

IN THE MATTER OF
BRUNSWICK CORPORATION, ET AL.

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

Docket 9028. Complaint, April 15, 1975 —Final Order, August 14, 1980*

This order requires, among other things, a Skokie, Ill. manufacturer and marketer of outboard motors and other products and its subsidiary, Mariner Corp., to dissolve their joint venture agreement with Yamaha Motor Co., Ltd. ("Yamaha"); sell all their interests in Sanshin Kogyo Co., Ltd. to Yamaha, within 90 days; and remove their representatives on Sanshin's board of directors immediately. Further, the firms are prohibited for three years from acquiring, without prior Commission approval, any interest in a company manufacturing outboard motors for sale in the United States.

Appearances

For the Commission: *Steven R. Newborn.*

For the respondents: *Henry Y. Ota, Mori & Ota, Los Angeles, Calif., James H. Wehrenberg, Skokie, Ill., Mindy Liss, Mayer, Brown & Platt, Wash., D.C., and John R. Ferguson, Pettit & Martin, Wash., D.C.*

FINAL ORDER

For the purposes of this Order:

a) "Brunswick" shall mean the Brunswick Corporation, together with its present and future domestic and foreign subsidiaries, affiliates, joint ventures, related corporations (including Mariner Corp.), and corporations controlled by Brunswick Corporation; and all successors to Brunswick Corporation and their domestic and foreign subsidiaries, affiliates, joint ventures and related corporations; and all corporations controlled by the successors of Brunswick Corporation.

b) "Yamaha" shall mean Yamaha Motor Co., Ltd., together with its present and future domestic and foreign subsidiaries, affiliates, joint ventures, related corporation, and corporations controlled by Yamaha Motor Co., Ltd.; and all successors to Yamaha Motor Co., Ltd. and their domestic and foreign subsidiaries, affiliates, joint

* Complaint, Initial Decision, Opinion of the Commission, and Order Remanding for Additional Evidence previously published in 94 F.T.C. 1174.

ventures and related corporations; and all corporations controlled by the successors of Yamaha Motor Co., Ltd.

c) "Mariner" shall mean Mariner Corp., together with its present and future domestic and foreign subsidiaries, affiliates, joint ventures, related corporations, and corporations controlled by Mariner Corp.; and all successors to Mariner Corp. and their domestic and foreign subsidiaries, affiliates, joint ventures and related corporations; and all corporations controlled by the successors of Mariner Corp.

I.

It is ordered, That within 90 days of the date this Order becomes final, Brunswick and Mariner shall sell to Yamaha, and Yamaha shall buy from Brunswick and Mariner, all capital stock, bonds, debentures, and other securities and other interests held by Brunswick and Mariner in Sanshin Kogyo Co., Ltd. ("Sanshin"). The purchase price shall be equal in dollars to the value of the net tangible assets per share, computed and adjusted to the last day of the six month term immediately preceding the date of the sale.

II.

It is further ordered, That, on or before 90 days from the date this Order becomes final, Brunswick, Yamaha, and Mariner shall rescind in all respects the Joint Venture Agreement, and the agreements attached thereto, entered into on November 21, 1972, and all agreements modifying the Joint Venture Agreement and the agreements attached thereto, shall consider them null and void, and shall cease and desist from observing or enforcing the terms of said agreements.

III.

It is further ordered, That from the date this Order becomes final, Brunswick and Mariner shall cease any and all representation on the board of directors of Sanshin, cease and desist from taking any steps to nominate, seat, or admit any representatives of Brunswick and Mariner to the board of directors of Sanshin, and cease and desist from exercising any of the rights of a shareholder of Sanshin except the right to receive dividends.

IV.

It is further ordered, That from the date this Order becomes final, neither Brunswick nor Mariner shall enter into, continue to be a party to, or enforce any agreement which in whole or in part prevents a manufacturer, seller, or distributor of outboard motors from manufacturing, selling, or distributing such motors in the United States, its territories or possessions.

V.

It is further ordered, That from the date this Order becomes final, Yamaha shall not enter into, continue to be a party to, or observe any agreement which in whole or in part prevents Yamaha from manufacturing, selling, or distributing outboard motors in the United States, its territories or possessions.

VI.

