It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

It is further ordered, That respondents shall notify the Commission at least thirty (30) days prior to any proposed change in their business organization such as dissolution, assignment, incorporation or sale resulting in the emergence of a successor corporation or partnership or any other change which may affect compliance obligations arising out of this order.

IN THE MATTER OF

THE SPERRY AND HUTCHINSON COMPANY

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 8671. Final Order, February 16, 1973.

Order reaffirming previous Commission order, 73 F.T.C. 1099, as to Counts I and II of the complaint and requiring respondent, among other things to cease setting a maximum number of stamps to be dispensed by its retail licensees in relation to the purchases by such retailers' customers and conspiring with others to enforce its policy of limitation.

FINAL ORDER

Whereas, The Commission issued its original order in this case on June 26, 1968, [73 F.T.C. 1099,1226] from which respondent appealed to the United States Court of Appeals for the Fifth Circuit, seeking review of the issues relating to Count III of the complaint herein, and

Whereas, The Fifth Circuit reviewed the issues relating to Count III of the complaint, respondent having abandoned any challenge to those portions of the order relating to Counts I and II of the complaint, and

Whereas, The Commission petitioned the Supreme Court of the United States for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit from its decision adverse to the Commission, and

Whereas, The Supreme Court granted said writ and, upon its review of the issues relating to Count III of the complaint,

ordered the case remanded to the Commission for such further proceedings as may be appropriate, [405 U.S. 233] and

Whereas, The case has been remanded to the Commission, and

Whereas, The Commission has decided to republish as final the following portions of its order, relating to Counts I and II of the complaint, which were neither challenged by respondent nor judicially reviewed by the Courts:

Now therefore, it is ordered, That respondent, The Sperry and Hutchinson Company, its officers, agents, representatives, and employees, directly or through any corporate or other device, in connection with the issuing, distribution, sale, or the redemption of trading stamps in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Putting into effect, maintaining, or enforcing any plan or policy under which contracts, agreements, or understandings are entered into with any retailer which have the purpose or effect of:

(a) fixing or establishing the maximum number of trading stamps which may be dispensed by retailers to their customers in relation to such customers' purchases of goods or services; and

(b) requiring, expressly or by implication, or suggesting to or inviting any retailer to dispense trading stamps on a basis not to exceed a specified number of trading stamps in relation to purchases by such retailer's customers of goods or services.

2. Securing adherence to a scheme or policy of foreclosing the dispensing of trading stamps at the retail level in excess of any specified ratio of stamps to goods or services sold, by terminating or threatening to terminate or cancel, or refusing to enter into contractual relationship with, or threatening to refuse to deal with, any retailer, or taking any other affirmative action which goes beyond the mere declination to deal with a customer who will not observe such policy.

3. Combining, conspiring, or otherwise knowingly acting in concert with any other person to cause any retailer to dispense trading stamps in any specified ratio of the number of stamps to goods or services sold.

4. Communicating in any way with any other trading

stamp company, or acting in any way in response to any communication from any trading stamp company, with respect to the ratio of the number of trading stamps dispensed in relation to goods or services sold by the retailer.

It is further ordered, That the respondent, within sixty (60) days after the effective date of this order:

(a) notify in writing all of its sales employees, sales representatives, and licensees of the provisions of this cease and desist order; and

(b) reform all contracts with retailers or others who dispense S&H green stamps to the public to conform with the provisions of this cease and desist order.

It is further ordered, That respondent, the Sperry and Hutchinson Company, shall, within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

IN THE MATTER OF

THE SPERRY AND HUTCHINSON COMPANY

Docket 8671. Notice, Feb. 16, 1973.

Notice of Commission action to reconsider findings of fact, conclusions, opinion and final order relating to Count III of the complaint; granting both sides opportunity to file briefs and reply briefs; and advising of intent to schedule oral argument not earlier than ten days after the date set for the filing of reply briefs.

NOTICE OF COMMISSION ACTION TO RECONSIDER PORTION OF THE ORDER AND TO PERMIT PARTIES TO SUBMIT WRITTEN AND ORAL ARGUMENT

The Supreme Court of the United States [405 U.S. 233] having remanded this case to the United States Court of Appeals for the Fifth Circuit with instructions to remand the case to the Commission for such further proceedings not inconsistent with the Supreme Court's opinion, as may be appropriate, and the case having been remanded to the Commission by the said Court of Appeals, the Commission has determined to reconsider its findings of fact, conclusions, opinion and final order relating to Count III of the complaint.

To facilitate reconsideration of the matter relating to Count III of the complaint, complaint counsel and respondent are hereby granted thirty (30) days from the date of receipt of this notice to file with the Commission briefs (not to exceed sixty (60)

pages) as to whether respondent's practices, though posing no threat to competition within the precepts of the antitrust laws, are nevertheless (1) unfair methods of competition, and/or (2) unfair or deceptive acts or practices. Of particular interest to the Commission is the extent to which there is evidentiary support in the record that the challenged practices may be unfair to the consuming public, stamp exchanges or retailers. Ten days from the date of receipt of the brief, each side may file a reply brief (not to exceed fifteen (15) pages).

The Commission intends to schedule oral argument in this matter not eariler than ten (10) days after the date set for the filing of reply briefs.

IN THE MATTER OF

AVNET, INC.

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE CLAYTON ACT, SECTION 7

Docket 8775. Complaint, Dec. 1, 1969—Decision, Feb. 16, 1973.

Order requiring a New York City diversified manufacturer, processor and marketer of numerous items consisting principally of electronic, automotive and consumer products, among other things to divest itself of all assets, stocks, properties, rights, privileges and interests as a result of its acquisition of Guarantee Generator & Armature Co., doing business as International Products & Manufacturing Co. Respondent is further prohibited from making any acquisitions of stocks or assets within the automotive electrical unit rebuilder industry for 10 years without prior Federal Trade Commission approval.

AMENDED COMPLAINT

The Federal Trade Commission having reason to believe that Avnet, Inc., respondent herein, has violated the provisions of Section 7 of the Clayton Act, as amended, 15 U.S.C. Section 18, by acquiring Guarantee Generator & Armature Co., d/b/a International Products & Mfg. Co., issues this amended complaint pursuant to Section 11 of that Act, stating its charge in that respect as follows:

I

1. For the purpose of this complaint, the following definitions shall apply:

(a) "Automotive electrical units" consist of any or all of the following items: generators, alternators, starters, starter drives, armatures, solenoids, and voltage regulators.

(b) The term "rebuilder" is synonymous with "re-manufacturer," and only applies to those engaged in rebuilding automotive electrical units.

(c) (1) The relevant line of commerce is the "rebuilders' supply industry," consisting of firms ("suppliers") engaged in the manufacture and/or supply of various new parts, materials, and equipment ("supply of new parts") to rebuilders.

(2) A relevant sub-line of commerce limits the rebuilders' supply industry by excluding the supply of new parts to rebuilders who, pursuant to an agreement with that supplier, rebuild and furnish automotive electrical units to said supplier or its designee.

(3) The term rebuilders supply industry does not include the supply of new parts to those engaged in the manufacture of automobiles, trucks, buses and related self-propelled land vehicles.

II

RESPONDENT

2. Respondent, Avnet, Inc. ("Avnet"), is a corporation organized and existing since 1955 under the laws of the State of New York, with principal executive offices located in the Time & Life Building, New York, New York.

3. Respondent is a diversified manufacturer, processor and marketer of numerous items consisting principally of electronic, automotive, and consumer products. For fiscal 1967, respondent's net sales exceeded $146 million. Net income was $9.3 million, and assets totaled $99 million in that year.

4. As the result of a program of expansion through merger and acquisition respondent has significantly increased its corporate growth in recent years. Between the years 1960 and 1968, respondent has acquired more than twenty companies including a number of profitable concerns engaged in manufacturing and marketing automotive parts and machinery, including alternators, generators, starters, and ignition systems and their components primarily for the replacement parts market. In 1966, respondent established an Automotive Process and Equipment Division, comprised principally of concerns acquired by respondent and engaged in the manufacture or distribution of automotive replacement parts. For the year ending June 30, 1967, respond-

ent's Automotive Process and Equipment Division accounted for $31.6 million of the company's aggregate net sales, establishing respondent as an important factor in the automotive aftermarket.

5. At all times relevant herein, respondent sold and shipped its products in interstate commerce and engaged in "commerce" within the meaning of the Clayton Act.

III

VALLEY FORGE PRODUCTS, INC.

6. On July 31, 1964, respondent acquired substantially all the assets of Valley Forge Products, Inc. ("Valley Forge"), for $2,415,000. Prior to its acquisition by respondent, Valley Forge was a corporation organized and existing under the laws of the State of New York, with its executive office and principal place of business located at 370 19th Street, Brooklyn, New York.

7. At the time of its acquisition by respondent, and for many years prior thereto, Valley Forge was engaged in the manufacture and supply of replacement ignition parts for motor vehicles and of various equipment, tools, and component parts used by rebuilders. The business acquired from Valley Forge was re-established in part as a division of respondent and, since 1966, has been conducted in the Automotive Process and Equipment Division of respondent.

8. In the year prior to its acquisition, Valley Forge had sales of $4.8 million and total assets of $2.4 million. At the time of acquisition, Valley Forge sold its products to independent distributors and rebuilders throughout the United States, was an important supplier of a complete line of parts to rebuilders, and was an acknowledged leader in the manufacture and supply of quality-built field coils. Approximately 50 percent of Valley Forge's sales were to rebuilders.

9. At all times relevant herein, Valley Forge sold and shipped its products in interstate commerce and engaged in "commerce" within the meaning of the Clayton Act.

IV

GUARANTEE GENERATOR & ARMATURE CO., d/b/a
INTERNATIONAL PRODUCTS & MFG. CO.

10. Prior to its acquisition by respondent on January 31, 1965, Guarantee Generator & Armature Co., d/b/a International Prod-

ucts & Mfg. Co. ("IPM"), was a corporation organized and existing under the laws of the State of Illinois, with its principal office and place of business located at 850 Ogden Avenue, Chicago, Illinois.

11. At the time of its acquisition by respondent, and for many years prior thereto, IPM was, and continues to be, engaged in the manufacture and supply of a comprehensive line of equipment, tools, component parts and supplies used by rebuilders.

12. During the year prior to acquisition, IPM had sales and assets of $12 million and $5 million, respectively. Sales were made to over 5,000 independent distributors and rebuilders located primarily in the United States. In fiscal 1964, IPM's sales to rebuilders were approximately $11.3 million. IPM was and is still considered the leader in supplying a full line of parts, materials and equipment to rebuilders.

13. At all times relevant herein, IPM sold and shipped its products in interstate commerce and engaged in "commerce" within the meaning of the Clayton Act.

V

TRADE AND COMMERCE

14. The automotive parts rebuilding industry constitutes a significant segment of the important multi-billion dollar automotive aftermarket for replacement parts. Rebuilt parts have continued to gain acceptance and, in some instances, are in direct competition with new units for replacement purposes. For many products the rebuilder can offer a rebuilt unit equal in quality to a new unit at a lower price. The expanding area of automotive electrical unit rebuilding, constituted as a highly fragmented industry primarily made up of many small concerns, forms a solid sub-segment of the rebuilding industry. Rebuilt generators, starters, starter drives, and armatures have achieved such widespread acceptance that in comparison to the use of new parts, they completely dominate the replacement parts aftermarket.

15. In 1964 the rebuilders' supply industry was highly concentrated. Sixteen firms supplied virtually the total volume of equipment and parts furnished to rebuilders. The total value of their supply during that year approached $24 million. Three firms supplied rebuilders with products valued at $16 million and were considered by rebuilders as being their major suppliers, and the only concerns able to furnish a complete line of equip-

ment and rebuilding parts. IPM ranked first in sales in that year with a volume of $11.3 million and was the single most important factor in the supply of parts and equipment to rebuilders. While IPM accounted for over 47 percent of industry sales, Valley Forge ranked third on a volume of $2.4 million accounting for 10 percent of industry sales. Combined, IPM and Valley Forge accounted for approximately 57 percent of total industry sales to rebuilders in 1964, with the four leading companies accounting for approximately 79 percent and the eight leading firms controlling 92 percent of such sales.

16. Since 1963, a series of acquisitions and mergers involving five of the sixteen suppliers referred to in Paragraph 15 has significantly altered the structure of the rebuilders' supply industry. The merger movement, precipitated by respondent's acquisition of IPM, challenged herein, has tended to solidify further an already highly concentrated industry to the detriment of substantial actual and potential competition.

VI

THE ACQUISITION

17. On or about January 31, 1965, respondent acquired substantially all of the assets and business of IPM for $7,537,533. Upon consummation of this acquisition, the business of IPM was conducted through the Guarantee Generator & Armature Division of respondent. However, since 1966, the business of IPM has been conducted through the Automotive Process and Equipment Division of respondent.

VII

EFFECTS OF ACQUISITION

18. The effects of the acquisition of IPM by respondent may be substantially to lessen competition or to tend to create a monopoly in the manufacture and/or supply of parts, materials, and equipment to rebuilders throughout the United States, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. Section 18, in the following ways among others:

(a) Substantial actual and potential competition between respondent and IPM has been, or may be, eliminated;

(b) The combination of the business of IPM as a result of the acquisition challenged herein, with respondent's existing busi-

ness as a leading supplier of parts, equipment, and materials to rebuilders of automotive electrical units, and respondent's position as an important manufacturer and marketer of replacement parts for sale in the automotive aftermarket, constitutes a major restructuring of the rebuilders' supply industry and may tend unduly to:

i. increase barriers to the entry of new and effective competition in that industry;

ii. deprive smaller, limited-line rivals of an equal opportunity to compete for sales to rebuilders thereby entrenching respondent in its acquired dominant and monopolistic position;

iii. increase previously existing high levels of concentration; and

iv. precipitate additional acquisitions or mergers between other rebuilders' suppliers which effect may be to eliminate actual and potential competition; and

(c) Rebuilders of automotive electrical units 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.

19. The acquisition by respondent, as alleged in Paragraph 17 constitutes a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. Section 18.

Mr. K. Keith Thurman and *Mr. Jere W. Glover* supporting the complaint.

Wilmer, Cutler & Pickering, Washington, D.C. by *Mr. Howard P. Willens, Mr. Daniel C. Schwartz* and *Mr. Stephen F. Black* for respondent.

INITIAL DECISION BY WILLIAM K. JACKSON, HEARING EXAMINER

MARCH 3, 1972

PRELIMINARY STATEMENT

The Federal Trade Commission on April 1, 1969, issued its complaint in this proceeding charging Avnet, Inc., a corporation, by its acquisition of Guarantee Generator and Armature Co., d/b/a International Products & Mfg. Co., hereinafter referred to as IPM, violated Section 7 of the Clayton Act, as amended (15 U.S.C. Section 18). Thereafter on December 1, 1969, the Commission amended its complaint in several material respects.

The amended complaint alleges that the effects of the acquisition of IPM by respondent may be substantially to lessen competition or to tend to create a monopoly in the manufacture and/or supply of parts, materials and equipment to rebuilders throughout the United States, in the following ways, among others:

1. Substantial, actual and potential competition between respondent and IPM has been, or may be, eliminated;

2. The combination of the business of IPM as a result of the acquisition challenged herein, with respondent's existing business as a leading supplier of parts, equipment, and materials to rebuilders of automotive electrical units, and respondent's position as an important manufacturer and marketer of replacement parts for sale in the automotive aftermarket, constitutes a major restructuring of the rebuilders supply industry and may tend unduly to:

a. increase barriers to the entry of new and effective competition in that industry;

b. deprive smaller, limited-line rivals of an equal opportunity to complete for sales to rebuilders thereby entrenching respondent in its acquired dominant and monopolistic position;

c. increase previously existing high levels of concentration; and

d. precipitate additional acquisitions or mergers between other rebuilders' suppliers which effect may be to eliminate actual and potential competition; and

3. Rebuilders of automotive electrical units 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.

After being served with the amended complaint, respondent appeared by counsel and filed on January 14, 1970, its answer to the amended complaint denying, in substance, that the merger was illegal. Thereafter, on January 26, 1970, August 20, 1970, October 16, 1970, and October 30, 1970, four prehearing conferences were held pursuant to pretrial orders of the hearing examiner for the purposes of simplification of the issues, obtaining admissions of fact and authentication of documents, discovery of relevant material, exchanging lists of exhibits and names of witnesses, together with a summary of their proposed testimony, to be used at the trial, and the preparation of a concise statement of the contested issues of law and fact. In accordance with the

examiner's pretrial order both parties prepared and submitted a pretrial memorandum.

Hearings for the presentation of testimony and other evidence by complaint counsel began in Washington, D.C. on February 1, 1971, and concluded on February 25, 1971. Pursuant to a request by respondent for further discovery, a two and one-half month adjournment was granted prior to the presentation of respondent's defense. During this period respondent presented to the examiner several subpoenas *duces tecum,* all of which were issued. On May 6, 1971, after having indicated that it had completed all its discovery requests, respondent commenced the presentation of testimony and other evidence in its defense. Except for several brief adjournments, the hearings continued until September 13, 1971, during which time respondent called approximately 59 witnesses. On October 18 and 19, 1971, complaint counsel called three rebuttal witnesses and the record was closed on October 19, 1971. The record in this matter consists of 5,663 pages of testimony and 354 documentary exhibits.

Pursuant to an application of the hearing examiner based on a joint request by the parties, the Commission by order of November 5, 1971, ruled that the parties file their proposed findings of fact, conclusions of law and briefs 50 days after the closing of the record or on or before December 8, 1971; that both parties thereafter have an additional 25 days within which to file reply briefs or on or before January 3, 1972; and that the hearing examiner thereafter will have 60 days within which to file his initial decision, or until March 3, 1972.

Proposed findings of fact and briefs in support thereof were filed by the parties on December 8, 1971, and reply briefs were filed on January 3, 1972.

Any motions not heretofore or herein specifically ruled upon, either directly or by the necessary effect of the conclusions in this initial decision, are hereby denied.

This proceeding is before the hearing examiner upon the complaint, answer, testimony and other evidence, proposed findings of fact and conclusions and briefs filed by counsel supporting the complaint, and by counsel for respondent. The proposed findings of fact, conclusions and briefs in support thereof submitted by the parties have been carefully considered by the examiner, and those findings not adopted either in the form proposed or in substance are rejected as not supported by the evidence or as involving immaterial matter.

For the convenience of the Commission and the parties, the findings of fact include references to the principal supporting items in the record. Such references are intended to serve as convenient guides to the testimony and exhibits supporting the recommended findings of fact, but do not necessarily represent complete summaries of the evidence considered in arriving at such findings.

Reference to the record are made in parentheses, and certain abbreviations, as hereinafter set forth, are used:

CX —Commission's Exhibit
RX —Respondent's Exhibit
CPF —Complaint Counsel's Proposed Findings and Conclusions
RPF —Respondent's Proposed Findings and Conclusions
RB —Respondent's Brief
CRB—Complaint Counsel's Reply Brief
RRB—Respondent's Reply Brief

The transcript of the testimony is referred to with either the last name of the witness and the page number or numbers upon which the testimony appears or with the abbreviation Tr. and the page.

Having heard and observed the witnesses and after having carefully reviewed the entire record in this proceeding, together with the proposed findings, conclusions and briefs submitted by the parties, as well as replies, the examiner makes the following:

FINDINGS OF FACT

I. Identity and Business of Respondent and Acquired Company

A. *The Respondent*

1. Respondent Avnet, Inc. (hereinafter referred to as "Avnet"), is a corporation organized and existing since 1955 under the laws of the State of New York, with principal executive offices located at 767 Fifth Avenue, New York, New York (Amended Complaint, ¶2 (hereinafter referred to as Complaint); Answer ¶2).

2. Avnet, together with its subsidiaries and divisions, is a diversified manufacturer, processor and marketer of numerous items consisting principally of electronic, automotive and con-

sumer products. For fiscal 1965, Avnet's net sales were approximately $57.5 million, with net earnings of approximately $3.3 million. For fiscal 1967, primarily due to a program of expansion through merger and acquisition, Avnet had increased its net sales to approximately $146 million, with a net income of $9.3 million and assets totaling $99 million (Complaint, ¶¶3, 4; Answer ¶¶3, 4; CX 10 a, CX 12 a).

3. As the result of a program of expansion through merger and acquisition, Avnet has significantly increased its corporate growth in recent years. Between the years 1960 and 1968, Avnet acquired more than 20 companies including a number of profitable concerns engaged in manufacturing and marketing automotive parts and machinery, including components for alternators, generators, starters and ignition systems primarily for the replacement parts market. In 1966, Avnet established an Automotive Process and Equipment Division, comprised principally of concerns acquired by it and engaged in the manufacture or distribution of automotive replacement parts. For the year ending June 30, 1967, Avnet's Automotive Process and Equipment Division accounted for $31.6 million of the company's aggregate net sales (Complaint, ¶4; Answer, ¶4).

4. On July 31, 1964, Avnet acquired substantially all the assets of Valley Forge Products, Inc. (hereinafter referred to as "Valley Forge"), for $2,415,000. Prior to its acquisition by Avnet, Valley Forge was a corporation organized and existing under the laws of the State of New York, with its executive office and principal place of business located at 370 19th Street, Brooklyn, New York (Complaint ¶6; Answer, ¶6; CX 9 c).

5. At the time of its acquisition by Avnet, and for many years prior thereto, Valley Forge was engaged in the manufacture and supply of replacement ignition parts for motor vehicles and of various component parts and materials used by rebuilders of automotive electrical units (Complaint, ¶7; Answer, ¶7). From the time of its acquisition until July 1966, the business acquired from Valley Forge (the Valley Forge Division) was conducted in the Automotive Division of Avnet, and from July 1966 to July 1968 was conducted in the Automotive Process and Equipment Division of Avnet. From July 1968 to July 1970, the Valley Forge Division was part of the Electrical and Automotive Division of Avnet and from July 1970 to July 1971, it was part of the Wire and Cable Division of Avnet (RX 128 a–b).

6. For calendar year 1964, Valley Forge and the Valley Forge Division had sales of $5.034 million and total domestic sales of $2.040 million (Fischer 3975–76). In 1964, Valley Forge and the Valley Forge Division had total sales to automotive electrical unit rebuilders of $2.5 million, and total domestic sales to such customers of $1.856 million (CX 22 a–b, CX 23 b, Fischer 3975–76).

7. In 1964, Valley Forge and the Valley Forge Division sold several thousand different new items for use in rebuilding generators, starters, starter drives, armatures, alternators, solenoids and voltage regulators to domestic automotive electrical unit rebuilders (hereinafter "rebuilders") (CX 9 c, CX 15 b, CX 18 a, CX 20, CX 23 b, CX 29 b, CX 50 a–c, CX 105–CX 113). For each of the years prior to its acquisition by Avnet, Valley Forge offered an increasing number of new items for sale to rebuilders (CX 24 b, CX 38 a, Fischer 3965).

8. From 1961 through 1964, the sales to rebuilders by Valley Forge and the Valley Forge Division increased substantially (CX 24 b, CX 38 a, Fischer 4245).

9. At all times relevant herein, Avnet sold and shipped its products, particularly the products of its Valley Forge Division, in interstate commerce and engaged in "commerce" within the meaning of the Clayton Act (Complaint, ¶¶5, 9; Answer, ¶¶5, 9).

B. *The Acquired Company*

10. Prior to its acquisition by Avnet on January 31, 1965, Guarantee Generator & Armature Co., d/b/a International Products & Manufacturing Co. (IPM), was a corporation organized and existing under the laws of the State of Illinois, with its principal office and place of business located at 850 Ogden Avenue, Chicago, Illinois (Complaint, ¶10; Answer, ¶10).

11. At the time of its acquisition by Avnet, and for many years prior thereto, IPM was and continues to be, engaged in the manufacture and supply of a line of new component parts, supplies, equipment and tools used by rebuilders (Complaint, ¶11, Answer, ¶11). During the year prior to acquisition, IPM had sales and assets of $12 million and $5 million respectively (Complaint, ¶12; Answer, ¶12).

12. In 1964, IPM offered and continues to offer rebuilders the most extensive line of new parts, materials and equipment. In 1964, IPM sold over 10,000 different part numbers of new items to rebuilders making it "The Rebuilding Industry's complete

source of supply" (CX 50 d–s, CX 52 a, CX 96 c, CX 115–CX 265, Erwin 552, DeBlase 840, Flynn 937; see also Finding 71).

13. IPM had domestic sales of $11,353,000 to rebuilders in 1964 (CX 26 b, CX 45, Mansfield 2116–18).

14. In 1964 and for many years prior thereto, IPM was by far the largest supplier and had the most complete line of new parts, equipment and materials to rebuilders (CX 44 a, CX 47 b, CX 50 d, Smith 605, Shelly 750, Vander Veen 896, Flynn 943–44, Gordon 1160, Brock 1525, Garello 2185–86; see also Findings 60 and 68).

15. From the time of its acquisition until July 1966, the acquired business of IPM was conducted in the Automotive Division of Avnet; and from July 1966 to July 1968, it was conducted in the Automotive Process and Equipment Division of Avnet; and from July 1970 to July 1971, it was conducted in the Automotive Manufacturing Division of Avnet (RX 128 a–b).

16. At all times relevant herein, IPM sold and shipped its products in interstate commerce and engaged in "commerce" within the meaning of the Clayton Act (Complaint, ¶13; Answer ¶13).

C. *The Acquisition*

17. Negotiations between IPM and Avnet were initiated in the fall of 1964 when Mr. Mansfield, the president of IPM, met in Chicago with Mr. Morton Weiner, Avnet's senior vice-president. Mr. Mansfield was originally contacted by Harris Fischer, then president of the Valley Forge Division of Avnet, at Mr. Weiner's request (Mansfield 1875–76, Fischer 4151–52). Several further meetings were held, a letter of intent was signed and the acquisition was announced to the press on April 2, 1965 (CX 16). Pursuant to the agreement, Avnet acquired substantially all of the assets and business of IPM for $7,537,533, effective January 31, 1965 (Complaint, ¶17; Answer, ¶17).

II. NATURE OF THE TRADE AND COMMERCE

The Line of Commerce

A. *Definitions*

1. *Rebuilder*

18. There is a sharp disagreement between the parties over the meaning of the term "rebuilder" as used in Paragraph 1(b) of the complaint defining a rebuilder as "synonymous with 'remanufacturer' and only applies to those engaged in rebuilding

automotive electrical units." Respondent seeks to base the definition of a rebuilder on a broad and general examination of the physical operations performed: basically consisting of the disassembling of a unit, cleaning, testing, replacement or reconditioning of defective or worn parts, reassembling and testing without regard to any other factors (RPF 24–27).

19. Complaint counsel base their definition of who is a rebuilder on a variety of other processing and marketing factors hereinafter set forth, all of which are equally important (CPF 20–26).

