Chemical Co.*, 378 U.S. 158 (1964), *complaint dismissed on remand*, 246 F. Supp. 917 (D. Del. 1965), *aff'd by an equally divided Court*, 389 U.S. 308 (1967). In that case, Pennsalt Chemicals Corporation and Olin Mathieson Company formed a joint venture for the production of sodium chlorate. After holding that §7 of the Clayton Act extended to joint ventures, the Court reversed the lower court's dismissal of the suit based on the finding that Pennsalt and Olin Mathieson would not both have entered the sodium chlorate industry but for the joint venture. See *id.* at 167-73. The Court held that the lower court should have decided whether, but for the joint venture, one corporation would have entered the market while the other remained on the edge of the market exerting a procompetitive effect. See *id.* at 173-74. The Court held (*id.* at 174) that:

The existence of an aggressive, well equipped and well financed corporation engaged in the same or related lines of commerce waiting anxiously to enter an oligopolistic market would be substantial incentive to competition which cannot be underestimated.

The potential competition doctrine has previously been applied in international mergers or acquisitions. *United States v. Jos. Schlitz Brewing Co.*, 253 F. Supp. 129 (N.D. Cal.), *aff'd without opinion*, 385 U.S. 37 (1966). Enforcement action has also been taken against foreign companies participating in joint ventures and making acquisitions in this country. See, e.g., *United States v. Monsanto Co.*, Trade Reg. Rep. (1967 Trade Cases) ¶ 72,001 (W.D. Pa. 1967, consent decree); *United States v. Standard Oil Co.*, Trade Reg. Rep. (1970 Trade Cases) ¶ 72,988 (N.D. Ohio 1970, consent decree). See also *United States v. Standard Oil Co.*, 253 F. Supp. 196, 227 (D.N.J. 1966). [71]

C. Actual Future Potential Entry

In *Falstaff Brewing Corp.*, 410 U.S. 526 (1973), the Court again recognized that a merger between potential competitors may lessen competition within the meaning of Section 7 if the effect is to eliminate a present beneficial influence on a market resulting from the "outside" company's position as a perceived potential entrant. The Court remanded the case for an assessment by the trial court of this possibility, but declared that it was "leaving for another day" the

¹⁶ The Supreme Court has not yet found a violation where an acquisition was challenged under § 7 only on the grounds that the acquiring company could, but did not, enter *de novo* or through a "toehold" acquisition and that there is less competition than there would have been had entry been in such a manner. *United States v. Falstaff Brewing Co.*, 410 F.2d 526, 537 (1973); *United States v. Marine Bancorporation*, 418 U.S. 602, 625, 639 (1974).

second theory of potential competition which the Court described as involving:

a merger that will leave competition in the marketplace exactly as it was, neither hurt nor helped, and that is challengeable under § 7 only on grounds that the company could, but did not, enter *de novo* or through "toe-hold" acquisition and that there is less competition than there would have been had entry been in such a manner. [410 U.S. at 537.]¹⁷

In *United States v. Marine Bancorporation*, 418 U.S. 602 (1974), the Court faced the question left open in *Falstaff*. The Court's opinion sets forth three prerequisites that must be shown before "the doctrine comes into play": (1) A concentrated market that is not performing competitively (*id.* at 631); (2) The acquiring company has available feasible means for entering the market other than by acquiring a leading company; and (3) A showing that "those means offer a substantial likelihood of ultimately producing deconcentration of that market or other significant procompetitive effects" (*id.* at 633).¹⁸ [72]

The court found the latter two prerequisites were not met in that case and stated (*id.* at 639):

Accordingly, we cannot hold for the Government on its principal potential-competition theory. Indeed, since the preconditions for that theory are not present, we do not reach it, and therefore we express no view on the appropriate resolution of the question reserved in *Falstaff*. We reiterate that this case concerns an industry in which new entry is extensively regulated by the State and Federal Governments.

Although the Supreme Court has thus stated that it has never squarely decided the question, the Commission and a number of courts have held that elimination of a "probable future entrant" may violate Section 7.

This theory is the principal basis of the Commission's opposition to geographic market-extension mergers by large dairy companies.¹⁹ The Commission has recognized the doctrine in a number of other cases.²⁰

¹⁷ The Court observed (*id.* at 537-38):

There are traces of this view in our cases, see *Ford Motor Co. v. United States*, 405 U.S. 562, 567 (1972); *id.*, at 587 (Burger, C.J., concurring in part and dissenting in part); *FTC v. Procter & Gamble Co.*, 386 U.S., at 580; *id.*, at 586 (Harlan, J., concurring); *United States v. Penn-Olin Chemical Co.*, 378 U.S., at 173, but the Court has not squarely faced the question, if for no other reason than because there has been no necessity to consider it.

¹⁸ One such procompetitive effect is a future perceived potential entrant effect where the acquiring company would have been on the edge of the target market and exerted a procompetitive effect in the future. *British Oxygen Co., Ltd.*, *supra*, Trade Reg. Rep. (1973-76 Transfer Binder), at 20,912.

¹⁹ See, e.g., *Beatrice Foods Co.*, 67 F.T.C. 473, 720-22 (1965); *FTC Enforcement Policy with Respect to Mergers in the Dairy Industry*, 1 CCH Trade Reg. Rep. ¶ 4532.

²⁰ See *British Oxygen Co. Ltd.*, CCH Trade Reg. Rep. ¶ 121,063 (1976) (on appeal); *The Budd Co.*, Trade Reg. Rep. (1973-76 Transfer Binder) ¶ 20,998 (FTC 1975 [86 F.T.C. 518]); *General Mills, Inc.*, 83 F.T.C. 696, 732 (1973); *Beatrice Foods Co.*, 81 F.T.C. 481, 528 (1972); *Bendix Corp.*, 77 F.T.C. 731, 817-19 (1970), *rev'd and remanded on other grounds*, 450 F.2d 534 (6th Cir. 1971).

Likewise, a number²¹ of courts have applied the actual potential entrant doctrine. [73]

The actual future potential entry doctrine calls for examining the feasible means of entry other than the challenged transaction, and analyzing the incentive and capability of the acquiring firms to enter the market either *de novo* or by toe-hold acquisition.²² *United States v. Marine Bancorporation*, 418 U.S. 612, 633, 642 (1974). In looking at incentive, the firms' maturing present markets, commitment to growth by acquisition and the attractiveness of the market are important. *United States v. Phillips Petroleum*, 367 F. Supp. 1226, 1245 (C.D. Cal. 1973), *aff'd per curiam*, 418 U.S. 906 (1974). In determining the firms' capabilities to enter *de novo* or by a toe-hold acquisition, factors which may be considered include: the firms' expertise in manufacturing technology (extensive time necessary to develop the product by firms knowledgeable and active in the field corroborates the technical sophistication involved); availability of engineering expertise and purchased components; transferability of technical knowledge from present production methods; availability of distributors; and marketing strength through servicing capability, brand name recognition and advertising capability. *United States v. Black and Decker Mfg. Co.*, Trade Reg. Rep. (1976 Trade Cases) ¶ 61,033, at pp. 69,585-92 (D. Md. 1976).

D. Perceived Potential Entry

In *United States v. Falstaff Brewing Corp.*, 410 U.S. 526 (1973), the Supreme Court recognized that a potential competitor can have *present* procompetitive effects on the market, as well as providing a means of *future* deconcentration by actual entry into the market, *id.* at 532-33. The Court remanded for a determination of the question whether the presence of Falstaff on the edge of the market had any present procompetitive effect prior to the acquisition. See also *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 581 (1967).²³ [74]

A good explanation of the procompetitive effects of perceived potential competition is in *United States v. Phillips Pet. Co.*, *supra*, at 1232-33.

²¹ *United States v. Phillips Petroleum Co.*, 367 F. Supp. at 1232 (C.D. Cal. 1973), *aff'd without opinion*, 418 U.S. 906 (1974); *Kennecott Copper Corp. v. FTC*, 467 F.2d 67, 77-78 n.8 (10th Cir. 1972), *cert. denied*, 416 U.S. 909; *United States v. Wilson Sporting Goods*, 288 F. Supp. 543, 560 (N.D. Ill. 1968); *United States v. Standard Oil Co.*, 253 F. Supp. 196, 227 (D.N.J. 1966); *United States v. Jos. Schlitz Brewing Co.*, 253 F. Supp. 129, 147 (N.D. Cal. 1966), *aff'd without opinion*, 385 U.S. 37 (1966); *Eeko Prods. Co. v. FTC*, 347 F.2d 745, 752-53 (7th Cir. 1965).

²² A firm with less than 10% market share presumably may qualify as a toe-hold. *Budd Co.*, Trade Reg. Rep. (1973-76 Transfer Binder) ¶ 20,998, p. 20,857 (FTC 1975); *Beatrice Foods Co.*, Trade Reg. Rep. (1973-76 Transfer Binder) ¶ 20,944, p. 20,792 n.8 (FTC 1975 [86 F.T.C. 1 at 66]).

²³ In *Procter & Gamble*, the acquisition violated § 7 not only because of the fact that P&G's edge effect influenced the behavior of members of the target market, but also because the acquisition raised entry barriers and dissuaded smaller firms from aggressively competing. *Id.* at 578.

The edge effect, sometimes termed the "waiting-in-the-wings" or the "on-the-fringe" effect, is the beneficial effect upon competition exerted when a company is poised on the edge of the market, threatening to enter if market conditions become sufficiently favorable. The importance of the edge effect derives from the realization that the competitive behavior of companies is not determined solely by the actions and intentions of those in the market, but also by the actions and perceived intentions of those outside the market who may come in. The presence of a potential entrant on the edge of the market exerts a moderating influence on those inside. If the firms inside raise prices beyond a certain level, for instance, a company on the edge may decide to enter because the profitability of entering would be enhanced by the higher prices. Its entry, in turn, would make conditions in the market more competitive.

In addition to the economic facts considered in the actual potential entry theory, the reasonable expectations of the competitors in the market are relevant in determining the perceived potential entry effects. *United States v. Black and Decker Mfg. Co.*, *supra*, at p. 69,596. This branch of the potential competition doctrine looks to evidence of the probability that the acquiring firm on the edge of the market in fact exerted a present procompetitive influence. The Supreme Court in *Marine Bancorporation*, *supra*, defined the perceived potential entry doctrine as follows at pp. 624-25:

Unequivocal proof that an acquiring firm actually would have entered *de novo* but for a merger is rarely available. Thus . . . the principal focus of the doctrine is on the effects of the premerger position of the acquiring firm on the fringe of the target market. In developing and applying the doctrine, the Court has recognized that a market extension merger may be unlawful if the target market is substantially concentrated, if the acquiring firm has the characteristics, capabilities, and economic incentive to render it a perceived potential *de novo* entrant, and if the acquiring firm's premerger presence on the fringe of the target market in fact tempered oligopolistic behavior on the part of existing participants in that market. In other words, the Court has interpreted § 7 as encompassing what is known as the "wings effect"—the probability [75] that the acquiring firm prompted premerger procompetitive effects within the target market by being perceived by the existing firms in the market as likely to enter *de novo*. . . . The elimination of such present procompetitive effects may render a merger unlawful under § 7.

The Court in *Marine Bancorporation*, while reserving final decision on the status of the actual potential entrant aspect of the potential competition doctrine, stated as two preconditions to its application: (1) that the acquiring firm have feasible alternative means of entering the relevant market other than by acquisition of the target company, and (2) that those alternative means "offer a substantial likelihood of ultimately producing deconcentration of that market or other significant procompetitive effects." 418 U.S. at 633, 639. The Court suggested that these same preconditions are relevant to the perceived potential entrant aspect of the doctrine. *Id.* at 639.

The facts of *Marine Bancorporation* redefined the potential compe-

tition test. There, even if the acquiring company could have entered the target market *de novo* or by a foot-hold merger, bank regulations against branches made it highly unlikely that significant procompetitive deconcentration would occur. *Id.* at 636-39. *Marine Bancorporation* however, retained the basic tenets for finding perceived potential competition. That doctrine was set out in *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 533-34 (1973):

The specific question with respect to this phase of the case is not what Falstaff's internal company decisions were but whether, given its financial capabilities and conditions in the New England market, it would be reasonable to consider it a potential entrant into the market. Surely, it could not be said on this record that Falstaff's general interest in the New England market was unknown; and if it would appear to rational beer merchants in New England that Falstaff might well build a new brewery to supply the northeastern market then its entry by merger becomes suspect under Section 7. The District Court should therefore have appraised the economic facts about Falstaff and the New England market in order to determine whether in any realistic sense Falstaff could be said to be a potential competitor on the fringe of the market with likely influence on existing competition.

[76] Thus, if entry into the target market *de novo* or by foothold acquisition would not "offer a substantial likelihood of ultimately producing deconcentration of that market or other significant procompetitive effects," the acquiring company could not "be said to be a potential competitor on the fringe of the market with likely influence on existing competition."

It is the *inferred* effect of the presence of the acquiring company on the edge of the market due to the perception of those firms in that target market which the theory tries to save. And no actual market response to the influence of the acquiring company need be introduced. *United States v. Black and Decker, supra*, at p. 69,598.²⁴ In *British Oxygen, supra*, the Commission reversed the administrative law judge's finding that BOC's position on the fringe of the market exerted a procompetitive influence, because of the failure of record evidence of that effect. *Id.* at p. 20,911 n.8. The better rule is expressed in *United States v. Phillips Petroleum Co., supra*. There the court found that the objective evidence demonstrated a procompetitive effect from the position on the edge of the market of the potential entrant prior to the acquisition. But even in the absence of evidence of specific actions by firms in the market prior to the acquisition, the court would have inferred such influence if the market were concentrated. *Id.* at 1257: "Whether or not it can be shown that specific actions of companies in the market have been influenced by the presence of the potential entrant on the fringe, it must be assumed that such influence exists

²⁴ Absence of any actual market response, however, tends to corroborate objective factors indicating that the acquiring company was not one of the most likely perceived potential entrants. *Id.* at pp. 69,598-99.

where the market is concentrated." This reasoning is in line with *United States v. Falstaff Brewing Corp.*, *supra*, which stated at 534 n. 13, that "[t]he Government did not produce direct evidence of how members of the [target] market reacted to potential competition from Falstaff, but circumstantial evidence is the life blood of antitrust law . . . especially for § 7 which is concerned 'with probabilities, not certainties.' " At the least, objective economic facts showing a reasonable probability of potential entry reaches the *prima facie* stage. *United States v. Penn-Olin Co.*, *supra*, 378 U.S. at 175. [77]

E. Applicability of the Doctrine of Potential Competition

1. Concentration Ratios

The Supreme Court stated in *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602 (1974), that the potential competition doctrine is applicable only in cases in which the relevant market or submarket is oligopolistic, *id.* at pp. 630-31:

The potential-competition doctrine has meaning only as applied to concentrated markets. That is, the doctrine comes into play only where there are dominant participants in the target market engaging in interdependent or parallel behavior and with the capacity effectively to determine price and total output of goods or services. If the target market performs as a competitive market in traditional antitrust terms, the participants in the market will have no occasion to fashion their behavior to take into account the presence of a potential entrant. The present procompetitive effects that a perceived potential entrant may produce in an oligopolistic market will already have been accomplished if the target market is performing competitively. Likewise, there would be no need for concern about the prospects of long-term deconcentration of a market which is in fact genuinely competitive.

