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In the

Supreme Court of the United States

FORD MOTOR COMPANY,

Appellant,

v.

UNITED STATES OF AMERICA,
et al.,

Appellees.

No. 70-113

Washington, D. C.
November 18, 1971

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Washington, D. C.,

Thursday, November 18, 1971.

The above-entitled matter came on for argument at
10:18 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice

APPEARANCES:

WHITNEY NORTH SEYMOUR, ESQ., One Battery Park Plaza,
New York, New York 10004, for the Appellant.

DANIEL M. FRIEDMAN, ESQ., Deputy Solicitor General,
Department of Justice, Washington, D. C. 20530,
for the Appellees.

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Whitney North Seymour, Esq.,
for the Appellant

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Daniel M. Friedman, Esq.,
for the Appellees

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REBUTTAL ARGUMENT OF:

Whitney North Seymour, Esq.,
for the Appellant

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments next in No. 113, Ford Motor Company against the United States.

Mr. Seymour, you may proceed whenever you're ready.

ORAL ARGUMENT OF WHITNEY NORTE SEYMOUR, ESQ.,

ON BEHALF OF THE APPELLANT

MR. SEYMOUR: May it please the Court:

I'm going to try to reserve a few minutes for reply.

This is a direct appeal from the judgment of the District Court in Detroit, holding that the acquisition in 1961 by Ford Motor Company of the spark plug business and the name of the Autolite Company to enable Ford to supply its own needs for original installation of spark plugs, and also to supply replacement plugs to others. And the acquisition occurred after Ford had been the customer of Champion, a leading company in the business, for 50 years.

The court held that the acquisition violated Section 7 of the Clayton Act. He directed divestiture, and then entered seven rather extraordinary injunctions.

First, he enjoined Ford from going into the business of making spark plugs by internal entry for ten years. The judgment enjoined Ford from making any plugs under its own name for five years -- from marketing any plugs under its own name for five years. And required Ford to buy half its requirements for five years from the purchaser of the divested

-- the person divested.

When the case was tried, batteries were also involved, but they've dropped out, they are not now involved. That matter having been satisfactorily disposed of.

Ford challenges the decision of the District Court as to the violation, and submits that even if there was a violation, divestiture in this case was not the best remedy, because other remedies, which I'll mention, were better.

And challenges all the extraordinary injunctions, with particular weight on the injunction against internal entry and the injunction against the use of the Ford name, which it regards as definitely anti-competitive.

Now, I think it's important to understand the nature of this industry, because, as in other cases, the impact of Section 7 depends on the nature of the industry in the particular situation involved.

General Motors has made its own spark plugs since 1909. In that year it acquired the then Champion Spark Plug business, and has since marketed spark plugs under the name of AC, the letters AC. And at the time of the acquisition, General Motors had 30 percent of the spark plug market.

When I say the spark plug market, I'm talking, for the most part, about the -- not the original installations but the market in the -- the so-called after-market, the replacement plugs; that's where the large amount of the plug business is

done.

Champion went back into the spark plug business, after selling to General Motors, and has supplied -- or had at the time of the acquisition supplied Ford for 50 years.

And in 1936 Autolite came into the business and began to supply Chrysler. And Champion got 50 percent of the business, had 50 percent of the business at the time of the acquisition. That is, General Motors 30, Champion 50, and Autolite about 15.

And the balance of a few percent was sort of -- was spread among small manufacturers, mostly in the private brand market. Now, the private brand market is the market served by such companies as Sears, Roebuck and Montgomery Ward, and other mass merchandisers, and some of the oil companies who market spark plugs under their own tradenames.

In 1960-61, in those years, Chrysler got very concerned -- I mean Autolite got very concerned because it saw signs that Chrysler might be getting ready to go into the spark plug business itself, and that might leave it with an expensive plant, which the court below described as a potential albatross if it couldn't do something about it.

So it came to Ford and offered to sell the spark plug business to Ford, and the Autolite name for spark plugs, and other uses, and they worked out a deal, under which Ford bought these assets, including the battery assets which are no

longer involved, for a total of \$28 million. And Autolite became ELTRA, so that there was a new company with the name of ELTRA created, which carried on the portion of the business not sold by Autolite to Ford, and ELTRA has built a spark plug plant in Alabama and is in the business of supplying spark plugs largely for the private brand market.

Ford, in connection with the sale, agreed to buy 12 million plugs from ELTRA over a period of two years, and also to provide it with certain ceramic parts. And thereupon Ford was in the business under the Autolite name; Champion became Chrysler's supplier; and it took a large part of a year to change over from Champion plugs to Autolite plugs, and work out the technical difficulties involved. And also to begin the process of improving the distribution system.

And it took about the same time for Chrysler to get started with its new supplier, Champion.