20. Rebuilders operate on a production line or modified production line basis depending on their size, with each employee performing an assigned task or tasks (Erwin 531; Smith 594–95; Woodruff 826; DeBlase 848; Vander Veen 901; Butchkes 2288–89; Young 2979; Fallen 3022; Ledbetter 3399; Hicks 4627, "Our categorization of a rebuilder, from a marketing standpoint, is a production rebuilder. * * * This rebuilder rebuilt from stock and sold from stock. He didn't ordinarily do custom rebuilding;" Wolf 3664; Krider 5607–08; RX 55 e).

21. Rebuilders take a quantity varying from 5 to 500 identical inoperative units known as cores which they own and have received in exchange from their customers or purchased from used core dealers (junk dealers) (Smith 597; Gelberg 661; Feldman 714,719, 732–33; Shelly 772; Woodruff 801, 815; DeBlase 844, 873; Vander Veen 901, 919–20; McGuire 1295; Ledbetter 3427–28).

22. These cores are then disassembled, the component parts lose their identity, the component parts are separated by various categories, cleaned, tested and placed in separate bins or barrels (Gelberg 648–49; DeBlase 848–49; Keesee 1383; Weiss 4842).

23. Additional used or new parts are then purchased to fill in where parts salvaged from cores are either worn or defective or just not in sufficient supply. Some items such as brushes and bushings are never reused but are always replaced with new (Smith 636; Feldman 717; Shelly 771; DeBlase 850; Ledbetter 3437).

24. Production rebuilders generally follow a uniform procedure on which parts are replaced if worn or defective (DeBlase 850–51; Woodruff 821; Krider 5614–15).

25. The new and used component parts are commingled and are then drawn on a random basis from the bins or barrels and reassembled on a production line basis (Erwin 531; Feldman

718–19, 733; "Units lose their identity during rebuilding operation," Woodruff 801; DeBlase 848–50; Vander Veen 906; McGuire 1295; Keesee 1383; Weiss 4842–43; Krider 5607–08, 5613).

26. The completed unit is then tested, packaged and sold to distributors, jobbers and dealers for use in the aftermarket (Gelberg 649; Feldman 719; Shelly 772; Woodruff 791, "in my terms a rebuilder is a production rebuilder who sells wholesale only," 801, 826; DeBlase 835; Vander Veen 894; McGuire 1289; Butchkes 2288; Peatross 2873; Ledbetter 3407–08).

27. Rebuilders in general purchase their new parts in bulk rather than in individual packages and generally maintain inventories (Erwin 540; Feldman 719; DeBlase 856; Vander Veen 902; Flynn 945; Kamber 1018; Stevens 3102, 3123; Burgess 3540; Fischer 4236).

28. Their principal sources of supply are rebuilder suppliers (hereinafter discussed) and only in case of emergency or unavailability of an item do they prchase from warehouse distributors or jobbers (Smith 590, 634, 638; Gelberg 653; 655, 689; Feldman 715; Shelly 750; Woodruff 797–99; DeBlase 839, Ace and IPM supplied him in 1964 with 75 percent of his new parts, at 840; Vander Veen 896–97, 899, 900, 902; McGuire 1289–90, 1299, 1302, 2453; Butchkes 2299, 2301, 2326; Peatross 2869, 2875; Ledbetter 3458, 3442, 3905–06, 3923; see also Finding 97).

29. Most rebuilders do not rebuild or repair any heavy-duty units (Smith 589; Gelberg 653; Shelly 752–53; Vander Veen 905; Garello 2175; Mills 2767).

30. Those rebuilders who work on heavy-duty units generally do so on a custom or repair basis (Vander Veen 906; McGuire 1294–95; Garello 2175; A. Johnson 2520–22; Ledbetter 3401; Mills 2767).

31. Such repair of heavy-duty units generally accounts for less than 5 percent of such rebuilders' business and is done primarily as a convenience for these rebuilders' customers (Smith 630; Vander Veen 905; McGuire 1294–95; Butchkes 2290, 2333; A. Johnson 2509; DeBlase 2903; Ledbetter 3400–01, 3858–59).

32. Rebuilders generally issue catalogues and price lists and sell their units for an established price plus a core exchange, through salesmen who call on their customers (McGuire 1295, 2449; DeBlase 2948–49; Ledbetter 3410–12).

33. Rebuilders mark their units as "rebuilt" (DeBlase 852; Vander Veen 901; Ledbetter 3858; RX 56 a–c (16 CFR 62)).

2. *Repair Shop*

34. A rebuilder differs from a repair shop, sometimes referred to as a "custom rebuilder" in the trade, in the following ways, among others:

(a) Repair shops seldom own the units on which the work is performed and in most circumstances the units are owned by and returned to the customer (Gelberg 648; Garello 2183; Bensen 2198, 2285; Butchkes 2310; McGuire 2449–50; A. Johnson 2522; Crisman 2562; Tarras 2593; Sechrist 2635, 2640–41; Mills 2744, 2746, 2769; Peatross 2873; Ledbetter 3399).

(b) Repair shops work on one unit at a time and the parts are not commingled with those of another unit (Smith 631; Gelberg 648; Feldman 718; Shelly 753; Woodruff 826; DeBlase 850, 852; Keesee 1383–84; Garello 2183, 2187; Bensen 2221; Rowe 2345; A. Johnson 2509; Crisman 2560; Mills 2744, 2746; Ledbetter 3399; Wolf 3664).

(c) Repair shops reassemble a unit from that unit's parts or from parts substituted for defective or worn items (Gelberg 648; Feldman 718; Shelly 753; McGuire 1295; Mills 2744).

(d) Repair shops do not resell the units in most instances, but charge the customer—generally the vehicle owner—on a parts and labor basis and return the unit to the customer or install it on the customer's vehicle (Feldman 719; Shelly 753; Woodruff 801; McGuire 1295; Keesee 1388; Butchkes 2310; Rowe 2348, 2377; A. Johnson 2513, 2522–23; Crisman 2562, 2575, 2578; Tarras 2606–08; Sechrist 2622; Mills 2744, 2746, 2760).

(e) Repair shops purchase primarily their new parts requirements from wholesalers (Shelly 754; Garello 2171; Rowe 2352; Crisman 2551; Tarras 2599–2600; Sechrist 2628; Mills 2749–51, 2764).

35. The distinction between rebuilders and repair shops is recognized by a trade association, Automotive Parts Rebuilding Association (APRA), which allows only rebuilders, their suppliers and other manufacturers that can offer technical assistance to become members (RX 55 e; Shelly 756; Woodruff 792–93; Winters 1186; Young 2979).

36. The distinction between rebuilders and repair shops was recognized by the Federal Trade Commission in promulgating a trade regulation rule concerning the labeling of units produced by rebuilders but not those repaired by repair shops. In compliance with this rule, units rebuilt and sold by rebuilders have

been labeled "rebuilt," whereas the units worked on by mechanics in repair shops (or by custom rebuilders) have not been so labeled (CX 246, RX 56 a–c (16 CFR 62(b)(1)); Shelly 758; Woodruff 828; Vander Veen 901; Bensen 2198; A. Johnson 2533–34; Crisman 2570; Tarras 2597–2605; Sechrist 2635; Mills 2747; Young 2978; Ledbetter 3858).

37. Part 62 of the Federal Trade Commission's Trade Regulation Rule (RX 56 a–c; 16 CFR 62) must be read in its entirety in order to properly interpret the rule. Indeed, repair shops perform some of the functions delineated in the rule in order to repair a unit but are eliminated from the rule at the very outset. In order to qualify under the rule, the person, firm, corporation or organization must be engaged in the *sale* of the product (16 CFR 62.1(b), Bensen 2211). Repair shops are not engaged in selling a rebuilt unit but invoice on a parts and labor basis (Finding 34(d)).

38. Treasury regulations promulgated under 26 U.S.C.A. Section 4061(b) (1954) distinguish between rebuilt and repaired or reconditioned units. Treas. Reg. Section 48.4061(b)–3 provides with regard to rebuilt, reconditioned or repaired parts (units) or accessories:

(a) Rebuilt parts or accessories. Rebuilding of automobile parts or accessories, *as distinguished from reconditioning or repairing, constitutes manufacturing,* and the rebuilder of such parts or accessories is liable for the tax imposed by Section 4061(b) with respect to his sales of such rebuilt parts or accessories. Reboring or other machining, rewinding and comparable major operations constitute rebuilding. * * * (emphasis added)

(b) Reconditioned parts or accessories. The mere disassembling, cleaning and reassembling (with any necessary replacement of worn parts) of automobile parts or accessories * * * are regarded as reconditioning operations rather than the manufacturing or production of rebuilt parts or accessories. The sale of reconditioned parts or accessories is not subject to tax. * * *

In 1964, Congress recognized this distinction by amending the excise tax law to exempt rebuilt units (CX 292; Woodruff 793; Weiss 4842–43; 26 U.S.C.A. Sections 4061(b), 4063(c); Treas. Reg. Section 48.4061(b)–(c)).

39. Some state tax regulations make a distinction between repairing and the sale of rebuilt units. When a unit is reparied, sales tax is charged only on the parts, whereas the entire price

of the unit is subject to taxation on rebuilt units (A. Johnson 2523–24; Mills 2760).

40. Under the foregoing criteria, the examiner finds that respondent's witnesses John Garello 2158–2189, Gem Truck Electric; Roy Bensen 2192–2227, Schelen Electric; Michael Rowe 2342–2378, Apex Auto Parts & Electric Co.; Donald M. Crisman 2537–2590, Auto Truck Electric; Harold Tarras 2591–2612, Terrace Auto Supply; E. Paul Sechrist 2614–2644, D.C. Ignition Headquarters; and Don Mills 2739–2774, Herb's Truck Electric, are repair shops or custom "rebuilders."

41. Respondent called several warehouse distributors or jobbers for original equipment manufacturers (Tarras 2594; Roberts 4383–84, 4448; Morrison 5153, 5154, 5161) who operated service or custom repair facilities in conjunction with their distribution of parts (Tarras 2593, 2608, "worked on customers' cars," 2598, has "drive-in" service; Roberts 4433, does "tune-up" work, 4435, 4398–99, has "drive-in" service, five days, 4436, does "bench work," customer brings in unit and returns unit to customer, 4447, does warranty work in "drive-in" facility, 4455, does general repair work; Morrison 5179–80, had "drive-in" service, in most instances customers owned the units, doesn't sell to warehouse distributors, 5192–93, jobber with service facility, ads in yellow pages state "units repaired and exchanged," 5194, does warranty work), performed work on one unit at a time on custom repair basis (Tarras 2596, 2606), charged for time and materials or flat rate (Tarras 2597, 2608; Roberts 4431; Morrison 5195), used high percentage of OEM parts (Tarras 2600–01), units not stamped "rebuilt" (Tarras 2606, 2607, puts word "repaired" on invoice; Roberts 4431, 4447; Morrison 5180, "we label them"). Upon the basis of the foregoing testimony, the examiner finds that respondent's witnesses Tarras, Roberts and Morrison operate service facilities and do custom repair work and are not rebuilders.

42. Respondent called several fleet operators who maintained their own service and overhaul facilities (Nelson 2406–2427, Consolidated Freightways Corp.; Rosendhal 2460–2505, Chicago Transit Authority; Meell 2671–2738, Greyhound Corp.; Miller 2776–2818, Ryder Truck Rental). Such facilities perform a wide range of repair and maintenance services on the vehicles of their fleets (Rosendhal 2461–62, 2479–81; Nelson 2409, 2418–19; Meell 2676; Miller 2779). These facilities, in general, work on one unit at a time; and the parts are not commingled with those

of another unit (Rosendhal 2464, 2470, 2496; Nelson 2411; Miller 2782). Fleets do not *resell* the units repaired in their maintenance facilities but utilize them on their own vehicles (Kessee 1338–39; Nelson 2419, 2422; Rosendhal 2481; Meell 2689–90, 2717, sells a few rebuilt units to companies that have bought used Greyhound buses, as a convenience, but sells to no others; Miller 2803). Fleets do not mark the units repaired in their maintenance shops as "rebuilt" (Nelson 2411, 2424; Rosendhal 2499; Meell 2716). Fleets purchase almost all of the parts they use in repairing automotive electrical units from wholesalers handling OEM brands or vehicle dealers (Nelson 2417–18; Rosendhal 2473–74; Meell 2696, 2699–2700, 2719; Miller 2790, 2793, 2795, 2803–04). Fleets do not purchase from rebuilder suppliers who offer almost none of the items required by such fleets (CX 36 c; Erwin 575; Nelson 2417–18, 2427; Rosendhal 2474–75, 2482–84; Meell 2726; Miller 2791, 2803–04; DeBlase 2914; Fischer 4065, 4245–46). Fleet maintenance shops do not purchase used cores or parts for use in their repairing operations (Rosendhal 2492–93; Meell 2706–07). Accordingly, the examiner finds that fleet maintenance facilities are not rebuilders, but repair shops.

3. *Automotive Electrical Units*

43. An automotive electrical unit (hereinafter referred to as "units") is any item sold separately by a rebuilder for use on self-propelled land vehicles (CX 36 c; Erwin 573; Smith 608; Winters 1183; Butchkes 2286, 2290, 2309–10). The Federal Trade Commission, in the Trade Practice Rule for the "Rebuilt, Reconditioned and Other Used Automotive Parts Industry," defined "automotive" parts as including any item designed for "an automobile, truck, motorcycle, tractor or similar self-propelled vehicle" (RX 56 a). Units include generators, alternators, starters, armatures, starter drives, solenoids, voltage regulators, stators, and rotors (Erwin 573; Smith 602–03, 608; Gelberg 647; Feldman 709–10; Shelly 773, 775–76; Woodruff 790–91, 806; DeBlase 833–34, 840; Vander Veen 892–93, 913, 920–21; Eurich 1413; Butchkes 2286; Ledbetter 3398, 3862).

4. *Parts For Automotive Electrical Units*

44. A part consists of any item purchased by a rebuilder for incorporation in units which he rebuilds (Smith 583, 608; Shelly 760–61, 766, 773; Woodruff 806; Vander Veen 913, 920–21; Winters 1183).

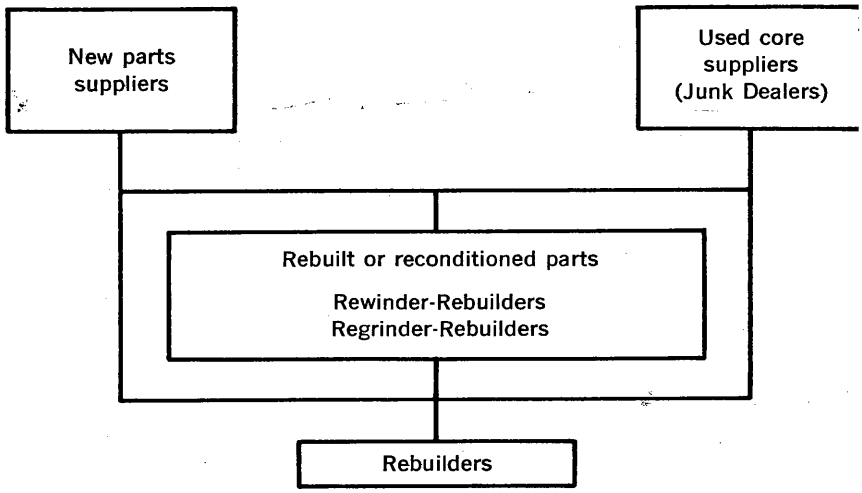
5. *Cores*

45. A core is an inoperative unit used by a rebuilder as his prime source of used parts. Used parts are not readily usable in the rebuilding process at the time of their receipt by rebuilders. Before used parts can be reused by rebuilders, the cores must be disassembled and the parts therefrom sorted, cleaned, inspected and tested. Only a percentage of the used parts meet satisfactory standards to be commingled with similar parts for subsequent use in the rebuilding process. The unusable parts and cores are discarded or sold as scrap (CX 37 f; Erwin 542; Smith 581, 623; Feldman 716; Shelly 755; Woodruff 796, 799, 802, 815–16; DeBlase 843; Vander Veen 900, 919–20; Butchkes 2291; Ledbetter 3427, 3436). Cores constitute the most fundamental source of supply for rebuilders. Rebuilders could not continue profitably in business without the availability of used cores (Smith 623–24; Feldman 733, 740; Woodruff 816; Vander Veen 920). Rebuilders obtain approximately 85 percent of their cores from their customers in exchange for rebuilt units (Smith 602; DeBlase 843, 873; Vander Veen 920; Kamber 1043; Ledbetter 3427). The remaining 15 percent of cores are obtained by rebuilders from junk dealers, firms which specialize in the sale of used units and occasionally used parts (Smith 620; Shelly 780; Kamber 1043; McGuire 1293–94; Fallen 1460; Ledbetter 3428).

B. *Supply of Items to Rebuilders*

46. The firms supplying rebuilders are divided into three groups: suppliers of new parts, suppliers of used cores and suppliers of rebuilt parts. There is no dispute that new and used parts are physically interchangeable with one another; however, as hereinafter found, each of the three groups has significant distinct and different price and marketing characteristics which place them in separate competitive categories (see Findings 48 to 58).

47. The following chart shows the relationship of these principal sources of supply to rebuilders:



48. In 1964, rebuilders purchased complete used cores from junk dealers. In that year, rebuilders were generally unable to purchase used parts (Erwin 540, 542–44; Smith 619; Gelberg 692–94; Shelly 768, 780; Woodruff 804; McGuire 1293–94; Fallen 1460; Wolf 3693–94).

49. Junk dealers sell on a local or regional basis, whereas rebuilder suppliers of new parts generally compete on a nationwide basis (RX 80 c; Erwin 531, 542; Smith 619; Gelberg 665; Feldman 722, 732; Woodruff 815; Flynn 935; Green 987; Kamber 1016; Gordon 1156; Winters 1184; McCullough 1243; Fallen 1452; Goldblatt 3350; Fischer 3974).

50. Such used parts as were available in 1964 were sold by junk dealers (Gelberg 692–95; McGuire 1290, 1293–94; Wolf 3640–41, 3645–46).

51. The suppliers of new parts and the suppliers of used parts compete in separate and distinct markets (Smith 599–601, 639–40; Fischer 4244). The suppliers of new parts either did not sell used parts and cores or had *de minimis* sales (CX 274 a, Hubert Products sold both new and used items, with used accounting for no more than 2 percent; Erwin 565–66; Smith 592, 620; Gelberg 659; Green 999–1000; Winters 1218; McCullough 1248). Conversely, with very few exceptions, the suppliers of used parts did not supply new parts (Erwin 544; Gelberg 661; Feldman 716; DeBlase 845; Vander Veen 926; Winters 1218; Wolf 3640–41, 3646; Ledbetter 3879).

52. The price of a new and a used item for the same application differs so substantially as to exclude competition between the two items (DeBlase 880; Kamber 1057; Broadwell 1087–88; McCullough 1248; Fischer 4244). In general, the price of the used item is between 50 percent and 75 percent less expensive than the price of the same new item (Shelly 767–68, 779, 782–84; DeBlase 2952; Goldblatt 3351, 3364; Wolf 3699; Fischer 4061–62). Rebuilders purchased used items whenever such items were available in preference to new items (Shelly 783–84; Woodruff 796, 818, 823, 850; Vander Veen 896, Broadwell 1087; Winters 1225–26; Goldblatt 3361; Ledbetter 3436–37). Rebuilders will continue to purchase such used items even though the price of the same item may vary considerably from time to time (Shelly 779–84).

53. Junk dealers neither employ salesmen nor provide catalogs or price sheets to rebuilders (Smith 605–06, 637; Feldman 720; Vander Veen 926; Wolf 3653–54, 3671).

54. Core prices in the short run may vary considerably based upon availability. New parts are not subject to such short term price fluctuations (Smith 602; Shelly 772). The price trend of new and used parts over the long term differs remarkably. A given used item inevitably decreases in price as time passes. In contrast, the new item which fits a similar application shows a steady price increase over time (Smith 601–02; Feldman 726; Shelly 772; Woodruff 805; DeBlase 858–59; Vander Veen 904; Broadwell 1088, 1091 a; Winters 1197, 1222–24; Wolf 3676–77, 3682–83; Fischer 4061–62).

55. Cores and used parts are not available for many late model applications for which rebuilders need parts (CX 37 f; Erwin 544–45; Smith 597–98; Gelberg 693–94; Feldman 717, 722; DeBlase 845–46; Winters 1226).

56. Rebuilders regularly use only new parts for several items which they replace during the rebuilding process (Erwin 540, 544; Smith 592, 636; Feldman 717; Shelly 780; Woodruff 799, 802–03; Winters 1223, 1225–26; Ledbetter 3437; see also Finding 23).

57. The price of a new and a rebuilt or reconditioned item for the same application differs so substantially as to exclude competition between the two items. In general rebuilt items sell for 25 percent to 50 percent less than a comparable new item (Smith 636; Gelberg 668; Feldman 737, 741–42, 744; Shelly 759, 777–79;

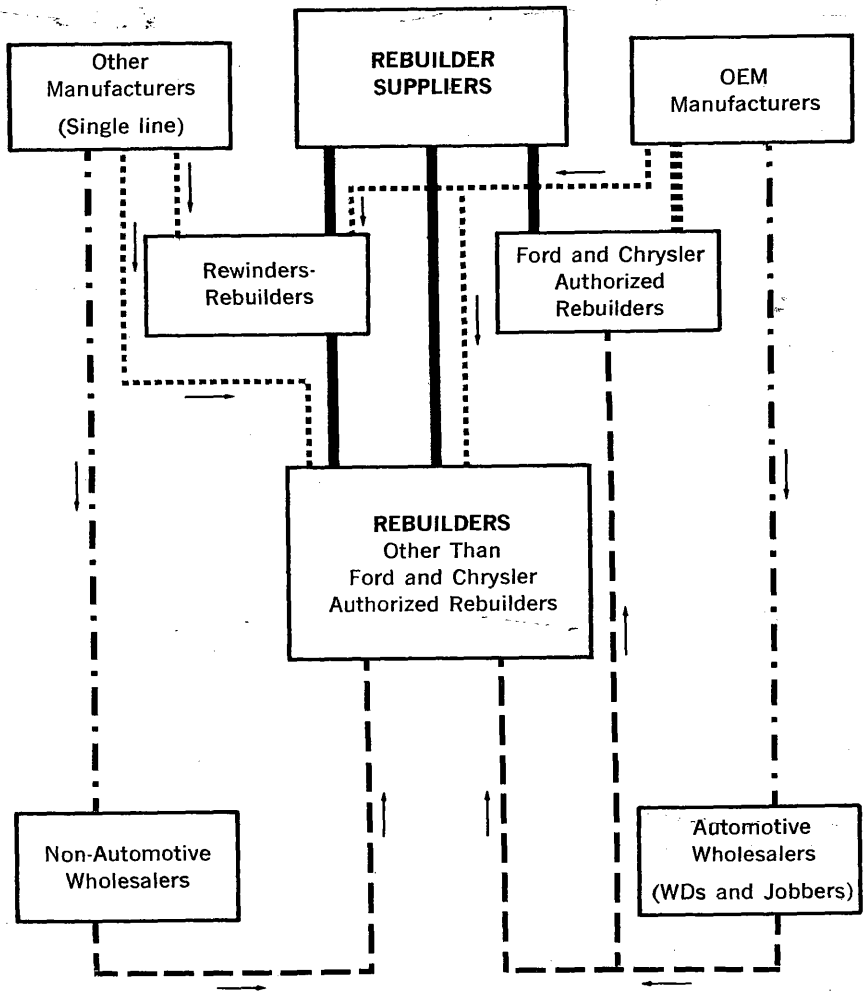
Woodruff 816; DeBlase 846–48; Vander Veen 925–26; Flynn 979; Kamber 1023; Winters 1183; Butchkes 2294, 2297–98; Ledbetter 3425–26; Levine 5028). Rebuilders purchased rebuilt items whenever such were available in preference to new items (Smith 612–13; Shelly 778; Woodruff 829; DeBlase 847–48; Vander Veen 896; Butchkes 2297–98; McGuire 2443; Ledbetter 3425).

58. Rebuilt and reconditioned items supplied to other rebuilders should also be excluded from any consideration of the supply of various parts, materials and equipment to rebuilders, because each supplier of a rebuilt item to another rebuilder is also a purchaser of new or used parts, materials and equipment. If the sales of rebuilt items were included in determining the total supply of parts, materials and equipment to rebuilders, one would be counting the value of the supply twice—once for the new and used parts consumed by the first rebuilder and again when the rebuilder resells the item to another rebuilder (Woodruff 808–09; Kamber 1016–17; Winters 1183; Butchkes 2294). Accordingly, the examiner finds that used core suppliers (junk dealers) and the suppliers of rebuilt or reconditioned parts (rewinders of armatures, rotors and stators and regrinders of bearings) should not be included in the relevant product market (suppliers of new parts to rebuilders).

C. Rebuilder Suppliers

59. The 1964 sources of new items for rebuilders are illustrated by the following chart:

1964 SOURCES OF NEW ITEMS FOR REBUILDERS



KEY:

- Rebuilder supply market.
- Rebuilder supply market—sales by Ford and Chrysler to their authorized rebuilders.
- Primary channels of distribution.
- Occasional insubstantial sales to a few of the largest rebuilders.
- Emergency and convenient insubstantial sales.

60. The 1964 sales of new parts, materials and equipment to domestic rebuilders by rebuilder suppliers selling *primarily* to rebuilders were:

Company	Sales	Market Share	Source
	($000)	(%)	
IPM	11,353	57.4	CX 26B, CX 45, Mansfield 2116–18
Ace	2,200	11.1	Weiss 4797, 4804–05, 4835 [1]
Valley Forge	1,856	9.4	Fischer 3976
Vulcan Motor Products	750–1,000	5.0	Green 987
VMC & Rebuilders Supply Co.	1,000	5.0	McCullough 1243
Carwin Sales	511	2.6	Winters 1179, 1182–83 [2]
Butts Electric Supply Co.	438	2.2	Flynn 935
American Starter Drive Service	425	2.1	Kamber 1018
Ennis Automotive, Inc.	167	.8	Fallen 1452, 1458
Preferred Electric & Wire Corporation	100–150	.8	CX 273A
Lincoln Bearing Co.	138–165	.8	Levine 5050–51, 5055
Starter Service Company, Inc.	128	.6	CX 272A [3]
Los Angeles Commutator	122	.6	RX 80
Precision Field Coil Co.	95	.5	Erwin 530, 536
Jamison Parts	less than 70	.4	Broadwell 1096
Hubert Products	55	.3	CX 274A
Rich Engineering Co.	46	.2	CX 271A
TOTAL	19,781	100.0	

[1] See also Broadwell 1075; and Gordon 1154.

[2] Includes $341,250 in sales of solenoids which may not have been utilized as parts by rebuilders.

[3] Sales made through Automatics, Inc. and include transfers to Starter Service Co., Inc.

61. In 1964, each of the above rebuilder suppliers had salesmen or sales representatives which called on rebuilders (Erwin 532; Smith 605; Feldman 719–20; Shelly 752; Flynn 935–36, 942; Green 989; Gordon 1156; Fallen 1455; A. Johnson 2533; Fischer 4069; Weiss 4834). Rebuilder suppliers engage in research and development of new methods and products for the rebuilder (CX 50 s; CX 96 a; CX 119, page DGP 88; CX 274 b15; Winters 1190).