If there is evidence of high concentration ratios, a *prima facie* case is established that the relevant market is a candidate for the potential competition doctrine. *United States v. Marine Bancorporation*, at p. 631. At this point in a case, the burden then shifts to the respondents to show that the concentration ratios, which can be unreliable indicators of actual market behavior, (see *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974)), did not accurately depict the economic characteristics of the market. *United States v. Marine Bancorporation*, *supra*, at p. 631.

The market shares here in 1973 for low horsepower (Finding 86) or high horsepower (Finding 101) show that OMC was the dominant firm, with half of the sales of low horsepower outboards and over 60% of the high horsepower [78] market. Mercury had about one-quarter of both

markets, with the rest being shared by three domestic manufacturers.²⁵ Chrysler had the rest of the high horsepower market, and shared the remainder of the low horsepower market with Eska and Clinton.

In *Stanley Works v. FTC*, 469 F.2d 498, 504 (2d Cir. 1972), *cert. denied*, 412 U.S. 928 (1973), the cabinet hardware industry with a four-firm concentration ratio of 49-51% was held to be concentrated. The California retail gasoline market in which the top four firms accounted for 61% of the refining capacity and 58% of the sales was held to be highly concentrated. *United States v. Phillips Petroleum Co.*, *supra*, 367 F.2d at 1252. And in *British Oxygen Co.*, *supra*, at p. 20,909, the Commission held that the industrial gases industry, with a four-firm concentration ratio of 70% and an eight-firm ratio of over 80% was highly concentrated.

The market shares here show a tight oligopoly by these standards, and the burden shifts to respondents to demonstrate with evidence of actual competitive market performance that these concentration ratios do not accurately reflect the competitive nature of the markets.

2. Competitiveness of the Markets

In analyzing the relevant markets to decide whether the potential competition doctrine is applicable, the factors which were considered by the court in *United States v. Black and Decker Mfg. Co.*, *supra*, 1976 Trade Cases at pp. 69,579-86, in determining the competitiveness of the market included: demand for the product (growth is significant since it can provide incentive for new entry); a fluid market (market entry and exit can indicate competitive behavior and new entrants add production capacity, encouraging lower prices); entry barriers (such as technical manufacturing expertise); ability to obtain marketing outlets; product improvements and innovation (industry commitment to research and development); the impact of private label sellers and price competition. [79]

These same factors applied to the markets here show as follows:

1. Demand for the product - For several years demand has exceeded supply in the industry. (Findings 64-71.) The total United States market for outboards in units is expected to double in the next 10 years. (CX 108U.)
2. Fluid market - Historically, this industry has had a declining number of firms. (Finding 77.) Since the early 1970's, however, several

²⁵ The market share findings are not precise because they do not exclude foreign sales by United States manufacturers and do not include sales in this country by foreign manufacturers (which have not been an important factor in the United States market - Finding 67.) These market share findings do show the broad picture of oligopoly, however. "[P]recision in detail is less important than the accuracy of the broad picture." *United States v. Brown Shoe Co., Inc.*, 370 U.S. 294, 342 n.69 (1962). See also *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 364 n. 40 (1963); *A.G. Spalding & Bros., Inc. v. FTC*, 301 F.2d 585, 610-11 & n.20 (3d Cir. 1962).

new firms, including Mariner, have started selling outboards in the United States. They are not yet a factor in the market. (Findings 87, 88.)

3. Entry barriers - The entry barriers here, especially to the high horsepower outboard market, are significant, including capital costs, technology and know-how, the need to produce a broad line and to develop a sales network. (Findings 81, 99, 105.)

4. Ability to obtain marketing outlets - High horsepower outboard motors are sold almost exclusively through marine dealers, and establishing a network of marine dealers is a substantial entry barrier. (Findings 123-127; Anderegg, Tr. 816.)

5. Product improvement - Both markets have seen substantial product improvement. (Findings 72, 205.) There has been intense competition in the high horsepower market in offering product features. (Finding 105.) OMC has initiated programs for the design and development of low horsepower engines to be competitive in that market. (Findings 95, 205.)

6. Impact of private label sales and price competition - Price competition in the low horsepower market, primarily because of sales by mass merchandisers and private label sellers, has been quite severe. (Findings 96-98; CX 90Z-44, 49.) In the high horsepower market, competition has been less intense and profits have been higher. (Findings 70, 72-76.) In 1969, the following pricing existed for 4 or 5 horsepower outboards (CX 90U):

Chrysler (5 h.p.)	- \$295
Mercury (4 h.p.)	- 240
Johnson/Evinrude (4 h.p.)	- 207
Eska (5 h.p.)	- 160
Clinton (5 h.p.)	- 150

[80] In *Black & Decker, supra*, the market analysis demonstrated that competitive performance in the gasoline powered chain saw market offered conflicting indications, *id.* at p. 69,583:

As the foregoing analysis demonstrates, various facets of competitive performance in the gasoline powered chain saw market offer conflicting indications. The market was a rapidly growing one that had attracted a number of new entrants, notably foreign gasoline powered chain saw manufacturers. While these entrants enjoyed significant growth, their arrival provoked no discernible trend to deconcentration, and, in fact, their market share remains low. Moreover, significant technological barriers to entry exist; marketing, servicing and advertising also pose problems for a new entrant. Yet the market has been characterized by aggressive product innovation as well as by the expansion of production facilities.

These factors, combined with a lack of clear price competitiveness, led

the court to hold that defendants had failed to meet their burden to establish that the high concentration ratios there did not accurately depict the economic characteristics of the market.

Here, the competitive indicators of the markets are also mixed. The markets are rapidly growing, attracting new entrants, but these new entrants have not yet established a trend to deconcentration. Significant technological barriers, especially to the high horsepower market, exist. Marketing and servicing barriers, again especially for high horsepower outboards, pose problems for the new entrant. Both markets have had impressive product innovation and expansion of production facilities.

These factors show a mixed review of competitive behavior. But one—perhaps the most important²⁶—competitive factor remains: price competition. The low horsepower market has intense price competition, because of sales by mass merchandizers and through private labels. That market “performs as a competitive market in traditional antitrust terms.” *Marine Bancorporation, supra*, at pp. 630–31. Therefore, even though the market has high concentration ratios, it is not a candidate for the potential competition doctrine. *Id.* at p. 631. The market for high horsepower outboards, on the other hand, has no similar indication of competitive behavior, and the potential competition doctrine is applicable to that market. [81]

F. Reasonable Probability Test

The issue for determining potential competition in this case is whether it is “reasonably probable” that, but for the joint venture, Yamaha would have entered, or Brunswick would have expanded its production facilities in the high horsepower market here found relevant. Certainty is not required. *British Oxygen Co. Ltd., supra*, at p. 20,916.

In *United States v. Penn-Olin Chemical Co.*, 378 U.S. 158 (1974), the Court, after reviewing objective factors that indicated that each of the parties to the joint venture had the ability and incentive to enter the market alone, concluded (*id.* at 175):

Unless we are going to require subjective evidence, this array of probability certainly reaches the prima facie stage. As we have indicated, to require more would be to read the statutory requirement of reasonable probability into a requirement of certainty. This we will not do. [Emphasis added.]

The “reasonable probability” standard was applied in *Ekco Prods. Co. v. FTC*, 347 F.2d 745 (7th Cir. 1965) where the actual potential

²⁶ *Black & Decker, supra*, at p. 69,582.

entrant issue was the question before the court. Citing *Penn-Olin*, the court stated that "the test is whether there is a 'reasonable probability' that the acquiring corporation would have entered the field by internal expansion but for the merger." *Id.* at 752-53. In that case the court agreed with the Commission that the acquisition by Ekco Products Company of the leading manufacturer of commercial meat-handling equipment violated Section 7 of the Clayton Act because there was a "reasonable probability that Ekco would have entered the commercial meat handling industry by internal expansion." *Id.* at 753.

And in *Marine Bancorporation*, both the district court and the Supreme Court assumed throughout their opinions that the reasonable probability standard was applicable in a potential entrant case. *United States v. Marine Bancorporation*, 1973-1 Trade Cases ¶ 74,496 at p. 94,246 (W.D. Wash. 1973), *aff'd*, 418 U.S. 602, 616, 617 (1974). [82]

FTC v. Atlantic Richfield Co., et al., (4th Cir. decided January 12, 1977), No. 797 BNA AT&T Reg. Rep., is to the contrary. There, the court of appeals affirmed the district court which refused preliminary relief pending resolution of administrative proceedings, in part, on the grounds that there was not a substantial likelihood that the Commission would be able to establish a violation of § 7 under the actual potential entry doctrine. The circuit court required a higher burden of proof in mergers alleged to eliminate future potential entry than in horizontal or vertical mergers or in a perceived potential competition case. (See pp. 12-15 slip opinion.) The court pointed out that the conglomerate merger there was for purpose of diversification and involved no product or market extension. Further, the acquiring company was not poised on the fringe of the market; it had no technological skills readily transferrable to the market; and it had no channels of distribution which might be used in that market.

In that context, it is not surprising that the circuit court adopted a different standard of proof. The standard adopted, however, is very stringent. The court would require certain, unequivocal proof that, but for the merger, the acquiring company would have entered the market *de novo* or the equivalent. In creating this rule, the court read *United States v. Falstaff Brewing Co.*, 410 U.S. 526 (1973), as holding that in a future potential competition case "very little evidence is required to prove that there would not be *de novo* entry." (See p. 14 slip opinion.) The court based this on its observation that "the Supreme Court did not disturb the district court's finding that Falstaff was not an actual potential entrant" and "that the district court relied almostly solely on management's post acquisition statements that Falstaff would not enter *de novo*." (See p. 14 slip opinion.) In fact, the Supreme Court clearly and specifically refused to pass on the actual potential

competition issue. That question was left "for another day." 410 U.S. at 537. Therefore, no weight should be given to the Court's failure to revise the district court's disposition of the actual potential competition case.

The standard of proof in a Section 7 case is stated in the language of the statute. That test does not call for certain proof, only for a reasonable probability of violation. The type of acquisition involved may, however, lead to different standards of proof of economic evidence needed to show a violation, as for example in a horizontal merger case as contrasted with a vertical or conglomerate. A horizontal merger removes an independent decision-making force from the market; a vertical or conglomerate simply substitutes one firm for another.²⁷ Thwarting horizontal mergers may [83] more readily lead to procompetitive internal expansion since the entry barriers are lower to a firm already in the market.²⁸ And vertical and conglomerate mergers, although not without possibilities of anticompetitive consequences, may lead to economies and do not increase the market position of the merged firms in either of the markets involved. This would suggest varying standards of proof which are: hardest on horizontal mergers, easier on vertical, and least severe on conglomerates. Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 Harv. L. Rev. 1313, 1320-22 (1965). Further stratification of the standards of proof required may be appropriate where the acquisition involves a product or market extension or a joint venture, or where the type of potential competition involved is future or perceived. But none of these ramifications remove "may" from the standard set forth in the statute.

G. Potential Competition in the High Horsepower Market

The thrust of complaint counsel's case was directed at showing the unlawful effects of the transaction by concentrating on the alleged elimination of Yamaha as a potential future entrant and as a perceived potential competitor on the edge of the market. The effects of the joint venture, however, should be analyzed to see not only whether Yamaha was removed as a potential competitor, but also whether the transaction eliminated potential competition by the unilateral expansion of a second line by Mercury. Since this latter theory was not alleged or proved, no finding of violation can be based on it, *Bendix Corp. v. FTC*, 450 F.2d 534 (6th Cir. 1971), and it is explored here only to put the transaction in context and to show its full impact on competition in the relevant market.

²⁷ A joint venture may in fact add another decision-making force, *infra*.

²⁸ See, e.g., *United States v. Falstaff Brewing Co.*, *supra*, at p. 568 n.20 (Mr. Justice Marshall concurring).

In order to determine whether Yamaha was a potential entrant and whether, but for the joint venture, Mercury would have unilaterally increased its production facilities, the following factors are considered: (1) the fact that Yamaha was already in the business of producing low horsepower motors, and entry into the United States market for high horsepower outboards would be a product and market extension; (2) Yamaha's interest in the market and unsuccessful attempts to enter the United States market for low horsepower outboards; (3) Yamaha's capability to enter the United States market unilaterally; (4) Yamaha's incentives to enter the United States market; (5) recognition by [84] United States manufacturers that Yamaha was a potential entrant; (6) Mercury's capability and incentives unilaterally to bring in a second line; (7) feasibility of a unilateral move by Yamaha or Mercury; and (8) economic facts relating to the structure and degree of concentration of the market and barriers to entry therein.

On the basis of the objective evidence, I find that Yamaha was a likely potential unilateral entrant into the United States high horsepower outboard market, and in fact was the most likely potential entrant; and Yamaha exerted, prior to the joint venture, a substantial procompetitive effect on the behavior of those in the market from its position on the edge of the market.

1. Incentive of the parties to the joint venture

Mercury began planning a second line of outboard motors which it hoped would be the means of increasing its market share. (Finding 128.) Mercury wanted to obtain new dealers, and with a second line available, a marine dealer selling this new line could be located near an existing Mercury dealer, thereby adopting a sales tactic long used by OMC. (Findings 125, 129.) Mercury also wanted to try new distribution through private labeling and mass merchandisers and through camper retailers, and sport and fishing stores. (Finding 130.) In addition, Mercury wanted to meet the demands of the low horsepower market to preempt foreign entrants. (Findings 131-132.)

Yamaha's incentive for entering the United States outboard market was that it is the largest market in the world (Findings 65-66), as well as a very profitable market. (Findings 73-76, 121, 122.)

2. Capability

When the decision was reached for Mercury to have a second line, its production facilities were already strained to meet demands for existing Mercury marine products. (Findings 71, 134.) In addition to the expense involved, a wait of about five years would be necessary to

build new plants to produce the second line. (Finding 135.) Mercury therefore started looking for a joint venture partner. (Finding 136.) [85]

Before entering the joint venture, Yamaha tried twice to market outboards in the United States. In 1968, Yamaha tried to market three low horsepower outboards but the attempt failed because of product deficiencies and because it tried to market the outboards primarily through motorcycle dealers. (Findings 154, 155.) In 1971, Yamaha tried again through Sears, Roebuck but again failed because its outboards were too expensive. (Findings 156-58.) Yamaha continued to have great interest in the United States market and increased the quality of its outboards. (Findings 159-170.)

By 1972, Yamaha had 70% of the Japanese outboard market, and sold throughout the world, except the United States. (Findings 173, 174.) Yamaha went into the European market in 1968, and by 1972 had 12% of the low horsepower market and was second to OMC. (Finding 184.)

Yamaha had a successful history of entering United States markets for motorcycles and snowmobiles. Yamaha had entered the United States market for motorcycles in 1959. By 1974, it had 20% of the market. (Finding 176.) Yamaha entered the United States market for snowmobiles in 1968 and by 1974 sold eleven or twelve models in this country. (Finding 177.) The "Yamaha" brand name carries public recognition in the United States through consumer and trade advertising. (Finding 178.)