At the time of the acquisition, or just before the acquisition, Ford had some 14 percent of the spark plug business, and after the acquisition Ford's percentage gradually came up and Champion's went down, and General Motors has retained, or remained about the same, although it's gone up a little bit.

Q What was the Champion figure?

MR. SEYMOUR: The Champion figure originally was 50 percent. At the time of the acquisition --

Q 1961?

MR. SEYMOUR: 1960 -- yes, 1960-61. Just before the acquisition.

And Ford's was 30, and Autolite's was about 15. And when Ford came in, the Autolite business began to go up, so that by about 19-- in the late 1960's, Ford's business was up to about 19 percent, and Champion's business had come down from 50 to about 40, and General Motors' had remained about the same. That's gone up a little bit.

It isn't correct, as the government suggests, that this was all automatic, that all that happened was that the Champion business went down and the Autolite business went up, and it was just as a result of changing suppliers. There was active and intense competition in the after-market, and it was as a result of that competition that these changes in percentages took place.

True, they seem like relatively small changes in percentage, but each percentage point was about four million plugs, and it's a substantial amount of business involving thousands and thousands of transactions.

I think Your Honors will be satisfied when I finish describing the industry, that historically there have been, since 1936, only three major suppliers to the automobile companies, and that before that there were only two, and that the business does not accommodate itself to more than three

major suppliers. There is this private market business, but inevitably there are, in this business, I think, only -- there is room only for three major suppliers. And that's because of the special nature of the plug in the business, which I'll now turn to.

Without going into any detail of the mechanics, the spark plug is a small but essential part of an automobile, and a truck, and also is used in tractors, lawn mowers, and so on. It has, as you know, two electrodes. It's inserted in the cylinder to jump the spark caused by power from the generator to ignite the mixture of oil -- or gasoline and air in the cylinder, and cause the explosion which drives the engine.

The plugs are carefully engineered to particular makes and models. It takes the plug manufacturers and the automobile manufacturers, working closely together over a long period of time, to get just the right form and construction of the plug. And to make it deal most effectively with the particular model for which it's used.

Just as an example, I think Ford now makes some 80 different motors, and has 80 different plugs for those motors.

The use of the wrong plug can cause malfunctioning, affect the exhaust fumes from the engine, and could cause serious damage.

Now, the plugs are installed at the factory in what

is called OE installation, that's original equipment installation. And the automobile manufacturer buys or makes these plugs, and they are put in the car and then the car is sold. And about six -- about 18 months after the car is sold, the average car owner goes around and gets a tune-up and has a replacement of the plugs, and the plugs are replaced about five times during the use of the average automobile. And that means that on a six-cylinder car there are 30 plugs that are bought over that period; on an eight-cylinder car, 40 plugs.

The facts I am stating I think there is no dispute about. We're at one about, I think, the nature of the market and the facts about the market; and, indeed, many of them were stipulated.

The most replacement plugs are inserted by mechanics in the course of a tune-up. One doesn't ordinarily take his car around and says, "I need a new spark plug", but usually he's going to a garage or a service station or some other place, to have the car tuned up and gone over. And it's at that time that the mechanic ordinarily inserts the new plugs.

And the new plugs are such a minor part of the cost of that operation that really price and cost of the plugs to the customer are of no moment. So that there is little, if any, price competition at that level.

The mechanic --

Q Well, then, the customer doesn't really choose,

either, does he? It's the mechanic that probably chooses the plugs.

MR. SEYMOUR: That's right.

Q What plugs to put in.

MR. SEYMOUR: That's right. The mechanic, on the basis of his experience and knowledge, ordinarily makes the choice.

Now, he chooses the plug which ordinarily -- the plug which was originally installed. This propensity of mechanics to use the plug originally installed is called, in this record, sometimes the OE tie, which merely means the propensity of mechanics to use the same plug in replacement that was there originally. And he does this because he knows about the fact that the plug was originally designed for that car, and he doesn't want to take any risks about it. He doesn't want to think that he's smarter than the engineering departments that designed it.

Now, there are all-purpose plugs manufactured by all these companies, and the average garageman or service station man stocks some of the plugs, but usually not all the plugs. Usually, if, the record shows, that sometimes the garage owner of the filling station owner has only the AC plug or sometimes only the Champion plug, but usually both of those because they're so popular.

And then, at the time of this acquisition, relatively

few of these places also stocked the Autolite plugs. And one of the great efforts here, in the competitive struggle, has been to get more and more of these places to stock the Autolite parts, plugs.

If they don't have the --

Q Well, now, up to the time of this acquisition, all General Motors cars had AC plugs?

MR. SEYMOUR: That's right.

Q Is that correct? And all of Ford cars had Champion plugs.

