

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.

Initial Decision

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**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 delimitation 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

<i>Market Share by Unit Volume</i>			
	1971	1972	1973
OMC	63.4%	62.8%	62.4%
Mercury	24.5%	25.1%	26.4%
Chrysler	12.1%	12.1%	11.2%

<i>Market Share by Dollar Volume</i>		
	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, 12PP.)

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