62. In 1964, these rebuilder suppliers sold new parts, materials and equipment directly to rebuilders at the same price level. In that year, the three major rebuilder suppliers, after IPM, Ace Electric Company (hereinafter "Ace"), Valley Forge and Vulcan Motor Products (hereinafter "Vulcan"), equalized freight charges in order to have similar prices and compete with the dominant rebuilder supplier, IPM (Erwin 533–34; Gelberg 653–54, 657–58; Woodruff 802; Vander Veen 902; Green 996; Broadwell 1110–11; Fallen 1453–54; Butchkes 2326; Fischer 4103).

63. The smaller and medium size rebuilder suppliers base their prices on the prices charged by the four major rebuilder suppliers (Erwin 533–34; Fallen 1454).

64. Rebuilder suppliers sell their new parts in bulk (CX 54; CX 55; CX 138; Erwin 541; Vander Veen 902; Flynn 945; Fischer 4068).

65. Rebuilder suppliers have specialized catalogues and price sheets for rebuilders listing the items which they have available for sale (CX 51 z13; CX 53; CXs 67–78; CX 98 a–c; CX 139; CX 140; CX 273; CX 274 b15; RX 29 a–c; RX 80 a–d; Smith 637; Gelberg 657; Flynn 947, 965; Green 989).

66. In 1964, rebuilder suppliers only offered parts for automotive electrical units. In order to rebuild nonelectrical units such as water pumps, a rebuilder would have had to purchase from suppliers other than rebuilder suppliers (Smith 597; Gelberg 652; Feldman 720; Vander Veen 907).

1. *The Four Major Suppliers*

67. Prior to the acquisition of IPM by Avnet, the top four rebuilder suppliers accounted for $16,409,000 in sales or 82.9 percent of 1964 total sales by suppliers selling primarily to rebuilders (Vander Veen 902; Gordon 1160–61; Findings 60, 73).

68. The uncontradicted testimony of almost every rebuilder witness, as well as other witnesses, was that in 1964 and for a number of years prior thereto, four firms, *viz*, IPM, Ace, Valley Forge and Vulcan, were the major suppliers of new parts, materials and equipment to rebuilders. It is undisputed that of these four, IPM was the largest rebuilder supplier (Erwin 531–32, 534, 553; Smith 582, 586, 605, 608–09; Gelberg 653, 689; Feldman 711–13; Shelly 750; Woodruff 795, 796–97; DeBlase 838–39, 841; Vander Veen 896–97, 902; Flynn 936, 943–44; Green 987,

989–90; Broadwell 1084, 1092; Gordon 1160; Winters 1184; McCullough 1245–47, 1250, 1258; Fallen 1452–54, 1465; Brock 1525; Butchkes 2299, 2322–23; A. H. Johnson 2529–31; Ledbetter 3905–06; see also CX 36 c; CX 37 d; CX 44 a–b).

69. In 1964, the four major suppliers furnished rebuilders with between 64 percent and 97 percent of their new parts requirements (Shelly 750–51; Woodruff 797; DeBlase 837, 839, 841; Vander Veen 896–97, 902; Gordon 1160–61; McGuire 1289–1300; Butchkes 2321–23; A. Johnson 2533).

70. In 1964, rebuilders purchased between 34 percent and 80 percent of their total requirements of new parts, materials and equipment from the four major suppliers (Smith 582–84, 610–12; McGuire 1289–1300; Butchkes 2331).

71. In 1964, each of these four major suppliers supplied a wide range of parts to rebuilders and were the only suppliers of such a wide range of parts to rebuilders (Erwin 553; Gelberg 657; Feldman 726; Woodruff 797, 802; DeBlase 840–41; Flynn 943–44; Green 987–88, 990; Gordon 1156; McGuire 1290, 1292–93; Fallen 1453–54). Numerous witnesses testified that IPM had the widest range of parts available to rebuilders. One witness testified:

> Yes. I think probably after looking at the availability of parts then it became very evident to me that if I really wanted something and didn't want to hunt for it I could find it at IPM. IPM's salesmen were convenient to the telephone, they were prompt on delivery, their stores were great, their supplies were adequate, and it simply was for the same reason that you might go to a supermarket instead of to the corner grocery store. (Smith 586; see also Erwin 553; Flynn 943; Broadwell 1084; Gordon 1160; Mansfield 1908–13; Butchkes 2321–23; Ledbetter 3905).

72. In 1964, Ace furnished rebuilders with "Interchange Lists" showing how part numbers of its major competitors, IPM and Valley Forge, interchanged with those of Ace (CX 51 c–z12; Gordon 1162).

73. In 1964, most of the domestic sales by three of these four major suppliers were made to rebuilders with one-quarter to one-third of Vulcan's sales being made to rebuilders (CX 23 c; CX 45; CX 46 a; Green 986–87; Broadwell 1078–79; Gordon 1157). A very minor percentage of these companies' domestic sales went to nonrebuilder customers. Although IPM sold some nonrebuilders, no reliable figures for these sales were submitted (Mansfield 1937–47, 1981, 1983–87, 1998, 2038, 2141–51, 2252–69; cf. CX 290).

74. In 1964, these four major suppliers were the only sources, other than wholesalers, from which a nonfactory authorized rebuilder could obtain a substantial number of necessary new parts including categories such as end frames, drive end housings and other iron castings and kits (CX 20; CX 21; CX 37 a–c; Erwin 540; Smith 591; Feldman 716; Shelly 758; Gordon 1157–58; Winters 1190, 1194; McGuire 1294).

75. Without these four major suppliers, particularly IPM and Valley Forge, rebuilders could not remain in business at a profit (CX 36 b; Smith 598; Gelberg 660; Feldman 721–22; Woodruff 797–98, 801; DeBlase 859).

2. *The Other Non-OEM Suppliers*

76. The 13 other non-OEM rebuilder suppliers suffered many competitive disadvantages in competing with the four major broad-line suppliers:

(a) Salesmen are difficult for these other suppliers to obtain (Erwin 532–33, 556).

(b) It is more difficult for rebuilders to achieve the lowest freight charges and reduce other costs when dealing with several nonmajor rebuilder suppliers instead of one full-line major supplier (Erwin 556–57; Feldman 723; Green 991; Broadwell 1110; Gordon 1159–60; McCullough 1275, Fallen 1454; DeBlase 2929–30).

(c) These other non-OEM rebuilder suppliers cannot offer package deals or discounts, whereas the four major suppliers can (Flynn 938–39; Fallen 1454; Winters 1187).

(d) Collections from rebuilders are more difficult for the nonmajor suppliers (Winters 1185).

(e) It is more convenient for a rebuilder, especially a medium or small size rebuilder, to place one order for all his needs with one of the four major suppliers (Erwin 556; Smith 586, 609; Gelberg 657; Feldman 721–22; Shelly 752; Woodruff 797–98, 801–02; Vander Veen 902; Flynn 938; Green 991; Kamber 1027; Broadwell 1102; Gordon 1159; Winters 1192; McCullough 1252; Fallen 1454).

3. *OEM Suppliers*

77. In 1964, OEM manufacturers had total sales of new parts to rebuilders of $664,000 of which $610,000 was to their authorized rebuilders (see Findings 78–91).

78. In 1964, Ford Motor Company did not engage in rebuilding units (Closser 1424). In that year, Ford Motor Company had sales to rebuilders of $500,000 (Closser 1427).

79. All of these Ford Motor Company sales were to 24 authorized Ford rebuilders (CX 286 o; CX 37 e; Closser 1425; Wolski 5141). The authorized Ford rebuilders were under contract with Ford Motor Company which permitted them to use the Ford trade name (CX 2; Closser 1425–26; Ensor 5206–07). Under these contracts, Ford Motor Company had the power to determine the source from which its authorized rebuilders could obtain their parts (CX 2; Erwin 547; Kamber 1019; Ensor 5213–17). In 1964, all of the units rebuilt under the Ford name were sold to Ford Motor Company dealers (Closser 1424–25). In that year, Ford Motor Company had a policy against selling parts directly to nonauthorized rebuilders (CX 286 o, p, u, v; DeBlase 842; Closser 1425; Butchkes 2302, 2327; Ledbetter 3455–56; Wolski 5140–43).

80. Chrysler Corporation did not rebuild any units in 1964 (Eurich 1412). In that year, it only made sales of parts to five rebuilders, all under contract with Chrysler Corporation to supply its dealers and wholesalers with rebuilt units under the MoPar trademark, a trademark owned by Chrysler Corporation (CX 1; Eurich 1413–14, 1416). In 1964, Chrysler Corporation's sales of electrical parts to these five rebuilders were considerably less than $60,000 (Eurich 1415). Chrysler Corporation had a policy against selling directly to nonauthorized rebuilders in 1964 (DeBlase 842; Eurich 1416; Butchkes 2302, 2327).

81. General Motors Corporation (hereinafter "GM") made direct sales to only one rebuilder in 1964. The amount of such sales was $50,000, most of which consisted of parts used to rebuild starter drives sold to GM (Kulesa 1338–39). In 1964, GM had a policy against selling directly to rebuilders (DeBlase 842; Keesee 1359; Butchkes 2302–03, 2327).

82. GM, through its Delco-Remy Division (hereinafter "D-R"), was engaged in the rebuilding of units. Most of the items used by D-R in its rebuilding operations were manufactured by D-R. The remainder of the parts used by D-R was procured from the stock of parts used by D-R to produce new units. No separate accounting was made for parts procured for use in D-R's rebuilding operation, either for parts which D-R manufactured or those which it procured (Kulesa 1333, 1335–36, 1339).

83. Robert Bosch GMBH supplies and has supplied new, original equipment electrical units for Volkswagen, Mercedes-Benz, Volvo, Porsche, Saab, Ford Pinto, Lincoln Capri and Opel (Stevens 3099, 3143). In 1964, its subsidiary, Robert Bosch Corporation of the United States, made direct sales amounting to less than $5,000 to only one rebuilder, Arrow Armature, who utilized such parts in rebuilding Robert Bosch units (Stevens 3101, 3121–22).

84. Robert Bosch Corporation of the United States does not consider IPM to be a competitor (Stevens 3138).

85. In 1964, Robert Bosch Corporation of the United States rebuilt some units (Stevens 3125, 3144). All of the parts used in its rebuilding operations were new parts imported directly from Robert Bosch GMBH's foreign plants (Stevens 3128–29).

86. Joseph Lucas, Ltd. supplies and has supplied new, original equipment electrical units for vehicles produced by British Leyland Motors, such as Triumph, MG and Jaguar (Burgess 3527). In 1964, its subsidiary, Lucas Electrical Services, Inc., made an insignificant amount of sales directly to rebuilders in the United States (Burgess 3535–36, 3538, 3557). The parts sold by Joseph Lucas, North American and its predecessor, were primarily used in rebuilding units originally produced by Joseph Lucas, Ltd. (Burgess 3555).

87. The Prestolite Company (hereinafter "Prestolite"), a division of Eltra Corporation, made insubstantial direct sales to rebuilders in 1964. Prestolite's direct sales to rebuilders were $7,193 in 1964 (Bauerschmidt 4343). In that year, Prestolite made sales in excess of $5 to only three rebuilders (Bauerschmidt 4342, 4376).

88. In 1964, the Bendix Corporation had direct sales to rebuilders of starter drive parts of $41,748 (R. Johnson 3063). All of these sales were made to two customers (R. Johnson 3066).

89. The Leece-Neville Division, VLN Corporation and Motorola Automotive Products, a division of Motorola, Inc., made no direct sales to rebuilders in 1964 (Hill 3176, 3190; Noonan 3831, 3833).

90. OEM suppliers are properly excluded from the rebuilders supply industry by subparagraph 1(c) (2) of the complaint since in 1964 the big three, GM, Ford and Chrysler, without exception refused to sell parts directly to independent rebuilders and the sales by other OEMs were insignificant.

91. Since 1964 there has been no change in policy by the big three OEM suppliers regarding direct sales to independent rebuilders. Only insignificant changes have occurred in the pattern of direct selling by some of the other OEM suppliers (Stevens (Bosch) 3101—1970 direct sales to rebuilders were $46,000 and for the first five months of 1971 were $36,000, 40 percent of which was for complete units, not parts, 3123—Bosch required a minimum bulk quantity, 3140—the volume of most rebuilders was not sufficient to buy from bosch; Noonan (Motorola) 3833—insignificant competition in 1969 with IPM, 3840—sold only one rebuilder (Arrow) parts in 1970; Bauerschmidt (Prestolite) 4344—in 1969 sold only three rebuilders: Accurate $132; National Lease $7,489; Arrow $5,851, 4376—sales of $308,766 to Flint Armature were for marine application only; Johnson (Bendix) 3083—Bendix doesn't sell small rebuilders or small quantities, 3087—only the ten largest rebuilders in 1970 were qualified to buy from Bendix, 3089—several of these ten were authorized rebuilders for Bendix).

D. *Other Manufacturers (Occasional or Single Line Suppliers of New Parts, Materials and Equipment)*

92. In 1964, rebuilders made occasional purchases from other manufacturers whose primary business is nonautomotive. Such other manufacturers generally confine their sales to a few large rebuilders and one product line (RX 83 *in camera;* Kirkwood 3489; Perkins 3613, 3632; Atwater 4278; Kling 4544; Fleming 4600; Ainsworth 4726–27, 4730–31; Ingald 5286–87, 5291, 5323). Such sales to rebuilders generally were an insignificant percentage of the total overall sales of such other manufacturers (Bashe 3369, 3380; Kirkwood 3476, 3489; Perkins 3623–24; Atwater 4296; Ainsworth 4744; Ingald 5273). Individually and in combination, the sales of such other manufacturers to rebuilders were not substantial (Gelberg 698–99; Green 1000–01; Broadwell 1126; Bashe 3380; Kirkwood 3489; Perkins 3608, 3623–24; Atwater 4278; Kling 4562; Fleming 4600; Ainsworth 4731; Boydston 4758, 4786–87; Ingald 5273). Such other manufacturers, in the view of Harris Fischer, vice-president of Avnet and president of the Valley Forge Division, "* * * would continue to exist but it is reasonable to conclude that they could not progress to a point of being real competition" (CX 44 a).

93. All of the witnesses in the category of other manufacturers were called by respondent. The following chart indicates their composition.

Company	Type of Business	Amount of Sales To Rebuilders In 1964	Percentage of Sales to Rebuilders to Total Sales
Belden Corporation	Wire Manufacturer	Sales to rewinders $389,938; some resold (Atwater 4273, 4282).	Less than 1% (Tr. 4296)
Phelps Dodge Magnet Wire Co.	Wire Manufacturer	$414,400 (Ainsworth 4730–31). Policy to only sell accounts directly with $50,000 or more of purchases per year (Tr. 4738). Only sells to five rewinders (Tr. 4730–31).	1% (Tr. 4744)
Essex International	Wire Manufacturer	No figures (Simon 5489).	1% (Tr. 5524) Classifies sales to rebuilders as practically nothing (Tr. 5525)
Electrical Specialty Co.	Wire Distributor	Sold two rewinders, estimated amount $6,000 (Boydston 4758, 4762, 4782–83, 4787).	Estimate 1% at best (Tr. 4786)
Torrington Co.	Bearing Manufacturer	RX 79 *in camera*	2/10 of 1% (Tr. 3608, 3623–24, 3634)
American Koyo Corp.	Bearing Manufacturer	No figures (Fleming 4588–89). Sales to three rebuilders $19,951 (Tr. 4600). Rebuilder customers resell (Fleming 4579, 4582, 4587, 4600), largest rebuilder customer resells (Tr. 4614–15).	No basis for computation
SKF Industries	Bearing Manufacturer	$37,631 (Ingald 5287, 5291; see also CX 289).	3/100 of 1% (Tr. 5277)
Nubro Corporation	Regrinder	$8,935 (Brock 1506–07).	100% of sales of new parts and equipment (Tr. 1507). (Principal business regrinding bearings)

Company	Type of Business	Amount of Sales to Rebuilders In 1964	Percentage of Sales to Rebuilders to Total Sales
Holcombe Armature Co.	Rewinder	$62,299 (sales of four new parts) (Holcombe 4506, 4510–12).	100% of new parts sales (Principal business rewinding generator armatures)
Kirkwood Commutator Co.	Commutator Manufacturer	$22,611 (Kirkwood 3489).	1/2 of 1% (Tr. 3476)
Dobbins Manufacturing Co.	Brush Manufacturer	No figures (Kling 4533, 4564). Definitely sold one rebuilder $25,000 (Kling 4562) but rebuilder resold some (Tr. 4581–82; see also Holcombe 4487–88).	No basis for computation.
Oakite Products, Inc.	Solvent Manufacturer	No 1964 sales (Tucker 4308). 1969 sales $12,700 (Tucker 4312).	4/100 of 1% 1969 (Tr. 4324)
Baron Blakeslee, Inc.	Equipment Manufacturer	$66,000 (Bashe 3380).	1/2 of 1% (Tr. 3369, 3388)
Snap-On Tools Corp.	Handtool Manufacturer	No figures (Weiss 4468).	No basis for computation.

94. The examiner finds that four of these suppliers were large copper wire companies or distributors of wire with total sales to rebuilders of approximately $660,000, three were bearing companies with approximate sales of $192,000, two were rebuilders with limited redistribution sales of new parts of $42,000 after elimination of double counting, and one each was a brush manufacturer (no figures for 1964), a commutator manufacturer with approximately $22,000 worth of sales, a seller of solvents (no figures for 1964), a tool manufacturer (no figures for 1964) and an equipment manufacturer with $66,000 worth of sales, for a total combined figure for all these companies of $982,000 which in almost all cases, with the exception of the rewinder and regrinder witnesses, represented no more than 1 percent of such companies' total sales.

Respondent throughout its proposed findings and briefs strongly urges that a survey commissioned by it identified over 1,000 additional rebuilder suppliers. Curiously enough neither the survey nor the list of 1,000 was offered into evidence, although the man responsible for its preparation was called as a witness, and testified as to the 1,000 figure (Gunn 5058–5112, 5087–90; see also RPF 229, cf. RPF 616). Since the survey was prepared for and in the possession of respondent, the names of the alleged additional 1,000 rebuilder suppliers were known only to respondent. Respondent had ample opportunity during the many months of discovery granted to it to cull the list. The examiner must infer that the 14 other manufacturers called by respondent were carefully chosen from the list of 1,000 and represent the most important and significant additional suppliers it could identify apart from its rather extensive independent knowledge of the industry as the principal competitor meeting its competitors in the market place.

In view of the foregoing, the hearing examiner finds that these 14 witnesses were, with the exception of the rewinders and regrinders which have already been excluded from the market, only incidentally engaged in supplying rebuilders and at best were insignificant suppliers whose total dollar volume of sales would not materially alter the overall dollar value of the rebuilder suppliers market. The examiner also finds that complaint counsel's failure to include these 14 companies, as well as any other wire, bearing, commutator, brush, solvent, equipment, handtool companies supplying rebuilders as merely an incidental portion of their overall business, does not materially alter the overall

structure of the rebuilder suppliers industry as set forth in Finding 60.

E. *Wholesalers*

95. Some rebuilders make occasional purchases of new parts, materials and equipment from wholesalers including warehouse distributors and jobbers (hereinafter "wholesalers") primarily from those wholesalers who handle OEM brands of parts (Smith 590; Gelberg 655; Feldman 715; Woodruff 798; DeBlase 842; Vander Veen 898–99; Kamber 1020; Butchkes 2301).

96. Such wholesalers charge prices to rebuilders considerably in excess of the prices charged by rebuilder suppliers (CX 36 a; CX 37 e; Erwin 534, 537–39, 541; Smith 590–91, 642; Gelberg 655; Feldman 715; Woodruff 798; DeBlase 843; Vander Veen 899; Broadwell 1080, 1082; McCullough 1248; Butchkes 2302, 2325–26; McGuire 2453; A. Johnson 2529; Weiss 4845; Gilbert 4913, 4967–68).

97. Rebuilders purchased from such wholesalers only those items unavailable from rebuilder suppliers or items needed on an emergency basis (Erwin 541; Smith 590–91; Gelberg 655; Shelly 754, 761, 776; DeBlase 842–43; Vander Veen 899; Kamber 1020; McCullough 1249; McGuire 1294, 1296, 1302; Butchkes 2302, 2326, 2330; Ledbetter 3861; see also Finding 28).

98. Parts sold by such wholesalers are packaged individually or in small quantities rather than in bulk (Erwin 541; DeBlase 856; Fischer 4068–69, 4236).

99. Rebuilders could not produce a rebuilt unit for a lower price than a new unit if they had to buy exclusively from wholesalers (CX 36 b; Smith 598–99; Gelberg 655–56, 660; Feldman 715, 727–28; Woodruff 797–98; Vander Veen 900; Broadwell 1082; Gordon 1159; Winters 1227; Butchkes 2330).

100. Wholesalers do not offer all of the items needed by rebuilders (CX 36 a; CX 37 e; Smith 590–91; Woodruff 798, 803–04; Kamber 1018–19, 1026, McGuire 1302–03; Butchkes 2330; A. Johnson 2529; R. Johnson 3076; Bauerschmidt 4353–55).

101. In 1964, wholesalers' salesmen, in general, did not call on rebuilders (Smith 607; Gelberg 655).

102. No accurate estimate of sales by wholesalers to rebuilders is contained in the record, but based on the witnesses' testimony, the examiner finds that sales by wholesalers do not con-

stitute a significant competitive factor in the rebuilder suppliers market.

F. *Conclusionary Findings Re Line of Commerce*

103. The relevant line of commerce in this proceeding consists of direct sales by rebuilder suppliers of new parts, materials and equipment to rebuilders (Findings 18–102).

104. A relevant subline of commerce in this proceeding consists of direct sales by rebuilder suppliers to rebuilders, excepting direct sales by original equipment manufacturers (OEM) to their authorized rebuilders who, pursuant to an agreement with that OEM supplier, rebuild and furnish automotive electrical units to said supplier or its designee (Findings (77–91). The examiner also finds that supplies furnished to their own divisions for "in-house" rebuilding by OEMs is also included in such exception (see Findings 82, 85; Complaint ¶ 1(c)(2)).

105. In 1964, sales of new parts, materials and equipment by rebuilder suppliers directly to rebuilders, exclusive of sales by OEMs to their authorized rebuilders, constituted a recognized market (CX 36; CX 37; CX 44; CX 46; CX 52 a–b; CX 67–CX 78; CX 88 p; CX 119, page DGP88; CX 167 d; CX 286; RX 69; McCullough 1244; Fischer 4154–55; Bauerschmidt 4338).

III. THE GEOGRAPHIC MARKET

106. The only relevant section of the country or geographic market in which to determine the probable competitive effects of Avent's acquisition of IPM is the United States as a whole, and there are no geographic relevant submarkets (CX 275).

IV. CENSUS OF MANUFACTURERS

107. The 1967 Census of Manufacturers Report contains no data on direct sales to rebuilders in 1964 or 1967 (CX 270 a–z–11).

108. The Census of manufacturers reported total net sales (CX 270 z–7 "Value of Shipments") of rebuilt generators, alternators, starters and voltage regulators of $67.8 million in 1967 (CX 270 f, w, x, y). Sales of rebuilt armatures, starter drives, solenoids, stators and rotors were not reported (CX 270).

109. New parts purchases by rebuilders account for approximately 15 percent to 35 percent of sales by rebuilders (Smith

581–82; Gelberg 653; Feldman 714; DeBlase 837–38; Vander Veen 898; Butchkes 2299).

110. Using the foregoing Census of manufacturers figures, total new parts purchases by rebuilders for use in rebuilding generators, alternators, starters and voltage regulators in 1967 were between $10 million and $25 million.

111. Sales by rebuilders increased substantially between 1964 and 1967 (CX 39; Gelberg 649, 651, 683; DeBlase 836–37; Vander Veen 893–94, 902–03; Butchkes 2287).

112. Although there are no Census of manufacturers' figures for 1964, the examiner finds that the Census data substantially corroborates the approximately twenty (20) million dollar figure (Finding 60) of direct sales to rebuilders in 1964.

V. CHANGING STRUCTURE OF THE REBUILDERS SUPPLY INDUSTRY

113. Since 1964, the structure of the rebuilders supply industry has been altered through a series of mergers and acquisitions.

114. Ace, the second largest firm in 1964, was acquired by Xebec Corporation in 1965, which was acquired by Susquehana Corporation in 1968 (Broadwell 1075; Weiss 4792). In 1970, the Echlin Manufacturing Company acquired the assets of Ace (Stipulation Tr. 5655–56).

115. In 1967, Jamison Parts, a supplier of shafts, was acquired by Ace, in part to strengthen Ace's position in the rebuilders supply industry (Broadwell 1096–97).

116. In 1966, Vulcan was acquired by the Casco Products Division of Standard-Kollman Industries (Green 986).

117. In 1967, Butts Electric Supply, Inc., was acquired by Essex International, Inc., (Flynn 930). Subsequently, Butts Electric Supply, Inc., which became Region 9 of Essex's IWI Division (Flynn 929–30), downgraded the supply of parts and materials to rebuilders (Flynn 962).

118. Postacquisition evidence adduced by respondent relating to the changing pattern of sales, new entrants, expansion of lines and sales by firms presently in the market, etc., was fragmentary, inconclusive and relatively insignificant particularly in comparison to the increase in combined sales of IPM and Valley Forge as divisions of Avnet.

VI. COMPETITIVE EFFECTS

A. *Elimination of Competition.*

119. Prior to the acquisition, IPM and Avnet (Valley Forge) competed for sales to rebuilders (CX 275). The nature and extent of this competition, as well as the predicted competitive effects after the acquisition, are set forth in two memoranda (CX 36; CX 44) prepared by Harris Fischer, an Avnet director and vice-president, the president of Avent's Valley Forge Division and formerly operating head of Valley Forge prior to its acquisition by Avnet (Fischer 888, 3962–64).

Fischer testified that CX 36 and CX 44 were typed by him at his home merely for his own information, were placed in a desk drawer in his house and were not submitted to anyone (Fischer 4153). However, these memoranda were typed after Fischer held a preliminary meeting in Chicago with Mansfield in August 1964 (Fischer 4152; see also Finding 17), a few days before an Avnet board of directors meeting held on February 15, 1965 for the purpose of considering the proposed acquisition of IMP, which was attended by Fischer (Fischer 4221) and at which meeting Fischer comprehensively briefed the board of Avnet on the rebuilders supply industry and IPM in particular (Fischer 4150, 4154, 4221, 4229–30; see also 4226–27; CX 285 b). Moreover, Fischer admitted that he gave Mr. Scheib, a member of the board and the acquisition committee (Fischer 4155, 4231), a list of competitive suppliers (CX 37 a–f), discussed with Mr. Scheib various aspects of the proposed merger prior to the board meeting (Fischer 4229–30), and that Mr. Scheib addressed the board at this meeting on various aspects of the proposed merger including competitive conditions in the industry (Fischer 4155, 4221–22, 4229). Fischer also reluctantly agreed that the thoughts expressed in CX 36 and CX 44 were clearly in his mind at the time he attended the board meeting to consider the acquisition of IPM (Fischer 4222–23).