MR. SEYMOUR: That's right.

Q And all Chrysler cars had Electric -- had Autolite plugs.

MR. SEYMOUR: After 1936.

Q And so --

MR. SEYMOUR: Before 1936 General Motors supplied Chrysler.

Q Right. But from '36 until the time of this acquisition --

MR. SEYMOUR: That's right.

Q -- what I've said is correct.

MR. SEYMOUR: Correct. That's right.

Q And then if it's -- if, as you tell us, it was the habit or practice of mechanics to install as replacement plugs the original equipment plugs, why wouldn't they have

stocked all three, just in the ordinary course of business? Because those are the so-called Big Three automobiles.

MR. SEYMOUR: Well, generally speaking, there are perhaps two reasons, as far as the Autolite plug -- or the Ford Champion plug, to take that first.

Ford tried to distribute these plugs through its franchised dealers, and the franchised dealers were no longer handling that, or about the time of the acquisition, as many of the installations as the filling stations and others. And the filling station proprietors and the garage proprietors were concerned about not having too large an inventory. And naturally they would maintain an inventory which would do the best job in supplying plugs for the largest possible number without too much of an investment.

So there was a tendency to have the major lines, and the Autolite line had difficulty getting in, as is indicated by the fact that between about the time of the acquisition and the late '60's, the percentage of Ford sales in the after-market crept up some 5 percent, which I think is represented by the increased stocking of these plugs in the market.

Now, the -- I mentioned the all-purpose plug. All these companies make all-purpose plugs, so that if the mechanic doesn't have the OE plug at the time, he can try to do the best he can by using an all-purpose plug, which is sort of

a compromise. It's not as good, many people think, as the OE plug, but it's better than a plug that was made for a wholly different kind of a car, and it's kind of a compromise solution.

Q Didn't I read somewhere in the record that there had been testimony to the effect that in most of the filling stations, they didn't appear to want to carry more than two different brands?

MR. SEYMOUR: That was so for a long time, and the business of trying to get them to carry three took a lot of effort. And that's what went on.

Now, the OE use is of such importance to the manufacturer, that Champion, beginning in 1920, started what is known as the 6-cent OE price. It began to sell the plugs for original installation at six cents. And then everybody -- all the other manufacturers followed suit. So that all the plugs for original equipment installation were sold at six cents. And the cost of the plugs was three or four times as much as that.

So that the manufacturer used this low OE price to get in and get the business, and then he had to make up for the loss on that same by a higher price on the sales for the after-market, for the replacement plugs.

And so this is a very important part of the getting into the business and holding the business, and is a fact of life which is unusual in this industry, I think.

The -- I've already mentioned the fact that because of the fact that the plugs are originally installed as part of other work, that their price is of little or no moment. And this -- one of the reasons that the price in the business has been so stable is that in 1953 all of the plug manufacturers had cases before the Federal Trade Commission which involved the question of whether they could distinguish in price between the various types of distributors who distributed their plugs, including the other companies who might distribute their plugs, and the Federal Trade Commission held that they had to give the same price to everybody in the distribution chain.

And this has naturally kept the plug manufacturers from lowering their price because if they did they had to do it to everybody. And therefore they couldn't do it in the ordinary competitive way.

The court below regarded one of the important factors as to whether or not the Champion -- or Ford's relations to Champion tended to moderate Champion's price, and he held that it did. And it was his view that somehow Ford being a large customer of Champion moderated Champion's price.

Now, on this record, that's just a theory. There was no proof, and there's nothing in this record to show that there was any such moderation. I would take it that the original equipment price, given 50 years ago, is hardly a moderation which would still persist in any realistic sense at the time of

the acquisition.

It was really not a moderation, it was a sort of a payment for entrance, or an arrangement for entrance.

And, aside from that, the record doesn't show any moderation. Ford had to pay a higher price in '59 and '60 for its plugs than other people did, and there isn't any evidence of moderation.

The suggestion is made that -- and the court examined this carefully -- that Ford was a potential competitor and that under Penn-Olin somehow this acquisition was bad.

Now, the court took testimony, and the government tried very hard to try to show that Ford was on the verge of entering this business. But the evidence the court found did not show that Ford was on the brink of entering this business. There are certain memoranda in the record which indicate that there was a study made of that subject, several studies, but they never reached the point of top-level consideration.

And the reason they didn't was that, and the testimony of Mr. Duffy in the record, which the court accepted, was that plugs were available to Ford for OE installation at one-third of cost; Ford didn't have at that time any engineers who were expert in the plug business, or even in the ceramic business, that they had no distribution system which was adequate at that time to enable them to compete effectively in the after-market. And then the undisputed evidence is, and the

court recognized it and everybody recognized it, that after original OE installation of a new plug, it takes five to eight years to have enough vehicles on the road with that plug in them to really do a lot of business in the after-market.