It is further ordered, That Brunswick, Yamaha, and Mariner shall, for a period of three years from the date this Order becomes final, cease and desist from acquiring, directly or indirectly, through subsidiaries or otherwise, without the prior approval of the Federal Trade Commission, all or any part of the stock or share capital of any concern, corporate or noncorporate, engaged in the production, distribution or sale of outboard motors in or for the United States, or capital assets pertaining to such production distribution or sale of such motors in or for the United States.

VII.

It is further ordered, That Brunswick, Yamaha, and Mariner notify the Federal Trade Commission at least 30 days prior to any proposed change in its corporate structure such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any change in the corporation which may affect compliance obligations arising out of this Order.

VIII.

It is further ordered, That Brunswick, Yamaha, and Mariner shall within 120 days of the date this Order becomes final, submit in writing to the Federal Trade Commission a verified report setting forth in detail the manner and form in which Brunswick, Yamaha,

and Mariner each intends to comply or has complied with this Order. Brunswick, Yamaha, and Mariner shall submit such other information as may from time to time be requested by the Commission.

Commissioner Bailey did not participate.

OPINION OF THE COMMISSION

BY PITOFSKY, *Commissioner*:

The sole question here is the formulation of an appropriate order of relief. On November 9, 1979, we determined that a joint venture between Brunswick Corporation ("Brunswick") and Yamaha Motor Company, Limited ("Yamaha") violated Section 7 of the Clayton Act¹ and Section 5 of the Federal Trade Commission Act.² Since the Administrative Law Judge ("ALJ") had originally ordered the dismissal of the complaint, his initial decision lacked findings and recommendations on the issue of appropriate relief. We therefore remanded the proceeding to enable him to address those questions. Additional hearings were held on February 19 and 20, 1980, and on March 14, 1980, the ALJ issued his "Findings and Proposed Order." After considering briefs filed by Complaint Counsel, Brunswick and Yamaha we have determined to adopt the ALJ's findings and issue the proposed order, with the minor modification discussed below.³

I

We concluded, in our previous opinion, that the joint venture violated the antitrust laws on three theories: (1) it eliminated the potential competition likely to result from Yamaha's probable independent entry into the United States outboard motor market; (2) it eliminated the existing competition Yamaha provided in that market; and (3) it included collateral agreements unreasonably limiting competition between Yamaha and Brunswick. In remanding the proceeding, we instructed the ALJ to determine the most effective means of terminating the joint venture, nullifying the

¹ 15 U.S.C.18.

² 15 U.S.C.45.

³ The following abbreviations are used herein:

IDF — Initial Decision Finding of Fact No.

RDF — Remand Decision Finding of Fact No.

CX — Complaint Counsel's Exhibit No.

CCRAB — Complaint Counsel's Remand Appeal Brief Page No.

BRRB — Brunswick's Remand Reply Brief Page No.

restrictive agreements, and restoring Yamaha as an actual and potential competitor in the U.S. outboard motor market.

In brief summary, the ALJ's proposed order recommended: (1) the rescission of the joint venture agreement and all collateral agreements;⁴ (2) the sale to Yamaha of all Brunswick's stock in Sanshin, the jointly owned manufacturing facility of Yamaha and Brunswick;⁵ and (3) a three year prohibition upon Brunswick's or Yamaha's acquisition of any competitor in the outboard motor market without the prior approval of the Commission.⁶

II

Our goal, in fashioning relief for a violation of Section 7, is "to restore, so far as practicable and equitable, the state of competition in the relevant market as it would have been but for the acquisition."⁷ As we observed in remanding this question to the ALJ, "we cannot turn back the clock," but "we can seek to restore the market structure to that which existed at the time the venture was entered upon."⁸ This joint venture violated the antitrust laws because it eliminated the actual and potential competition that Yamaha represented in the U.S. outboard motor market. A satisfactory remedy must restore Yamaha, to the extent possible, as an actual and potential competitor with approximately that competitive vigor, independence and strength that it possessed in 1972.

We agree with the ALJ's conclusion that this objective can be achieved only by a complete undoing of the joint venture. The joint venture agreement and all collateral agreements must be rescinded, and the Sanshin stock held by Brunswick must be resold to Yamaha.