120. Fischer, who had been in the rebuilders supply business since 1946 (Fischer 890) expressed his view of the anticipated results of the acquisition of IPM by Avnet as follows:

The acquisition of IPM would serve chiefly to remove our most major competitor from the scene (CX 44 a).

The biggest benefit would unquestionably be the removal of the competition that has existed and of the massive duplication of effort that has taken place (CX 36 b).

121. In 1964, IPM and Avnet served many common customers (Smith 582–83; Gelberg 653; Feldman 713; Shelly 750; Woodruff 797; Vander Veen 896, 912; McGuire 1289–90; Butchkes 2307; A. Johnson 2516, 2530; Ledbetter 3458–59).

122. In that year, IPM as the largest and Avnet–Valley Forge as the third largest supplier of new parts to rebuilders, accounted respectively for 57.4 percent and 9.4 percent of such new parts sold to rebuilders (Shelly 750; Woodruff 797; DeBlase 837, 841; Vander Veen 896–97, 902; Flynn 944; Gordon 1160–61; McGuire 1289–1300; Butchkes 2321–23; A. Johnson 2533; see Findings 14, 60, 68).

123. The elimination of competition between Avnet's Valley Forge Division and IPM by Avnet's acquisition of IPM was reflected in a conversation subsequent to the acquisition between the sales manager of Avnet's IPM Division and Smith, general manager of Champion Armature. Smith testified that the sales manager told him, "* * * that they now owned Valley Forge and that if we wanted to play poker, they had the only poker game in town" (Smith 629).

B. *Competitive Advantage*

124. One of the primary objectives of the acquisition of IPM by Avnet was the elimination of price competition between the two firms. IPM's sales manager, Jim Paschal, expressed his reaction to this elimination of price competition, as follows:

> * * * we would not have to make price concessions to compete with one another in the manner we have done in the past, and thus enhancing the overall profit of the Corporation. (CX 35 c).

Harris Fischer also expressed his views on the subject as follows:

> We have glossed over the natural inherent advantages of elimination of bitter price competition for this is taken for granted, but the benefits should not be discounted. (CX 36 d).
>
> The acqusition of IPM would serve chiefly to remove our most major competitor from the scene. This would reduce to an overwhelming extent the price competition that is a major factor in the industry. In many cases severe competition has held profit margins on key items to a reduced level owing to the ability of two firms to offer substantially the same item at the same price. (CX 44 a).

125. The acquisition also contemplated the end of certain special discounts which IPM gave some of its customers. As expressed by Harris Fischer:

IPM has been very active in offering preferential discounts to large customers which Valley Forge has been obligated to meet (CX 44 a).

126. Such discounts indeed were eliminated subsequent to the acquisition (Smith 586–87, IPM discontinued discounts; Woodruff 802, Valley Forge also discontinued its discounts).

127. Avnet, absent the acquisition of IPM, had executive and engineering talents to challenge IPM's dominant position in the supply of new parts, materials and equipment to rebuilders (CX 44 a–c).

128. The acquisition of IPM by Avnet lead to a decrease in the Valley Forge Division's role in the rebuilders' supply industry and a shift in sales emphasis of the Valley Forge Division toward those products sold by that division which were not in competition with the products sold by IPM (CX 35 c).

129. Contrary to Fischer's general testimony that after the acquisition Valley Forge and IPM operated independently through separate divisions of Avnet (Fischer 3963–64; RX 128 a–b) and competed vigorously (Fischer 4147–49, 4158–61), the record shows that between 1964 and 1969 Valley Forge's sales of ignition parts increased more than 10 times from $184,260 to $2,185,131 (Fischer 4006, 4232) and that during the same period its sales of rebuilder parts moderately increased from $1,798,766 to $1,870,750 (Fischer 3976, 4006, 4166, 4233). These figures amply support the statements contained in Mr. Fischer's "Appraisal of the IPM Acquisition" (CX 36) wherein he commented on the possible shift in emphasis by the Valley Forge Division after the acquisition as follows:

Recognize that both Valley Forge and IPM have toolrooms where the same tools, dies and jigs are being made and then visualize freeing tooling time from one division to make products designed to penetrate another field (CX 36 b).

As a conclusion to the above comments, the freeing of duplicated effort would afford one company the vital time and energy to pursue other fields where there has been no penetration because of duplicated effort. *Thus, if IPM would assume the major burden in the rebuilding field and Valley Forge in the other fields, we would develop a major expansion into areas where neither of us penetrate right now.* (CX 36 c) (Emphasis supplied).

Finally, Fischer concluded:

Should we acquire IPM, we would have reached an impregnable point provided we took appropriate steps to maintain our position. *At this point only Ace Electric and Vulcan Motor Products would remain as replacement suppliers of any consequence.* (CX c) (Emphasis supplied).

130. Shortly after the acquisition of IPM by Avnet, the general sales manager of IPM, Jim Paschal, wrote Mr. Mansfield suggesting a split in the markets referred to above as follows:

> Having become a part of the Avnet Corp. it is reasonable to believe that International Products & Mfg. Co. will be able to show where it would be extremely profitable for Valley Forge to concentrate on the redistribution outlet for their products, and International Products & Mfg. Co. to concentrate on the rebuilding industry for their outlet.
>
> This way, we would not have to make price concessions to compete with one another in the manner we have done in the past, and thus enhancing the overall profit of the corporation. (CX 35 c).

C. *Increase in Concentration*

131. The acquisition of IPM by Avnet increased the dominant position of Avnet–IPM in the supply of new parts, materials and equipment to rebuilders, raising Avnet's share in that market to 67 percent (see Finding 60). As stated by Harris Fischer:

> In short, it would be reasonable to conclude that the acquisition of IPM would place us in a dominant position and probably beyond reach of any newcomer. (CX 44 a).
>
> The summation would indicate that by acquiring our major competitor we would at a single jump achieve dominance in a growing field and occupy a powerful position to uplift profit levels. (CX 44 b).

The combined market share of IPM and the Valley Forge Division of Avnet in 1964 was six times the market share of Ace, the next largest supplier of new parts, materials and equipment to rebuilders and thirteen times the market share of Vulcan. Due to the acquisition, the concentration ratio for the top four firms in the supply of new parts, materials and equipment to rebuilders increased from 83 percent to 88 percent, or an increase of 5 percent for the top four firms (see Finding 60).

132. Avnet's acquisition of IPM, the dominant firm in the industry for many years, reduced the major rebuilder suppliers from four to three and the Avnet–IPM combine was further entrenched as the dominant firm and placed it beyond the reach of any potential entrant (CX 44 a–b; Flynn 947; Findings 68 and 133, *infra*).

D. *Barriers to Entry*

133. The acquisition of IPM by Avnet increased the already substantial difficulties any new entrant or present competitor wishing to expand would have to meet in order to begin the sale of new parts, materials and equipment to rebuilders. Fischer ex-

pressed his views on this subject in no uncertain terms as follows:

By combining Valley Forge and IPM it is very unlikely that any other company could arise to become a substantial competitive factor. The amount of tooling required on older numbers with reduced sales would preclude anybody making the investment which would be very unsound. It is always possible that original equipment manufacturers would choose to enter the field with tremendous sums available for the job to be done but in light of experience, it is not likely that they would embark on a program of tooling where the items to be made were hardly likely to show amortization of the investment. In order to become a factor any newcomer would have to make a very substantial investment in order to give sufficient coverage. To start from scratch and become a factor we estimate the minimum figure of three to four million dollars which would not afford full product coverage. In addition we estimate that this project would involve several years in which time new items would undoubtedly be introduced that would make the problem more complex and expensive. In short it would be reasonable to conclude that the acquisition of IPM would place us in a dominant position and probably beyond reach of any newcomer (CX 44 a).

Fischer in his testimony repeated that an investment of 3 to 4 million would be required to tool up (Fischer 4170). Fischer admitted he knew of no one who has invested that amount since 1964 (Fischer 4171). Fischer also was asked:

HEARING EXAMINER JACKSON: Do you know of anybody in your terminology who had full product coverage that had entered the field since '64? (Tr. 4172).

THE WITNESS: No, your Honor, I cannot. (Tr. 4173; see also Gelberg 659).

134. Other rebuilder suppliers cannot match the advertising and promotional expenditures of IPM and the Valley Forge Division (Erwin 545–47; Flynn 945–46).

DISCUSSION

The major thrust of respondent's defense is twofold: the appropriateness of the product market set forth in the complaint and the size of that market.

The Relevant Market

Respondent contends that the demand side of the relevant product market should not only include rebuilders (Findings 18–33) but (a) repair shops, electrical specialty shops and service

stations (Findings 34–40); (b) fleet "rebuilders" (Finding 42); (c) warehouse distributors and jobbers (Finding 41); (d) OEM authorized rebuilders (Findings 79, 80, 81); and (e) OEMs engaged in in-house rebuilding (Findings 82, 85). Respondent also contends that the supply side of the market should not only include rebuilder suppliers of new parts (Findings 60–76) but also suppliers of used, rebuilt or reconditioned parts (Findings 48–58), OEM suppliers of new parts (Findings 77–91), occasional or single line suppliers of new parts (Findings 92–94); wholesale distributors including OEM warehouse distributors and jobbers (Findings 95–102).

The guidelines for determining the appropriate product market or submarket were laid down by the Supreme Court:

> The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. However, within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes * * * The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes and specialized vendors. Because Section 7 of the Clayton Act prohibits any merger which may substantially lessen competition in *any* line of commerce (emphasis supplied), it is necessary to examine the effects of a merger in each such economically significant submarket to determine if there is a reasonable probability that the merger will substantially lessen competition. If such a probability is found to exist, the merger is proscribed. *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 325 (1962).

It is now well established that it is not necessary for each of the seven criteria set forth in *Brown Shoe* to be present in every merger case in order to establish a market. A relevant market has been found to exist where three or less of the *Brown Shoe* criteria were present. *United States* v. *E. I. du Pont de Nemours & Company*, 353 U.S. 586, 593–95 (1957); *General Foods Corporation* v. *Federal Trade Commission*, 386 F.2d 936, 941 (1967); *Reynolds Metals Co.* v. *Federal Trade Commission*, 309 F.2d 223 (D.C. Cir., 1962).

The examiner recognizes that rebuilding and repair (custom rebuilding) processes have certain similarities, but he has considered many other factors which must be analyzed before a firm can be classified as a rebuilder. Some of these factors are the ownership, marking, pricing, stocking and sale of the unit,

the type of customer to whom the unit is sold, and the source of supplies (Findings 18–42).

In 1964, the rebuilders supply industry was recognized as a separate entity by its members and numerous rebuilders testified that their very existence depended upon rebuilder suppliers such as IPM and Avnet (Findings 35, 75, 105). In 1964, all significant suppliers of new items directly to rebuilders, except the OEMs, specialized in sales to rebuilders. Such suppliers had salesmen or sales representatives specifically calling on the rebuilding trade and offering rebuilders specialized catalogues and price sheets (Findings 61, 65). In contrast, junk dealers neither employed salesmen nor provided catalogues or price sheets to rebuilders (Finding 53). Likewise, wholesalers' salesmen, in general, did not call on rebuilders (Finding 81).

In 1964, rebuilder suppliers sold the bulk of their items to a distinct class of customers—rebuilders—and these customers purchased the major portion of their new items from such suppliers (Findings 28, compare Finding 34 (e); 51, 69, 70, 71, 73).

In 1964, rebuilder suppliers sold rebuilders new items at distinct prices which were substantially lower than those charged by the primary alternative source of supply of such new items, *i.e.*, wholesalers. Rebuilders testified that if they had to purchase their requirements of new items from wholesalers exclusively, they could not profitably offer their rebuilt unit at a competitively lower price than a new unit (Findings 62, 96, 99).

In 1964, the prices charged by rebuilder suppliers for new parts were substantially higher than the prices charged by suppliers of used, rebuilt or reconditioned parts. This difference in price between new and either used or rebuilt parts was so substantial that rebuilders used new parts only when used or rebuilt parts of acceptable quality were unavailable (Findings 52, 54, 57).

In 1964, several peculiar characteristics existed in the supply of new parts, materials and equipment by rebuilder suppliers to rebuilders:

(1) Rebuilder suppliers, in general, sold to rebuilders in bulk, whereas wholesalers made their limited sales generally to rebuilders in individual packages. Rebuilders preferred to purchase in bulk rather than in individual packages for at least two reasons: parts sold in bulk are less expensive as they do not have a packaging cost included in their price, and rebuilders

can save the labor cost of unpacking parts by purchasing in bulk (Findings 64, 98).

(2) Rebuilders never utilized certain used parts in their rebuilding operations but always utilized new parts instead of used parts in these instances (Findings 23, 56).

(3) For late model applications, rebuilders were primarily forced to use new parts due to the unavailability of used parts for such applications (Finding 55).

(4) Junk dealers did not compete with rebuilder suppliers because (a) the price of a new item and a used part for the same application differed substantially, (b) junk dealers sold almost exclusively complete used units (cores) instead of individual used parts, and (c) junk dealers don't always have available the necessary individual parts (Findings 45, 48, 51, 52, 54, 55).

(5) Rebuilders could obtain from rebuilder suppliers necessary new items that were unavailable from wholesalers (Finding 100).

New and used parts exhibit different price trends as well as differences in price sensitivity both over the short term and long term (Findings 52, 54).

In support of its contention that used (including rebuilt and reconditioned) parts should be included in the relevant line of commerce, respondent places great reliance on *United States* v. *Aluminum Co. of America,* 148 F.2d 416 (2d Cir. 1945) in which Judge Learned Hand held that "secondary" (used) aluminum ingot competed directly with "virgin" (new) aluminum ingot (RB 20).

In quoting from Judge Learned Hand's opinion (148 F.2d 416 at 424) respondent made no reference to that portion of the opinion concerning the price difference between "virgin" and "secondary" or used aluminum ingots where Judge Hand stated:

> * * * the difference in price is ordinarily not very great; the [District] Judge found that it was between one and two cents a pound, hardly enough margin on which to base a monopoly. Indeed, there are times when all differential disappears, and "'secondary" will actually sell at a higher price * * *. (148 F. 2d 416 at p. 424).

In subsequent decisions the courts have emphasized that price differentials are important in separating markets for antitrust purposes. Judge (now Chief Justice) Burger stated in *Reynolds Metal Company* v. *F.T.C.* 309 F.2d 223, 229 (D.C. Cir. 1962),

We think price differentials have an important if not decisive bearing in the quest to delimit a submarket * * * * Such a difference in price as appears on this record must effectively preclude comparison, and inclusion in the same market, or products as between which the difference exist, at least for purposes of inquiry under Section 7 of the Clayton Act.

Two years after *Brown Shoe* the Supreme Court stated:

* * * to ignore price in determining the relevant line of commerce is to ignore the single, most important, practical factor in the business. (*United States* v. *Alcoa*, 377 U.S. 271, 276 (1964).)

In the present case the record amply supports the fact that there are substantial price differences between new and used or rebuilt parts (Findings 52, 54, 57).

Applying the foregoing criteria laid down by the courts, the examiner is of the opinion that the supply of new parts to rebuilders by rebuilder suppliers constitutes a reasonable and appropriate product market in which to measure the legality of Avnet's acquisition of IPM.

Size of the Relevant Market

Respondent contends that complaint counsel have failed to sustain their burden of proving the size of the "rebuilders supply industry" (RB 49–58).

In a recent decision the Commission, under remarkably similar circumstances to the instant case, discussed the degree to which the size of a product market must be ascertained. In that opinion the Commission stated:

* * * In industries such as the one involved here, where there is a central "core" of major firms surrounded by a score or more of relatively unimportant local or regional producers, really precise market data can be prohibitively expensive and burdensome to obtain. As the Supreme Court said in *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 343 (n. 69), "although appellant may point to technical flaws in the compilation of these statistics, we recognize that in cases of this type precision of detail is less important than the accuracy of the broad picture presented." See also *Luria Bros.* v. *Federal Trade Commission*, 389 F. 2d 847, 858 (CA–3, 1968), *cert. denied*, 393 U.S. 829 (1968). We think it quite unlikely that this group of experienced executives in the giftwrap industry was substantially inaccurate in its identification of the major competitors it faces in the marketplace and its overall assessment of the general order of their aggregate share of the market in question. (*Papercraft Corp.*, 3 CCH Trade Reg. Rep. ¶ 19,725 at p. 21779–80 (FTC 1971) [78 F.T.C. 1352].)

Counsel supporting the complaint, as part of its case-in-chief

submitted sales figures for 17 rebuilder suppliers (Finding 60). Testimony from practically every rebuilder witness, as well as other witnesses, was that in 1964 and for a number of years prior thereto, four firms, IPM, Ace, Valley Forge and Vulcan were the major suppliers of new parts, materials and equipment to rebuilders (Finding 68). Respondent in its defense called 14 other manufacturers who were occasional or single line suppliers of new parts, materials and equipment to rebuilders (Findings 92, 93). The examiner found that these additional suppliers accounted for an insignificant share of the market and at best were only incidentally engaged in the rebuilder suppliers market (Finding 94). Based on the record as a whole, the complaint counsel's data appears to be relatively accurate, particularly in light of the fact that admittedly the four major firms account for the bulk of purchases by rebuilders (Findings 69, 70, 71). Moreover, complaint counsel's market figures are corroborated by the Census of Manufacturers Report (Findings 107, 112). Under the guidelines laid down by the Commission in the *Papercraft* decision and cases cited therein, the examiner believes that complaint counsel have sufficiently identified the major competitors in the product market and their individual and aggregate share of the market in question. Although respondent may point to some technical flaws in the compilation of these statistics, there is no substantial evidence that this would change the fact that IPM was number one in sales with approximately six times the market share of its nearest competitor Ace, and that Valley Forge, the third largest supplier, had sales roughly equivalent to that of Ace (Findings 60, 131).

Anticompetitive Effects

Respondent maintains that complaint counsel have failed to sustain their burden of proving any reasonable probability of anticompetitive effects resulting from the acquisition by Avnet of IPM (RB 59–74).

The Commission's observations regarding "competitive injury" set forth in their decision in *Papercraft* appear equally applicable here. In that decision the Commission stated:

> The acquisition involved in this proceeding is so far outside the pale of permissible combinations that, even if we accepted respondent's efforts to expand the universe figure to double or more the figure we believe to be reasonably correct and to place the two firms in question in separate

"submarkets" of the overall gift-wrap field, we would still be constrained to enter an order restoring this acquired firm to its former status as a separate full-line gift-wrap producer. No matter how the product markets (or submarkets) might be defined, the facts still would remain, as noted, that the 1st and 2nd largest gift-wrap manufacturers have been combined into one; that the combination thus created is more than twice the size of the next-largest competitor; that those two firms were the most likely entrants into all aspects of gift-wrap production; that the number of significant firms in the industry has been decreasing; that the trade expects this trend to continue, with only four significant firms ultimately remaining in the industry; and that there is no prospect for any new firms to enter the industry in the future. The case law simply does not sanction acquisitions of this kind. (*Papercraft Corp.*, 3 CCH Trade Reg. Rep. ¶ 19,725 at p. 21781 (FTC 1971) [78 F.T.C. 1352, 1409].)

In the instant case the largest competitor has been eliminated which in and of itself would be sufficient proof of injury to competition. Moreover, the combination of the largest supplier with the third largest supplier beyond question would increase substantially the previously existing high levels of concentration in the industry. Furthermore, the acquisition would discourage new entrants into an industry where the barriers to entry were already formidable and would entrench respondent Avnet as the dominant firm in the industry (Findings 119, 134).

The Remedy

It is well settled that the choice of the remedial order is committed to the discretion of the Commission. *F.T.C.* v. *Mandel Bros.*, 359 U.S. 385, 392–93 (1959); *Miresk Industries, Inc.* v. *F.T.C.*, 278 F.2d 337, 343 (7th Cir. 1960), *cert. denied*, 364 U.S. 883 (1960); *L. G. Balfour Company* v. *F.T.C.*, 442 F.2d 1 (7th Cir. 1971). The Commission has the power to order divestiture to restore competition to the state of health it might be expected to enjoy but for the acquisition. *F.T.C.* v. *Dean Foods Co.*, 384 U.S. 597, 606 n. 4 (1966); see *Pan American World Airways Inc.* v. *United States*, 371 U.S. 296, 312–13 nn. 17 and 18 (1963); *Ekco Products Company*, 65 F.T.C. 1204, 1214–17 (1964). The remedial phase of antitrust cases is crucial and the primary focus of inquiry as to remedy is whether the relief adequately redresses the economic injury arising out of the violation. *U.S.* v. *E. I. du Pont de Nemours & Co.*, 366 U.S. 316, 326, 327. Moreover, "once the government has successfully borne the considerable burden of establishing a violation of law all doubts as to the remedy are to be resolved in its favor." *U.S.* v. *du Pont,*

supra, 334. Generally, the most appropriate remedy to redress a Section 7 violation is divestiture. *F.T.C.* v. *Procter & Gamble Co.,* 386 U.S. 568 (1967).

Respondent urges that the cease and desist order proposed by complaint counsel in several respects is punitive in nature and wholly unprecedented. Indeed, respondent points out that several of the proposed provisions are more stringent than those contained in the proposed order incorporated in the complaint. In short, respondent takes issue with four major provisions in the order: (1) the inflexible requirement that respondent divest IPM together with all additions, improvements and earnings accumulated subsequent to acquisition (¶ 1 of the Proposed Order); (2) the absolute prohibition against respondent's making *any* acquisition until divestiture is accomplished (¶ 3 of the Proposed Order); (3) the ban of unlimited duration on future acquisitions of firms engaged in businesses outside the line of commerce which complaint counsel contend is relevant to this proceeding (¶ 4 of the Proposed Order); and (4) the requirement that respondent file compliance reports every 30 days until divestiture is accomplished and annually thereafter as long as it exists (¶ 5 of the Proposed Order).

Respondent's objection to the language in Paragraph One of the proposed order that IPM be divested "together with all additions and improvements to IPM which have been added to IPM and all earnings therefrom subsequent to the acquisition," is that this provision is arbitrary, unduly rigid and unprecedented. The tests to be applied to the divestiture of after-acquired property is generally whether such property is required to assure that the divested company can function as a going independent concern and whether such relief is necessary to restore competition to the state in which it existed prior to the acquisition. The respondent has been unable to discover any Commission order directing the divestiture of postacquisition earnings of the company to be divested. In fact the Commission recently specifically deleted such a provision from the hearing examiner's order in *Matter of The Stanley Works,* 3 CCH Trade Reg. Rep. ¶ 19,646 at 21,706 (FTC 1971) [78 F.T.C. 1023]. Similarly, the Commission itself has recognized that divestiture of after-acquired property is appropriate only where absolutely essential to assure the viability of the divested company (*In the Matter of Crown Zellerbach Corporation,* 55 F.T.C. 769 (1957), *aff'd* 296 F.2d 800 (9th Cir. 1961), *cert. denied,* 370 U.S. 937

(1962); see also ¶ 1 of the order in *Stanley Works, supra.*) Accordingly, the hearing examiner has revised the language in Paragraph One of the proposed order submitted by complaint counsel to make more explicit the kinds of assets that Avnet is required to divest, and has eliminated the phrase with respect to after-acquired earnings to which respondent objected.

Respondent's second exception to the proposed order would prohibit it from acquiring any concern in the United States, regardless of its business, until divestiture of IPM has been accomplished. This provision is seemingly without precedent, as complaint counsel has cited no authority or basis for such a provision and it was not a part of the proposed order contained in the complaint. Furthermore, it appears that this provision is punitive in nature and wholly unnecessary to accomplish any legitimate purpose. Accordingly, the examiner has eliminated Paragraph Three of the proposed order.

Respondent's third objection is to Paragraph Four of the proposed order by complaint counsel which would prohibit respondent from every acquiring or obtaining the market share of any firm "engaged in the business of manufacturing and/or supplying parts, materials, equipment, and other products to automotive electrical unit rebuilders." Respondent urges that this paragraph is impermissibly broad in two respects: (1) it contains absolutely no time limitations; and (2) its prohibition is far broader than the relevant line of commerce as alleged in the complaint. A similar ban of unlimited duration against acquisitions without prior approval of the Commission was sought by complaint counsel and adopted by the examiner in *The Stanley Works* matter but modified by the Commission to incorporate a ten-year ban. Complaint counsel have set forth no peculiar facts which would justify such a provision in this matter. With respect to the proposed injunction barring respondent from acquiring or obtaining the market share of firms engaged in businesses outside the line of commerce found as alleged in the complaint, complaint counsel, although they have not so stated, presumably are requiring such a provision in view of Avnet's position as an important manufacturer and marketer of replacement parts for sale in the automotive aftermarket as well as its acquisition of more than 20 companies in the past ten years, including a number of profitable concerns engaged in the manufacturing and marketing of automotive parts and machinery (see Findings 2, 3). In short, respondent has the resolve, capability and market

proximity to enter this market. Under these circumstances, it appears to the examiner that a ban on the acquisition of *all* manufacturers and/or suppliers of new parts, materials and equipment to *rebuilders* is closely related to the violation found herein since Avnet is a potential entrant into such market and necessary to insure against further violations of the same or similar nature by the respondent in order to protect competition. The examiner has deleted the unlimited ban against acquisitions and substituted therefor a period of ten years.

Respondent objects to Paragraph Five of complaint counsel's proposed order requiring compliance reports every 30 days as punitive and a "clear departure from established Commission precedent." The examiner disagrees (see *Matter of Stanley Works,* ¶ 3 of the Order [78 F.T.C. 1023, 1054]). Respondent also objects to the requirement contained in Paragraph Five that annual reports describing the nature of all future acquisitions be made. In light of the respondent's expansion program through merger and acquisition over the past ten years, the hearing examiner is of the opinion that this requirement is not unreasonable and should be retained. As modified, the complaint counsel's proposed order is hereinafter adopted.

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction of and over respondent and the subject matter of this proceeding.

2. At all times relevant in this proceeding, respondent Avnet and IPM were corporations engaged in "commerce" as defined by Section 7 of the Clayton Act, as amended.

3. As stipulated by the parties, the entire United States is the appropriate geographic market, or "section of the country," within which to consider the alleged competitive effects of the merger of Avnet and IPM under Section 7 of the Clayton Act, as amended.

4. The direct sales by rebuilder suppliers of new parts, materials and equipment to rebuilders, excepting direct sales by original equipment manufacturers to their authorized rebuilders who, pursuant to an agreement with that OEM supplier, rebuild and furnish automotive electrical units to said supplier or its designee, is an appropriate product market, or line of commerce, within which to consider the alleged competitive effects of the

merger of Avnet and IPM under Section 7 of the Clayton Act, as amended.