And so anybody going into the plug business, as a major manufacturer, had to face all these difficulties: the problem of five to eight years before he could really rise on the after-market; the problem of the loss which was involved in connection with getting -- having something other than the six-cent price; the problem of working out the technicalities, and so on.

So, it's clear, I think, that Ford was not a potential competitor, and the court didn't conclude that it was.

Q Did any of the -- was AC -- are AC plugs manufactured by General Motors or are they manufactured by a company that's owned by General Motors, or what?

MR. SEYMOUR: I believe they're manufactured by General Motors, or one of its divisions.

Q And it was the only one of the so-called Big Three then that did manufacture its own plugs?

MR. SEYMOUR: Yes.

At the time Ford went into the business.

Q At --?

MR. SEYMOUR: At the time Ford made the acquisition.

Q Up to this acquisition.

MR. SEYMOUR: Now, I want to move along. I've spent more time over the industry than I intended to.

The court -- I pointed out, I think, that Ford considered that making this acquisition would enable it to get into the business and compete effectively, and that expectation was realized because the competition has increased since Ford made this acquisition. And it's perfectly clear that it was not just a slipping around of percentages, but it was a genuine increase in competition in the market.

This acquisition, we submit, was pro-competitive because it made Ford a -- Ford was a stronger and more effective competitor than Autolite had been. Where there were three companies before the acquisition, the creation of ELTRA after the -- in connection with the acquisition, a company which is now an effective competitor in the private brand market, and the fact that Champion, having lost a portion of its interest and its sales in the after-market, has had to become a more effective and active competitor in the private brand market. All, I submit, are contributions to competition.

And so, we submit, that it was a pro-competitive acquisition.

Now, the court below, as I suggested, regarded the fact that although Ford was not a potential entrant, it still moderated Champion's price, and also the fact that the acquisition somehow foreclosed competition and perhaps also

increased barriers to entry as the grounds upon which it decided the Section 7 case adversely to Ford.

Now, as I have said, there is no evidence in this record of moderation of Champion's prices. There is no foreclosure of anybody but Champion, and Champion has had to simply get out and compete in a different way.

This is not a case like Brown Shoe, where there were sales being made by competitors in the market, and such sales would have gone on but for the acquisition.

It's not a case like many of your cases on potential competition, where a potential competitor was acquired and absorbed, and there was no substitute, as there was here; for the absorption here, the acquisition gave rise to a stronger competitor.

And as far as barriers to entry is concerned, I hope I've made clear that any company seeking to go into the making of spark plugs for use in automobiles had to face the barriers to entry which were inherent in the business; that is, that they had to sell at a low price, at a loss, they had to make up that loss over a period of years through the replacement market. They couldn't get into the replacement market for five to eight years. They had to work out all kinds of technical difficulties in arriving at the thing.

So that, really, the idea that little companies were in a position to come knocking on the door and get the business

is just a concept of an unnecessary charade. It would be just a charade to suggest that small manufacturers were in a position to come in and get that business.

Now, Champion, if this transaction had not taken place, it seems clear on this record that what would have happened would be that Champion would have continued, as it had for 50 years, to be Ford's supplier, and the market would have been just what it was before.

Instead of that, the market has become more competitive as a result of Ford's activity in it, and the creation of ELTRA as a real competitor, and the fact that Champion has had to scramble now for business by competing in the private brand market all are contributions to competition.

The --

Q ELTRA doesn't supply any original equipment, does it?

MR. SEYMOUR: No. Not as far as I know.

Q Yes.

Q Well, what of those 12 million, isn't there some arrangement there, you said, that --

MR. SEYMOUR: Oh, I beg pardon. Yes. In connection with the sale, Ford undertook to buy --

Q For two years is what you mean.

MR. SEYMOUR: -- 12 million for two years.

Q Right.

MR. SEYMOUR: So those may well have been used for original --

Q Those were for original installation?

MR. SEYMOUR: They might well have been used for that purpose.

Now, I must come to the problem of relief.

Let me just, before I come to that, I really think that the government's position and the court's position here was, without any -- kind of a sub silentio treatment; that Ford being a large customer must, as a matter of law, be regarded as having somehow moderated without regard to the facts, and thus, that any acquisition involving such a large customer must be regarded as, per se, illegal.

The court doesn't use those words, but I think that's the necessary implication. And I submit that there are quite enough per se rules now without adding one in this field. And, furthermore, it would be very unsound, indeed, to treat a customer in the same position as one, as Your Honor said, in Penn-Olin, "waiting anxiously on the edge of the market to come in."

Now, on relief: If I've satisfied Your Honors that there is no violation, that's the end of the case.