Divestiture of the acquired firm is the familiar remedy for a merger found to lessen actual or potential competition in violation of Section 7.⁹ As the Supreme Court observed in *United States v. du Pont & Co.*, 366 U.S. 316 (1961), "divestiture is peculiarly appropriate in cases of stock acquisitions which violate Section 7 The very words of Section 7 suggest that an undoing of the acquisition is a natural remedy."¹⁰ By making the acquired firm an actual or potential competitor again, a divestiture order helps restore the market structure existing before the challenged acquisition. The

⁴ Paragraph II

⁵ Paragraph I

⁶ Paragraph VI

⁷ *Fruehauf Trailer Co.*, 68 F.T.C. 1167, 1168 (1965), modified, 69 F.T.C. 180 (1966).

⁸ *Brunswick Corp.* [94 F.T.C. 1174 at 1278] [1979] Trade Reg. Rep. (CCH) (FTC Complaints and Orders) Para. 21,623 at 21,788.

⁹ See, e.g., *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964); *United States v. du Pont & Co.*, 366 U.S. 316 (1961).

¹⁰ *United States v. du Pont & Co.*, 366 U.S. 316, 328-29, (1961).

lessening of competition resulting from this joint venture, as we noted in our previous opinion, is "roughly equivalent" to that which would have resulted from Brunswick's acquisition of an actual or potential competitor.¹¹ Just as an order of divestiture would have been an appropriate remedy for such an acquisition, we conclude that an undoing of the transaction is appropriate here as well.

We cannot accept Brunswick's suggestion that the order of relief void the various joint venture agreements, but allow Brunswick to retain and vote its shares of Sanshin common stock. Although Brunswick would be guaranteed no representation on the board of directors under this proposed plan,¹² Yamaha's independence and vitality as a competitor might still be impaired. Brunswick's ownership of 38% of Sanshin's voting stock could enable Brunswick to hamper Sanshin's competitive efforts, making Sanshin a less effective competitor than it had been before the joint venture.

Yamaha owned a majority of Sanshin stock prior to the creation of the joint venture, enough to control most questions raised in votes at shareholder meetings.¹³ Since Yamaha now owns only 38%, Brunswick could conceivably enlist sufficient support among the remaining 24% held by individual Japanese shareholders to create a majority on some issues or at least to extract significant compromise concessions from Yamaha. Moreover, under the Japanese Commercial Code and Sanshin's articles of incorporation, a two thirds vote is necessary to approve several significant types of corporate actions—a merger or acquisition, for example, a change in authorized capital, or the issuance of new shares of stock.¹⁴ With respect to these questions, Brunswick's 38% of the outstanding stock would amount to an absolute veto.

Finally, aside from the possible influence or control resulting from Brunswick's ownership of Sanshin stock, that stock ownership would also provide Brunswick access to competitively sensitive information otherwise unavailable to competitors.¹⁵ Brunswick's access to such information—profitability data, inventory schedules or new construction reports, for example—might significantly impair Sanshin's effectiveness as a competitor.

¹¹ *Brunswick Corp.* [94 F.T.C. 1174 at 1268] [1979] Trade Reg. Rep. (CCH) (FTC Complaints and Orders) Para. 21,623 at 21,782.

¹² The present division of seats on the board of directors—five to Brunswick and six to Yamaha—is required by the joint venture agreement. See CX 1. If that agreement were voided, the directors would be elected by shareholders under Sanshin's articles of incorporation. See CX 1-Y. Since those articles do not provide for cumulative voting, Brunswick's 38% of the outstanding Sanshin stock is insufficient, alone, to elect any directors.

¹³ Sanshin's articles of incorporation provide that: "Unless otherwise provided by law or by these Articles of Incorporation, all resolutions of meetings of shareholders shall be adopted by a majority of the voting rights present at the meeting." CX 1-X.

¹⁴ See RDF 42-49.

¹⁵ See RDF 53.

This possible lessening of competition resulting from Brunswick's ownership of 38% of Sanshin's common stock is, no doubt, more attenuated than that accompanying the original joint venture itself. Nonetheless, ample authority holds that Section 7 may be violated when an acquisition of less than a majority of a firm's stock creates the possibility that the acquiring firm either may gain access to confidential competitive information, or may be able to steer the acquired firm towards less competitive strategies.¹⁶ Considering the record evidence that Brunswick has eagerly seized opportunities to minimize the competition provided by Sanshin—evidence that can be found in both the creation of this joint venture and in Brunswick's actions during its existence¹⁷—we conclude that the possible lessening of competition likely to result from allowing Brunswick to keep its Sanshin stock is far from insubstantial.