Prior to the joint venture, Yamaha generally had a simple, economical low horsepower line of outboards suitable for commercial fishing and transportation. (Findings 182, 185.) The Yamaha line lacked the high horsepower and some of the features common on outboards sold for pleasure boating in the United States. (Finding 183.) From the attempt to penetrate the United States outboard market in 1968, Yamaha learned the value of a full line and distribution through marine dealers. (Findings 186-188.) Yamaha had also determined that it would take time to develop higher horsepower outboard motors necessary to enter the market. (Finding 192.)

Yamaha increased the size of its largest outboard from 8 h.p. in 1969 (Eguchi, Tr. 667) to 55 h.p. in 1972. (Finding 170.) By that time, Yamaha had added some of the features necessary for the United States market, such as water cooling and two-cylinder engines. (Finding 164.) Yamaha's 25 h.p. was a "topnotch, ultra-modern outboard" (Finding 166), able to compete favorably with similar outboards sold in the United States. (Findings 167, 168.) Yamaha's 55 h.p. was not as good, lacked features and had a cost problem, but was

basically a good engine (Finding 170), and since Yamaha developed the excellent 25 h.p. outboard, they "must have had the technology to develop a larger engine." (Strang, Tr. 418.) [86]

With a higher horsepower outboard, Yamaha would probably be able to gain distribution in this country through marine dealers. Yamaha's full line of boats would make it an attractive supplier for marine dealers. (CX 107L.) Marine dealers are generally franchised on an annual basis by one of the three largest outboard motor firms, OMC, Mercury or Chrysler, and handle only one line. (Findings 125-127.) Dealers sometimes switch brands. (Anderegg, Tr. 798.) Over the past several years, demand has exceeded supply in the industry and "manufacturers have taken an independent attitude which has been an irritant to many existing and potential dealers." (BX 25Z-73.) Many existing marine dealers "are open to discussion to switch. This is due in part to availability problems, plus independent attitudes of manufacturers." (BX 25Z-77.) Mariner was able to gain 51 marine dealers, and had plans to have up to 300 after a short period of promotion. (Finding 148.) Distribution through marine dealers is necessary in the market for high horsepower outboards and is a barrier to entry (BX 12R), but, with time, a determined entrant can overcome this hurdle.

At the time of the joint venture in 1972, Yamaha was capable of entering the relevant market.

While the subjective evidence in testimony and statements of the respondents for this litigation was to the effect that Yamaha was not considering entering the market on its own in the near future (Finding 192), the objective evidence of Yamaha's incentive and history of great interest in the market, as well as its growing capacity to overcome the technological barrier to entry, leads inexorably to the conclusion that it eventually would have entered the United States market for high horsepower outboard motors.²⁹ Yamaha was therefore a potential future entrant. Given Yamaha's substantial financial strength (CX 114E, I) and history of successful market entry in the United States (Findings 176, 177), it is reasonable to conclude that the unilateral entry of Yamaha into the United States market for high horsepower outboards would offer a substantial likelihood of ultimately producing deconcentration of that market as well as other significant procompetitive effects.

3. Yamaha as a perceived entrant

Yamaha was not only a potential future entrant. The technical strength of its 25 h.p. outboard and the success of the motor in the

²⁹ There are no features of the high horsepower outboard market, not already discussed, which would make such entry infeasible. *United States v. Phillips Pet Co.*, 367 F. Supp. 1226, 1247 (C.D. Cal. 1973).

European market caused a procompetitive market reaction by OMC. After seeing a test report on the [87] Yamaha 25 h.p., and after seeing the impressive display of Yamaha outboards at the 1972 Tokyo Boat Show, OMC made "sizeable changes" in its own 25 h.p. outboard which "eventually wound up as virtually a new engine of larger piston displacement." (Finding 205.) OMC had no plans to upgrade the 25 h.p. engine until the Yamaha outboard came along. OMC's President testified as to the reason for the product improvement: "We had been stung by them abroad and we were very fearful of an invasion of the U.S. market." (Finding 206.)

The 1972 Tokyo Boat Show convinced OMC that several Japanese firms were potential entrants into the United States market. As a result, OMC started considering the projected effect on OMC's sales and earnings from such possible activity by Japanese outboard manufacturers. (Finding 207.)

Of all the outboard firms displaying their products at the 1972 Tokyo Boat Show, Yamaha was the most impressive to OMC. (Strang, Tr. 446.) OMC's President reported that Yamaha's display was the "biggest display in the place" and that he had seen the "new 25, 2-cylinder loop-scavenged ultra modern engine, quality and performance right on a par with anything we have in the U.S." (CX 107L - M.)

OMC is a competitor of respondents and opinions of OMC officials are "not necessarily the last word," *cf.*, *United States v. Falstaff*, *supra*, at pp. 534-36. But much of this evidence was not prepared for litigation and corroborated the credible testimony of Mr. Strang. In addition, it is supported by objective economic facts. I conclude, therefore, that it was reasonable for manufacturers of high horsepower outboards in this country in 1972 to believe, and that they in fact did perceive, that Yamaha was a potential competitor at the edge of the market. Furthermore, this perception had a procompetitive effect in the increased quality of OMC's 25 h.p. outboard, as well as in causing OMC and others to take a backward glance at Yamaha before making marketing decisions after the 1972 Tokyo Boat Show.³⁰ [88]

H. Effects of the Joint Venture

Unlike a merger or acquisition, a joint venture can *add* to an industry a new decision-maker and additional production facilities. Unless the parties withdraw from the market because of the joint venture, then it may in fact add a procompetitive force. Determining the competitive effects of a joint venture alleged to violate Section 7 because potential competition has been eliminated, therefore, requires

³⁰ OMC apparently did not perceive that Mercury might increase its manufacturing facilities. (Strang, Tr. 340.)

a balancing of the procompetitive effects which might have occurred through the potential competition against the procompetitive effects which have occurred due to the entry of the joint venture into the market. Although Yamaha was a potential future entrant and was perceived as a potential competitor, those procompetitive effects must be compared to the procompetitive effects of the joint venture, which put a new entrant into the market and has enhanced Yamaha's potential as a future entrant.

In *Penn-Olin*, *supra*, the Court recognized that a joint venture may add a new competitive force to the market, and held that it is not controlled by the same criteria as a merger or conglomeration. 378 U.S. at 170. Since the Court found that the joint venture added a new firm to the market, the government on remand had to show that, but for the joint venture, one of the firms probably would have entered the market (thereby adding at least the competition added by the joint venture), plus that the other firm would have remained on the edge of the market, continually threatening to enter.³¹

Here, the joint venture has added to the market a new competitive force—Mariner outboard motors produced by Sanshin and sold by Mariner. These motors compete with many of the motors produced and sold by Mercury and others. [89] In arguing that the joint venture violates Section 7, complaint counsel assert that the transaction eliminated the probability that Yamaha would enter the market in the future and stopped the present edge effect on competitors in the market who perceived Yamaha as a likely potential entrant.³² But since the joint venture added a competitor to the market, complaint counsel have the burden of showing that the procompetitive effect of the potential competition provided by Yamaha prior to the joint venture was substantially greater than the actual entry of the new competitor, Mariner. See *Penn-Olin* on remand, *United States v. Penn-Olin Chemical Co.*, 246 F. Supp. 917, 919 (D. Del. 1965), *aff'd by an equally divided Court*, 389 U.S. 308 (1967).

In analyzing the competitive effects of the joint venture, I considered the subjective evidence (such as the testimony of officials of respondents and respondents' competitors, and the documents prepared with one eye on this litigation) as "biased commentary on the nature of the objective evidence" and as a "counterweight to weak or inconclusive objective data." *United States v. Falstaff Brewing Corp.*,

³¹ Although Pennsalt was in the market and was replaced by the joint venture company, *id.* at 164, the cost of freight in shipping from its plant in Portland, Oregon, made it an ineffective competitor in the southeastern market. *United States v. Penn-Olin Chemical Co.*, 217 F. Supp. 110, 120-22 (D. Del. 1963). So the joint venture did, in effect, add a new competitive force to the market. Here, Mercury was in the market prior to the joint venture and remains in the market now. The joint venture here also added a new competitive force to the market.

³² Although the theory was not alleged or developed, an anticompetitive effect of the joint venture could have been the elimination of additional production facilities and a second line of outboard motors by Mercury.

410 U.S. 526, 570 (1973) (Mr. Justice Marshall concurring). Evidence of what occurred after the joint venture agreement could not alone override all probabilities, but was considered as relevant in determining whether the transaction violates Section 7. *FTC v. Consolidated Foods Corp.*, 380 U.S. 592, 598 (1965); *United States v. Phillips Pet. Co.*, 367 F. Supp., at p. 1260. This evidence was considered in the light of the main objective fact in this case, which is that the joint venture added to the relevant market a new procompetitive force – the Mariner line of outboard motors. In addition, the transaction had the following effects:

Yamaha has received substantial benefits from the joint venture. It has provided Yamaha with designing and manufacturing techniques for making high performance outboard motors, especially larger engines over 50 h.p. (Finding 189.) Six or eight Yamaha engineers came to Mercury's factory and lived there for several months in early 1973, so they could [90] learn the technology required in making high horsepower outboards. They learned valuable proprietary know-how from Mercury's experienced engineers, which was not otherwise available. (Finding 195.) Mercury has continued this educational program, and Yamaha engineers continued in 1975 redesigning the outboards under the guidance of Mercury engineers. (Finding 193.)

The joint venture has saved Yamaha time in creating a line of outboards which are being marketed through marine dealers in the United States. The entry of the Mariner line was delayed in part due to spiraling inflation in Japan and the weakening of the dollar in relation to the yen. (Finding 147.) This economic difficulty changed the plan to have the joint venture selling outboards in the United States in early 1974.³³ (Finding 147.) Without the technology supplied through the joint venture, it would have taken two or three times as long, and several years would have passed, before Yamaha would have been able to build on its own the high horsepower outboards with the features needed for the United States market. (Findings 192, 194.) Yamaha certainly could not have been ready to enter the market by the beginning of 1974. The 55 h.p. outboard made by Sanshin for Yamaha—its only true high horsepower outboard—was not ready for the United States market by 1974 even after receiving help from Mercury engineers. (Finding 170.)

Yamaha got valuable help from Mercury through the joint venture which, with the product rationalization from increased production, led to cost reduction in outboards produced by Sanshin. (Findings 189, 190,

³³ Entry of the Mariner line was also delayed pending the production of an outboard larger than 55 h.p., with Mercury finally supplying an 85 h.p. outboard for the 1976 entry of Mariner into the United States. Presumably this could have been done in 1974 but for the economic difficulty.

193, 195.) Yamaha also probably avoided some field disasters and some massive recalls because mistakes are made when a firm plunges into a new market with untried products and "massive recalls hurt the image as well as cost money." (Finding 194.)

Moreover, the joint venture has allowed Yamaha to avoid the highly competitive market for low horsepower outboards [91] in the United States (Finding 191) which has lower entry barriers and which would have been the natural access to the high horsepower market. (CX 8A.) Yamaha recognizes the advantages it received from the joint venture: "Yamaha-Sanshin will be able to enter the U.S. market, whatever the brand name of . . . product may be." (BX 8B.)

Mercury's gains from the joint venture also had a procompetitive effect. When Mercury decided to have a second line, its production facilities had been unable to meet demands for Mercury outboards for several years. (Finding 133.) Mercury decided that it was not practical to build additional plant facilities because of the cost and time involved. (Findings 133-34.) It would have taken about five years for Mercury to provide the second line through plant expansion. (Finding 135.) When Mercury entered the joint venture, it planned to start marketing Mariner outboards in the United States in one and one-half years (Finding 147), a saving of three and one-half years compared to internal expansion. Unforeseen world economic difficulties were in part the reason for the elimination of this procompetitive effect of the joint venture, but it must be weighed in favor of the transaction.³⁴ In addition, Mercury has obtained valuable technical information from Yamaha through the joint venture. (Findings 141, 144-45.)

A substantial present procompetitive effect of the joint venture is that there is another decision-maker in the oligopolistic United States market for high horsepower outboard motors. Mariner has joined the other three outboards, Johnson/Evinrude, Mercury and Chrysler, in this market. This entrant "adds new production capacity and has significant incentive to avoid the anticompetitive oligopolistic market practices in order to realize and expand a market share." *United States v. Black and Decker Mfg. Co.*, *supra*, 1976 Trade Cases, at p. 69,572.

Most importantly, Mariner launched its entry by price competition. Mariner outboards have a retail price [92] 5% to 8% lower than comparative outboards sold by OMC, Mercury and Chrysler. (Finding 150.) The Chairman of Mariner concluded in January of 1972, *before the joint venture was created*, that in order for the Mariner line successfully to compete in the United States market: "The product must have a

³⁴ Another Mercury purpose for the joint venture was building a second line as a "fighting" brand to preempt the low horsepower market as an entry place for foreign competition. (Findings 131-32.) Because of higher costs than anticipated, this purpose was later abandoned to some extent, and rather than private label sales or distribution through mass merchandisers the Mariner line is being marketed solely through marine dealers. (Finding 149; BX 11.)

price advantage." (CX 8F; see also BX 1F.) Mariner intends to price low enough to "get a reading on the question of dumping." (CX 84A.) In other words, unless prohibited by the government under the antidumping regulations prohibiting territorial price discrimination on foreign-manufactured goods, Mariner intends to gain market share by engaging in substantial price competition.

The manufacturing of high horsepower outboard motors has high fixed costs. (Strang, Tr. 556.) In a high fixed cost industry, leading firms are prone to avoid price competition. *British Oxygen Co., Ltd.*, *supra*, 1973-76 Trs. Bd., at p. 20,920. Here, the introduction of price competition through the Mariner line of outboard motors may very well have the "effect of shaking up established industry leaders [setting] in motion pressures on them to compete more vigorously in price or services in order to retain their existing market shares." *Ibid.*

Another procompetitive effect from the joint venture is that it has enhanced Yamaha as a potential future unilateral entrant. Both parties expect the joint venture to end in 1979. (Findings 196, 199.) Yamaha has obtained vital technical information from Mercury. At the end of the joint venture, Mariner dealers in the United States will be ideal distributors for Yamaha outboards, since they will have been selling identical engines, with only the decal and color different from Yamaha outboards. (Finding 198.)

Mercury has already decided to expand its production facilities to be able fully to provide the Mariner line by the end of the joint venture in 1979. (Finding 199.)

In summary, the joint venture has had the procompetitive effects of actually introducing a new line of outboards into the United States market with the promise of causing price competition, as well as enhancing the probability of an early unilateral entry by Yamaha into the market. Furthermore, after the joint venture is terminated, Mercury will have a new second line, provided by its own additional production facilities. [93]

These actual procompetitive effects, in my opinion, outweigh the loss of the effects by the temporary removal of Yamaha from the edge of the market. And since the joint venture has actually enhanced Yamaha as a future potential entrant, there has been no anticompetitive effect of the transaction in that regard.

IV. Division of World Markets

When the joint venture was first being organized, Mercury's proposal was that Mariner have the exclusive right to sell in North America, Europe and Australia; Yamaha would have the exclusive right to sell in Japan; and a marketing joint venture would sell in the

rest of the world. (CX 16A.) There was some discussion in November 1971, in which Mercury advised Yamaha that Mercury was "looking for a Japanese partner with 2-cycle capabilities" and "would expect our partner to put his existing outboard business into the joint venture and not compete directly or indirectly with the joint venture." (CX 5A.) And in July 1972, one Mercury official expressed his opinion to another Mercury official that: "With respect to Europe, I believe that we should not attempt to market Mariner until that point in time that Yamaha has, in effect, pulled out of Europe. I don't think we want at anytime, a situation where Yamaha and Mariner are both in the same marketing area." (CX 16A.)