5. The effect of the acquisition by Avnet of IPM has been, or may be, substantially to lessen competition or tend to create a monopoly in violation of Section 7 of the Clayton Act, as amended (15 U.S.C. 18).

ORDER

1. *It is ordered,* That respondent Avnet, Inc. (hereinafter "Avnet"), a corporation, its successors and assigns, shall divest all stock, assets, properties, rights, privileges and interests of whatever nature, tangible and intangible, acquired by Avnet as the result of its acquisition of the assets and business of Guarantee Generator & Armature Co., d/b/a International Products & Manufacturing Co. (hereinafter "IPM"), together with all additions and improvements to IPM which have been added to IPM subsequent to the acquisition, so as to assure that IPM is reestablished as a separate, effective and viable competitor engaged in the business of manufacturing and/or supplying of parts, materials, equipment and other products to independent automotive electrical unit rebuilders. Such divestiture shall be absolute, shall be accomplished no later than one year from the effective date of this order, and shall be subject to the prior approval of the Federal Trade Commission.

2. *It is further ordered,* That pursuant to the requirements of Paragraph 1 above, none of the stock, assets, properties, rights, privileges and interests of whatever nature, tangible or intangible, acquired or added by Avnet, shall be divested, directly or indirectly, to anyone who is at the time of the divestiture an officer, director, employee or agent of, or under the control, direction or influence of Avnet or any of Avnet's subsidiaries or affiliated corporations or who owns or controls more than one (1) percent of the outstanding shares of the capital stock of Avnet.

3. *It is further ordered,* That for a period of ten (10) years from the date this order becomes final, Avnet shall cease and desist from acquiring, directly or indirectly, without the prior approval of the Federal Trade Commission, the whole or any part of the stock, share capital, assets, any interest in or any interest of, any concern, corporate or noncorporate, engaged in the business of manufacturing and/or supplying parts, materials,

equipment and other products to automotive electrical unit rebuilders, nor shall Avnet enter into any arrangement with any such concern by which Avnet obtains the market share, in whole or in part, of such concern in the above described product lines.

4. *It is further ordered,* That Avnet shall, within thirty (30) days after the effective date of this order, and every thirty (30) days thereafter until Avnet has fully complied with the provisions of this order, submit in writing to the Federal Trade Commission a verified report setting forth in detail the manner and form in which Avnet intends to comply, is complying or has complied with this order. All compliance reports shall include, among other things that are from time to time required, (a) the steps taken to accomplish the required divestiture; and (b) copies of all documents, reports, memoranda, communications and correspondence concerning or relating to the divestiture.

With respect to Paragraph 4 of this order, Avnet shall on the first anniversary date of the effective date of Paragraph 4 and each anniversary date thereafter, submit a report, in writing, listing all acquisitions and mergers made by it, the date of every such acquisition or merger, the products involved and such additional information as may from time to time be required.

5. *It is further ordered,* That Avnet notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

DISSENTING STATEMENT

BY DENNISON, *Commissioner:*

I find myself unable to agree with the majority's treatment of the relevant product market. Unlike most market definition issues, the problem is not whether the products of the acquiring company compete with those of the acquired; rather, the issue is the size of the product market in order to determine whether there is the substantial lessening of competition by the acquisition of a competitor. To establish a violation of Section 7, complaint counsel must prove that the merger between the two

electrical equipment suppliers substantially lessened competition in that line of commerce.

Complaint counsel maintain that the relevant product market is the new automobile electrical component parts sold to production-line rebuilders.

The majority approaches this issue of product market from two perspectives: Companies which make up the demand side, and those who compose the supply side. On the demand side, for example, the majority limits rebuilders to only those employing a production-line method and not engaged in "in-house" production of component parts. On the supply side, the Commission restricts its consideration of market size to exclude respondent's competitors who utilized used or rebuilt parts (as opposed to new parts), original equipment manufacturers who sell to rebuilders, suppliers of single line items and those who did not sell "primarily" to rebuilders. In each instance the majority determined either the competition was outside the relevant product market or, if within, was negligible. I am not persuaded by the evidence that such is the case.

I cannot agree with the majority's view that complaint counsel has met his burden in demonstrating the size and dimension of the relevant line of commerce. While I may subscribe to the general proposition that the Commission does not have the burden of listing all and every competitor in order to determine the market, there must be a sufficient treatment of the factors in such market to meaningfully show what share the respondent enjoys *vis-a-vis* its competition. This record does not adequately treat the type or number of respondent's competitors, nor does it show their size.

While embracing the teaching of *Brown Shoe,*[1] the majority carries the guidelines to the extreme. There may well be industry recognition of "production-line" rebuilders on the demand side of the market. Recognition of such a different production system is, according to the majority, tantamount to a separate submarket. However, recognition alone is a distinction without necessarily a difference.

With respect to the majority's use of the distinct pricing structure in establishing the relevant market, again I am unconvinced. For instance, the majority opinion itself concedes that demand for "new" component parts is substantially diminished when "used" parts are available. (Slip Opinion p. 18 [pp. 456–57

[1] *Brown Shoe Co.* v. *United States*, 370 U.S. 294.

herein]) What better evidence can there be of cross-elasticity of demand? See *Papercraft Corp.*, Docket No. 8779, Slip Opinion p. 8, n. 22 (June 30, 1971 [78 F.T.C. 1372, 1402]).

The majority's curious market definition closely approximates what Justice Fortas once described as a "strange red-haired, bearded, one-eyed man-with-a-limp classification." [2] I am unable to support this tortured definition of product market and, therefore,

I dissent.

[2] *United States* v. *Grinnell Corp.*, 384 U.S. 563, 585.

OPINION OF THE COMMISSION

BY KIRKPATRICK, *Commissioner:*

This matter is before the Commission pursuant to respondent's appeal from the administrative law judge's initial decision holding Avnet's acquisition of Guarantee Generator and Armature Co., d/b/a International Products and Manufacturing Co. (IPM), in violation of Section 7 of the amended Clayton Act, 15 U.S.C. Section 18 (1970).[1]

In his initial decision, the judge found that the horizontal acquisition not only eliminated Avnet's largest competitor but entrenched it as the dominant supplier of new parts, materials, and equipment to rebuilders of automotive electrical units [2] with a market share more than six times greater than that of its

[1] The following abbreviations are used for citations:
I.D.—Initial decision of administrative law judge (Findings cited by paragraph number; conclusions cited by page number).
Tr.—Transcript of testimony
CX—Commission exhibit
RX—Respondent exhibit
HE—Hearing Examiner's (administrative law judge's) exhibits
Res. App. Br.—Brief on Appeal of respondent
Ans. Br.—Answering brief of complaint counsel
Rep. Br.—Reply brief of respondent
RPF—Respondent's proposed findings

[2] The relevant line of commerce pleaded in the complaint and found by the judge (I.D. 103 [p. 425 herein]) is the "rebuilders' supply industry." Simply stated, that industry consists of those firms supplying new parts, materials, and equipment directly to firms engaged in rebuilding automotive electrical units. The judge also found a relevant subline of commerce consisting of the rebuilders' supply industry but excluding sales by suppliers to rebuilders that produce units for the supplier or its designee. (I.D. 104, 105 [p. 425 herein]). As defined in the complaint, "automotive electrical units" refers to generators, alternators, starters, starter drives, armatures, solenoids, and voltage regulators. (Amended complaint 1(a)). *See* note 21 [pp. 454–55 herein], *infra*.

The geographic market, about which there is no dispute, is the nation as a whole.

leading competitor.[3] In the judge's opinion, Avnet's acquisition of IPM, the largest firm in the market, only six months after Avnet had entered the market by purchasing Valley Forge (VF), the third largest supplier of rebuilders, would tend to: (1) decrease substantially the previous price competition in the industry, (2) permit a division of markets between IPM and Valley Forge, and (3) discourage new entry into an industry where barriers to entry were already formidable. Quoting from the Commission's *Papercraft* opinion, Dkt. 8879 (June 30, 1971) at p. 16, *aff'd*, No. 71–1681 (7th Cir., January 25, 1973), the judge concluded (I.D. p. 43 [p. 436 herein]):

> The acqusition involved in this proceeding is so far outside the pale of permissible combinations that, even if we accepted respondent's efforts to expand the universe figure to double or more the figure we believe to be reasonably correct * * *, we would still be constrained to enter an order restoring the acquired firm to its former status * * *. The case law simply does not sanction acquisitions of this kind.

On the basis of the violation found, the judge issued an order requiring divestiture of IPM and prohibiting Avnet from acquiring, without prior Commission approval, any firms supplying automotive electrical unit rebuilders for a period of ten (10) years.

On appeal, respondent challenges principally the judge's definition of the relevant line of commerce, his determinations on the size of that market, and finally his finding that the acquisition tended to lessen competition. More specifically, respondent contends that the relevant market should include: (1) the sales to all categories of automotive electrical unit rebuilders, not just those who rebuild on a "production-line" basis (Res. App. Br. at 10–17; Rep. Br. at 2–6); (2) the sales of used and rebuilt as well as new components utilized in rebuilding (Res. App. Br. at 17–28; Rep. Br. at 3); and (3) sales of original equipment manufacturers' (OEMs) new parts by wholesale distributors (Res. App. Br. at 28–32; Rep. Br. at 3). The respondent also argues that the evidence on the size of the market presented by complaint counsel is extremely unreliable and that, therefore,

[3] In his initial decision, the judge determined that the challenged acquisition increased Avnet's share of the market from 9.4 to approximately 67 percent. (I.D. 60, 131 [pp. 414, 430 herein]). Furthermore, the concentration ratio for the top four firms increased as a result of the acquisition from 83 to 88 percent of the market. (I.D. 131 [p. 430 herein]). Although these findings are based on the submarket, we note that for the line of commerce as a whole, the market-share figure would only be approximately 3 percent less. *See* page 7, [p. 448 herein], *infra*.

surveys of respondent which allegedly represent a more complete analysis of the market were wrongfully excluded. (Res. App. Br. 40–53; Rep. Br. 5–15). Finally, respondent contends that the judge placed undue weight on preacquisition documents prepared by Avnet executives in evaluating the probable anticompetitive effects of the merger. (Res. App. Br. 55–59; Rep. Br. 15–20).

We have carefully considered all of respondent's arguments in light of the record and the initial decision and have concluded, for the reasons stated below, that the judge's findings and conclusions are fully supported by the evidence and applicable case law. Therefore, we hereby adopt, except to the extent noted in this opinion, the findings and conclusions contained in the initial decision and the order prepared by the judge.

I. THE REBUILDING INDUSTRY AND ITS SUPPLIERS OF NEW PARTS

The rebuilding of automotive electrical units [4]—generators, starters, voltage regulators, and, in more recent years, alternators—grew out of the depression. At that time, the economic situation created a unique opportunity for those entrepreneurs who could rebuild an electrical unit with parts salvaged from several used inoperative units (referred to by the industry as "cores") and sell their product at a fraction of the price of a new unit. Today, with the technological sophistication of the industry, the increased consumer acceptance of rebuilt automotive units and the availability of new and rebuilt component parts, the rebuilder has become, in a very real sense, a manufacturer with a special niche in the automotive aftermarket. Because rebuilders provide the motoring public with a cheaper alternative of comparable quality to the new units produced by the OEMs [5], the rebuilding industry represents a viable competitive challenger

[4] Today, components of these four electrical units, such as armatures, rotors, solenoids, starter drives and stators, are also rebuilt on a major scale. (Rebuilt armatures, rotors, and stators are commonly designated "rewound.") These rebuilt components are largely produced for the purpose of being incorporated into the larger units by a rebuilder, although some are sold directly into the automotive aftermarket as finished goods. Consequently, there are today two levels in the rebuilding industry, one supplying the other. Several large rebuilders operate exclusively at one level, while others produce both rebuilt component parts and larger rebuild units.

[5] Rebuilt units are generally sold to the consumer at prices 30–40 percent below those of OEM new units. (Tr. 795, 884, 895). Most rebuilders of automotive electrical units consider their products to be comparable in quality, if not better, than new units which are manufactured by the OEMs. (Tr. 651, 757, 795, 895). Furthermore, rebuilt units sold by most rebuilders today carry warranties that, if anything, are better than the 90-day coverage offered by the OEMs for new replacement units. (Tr. 651, 757).

in at least one small segment of the automotive replacement parts market to the general OEM dominance in the automotive aftermarket.

While many factors account for the meteoric rise of the automotive electrical rebuilding industry in the past quarter century, none is more important than the development of sources of supply for the full range of new parts required in rebuilding. Unlike his predecessor of the 1930s, the modern rebuilder need not resort to cannibilizing parts from several cores to rebuild a single unit. (Tr. 1574). He is now able to operate on a much more efficient production-line basis, rebuilding each used core into a finished unit; because he can supplement his inventory of component parts with new parts when sufficient used parts cannot be salvaged from cores received in exchange from customers or purchased from junk dealers. (I.D. 20–26 [pp. 403–04 herein]).[6] Likewise, the availability of certain new parts which are seldom salvageable in reusable form, such as brushes and bushings, has permitted the rebuilding industry to produce rebuilt units comparable in quality to new replacement units. (Tr. 794–95). But, perhaps the most important result of the development of the rebuilder supply industry is that today's rebuilders can produce rebuilt late model units years before cores and used parts are available from the junk yards.[7]

Consequently, the suppliers of new parts to rebuilders hold the key to this industry. The industry can only exist if new parts are available at prices sufficiently low so that the rebuilder will be able to sell the finished product on the market at a price substantially below that for new units.[8] The OEMs, however, have consistently followed a policy of not selling directly to rebuilders

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[6] The entire rebuilding industry operates on an "exchange" basis. That is, rebuilders sell to their customers, mostly wholesale distributors or jobbers, who generally return to the rebuilder a used core in partial payment for each rebuilt unit. Thus, the rebuilder has a constant source of supply for the most basic item in rebuilding—the used core. Since rebuilders can continue to operate on a production basis only with a continuous supply of used cores, their operation depends in large part on their ability to rebuild a unit from a single used core. (Tr. 815–16, 919–20, 1574).

[7] Mr. Fischer, the president of Avnet's Valley Forge Division, noted the vital role of rebuilder suppliers in making parts available for late model units:

When original equipment [sic] changes basic parts in a new model, the rebuilder cannot secure these until the units hit the junk yards and this takes time. It is in this interval of time that VF [Valley Forge] and IPM serve their largest function. (CX 37f).

[8] As one experienced rebuilder testified:

Q Why in your opinion do rebuilders exist today?

A Because of price. Only because of price, as compared with OEM * * *. If it ever became where a rebuilt unit irrespective of its quality could not be bought cheaper than a brand-new unit, then the rebuilding business would stop. (Tr. 795–96).

other than those rebuilding units for them (so-called "authorized rebuilders"). Rebuilders are able to obtain OEM new parts from wholesale distributors (WDs); but, as virtually every rebuilder who testified in this proceeding indicated, WD prices are so high that rebuilders could not produce a rebuilt unit for less than a new one if they had to buy exclusively from wholesalers. (I.D. 99 [p. 424 herein]). Consequently, a small group of rebuilder suppliers, led by IPM and Valley Forge, has essentially been the sole source of new parts for rebuilders since the inception of the rebuilding industry in the 1930s.[9] As one major rebuilder testified with reference to IPM and Valley Forge and their leading competitor, Ace: "I doubt if we could have existed if it had not been for the three." (Tr. 798).

II. THE RELEVANT PRODUCT MARKET

The judge found the relevant line of commerce to be "direct sales by rebuilder suppliers of new parts, materials and equipment to rebuilders." (I.D. 103, pp. 38–41 [pp. 431–35 herein]). In addition, he concluded that a relevant subline of commerce existed consisting of all sales of new parts, materials, and equipment to rebuilders excepting direct sales by OEMs to their authorized rebuilders. (I.D. 104, 105 [p. 425 herein]). The geographic market, about which there is no dispute between the parties, is the United States as a whole. (I.D. 106 [p. 425 herein]).

Recognizing that respondent's market share as a result of the acquisition is considerably greater than that sanctioned under any Section 7 precedent, Avnet on appeal raises a series of objections to the judge's definitions of the relevant market and submarket. Since we note that the judge's submarket decreases the total market by only $610,000 or approximately 3 percent (I.D. 77 [p. 417 herein]), we will confine our review to those issues which relate to the overall market.

A. *The Demand Side of the Market*

1. *Definition of "Rebuilder"*

Throughout the proceeding below and on appeal, respondent

[9] It is indeed ironic that the predecessor of IPM actually entered the rebuilder supply business to compete with Valley Forge, the principal supplier in the mid-1930s, because Valley Forge refused to sell new parts on other than a cash or c.o.d. basis. (Tr. 1572). And, during World War II, IPM was the first supplier to realize the potential for tremendous growth in the parts business if rebuilders had a full line of new parts at reasonable prices so that they would no longer have to cannibilize several cores to make a single unit. (Tr. 1574). Thus, from the very beginning of the rebuilding industry, competition among the suppliers of the industry has been an important factor in its developement.

has contended that the term "rebuilder" refers to all firms that engage in the physical operation of disassembling a unit, cleaning, testing, replacing or reconditioning defective or worn parts, and reassembling and testing the finished product. (I.D. 18 [p. 402 herein]). Thus, respondent argues that the definition of "rebuilder" in the complaint should include not only "production-line" rebuilders but all types of automotive repair firms—service stations, general repair garages, vehicle dealers, electric specialty shops, and fleet maintenance facilities. (Res. App. Br. 10–17; Rep. Br. 2–6).

Admittedly, many types of repair shops engage in rebuilding on an individual unit basis (termed in the trade "custom rebuilding"), which involves the same basic process and parts employed in "production-line" rebuilding.[10] As the judge below found, however, fundamental differences exist between production-line rebuilders and repair shops with respect to the nature of their business operations, their methods of pricing, their types of customers, and the degree of their dependency on specialized rebuilder suppliers. (*Compare* I.D. 19–33 *with* I.D. 34 [pp. 403–05 herein]). Furthermore, the industry itself clearly recognizes the basic practical difference between production-line and custom rebuilders as demonstrated not only by the testimony of several major rebuilders (Tr. 647–49, 718, 753–54, 826, 1295, 2310–11, 4627) but also by the existence of a separate trade association limited to production-line rebuilders and their suppliers.[11] (RX 55e).

The significance of the distinction between production-line and custom rebuilding in determining the relevant line of commerce lies in the fact that production-line rebuilders are manufacturers that sell completed units at an established price for distribution into the automotive aftermarket, primarily through wholesale distributors. (I.D. 26, 32 [p. 404 herein]). Custom rebuilders or repair shops, on the other hand, actually perform a service.

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[10] We cannot agree with respondent's contention that the fact that several production-line rebuilders engage in some custom rebuilding, primarily of heavy-duty units, renders the judge's distinction between production line and custom rebuilding untenable. (Res. App. Br. at 12–13; Rep. Br. 3–4). The judge, in fact, found that the custom rebuilding performed by production-line rebuilders was generally for the convenience of their customers and accounted for less than 5 percent of their business. (I.D. 31 [p. 404 herein]).

[11] As the executive secretary of the trade association testified (Tr. 2979):

"We generally define a rebuilder as a firm substantially engaged in rebuilding on a production scale automotive parts for use in the aftermarket distribution channels. Production scale would generally refer to a firm who was substantially engaged in the promotion of the industry."

Custom rebuilders do not prepare a unit for sale but rather repair the particular unit and return it to the customer, generally the vehicle owner, charging him on a parts and labor basis. (I.D. 34 (a), (d), 37,39,42 [pp. 405, 406, 406, 407 herein]). Perhaps most significant in this proceeding is the fact that, while production-line rebuilders could not operate without a supply of new parts from rebuilder suppliers, custom rebuilders buy their new parts primarily [12] from OEM wholesale distributors at prices 20–40 percent higher than those charged by the rebuilder suppliers. (I.D. 34(e) [p. 405 herein]).[13]

For these reasons, we cannot agree with respondent's contention that the Commission's decision in *Papercraft,* Dkt. 8779 (June 30, 1971), pp. 7–8 [78 F.T.C. 1372, 1402], *aff'd,* No. 71–1681 (7th Cir., January 25, 1973), supports a broadening of the line of commerce to include sales to custom rebuilders. The facts found by the judge demonstrate that production-line rebuilders sell a product, not a service, to entirely different classes of customers at different distribution levels using completely different pricing methods. Thus, unlike the situation *Papercraft* where a dramatic shift in the market share from one type of retailer to another strongly indicated direct competition, competition between these two categories of rebuilders seems at best very indirect.

Furthermore, the tremendous disparity between the production-line rebuilders' dependence on rebuilder suppliers and the custom rebuilders' reliance on wholesalers, despite the fact that wholesalers charge a substantially higher price, indicates that sales to these two categories of rebuilders are in different lines of commerce. As the D. C. Circuit observed in *Reynolds Metals Company* v. *FTC,* 309 F.2d 223, 229 (1962):

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[12] We do not disagree with respondent's assertion that rebuilder suppliers do have some sales to repair shops. (Res. App. Br. 11–12). The rebuilder suppliers cited by respondent, however, had very limited occasional sales to a limited number of repair shops. (Tr. 1078–79, 1155, 1462–63, 2142; CX 290). Furthermore, there is no basis in the record for respondent's contention that 2,000 of IPM's active customers were repair shops or that 700 were service stations. (Tr. 2268). *See* discussion at pp. 36–37 [pp. 470–71 herein], *Infra.*

[13] Although the judge in his initial decision made no finding as to the differential between the prices charged to rebuilders by wholesalers and those charged by rebuilder suppliers, the testimony cited by the judge demonstrates that WD prices to rebuilders were at least 20–40 percent higher than rebuilder supplier prices. For example, the president of Precision Field Coil noted that WD prices for General Motors' field coils were $4.41 while Precision sold to rebuilders at $2.76. (Tr. 538–39). One of the nation's largest rebuilders testified that IPM's prices were at least 20 percent cheaper than WD prices. (Tr. 843). The president of Valley Forge indicated that Valley Forge and IPM generally sold at a price 70 percent off OEM list price while jobbers sold at a 50 percent discount. (CX 37e). Thus, jobbers sold at prices over 60 percent greater than those of rebuilder suppliers.

We think price differentials have an important if not decisive bearing in the quest to delimit a submarket. No prudent businessman (the ordinary end user of foil), would purchase colored or embossed foil at prices on this record of $1.15 to $1.22 per unit when another foil converter market offers florist foil, similarly colored or embossed, and of similar gauge and weight, at a cost of only $ .75 to $ .85 per unit. The fact that prudent businessmen do so supports the inference, drawn in the negative since as we have noted the record lacks affirmative evidence on the point, the florist foil must be distinct and separable from aluminum foil generally or the many users of the latter would have long ago begun to substitute the former at the lower price. Such a difference in price as appears on this record must effectively preclude comparison, and inclusion in the same market, of products as between which the difference exists, at least for purposes of inquiry under Sec. 7 of the Clayton Act.

Certainly, under the D. C. Circuit's reasoning in *Reynolds Metals*, no prudent businessman engaged in custom rebuilding would continue to purchase new parts from wholesalers if he was in direct competition with rebuilders who purchased their new parts at prices substantially lower than those charged by wholesalers.

2. *"In-House" Manufacturing or New Parts by Rebuilders*

Respondent also disagrees with the judge's exclusion (I.D. 104 [p. 425 herein]) of the production of new parts by various rebuilders for use in their own rebuilding operations. (Res. App. Br. 36–37).[14] Avnet contends that in-house manufacture of components competes directly with the sale of such components by outside suppliers and that, therefore, parts manufactured "in-house" by rebuilders should be included in the market. Respondent asserts that testimony in the record refers to numerous instances where rebuilders have shifted back and forth between purchasing from outside sources and manufacturing "in-house" depending on varying conditions of price, quality, and availability. (Res. App. Br. at 37).[15]

[14] We note that the judge in his initial decision did not actually discuss the issue of "in-house" supply of new parts but did, in fact, exclude "in-house" supply by limiting the relevant market to "sales." (Res. App. Br. at 36).

[15] The testimony cited by respondent to show that rebuilders shift between "in-house" production and purchasing from outside sources largely relates to rebuilt, rather than new, parts. *See* RPF 151–152. (Tr. 608, 625–27, 658–59, 760, 809, 867–69, 1288, 2837, 3425, 3454–55). While the record does show that in 1964 some rebuilders manufactured their own field coils and that one fairly large rebuilder produced new commutators, the record also shows the very real limitations on the ability of rebuilders to manufacture these parts themselves. Champion Armature, which manufactured its own commutators, was cut off by Anaconda, its supplier of "bar stock," in 1967 when its purchases dropped and was forced to discontinue commutator manufacturing because it could not obtain bar stock without paying a premium. (Tr. 627). With regard to field coils, Mr. Gordon of Ace, whose entire business centered on the sale of field coils (CX 44a–b), testified that by 1964, high labor costs effectively prohibited "in-house" production (Tr. 1170):

Contrary to respondent's argument, we find that the record in this case amply demonstrates that "in-house" production does not effectively compete with sales of new parts by rebuilder suppliers and that, in fact, it is extremely difficult for the overwhelming majority of rebuilders to supply any significant portion of their requirements of new parts. This is demonstrated not only by evidence of the substantial investment required to "tool up" for new parts production and the substantial risks involved,[16] but also by the fact that respondent identified only six rebuilders out of some 150–200 firms engaged in automotive electrical unit rebuilding in 1964 that manufactured any of their new parts requirements.[17]

In fact, a mere listing of the vertically integrated firms named by respondent in its brief (Res. App. Br. at 37) demonstrates how unique "in-house" production of new parts really is in the rebuilding industry. Respondent lists only five firms—the Delco-Remy Division of General Motors, Robert Bosch, American Starter Drive, Carwin, and Accurate Parts. With the exception of Accurate Parts, the world's largest rebuilder of a very narrow line of specialized products,[18] all rebuilders listed by respondent manufacture new parts primarily for purposes other than for supplying their own rebuilding operations. Thus, Delco-Remy and Robert Bosch, which are engaged principally in the manufacture of original equipment units (I.D. 81–85 [pp. 418–19 herein]), use some small percentage of the new parts they manufacture in

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Q. In 1964 to your knowledge did any rebuilders wind their own field coils?

* * * * * * *

A. I don't know. I know that prior to '64 they did and then they had to quit because it was too expensive for them to wind their own unless the owners' wives came down and didn't have anything to do and they didn't have to pay them and they wound the coils for them, but that is about the only way. But if they had to pay 75 cents or a dollar o[r] $1.25 an hour, it wasn't worthwhile for them to wind their coils.

[16] The cost of tooling for manufacturing any significant portion of the broad range of parts required by rebuilders is substantial. *See* pp. 42–43 [pp. 475–76 herein], *infra*. Mr. Fischer, the president of Valley Forge estimated that a minimum investment in tooling of $3–4 million would be necessary to produce a broad, but not complete, line of new parts. (Tr. 4170, CX 44a). A 1964 study by Vulcan concluded that three quarters of a million to a million dollars would be required to "tool up" to enter the alternator parts business. (Tr. 992).