These same considerations dictate that an order requiring the divestiture of Brunswick's Sanshin stock to any buyer would also be an insufficient remedy; the stock must be sold to Yamaha. Divestiture of Brunswick's Sanshin stock to any other buyer would not restore Yamaha to its pre-joint venture competitive position. Yamaha would be left with only a minority holding of Sanshin stock, and not the controlling position it held prior to the joint venture. Without majority control, Yamaha might be unable to enter or compete effectively in the U.S. outboard motor market. Indeed, if Brunswick's Sanshin stock were divested to another competitor in that market, or ultimately come to rest in such a competitor's hands, competition might be lessened in much the same manner as if Brunswick retained the stock—that competitor might be able to influence Sanshin's decision-making, for example, or gain access to competitively sensitive information. We conclude, therefore, that fashioning a satisfactory remedy in this case—a remedy effectively restoring Yamaha as an actual and potential competitor—requires not only the voiding of the joint venture agreements, but the return of Brunswick's Sanshin stock to Yamaha as well.¹⁸

¹⁶ See, e.g., *United States v. du Pont & Co.*, 366 U.S. 316 (1961); *F&M Schaefer Corp. v. C. Schmidt & Sons, Inc.*, 597 F.2d 814 (2d Cir. 1979); *Gulf & Western Indus., Inc. v. Great Atlantic & Pacific Tea Co., Inc.*, 476 F.2d 687 (2d Cir. 1973); *American Crystal Sugar Co. v. Cuban-American Sugar Co.*, 259 F.2d 524 (2d Cir. 1958); *Hamilton Watch Co. v. Benrus Watch Co.*, 114 F.Supp. 307 (D. Conn.), *aff'd*, 206 F.2d 738 (2d Cir. 1953).

¹⁷ The ALJ observed that Brunswick had effectively used its holdings of Sanshin stock and its position on Sanshin's board of directors to hinder any direct competition provided by Sanshin, and hence, Yamaha. See, e.g., RDF 22, 23.

¹⁸ No previous decision has ever addressed the problem of determining an appropriate remedy for a joint venture found to violate Section 7. Although consent decrees hold little precedential value, see *United States v. du Pont & Co.*, 366 U.S. 316, 330 n. 12 (1961), we note that consent decrees in such cases have ordered relief similar to that suggested here by the ALJ—the voiding of any joint venture agreement and the rescission of any stock acquisition. See, e.g., *Continental Oil Co.*, 72 F.T.C. 850 (1967) (consent order); *Phillips Petroleum Co.*, 70 F.T.C. 456 (1966) (consent order); *United States v. Monsanto Co.*, 1967 Trade Cas. Para. 72,001 (W.D. Pa. 1967) (consent decree). Courts have concluded that their equitable power encompasses an order directing the rescission of a stock

The provision governing the sale of Brunswick's stock in the ALJ's proposed order of relief differed from a simple order of rescission in one important respect. It ordered that Brunswick sell its Sanshin stock to Yamaha at a price different from that which Brunswick originally paid. Under the joint venture agreement executed in 1972, Brunswick purchased the newly issued Sanshin stock at a price equal to the "value of the net tangible assets per share" of Sanshin's then outstanding stock.¹⁹ That value was calculated by a procedure outlined in the joint venture agreement.²⁰ Requiring Brunswick to receive the same dollar figure for its sale of the stock under this order might inflict substantial economic hardship; the value of the shares may have appreciated considerably during the intervening years.