When the parties entered the joint venture agreement in November 1972, Article 8.4 of the agreement provided that, as to the products of Sanshin, Yamaha shall have the exclusive right to sell in Japan; Mariner shall have the exclusive right to sell in North America and Australia; and a joint venture sales company would be formed to sell in the rest of the world. (CX 1K-L.)³⁵

In subsequent discussions culminating in an amendment to the joint venture agreement in October 1973, the parties agreed that it was inappropriate to attempt to form a joint venture company for the marketing of Sanshin products, and, as a result, [94] it was agreed that both Yamaha and Mariner are free to conduct their own marketing programs independent of each other in those territories which the joint venture agreement contemplated would be served by the joint venture sales company.³⁶ (CX 78A.)

The Senior Managing Director of Yamaha wrote to the President of Mercury in July 1973, requesting that (CX 76B):

in establishing MMI [Mercury Marine International] sales network in the non-exclusive markets, you refrain from inviting Yamaha's existing distributors/dealers to join MMI's sales network. Also, in order to avoid struggling with each other for new distributors/dealers by competing in the terms and conditions each party offers, we would like to propose to have as frequent meetings as possible.

In response, the President of Mercury, who was also Chairman of the Board of Mariner, replied in August 1973 (CX 77C):

We agree that we will not seek out Yamaha's distributors or dealers in the non-exclusive market but, in some area, such as Europe with its great number of subdealers, we may find dealers handling not only Yamaha and International's line but Mercury, OMC and

³⁵ Under Article 8.1, Yamaha, Mariner and the joint venture sales company were appointed the exclusive purchasers from Sanshin; under Article 10.1 Yamaha agreed not to make marine engines or buy them from other than Sanshin.

³⁶ The term "North America" as used in the joint venture agreement was defined to include Canada, the United States, and Mexico, with the exclusion for an arrangement between the government of Mexico and Yamaha for three fishing engines. Also, Yamaha agreed that Mariner would have the exclusive right to sell Sanshin products in New Zealand. (CX 78C.)

other brands as well, in spite of our efforts to keep them separate. As a matter of good business, we recognize that, although we have separate marketing organizations, our basic philosophy must be to respect each other's position and to concentrate on making inroads against other outboard manufacturers.

This agreement was a qualification of competition by the parties to a joint venture agreement in one of the markets where the joint venture product would be sold.

Yamaha also agreed for the life of the joint venture, not to sell Yamaha brand outboards in New Zealand and Australia [95] (where it had been handicapped by a 25% import duty, CX 15D), and Canada (where it ceased selling in 1972 or 1973, Eguchi, Tr. 664). And Yamaha agreed during the life of the joint venture not to enter Yamaha outboard motors any further in the markets in the United States and Mexico. Because it owns half of sales to Mariner, of course, Yamaha was not foregoing these markets completely.

The Supreme Court recognized in *United States v. Penn-Olin, Chemical Co.*, 378 U.S. 158, 168 (1964) that:

Certainly the formation of the joint venture and purchase by the organizers of its stock would substantially lessen competition—indeed foreclose it—as between them, both being engaged in commerce. This would be true whether they were in actual or potential competition with each other and even though the new corporation was formed to create a wholly new enterprise. Realistically, the parents would not compete with their progeny.

Yet the Court did not rule that joint ventures are unlawful *per se*. The lessening of competition which naturally occurs between the parties to the joint venture must be weighed against the increase in competition caused by the new entrant. *Id.* at 169–70.³⁷

Here, when Yamaha requested that its established distributors in Europe be left alone, and when it agreed to the sale of Mariner products in lieu of Yamaha products in some markets, the restraint was reasonable in the context of the joint venture agreement. “If a joint venture or partnership is formed for the purpose of a lawful business enterprise and restraints result from the right to protect established business interests no violation of law occurs.” *United States v. Timken Roller Bearing Co.*, 83 F. Supp. 284, 312 (N.D. Ohio 1949), *aff'd* 341 U.S. 593 (1951). Both *Timken* and *Penn-Olin* recognize that a joint venture between potential or actual competitors is different from a horizontal territorial division of markets having no purpose other

³⁷ A conspiracy to divide markets, fix prices and eliminate competition cannot “hide from the effects of the law under the cloak of a joint venture.” *United States v. Timken Roller Bearing Co.*, 83 F. Supp. 284, 312 (N.D. Ohio 1949), *aff'd*, 341 U.S. 593 (1951). But “it is not illegal *per se* for competitors to combine their resources in a manufacturing joint venture to exploit a particular product or a particular market.” *United States v. E. I. du pont de Nemours & Co.*, 118 F. Supp. 41, 219 (D. Del. 1952), *aff'd* 351 U.S. 377 (1956).

than restraining competition. The rule of the *United States v. Topco Associates, Inc.*, 405 U.S. 596, 608 (1972), is therefore inapplicable. [96]

A. Technical Assistance Agreement As A Division of Markets

Mercury and Yamaha each entered into technical assistance agreements with Sanshin in accord with provisions of the joint venture agreement. These agreements provided that Mercury and Yamaha would disclose and license to Sanshin all Mercury and Yamaha patents and know-how applicable to making marine engines. (Finding 52.) Mercury and Yamaha also entered a technical assistance agreement between themselves pursuant to the joint venture. (Finding 48.) Complaint counsel attack provisions of this latter technical assistance agreement as violating Section 5 of the Federal Trade Commission Act. The specific provisions involved are: (1) Article 2.1 which is a cross licensing agreement, limiting the use of exchanged technical information to noncompeting goods, and (2) Article 6.7 whereby Mercury agreed not to manufacture any product competitive with those manufactured by Yamaha, except snowmobiles. (Finding 48.)

These provisions of the technical assistance agreement provide for a free flow of information between the parties to the joint venture, which may go directly to Mercury or Yamaha, or come to them through Sanshin. For example, snowmobiles, motorcycles and outboard motors all use two-cycle engines. Yamaha makes motorcycles and snowmobiles. Mercury makes snowmobiles and outboard motors. Article 2.1 does not prohibit Yamaha from using, in the production of motorcycle engines, information it obtains from Mercury concerning outboard motors. Article 2.1 does not prevent Mercury from using, in the production of outboard motors, information it obtains from Yamaha concerning motorcycles. Article 2.1 does prevent either Yamaha or Mercury from using, in the production of snowmobiles, information gained from the other in the exchange of technical information meant to increase Sanshin's ability to produce better outboard motors.

Similarly, Article 6.7 prevents Mercury from gaining technical knowledge from Yamaha because of the joint venture relationship and using this information in starting to produce motorcycles or boats. Mercury had disposed of its boat manufacturing facilities prior to the joint venture after suffering heavy losses, and it has no intention of manufacturing motorcycles. Therefore, the agreement has no adverse effect on competition. [97]

A moderate competitive restraint in the cross license is lawful if respondents can show that the main purpose of the agreement serves a legitimate business objective and the restraint is ancillary to that purpose. *Standard Oil Co. v. United States*, 283 U.S. 163, 171 n.5 (1931)

(Brandeis, J.) (a cross license involving patent improvements is frequently necessary if technical advancement is not to be blocked by threatened litigation); *In re Multidistrict Vehicle Air Pollution*, 367 F. Supp. 1298, 1303 n.7 (C.D. Cal. 1973) (cross licensing agreement in which parties agreed to withhold publication of development data and to withhold offering for public use developed devices for air pollution control except with the concurrence of all the parties); *United States v. E. I. du Pont de Nemours & Co.*, 118 F. Supp. 41, 219 (D. Del. 1953), *aff'd on other grounds*, 351 U.S. 377 (1956) (territorial limitation ancillary to lawful transfer of trade secret).

Here, the restrictions in the cross license are reasonably related to the main purpose of the agreement—to provide for the free flow of technical information concerning the patents and know-how used in making outboard motors which can compete in the United States market. The restrictions are reasonable³⁸ and ancillary to the lawful purpose of the joint venture. [98]

ORDER

The joint venture agreement does not violate Section 7 of the Clayton Act. Although the complaint alleges that the joint venture violates Section 5 of the Federal Trade Commission Act, the proof offered under that statute related solely to the jurisdictional issue.³⁹

Furthermore, the agreements not to compete, made pursuant to the joint venture, do not adversely affect competition, and are reasonable and ancillary to the lawful purpose of the joint venture.

The complaint must therefore be dismissed.

OPINION OF THE COMMISSION

BY PITOFSKY; *Commissioner*:

The complaint in this case charges respondents Brunswick Corporation ("Brunswick"), Yamaha Motor Company, Limited ("Yamaha") and Brunswick's wholly-owned subsidiary Mariner Corp. ("Mariner") with violating Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, by a transaction involving a joint venture agreement. The complaint alleges that the effects of the joint venture may be substantially to lessen competition

³⁸ Complaint counsel's main argument concerning the asserted lack of reasonableness of the restrictions in the cross license, was that technical information provided by Mercury pursuant to the agreement (CDI, jet prop exhaust, high pressure die casting, and lower unit design and styling) lacked value. This argument contradicts the finding that one of the barriers to entry to the United States market for outboard motors is technology and know-how, and is contrary to facts in the record.

³⁹ Since the theory of the case-in-chief was shaped to fit Section 7, the established concepts of that statute (rather than an additional standard introduced by Section 5) should control the substantive law involved in this proceeding. See *Perpetual Federal Savings & Loan Ass'n*, FTC Initial Decision, decided March 28, 1977, p. 19 (90 F.T.C. 608).

or to tend to create a monopoly in the manufacturing and/or marketing of outboard motors in the United States by, *inter alia*, eliminating substantial potential competition between Brunswick, Yamaha and Mariner, and increasing barriers to entry and concentration levels in the relevant market.

The administrative law judge (ALJ) issued an order on May 2, 1977 dismissing the complaint. He determined that the addition of a "new entrant into the market" by this venture, combined with its enhancement of "Yamaha's potential [2] as a future entrant," I.D. p. 88,¹ outweighed any anticompetitive effects the agreement may have had. The ALJ further rejected Complaint Counsel's contention that the agreement constituted an illegal division of world markets. I.D. p. 95.

For reasons discussed below, we disagree and find that this joint venture in several respects substantially lessened actual and potential competition. Specifically, the joint venture violated the antitrust laws in that it eliminated likely independent entry by Yamaha, eliminated actual existing competition provided by Yamaha in the United States market, and because a series of collateral agreements entered into in connection with the joint venture constituted an illegal limitation on competition between Yamaha and Brunswick. Measuring and balancing the pro-competitive and anti-competitive effects of a joint venture is often a very delicate task and this case is no exception. Nevertheless, we believe the anticompetitive effects are sufficiently pronounced here to require a finding of a violation.

I. The Parties and the Industry Involved

Brunswick is a diversified manufacturer and marketer of medical products and recreational items with a net income in 1973 of \$39 million on net sales of \$683 million. Brunswick commenced manufacturing marine engines in 1961 when it acquired what is now its Mercury Marine Division ("Mercury"). Mercury manufactures and sells outboard motors, stern drives and inboard marine engines and snowmobiles. In 1973, Mercury sold 130,000 units of outboard motors valued at \$80 million. It is the second largest seller of outboard motors

¹ The following abbreviations are used herein:

I.D. - Initial Decision
Finding of Fact No.
I.D.p. - Initial Decision Page No.
Tr. - Transcript of Testimony, Page No.
CX - Complaint Counsel's Exhibit No.
BX - Respondents Exhibit No.
CAB - Complaint Counsel's Appeal Brief
RAB - Respondents Appeal Brief

in the United States. Mercury also sells outboard motors in Canada, Australia, Europe and Japan.

Yamaha is a Japanese corporation. Nippon Gakki Co., Ltd., ("Nippon Gakki"), a Japanese corporation which manufactures musical instruments and sporting goods, incorporated Yamaha to manufacture motorcycles. Nippon Gakki owns 39.11% of Yamaha's stock; the next largest shareholder holds 5%. Since 1961, Yamaha has manufactured and sold snowmobiles, motorcycles and spare parts to Yamaha International Corporation, [3] a wholly-owned subsidiary of Nippon Gakki, which in turn distributes in the United States. In 1972, approximately 40 percent of Yamaha's total sales of \$405 million were made for export to the United States.

Yamaha also manufactures outboard motors through Sanshin Kogyo Company Limited ("Sanshin"), a Japanese corporation. Yamaha acquired 60% of Sanshin's stock in 1969. Since then, Sanshin has produced all "Yamaha" brand outboard motors. In the year ending June 1971, Sanshin produced approximately 75,000 outboard motors for Yamaha. Twenty-five thousand of these were exported, mostly in Europe, but some of these Sanshin outboard motors had been exported to the United States prior to the joint venture.

On November 21, 1972, Brunswick entered into a joint venture agreement with Yamaha. In contemplation of this agreement, Brunswick formed Mariner Corporation ("Mariner"), a wholly-owned subsidiary. Under the terms of the joint venture agreement, Brunswick caused Mariner to purchase 62,000 shares of Sanshin stock for approximately \$1.4 million, resulting in Mariner and Yamaha each owning 38 percent of the total outstanding stock of Sanshin.² Five of Sanshin's 11 directors were to be appointed by Mariner, 6 by Yamaha. The motors manufactured by Sanshin were to be marketed in Japan by Yamaha under the "Yamaha" label, in North America and Australia by Mariner under the "Mariner" label, and on a non-exclusive basis by either parent in the rest of the world.³ Yamaha and Mariner are the sole purchasers of the products which Sanshin manufactures.

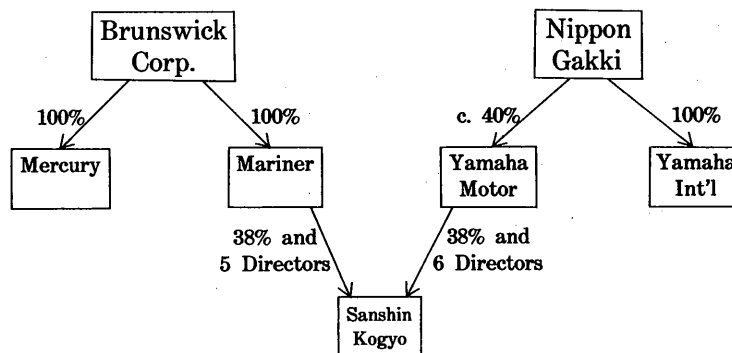
The joint venture agreement also incorporates licensing arrangements providing for the exchange among Mercury, Yamaha and Sanshin of patent and technical information and a technical assistance agreement. Technical information other than patents and the like exchanged pursuant to the agreements becomes the joint property of the parties, while patents and other licenses are renewable, at reasonable cost. The joint venture agreement is to remain in effect for

² The remaining 24 percent of the Sanshin stock is held by individual Japanese shareholders.