[17] We do not include among the six rebuilders those rebuilders who may have made some of their own field coils as late as 1964. *See* note 15, *supra*.

[18] Accurate Parts is the world's largest rebuilder of starter drives and starter solenoids, which are components of starters. (RX 15d). In 1964, its sales of rebuilt starter drives alone was $2.2 million (Tr. 4665), which is greater than the total sales volume of many of the nation's largest rebuilders, even though the other rebuilders sell a much broader line of products. For example, Standard Automotive Components, which ranked among the top-ten rebuilders, had sales in 1964 of $1.178 million (Tr. 836); Automotive Armature, also in the top ten, had sales of $1.119 million in that year. (Tr. 1289).

their rebuilding operations.[19] American Starter Drive and Carwin, which are two rebuilder suppliers, manufacture new parts primarily for resale or for use in manufacturing new units.[20] The fact that virtually the only vertically integrated rebuilders in the industry are those with a substantial market for new parts other than for use in their own rebuilding operations demonstrates that real barriers exist which preclude the overwhelming majority of rebuilders from engaging in "in-house" production of new parts.

In analogous situations, the courts have excluded "in-house" production from the relevant line of commerce. In the leading case, *United States* v. *Greater Buffalo Press*, 402 U.S. 549 (1971), the Supreme Court recognized the relevant line of commerce, the independent color comic supplement printing business, as one separate from the "in-house" printing of color comic supplements by the newspapers themselves. Both the Supreme Court and the District Court excluded "in-house" printing because of the greater skill and specialized machinery necessary to produce quality color supplements and the cost savings inherent in printing such supplements on a high-volume basis. *U.S.* v. *Greater Buffalo Press, Inc.*, 402 U.S. at 555 (1971); *U.S.* v. *Greater Buffalo Press, Inc.*, 327 F. Supp. 305 at 307–09 (W.D.N.Y. 1970). Both courts acknowledged the fact, however, that a substantial number of newspapers printed color comic supplements themselves and that even those newspapers that did not would do so "if at any time the cost of purchasing such color comic supplements exceeds the cost to the newspaper of printing them." (*Id.* at

[19] As the judge found, Delco-Remy's (D-R) rebuilding operation was so incidental to its production of new units that D-R's purchasing decisions were made solely on the basis of new-unit production. The rebuilding operation simply drew upon new parts in D-R's stock used to manufacture new units, and no separate accounting was made to distinguish the use made of the parts. (I.D. 82 [p. 418 herein]).

Robert Bosch GMBH is a world-wide manufacturer of original equipment that sells electrical units in the United States through a subsidiary, Robert Bosch Corporation of the United States, for Volkswagen, Mercedes-Benz, Volvo, Porsche, Saab, Ford Pinto, Lincoln Capri, and Opal. In 1964, the American subsidiary engaged in some rebuilding using only parts imported directly from Bosch's foreign plants. (I.D. 83–85 [p. 419 herein]).

[20] American Starter Drive in 1964 sold to rebuilders $415,000 in rebuilt starter drives and $425,000 in new components for starter drives. (Tr. 1017–18, 1028–29). Since the cost of new parts used in rebuilding usually represents 15–35 percent of total sales of rebuilt units (I.D. 109 [p. 425 herein]), we find that the overwhelming majority of new starter drive components were manufactured by American for sale to rebuilders rather than for use in its own rebuilding operation.

In 1964, Carwin was primarily engaged in the manufacture of new solenoids for which it made most of the component parts. While Carwin also rebuilt solenoids for sale to rebuilders, rebuilt solenoids accounted for only a quarter of Carwin's total solenoid production. (Tr. 1182–83). In addition, Carwin sold $170,000 in new solenoid components, of which it manufactured 60 percent. (Tr. 1194).

307–08). *See also, United States* v. *Philadelphia Nat'l. Bank*, 374 U.S. 321, 356–57 n. 33 (1963).

Nor do we find the decision of the District Court in *United States* v. *International Telephone & Telegraph Corp.* (ITT-Canteen), 1971 CCH Trade Cas. Par. 73,619, at 90, 539–45 (N.D. Ill.) inconsistent with the judge's exclusion of "in-house" production from the market. In *ITT*, the court's determination that "in-house" food service should be included in the relevant market was based on the finding that in the Chicago area, 14 percent of the food centers at plants, 42 percent of those at schools, and 52 percent of those at hospitals were operated by the institution. (*Id.* at 90, 542.) In the court's view, the substantial percentage of institutions engaged in "in-house" food service confirmed expert testimony indicating that food-service operations by institutions were an important competitive factor in the overall food-service industry. In the present case, however, the facts dramatically demonstrate that "in-house" manufacture of new parts is unique and is almost exclusively limited to those rebuilders that have entered the rebuilding field as an outgrowth of their substantial new-part manufacturing operations.

B. *The Supply Side of the Market*

1. *Used and Rebuilt Parts*

Ignoring the overwhelming evidence on the record indicating that the rebuilding industry exists solely because of its ability to assemble units from the least expensive components and thereby sell its product at a price substantially below that of new units, respondent contends that used cores and parts, together with rebuilt and reconditioned parts, compete "directly and effectively" with substantially more expensive new parts. (Res. App. Br. 20–28). Respondent argues that the judge's findings and conclusions, excluding sales of used cores and parts and rebuilt parts, are therefore unsupportable and "ignore[s] the dynamics of the rebuilding industry." (Res. App. Br. at 20). This argument would certainly astound the rebuilders who testified in this proceeding.[21]

[21] Respondent also contends that the judge in his initial decision excluded five components of electrical units—armatures, rotors, solenoids, starter drives, and stators—from the product market by defining them as "units" rather than "parts." (Res. App. Br. 18–20). Actually, these components can be considered either "parts" or "units" depending on the context in which they are used. Rebuilders of components consider them "units," but rebuilders that incorporate these components into larger units consider them "parts." (Tr. 773, 1183).

In fact, the record amply demonstrates that the purchasing decisions of rebuilders are made basically on considerations of availability which in turn are premised on the very substantial differentials in price among used, rebuilt, and new parts.[22] Rebuilders will generally purchase used parts if they are available in preference to rebuilt or new components. (I.D. 52 [p. 411 herein]). When used parts are not available, rebuilders will turn to rebuilt parts suppliers (I.D. 57 [p. 411 herein]). Only if neither used nor rebuilt parts are available will rebuilders resort to new parts. (I.D. pp. 39–40 [p. 433 herein]).

The rebuilders' main source of used parts is used cores obtained primarily from their customers in exchange for rebuilt units and, to a lesser extent, from junk dealers, affectionately

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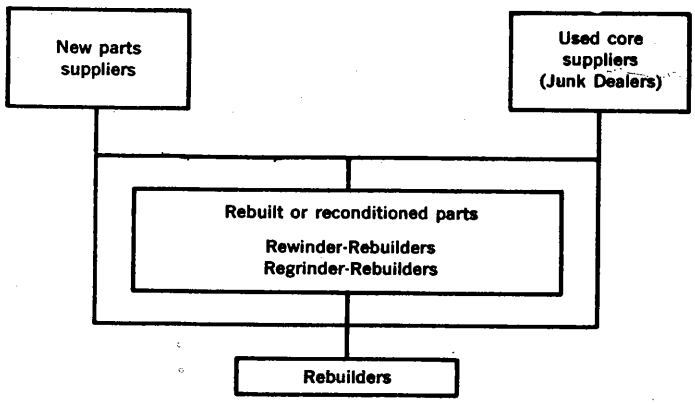
Therefore, we find that the judge's definition of "units" as "any item sold separately by a rebuilder" (I.D. 43 [p. 408 herein]) and his definition of "parts" as "any item purchased by a rebuilder for incorporation in units which he rebuilds" (I.D. 44 [p. 408 herein]) reflect the recognized usage of those terms in the trade.

The mere fact that the judge listed a series of examples of "units," which included these components, but listed no examples in his definition of "parts" certainly does not indicate, as respondent argues, that the judge did not consider these components "parts" when they were purchased by a rebuilder for incorporation into a larger unit. In fact, the judge parenthetically noted that suppliers of rebuilt parts included "rewinders of armatures, rotors and stators" and included Carwin's sales of new solenoids in his computation of market shares. (I.D. 58, 60 n. 2 [pp. 412, 414 herein]). While respondent attempts to support its strained reading of the initial decision by claiming that the judge erroneously excluded Bendix's sales of starter drives to rebuilders (Res. App. Br. at 19 n. 15), the record clearly shows that these drives were *not* incorporated into rebuilt starters (Tr. 3081) and thus were not "parts" under the judge's definition.

[22] The following chart illustrates the relationship of the rebuilders' principal sources of supply (I.D. 47 [p. 410 herein]):



called "junkies." [23] Rebuilders disassemble the cores to recover the individual parts which, in turn, are sorted, cleaned, inspected, tested, and then commingled with other similar parts for use in the rebuilding process. (I.D. 45 [p. 409 herein]).

While respondent acknowledges that "the apparent price of parts contained in a used core is always substantially lower than the price of the same components new, rebuilt, or reconditioned" (Res. App. Br. at 25), it contends that the price discrepancy found by the judge is actually considerably less because of the cost of labor necessary to salvage a part from a used core. In fact, the judge's finding that used items sell at 25–50 percent of the price of a comparable new part is based primarily on testimony comparing new part prices with prices for individual used parts extracted from cores by the junkie. (I.D. 52 [p. 411 herein]). For example, one rebuilder cited by the judge testified that used end plates for generators were available at the time of the proceeding for 15 cents compared to $1.00 to $1.50 for comparable new end plates. (Tr. 782–84). Furthermore, the president of Avnet's Valley Forge Division indicated that used cores containing several salvageable parts often sell below the price for a single new part and that junk dealers who themselves break down the cores to salvage individual parts are able to sell used parts at prices 65–75 percent lower than those charged by Valley Forge. (Tr. 4061–62). Thus, the judge's finding and the evidence on the record clearly indicate that the cost of salvaging parts from used cores is insignificant compared with the substantial price differential between used cores and the total new-part price of all the component parts which usually can be salvaged from used cores.[24]

Were used parts and cores in the same market with new parts, one would expect to find a substantial interaction in price

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[23] Junkies market their product in a manner completely different from new-parts suppliers. First, they generally sell whole cores, not individual parts. (I.D. 48 [p. 410 herein]). Second, they tend to sell on a local or regional basis whereas new-parts suppliers compete on a nationwide basis. (I.D. 49 [p. 410 herein]). Third, junkies do not maintain a stock of various kinds of cores but dispose of cores as soon as possible. (Tr. 600). Fourth, unlike the new-parts suppliers, junkies sell on an "as is" basis without any guarantee of quality. (Tr. 600–01, 693). Fifth, junk dealers have no salesmen and provide no promotional services such as those often performed by new-part suppliers' salesmen. (I.D. 53 [p. 411 herein]). Sixth, junkies do not have price lists but sell at the highest price offered by their customers. (I.D. 53).

[24] Respondent's argument (Res. App. Br. at 26) that used parts compete with new ones on the basis of differences in quality—citing its Proposed Findings of Fact (RPF 108, 109, 119)—is indeed curious in light of the statement contained in Paragraph 106 of its proposed findings: "Such used parts are generally considered substantially the same in quality as their new equivalents." We feel that the latter statement substantially reflects the evidence in the record.

between the two. In fact, as the judge found (I.D. 54 [p. 411 herein]) and the record again amply demonstrates, the prices for new parts are relatively stable with a slight increase over time while used items and cores decrease substantially in price as time passes and more used cores are available to the junkyards.[25] While respondent refers to a few isolated excerpts from the record to indicate that price sensitivity actually exists (Res. App. Br. 26–27), most of the testimony cited tends to confirm, not rebut, the judge's finding. Thus, the testimony of Avnet's two vice-presidents indicated that as used parts became plentiful, their price fell well below the cost of manufacturing a new part (Tr. 4061), sometimes to the extent that IPM could not sell the new parts even at reduced prices and "ended up selling approximately eight or nine tons of end plates and stuff for scrap * * * ." (Tr. 1675). That is not price sensitivity but the bottom falling out of the market.

Substantial price differentials also distinguish the sales of rebuilt and reconditioned parts from the sales of new parts. On the basis of substantial evidence on the record, the judge found that rebuilt parts generally sell for 25–50 percent less than comparable new parts and that rebuilders purchased rebuilt parts whenever they were available in preference to new parts. (I.D. 57 [p. 411 herein]).[26]

Respondent contends, however, that the "price differences that exist between rebuilt and reconditioned parts and their new equivalents are not differences in real cost to the rebuilder" because the price ordinarily quoted for rebuilt parts is an "exchange price" which presumes the return of a used core by the customer. (Res. App. Br. at 21; Rep. Br. at 7–8 n. 16). Respondent is correct in asserting that if the value of the used core were added to the price charged by the supplier of the rebuilt part, the disparity in price between rebuilt and new parts would be reduced. However, respondent's contention again ignores

[25] The wide fluctuation of the prices of used parts and cores is illustrated by the fact that used generator core prices vary from one to ten dollars. (Tr. 805).

[26] To dispute the judge's finding of a substantial price differential, respondent cites testimony that two suppliers sold rebuilt and new starter drives at the same price and that new Japanese bearings sell at prices equal to those of reground bearings. (Res. App. Br. at 21). However, the testimony of the two starter-drive rebuilders, in fact, indicates that they sold all products as rebuilt even when they were unable to fill an order with a rebuilt drive and had to purchase a new one to keep the customer content. (Tr. 1052; 4624–25). Respondent's assertion about the price of Japanese bearings is true today. But, Japanese bearings were just entering the American market in 1964 so that at that time most rebuilders preferred reground bearings over new because of the substantial lower price. (Tr. 697, 715, 731, 1000, 4599–4600).

the dynamics of the rebuilding industry. The evidence in the record demonstrates that customers of rebuilders in the overwhelming majority of cases return cores to the rebuilder in order to receive the exchange price. As the judge found, approximately 85 percent of the cores used in rebuilding are obtained from the rebuilder's customers. (I.D. 45 [p. 409 herein]).

This practice comports with the basic rationale of the rebuilding industry. To a rebuilder of generators, an armature core has little value since it cannot be utilized in rebuilding generators until it is rewound. But, to a rewinder (who is a type of rebuilder of component parts), armature cores provide the very foundation of his business. Consequently, to the rebuilder of generators, who himself receives used generators containing armature cores in exchange from his own customers, armature cores are of little value except to the extent that he can use them to decrease the cost of obtaining rebuilt armatures. Therefore, it is to the generator rebuilders' advantage to purchase on an exchange basis whenever possible.[27]

In view of the fact that the entire rebuilding industry exists because of its ability to sell its product at a price substantially below that of new units and that, therefore, the predominant factor in choosing between alternative sources of supply is price, we find that the substantial price differences between new and used and new and rebuilt parts establishes the sales of new parts as a distinct market. The facts found by the judge in his initial decison are so analogous to the facts relied upon by the Supreme Court in *United States* v. *Alcoa*, 377 U.S. 271 at 276 (1964), that the language of the court in separating insulated aluminum conductor from insulated copper conductor and placing it in another submarket is appropriate:

> The price of most insulated aluminum conductors is indeed only 50% to 65% of the price of their copper counterparts; and the comparative installed costs are also generally less. As the District Court found, aluminum and copper conductor prices do not respond to one another.
>
> Separation of insulated aluminum conductor from insulated copper conductor and placing it in another submarket is, therefore, proper. It is not inseparable from its copper equivalent though the class of customers is the same. *The choice between copper and aluminum for overhead distribution*

[27] Although the judge made no findings with respect to price sensitivity between rebuilt and new parts, we note that the testimony in the record tends to indicate that the principal determinant of rebuilt parts prices is the cost of the used core. Thus, the price of rebuilt parts will generally decrease substantially over time as used cores become plentiful and the price of the core drops. (Tr. 2451, 2455–56). In contrast, as we noted above, new part prices remain relatively stable over time with a slight upward trend.

does not usually turn on the quality of the respective products, for each does the job equally well. The vital factors are economic considerations. It is said, however, that we should put price aside and *Brown Shoe, supra,* is cited as authority. There the contention of the industry was that the District Court had delineated too broadly the relevant submarkets—men's shoes, women's shoes, and children's shoes—and should have subdivided them further. It was argued, for example, that men's shoes selling below $8.99 were in a different product market from those selling above $9. *We declined to make price, particularly such small price differentials, the determinative factor in that market. A purchaser of shoes buys with an eye to his budget, to style, and to quality as well as to price. But here, where insulated aluminum conductor pricewise stands so distinctly apart, to ignore price in determining the relevant line of commerce is to ignore the single, most important, practical factor in the business.* (Emphasis added.) *See also Reynolds Metals Co.* v. *FTC,* 309 F. 2d, 223 at 229 (D.C. Cir. 1962).

2. *Exclusion of Sales to Rebuilders of OEM New Parts*

We note at the outset that OEMs sell to rebuilders only through wholesale distributors and jobbers except for those "authorized rebuilders" engaging in rebuilding for the OEMs. Furthermore, despite respondent's contentions to the contrary (Res. App. Br. at 30–32), OEMs do not consider rebuilder suppliers as competitors. In fact, the memoranda by Ford and General Motors referred to by respondent indicate that these two companies do *not* regard themselves as competitors of IPM or Valley Forge. (CX 286, RX 69). The Ford memorandum discussing sales by these two divisions of Avnet actually states that the divisions "* * * do not compete directly in the channels with parts sold under various Ford brands * * * ." (CX 286u).

In contending that the judge erroneously excluded sales by wholesale distributors (WDs) to rebuilders, respondent misreads the initial decision. The judge did not exclude WD sales to rebuilders but rather found "that sales by wholesalers do not constitute a significant factor in the rebuilders supply market." (I.D. 102 [p. 424 herein]). The judge's conclusion is substantiated by the virtually unanimous testimony of every rebuilder witness that WD prices were so much higher than rebuilder suppliers' (20–40 percent greater) that they sought parts from WDs only in an emergency or when the parts were not otherwise available. (I.D. 96, 97 [p. 424 herein]). Nine industry members stated that rebuilders could not produce a rebuilt unit for less than a new one if they had to purchase all new parts from WDs. (I.D. 99 [p. 424 herein]).

3. *Exclusion of Occasional or Single-Line Suppliers of New Parts, Materials, and Equipment*

Respondent likewise misreads the initial decision when it contends that the judge excluded from the market suppliers that did not sell "primarily" to rebuilders. (Res. App. Br. 33–36). To the contrary, the judge included the proven sales of other suppliers in the market but found "at best [they] were insignificant suppliers whose total dollar volume of sales would not materially alter the overall dollar value of the rebuilder suppliers market * * * ." And, "complaint counsel's failure to include these 14 companies [and similar types of suppliers] does not materially alter the overall structure of the rebuilder suppliers industry as set forth in Finding 60." (I.D. 94 [p. 423 herein]).

Respondent's argument concerning the other suppliers, as apparently acknowledged in its reply brief (pp. 8–11), in actuality relates to the size of the market and the substantiality of the sales to rebuilders by suppliers other than those included in complaint counsel's original list of rebuilder suppliers.

C. Sales by Rebuilder Suppliers of New Parts, Materials, and Equipment to Rebuilders Constitutes a Distinct and Valid Market

When the air is cleared of all of respondent's protestations and references to relatively insignificant exceptions to the ordinary course of dealing in the rebuilder supply field, the conclusion that sales of new parts to rebuilders of automotive electrical units is a relevant line of commerce within classic Section 7 terms is inescapable. In 1964, all significant suppliers of new parts to rebuilders, except the OEMs, specialized in sales to a distinct class of customers, production-line rebuilders. (I.D. 61, 65, p. 39 [pp. 414, 415 herein]). These suppliers catered to the needs of rebuilders with salesmen specially soliciting and serving the rebuilder trade (I.D. 61 [p. 414 herein]), with research and development of new methods and products for the rebuilder (I.D. 61), and with specialized catalogs and price sheets for rebuilders. (I.D. 65 [p. 415 herein]).

In addition to the fact that the rebuilders supply industry was recognized by rebuilders as the indispensable source of new parts, the rebuilder suppliers themselves recognized the industry as a separate economic entity. Despite respondent's assertions to the contrary (Res. App. Br. 38–39), the record amply demonstrates that rebuilder suppliers' pricing decisions were made primarily

on the basis of the prices charged by the four largest rebuilder suppliers, particularly IPM. (I.D. 62, 63 [p. 415 herein]; CX 44a). Several rebuilder suppliers also equalized freight, which is one of the major cost factors in the industry, so that their total prices to a particular rebuilder would be similar to the prices of IPM, Ace, and Valley Forge. (I.D. 62 [p. 415 herein]; Tr. 656–57, 996–97, 1110–11). *See General Foods Corp.* v. *FTC*, 386 F. 2d 936, 941–42 (3d Cir. 1967), *cert. denied*, 391 U.S. 919 (1968).

Our conclusion that this market meets at least five of the seven practical indicia for defining submarkets noted in *Brown Shoe Co.* v. *United States*, 307 U.S. 294, 325 (1962) [28]—industry recognition, distinct customers, distinct prices, sensitivity to price changes and specialized vendors—is confirmed by Avnet's own preacquisition memoranda. (CX 36, CX 37d–f, CX 44).[29] All the memoranda, which were prepared by Mr. Fischer, the president of Avnet's Valley Forge Division and an Avnet director and vice-president, strongly indicate that Valley Forge viewed only IPM, Ace, and Vulcan as meaningful competitors, (CX 36c, 37d, 44a–b). Moreover, Mr. Fischer concluded:

> The acquisition of IPM would serve chiefly to remove our most major competitor from the scene. This would reduce to an overwhelming extent the price competition that is a major factor in the industry. In many cases severe competition has held profit margins on key items to a reduced level owing to the ability of two firms to offer substantially the same item at the same price. (CX 44a).
>
> We have glossed over the natural inherent advantages of elimination of bitter price competition for this is taken for granted, but the benefits should not be discounted. (CX 36d).

That Mr. Fischer was not alone in this view is demonstrated by the comments of IPM's sales manager immediately after the acquisition:

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[28] The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. However, within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for anti-trust purposes. *United States* v. *E. I. DuPont De Nemours & Co.*, 353 U.S. 586, 593–595. The boundaries of such a submarket may be determinde by examining such practical indicia as *industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes and specialized vendors.* (Emphasis supplied.)

[29] Copies of Commission exhibits 36 and 44 are attached to this opinion as Appendix A and B [pp. 429, 483 *infra*].

* * * we would not have to make price concessions to compete with one another in the manner we have done in the past, and thus enhancing the over-all profit of the Corporation. (CX 35c).

These observations by two of the most knowledgeable individuals in the rebuilding field indicate that the rebuilder supply market, which would be dominated after the acquisition by Avnet, was a separate and distinct market. Only if a distinct market existed would Avnet have the power to reduce to "an overwhelming extent the price competition" in the industry.

As we stated in *General Foods Corp.*, 69 F.T.C. 380, 414 (1966), *aff'd.* 386 F. 2d 936, 941 (3rd. Cir. 1967), *cert. denied,* 391 U.S. 919 (1968):

It is obvious that if respondent and the other steel wool soap pad manufacturers regard themselves as a separate market, then it is this market in which the impact of respondent's acquisition must be judged.

III. SIZE OF THE RELEVANT MARKET

Respondent's most vigorous challenge to the initial decision is its attack on the judge's conclusions concerning the size of the rebuilder supply market. Respondent asserts that complaint counsel failed to meet its burden of proof demonstrating the approximate size of that market (Res. App. Br. 42–44; Rep. Br. 6, 11), that the judge shifted the burden of proving the market size to respondent (Res. App. Br. 43–44; Rep. Br. at 11), and that, thereafter, the judge prevented respondent from developing and introducing evidence on market size by refusing to grant certain prehearing discovery requests, excluding respondent's market surveys and excluding certain testimony regarding the amount of sales in the market. (Res. App. Br. 45–53; Rep. Br. 5–6, 9–15).

A. Substantial Evidence Supports the Judge's Market-Size Determination

At the outset, it should be noted that reliable market data for this industry is extremely difficult to obtain. Compliant counsel, to establish a *prima facie* case, introduced into evidence the sales figures for 17 rebuilder suppliers considered by complaint counsel to account for the overwhelming majority of the total sales in the

market.[30] The estimate of market size based on the aggregate 1964 sales of these 17 firms, which amounted to $19.8 million, was corroborated by computations based on the 1967 Census of Manufacturers. In that year, the sales of rebuilt generators, alternators, starters, and voltage regulators amounted to $67.8 million. (I.D. 108 [p. 425 herein]). Since, as uncontroverted testimony in the record indicates, new part purchases by rebuilders account for approximately 15–35 percent of their total sales (I.D. 109 [p. 425 herein]), the judge found that the new part purchases by rebuilders to rebuild these four types of units was roughly $10–25 million in 1967. Noting that sales of rebuilt parts increased substantially between 1964 and 1967, the judge concluded that "the Census data substantially corroborates the approximate twenty (20) million dollar figure" represented by the total sales to rebuilders of the rebuilder suppliers included in complaint counsel's market. (I.D. 112 [p. 426 herein]).

In challenging the judge's reliance on the estimates extrapolated on the basis of the census report, respondent argues that

[30] The following table lists the 17 firms in complaint counsel's market with their 1964 sales to rebuilders (I.D. 60 [p. 414 herein]):

Company	Sales ($000)	Market Share (%)
IPM	11,353	57.4
Ace	2,200	11.1
Valley Forge	1,856	9.4
Vulcan Motor Products	750–1,000	5.0
VMC & Rebuilders Supply Co.	1,000	5.0
Carwin Sales	511	2.6
Butts Electric Supply Co.	438	2.2
American Starter Drive Service	425	2.1
Ennis Automotive, Inc.	167	.8
Preferred Electric & Wire Corporation	100–150	.8
Lincoln Bearing Co.	138–165	.8
Starter Service Company Inc.	128	.6
Los Angeles Commutator	122	.6
Precision Field Coil Co.	95	.5
Jamison Parts	less than 70	.4
Hubert Products	55	.3
Rich Engineering Co.	46	.2
TOTAL	19,781	100.00

In addition, we note that in 1964, Ford, Chrysler, and General Motors had sales to authorized rebuilders of $500,000, $60,000, and $50,000 respectively. (I.D. 78, 80, 81 [p. 418 herein]). See p. 7 [p. 448 herein], *supra*.

many production-line rebuilders may not have been included and furthermore that the judge's reliance on the census report in resolving the market-size issue effectively denied respondent's right to cross-examination.[31] While we acknowledge that the census data may not present the most precise picture of the rebuilding industry and that the further extrapolation to estimate the rebuilders' purchases of new parts in 1964 provides us with only a general "ball park figure" of the size of the market, we cannot say that the judge erred in utilizing the census data to corroborate complaint counsel's other evidence on market size. What respondent ignores is that the judge in his initial decision actually relied more heavily on several other findings based on substantial evidence in the record in determining the size of the market. (I.D. pp. 41–43 [pp. 435–36 herein]). Except for the census report, all pertinent testimony was subject to cross-examination by respondent.

