

Complaint

94 F.T.C.

IN THE MATTER OF
BRUNSWICK CORPORATION, ET AL.

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

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

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

Appearances

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

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

COMPLAINT

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

I

RESPONDENTS

A. Brunswick Corporation

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

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

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

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

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

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

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

B. Yamaha Motor Co., Ltd.

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

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

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

9. Yamaha distributes motorcycles and snowmobiles in the United

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

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

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

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

C. Mariner Corp.

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

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

II

THE TRANSACTION

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

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

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

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

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

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

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

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

* * * * *

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

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

III

TRADE AND COMMERCE

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

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

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

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

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

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

IV

EFFECTS OF JOINT VENTURE

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

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

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

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

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

V

VIOLATION

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

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

INITIAL DECISION BY JAMES P. TIMONY, ADMINISTRATIVE LAW
JUDGE

MAY 2, 1977

PRELIMINARY STATEMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

FINDINGS OF FACT

I. Identity and Business of Respondents

A. Brunswick Corporation

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

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

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

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

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

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

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

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

B. Mariner Corporation

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

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

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

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

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

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

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

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

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

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

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

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

C. Yamaha Motor Co., Ltd.

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

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

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

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

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

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

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

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

D. Sanshin Kogyo Co., Ltd.

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

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

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

E. Yamaha International Corporation

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

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

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

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

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

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

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

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

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

II. The Transaction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