If Your Honors think -- as far as we're concerned -- if Your Honors think that there was a violation, we submit that divestiture in this case was an improper remedy.

We know that divestiture is usually the remedy. But Your Honors have laid it down that it is not inexorably the remedy, and here the effect of divestiture, as we've shown in our brief, would have been one of two things: either, after all the effort involved in divestiture, all that would have happened would have been that the new Fostoria, the purchaser would have become tied to Ford just as the old company -- just as Champion had been. The market would have been just as it was before, and all the advantages, the proselytative advantages of this acquisition would have been lost.

And the alternative to that, which is perhaps still worse, is that after the five years, during which Ford had to take half of its requirements from new Fostoria, the company would not have been able to market; somehow it would have lost its markets, and it would have failed. And then the whole thing would have gone for naught, with great economic loss to the public.

Now, let me leave that.

Ford made a proposal, which I think really was, in this setting, far more fruitful than divestiture. And that was that for ten years it should buy 30 million plugs from the -- from ELTRA. ELTRA then had a capacity of about 20 million plugs. Annual purchases of 30 million would have put ELTRA in a position to sell 50 or more million a year, and made it an effective competitor.

And that relief, in lieu of divestiture, would have done more to improve the competitive situation than divestiture would have done.

Let me come to the injunctions, because these are things in which I have a deep concern, and I haven't left myself any time to talk about them.

The injunction which the court granted forbidding Ford, by internal entry, to go in and manufacture for ten years is absolutely unprecedented, as far as I know; it's clearly anti-competitive; it's effect would be to deprive Ford of a right that everybody else has, that General Motors had and exercised; and there's absolutely no reason, except some backhanded penalty, for any such harsh injunction.

My learned friends say, Well, Ford -- it would have taken Ford a while to get into the business, and it wasn't time to go into the business anyhow. That does not take away, I think, from an error in the court below in granting such a sweeping, unprecedented and unjustified injunction.

And in the same category is the injunction against Ford using its own name, after -- for five years.

That means that Ford would have to buy not only half its plugs from ELTRA -- or from new Fostoria, but would have to buy the rest of its plugs from somebody else under that person's trade name and not use the Ford name. So that Ford would be forbidden from really beginning to edge into this

market under its own name, for a long period of time. There is no precedent for any such relief as that. It is unnecessary and clearly anti-competitive.

Now, I won't argue the performance contract, which is the third injunction, because, in my own view, if divestiture was proper, if there was a violation and divestiture was proper, that injunction may have been useful in implementing the divestiture and in insuring the divested company of business for a period of time.

And while it's unusual, and I think unnecessary, I won't press that.

It seems to me the other two injunctions, whatever Your Honors do with divestiture and violation, are clearly erroneous and the decree should be reversed on that ground alone. It is our view that it should be reversed across the board.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Seymour.

Mr. Friedman.

ORAL ARGUMENT OF DANIEL M. FRIEDMAN, ESQ.,

ON BEHALF OF THE APPELLEES

MR. FRIEDMAN: Mr. Chief Justice, and may it please the Court:

Section 7 of the Clayton Act, of course, deals with probabilities not with certainties. The statutory standard is that acquisitions are condemned whose effect may be -- may

be -- substantially to lessen competition. And as this Court has stated, and as the legislative history indicates, all that is required is that there be a reasonable probability of an anti-competitive effect.

And in the Philadelphia Bank opinion, this Court stated that a determination of whether there is such a reasonable probability of anti-competitive effect, said "requires not merely an appraisal of the immediate impact of the merger upon competition, but a prediction of its impact upon competitive conditions in the future." And also added that a prediction as to the future impact is sound "only if it is based upon a firm understanding of the structure of the ... market."

That is, the impact of Section 7 is to prevent anti-competitive changes in the structure of the market, the way the market operates.

Now, there is no question about the market in this case. It's one of the most concentrated markets that we can find.

For more than 20 years, the three leading firms have had between 90 and 95 percent of the market, in most instances closer to 95, and that condition has continued since the acquisition.

There are also, as Mr. Seymour has indicated, high entry barriers in this market, primarily because of the fact

that due to the OE tie, a manufacturer finds it almost impossible to get into the lucrative replacement market unless he has the OE tie, he can't get the OE tie unless you can get the business of one of the major automobile manufacturers.

Q And in order to do that, you have to sell way below cost.

MR. FRIEDMAN: You have to sell way below cost.

So what you have is, this is a market where there's a high concentration and very high barriers to entry. And it's to be expected in such a market, there's a little price competition. I'm not talking now of the price competition at the service station or the garage level, where you go to have your motor tuned. I'm talking of the competition at the next level, at the distributor level, at the warehouse level, the prices at which the manufacturers and the distributors of spark plugs put the plugs into the distribution channels.