³ In October 1973, the agreement was amended to provide that Yamaha could continue selling outboard motors to the Mexican government for their fishing program. Otherwise, Mariner's rights to sell Sanshin products in North America were exclusive.

an initial period of 10 years with automatic extensions for 3 year periods (subject to any necessary Japanese government approvals) unless notice of termination is given by either party 3 years prior to the expiration of the initial or any extended term. [4]

The following is a diagram of the transactions:



The United States outboard motor industry, in both its low and high horsepower segments, is marked by the substantial dominance of a few firms. The four principal competitors in 1973 — Outboard Marine Corporation ("OMC") (through its Johnson and Evinrude brands), Brunswick (through the Mercury brand), Chrysler, and Eska — accounted for 94.9% of the market by units sold with the top two firms controlling 72.9%. I.D. 78. Dollar volume figures are even more dramatic: the top four firms accounted for 98.6%, with the top two controlling 85.0%. I.D. 78. If the figures are broken out by low horsepower and high horsepower motors, similar results obtain. In the low end, by unit volume, the concentration ratios are 4:98.1% and 2:69.3%; by dollar volume, the figures are 4:94.4% and 2:73.6%.⁴ I.D. 86. In the high horsepower [5] end, figures are available only for the top three firms, since they control 100% both by dollar and by unit volume. The top two firms account for 88.8% both by units and dollars. I.D. 101.

"Historically, the outboard motor industry has been marked by a lack of significant entry and a declining number of firms," I.D. 77, quoting Yamaha Amended Ans., ¶19, even though it is an industry characterized by rapid sales growth and high profits. BX 12; CX 71D. While U.S. sales of outboard motors rose by 10.9% annually between 1963 and 1972, I.D. 64, imports in 1973 still made up an insignificant share. I.D. 67. Moreover, of the eight competitors in the U.S. industry in 1955, two had exited by 1969. Tr. 283-291, I.D. 77. Barriers to entry,

⁴ Brunswick's Mercury Division is the number two firm in all computations except low horsepower motors by unit volume, where its sales are exceeded by those of Eska. Eska does not manufacture motors but assembles them from components it purchases. Tr. 609. Brunswick's number two position is firm, however, in both unit and dollar figures in the overall market and high horsepower end, and in dollar volume sales in the low horsepower end.

including capital costs, technology and know-how, and the need to develop a sales network, have remained significant over time. I.D. 80, 81; Brunswick Amended Ans. ¶26, BX 12.

II. Market Definition

A. Geographic Market

The relevant geographic market is the United States, as stipulated by the parties. Complaint, ¶21; Brunswick Amended Ans., ¶21; Yamaha Amended Ans., ¶14.

B. Product Market⁵

The boundaries of our analyses under Section 7 of the Clayton Act are determined by the familiar litany of factors the Supreme Court has enumerated in various cases. In *United States v. E. I. duPont de Nemours & Co.*, 351 U.S. 377 (1956) (the “Cellophane” case), the Court set forth the outer reaches of a relevant market:

That market is composed of products that have reasonable interchangeability for the purposes for which they are produced—price, use and qualities considered. 351 U.S. at 404.

The Supreme Court elaborated upon the appropriate test for market definition not long after *Cellophane* in *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962) where, after affirming that cross-elasticity of demand determines the “outer boundaries” of a product market,⁶ the Court [6] enumerated certain criteria which, when present, may point to the existence of submarkets, or significant market segments in which the competitive implications of a transaction may be demonstrated.

The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product’s peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.⁷

The ALJ concluded that there was no overall outboard motor market, but rather that high and low horsepower outboard motors comprised two separate and distinct markets. I.D. 83, I.D. 99, and I.D. at 68. Complaint counsel contend that there is a broad overall outboard motor market, because outboard motor manufacturers constitute a recognized industry of firms selling outboard motors which are

⁵ The manufacture of electric outboard motors, inboard/outboard motors or stern drive motors have been excluded from the term “outboard motors” in this proceeding. (stipulation, Tr. 169.)

⁶ 370 U.S. at 325.

⁷ 370 U.S. at 325.

interchangeable within broad horsepower ranges. Complaint counsel further contend that despite the price differential between low and high horsepower outboards, there is commonality in their production, distribution, components, general technology, and basic end uses. CAB at 34-36. Complaint counsel took no position on the possibility of submarket categories within the overall outboard motor market.

Respondents' position before the ALJ was that the relevant market consisted of sales of all outboard motors through marine dealers, excluding low price outboards marketed through mass merchandisers or by any other distribution system. Respondents apparently believe their position was essentially consistent with the ALJ's market determinations, RAB at 41, since high horsepower outboards have traditionally been sold exclusively through marine dealers and respondent regarded low horsepower motor sales as irrelevant to this case.

We think the ALJ's discussion of the factors which go into a market analysis should have led him to the conclusion that there is an overall outboard motor market. While it is not essential to disposition of this case, we further note that the record supports findings that the low horsepower and high horsepower segments are appropriate submarkets when examined in light of *Brown Shoe*. [7]

The basic end use of all outboard motors is the same—to push a boat through water. It would be too simplistic, however, for us to conclude on that basis that ten 6-horsepower motors can reasonably be used in place of one 60-horsepower motor. But such a strict standard need not be met for an entire industry to constitute a product market, and we have recognized this in the past. See *British Oxygen Co.*, 86 F.T.C. 1241, rev'd. on other grounds *sub nom. BOC International, Ltd. v. FTC*, 557 F.2d 24 (2d Cir., 1977) (industrial gases); *Coca-Cola Bottling Company of New York, Inc.*, FTC Docket 8992 (Jan. 23, 1979 [93 F.T.C. 110]) (wine); *Liggett and Myers*, 87 F.T.C. 1074 (1976) (dog foods). Here, the three companies in the higher end of the market are all active and substantial competitors in the lower end of the market. But, more important, three characteristics convince us that an overall market exists: industry recognition, technological overlap along the entire horsepower range, and, most significant, the economic incentive sellers have to manufacture and market a full line of motors.

First, both the industry trade association, the Boating Industry Association, and its individual company members recognize the existence of a United States outboard motor industry. CX 91; CX 90; BX 25; BX 12. A market study performed for American Honda discusses and describes an overall outboard motor market, as does a securities research report prepared for OMC. BX 12; CX 90.

Second, while a 200 h.p. motor is different in many ways from a 10

h.p. motor, there is considerable technological overlap throughout the line. All outboard motors are composed basically of an electrical system, a powerhead and a lower unit containing the gear train, propeller and fuel supply. I.D. 62. Certain features requiring advanced technology appear on high horsepower motors and not on low horsepower motors, such as jet prop exhaust and capacitor discharge ignition ("CDI"). I.D. 105. CDI is not as necessary on smaller outboards, and would add substantially to their cost. I.D. 116. Similarly, jet prop exhaust is costly and has not been incorporated by one major competitor, Chrysler, into any of its engines. I.D. 112. But these features are minor in the context of the overall technology involved in outboard motor manufacture.

Third, as respondents vigorously contend, the ability to market a full line of motors is of economic benefit to outboard manufacturers. OMC and Mercury, which together [8] accounted for 72.9% of all units sold in 1973, I.D. 78, both sell their motors exclusively through marine dealers. Chrysler sells its motors both through marine dealers and mass merchandisers like Sears and Montgomery Ward. Eska and Clinton, the other two competitors in the industry between 1971 and 1973, I.D. 77-79, sell their motors exclusively through mass merchandisers. I.D. 97. Well over 70% of total distribution of outboard motors is through sales to marine dealers. The dealers prefer a full line, usually sourced by a single brand, in order to offer the widest range of product choice to customers, I.D. 126, along with the boats, accessories, and skilled servicing they also provide. I.D. 124-5. So while the smallest outboards do not compete directly with the largest, there are economic reasons for viewing all motors as competing in one market.

In *U.S. v. Philadelphia National Bank*, 374 U.S. 321 (1962), "the cluster of products (various kinds of credit) and services (such as checking accounts and trust administration) denoted by the term 'commercial banking' " was held to constitute a distinct line of commerce, despite the lack of price sensitivity or head-on competition among the various components of the "cluster." 374 U.S. at 356. Because of considerations of "convenience", and also some economic reasons why customers were likely to prefer doing their banking business in one place, the cluster of banking services was seen as constituting in practical terms a distinct product market category. See *U.S. v. Phillipsburg National Bank*, 399 U.S. 350, 360-61 (1969). The outboard motor market involves the "cluster" aspect of *Philadelphia National Bank* from a retailer's point of view. In contrast to the situation which obtains with regard to "commercial banking," no single consumer has an economic incentive to purchase a number of outboard motors under a single roof rather than shopping around. But

dealers have strong incentives to display a broad line from a single supplier, Tr. 696, and, as a result manufacturers have strong incentives to be able to supply that full line.

Such incentives, which respondents emphasize as part of their own case, RAB 34-36, point to an overall outboard motor market, and do not establish respondents' asserted market: outboard motors sold through marine dealers. The record shows that low horsepower motors, however sold, compete with each other; there is considerable price sensitivity across distributional lines. I.D. 98. Eska, for example, distributing through mass merchandisers, was able to make substantial inroads on OMC's share of low horsepower outboard-motor sales. I.D. 95.

Of course, the existence of an overall market does not bar scrutiny of the effects of this joint venture in appropriate submarkets. There are aspects of the outboard motor [9] industry which distinguish low horsepower motors from high horsepower motors.⁸ In general, high horsepower motors are used on larger boats, for water skiing or cruising. I.D. 102, 103. Low horsepower motors are primarily used on smaller boats, for fishing, hunting and on sailboats⁹ I.D. 89; CX 90-J, CX 90-Z; I.D. 90. Differences in production facilities between low and high horsepower motors seem generally to be attributable to the physical size of the motor to be manufactured. I.D. 92; Tr. 298-300, 393.

Mr. Strang of OMC, the largest competitor in both low and high horsepower outboards, testified that OMC's pricing decisions regarding high horsepower outboards are not affected by prices set for low horsepower outboards, and vice versa. Tr. 397. In pricing high horsepower motors, OMC looked only to the prices set by Chrysler and Mercury. Tr. 537. Advertising, however, was generally "of the whole line in some publications, and then specific advertising aimed at the use of a given size engine in other publications." Tr. 397-8.

It is certainly true that "industry activities cannot be confined to trim categories."¹⁰ A degree of imprecision always attends the attempt to fit dynamic economic operations into neat pigeonholes. Therefore, we are inclined to agree with the ALJ that there are significant differences between low and high horsepower motors. However, we do not agree that such differences are of a degree that warrants the

⁸ While somewhat arbitrary, the ALJ determined the dividing line between "low" and "high" horsepower motors to be at 20 h.p. I.D. at 21, footnote 3., I.D. 83. We find this dividing line reasonable.

⁹ There is, however, notable overlap in uses. As Mr. Dillon, General Manufacturing Manager of Chrysler's Marine Products group described it:

Generally . . . we deal with different classes or markets that we aim at with our product line, and generally we speak of the small twins [up to 15 h.p. motors] as catering to the fishing market, but I hasten to say that there is an excellent fishing market at 105 horsepower, so I don't think our terminology is necessarily very firm. Tr. 304.

¹⁰ *Cellophane*, 351 U.S. at 395.

finding of two entirely separate markets. Therefore, we [10] find that there is an overall outboard motor industry, with two submarkets: outboard motors of 20 h.p. and under, and outboard motors of over 20 h.p.¹¹

III. The Positions of Yamaha and Brunswick Vis-a-Vis the Market

A. Yamaha

Outboard motors, like snowmobiles and motorcycles, have two-cycle engines. Yamaha entered the U.S. snowmobile market in 1968 and by 1974 was marketing eleven or twelve models. Stipulation No. 2, #32. Even more dramatic is the 20% share of the U.S. motorcycle market captured by Yamaha between 1959, the year it entered the U.S. market, and 1974. Stipulation No. 2, #25, #27, #28. "Yamaha" brand motorcycles are sold through a network of franchised retail dealers developed in the U.S. by YIC.¹² I.D. 176. There is heavy advertising and substantial brand recognition in the United States for the "Yamaha" name. Stipulation No. 2, #24.

Yamaha has marketed outboard motors in Europe, Canada, South East Asia, Africa, the Middle East, Australia, and Central and South America. I.D. 173. Those motors were both water and air-cooled, with all component parts manufactured by Sanshin. I.D. 164. Yamaha was marketing motors of up to 25 h.p. in 1972, I.D. 175, with development plans in progress for higher horsepower engines.¹³ Yamaha exhibited a prototype 55 h.p. motor at the 1972 Tokyo Boat Show with a jet prop exhaust system and marketed that motor in Japan in 1973. I.D. 170. Japanese ignition systems makers were able to provide a CDI system at that time. I.D. 117.¹⁴ Thus there seems little doubt that the [11] technology was available to Yamaha to produce and sell in the United States—as it was then selling in other foreign markets—outboard motors suitable to compete effectively in this market.

Yamaha had made two unsuccessful attempts to enter the U.S. outboard motor market prior to the joint venture agreement. In 1968, Yamaha attempted to market air-cooled, single-cycle outboards ranging from 3.5 to 7.5 h.p. through its motorcycle dealers. Only about 900

¹¹ In light of our disposition of the relevant product market question, it is unnecessary to nicely distinguish between the overall outboard motor industry and its low and high horsepower segments because we find that both are market categories in which anticompetitive effects can occur and, as will be demonstrated below (see note 27 p. 19 and following text), Yamaha was a potential and actual participant in each of those markets.

¹² Some of those dealers also market "Yamaha" brand snowmobiles. I.D. 179.

¹³ In 1970, a 40 h.p. motor was in planning at Yamaha for "the export sector." CX 26-D.

¹⁴ Many companies, including Japanese producers, offered CDI systems for sale in 1972. I.D. 115. Jet prop exhaust technology has been available from a long expired 1921 patent. I.D. 112. Even when the patent was in effect, it did not prevent the development of such systems, or "inventing around" the patent, by other producers. Tr. 401-405.

motors were delivered to dealers. The Yamaha motors suffered a price disadvantage in certain parts of the U.S. due to freight costs, and were air-cooled single engines, while the U.S. preference was for water-cooled two-cylinder engines. CX 61, CX 68; I.D. 153-155. In 1971-72, Yamaha sold about 500 1.5 h.p. motors to Sears for marketing under the "Sears" brand. The Yamaha motors did not sell well at Sears because the quality and the price were too high for Sears' market. I.D. 156, 157.

As noted, the U.S. market for outboard motors was the world's largest and was expanding. Yamaha's plans in 1971 called for the export of a two cycle 6 h.p. motor, featuring water-cooling, noise and water pollution controls, and CDI. The engine was scheduled for production in early 1973 as "the major model" for export into the U.S. CX 20-D; I.D. 161. Similar plans for motors to be exported into the U.S. were developed during 1971 for 10 h.p., 9.5 h.p., and 45 h.p. models. I.D. 162, 163.

B. Brunswick

Brunswick, through its Mercury division, is the second largest seller of U.S. outboard motors accounting annually during the period 1971-73 for 20-22% of units sold. I.D. 78. Since at least 1971, Mercury has sold outboards in Europe, Canada, Australia and Japan as well as in the U.S. I.D. 5; CX 91-A-I; CX 101-A-C. In the U.S., Mercury's market share had remained relatively stable since 1965. I.D. 78, 128. Prior to entering the joint venture, Mercury decided to pursue production of a second line of outboards as a means of increasing its share. A second line would allow Mercury to enlist additional marine dealers in close proximity to those carrying the "Mercury" brand, thus expanding its dealer network, and, at the same time, explore marketing through other retail outlets. I.D. 129, 130; Brunswick Admissions No. 6, p. 6. "Mariner" brand engines were to become that second line. Brunswick Admissions, No. 5, p. 5.

