

Decision

IN THE MATTER OF
OUTBOARD, MARINE & MANUFACTURING COMPANYORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 3
OF THE CLAYTON ACT*Docket 5882. Complaint, May 23, 1951—Decision, June 27, 1956*

Order requiring a manufacturer of outboard motors for boats and parts and accessories therefor, with factories and offices at Milwaukee, Wis., and Galesburg, and Waukegan, Ill., accounting for one-third to one-half of the total sales of outboard motors in the United States, to cease exacting assurances from its distributors and dealers that they would not deal in its competitors' outboard motors or parts.

Mr. Paul R. Dixon for the Commission.

Butzel, Levin, Winston & Quint, of Detroit, Mich., and *Cleary, Gottlieb, Friendly & Ball*, of Washington, D. C., for respondent.

INITIAL DECISION BY FRANK HIER, HEARING EXAMINER

THE PROCEEDINGS

Complaint herein was issued May 23, 1951 and charged respondent with selling or contracting to sell its outboard motors or fixing the sales price thereof on the condition, agreement, or understanding that the purchasers thereof would not use or deal in the merchandise of competitors of respondent in violation of Section 3 of the Clayton Act (15 U.S.C.A. 14). After service and answer, seven hearings were held resulting in 578 pages of transcript, 79 Exhibits for proponent and 22 Exhibits for respondent. The proceeding was closed by the hearing examiner on December 16, 1952 and initial decision filed by him December 29, 1952. The case was tried and decided on the theory of, and the quantitative tests applied by, the court in the so-called *Standard Stations case*¹ and others of like import; namely, that the statutory requirement of "where the effect of such lease, sale or contract for sale of such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce" is satisfied, if it be shown that respondent's sales accounted for a major or substantial share of the available market for the product involved. This showing was that, in 1949, respondent sold almost as many units as all its competitors combined and did more business dollarwise than the rest of the industry;

¹ *Standard Oil of California v. U. S.*, 337 U. S. 293 (1949). *International Salt Company v. U. S.*, 332 U. S. 392.

in other words, accounted for more than 50% of all outboard motor sales.

All evidence offered by respondent—tending to show: that respondent spent far more than its competitors on advertising, on service maintenance, on dealer service training, on the number of salesmen and outlets of each competitor, and the latter's individual sales volume; that dealers prefer to handle only one brand of outboard motor and that they handle other non-competitive products such as boats, as well as outboard motors; the experience and training of respondent's dealers prior to becoming such, and since; the number of motors sold by them, why some quit selling respondent's motors, what dealers in other motors than respondent's sell and how, and the importance of service in selling motors; the relationship between consumer price and exclusive dealing; the reasons why respondent discontinued merchandising through distributors and sold direct to dealers; the benefits to the industry and to the public of exclusive dealing, and opinion evidence that respondent's success and pre-eminent position in the market was due to other factors, such as excellence of product, rather than its exclusive dealing policy—was all rejected by the hearing examiner, or, if received, was subsequently stricken from the record by him as immaterial under the Standard Stations case ruling referred to. Similarly, evidence to show actual injury to competitors of respondent was likewise rejected.

Upon appeal by respondent to the Commission from the initial decision, the Commission set the latter aside stating that such rejected evidence was, in its opinion, material and necessary for it to decide the case and remanded the case on February 18, 1954, with instructions to reconsider such rulings.

Since that hearing examiner was then about to be mandatorily retired for age, the proceeding was transferred to the undersigned hearing examiner for completion in conformity to such order, and counsel for respondent having waived any objection to such transfer, the former rulings of rejection or striking were reversed and 13 additional hearings were held resulting in 1,114 additional pages of transcript, 3 additional exhibits for proponent and 17 additional exhibits for respondent. The proceeding was then again closed on July 11, 1955, and the undersigned hearing examiner, having considered the entire record, the proposed findings and conclusions and briefs submitted by all counsel, makes the following:

FINDINGS OF FACT

1. Respondent, Outboard Marine and Manufacturing Company, is a Delaware corporation, with its principal office and place of business

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located at Waukegan, Illinois. It has factories and offices located at Milwaukee, Wisconsin, and Galesburg and Waukegan, Illinois, and since its incorporation on September 30, 1936, has manufactured and sold outboard motors for boats, parts of such motors and other products, through three divisions:

A. Johnson Motors Division (referred to hereinafter as "Johnson"), with office and factory at Waukegan, Illinois, which manufactures and sells "Johnson Sea Horse" outboard motors.

B. Evinrude Motors Division (referred to hereinafter as "Evinrude"), with office and factory at Milwaukee, Wisconsin, which manufactures and sells "Evinrude" outboard motors and which, until 1950, also manufactured and sold "Elto" outboard motors.

C. Gale Products Division (referred to hereinafter as "Gale"), with factory at Galesburg, Illinois, which manufactures outboard motors primarily for special order and specification customers. In addition, Gale manufactures the "Buccaneer" line of outboard motors for sale to hardware jobbers throughout the nation.