Q Mr. Friedman, do you agree with Mr. Seymour that, as a result of the acquisition in '61, the giants are less big and the lesser companies are bigger, have a greater share of the total market?

MR. FRIEDMAN: We don't agree as he characterizes it. Of course, as a result of the acquisition, Ford now -- Autolite in the hands of Ford now has a greater share of the market than Autolite had before the acquisition. But of course what has happened is that since the Ford account was a much larger

account than the Chrysler account, necessarily when Autolite shifted its custom from Chrysler to Ford, it necessarily got a larger share of the market. And conversely, when Champion, after it had lost the Ford account, picked up the Chrysler account, it had a smaller share of the market.

Now, we're not saying that the correspondence is automatic, but we think this reflects a major share of the shift in the market. But we don't think the market is any more competitive, Mr. Chief Justice.

We had an economist who testified on this, and the fact of the matter is that even after the shift, there's been no basic change in the market. The market is still oligopolistic. The market is still -- the Big Three have 95 percent. There is still virtually no price competition in the market.

This new competitor that's been referred to, the ELTRA Company; the ELTRA Company, as the District Court characterized it, is a pygmy. It has something now -- even now something like 1.4 or 1.6 percent of the market. It has its own name brand Prestolite, which has made very little progress in the market. It's basically attempting to sell in the after-market through the private brand labels, and it just can't get in to the market in any substantial measure because of the original equipment tie.

We believe -- we do not concede that the market is any more competitive.

Q Who is at the top of the market now?

MR. FRIEDMAN: Still Champion.

Q But don't they have to try harder as a result of this, to hold their position?

MR. FRIEDMAN: Well, they may have to -- they may have to try harder, they may have to sell more, because, having lost the Ford account, they may find it necessary to fight more vigorously for business in the after-market. But, nevertheless, all there has been is a slight shift in the shares among the firms in the market. And we had an economist, a distinguished economist, Professor Mann, who testified that in a market of this type, a market of this type, the shifting of shares, slight shifting of shares among the three leading firms that together had 95 percent, does not really reflect any greater vigor of competition in the market.

There's no price competition. This has not injected any greater price competition into the market. There's no --

Q Is price the only area of competition, or --

MR. FRIEDMAN: Price is not the only area of competition, Mr. Chief Justice. But one of the characteristics of an oligopolistic market is the absence of price competition, and price competition is, in a sense, the ultimate of competition. I mean, that's what it's really all about is prices.

And if you get into a market of this type, where you

have a rigid structure; and I might mention in passing, one of the things that's pointed out by our economist, and one of the things that the record shows, is in this type of a market profits are very high. Although the average return of all manufacturing enterprises in the country is 10 percent on investment, Champion over a 15-year period had an average of 25 percent.

Q Mr. Friedman, do you have any comment, perhaps it isn't in the case, as to the very advantageous position that GM occupies here? Maybe there isn't anything you can do about it.

MR. FRIEDMAN: I don't think there's anything, Mr. Justice, that can be done about it here, except, I think the fact that GM has in effect tied up such a large share of the market, because of its own manufacturing of plugs, is an important consideration as to why it's significant and vital to preserve the other forces in the market that tend to be competitive.

And I would like to turn --

Q But this is small comfort to Ford, I suppose?

MR. FRIEDMAN: That may be, Mr. Justice.

On the other hand, the fact that General Motors is now engaged in the manufacture of its own spark plugs is no reason why Ford should be permitted to do the same thing. Whereas, we believe -- and I will come to this in a minute now

-- we think the effect of Ford's acquisition of the Autolite Company and going into the manufacture has definite anti-competitive consequences.

Q But you would not object to Ford taking the time to develop it internally, I take it?

MR. FRIEDMAN: That is correct. Because Section 7, Mr. Justice, speaks of acquisition. Any firm is free to develop it internally. That's exactly --

Q Because Ford, under this decree, would be --

MR. FRIEDMAN: Under this decree, and as I will come to the reason for that, Mr. Justice, is that Ford is prohibited from manufacturing for ten years in order to give the divested company the opportunity to get on its feet again.

Basically, it's an attempt -- Ford, for ten years, has had the benefits of the ownership of Electric Autolite. Ford has acquired in this ten-year period many things. It has developed great knowhow. It has built up a staff of engineers. It acquired Autolite's entire distribution system, its entree to these warehouse distributors who are so important in penetrating into the after-market.

And the purpose of the ten-year provision, in effect, is to put the thing back, put the thing back to where it was before. Once again, Ford will be a customer, there will be a large independent manufacturer, and to give this large company

the opportunity to begin to develop.