Brunswick also hoped to use its second line as a means of forestalling perceived new entry:

From both a "defensive" and "offensive" viewpoint, it is obvious that we (Mercury) need new, simple, low cost, low horsepower offerings. So, too, do [12] all of the other U.S. marine manufacturers. Everyone is vulnerable . . . It is not unlike the automotive industry and the price which they paid to foreign firms for abandoning the low price, compact market. We can expect a similar challenge—with or without us. Add to this the global opportunities for low horsepower engines resulting from less availability and higher cost for fuel, as well as different usage of the product. CX 8-A.

C. The Joint Venture Agreement

A joint venture agreement was entered into to further the mutual aim of the Mercury Division of Brunswick and Yamaha to manufacture and sell a new line of outboards. CX 1-A, 1-B. The implementing device was capital participation by Brunswick in Sanshin, Yamaha's manufacturing subsidiary, through a subsidiary created for that purpose—Mariner. Yamaha and Mariner were each to hold 62,000 shares of Sanshin stock.

Sanshin's Board was to be composed of eleven directors: 6 approved by Yamaha (including the President), and 5 by Mariner. Certain transactions, like approval of Sanshin's budgets and expansion or discontinuance of Sanshin's product line, required approval by seven directors. The Operating Committee, appointed by the Board, was to be composed of two Yamaha-appointed and two Mariner-appointed directors.

The original Article 8 of the agreement provided for the formation of a joint sales company, with the sales company, Mariner and Yamaha to buy all of Sanshin's output.¹⁵ It further provided that "Yamaha shall have the exclusive right to sell in Japan the product of Sanshin; and [Mariner] International shall have the exclusive right to sell in North America and Australia the products of Sanshin." CX 1-K. The joint sales company was to be the exclusive marketer of Sanshin products in the rest of the world. This article was amended in October, 1973, to eliminate the joint sales company, and to add New Zealand to Mariner's exclusive territories. As a result, Mariner brand, Mercury brand and Yamaha brand motors could all be marketed outside the designated exclusive territories by Yamaha and Mariner.¹⁶ Under the terms of the agreement, Yamaha remained free to continue its practice of purchasing various motors for resale in Japan, [13] but it was barred from manufacturing "directly or indirectly" the same motors or those "substantially the same" as the motors "which are or will be manufactured by Sanshin." CX 1-M.

The agreement was to extend for one initial ten-year period with automatic three-year extensions unless notice was given of intention to terminate three years before the expiration of the original or any extended term. CX 1-R.

The joint venture agreement contained ancillary agreements between Mercury and Sanshin, between Yamaha and Sanshin, and between Yamaha and Mercury, regarding technical assistance. CX 1-Z-5-46. Under these agreements, Mercury and Yamaha granted non-exclusive, non-assignable licenses to each other and to Sanshin to use

¹⁵ Sanshin was to charge its three buyers "identical prices" Article 8.2, CX 1-K.

¹⁶ However, Mariner had already agreed, in response to a Yamaha inquiry, that it "would not seek out Yamaha's dealers in the non-exclusive markets" and that "our basic philosophy must be to respect each other's position and to concentrate on making inroads against other outboard manufacturers." I.D. at 94; CX 77-C.

"Technical Information", defined to include patents, designs, technical knowledge, data, manuals, experience and the like, in the manufacture of motors in accordance with the joint venture agreement.¹⁷ Such licenses were limited however in that each company could not use the information to "make, use or sell 'goods' which are competitive to the goods manufactured" by the other company.¹⁸ CX 1-Z-30.

IV. Commerce Requirement

Insofar as the conclusions reached in this opinion as to the legality of the Brunswick-Yamaha joint venture are grounded in Section 5 of the FTC Act there is no dispute that the jurisdictional "commerce" requirements of that statute are satisfied. Both respondents are admittedly engaged in commerce. I.D. 6, 24

To the extent that Section 7 of the Clayton Act is the operative statute, this issue becomes somewhat more complex. Section 7 states, in pertinent part, "[n]o corporation [14] engaged in commerce shall acquire . . . the stock . . . of another corporation engaged also in commerce." The sole acquisition involved in the transactions at issue is that by Brunswick (via Mariner) of the stock of Sanshin, the joint venture vehicle. For Section 7 to apply here, Sanshin as well as Brunswick must be "engaged in commerce."

The ALJ initially found that Sanshin "has never by itself engaged in commerce, within the meaning of the statute." (I.D. at 61) He reasoned, nevertheless, that Sanshin, because it was dominated by Yamaha and Brunswick (both engaged in commerce) prior to and after the formation of the joint venture, was engaged in commerce sufficient to meet the requirements of the statute.

We agree with the ALJ's conclusion that the commerce requirements of Section 7 are satisfied. We do so, however, for slightly different reasons. Based upon the ALJ's findings of fact, we conclude that Sanshin was itself "engaged in commerce" within the meaning of Section 7 of the Clayton Act without resort to any theory of vicarious participation through Yamaha and Brunswick.

"Commerce" for the purposes of the Clayton Act includes the foreign commerce of the United States.¹⁹ A foreign corporation, by

¹⁷ Like the joint venture agreement, this agreement was to remain in effect for ten years, with automatic three year renewals. See, e.g., Article 11.1, CX 1-Z-13.

¹⁸ Indeed, Mercury's promises go even further. Article 6.7 provides:

Because of the difficulty of identifying when a product of Mercury incorporates part of the Yamaha Technical Information, in order to induce Yamaha to enter this Agreement in its capacity as licensor, and because it presently has no intention of producing such goods, Mercury agrees not to manufacture any product competitive to those manufactured by Yamaha at the date of execution of this agreement, notwithstanding the foregoing, Mercury may manufacture snowmobiles. CX 1-Z-39.

¹⁹ Section 1 of the Clayton Act provides: "'Commerce,' as used herein, means trade or commerce among the several States and with foreign nations" (emphasis supplied). See generally W. Fugate, Foreign Commerce and the Antitrust Laws (2d ed. 1973) 334.

virtue of its exporting, or selling for import, its products to the United States, may be engaged in that foreign commerce.²⁰ A substantial portion of the outboard motors manufactured by Sanshin in Japan are sold to Mariner for import to the United States where they are distributed under the Mariner label. Were there no more to this arrangement than the transactions described above, the question of Sanshin's involvement in the foreign commerce of the United States would be a closer one. Certainly not every foreign corporation whose products are actually sold in this country through intermediaries is engaged in U.S. foreign commerce. This simple case is not, however, the one presented us by the Mariner-Sanshin arrangement. [15]

We are not required to blind ourselves to the reality of the relationships between Mariner, Sanshin, Yamaha and Brunswick. Sanshin is not any Japanese corporation to whom Mariner has come as any purchaser. Sanshin exists for the purpose, made express in the joint venture agreement, of manufacturing motors for Mariner and Yamaha. Sanshin has no other customers for its motors. Sanshin's owners (Mariner and Yamaha), and perforce its management, knew and intended that a large part of Sanshin's production would be sold in the United States and such was in fact the case. There is evidence as well that Sanshin's product was designed and engineered with the American market in mind.

We do not challenge the reality of the separate corporate identities of Sanshin and Mariner or of the sales between them. But the interposition of a separate corporate entity as distribution arm and the formality of passage of title do not alter (though they may obscure) the fact that Sanshin's operations were intended to be and were, in fact, part of the flow of foreign commerce to the United States.²¹

V. The Legal Standard

The joint venture is in some respects a "quasi-merger," where cooperation between formerly independent companies often acts to benefit and spur competition. The combined capital, assets, or know-how of two companies may facilitate entry into new markets and thereby enhance competition, or may create efficiencies or new productive capacity unachievable by either alone. As a result, relatively lenient merger standards usually apply to joint ventures,²² rather than straight *per se* rules that may apply to cartel behavior.

²⁰ See, e.g., *United States v. Jos. Schlitz Brewing Co.*, 253 F. Supp. 129 (N.D. Cal), *aff'd per curiam*, 385 U.S. 37 (1966). See also *W. Fugate*, *supra*.

²¹ See *U.S. v. Aluminum Co. of America*, 148 F.2d 416, 443-4 (2d Cir. 1945); see also *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.*, 549 F.2d 597, 608-14 (9th Cir., 1977); *Deutsche Lufthansa Aktiengesellschaft v. C.A.B.*, 479 F.2d 912, 917 n.9 (D.C. Cir. 1973); *Schoenbaum v. Firstbrook*, 405 F.2d 200, 208 (2d Cir. 1968).

²² See *U.S. v. Penn-Olin*, 378 U.S. 158, 170-2 (1964).

But "[t]he talisman of 'joint venture' cannot save an agreement otherwise inherently illegal."²³ A price-fixing scheme or other cartel-like behavior cannot be insulated from review simply by fixing the "joint venture" label to a device used to engage in behavior inherently pernicious to competition. Thus, a threshold question is whether a transaction can properly be characterized a "joint venture." [16]

While the issue is a close one, we believe the Brunswick-Yamaha agreement is indeed a joint venture. There are factors which could point to a contrary answer. Sanshin already existed before the reallocation of its stock so no new productive capacity was created. Both joint venturers produced outboard motors, and between them, marketed all over the world before the venture was formed so the venture was not necessary to create a new competitor in otherwise unserved markets. However, each parent corporation made substantial contributions to the venture—essentially capital and some important technology from Brunswick and technology plus an existing manufacturing facility from Yamaha. A new product emerged combining these respective technologies which was designed especially to compete in the U.S. market. This combination of assets and the new product generated seems adequate to dispel any claim that the agreement was a "naked agreement" between the parties designed solely to eliminate existing or potential competition. See Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 75 Yale L.J. 373, 462-4 (1966); cf. *U.S. v. Topco Associates*, 405 U.S. 596 (1972).

Therefore, we approach this transaction with the kind of analysis usually applied to mergers under Section 7 of the Clayton Act.²⁴ The test is the effect of the joint venture on actual or potential competition in the joint venture market. Here, there are three possible theories according to which the Brunswick-Yamaha joint venture might have lessened competition: (1) as a result of the joint venture, Yamaha may have been eliminated as an actual potential entrant into the United States market, see *FTC v. Procter and Gamble Co.*, 386 U.S. 568 (1967); *Kennecott Copper Corp. v. FTC*, 467 F.2d 67 (10th Cir. 1972), *cert. denied*, 416 U.S. 809 (1974); (2) the joint venture may have substantially reduced existing competition between Yamaha, Mercury, and others in the United States market, see *U.S. v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964); and (3) collateral agreements between Brunswick and Yamaha, purportedly ancillary to the joint venture, may have consti-

²³ *Engine Specialities, Inc. v. Bombardier Ltd.* 605 F.2d 1, slip op. at 20 (1st Cir., July 25, 1979). But see *U.S. v. Minnesota Mining & Mfg. Co.*, 92 F. Supp. 947 (D. Mass. 1950).

²⁴ "Overall, the same considerations apply to joint ventures as to mergers, for in each instance we are but expounding a national policy enunciated by Congress to preserve and promote a free competitive economy." *U.S. v. Penn-Olin*, *supra*, 378 U.S. at 170. See also *U.S. v. Columbia Pictures Corp.*, 189 F. Supp. 153, 178-9 (S.D.N.Y. 1960); but see *U.S. v. Minnesota Mining & Mfg. Co.*, 92 F. Supp. 947 (D. Mass. 1950).

tuted an illegal limitation on competition between the two parent firms. Our review of the record leads us to believe that all three anticompetitive effects are present here. [17]

Complaint counsel also argued that Section 7 was violated by the removal of Yamaha's "in-the-wings" effect on the U.S. outboard motor market. In our view, it is not necessary to address that theory here, in light of our discussion of *U.S. v. El Paso Natural Gas Co.*, *supra*, pp. 24-5, *infra*. *El Paso* involves the elimination of actual competition from the market, and involves anticompetitive effects which are similar to but less ambiguous than those addressed by the perceived potential competition theory.

A. Elimination of Yamaha as a Potential Entrant into the U.S. Outboard Motor Market

Our starting point is that Brunswick, through Mercury, already was a vigorous competitor in the U.S. market, selling a product that competitive with the planned product of the joint venture. If the effect of the Brunswick-Yamaha joint venture, operating as it does in the identical product and geographic markets as Brunswick, was to eliminate Yamaha as a most likely potential entrant into the U.S. outboard motor market, that could constitute a substantial lessening of competition under Section 7.²⁵ [18]

In that event, there would be no introduction of effective new competition into the U.S. market. It is on this key point that we part company with the reasoning of the ALJ. Mercury was already competing in the U.S. and, as we will discuss below, it could not be expected that Mariner would compete vigorously with its own parent.

²⁵ In this respect, the case is significantly different from *United States v. Penn-Olin Co.*, *supra*. There, the Court found that if either parent had entered the target market, that would have led the other parent of the joint venture to remain on the sidelines. If there was any lessening of competition in that situation, it necessarily would have been the loss of a sidelines procompetitive effect whereby the threat of entry by the second parent, eliminated by its participation in the joint venture, could have been a significant factor in affecting competitive decisions by existing sellers in the market. 378 U.S. at 173-4. By contrast, the theory to be explored here is that but for the joint venture, Brunswick would have continued to compete effectively on outboard motor sales in the U.S. market and Yamaha would have entered the market as a separate independent competitor. Arguably, that possibility was lost when Yamaha joined Brunswick in a joint venture. *Cf. U.S. v. Marine Bancorporation*, 418 U.S. 602 (1974); *U.S. v. Falstaff Brewing Corp.*, 410 U.S. 526 (1973); *FTC v. Procter and Gamble Co.*, 386 U.S. 568 (1967).

While the Supreme Court expressly reserved decision on the validity of the actual potential competition doctrine, *U.S. v. Marine Bancorporation*, *supra*, 418 U.S. at 625, 639; *U.S. v. Falstaff Brewing*, *supra*, 410 U.S. at 537; *see also* *FTC v. Procter and Gamble*, *supra*, 386 U.S. at 575 ("If Procter had actually entered Clorox's dominant position would have been eroded and the concentration of the industry reduced"); the Commission, together with numerous federal courts, has endorsed the doctrine and we are confident that it eventually will receive the Supreme Court's approval. *See, e.g., U.S. v. Phillips Petroleum Co.*, 367 F. Supp. 1226, 1232 (C.D. Cal. 1973), *aff'd without opinion*, 418 U.S. 906 (1974); *U.S. v. Jos. Schlitz Brewing Co.*, 253 F. Supp. 129, 147 (N.D. Cal.), *aff'd without opinion*, 385 U.S. 37 (1966); *Kennecott Copper Corp. v. FTC*, 467 F.2d 67, 77-78 n.8 (10th Cir. 1972), *cert. denied*, 416 U.S. 809 (1974); *Ecco Products Co. v. FTC*, 347 F.2d 745, 752-53 (7th Cir. 1965); *U.S. v. Wilson Sporting Goods Co.*, 288 F. Supp. 543, 560 (N.D. Ill. 1968); *U.S. v. Standard Oil Co. (New Jersey)* 253 F. Supp. 196, 227 (D.N.J. 1966). The validity of the doctrine is also supported by eminent legal scholars. *See, e.g.,* Brodley, Potential Competition Mergers: A Structural Synthesis, 87 Yale L.J. 1, 45-52 (1977); Sullivan, *Handbook of the Law Of Antitrust*, 651-2 (1977).