2. Respondent's fiscal year runs from October 1st to the succeeding September 30th and all figures and data in these findings, pertaining to a specified year unless otherwise stated, refer to the fiscal year ending on September 30th of the specified year. Thus, 1948 means the twelve month period beginning October 1, 1947, and ending September 30, 1948.

3. In the years 1937 through 1950, respondent's sales through its three divisions were as follows:

	Johnson Motors division		Evinrude Motors division		Gale Products division		Total	
	Number of motors	Total price	Number of motors	Total price	Number of motors	Total price	Number of motors	Total price
1937.....	29,391	\$2,113,912	38,680	\$2,011,256	-----	-----	68,071	\$4,125,168
1938.....	31,075	2,165,086	37,345	1,973,454	-----	-----	68,420	4,138,540
1939.....	40,802	2,865,493	48,967	2,497,666	-----	-----	89,769	5,273,159
1940.....	41,929	3,073,374	46,887	2,741,091	-----	-----	88,816	5,814,465
1941.....	41,964	3,281,504	51,870	3,141,822	5,392	\$283,041	99,226	6,706,367
1942.....	14,428	1,427,826	12,957	1,033,645	936	56,391	28,321	2,517,862
1943.....	6,252	1,321,365	6,772	1,926,900	-----	-----	13,024	3,248,265
1944.....	7,366	1,293,033	6,901	1,762,824	-----	-----	14,267	3,055,857
1945.....	11,578	1,583,462	11,466	2,018,254	7,683	526,463	30,727	4,128,179
1946.....	47,557	4,870,784	41,728	3,808,923	35,775	2,280,220	125,060	10,959,927
1947.....	78,554	8,866,148	89,830	8,323,540	93,707	6,498,493	262,091	23,688,181
1948.....	99,627	10,316,614	76,221	8,018,636	98,865	7,204,131	265,713	25,539,381
1949.....	80,419	11,332,254	37,086	4,790,342	49,576	4,112,166	137,081	20,234,762
1950.....	82,230	10,818,766	56,360	6,846,799	36,659	2,907,490	175,249	20,573,055

4. In the year 1949, the entire outboard motor industry sold 347,159 motors for a total selling price of \$39,094,482, of which approximately \$8,320,651 were private brand sales. In that year, respondent ranked first in dollar volume of sales of outboard motors, equal to the aggregate of the dollar volume of all other outboard motor manufacturers,

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although respondent's unit production was not equal to the total unit production of all other outboard motor manufacturers, being 48.1% for all three divisions, or 33.9% counting only Johnson and Evinrude production. During 1949, the largest of respondent's competitors enjoyed less than one-half of the dollar and unit volume of business secured by respondent. Between 1946 and 1950 the annual dollar sales of Johnson and Evinrude alone, in relation to the total sales of substantially all of the industry, declined 11.9%, although in each year it was never less than twice and usually more than three times the market share of any other manufacturer.² Johnson and Evinrude sales alone since World War II have never been less than 32% and have exceeded 50% of the total market. The finding, accordingly, is that respondent's market share has at times been dominant, and never less than substantial.

5. As of the date of the complaint, and for many years prior thereto, respondent has sold its outboard motors and parts therefor to distributors and dealers located throughout the several States of the United States, the territories thereof, the District of Columbia and foreign countries, for resale in interstate and foreign commerce and regularly caused such products, when sold, to be shipped from their various places of manufacture throughout the nation and abroad in a constant current of trade in such commerce.

6. In the course and conduct of its business, respondent has been for many years last past and is now in substantial competition in the manufacture, sale and distribution of outboard motors in commerce between and among the various States of the United States, the Territories thereof, and in the District of Columbia, with other corporations, persons, firms and partnerships who are likewise so engaged.

In addition to respondent there were, in 1951, ten manufacturers making and selling at least fifteen brands of outboard motors. These are:

(1) Kiekhaefer Corporation and Kiekhaefer Aeromarine Motors, Inc., manufacturer of Mercury and Wizard brands.

(2) National Pressure Cooker Co., manufacturer of Martin brand.

(3) Hart-Carter Co., manufacturer of Lauson brand.

(4) West Bend Aluminum Company, manufacturer for Sears-Roebuck of the Elgin brand.

(5) Chris-Craft Outboard Motors Co., manufacturer of Chris-Craft brand.

(6) Scott-Atwater Mfg. Co., manufacturer of Scott-Atwater, Corsair, and Firestone brands.

² Respondent's Exhibit 22-G, -H, -I and -K.

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(7) Champion Motors Co., manufacturer of Champion, Majestic, and Voyager brands.

(8) H. B. Milburn Co., manufacturer of Milburn Cub brand.

(9) Metal Products Corp., manufacturer of Flambeau brand.

(10) Muncie Gear Works, manufacturer of Neptune brand.

7. At the time of organization of respondent in 1936, there was being manufactured, in addition to its motors, the following:

Name of motor :	Name of manufacturer
Champion	Champion Outboard Motors Company.
Neptune	Muncie Gear Works.
Thor	Cedarburg Manufacturing Co.
Bendix	Bendix Aviation Corporation.
Elgin-Waterwitch	(Sears, Roebuck)—Kissel Company.