The possibility of such hardship, of course, would not be sufficient reason to chose a less effective form of relief. As the Supreme Court noted in *United States v. du Pont & Co.*, 366 U.S. 316 (1961), once a conclusion has been reached "that other measures will not be effective to redress a violation, and that complete divestiture is a necessary element of effective relief, the Government cannot be denied the latter remedy because economic hardship, however severe, may result."²¹ But the issue here is not a choice between an effective form of relief and a less effective one, but rather a question of how to implement the form of relief we have already determined to be most effective. We have decided that Brunswick's Sanshin stock must be sold to Yamaha; the question that remains is the appropriate price. In these circumstances, it is important to consider any hardship attendant upon our decree.²²

No easy answer exists to this problem. The ALJ apparently concluded that any hardship could be minimized by defining the price as "the value of the net tangible assets per share, computed and adjusted to the last day of the six month term immediately preceding the date of the sale."²³ We affirm that conclusion. The

acquisition violating Section 7. See *U.S. v. Coca-Cola Bottling Co. of L.A.*, 575 F.2d 222 (9th Cir.), cert. denied, 439 U.S. 959 (1978); *United States v. Reed Roller Bit Company*, 274 F.Supp. 573 (W.D. Okla. 1967). See also *U.S. v. Phillips Petroleum Co.*, 367 F.Supp. 1226 (C.D. Cal. 1973), aff'd, 418 U.S. 906 (1974). We believe that our remedial powers encompass no less. See *Ekco Products Co.* 65 F.T.C. 1163 (1964), aff'd, 347 F.2d 745 (7th Cir. 1965).

¹⁹ CX 1-C.

²⁰ CX 1-C.

²¹ *United States v. du Pont & Co.*, 336 U.S. 316, 327 (1961). One court of appeals, in affirming a district court's issuance of a preliminary injunction to preserve the ultimate availability of rescission as a remedy for an acquisition, observed that the possible unfairness to the acquiring company would not be reason to deny the remedy of rescission: "If nothing else, the buyers in this transaction . . . might be required to give back the illegally acquired assets . . . without accepting full repayment." *U.S. v. Coca-Cola Bottling Co. of L.A.*, 575 F.2d 222, 231 (9th Cir.), cert. denied, 439 U.S. 959 (1978).

²² See *Ekco Products Co.*, 65 F.T.C. 1163, 1221 (1964), aff'd, 347 F.2d 745 (7th Cir. 1965) ("If the Commission enjoys, as we think it does, essentially equitable powers under Section 11 of the Clayton Act, it must, as a corollary, assume equitable responsibilities.")

²³ Paragraph I.

valuation formula chosen by the ALJ was the same one used by the parties to determine the price Brunswick initially paid for the Sanshin stock.²⁴ The arms length bargaining that occurred suggests some fairness in that formula.²⁵ Yet by requiring that the assets be valued near the time of the sale to Yamaha, rather than at the time of Brunswick's initial purchase, the order is likely to reduce any hardships resulting from changes in either Sanshin's assets or their value.²⁶

III

In addition to the provisions voiding the joint venture agreements and ordering the divestiture of Brunswick's Sanshin shares, the ALJ's proposed order of relief contained a three year requirement that both Brunswick and Yamaha seek Commission approval before acquiring any firm engaged in the production, distribution or sale of outboard motors.²⁷ We consider that provision both an appropriate and necessary element of the relief in this case. The authority to include such a requirement in an order of relief cannot be questioned.²⁸ The sole issue—as it is with any element of a Commission remedial order—is whether this requirement of Commission approval of future acquisitions has some “reasonable relation” to the violations of Brunswick and Yamaha.²⁹ We conclude that it does.

Brunswick's acquisition of Sanshin stock presents the more typical instance of illegal conduct where this kind of relief is appropriate.³⁰ Commission review is necessary to insure that Brunswick does not again act to substantially lessen competition in the U.S. outboard motor market by acquiring an actual or potential competitor. Considering the thoroughness with which this joint venture was constructed to minimize the competition provided by Yamaha in the U.S. market, it is reasonable to predict that such a path could be followed again.

Although Yamaha's actions present a more unusual case—Yam-

²⁴ CX 1-C.

²⁵ We cannot accept Brunswick's suggestion that the parties be allowed to negotiate a price for the sale. It is difficult to imagine fair bargaining once an order has required that the stock be sold.

²⁶ We reject Yamaha's suggestion that Sanshin's assets be valued as of October 31, 1979, the close of the accounting period immediately preceding the publication of our opinion finding that the joint venture violated Section 7. Since considerable time may pass before our order is effectuated, we believe that both parties should share in any appreciation in the value of Sanshin's assets.

²⁷ Paragraph VI.

