

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.