Thus, the judge also relied on "uncontradicted testimony of almost every rebuilder * * * that in 1964 and for a number of years prior thereto, four firms, viz., IPM, Ace, Valley Forge and Vulcan, were the major suppliers of new parts, materials and equipment to rebuilders." (I.D. 68, p. 42 [pp. 415, 436 herein]). The judge further found, and the record amply demonstrates, that the four major suppliers furnished rebuilders with between 64–97

[31] The cross-examination issue was previously treated by the Commission in its Ruling on Certification of Request for Subpoena to Government Official of January 29, 1971, in the present case. There we granted a subpoena *ad testificandum* to Paul F. Beard, Chief of the Census Bureau's Metals and Machinery Branch, to afford respondent the opportunity to cross-examine the official responsible for collecting and compiling the Census data in question "regarding the terms used in the report and the manner in which the firms furnishing the information as well as the products were classified in the report." (*Id.*, p. 2). Mr. Berard, in fact, testified in this proceeding. (Tr. 499–524).

However, in the same opinion, the Commission denied respondent's request for a subpoena *duces tecum* to Mr. Berard, which would have required him to produce a list of the firms that furnished the information compiled under certain product codes. We felt that the opportunity to question Mr. Berard would adequately protect respondent's right of cross-examination. In this regard, we noted that the rule set forth in *Wirtz* v. *Baldor Electric Co.*, 337 F.2d 518 (D.C. Cir. 1964), which would require that underlying survey material be made available to respondent's counsel when a summary of the survey is to be introduced in evidence, is inapplicable to a regular report of the Census Bureau:

We are of the opinion that this rule does not obtain with respect to regular reports compiled and published by Bureau of the Census pursuant to Title 13 of the United States Code. Generally speaking, the latter is admissible without production of the underlying material in an administrative proceeding under Section 7 for the reason that necessity and circumstantial guaranty of trustworthiness is present and the Commission may take official notice thereof. *Cf. United States* v. *Aluminum Co. of America*, 35 F. Supp. 820, 823–825 (S.D.N.Y. 1940); *United States* v. *Aluminum Co. of America*, 148 F.2d 416, 445, 446 (2d Cir. 1945); Dession, "The Trial of Economic and Technological Issues of Fact," 58 Yale L. J. 1019, 1242 (1949). This also appears to be the established practice before the courts and, as far as we are aware, has not been successfully challenged.

percent of their new parts requirements. (I.D. 69, p. 42 [pp. 416, 436 herein]). Large and small rebuilders alike and rebuilders from all sections of the country and in several areas of specialization all agreed that IPM, Ace, Valley Forge, and Vulcan furnished the majority of new parts (I.D. 69) and the bulk of their requirements in 1964 of new materials and equipment. (I.D. 70 [p. 416 herein]).[32] (Appendix C *infra*) [p. 485 herein].

Respondent, however, takes issue with the judge's holding that the evidence relied upon by the judge was sufficient to meet complaint counsel's burden of proof under the Commission's *Papercraft* decision.[33] (Res. App. Br. at 44). In *Papercraft,* we noted that the development of precise market data could be "prohibitively expensive and burdensome to obtain" in industries characterized by a central core of firms surrounded by a fringe of much smaller competitors. Relying on the Supreme Court's statement in *Brown Shoe* that "precision of detail is less important than the accuracy of the broad picture," we held in *Papercraft* that complaint counsel had sustained their burden by establishing the sales of the major firms identified by experienced executives in the gift-wrapping industry where those executives expressed substantial agreement on the total size of the industry. While respondent is correct in asserting that one element of proof in *Papercraft*—the agreement among the executives of the major competitors as to total market size—is lacking in this case, we feel that the underlying rationale of our decision in *Papercraft* is certainly applicable here. As indicated by several appellate court decisions, the real concern of an appellate tribunal in Section 7 cases concerning industries of this type is simply that the fringe firms' aggregate market share is not so substantial as to cast doubt on what would otherwise be an illegal merger under any interpretation of Section 7. *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 364 n. 40 (1963); *Luria Brothers and Co.* v. *F.T.C.,* 389 F.2d 847, 858 (3rd Cir.), *cert. denied,* 393 U.S. 829 (1968). Thus, it is not necessary in all merger cases for complaint counsel to establish the overall size

[32] Respondent does not contend that the rebuilders who testified in this proceeding were unrepresentative of the production-line rebuilders throughout the country. Although most of the rebuilders who testified tended to be larger than average, we note that substantial evidence indicates that small and medium-sized rebuilders would tend to purchase a greater percentage of their new parts requirements from the four "full-line" suppliers because of the reduced freight costs and greater convenience of purchasing several different items from a single supplier. (I.D. 76(b), (e) [p. 417 herein]).

[33] *In Re Papercraft Corp.,* Dkt. 8779 (June 30, 1971), pp. 9–12 [78 F.T.C. 1352, 1404–06], *aff'd,* No. 71–1681 (7th Cir., January 25, 1973).

of the market as long as probative evidence exists from which the outer dimensions of that market can be determined.

On the present record, we find that complaint counsel has more than adequately met their burden. Complaint counsel's listing of firms in the market undoubtedly includes all full-line suppliers. In addition, we find no indication in the record that complaint counsel's listing omits any significant supplier selling a broad range of new products to rebuilders except the OEMs which we have included in the market.

The testimony of the rebuilders and of some rebuilder suppliers indicates, however, that rebuilders purchase new parts, materials, and equipment from a large number of suppliers which sell basically one product line. Often, as in the case of wire manufacturers, these sales are incidental to their overall business to the point that such suppliers make no effort to sell to the rebuilder market. In such circumstances, where complaint counsel's evidence tends to show that rebuilders generally purchased a majority of their new parts requirements from the main core of suppliers, we do not feel that complaint counsel has to undertake the onerous additional burden of demonstrating that the aggregate sales of the single-line suppliers in at least 20 different product classifications (CX 37ā–c) would not materially affect the size of the market.

While respondent contends that the judge in his decision shifted the burden of proving the size of the relevant market to Avnet, it concedes that the judge, throughout the prehearing stages of the case, repeatedly informed respondent that it did not bear the burden of proving market size "but had only to demonstrate that Complaint Counsel had overlooked several categories of substantial suppliers to rebuilders." (Res. Br. 43). We find that the judge's prehearing instructions to respondent were not only correct but necessary to avoid substantial delay in the proceedings. *See* Subsection III–B, *infra*. We further find that, contrary to respondent's assertion, the judge did not shift the burden of proving market size to the respondent but that respondent, despite two years of prehearing discovery and its expert knowledge of the industry,[34] simply failed to produce any significant

[34] Probably no two individuals are more familiar with the rebuilding industry than Avnet's two vice presidents, Mr. Mansfield and Mr. Fischer. As one rebuilder testified:

I think it is generally acknowledged [that Mr. Mansfield] has done more for the electrical rebuilding industry than any other man in the country. (Tr. 898).

Both men had been involved in the industry for more than a quarter century. (Tr 890, 1568).

number of suppliers which either had substantial sales themselves or were representative of a category of rebuilder suppliers with substantial sales in the aggregate.

Altogether, respondent called 14 alleged suppliers of new parts to rebuilders in an effort to demonstrate that complaint counsel had vastly understated the size of the market. With the exception of two firms—Belden and Phelps Dodge—respondent failed to identify any supplier with sales to rebuilders in 1964 exceeding $100,000. Nor is there any reliable evidence in the record indicating that the suppliers with sales under $100,000 were representative of a large number of small suppliers of rebuilders with substantial sales in the aggregate.

Contrary to respondent's assertions, we do not find that complaint counsel's omission of Belden and Phelps Dodge seriously undermines their estimate of market size. Rather, we conclude on the basis of IPM's own market survey (CX 39) that the two wire manufacturers, together with the suppliers listed by complaint counsel in their market, accounted for almost the total sales of wire sold to rebuilders in 1964. Magnet wire is used by rebuilders primarily in rewinding armatures by the so-called "random-winding" method. In 1964, armatures were rewound using either the "random-winding" method or the preformed coil method, which at that time required coils obtainable only from IPM or VMC, a supplier listed by complaint counsel in its original market. In the IPM market survey, Mr. Mansfield estimated that 5 million rewound armatures were produced in 1964 of which IPM accounted for 2.55 million, 1.3 million by preformed coils and approximately 1.25 million through its sales of magnet wire. (CX 39). In addition, VMC supplied approximately 400,000 preformed coils in 1964. (Tr. 1245, 1252–54). Whether we rely on Mr. Mansfield's estimate of 5 million rewound armatures produced in 1964 or on IPM's advertising claim that the majority of armatures were produced by preformed coils (CX 234 page CIG–2),[35] it is apparent that suppliers other than IPM and VMC provided the windings for between .5–2 million armatures in 1964. Placing the cost of each winding at approximately $1.00 per armature (Tr. 1253), it becomes clear that the wire suppliers called by Avnet accounted for most of the remaining sales of winding materials to rewinders in 1964.

In view of the unquestioned experience and expertise of IPM

[35] VMC's vice president also testified that in 1964 the majority of armatures were rewound by the preformed coil method. (Tr. 1245).

and Valley Forge in the rebuilders supply industry, we can only conclude that respondent, in attempting to destroy complaint counsel's market, strongly confirmed its validity.

B. Procedural Rulings

Respondent spends nine pages of its appeal brief (Res. App. Br. pp. 45–53) and several pages of its reply brief (Rep. Br. pp. 4–6, 11–15) arguing that the judge prevented respondent from developing and introducing evidence on the size of the market by (1) refusing to grant certain prehearing discovery requests, (2) excluding respondent's market survey, and (3) excluding certain testimony from respondent's market survey, and (3) excluding certain testimony from respondent's witnesses regarding the amount of sales in the market.

As respondent admits, the judge in the prehearing stages of the case "repeatedly asserted that Respondent did not have to prove the size of a market larger than that alleged in the Amended Complaint but only had to demonstrate that Complaint Counsel had overlooked several categories of substantial suppliers to rebuilders." (*See, e.g.*, Tr. 231–32, 244, 249–50, 257, 315–16, 333–34, 344–45, 352–54, 356–57). In light of these repeated statements to respondent, the prehearing discovery requests which are in issue here can only be explained as either an attempt to establish the size of the market, which was complaint counsel's, not respondent's, burden, or as a procedural tactic to unduly prolong the pretrial discovery. Respondent proposed a discovery program to subpoena the customer lists of respondent's competitors identified by complaint counsel as being in their market. (Tr. 162). Respondent proposed to send questionnaires to firms on its competitors' customer lists to determine their suppliers. Recognizing that such subpoenas to respondent's competitors were likely to be resisted by those companies subpoenaed, the judge directed respondent to first conduct questionnaire surveys of its own customers to determine their suppliers. (Tr. 168–69). In this case we feel that the judge's alternative was much more reasonable than that proposed by respondent since, as the record now clearly indicates and as the judge suspected, Avnet's customer list *is* the rebuilding industry.

The judge's ruling was entirely consistent with the Seventh Circuit's recent holding in *Papercraft Corp.* v. *FTC*, No. 71–1681

(January 25, 1973), that the Commission could require respondents to demonstrate the need for exceptional discovery requests. Here, Avnet's requests were exceptional, not because of the number of subpoenas as in *Papercraft,* but because of the confidential nature of the material requested (see Section 6(f) of the Federal Trade Commission Act, 15 U.S.C. Section 46(f)) and the high probability that Avnet's competitors would strongly resist disclosure of their customer lists. Since it is difficult to imagine that a thorough survey of Avnet's own customers would fail to reveal the names of any substantial rebuilder suppliers in the country, we find that that Avnet has not demonstrated the necessity for the subpoenas to its competitors.

Although it could be concluded that the requirements of due process were met when the judge permitted respondent nine months to conduct a survey of its customers to determine their suppliers, the judge offered to permit respondent further discovery if respondent's survey showed that substantial competitors existed who were not listed in complaint counsel's market. (Tr. 362–64, 414). The responses to respondent's questionnaire to its own customers, however, failed to produce more than a mere handful of firms in the relevant market. Respondent contends throughout its brief and argument before the Commission that the survey identified 1,001 new parts suppliers to rebuilders. Curiously, that survey was never introduced into evidence. Since respondent was given ample opportunity to subpoena any rebuilder or competitor to testify in this proceeding (Tr. 2398) and, as evident from our previous analysis of the record evidence, totally failed to produce more than two competitors with 1964 sales to rebuilders in excess of $100,000, we can only conclude that the judge was entirely correct in his evaluation of respondent's questionnaire technique.

Furthermore, we note that respondent voluntarily entered into a stipulation in October 1970 in which it agreed to commence the trial on January 25, 1971. (Tr. 429). The parties also agreed that a reasonable period of two to three weeks, later expanded to three months, would be allowed between the conclusion of the case-in-chief and the beginning of respondent's case to allow additional discovery by respondent. (Tr. 430).

Respondent's second challenge to the procedural rulings of the judge concerns his refusal to permit respondent to add a survey to its list of exhibits after respondent's defense was two-thirds

completed.[36] Respondent contends that the survey was necessary to determine the total volume of sales in 1967 of rebuilt automotive electrical units. (Res. App. Br. 46–49; Rep. Br. 11–15). This again, under the judge's statement of respondent's burden on the market-size issue, was totally unnecessary. Respondent asserts, however, that the survey was essential to demonstrate the incompleteness of the data contained in the 1967 Census Bureau's report which complaint counsel introduced to corroborate their evidence on the market-size issue.

The six-month period between the time that complaint counsel informed respondent they would rely on the 1967 census data and the date on which respondent actually contracted for the survey alone refutes respondent's contention.[37] Moreover, respondent informed neither the judge nor complaint counsel of the fact that it was conducting the survey even though most of the survey was conducted during the time that respondent was putting on its case.[38] Such action by counsel before any tribunal is highly suspect; it is contrary to all pretrial procedures.[39]

Respondent's protestations aside, the survey is largely irrelevant to any issue in this case. Respondent surveyed repair shops, service stations, car dealers and fleets, all of which are clearly distinct from rebuilders and are outside of the relevant market. Moreover, most of the information requested in the survey related

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[36] Order Denying Respondent's Request to Amend Its Exhibit List, July 23, 1971.

[37] Respondent was informed of complaint counsel's intention to introduce census data on October 30, 1970 (Tr. 430), but respondent did not contract for the survey until April 19, 1971. (Res. App. Br. at 46).

[38] While respondent asserts that Mr. Maloney (the witness through whom the survey was to be introduced) was included in its list of witnesses, the judge's findings, based in large part on correspondence between counsel for respondent and complaint counsel, indicate respondent's efforts to avoid revealing the nature of Mr. Maloney's testimony:

> Complaint counsel assert that their attempts to talk with Mr. J. M. Maloney, the witness through whom this exhibit is to be introduced, have been continually thwarted. Complaint counsel also state that when they interviewed Mr. Maloney in April 1971, he told them he had no idea of the substance of his proposed testimony and when they contacted Mr. Maloney again later that month he advised them he had been advised *not* to talk to complaint counsel about his testimony without respondent's counsel being present. Complaint counsel further state that they attempted to arrange with respondent's counsel to interview Mr. Maloney prior to the resumption of the hearings in May 1971 (see Appendix 1), but were informed that they would not be permitted to interview Mr. Maloney prior to the resumption of the hearings and that it was possible that Mr. Maloney would not even be called to testify (see Appendix 2).
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> * * * * * * *
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> Even more serious is the fact that respondent's counsel deliberately refused to divulge the purpose of Mr. Maloney's testimony when in fact at the very time complaint counsel was seeking to interview Mr. Maloney, the survey had already been commissioned and questionnaires there under were being mailed out in April 1971.

Order Denying Respondent's Request To Amend Its Exhibit List, July 23, 1971, pp. 3–4.

[39] A review of the record reveals a series of instances where respondent ignored the judge's orders and rulings. (Tr. 2236–39, 2385–98, 3955–60, 3983–91, 4000–03, 4080–91).

to the number and cost of units rebuilt by the repair shops surveyed. (Res. App. Br. at 47 n.55). Since the total sales of repair shops and custom rebuilders was never an issue in this case, respondent's time and money would have been better spent in attempting to find a few representative repair shops that competed with production-line rebuilders rather than conducting the survey.

In the course of its defense, respondent attempted to show through the testimony by its own officials, Mr. Mansfield, Mr. Eigenberg, and Mr. Fischer, that a substantial portion of the sales of IPM and Valley Forge in 1964 were to service stations and repair shops. With respect to IPM, respondent introduced the results of a survey conducted by its own salesmen in the three-month interval between the end of complaint counsel's case and the beginning of respondent's defense. The survey revealed that 166 of IPM's 1971 accounts had service facilities. After acknowledging that only 49 of these 166 customers had purchased from IPM in 1964 and that their total purchases amounted to less than $45,000 (CX 290), respondent, through its vice-president, Mr. Mansfield, attempted to expand the list of service station customers to 700 or more. (Tr. 2141–51). Since Mr. Mansfield's attempt to expand the list of service station customers on direct examination was unsupported by any concrete factual data, the president of Avnet, Mr. Sheib, directed him to conduct another survey of IPM's salesmen during the weekend between his direct and cross-examination. As Mr. Mansfield admitted on cross-examination:

> When I left this Hearing Room the Hearing Examiner was very disturbed about the material that was there [the first survey]. I was told in no uncertain terms by Mr. Simon Sheib that I had better firm up this information and do something about it. (Tr. 2146).

We agree wholeheartedly with the judge's exclusion of the testimony of both Mr. Mansfield and Mr. Eigenberg concerning this survey since the survey was developed during the course of the hearings. (Tr. 2268, 3311–13A). Such a survey could easily have been conducted by respondent at any time during the two years of pretrial in this matter or even in the three-months' recess between the end of complaint counsel's case and the beginning of respondent's defense.

Not dissuaded by the judge's rulings excluding the "weekend survey" conducted by Mr. Mansfield, respondent, through

Mr. Fischer, attempted to establish Valley Forge's 1964 sales by product categories and types of customers from figures contained in a ledger book which had been maintained continuously since 1959. (Tr. 3975–4003). Respondent did this despite the fact that the Commission counsel, during the course of the investigation four years previously, had requested respondent to report information for Valley Forge, IPM, and other Avnet subsidiaries to "[s]how dollar value of sales for each product or product line by each class of customer." (CX 33d, ¶ 2d). In reply, respondent's counsel indicated that Avnet could not provide such data because "it has only incomplete records of sales by product line and therefore could not supply the information requested * * * without making an individual tabulation of invoices which will require great many man months of labor." (HE 3a). While respondent in its reply brief (Rep. Br. at n.11) attempts to rebut the inescapable conclusion that it knowingly withheld information from the Commission by asserting that the development of the sales figures by IPM and Valley Forge required a considerable expenditure of time and effort, the acknowledged existence of the ledger breaking down Valley Forge's sales by product line and class of customer [40] disputes respondent's contentions.

Accordingly, respondent followed a course of conduct throughout four years of investigation, prehearing discovery, and trial during which it (1) denied the existence of a ledger book that had been known to the top officials of Avnet for eight years, (2) never disclosed the existence of such sales figures throughout two years of prehearing discovery, (3) never listed the book in its list of proposed exhibits or as the basis of Mr. Fischer's testimony, and (4) never disclosed the existence of the ledger to complaint counsel or the judge prior to Mr. Fischer's testimony.

[40] As Mr. Fischer testified (Tr. 3978):

Q. Were the figures broken down between sales of ignition parts and sales of rebuilder parts?

A. Well, all of the items were divided, as I stated, I believe it was about 61 or 62 categories at that time, and we took those items that sold only to the ignition market to be an ignition item. We had some items that sold all or practically all in the rebuilder market. Then, of course, there were some items that crossed over where there was a common market factor for both markets.

Q. What did you do to ascertain the sales of those overlapping items that should go in the rebuilder sales as opposed to ignition sales?

A. Well, first of all, items that definitely were one or the other were no questions. In some cases we took what we regarded as the overwhelming usage. In other words, if it was 90 percent or 95 percent rebuilding in our judgment, then we would have called it a rebuilder part. Wherever we could exclude and separate, we did so because it was of importance to us to recognize the paths that these product lines were going.

Again, respondent, through Mr. Fischer, attempted to introduce the results of a survey conducted weeks after the beginning of respondent's defense which had not been noticed to complaint counsel. (Tr. 4085–92). Like Mr. Mansfield's survey, this was an attempt to show that Valley Forge in 1971 had substantial sales to repair shops. Our comments with respect to Mr. Mansfield's survey apply equally here, particularly in light of the fact that the testimony on the survey of Valley Forge's customers followed the events that we have summarized above.[41]

Finally, respondent objects to the exclusion of the testimony of Mr. Roberts, a wholesale distributor, on his sales to rebuilders in 1964. (Res. App. Br. 51–52). The judge so ruled because the witness lacked knowledge about his customers' businesses and the use they made of the new parts which they purchased. This is evident from the fact that three of Roberts' alleged "rebuilder" customers who testified in this proceeding were actually repair shops. (Tr. 2164, 2169, 2549, 2749; I.D. 40).

IV. ANTICOMPETITIVE EFFECTS

In his initial decision, the judge found that Avnet's acquisition of IPM, resulting in a firm with approximately two-thirds of the relevant market, had severe anticompetitive effects, not only by eliminating Avnet's largest competitor from the market, but by substantially increasing the previously high levels of concentration in the industry and entrenching Avnet as the dominant firm in an industry where barriers to entry were already formidable. (I.D. pp. 43–44 [pp. 436–37 herein]). In reaching these conclusions, the judge relied heavily on two memoranda prepared by Mr. Fischer, an Avnet director and vice-president as well as the president of Avnet's Valley Forge division. (Tr. 888, 3962–64).

Throughout this proceeding, respondent has argued that the two memoranda (CX 36 and CX 44, attached as Appendix A and B [pp. 479, 483 herein]), which are extensive discussions of the competitive situation in the rebuilder supply industry and the benefits of Avnet's planned acquisition of IPM, were prepared by Mr. Fischer without any direction from any officer of Avnet and were never shown to any other person prior to 1967. (Res. App. Br. at 55; Rep. Br. at 15). However, the basic issue here is one of credibility which is a matter peculiarly within the domain

[41] We might also note, to give the reader a complete picture of the setting in which the judge made the procedural rulings to which respondent objects, that the day that Mr. Fischer testified was the first time that respondent revealed the fact that the survey of repair shops discussed at pp. 34–36 [p. 470 herein], *supra*, had been conducted. (Tr. 4002).

of the trier of fact who is in a much better position than we to judge the demeanor of the witness, namely Mr. Fischer. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 496 (1951). After closely examining Mr. Fischer's testimony, we feel compelled to affirm the judge's conclusion that the board of directors and other top management officials of Avnet were fully aware of the thoughts expressed in these two memoranda even though they may not have actually read them.

Thus, the judge found on the basis of ample evidence on the record that the memoranda were prepared before the Avnet board meeting of February 15, 1965, which was held for the purpose of discussing the proposed acquisition of IPM. Mr. Fischer, then a member of the board of directors, attended the meeting and comprehensively briefed the members of the board on the rebuilder supply industry and IPM in particular. (Tr. 4150, 4154, 4221, 4229–30; CX 285b). Mr. Fischer admitted on cross-examination that the thoughts expressed in these two memoranda were clearly in his mind at the time he attended the board meeting. (Tr. 4222–23). Furthermore, Mr. Fischer testified that he discussed the nature of the rebuilder industry and the implications of the proposed acquisition with Mr. Scheib, a member of the board and the acquisition committee, and provided him with a list of competitive suppliers (CX 37a–f) before the board meeting. The evidence also shows that Mr. Scheib made a presentation to the board of directors at that board meeting on various aspects of the proposed merger including competitive conditions in the industry. (Tr. 4155, 4221–22, 4229).

Confronted with the overwhelming evidence that the top management of Avnet was fully aware of the content of these memoranda, respondent argues that the judge in his initial decision placed undue reliance on the predictions contained in the memoranda in light of overwhelming evidence on the record demonstrating their inaccuracy. (Res. App. Br. at 55). However, as the judge found; there is substantial evidence in the record to demonstrate how accurate Mr. Fischer's predictions were.

Mr. Fischer observed, for example:

> The acquisition of IPM would serve chiefly to remove our most major competitor from the scene. This would reduce to an overwhelming extent the price competition that is a major factor in the industry. In many cases severe competition has held profit margins on key items to a reduced level owing to the ability of two firms to offer substantially the same item at the same price. (CX 44a). (Appendix B [p. 483 *infra*]).

We have glossed over the natural inherent advantages of elimination of bitter price competition for this is taken for granted but the benefits should not be discounted. (CX 36d). (Appendix A [p. 482 *infra*]).

Two months after Avnet's acquisition of IPM, Jim Paschal, IPM's sales manager, noted in a memorandum to Mr. Mansfield the benefits of a division of markets between IPM and Avnet to reduce price competition:

Having become a part of the Avnet Corp. it is reasonable to believe that International Products & Mfg. Co. will be able to show where it would be extremely profitable for Valley Forge to concentrate on the redistribution outlet for their products, and International Products & Mfg. Co. to concentrate on the rebuilding industry for their outlet.

This way, we would not have to make price concessions to compete with one another in the manner we have done in the past, and thus enhancing the over-all profit of the Corporation. (CX 35c).

In addition, as Mr. Fischer had predicted (CX 44a), both IPM and Valley Forge discontinued discounts to large customers. (I.D. 126 [p. 429 herein]).

Mr. Fischer also envisioned a division of markets between IPM and Valley Forge with the former concentrating on the rebuilders supply field, where it was undoubtedly the dominant firm, and the latter emphasizing the sales of ignition parts, a product line not sold to rebuilders:

If we were able to point to the future where one division would pursue the rebuilding industry and the other to be free to make progress in ignition products and perhaps other items for the consumer product market it could be put to great advantage for purposes of expanded sales. (CX 36b). (Appendix A [p. 481 *infra*]).

Again, Mr. Fischer's projections were amazingly accurate. The record shows that between 1964 and 1969 Valley Forge's sales of ignition parts increased more than tenfold from $184,000 to $2.185 million while its sales of rebuilder parts increased only slightly from between $1.5 million and $1.856 million in 1964 to $1.871 million in 1969 despite a rapid growth in the rebuilding industry. (Tr. 3976, 4006, 4166, 4232–33). *See also* CX 35c, quoted p. 41, *supra*.