²⁸ See, e.g., *Ekco Products Co.*, 65 F.T.C. 1163, 1215 (1964), *aff'd*, 347 F.2d 745 (7th Cir. 1965); *Abex Corp v. FTC*, 420 F.2d 928, 933 (6th Cir.), *cert. denied*, 400 U.S. 865 (1970).

²⁹ See *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 394-5 (1965); *FTC v. National Lead Co.*, 352 U.S. 419, 429 (1957); *Jacob Siegal Co. v. FTC*, 327 U.S. 608, 612-13 (1946).

³⁰ See, e.g., *RSR Corp.*, 88 F.T.C. 800 (1976), *aff'd*, 602 F.2d 1317 (9th Cir. 1979), *cert. denied*, 100 S. Ct. 1313 (1980); *Avnet, Inc.*, 82 F.T.C. 391 (1973), *aff'd*, 511 F.2d 70 (7th Cir.), *cert. denied*, 423 U.S. 833 (1975).

aha's violations consisted of participation in this joint venture through sale of stock and of agreement to various covenants not to compete—they nonetheless justify similar relief. A requirement of Commission approval of future acquisitions is especially valuable in the drafting of remedial orders seeking to insure that the possible procompetitive benefits of entry by a potential competitor are not lost.³¹ In this case, a primary goal of the order of relief is to preserve the possible procompetitive benefits of Yamaha's potential entry into the U.S. outboard motor market. By participating in the joint venture with Brunswick, Yamaha chose to enter that market in a manner that substantially lessened competition. Requiring Yamaha to come before the Commission before entering the market by acquisition or joint venture is necessary to insure that future entry is not also anticompetitive.³²

Though a requirement of Commission approval is appropriate here, we consider too broad the provision drafted by the ALJ. Yamaha, for example, has objected that the ALJ's order might hamper possible future acquisitions or joint ventures in Japan, or other foreign markets—legitimate competitive acts having no impact upon the U.S. outboard motor market. To allay such concern, we have narrowed the scope of the provision so that it applies only to acquisitions of the stock or assets of firms engaged in the production, distribution or sale of outboard motors "in or for the United States."

The ALJ's proposed order also contained provisions prohibiting both Brunswick and Yamaha from again entering mutual covenants not to compete—either with one another or with any other competitor in the U.S. outboard motor market.³³ We conclude that these provisions are also appropriate and necessary components of the order of relief. They prohibit the repetition of conduct we have found illegal—an example of the clearest reasonable relation of remedy to violation.³⁴ And, as we have already observed, in light of the record evidence it is not unreasonable to conclude that a danger of future anticompetitive conduct exists.³⁵

³¹ See, e.g., *Ekco Products Co.*, 65 F.T.C. 1163, 1228 (1964), *aff'd*, 347 F.2d 745 (7th Cir. 1965).

³² Drafting an effective order of relief often requires consideration of possible conduct not involved in the original violation: "When the purpose to restrain trade appears from a clear violation of the law, it is not necessary that all untravelled roads to that end be left open and that only the worn one be closed." *International Salt Co. v. U.S.*, 332 U.S. 392, 400 (1947). See, e.g., *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 395 (1965) (discussing necessity of "fencing in" in advertising violations); *International Salt Co. v. U.S.*, 332 U.S. 392 (1947) (similar issues in tying violation).

³³ Paragraphs IV and V.

³⁴ See, e.g., *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374 (1965).

³⁵ The ALJ's proposed order of relief also contained a provision requiring Brunswick and Yamaha to notify the Commission of significant changes in their corporate structure. Paragraph VII. This provision is necessary to ensure effective monitoring of Brunswick and Yamaha's compliance with the order.