Yet Yamaha, by joining in the joint venture, would as a practical matter no longer have any incentive to compete independently in the U.S. market.

Unlike *Penn-Olin*, a conclusion that the joint venture (operating through the Mariner brand) would not compete vigorously with Brunswick (operating through the Mercury brand)—at least not as vigorously as Yamaha would if it had entered as an independent competitor—can be reached as a matter of evidence rather than speculation.²⁶ Under the joint venture agreement, Brunswick had the right to appoint five of Sanshin's 11 directors and therefore obviously would have a significant say in Sanshin's decisions concerning price and output. Indeed, some key decisions required a Board majority of seven, and Brunswick in those matters would have an absolute veto. While Mariner was set up to market Sanshin output in the U.S. and Mercury was to remain separately incorporated and sell the Mercury brand, the same [19] individual (Reichert) served as Chairman of Mariner and President of Mercury. I.D. 130, 131. It was understood motors were not to be sold to existing Mercury dealers, CX 7-D; CX 8-C; and Mariner engines were designed to appeal to and were sold to the extent possible to "a different type or class of customer," CX 7-C. In short, the entire transaction was organized to minimize, to the extent possible, competition for dealers and customers between Mercury and Mariner, an arrangement which would not have pertained if Yamaha had entered the U.S. market independently. Thus the tradeoff of an independent Yamaha for a dependent and controlled Mariner would clearly constitute a possible lessening of competition—roughly equivalent to the acquisition by Brunswick, a 20 to 22% factor in a very highly concentrated market,²⁷ of a small but potentially vigorous new competitor.

Although Yamaha's sales in the U.S. during 1971-2 accounted for less than 1% of the relevant market, we do not think that sales figures accurately reflect the degree to which Yamaha would be a factor in that market. Given its financial resources, technological abilities, brand name recognition in the U.S. and quality of product, we believe actual sales in the year or two before entry seriously understate its competitive potential—if it can be demonstrated that it would have

²⁶ In *Penn-Olin* the Court noted: "If the parent companies are in competition, or might compete absent the joint venture, it may be assumed that neither will compete with the progeny in its line of commerce." (emphasis added) 378 U.S. at 169.

²⁷ We are assuming in this discussion that the market in which Yamaha would have competed is the overall outboard motor market and there the top four companies accounted for 94.9% of units sold and 98.6% of dollar volume (*supra*, page 4). If we were to view Yamaha as a potential entrant only into the low horsepower submarket, the top four companies would account for 98.1% of units sold and 94.4% of dollar volume. See *supra*, page 4. Either way, these concentration figures are extremely high and create a presumption that the addition of a new competitor would lead to significant deconcentration. *U.S. v. Marine Bancorporation*, *supra*, 418 U.S. at 631.

entered independently. Cf. *U.S. v. Aluminum Co. of America*, 377 U.S. 271 (1964); *Stanley Works v. FTC*, 469 F.2d 478 (2d Cir. 1972).

We turn next to the question whether Yamaha was a likely candidate to enter the U.S. outboard motor market, and the high or low horsepower submarkets, absent the joint venture. To establish that Yamaha was an actual potential entrant into the U.S., complaint counsel would have to show that Yamaha had the capacity, interest, and economic incentive to enter on its own. To establish a violation of Section 7, complaint counsel would also have to show that the target market was substantially concentrated and that independent entry offered a substantial likelihood of ultimately producing deconcentration or other significant pro-competitive effects. *U.S. v. [20] Marine Bancorporation*, *supra*; *U.S. v. Falstaff Brewing*, *supra*. There is also authority that the Government must show that entry was likely to occur in the reasonably near future. See *BOC International, Ltd. v. FTC*, 557 F.2d 24, 29 (2d Cir. 1977).

The record is unusually clear in this case showing that Yamaha would have entered the U.S. outboard motor market and also its two submarket components if the joint venture had been unavailable to it. The agreement with Brunswick was, to Yamaha, an alternative to direct entry. CX 79-E. The U.S. market is the world's largest and most sophisticated for outboard motors. It was the only developed market in the world in which Yamaha was not selling "Yamaha" outboards before the commencement of the venture and was practically the only significant part of the world in which Yamaha was not selling substantial numbers of outboards at all. I.D. 173.

Yamaha's participation in the joint venture is itself some proof of Yamaha's interest in the U.S. market, and its economic self-interest and the profit potential of this market made continued efforts to enter highly likely. An additional proof of interest is the fact that Yamaha attempted to enter the U.S. market on two separate occasions.²⁸ Most important, Yamaha had concrete plans to enter the market by 1973, abandoned only when the joint venture alternative arose. I.D. 159-163.

While capacity to achieve independent entry successfully is always somewhat speculative, the record here is again unusually clear that Yamaha had what it would take to sell outboard motors in the United States. There were no technological or other reasons why Yamaha could not have successfully carried out its entry plans. Yamaha was engaged, at the time it entered the joint venture, in a vigorous product development program, aimed at the kind of high horsepower motors for which the U.S. is the prime market. In 1969, Yamaha planned to

²⁸ See discussion p. 11, *supra*.

have a 25 h.p. motor for sale in the U.S. by 1971. CX 24-D. It planned for export a 40 h.p. engine to go into production in October, 1971, I.D. 160, and in 1971 planned a line of motors from 2 to 45 h.p.—*i.e.*, covering substantially the full range of high and low horsepower units—for production in 1972 for export to Europe and contemplated future export to the U.S. I.D. 163.

Yamaha exhibited a 25 h.p. motor it was marketing at the time and a prototype 55 h.p. motor at the 1972 and 1973 Tokyo Boat Shows. I.D. 166, 170. OMC, Brunswick's principal competitor, after it performed its own engineering evaluations, was so impressed with the performance of Yamaha's 25 h.p. motor that it took steps to upgrade the quality of its own 25 h.p. motor. I.D. 204. [21]

Yamaha's management was experienced in producing and marketing outboard motors. Moreover, it was adept at marketing in remote areas. Not only were its outboards marketed virtually worldwide, but Yamaha's history of sales successes far from Japan, including the sale of motorcycles and snowmobiles in the United States, show the feasibility of Yamaha selling, servicing, and establishing dealership systems for its motorized products in the U.S. While it is true that imports of outboard motors had not been a major market factor prior to 1972, we believe this record establishes that Yamaha was ready and able to commit itself to a full scale entry.

Respondent argues that in 1972 Yamaha could not have entered the U.S. market because it needed a "more complete line" to attract necessary dealers. RAB 36. There is considerable evidence in the record, however, that Yamaha was producing a broad enough range of motors to enter the U.S. market by Mercury's, OMC's, and Yamaha's own estimations.

Thus, in 1972, Yamaha produced and sold "Yamaha" engines up to 25 h.p. The 55 h.p. model exhibited by Yamaha in prototype in Tokyo in 1972 was being manufactured and marketed in Japan in 1973. I.D. 170. OMC tested this engine in 1974 and found it a "very good performer." Tr. 448. In 1974, Mercury's Vice-President for Marketing defined a "full-line producer" as one "who is offering a reasonable spread—I don't think he would have to have every model—a reasonable spread from 3 or 4 horsepower to 40 or 50 horsepower." Answer of Brunswick to Complaint Counsel's Initial Request, pp. 18-19.²⁹

Yamaha was in substantial agreement with that assessment. Mr. Eguchi, a Managing Director of Yamaha and a member of Sanshin's Board of Directors testified that "from our opinion, with the addition of the 55 horsepower, that is about the time we can go into a developed

²⁹ When Mariner began selling the U.S., it included an 85 h.p. Mercury motor, not part of the joint venture output, but it had not been anticipated before or after entry that this motor was essential to entry. CX 8-D.

market like the United States or Canada." Tr. 699. OMC agreed, and in its 1972 studies of the likely impact of foreign entry on U.S. market shares, assumed that entry would occur with a line up to and through 50 h.p. Tr. 446. Yamaha had such a line in place in prototype in 1972, and on the market in 1973.

Respondents' "full-line" contention relates to its argument that "Yamaha had to develop a marine dealer network to enter the relevant United States market as a first-class competitor." RAB 23. We have already determined that the relevant market in this case is not just high horsepower [22] alone, as the ALJ found,³⁰ but is all outboards as well as submarkets of high and low horsepower engines. Even in the high horsepower submarket, though, insofar as the record sheds any light on what constitutes a "full line", Yamaha had it. In addition, as we discuss below, there were various other ways for Yamaha to compete in the United States short of establishing a wholly new outboard motor distribution system. But if that *were* necessary, there is every reason to believe Yamaha could have done it.

As noted, though it is clear that Yamaha was a likely entrant, the potential competition doctrine has meaning only as applied to concentrated markets. "[T]here would be no need for concern about the prospects of long-term deconcentration of a market which is in fact genuinely competitive."³¹ The outboard motor market in the U.S. would benefit from aggressive new entry. Two firms control 85.0% of the overall market. The concentration ratios for both the high and low horsepower submarkets are also extremely high: 2:88.8% in the former, and 2:73.6% in the latter. Demand had been increasing, barriers to entry are significant, and profits are high. The number of firms in the high horsepower end of the market has declined over time, and while there has been some entry in the low end, it has been insignificant to the market leaders whose shares have remained constant. I.D. 87. Competition in the high horsepower end is primarily based on technical innovation. I.D. 105.³² Overall, competition in the outboard motor industry in the U.S., including both low and high horsepower submarkets, would be invigorated with the entry of a strong new seller.

Deconcentration was all the more feasible because Yamaha could have entered the U.S. market in a variety of ways absent the joint venture. The record evidence shows Yamaha could have entered *de*

³⁰ See discussion, p. 6, *supra*.

³¹ *U.S. v. Marine Bancorporation*, 418 U.S. at 630-1.

³² While the ALJ found the potential competition doctrine to be inapplicable to low horsepower outboard motor sales, we do not find the record evidence to support his statement that there is "intense price competition" in that segment, I.D. at 80, based as it was largely on the fact of sales of low horsepower engines by mass merchandisers and through private labelling as well as through marine dealers.

novo, sourcing its own line of motors from the Sanshin plant, through its U.S. sales company. Its motorcycle and snowmobile dealers could have [23] provided sales outlets and servicing.³³ Alternatively, Yamaha could have again gone to mass merchandisers, with its own brand or a private label. Marine dealers are almost universally on one-year contracts and could, of course, be wrested from competitors by an aggressive entrant, or convinced to carry a second line. Other merchandisers, including camping and sports supply stores, were potential distributors, already under consideration as sales outlets by U.S. outboard manufacturers. I.D. 130. By 1972, Yamaha was producing motors for sale of up to 25 h.p., enabling it *at that moment* to enter the U.S. at least through the low horsepower end of the market,³⁴ where substantial growth was occurring and substantial profits were available. CX 8-B. Thus deconcentration was feasible and could occur in the near future.³⁵

Independent entry by Yamaha would certainly have had a significant procompetitive impact on this market. Yamaha's financial strength overall, and its brand familiarity to U.S. consumers would have made its motors immediately acceptable. Yamaha intended to be "one of the top class outboard manufacturers" in the U.S. (Eguchi, Tr. 696). To do so, Yamaha would have to take on the market leaders "head-on," and compete fiercely to win market share.

Thus, the structure of the relevant market in this case is of the kind the Supreme Court described as being able to benefit from the effects of potential competition. *U.S. v. Marine Bancorporation*, *supra*. Moreover, given Yamaha's expansion history, strength in a variety of world and U.S. markets, development of an advanced motor that an existing U.S. competitor regarded as a market threat, with overall technological and financial capabilities, and stated entry plans regarding the U.S. outboard motor market, we think the "essential preconditions"³⁶ set out in *Marine Bancorporation* [24] are fully met, and that Yamaha was an actual potential entrant into the U.S. Given these factors, plus the absence of evidence that other potential entrants were poised at the edge of the market, we agree with the ALJ's finding below, that Yamaha was the most likely potential entrant. I.D. at 84.

³³ The ultimate viability of an outboard motor distribution system composed of motorcycle dealers is not clear, but it was an option Yamaha had available to it, and actively considered. I.D. 172, 180, 181 *but see* I.D. 188.

³⁴ By 1972, Yamaha, with 12%, was second only to OMC in the European market. I.D. 184.

³⁵ *Cf. BOC International, Ltd. v. FTC*, *supra*.

³⁶ *U.S. v. Marine Bancorporation*, *supra*, 418 U.S. at 633:

Two essential preconditions must exist before it is possible to resolve whether the Government's theory, if proved, establishes a violation of §7. It must be determined: (i) that in fact NBC has available feasible means for entering the Spokane market other than by acquiring WTB; and (ii) that those means offer a substantial likelihood of ultimately producing deconcentration of that market or other significant procompetitive effects.

B. The Elimination of Yamaha's Present Procompetitive Effect: El Paso Natural Gas Co.

We think the Brunswick-Yamaha joint venture also cannot withstand antitrust scrutiny on the theory of *U.S. v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964). El Paso Natural Gas, with a preacquisition market share exceeding 50%, acquired Pacific Northwest, described by the court as "the only other important interstate pipeline west of the Rocky Mountains." Pacific Northwest was not only on the verge of entering the California natural gas market, but it had gone further and entered into negotiations and reached a tentative agreement for a supply contract with the largest industrial user of natural gas in Southern California. El Paso defeated that potential inroad by cutting its price and thereafter by acquiring Pacific Northwest. In *Marine Bancorporation*, the Supreme Court described El Paso as an "actual competition rather than a potential competition case," presumably because, as the Court wrote in *El Paso*, Pacific Northwest was "a substantial factor in the California market at the time it was acquired by El Paso."

Yamaha's position is not unlike that of the Pacific Northwest Pipeline Corp. in *El Paso*. Yamaha's ability to inspire the fear of competition in the hearts of U.S. manufacturers was already clear before Yamaha entered the joint venture. The U.S. manufacturers, including Brunswick,³⁷ were wary of foreign entry, particularly in the low horsepower end of the market. Brunswick didn't want to pay the "price" it felt U.S. automakers had "to foreign firms for abandoning the low price, compact market." CX 8-A. For its part, OMC took quick steps to modify its motors to keep them competitive with the new Yamaha 25 h.p. models in 1972, I.D. 204, a product design modification that was a current response to Yamaha's competition.

Yamaha had in fact sold outboards in the U.S. on two separate occasions, and it was looking to try again. "Unsuccessful bidders are no less competitors than the successful one."³⁸ Pacific Northwest had a present impact [25] on the actions of competitors in the relevant market. No less so did Yamaha—particularly with respect to technological changes responding to features displayed by Yamaha at the Tokyo boat show. We, too, "would have to wear blinders" not to see that Yamaha's efforts to enter the U.S., its successes in outboard markets elsewhere, its track record with other products in the U.S., and the probability that U.S. entry efforts would continue absent the

³⁷ See pp. 11-12, *supra*.