As of May 23, 1951, the Neptune motors were still being manufactured and sold by Muncie and the Champion by Champion Motors Company, successor to the old Champion Company. Cedarburg Manufacturing Company was acquired by Kiekhaefer Corporation, and the name of its motor was changed from Thor to Mercury, and this company continued manufacturing and selling Mercury motors as well as private brand motors. Kissel Company sold its business to West Bend Aluminum Company, which continued to manufacture and sell Sears, Roebuck motors at the former Kissel plant. Bendix Aviation Corporation is the only manufacturer to withdraw from the industry in the fifteen years from 1936 to 1951.

After 1936, other manufacturers entered the outboard motor business, some before World War II, and some after the War. These include the following:

National Pressure Cooker Co.....	Martin Motor.
Scott-Atwater Manufacturing Co..	Scott-Atwater Motor, Corsair Motor, and Firestone Motor.
Chris-Craft Outboard Motors Co..	Chris-Craft Motor.
Hart-Carter Co.	Lauson Motor.
Metal Products Corp.....	Flambeau Motor.
H. B. Milburn Co.....	Milburn Cub.

All of these manufacturers who entered the business since 1936 were actively engaged in the manufacture and sale of outboard motors on May 23, 1951.

Between 1936 and 1950 the outboard motor industry expanded saleswise from five million total to over forty million. Business boomed, particularly from 1946 to 1950—from fifteen million to forty million. Gross sales and percent of market enjoyed by respondent and its competitors for these years is as follows:³

³ Unit sales total and unit sales percent of total for the same companies show relatively the same pattern.

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Company	1946		1947		1948		1949		1950	
	Company's percent of industry	Dollar sales	Company's percent of industry	Dollar sales	Company's percent of industry	Dollar sales	Company's percent of industry	Dollar sales	Company's percent of industry	Dollar sales
A (1).....			0.69	\$360,813	0.41	\$210,687	0.21	\$79,949	0.24	\$97,599
B.....										
C.....										
D.....	1.58	\$251,039	10.86	5,678,888	6.82	3,504,599	3.20	1,218,274	3.10	1,260,654
E.....	.72	114,398	1.20	627,502	.96	493,316	1.38	525,380	1.02	414,796
F.....	4.16	660,964	3.40	1,777,921	2.59	1,330,926	.59	224,619	.78	317,197
G.....	5.22	829,383	10.57	5,527,242	11.32	5,817,018	5.36	2,040,608	5.99	2,435,908
H (2) ¹	54.63	8,679,707	32.87	17,189,688	35.68	18,335,250	42.34	16,122,596	43.44	17,663,565
I.....							1.09	414,974	1.24	504,261
J.....	7.72	1,226,597	10.46	5,469,721	14.80	7,605,289	19.07	7,260,149	20.56	8,360,980
K.....	8.22	1,306,039	9.93	5,192,575	7.20	3,699,870	8.92	3,395,938	9.44	3,838,894
L.....	3.40	540,211	7.59	3,968,947	6.20	3,185,999	7.03	2,676,395	7.04	2,862,904
M (3) ²	14.35	2,280,220	12.43	6,498,493	14.02	7,204,131	10.81	4,112,166	7.15	2,907,490
Industry total ³	100.00	15,888,558	100.00	52,291,790	100.00	51,387,085	100.00	38,071,048	100.00	40,666,248

¹ H (2) is respondent, Johnson and Evinrude.² M (3) is respondent, Gale Products.³ Respondent's Exhibit 32.

8. Respondent now sells, and for many years last past has been selling, outboard motors and parts therefor to distributors and dealers in such motors located throughout the several States of the United States, the Territories thereof, the District of Columbia and foreign countries, for resale within the United States, the Territories thereof, the District of Columbia and foreign countries. Both Johnson and Evinrude direct factory dealers are authorized by respondent to appoint associate dealers who are also sometimes referred to as sub-dealers. During the years 1937 through 1950, respondent's Johnson and Evinrude Divisions sold their products to direct factory dealers and to distributors. Such direct factory dealers sold to the public, and in some instances to associate dealers, and said distributors sold to distributors' dealers. A list showing the number of distributors and dealers of the various classes follows:

JOHNSON MOTORS DIVISION

	Distrib- utors	Distrib- utors' dealers	Direct factory dealers	Associate dealers		Distrib- utors	Distrib- utors' dealers	Direct factory dealers	Associate dealers
1937.....	6	488	1,369	60	1944.....				
1938.....	5	629	1,627	207	1945.....				
1939.....	4	491	2,008	218	1946.....	7	988	2,058	6
1940.....	4	487	2,018	289	1947.....	6	512	2,593	11
1941.....	4	523	1,771	97	1948.....	6	538	2,424	15
1942.....					1949.....	5	553	2,580	57
1943.....					1950.....	5	609	2,604	210