Because -- if I may just say one other thing on that, Mr. Justice -- if Ford was permitted to go into manufacture immediately, the likely -- first, the likely thing that would happen would be this: -- well, and of course I might mention that the provision for the decree are all interrelated, because if Ford were permitted to go into manufacture itself, and there was no ban on the use of Ford's name, or even with the present thing, what probably would happen is Ford would purchase its 50 percent requirement of the divested plant and put those plugs into the after-market, to sell for the replacement in the Ford cars that are already on the road, and would begin manufacturing under its own name, selling under its own name.

And by the -- in a very short period, after five or six years, when the market for the replacement plugs is exhausted, this new company would find itself with no basis at all. It would have no OE tie, because Ford itself would be using its own brand on the plugs, and it would be left kept of floundering, if this is the word, trying to break into the after-market.

And this is designed, this provision and all of the provisions of the decree are designed to give the new company an opportunity to get a foothold, at least, in the market; to try to restore as much as possible the market structure that

existed before the acquisition.

Q By the new company you mean the so-called new Fostoria?

MR. FRIEDMAN: Fostoria, the new Fostoria, as it's called.

Q The divested plant --

MR. FRIEDMAN: The divested company.

Q -- of Autolite?

MR. FRIEDMAN: Yes.

Q Mr. Friedman, would you care to speculate on what impact this will have on Champion and General Motors, if any, or isn't there anything in that area that you can speculate about?

MR. FRIEDMAN: I think it's dangerous to speculate, Mr. Chief Justice, I think that presumably, what is likely to happen is this: The divested plant, the new Fostoria, under this decree, knows that at the end of five years it may or may not continued with any part of Ford's business. It's obviously going to be under pressures as a result of this decree. First, to try to gain all of Ford's business in the initial five years, not just the 50 percent; and then to keep the business after the five years.

It doesn't know, however, what is going to happen. Conceivably, after five years, Ford may take its business elsewhere. Or after Ten years Ford may decide to manufacture.

So I think what's likely to happen is, from the very outset, the new Fostoria is going to do two things: One, it's going to do everything it can to try to satisfy Ford in terms of quality, in terms of fair pricing, et cetera; secondly, it's going to be aware of the fact that at the end of five years it has no assured market. It may have to start fighting at this point in the after-market, and therefore it seems to me, in the initial five-year period, the new company is going to do everything it can to try to build its business in the after-market.

And if it's going to be building its business and competing vigorously in the after-market, I presume that Chrysler and General Motors will also feel the impetus to compete vigorously.

Now, if I may, I would like now to -- having gone to the second part of the case in some detail as to relief, I would now like to go on to discuss the merits of the case, the finding of violation.

Q Well, I take it, Mr. Friedman, you've indicated a while ago the market really hasn't changed much?

MR. FRIEDMAN: That's correct.

Q Has it become any more competitive?

MR. FRIEDMAN: We don't think so.

Q Then it remains about the same, then? And this is after ten years?

MR. FRIEDMAN: This is after ten years.

Q But you still think that it might get worse?

MR. FRIEDMAN: It's hard to say. It could get worse, I suppose it --

Q Well, if it's hard to say, then what about -- what's the antitrust case all about? I mean if this really hasn't changed the market much, it doesn't make much difference one way or the other whether Ford does or doesn't own this company.

MR. FRIEDMAN: Well, we --

Q What -- and perhaps you say we must ignore the experience of ten years; some cases perhaps indicate that. But ten years is a long time for it to view the impact on the market, and you seem to indicate there isn't much impact at all.

MR. FRIEDMAN: No, I didn't --

Q But nevertheless you want divestiture.

MR. FRIEDMAN: No, I did not -- I'm sorry, Mr. Justice, I did not intend to indicate that there's no impact. What has happened in the market has been that the -- two things have happened in the market, and these were the consequences, the basis of the District Court's decision.

First, the opportunity of other spark plug manufacturers to sell in the large segment of the market represented by Ford's purchases from Champion has been eliminated. That's

the first thing.

Secondly, --

Q Well, the market still hasn't changed much. That's the way it was before.

MR. FRIEDMAN: Well, there's the opportunity, there's a very great distinction, Mr. Justice --

Q The opportunity for some company to beat out Champion with Ford?

MR. FRIEDMAN: That is correct. And that opportunity was irrevocably lost, it was irrevocably lost by the foreclosure.

I will come in a minute, as we've discussed in our brief -- there's evidence in the record that during the time that Champion was supplying Ford, close to the time of the acquisition --

Q So the market, if Ford hadn't acquired this company, the market might have improved in the last ten years?

MR. FRIEDMAN: Oh, yes. Oh, yes.

Q Might have improved.

MR. FRIEDMAN: It most certainly might have improved. There's evidence that people were trying to sell to Ford. Autolite was trying to sell to Ford. Another company called General Battery and Ceramics Corporation was trying to sell to Ford.