³⁸ 376 U.S. at 661.

joint venture "had a powerful influence" on the U.S. outboard motor manufacturers.³⁹

C. The Problem of Duration of the Joint Venture

As noted, the competitive value of independent entry into the U.S. by Yamaha would far exceed that of the dependent Mariner. Respondents' argument that the joint venture improved competition by introducing a new competitive force into the U.S. market therefore fails.

But respondents argue, and the ALJ agreed, that any anticompetitive effects of the transactions were overcome by the fact that the joint venture was terminable by either party at the end of its initial ten-year term (in 1982) by giving notice of termination three years in advance. The short life of the venture, the ALJ found, would "enhanc[e] the probability of an early unilateral entry by Yamaha into the market" sometime after 1982. I.D. at 92.

We find this reasoning to be unpersuasive and unsupported by the record. Even putting the best face on it, respondent would have us ignore a significant lessening of competition for the ten-year life of the venture in return for a wholly speculative increase in competition in the future. Respondents assure us of the likelihood of the venture's timely demise, but have adduced no reliable evidence that it will terminate, that Yamaha, as a result of the joint venture, would be strengthened as a potential competitor in the U.S. outboard market over what it was in 1972, or that Yamaha would in fact enter the U.S. market upon the venture's asserted termination in 1982. [26]

Even assuming respondents are correct, and Yamaha does act to terminate the agreement at its first opportunity, we find nothing to support the contention that Yamaha in 1982 would be a more likely entrant than it was in 1972.⁴⁰ For example, respondents continually stressed the lack of a dealership system as a barrier to Yamaha's entry into the U.S. in 1972, based on Yamaha's purported inability to supply a line of motors of the requisite depth. We found such a barrier to have been surmountable by Yamaha in 1972, both through the availability of other distribution systems and by Yamaha's manufacture of a sufficiently "full" line.⁴¹ Even if respondents were correct and distribution problems were a significant barrier in 1972, they fail to

³⁹ 376 U.S. at 659.

Certainly the exclusion of what would promise to be an important independent competitor from the market may be sufficient, in itself, to support a finding of illegality under §7. *FTC v. Procter & Gamble Co.*, *supra*, 386 U.S. at 568 (Harlan, J., concurring).

⁴⁰ See discussion, pp. 17-24, *supra*.

⁴¹ See discussion, p. 21, *supra*.

explain, and we fail to see, how Yamaha will be in a better position vis-a-vis a dealership system in 1982.⁴²

The record does not support respondents' assertion. While a limited term joint venture in many circumstances will be more procompetitive than one with an indefinite term, here we have only self-serving assertions by *Brunswick* that *Yamaha* will act to terminate the venture. CX 108-0; CX 81-A; Tr. 792. Such "uncabined speculation"⁴³ cannot replace the reduced competition that occurred when Yamaha entered the joint venture.

D. Collateral Restrictive Agreements

Certain reductions in competition between the parents are an inevitable consequence of a joint venture agreement. For example, it is to be expected that the joint venturers will put their venture-related business into the venture and "not compete with their progeny."⁴⁴ The Supreme Court has recognized⁴⁵ that these limited reductions in competition are often necessary to make a joint venture operate efficiently, and therefore may escape the strict application of *per se* rules. [27]

But such agreements, to be legitimately ancillary to a joint venture, must be limited to those inevitably arising out of dealings between partners, or necessary (and of no broader scope than necessary) to make the joint venture work.⁴⁶

Three collateral agreements, associated with the joint venture formation, strike us as unreasonable agreements under Section 5.

First, the joint venture agreement between Brunswick and Yamaha resulted in a separate territorial limitation on Yamaha's ability to sell outboard motors. Under the agreement, Yamaha had the exclusive right to market the joint venture output in Japan, under the "Yamaha" label. Mercury was permitted to continue to sell "Mercury" motors in Japan, CX 1-K; CX 79-G, but "Mariner" brand engines could not be sold there. As to competition in the U.S., Yamaha was precluded from selling joint venture output in North America, leaving Mariner as the exclusive marketer of Sanshin-produced motors, and of course Mercury continued marketing "Mercury" motors in the U.S. Yamaha was also barred from "directly or indirectly manufactur[ing] engines the same or substantially the same as those which are or will be

⁴² Arguably, Yamaha would be in a worse position, having to compete with an additional "major" brand that didn't exist in 1972—Mariner—for dealers in 1982.

⁴³ *BOC International, Ltd. v. FTC*, *supra*, 557 F.2d at 29.

⁴⁴ *U.S. v. Penn-Olin*, *supra*, 378 U.S. at 168.

⁴⁵ See, e.g., *U.S. v. Penn-Olin*, *supra*, 378 U.S. at 169; *U.S. v. Timken Roller Bearing Co.*, 83 F. Supp. 284, 312 (N.D. Ohio 1949), *aff'd*, 341 U.S. 593 (1951).

⁴⁶ *U.S. v. Columbia Pictures Corp.*, *supra*, 189 F. Supp. at 178. See also Sullivan, *Handbook of the Law of Antitrust*, 219-224.

manufactured by Sanshin" and from "purchas[ing] for resale such marine engines from any third parties." CX 1-M. Yamaha had been buying and reselling outboards before entering the joint venture. CX 9-F. The joint venture agreement made specific provision for Yamaha to continue its purchases of motors for resale, but only for resale in Japan. CX 1-M.

Prior to the joint venture, Yamaha had sold Sanshin-produced outboards in Japan, in competition with Mercury. CX 97-D; CX 111-B. It may be that an agreement whereby Yamaha had the exclusive right to market joint venture output in Japan and Brunswick had the exclusive right to market joint venture output in North America *might* have been reasonably necessary to the operation of the joint venture, but we need not reach that question. The agreements here did more. The agreements left Brunswick free to market outboards in competition with the joint venture worldwide (including Japan) through its Mercury brand, but Yamaha is left unable to manufacture or acquire non-joint venture outboards for sale anywhere but Japan. In effect, Yamaha is foreclosed by the agreement from continuing pre-existing competitive efforts in the U.S., a division of markets [28] outside the ambit of the joint venture.⁴⁷ It cannot be argued that such a limitation is necessary to protect the joint venture. Here the venture was in direct competition with Brunswick in the U.S., and with both parents in Europe. There is no plausible reason Yamaha should not have been free—as Brunswick was free in Japan—to sell non-Sanshin products in the U.S. In any event, no reasons were offered by respondents. Elimination of Yamaha as an actual and potential competitor in the U.S. outboard motor market, through the joint venture or otherwise, has no relation to the efficient functioning of Sanshin, and only serves the anticompetitive goal of insulating Brunswick from Yamaha in the U.S. It is, in the language of *Penn-Olin*, a "collateral restrictive agreement"—here, the elimination by agreement of an actual and potential competitor in the U.S. market.

Second, Brunswick and Yamaha independently agreed to limit competition between themselves in the "non-exclusive markets," principally Europe and South America. In 1973, the Senior Managing Director of Yamaha wrote to the President of Mercury to ask that:

in establishing MMI [Mariner] sales network in the non-exclusive markets, you refrain from inviting Yamaha's existing distributors/dealers to join MMI's sales network. Also, in order to avoid struggling with each other for new distributors/dealers by competing

⁴⁷ *U.S. v. American Smelting and Refining Co.*, 182 F. Supp. 834, 858-60 (S.D.N.Y. 1960). In that case, two competitors divided the national market in lead by the device of one granting an exclusive sales agency to the other. Prior to the agreement, both companies sold lead in the eastern U.S. The contract made one the exclusive sales agent for the other in the east. As a result, each company was relieved of the other's competition for sales in its part of the country. The arrangement was struck down on a *per se* theory as an illegal division of markets.

in the terms and conditions each party offers, we would like to propose to have as frequent meetings as possible. CX 76-B.

Mercury's President (who was also Mariner's Chairman) agreed to cooperate.

We agree that we will not seek out Yamaha's distributors or dealers in the non-exclusive market but, in some area, such as Europe with its great number of subdealers, we may find dealers handling not only Yamaha and International's [Mariner's] line but Mercury, OMC and other brands as well, in spite of our efforts to keep them separate. As a matter [29] of good business, we recognize that, although we have separate marketing organizations, our basic philosophy must be to respect each other's position and to concentrate on making inroads against other outboard manufacturers. CX 77-C.

This agreement goes beyond anything that might reasonably be required to further a legitimate objective of the joint venture. While we do not have to decide whether competition between Mariner and Yamaha (the two sellers of joint venture output) could be reduced by an agreement of this sort without violating the law, the agreement here was a direct limitation of competition between Brunswick and Yamaha, a subject outside the ambit of the joint venture. It is, on its face, a naked agreement between horizontal competitors to direct their competitive efforts away from each other—not to compete—in certain markets. Such an agreement can not be hidden “under the cloak of a joint venture.”⁴⁸

Third and finally, Brunswick and Yamaha entered into a Technical Assistance Agreement as part of the joint venture, granting reciprocal non-exclusive, non-assignable licenses in each other's technical information. CX 1-Z-29-46. The use of such information by either party was limited, however, to the manufacture, use and sale of goods which were not competitive to the goods manufactured by the granting party. CX 1-Z-30. As a result, Mercury, for example, could not manufacture motorcycles without raising questions as to the extent to which Mercury had used Yamaha's technical information. As if to underscore the conclusion that the intent of this agreement was to lessen competition between Brunswick and Yamaha, Mercury made an additional promise: that because it would be too difficult to tell when Yamaha technical information was in fact used in a Mercury product, Mercury agreed “not to manufacture any product competitive to those manufactured by Yamaha at the date of the execution” of the joint venture agreement except snowmobiles. CX 1-Z-39.

Respondents contend that these limitations are of narrow scope and of limited duration. RAB 44-5. The ALJ found them to be reasonably related to providing for the free flow of technical information

⁴⁸ *U.S. v. Timken Roller Bearing Co.*, *supra* 83 F. Supp. at 213. See also *U.S. v. Penn-Olin*, *supra* 378 U.S. at 176.

regarding outboard motors, I.D. 97, and to have had no adverse effect on competition since Mercury no longer produced boats and had "no intention of manufacturing motorcycles." I.D. at 96.

We have already discussed respondents' claim that the joint venture was of limited duration.⁴⁹ We find that claim to be without support. But even if it were not, we would find this limitation of competition to be an [30] unreasonable extension of the scope of the joint venture, and not to be necessary to the efficient functioning of the joint venture. While outboard motor technology is related to motorcycle technology, this agreement would keep Mercury from marketing a wholly new type of motorcycle, scooter, motorized bicycle or anything that might conceivably be "a product competitive to" Yamaha's motorcycles.⁵⁰ This, in our view, impermissibly extends the product coverage of the agreement without any offsetting procompetitive effect on the joint venture itself.

VI. Remedy

The object of the remedy in this case is to dissipate the anticompetitive effects of the joint venture insofar as it is possible to do so. While we cannot turn back the clock, we can seek to restore the market structure to that which existed at the time the venture was entered upon. Our goal is to restore Yamaha as an actual and a potential competitor, in the U.S. outboard motor market, in at least as vigorous a form as it was in 1972 and to enjoin the collateral restrictive agreements.

The ALJ, having decided the complaint should be dismissed, failed to make findings or recommendations regarding remedy. We find the record is inadequate at this time for us to formulate an appropriate remedy. Indeed, we lack sufficient information to be able to determine how effective a particular remedy might be.

The preferred relief when a violation of Section 7 has been found is divestiture. *U.S. v. E. I. duPont de Nemours & Co.*, 366 U.S. 316, 334 (1961). The joint venture between Brunswick and Yamaha must be terminated and the restrictive agreements enjoined. The record is not sufficient at this time for us to determine what, if any, related or additional relief may be required. The Mariner brand will revert to Brunswick should the joint venture simply be terminated and no other provisions adopted; distributors carrying that brand would naturally continue to look to Mariner for supply. We do not know, however,

⁴⁹ See discussion, pp. 25-6, *supra*.

⁵⁰ We need not reach the question of the extent to which a patent holder may limit his licensee's operations. Although patents are included in the joint venture's definition of "technical information," much non-patent information is included as well. None of the agreements in question distinguishes patents from other kinds of information or places different use restrictions on patents than on other information.

whether Mariner has access to manufacturing capacity aside from Sanshin to source its line. Nor do we [31] know how many dealers Mariner has, whether they are on one-year contracts, whether they may or do carry more than one line of motors, whether they could easily switch to Yamaha as a source of supply, and so on.

Achieving the principal goal of the remedy in this case—restoring Yamaha as an actual potential competitor—should not be accomplished at the expense of the Mariner dealers if that is avoidable. Nor can it be accomplished without a record on the basis of which we can assess the effect Mariner has had and continues to have on the structure of the U.S. market.

Therefore we feel that a strictly limited remand is in order. The sole question for the parties and the ALJ is the shape a final order should take. Such a narrow question should require neither extensive new evidence nor protracted hearings. Similarly, only limited briefing time should be necessary. An appropriate order is appended.

ORDER REMANDING FOR ADDITIONAL EVIDENCE

This matter has been heard by the Commission upon the appeal of complaint counsel from the initial decision and upon briefs and oral argument in support thereof and opposition thereto, and the Commission, for the reasons stated in the accompanying Opinion, has determined to sustain the appeal. The administrative law judge, having dismissed the complaint, did not address the question of remedy and the record on that question is deficient. Accordingly,

It is ordered, That this matter is remanded to the administrative law judge for the receipt of additional evidence solely on the question of formulating an appropriate remedy.

It is further ordered, That the administrative law judge shall certify to the Commission the record of any further proceedings in this matter together with his findings of fact and recommendations regarding order provisions within 120 days of the date of this order.

Commissioner Bailey did not participate.

IN THE MATTER OF
WESTINGHOUSE CREDIT CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION, EQUAL CREDIT OPPORTUNITY, AND
FAIR CREDIT REPORTING ACTS

Docket C-2999. Complaint, Nov. 13, 1979—Decision, Nov. 13, 1979

This consent order, among other things, requires a Pittsburgh, Pa. finance company to cease violating federal regulations and statutes relating to credit discrimination and credit reporting by requesting, recording and utilizing prohibited consumer credit information; considering the sex and marital status of applicants in evaluating creditworthiness; and failing to provide rejected applicants with reasons for denial of credit. Respondent is further required to establish educational programs for its consumer credit employees and retail dealers to explain the application of federal credit regulations to firm's credit practices.

Appearances

For the Commission: *Rena Steinzor and Jean Noonan.*

For the respondent: *John S. Koch and Luize E. Zubrow, Covington & Burling, Wash., D.C.*

COMPLAINT

Pursuant to the provisions of the Equal Credit Opportunity Act, as amended, its implementing regulation, Regulation B, the Fair Credit Reporting Act and the Federal Trade Commission Act, and by virtue of the authority vested in it by such Acts, the Federal Trade Commission, having reason to believe that Westinghouse Credit Corporation, a corporation, has violated the provisions of said Acts and regulation, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

PARAGRAPH 1. For the purposes of this complaint the following definitions are applicable:

1. "Equal Credit Opportunity Act" shall refer to that version of the Act, 15 U.S.C. 1691, *et seq.*, in effect on and after March 23, 1977.
2. "Regulation B" shall refer to that version of Regulation B, 12 C.F.R. 202, in effect on or after March 23, 1977.
3. The terms "adverse action", "applicant", "application", "completed application for credit", "consumer credit", "contractually liable", "credit", "creditor", "extend credit and extension of credit",