Finally, in an extensive discussion of the barriers to entry in the rebuilder supply market, Mr. Fischer noted in his 1964 memoranda:

By combining Valley Forge and IPM it is very unlikely that any other company could arise to become a substantial competitive factor. The amount of tooling required on older numbers with reduced sales would preclude

anybody making the investment which would be very unsound. It is always possible that original equipment manufacturers would choose to enter the field with tremendous sums available for the job to be done but in light of experience, it is not likely that they would embark on a program of tooling where the items to be made were hardly likely to show amortization of the investment. In order to become a factor any newcomer would have to make a very substantial investment in order to give sufficient coverage. To start from scratch and become a factor we estimate the minimum figure of three to four million dollars which would not afford full product coverage. In addition we estimate that this project would involve several years in which time new items would undoubtedly be introduced that would make the problem more complex and expensive. In short it would be reasonable to conclude that the acquisition of IPM would place us in a dominant position and probably beyond reach of any newcomer. (CX 44a). (Appendix B [p. 483 *infra*]).

Mr. Fischer's estimate of the investment necessary to offer broad product coverage is confirmed by the witness from Vulcan who testified that a 1964 study indicated that a $750,000–$1,000,000 investment would be necessary for Vulcan to enter the alternator parts business. (Tr. 992). He estimated that an investment of approximately two-and-a-half million dollars would be necessary to tool up to manufacture starter, generator, and alternator parts. (Tr. 994). Mr. Fischer's assessment of the barriers to entry in the rebuilder supply field is further supported by the fact that no firm offering any substantial breadth of product coverage entered the field between the time of the acquisition and the time of this proceeding.[42] (Tr. 4171–73).

Finally, respondent argues that in utilizing the memoranda prepared by Mr. Fischer, the judge in his initial decision ignored the first page of the one memorandum noting the tremendous influence of the OEMs in the aftermarket and the fact that the entire rebuilding industry and its suppliers are allied in a battle against the OEMs. (CX 36a). As we stated at the outset, we acknowledge the dominance of the OEMs in the automotive aftermarket, a dominance due largely to the fact that the majority of consumers, being inadequately informed of the price, quality, and availability of rebuilt parts, have been persuaded to accept the higher-priced new parts offered by the OEMs. While the rebuilding industry is not yet a sufficiently large threat to the OEMs' business to make it necessary for the latter to lower their prices to meet the rebuilt prices—a situation that would prevail only if the two were in fact part of the same market—the re-

[42] *See also* pp. 10–15 [pp. 451–54 herein], *supra*.

builders do offer a challenge to the OEMs in a particular segment of total aftermarket, one that offers the informed consumer more meaningful price competition and a wider range of automotive electrical units. Rebuilders serve a market characterized by relatively knowledgeable and cost-conscious consumers. OEMs serve a separate market, one characterized by relatively less knowledgeable and less cost-conscious consumers. The barrier between them, inadequate information on the part of the motorists, protects the higher price level of the OEMs from erosion by the rebuilders. Lessening competition within the rebuilder supply industry, and thus raising the rebuilders' price level closer to that of the OEMs, is hardly the way to increase the likelihood that the potential for competition between them will some day become an effective reality.

Despite both subtle and ruthless attempts by the OEMs to impair the ability of rebuilders to compete since the inception of the rebuilding industry, the industry has prospered dramatically. We find nothing in the record which demonstrates that the continued prosperity or future growth of the industry is now suddenly dependent on a concentration of economic power among rebuilder suppliers to protect the industry from the OEMs. In fact, the evidence on this record demonstrates that exactly the opposite is true.

In summary, the record amply demonstrates that Avnet's acquisition of IPM gave it an impregnable position atop the concentrated rebuilder supply industry with approximately 60 percent of the market, six times greater than that of its largest competitor. On this basis alone, the acquisition could be deemed violative of Section 7 of the Clayton Act. *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 364–65 (1963) ; *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 343 (1962). When, in addition, there is ample evidence to indicate that Avnet acquired IPM to diminish price competition, divide markets, and increase the already formidable barriers to entry in the industry, we are compelled to affirm the judge's decision that the acquisition is illegal.

V. SCOPE OF THE ORDER

Respondent attacks the judge's order in three respects. (Res. App. Br. 55–62; Rep. Br. 21–23). First, respondent contends that it should be able to divest Valley Forge instead of IPM. In light of the ample evidence on the record indicating that Avnet acquired IPM to establish itself as the paramount rebuilder sup-

plier and sought to decrease the previous price competition between IPM and Valley Forge by diminishing Valley Forge's role in the rebuilder supply field, we can only conclude that to permit the divestiture of Valley Forge rather than IPM would be to run the risk that Avnet was at least partially successful in carrying out its plan. Certainly, when a respondent enters into a clearly illegal arrangement, it, rather than the public, should suffer the consequences of its own attempt to stifle competition.

Second, respondent argues that the ban on future acquisitions without prior Commission approval unjustifiably extends to a broader line of commerce than that found to be the relevant market for purposes of judging the legality of the acquisition. Paragraph 3 of the judge's order prohibits Avnet from acquiring any firm "engaged in the business of manufacturing and/or supplying parts, materials, equipment and other products to automotive electrical unit rebuilders" for ten years. The order provision thus bans acquisitions of firms selling rebuilt or used as well as new parts to rebuilders. In view of Avnet's position as an important manufacturer and marketer of automotive replacement parts, its acquisition of more than 20 companies in the past decade, its position as one of the major suppliers of new parts to rebuilders, and its relations with rebuilders developed over eight years of ownership of two of the major rebuilder suppliers, we consider respondent to be not only a potential, but a likely, entrant into any segment of the rebuilder supply business open to it. (I.D. 2, 3, p. 46 [pp. 399–400, 439 herein]). *See In re Bendix Corp.*, Dkt. 8739, June 18, 1970, p. 43 [77 F.T.C. 731, 834], *vacated on other grounds,* 450 F.2d 534 (6th Cir. 1971). Moreover, respondent's actions in acquiring two of the three largest rebuilder suppliers in a six-month period evidence not only a fervent interest in gaining a strong position in the rebuilder supply field but also a complete disregard for any laws that would prohibit respondent from doing so. Consequently, the requirement that respondent come to the Commission before entering any segment of the rebuilder supply field by acquisition is necessary to insure against future violations which are similar in nature to that involved in this case.

Third, respondent objects to Paragraph 4 of the order requiring it to file annual reports of all future acquisitions. We might normally limit the annual reporting requirement to a report on those mergers or acquisitions which involve product markets

related to the ban. *Cf.* Paragraph IV of the Order in *Stanley Works,* Dkt. 8760, May 17, 1971 [78 F.T.C. 1023, 1083], *aff'd.* 469 F.2d 498 (2d Cir. 1972). Respondent's disregard for the Commission's investigative authority as well as its lack of cooperation throughout the investigation, pretrial and trial of this case, however, convince us that the usual presumption that respondent will provide a full voluntary disclosure of all acquisitions related to the ban is inapplicable here. Therefore, we feel that the slight additional burden that might be imposed by requiring respondent to discuss all acquisitions in its annual compliance report is totally justified by the need for the Commission to have timely notice of any acquisition which may impair the competitive viability of the rebuilder supply industry. We do feel, however, that the reporting requirement should be limited to ten years, conterminous with the ban on acquisitions, and have so modified the order.

Finally, complaint counsel on appeal urge that respondent be precluded from making any acquisition before divestiture has been accomplished. Since we feel that the threat of a civil penalty action if divestiture is not soon effectuated is a sufficient deterrent, we do not deem the order provision urged by complaint counsel to be necessary in this case.

Appendix A

APPRAISAL OF THE IPM ACQUISITION:

In this memo I have prepared a gathering of thoughts and solutions rather than a series of arguments pro and con. In every case where arguments would be against the move, it is to be recognized that no argument or problem is without solution or counter-move. In a like vein every reasonable contingency has been raised in an industry known to be dynamic and subject to changes in distribution policies.

It is critical in an appraisal to recognize and evaluate the fact that all replacement manufacturers are allied against the original equipment manufacturers of car manufacturers themselves. The list prices from which all discounts are derived and from which all computations are made are set by OEM such as United Delco of General Motors, Autolite of Ford Motor Company, etc. Historically all replacement manufacturers have existed and prospered because of the fact that they were able to offer certain advantages which were price, broader product coverage, greater flexibility and service. No reliable figures have ever been developed which would indicate with authority what percentage of the overall business was secured by OEM as opposed to replacement.

OEM has always pursued a course of action designed to get all the business they could and their efforts often touch on infringement of anti-trust laws but the practical difficulties of getting people to testify and to

secure in writing what is only said verbally has prevented any serious action to deter their aggressive moves. It could be stated with complete truth that the actions currently being taken by OEM represent their highest point in terms of spending and concentration of effort to overwhelm the industry.

OEM has certain basic problems regardless of their approach and the main problem is one of distribution—giving profit to all the levels of distribution and still ending up with a product priced at list level that will be within range. It also must be recognized that consolidated balance sheets prevent anybody from knowing if these programs have been profitable and OEM is not noted for staying with any program for a long time if it means losses. Their systems of divisional management call for profits in addition to which they undoubtedly must have some sensitivity about their dominant position in a major industry. It is to be seriously doubted that they would undertake a program of selling at a loss to drive replacement manufacturers out of business for this would assuredly result in legal action to say nothing of the FTC counter-moves.

The above has been written not as a scare but merely to serve as background for some of the other points which clearly point the way to a combining of IPM and VF which would be the most effective counter-weapon to OEM plans. The latest price sheets of United Delco of GM indicate that they have raised their individual parts prices while at the same time keeping the same price level on the total unit itself. Sticking strictly to the rebuilding field this means that the individual parts in a starter, for example, have been raised but the price of a rebuilt starter has remained at the same level. United Delco has been in the rebuilding business themselves for many years but their efforts have been stronger in the very recent past. Thus, it would follow that the independent rebuilder would be caught in an inexorable squeeze if he had to buy parts at higher prices to compete with a unit that is being sold at the same price. If the rebuilder were at the sole mercy of United Delco (not the only offender but certainly the strongest force and therefore regarded as the main threat) without recourse to the parts manufactured by the independent manufacturer and sold at price levels well below OEM prices.

By the acquisition of IPM, we would move forward in many directions. The biggest benefit would unquestionably be the removal of the competition that has existed and of the massive duplication of effort that has taken place. It is assumed that an acquisition would mean that VF and IPM could for all practical purposes cease the duplication of tools and equipment and produce for all of the industry from one set of tools. Not only would this represent a reduction in expenditure but it would also mean that longer runs for combined usage would also result in lower unit costs for both.

Insofar as purchases of outside components and parts would be concerned, the combined purchasing power would be awesome in terms of our industry and it must be admitted that only lower costs would result. It should also be realized that in certain areas, such as screw machine products and cold heading for example, our individual requirements might not justify in-plant manufacture but combined usage would clearly point the way to more vertical manufacture with the consequent savings in such a program.

391 Opinion

One of the major points to be considered is the duplication in executive effort with major amounts of time being devoted on both sides to sales programs and products designed to gain a competitive edge. If we were able to point to the future where one division would pursue the rebuilding industry and the other to be free to make progress in ignition products and perhaps other items for the consumer product market it could be realized that the freed creative time could be put to great advantage for purposes of expanded sales.

Recognize that both VF and IPM have toolrooms where the same tools, dies and jigs are being made and then visualize freeing tooling time from one division to make products designed to penetrate another field. Both companies face the same problem of being unable to hire sufficient toolroom personnel to make every product that it would like.

Not to be overlooked for it is a key point is the immense duplication of time and money for the creation of catalogs and this is a major cost factor for both companies. Both companies have full-time personnel creating identical catalogs in terms of content and intent, differing in presentation and method but aimed at the same end.

One of the major areas of savings would be in the cost of sales. Both companies employ manufacturers representatives working on a commission basis. It must be recognized that eventually this could be eliminated and we could substitute paid factory representatives on a salary basis with regional overseers to direct and supervise the sales efforts.

As a conclusion to the above comments, the freeing of duplicated effort would afford one company the vital time and energy to pursue other fields where there has been no penetration because of duplicated effort. Thus, if IPM would assume the major burden in the rebuilding field and VF in the other fields, we would develop a major expansion into areas where neither of us penetrate right now. We could make foreign parts which neither do at present because of the thought that the market will not permit two sets of tools and thus the business goes to Lucas, Fiat, etc. because it is not feasible for one to do so for fear that the tooling costs might not be amortized. To follow this thought one company could penetrate sacrosanct OEM parts such as heavy duty trucks, marine, etc. where OEM has kept their prices high because of the absence of competition.

It is our feeling that each company would assume the responsibility for which each would be best suited and the facilities freed by such an action could be employed for markets now denied because of practical limitations.

The possibility of competition at this point and what could be developed is a key point. Should we acquire IPM, we would have reached an impregnable point provided we took appropriate steps to maintain our position. At this point only Ace Electric and Vulcan Motor Products would remain as replacement suppliers of any consequence. Ace was acquired in the very recent past by another company but Ace manufactures only field coils and buys the preponderant majority of their other parts from both IPM and VF. They could be more properly termed service suppliers and do not at this point have the personnel, knowledge or ability to implement a major threat in the parts they presently buy. Vulcan is years behind in product expansion and while they undoubtedly are adequately financed for such a venture, they

have acquired a reputation for poor quality that will be hard to live down. In addition, the management of Vulcan is not young and it is doubtful if they would have the desire to embark on such a program at this point. They are very anxious to sell but their manufacturing facilities are reputed to be obsolete for any serious purposes of expansion. Bear in mind also that Ace Electric is right now furnishing IPM with their field coils with an estimated annual sales volume of perhaps 300,000–350,000 which would normally gravitate to VF who is a basic manufacturer of this series of items.

Feeling that the eventual plan would call for a consolidation of effort in the rebuilding field, it is our belief that we would occupy a position of such dominance that effective competition would be difficult. Should the efforts be joined it should be considered as a possibility to establi warehouses in various parts of the country to serve the local rebuilder markets. At the present time both companies have made tentative efforts but they have been abandoned because of duplicated costs and the competitive pressures. Should IPM have installed an effective warehouse in California, for example, VF would have had to duplicate their efforts in order to protect the market. Neither has ever made a serious effort in that direction, therefore, feeling that any advantage would be temporary and the ultimate would be higher costs for both companies.

In the Canadian market, the combination would be dominant and the combined sales feature would permit the installation of purchasing in Canada for the combined sales would be enough to merit this.

In certain foreign markets, IPM has products that could be sold but because of the fact that their line has limited export appeal in many countries, the business is going to OEM overseas distribution. It does not pay an importer to send IPM a separate order for a small amount of products and incur the import charges that would result so that they buy OEM which would be cheaper to them in such cases. Were the product lines combined, the sales would of course be larger.

We have glosssed over the natural inherent advantages of elimination of bitter price competition for this is taken for granted but the benefits should not be discounted.

VF also feels that such a move would enable them to concentrate their product improvement and cost picture for it would tend to concentrate their efforts and eliminate the necessity of scattering efforts.

On the minus side is to be considered the expressed desire of IPM's key officer to retire from active participation in two years more or less. It would require a concentrated effort to bridge the gap that would be left but it is felt with confidence that this could be accomplished.

It should also be suggested that IPM is financially interested in several outside but concurrent ventures in the rebuilding field with particular reference to equipment. IPM holds an unknown interest in Possis Machine in Minneapolis and steps should be taken to prevent any future competition in the equipment field from this direction.

IPM also has an arrangement with Rea Magnet Wire of Fort Wayne which could prove to be of financial benfit in VF purchases of magnet wire. There is also an interest in a carbon brush company and this is brought

forth to ensure that no competitive efforts should stem from these directions.

Although no reasonable figures can be developed off the cuff it is felt that duplications of effort, tooling, time, etc. plus reduced sales costs and the gradual evolution of special price situations being phased out should result in a remarkable improvement in the profit picture.

To return to the first phase mentioned of OEM pressures, a combined front is a powerful stabilizing force. Bear in mind that if need be, IPM–VF could always do their own rebuilding at price levels that could prove to be interesting. At present both companies hesitate to even consider such a project for it would back-fire—selling your customer and competing with him would not be the shortest way to success but a combined effort would always be a perfect method of sweeping away these considerations should it be necessary.

Appendix B

Comparative evaluation re International Products:

In the event that Avnet does not choose to pursue the acquisition of IPM it is to be understood that alternative measures are available for attaining the same product coverage and potential sales range. Listed below are estimates of the initial costs and inventory requirements that would be needed for each of the product categories in which Valley Forge is not now active as well as the recommendations for each. Prior to this listing we should desire to make clear the following facts consistent with our knowledge of the industry.

1) The acquisition of IPM would serve chiefly to remove our most major competitor from the scene. This would reduce to an overwhelming extent the price competition that is a major factor in the industry. In many cases severe competition has held profit margins on key items to a reduced level owing to the ability of two firms to offer substantially the same item at the same price. IPM has been very active in offering preferential discounts to large customers which Valley Forge has been obliged to meet. It is recognized by both Valley Forge and IPM that we must retain a reasonable share of the business from the larger users for they represent the primary target of any substantial tooling. We both recognize that large customers are necessary for our continued growth. This has produced a situation where the large customer has used his position to play off one against the other. In this situation Maremont has been the chief offender and has used their purchasing power in the most effective manner.

2) By combining Valley Forge and IPM it is very unlikely that any other company could arise to become a substantial competitive factor. The amount of tooling required on older numbers with reduced sales would preclude anybody making the investment which would be very unsound. It is always possible that original equipment manufacturers would choose to enter the field with tremendous sums available for the job to be done but in light of experience, it is not likely that they would embark on a program of tooling where the items to be made were hardly likely to show amortization of the investment. In order to become a factor any newcomer would have to make a very substantial investment in order to give sufficient coverage. To start from scratch and become a factor we estimate the

minimum figure of three to four million dollars which would not afford full product coverage. In addition we estimate that this project would involve several years in which time new items would undoubtedly be introduced that would make the problem more complex and expensive. In short it would be reasonable to conclude that the acquisition of IPM would place us in a dominant position and probably beyond reach of any newcomer.

3) Marginal suppliers of a portion of the line would continue to exist but it is reasonable to conclude that they could not progress to a point of being real competition. The only other supplier of strong coverage is Ace Electric Company who manufactures only field coils and purchases the balance of the items from Valley Forge and IPM. The Ace operation has been weakened by the emergence of Valley Forge as a key supplier and manufacturer of their main item—field coils. Vulcan Motor Products of Newark, N.J. also manufactures many items but their progress has been stunted over the past few years and they have been severely outclassed. Their management is not young and by themselves, it is a remote possibility that they would represent a competitive factor. If they were acquired by a larger company with money available for expansion, it is always possible that they could be revitalized but their present tooling is inadequate and they have acquired a reputation for poor quality which would remain with them. In addition many items are slowing up in sales and to tool them today would be poor policy and thus, a newcomer would have to start with a short line unless they were prepared to spend money merely to achieve broad product coverage without any reasonable expectation of return.

4) A reasonable by-product of merger would be the ability of a combined operation to tool any new item without fear or being unable to have reasonable amortization. To have a guaranteed market for any new item without consideration of severe price competition would provide a major assurance in the case of any substantial tooling investment. As it exists today the introduction of a new item with major tooling expense represents a calculated risk to the result of who would be first on the market to capture the first and most profitable round of sales. Eventually both companies would recoup their investment but the limitation of original equipment as the only avenue of major competition would lead to faster tooling and greater profits at the expense of the OEM suppliers.

5) The summation would indicate that by acquiring our major competitor we would be at a single jump achieve dominance in a growing field and occupy a powerful position to uplift profit levels. The end could be achieved by other means as described below and the only differences would be slower progress and continued price competition. The end desired can be achieved either way and it is not be inferred that acquisition is the only reasonable means. IPM is dominated to an unbelievable extent by the capability and energy of a single individual who has admitted to the burden of this load. While this has been a labor of love to this point, no secondary management has arisen that has demonstrated their ability to carry on.

ALTERNATIVE PROPOSALS

1) Valley Forge has the executive and engineering talent to achieve the same ends. Mainly the difficulty would be the money required and the time needed to inaugurate and implement each of the missing segments. Valley

Forge has not penetrated the alternator market and we would need tooling and inventory for Chrysler and Delco Remy alternators. It is our estimate that each of these AC systems would require an initial tooling expense of perhaps $75,000 with an initial backup inventory of $50,000. The inventory would level off as sales came in. The Ford alternator would not have to be tooled owing to the fact that all Ford parts could be secured from Ford in the special status that we now have.

2) Valley Forge has been prepared to enter the starter and generator shaft business which has been completely dominated by IPM. We have a supplier who is prepared to produce these items at price levels that would be very desirable. Based on our estimates we would need an initial inventory of perhaps $250,000 to $300,000 which would level off within six months to a normal of possibly $175,000. The entry into this market would be slow owing to the fact that we could not effect a deep penetration until we had broad coverage with which to attract customers away from IPM. It has been considered and certainly still in consideration that the Shaw Process may well represent a new and desirable avenue of producing shafts.

3) IPM has attained a deserved reputation for equipment that is needed by the rebuilder. The equipment ranges in price from inexpensive items of perhaps ten dollars to complete winding setups involving thousands of dollars. Valley Forge has the capability to enter this field but our opinion is that this program would have to be placed behind any attempts to expand product coverage.

4) It is the rough estimate of Valley Forge that this expansion could not be achieved within our present space limitations. We believe at this point that we can support a total volume of about 7 million dollars in both plants at which point relocation would be mandatory. Aside from construction costs or rental expenses we calculate the sum of $200,000 to relocate our present facilities.

5) We are confident of success regardless of the avenue chosen. Valley Forge is a basic manufacturer of most of their items in the field of rebuilding and does have the know-how to make all of the items. IPM does sub-contract a great percentage of their production and we feel that this gives us an edge that would become more important as our product coverage would increase.

Appendix C—Percentage of New Parts Requirements Purchased by Rebuilders from the Four Largest Rebuilder Suppliers [1] in 1964 (see page 28, *supra*) [p. 465 herein]

Rebuilder & Location	1964 Net Rebuilt Unit Sales	Units Rebuilt [3]	Percentage of Total 1964 New Parts Purchases Represented By Purchases From Four Largest Suppliers [1]
CMS Mfg. Co. Sacramento, Calif.	92,500	ST., G, A	97%
John-Wilmer Corp. Atlanta, Ga.	500,000	Full-line	80–85%
Missouri Research Lab.[2] St. Louis, Mo.	1,178,000	ST., G, A	65%

Rebuilder & Location	1964 Net Rebuilt Unit Sales	Units Rebuilt [3]	Percentage of Total 1964 New Parts Purchases Represented By Purchases From Four Largest Suppliers [1]
World Generator South Holland, Ill.	478,000	ST., G, A	60%
Automotive Armature [2] Mooresville, Ind.	1,118,762	ST., G, A, AR.	60%
CAPCO Deluxe Generator [2] Covington, Ky.	1,126,000	G, ST., AR.	78%
Arlington Armature Arlington, Va.	123,500	ST., A, G	100%

[1] IPM, Ace, Valley Forge, and Vulcan.

[2] Among top ten rebuilders in nation.

[3] Types of units are designated by the following abbreviations: Generators (G); Alternators (A); Starters (ST.); Armatures (AR.).

Tr. 748–751, 790–1797, 832, 835, 839, 841, 892–93, 896–97, 1287, 1289, 1306–07, 2285, 2322–23, 2506, 2509, 2532–33.

ORDER

This matter has been heard by the Commission on appeal of respondent from the initial decision of the administrative law judge, filed March 3, 1972, finding respondent in violation of Section 7 of the amended Clayton Act, 15 U.S.C. Section 18 (1970). The Commission has determined that the initial decision of the administrative law judge should be affirmed and that the findings and conclusions of law contained in his initial decision, modified to conform with the attached opinion, should be adopted as those of the Commission. Other findings and conclusions of law made by the Commission are contained in that opinion. For the reasons therein stated, the Commission has determined that the order entered by the administrative law judge should be modified. Accordingly,

1. *It is ordered,* That respondent Avnet, Inc. (hereinafter "Avnet"), a corporation, its successors and assigns, shall divest all stock, assets, properties, rights, privileges and interests of whatever nature, tangible and intangible, acquired by Avnet as the result of its acquisition of the assets and business of Guarantee Generator & Armature Co., d/b/a International Products & Manufacturing Co. (hereinafter "IPM"), together with all additions and improvements to IPM which have been added to IPM subsequent to the acquisition, so as to assure that IPM is reestablished as a separate, effective and viable competitor engaged in the business of manufacturing and/or supplying of parts, ma-

terials, equipment and other products to independent automotive electrical unit rebuilders. Such divestiture shall be absolute, shall be accomplished no later than one year from the effective date of this order, and shall be subject to the prior approval of the Federal Trade Commission.

2. *It is furthered ordered,* That pursuant to the requirements of Paragraph 1 above, none of the stock, assets, properties, rights, privileges and interests of whatever nature, tangible or intangible, acquired or added by Avnet, shall be divested, directly or indirectly, to anyone who is at the time of the divestiture an officer, director, employee or agent of, or under the control, direction or influence of Avnet or any of Avnet's subsidiaries or affiliated corporations or who owns or controls more than one (1) percent of the outstanding shares of the capital stock of Avnet.

3. *It is further ordered,* That for a period of ten (10) years from the date this order becomes final, Avnet shall cease and desist from acquiring, directly or indirectly, without the prior approval of the Federal Trade Commission, the whole or any part of the stock, share capital, assets, any interest in or any interest of, any concern, corporate or noncorporate, engaged in the business of manufacturing and/or supplying parts, materials, equipment and other products to automotive electrical unit rebuilders, nor shall Avnet enter into any arrangement with any such concern by which Avnet obtains the market share, in whole or in part, of such concern in the above described product lines.

4. *It is further ordered,* That Avnet shall, within thirty (30) days after the effective date of this order, and every thirty (30) days thereafter until Avnet has fully complied with the provisions of this order, submit in writing to the Federal Trade Commission a verified report setting forth in detail the manner and form in which Avnet intends to comply, is complying or has complied with this order. All compliance reports shall include, among other things that are from time to time required, (a) the steps taken to accomplish the required divestiture; and (b) copies of all documents, reports, memoranda, communications and correspondence concerning or relating to the divestiture.

With respect to Paragraph 3 of this order, Avnet shall within thirty (30) days following the effective date of this order, and annually thereafter for a period of ten years, submit a report, in writing, listing all acquisitions and mergers made by it, the

date of every such acquisition or merger, the products involved and such additional information as may from time to time be required.

5. *It is further ordered,* That Avnet notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

Commissioner Dennison dissented for the reasons set forth in his dissenting statement.

IN THE MATTER OF

NATIONAL DYNAMICS CORPORATION, ET AL.

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 8803. Complaint, Nov. 21, 1969—Decision, Feb. 16, 1973.

Order requiring a New York City seller of battery additive, VX-6, and other articles of merchandise, among other things to cease misrepresenting earnings and profits from resale of its products; failing to maintain adequate records which substantiate its earnings claims; representing that any product has been approved by a laboratory or other organization or person; and misrepresenting the results of scientific tests.

COMPLAINT*

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that National Dynamics Corporation, a corporation, and Elliott Meyer, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

*Reported as amended by the hearing examiner's order dated July 7, 1970.