IV

In our previous opinion remanding this proceeding, we instructed the ALJ to study the effect of a termination of this joint venture upon the ability of Mariner dealers to obtain satisfactory supplies of outboard motors. We cautioned that the achievement of an appropriate remedy in this case "should not be accomplished at the expense of the Mariner dealers if that is avoidable."³⁶

On remand, Complaint Counsel argued that Mariner dealers would be satisfactorily protected only if the order of relief required Yamaha to continue to supply Mariner with "commercially reasonable quantities" of outboard motors until April 30, 1983, and of spare parts for those motors until April 30, 1990.³⁷ To insure that Yamaha would have the technology necessary to satisfy those supply obligations, Complaint Counsel also proposed provisions in the order of relief: (1) requiring royalty free grants between Brunswick and Yamaha of any patent rights or licenses utilized by the joint venture; and (2) establishing as joint property any other technical information exchanged during the joint venture.³⁸

The ALJ concluded that neither the imposition of the supply requirements nor the grants of access to patented and nonpatented technology were necessary to protect Mariner dealers. We accept that conclusion. There is no convincing evidence in the record that Mariner dealers will be endangered by any sudden supply shortages. Sanshin presently sells 25% of its production to Mariner dealers.³⁹ It seems unlikely that Yamaha would readily relinquish so substantial a source of profit. And, even if Sanshin's sales to Mariner dealers did decrease somewhat, the record shows that Brunswick has long desired the capability of satisfying the needs of Mariner dealers from its own production, and has been preparing that capability throughout the life of the joint venture.⁴⁰ In light of this evidence we conclude that Mariner dealers face no significant danger from our termination of this joint venture.

³⁶ *Brunswick Corp.* [94 F.T.C. 1174 at 1279] [1979] Trade Reg. Rep. (CCH) (FTC Complaints and Orders) ¶ 21,623 at 21,788.

³⁷ Paragraph VII of Complaint Counsel's Proposed Order. CCRA, Attachment A, p. 3.

³⁸ Paragraph IV of Complaint Counsel's Proposed Order. CCRA, Attachment A, p. 2.

³⁹ RDF 66.

⁴⁰ See, e.g., IDF 199; RDF 74-77. Brunswick has taken the position on this appeal that it is "prepared to supply Mariner if necessary." BRRB p. 6.

Interlocutory Order

96 F.T.C.

IN THE MATTER OF

GENERAL FOODS CORPORATION

Docket 9085. Interlocutory Order, Aug. 18, 1980

ORDER DEFINING PERMISSIBLE SCOPE OF TESTIMONY OF WILLIAM
H. SPRUNK UNDER QUARTERLY FINANCIAL REPORTS
CONFIDENTIALITY RULES

By order of March 20, 1980, the Commission stayed, pending its review of the matter, the return on the subpoena issued to a Commission employee, William H. Sprunk, Assistant Director for Financial Statistics, Bureau of Economics. The purpose of the stay was for the Commission to review the interpretation and application of the confidentiality rules governing the Quarterly Financial Reports (QFR)¹ and Line of Business (LB)² programs to the subpoenaed testimony of an employee of the Commission's Division of Financial Statistics, Bureau of Economics, in a Commission adjudicative proceeding. The crux of the instant order is the resolution of the apparent conflict between Mr. Sprunk's permissible functions under the QFR and Line of Business confidentiality rules and his testimony in response to the adjudicative subpoena.

The complaint in this case alleges General Foods' use of pricing practices and other policies to the injury of competitors in eastern coffee markets. Complaint counsel's expert witness used data obtained from published aggregate data in the QFR survey to establish a benchmark as to the existence of monopoly power, one of the issues in the case. The subpoena *ad testificandum* for Mr. Sprunk, who heads the Division of Financial Statistics, in which the QFR report is prepared, was issued by the Administrative Law Judge in order to

ha[ve] someone who knows what these figures are about testify as to the accuracy of the figures, how they are compiled, and why this contract was let to Standard and Poor's. [Tr. 5242]³

The Commission's order staying the subpoena return invited

¹ 38 Fed. Reg. 18720, 26162 (1973).

² 41 Fed. Reg. 28041, 34703 (1976); 40 Fed. Reg. 21542, 22318 (1975); 39 Fed. Reg. 30970 (1974). The subpoena issued to Mr. Sprunk appears to concern only QFR data, and the Commission's LB confidentiality rules are relevant here only insofar as they might suggest that no employee of the Division of Financial Statistics may appear in an adjudicative proceeding for any purpose. The Commission's order does not reach issues concerning the admissibility of LB reports or the privileged status of individual company data obtained in the LB program. See note 8, *infra*.

³ The transcript reflects discussion of a contract using a data tape prepared by Standard & Poor's leading to a "final report, including a statistical statement re QFR accuracy * * *." (Tr. 5237)