Once this acquisition took place, these companies

stopped trying to sell to Ford, they had no more chance of selling to Ford than they had of selling to General Motors. Because that market was foreclosed.

Now, in addition to that, the other thing this acquisition did was it removed the pro-competitive effect, the mediating influence that Ford had upon the market. And this impact on the market was twofold:

First, Ford as a potential entrant into the market; and, secondly, the impact Ford had as a customer.

Q But from what you're saying now, I should have thought you might have considered getting a divestiture decree of some kind in the General Motors-Champion area, too. Aren't you dealing in speculation here --

MR. FRIEDMAN: Well, Mr. Justice, --

Q of reasonable probabilities?

MR. FRIEDMAN: Mr. Justice, a very significant distinction, Champion was not acquired by Chrysler. Champion and Chrysler have a sales --

Q I realize that. But they've dominated the market for all this period, haven't they?

MR. FRIEDMAN: They are the largest in the market, and perhaps at some point we should proceed against Champion, I don't know. But that, it seems to me, again is no reason not to overturn -- not to permit -- no reason to permit this acquisition, which is one we think clearly within the terms of

Section 7.

Q Champion is a publicly held corporation, isn't it?

MR. FRIEDMAN: Champion is a publicly held corporation. And very interestingly -- very interestingly, the question as to whether Ford, whether Ford would itself become a manufacturer. There are two things. First, in 1960 there were some studies made by a high-level Ford group, which recommended to the top management that Ford itself go into the manufacturing of spark plugs.

And in addition to that, in 1958, --

Q But --

MR. FRIEDMAN: That was not followed.

Q What year was that?

MR. FRIEDMAN: That was in 1960. The --

Q And the recommendation was made to top management?

MR. FRIEDMAN: The recommendation was made --

Q And it was not done?

MR. FRIEDMAN: It was not done.

Q I don't see how that evidence helps you very much.

MR. FRIEDMAN: Well, it does indicate --

Q It just indicates it was a decision of top management not to do it.

MR. FRIEDMAN: But it does indicate -- it does indicate, Mr. Justice, that Ford was thinking about it. And as the District Court said, Ford was the leading potential entrant. And I refer this Court to its decision in the Procter & Gamble case, in which the Court stated -- there the Court of Appeals had reversed the Commission's finding that Procter & Gamble was a probable, likely entrant into the household bleach industry on the ground there was no showing that in fact it was going to do it.

And this Court, in reversing, said: That's immaterial, the important thing is that it was the most probable entrant.

And we think this is the most probable entrant.

Q Well, except here you have an explicit decision not to do it. Like you just told us.

MR. FRIEDMAN: You have a decision not to do it; but, at least as far as people in the industry were concerned, as far as the spark plug manufacturers were concerned, to them it was certainly not beyond the bound of possibility that Ford would integrate.

Let me just mention one other thing, Mr. Justice, in connection with Champion.

In 1958, Champion, for the first time, went public as a corporation. Of course it had to file a registration statement with the SEC. And one of the things that came out in this registration statement was the very high rate of

return Champion was making.

And a witness from Electric Autolite said that he thought it was not improbable that when Ford realized that for all these years Champion has been making this average of 25 percent rate of return to a large extent, as a result of Ford business, that Ford would very seriously think about going into the business.

Q You talked about the -- I think, just now, you used the word "mediating" effect of Ford. I think in the brief and in the District Court's opinion it's called a "moderating" effect. I don't quite understand what this --

MR. FRIEDMAN: Well, what it --

Q It has two aspects, I gather, and I'd be interested in --

MR. FRIEDMAN: Yes. Well, there are two aspects.

Q -- hearing your -- I don't understand.

MR. FRIEDMAN: -- the first one is the possibility that Ford may enter.

Q Right. That you've talked about.

MR. FRIEDMAN: I've talked about. The second one is that here is Ford, a very large customer in an industry that is very concentrated, and Champion knew that it had to satisfy Ford in order to keep the business.

If I may just refer, Your Honor, to one statement here. On page 35 of the record, this is the testimony of

Champion's vice president in charge of sales, in the middle of the page. And he said:

We were concerned about Autolite getting in there, because there were no actual affiliations, no financial arrangements between Ford and Champion, it was just a year-to-year arrangement, and we had to sell them a quality product and service them well to retain that business.

And if Autolite had been able to persuade them that they could have done as well or better, our account would be in jeopardy.

That is, Chrysler knew that in this peculiar market it had to satisfy Ford among other things on price.

Q Champion, you mean.

MR. FRIEDMAN: I'm sorry. Champion had to satisfy Ford on price.

Q Well, the price was -- it's called six cents, but I gather it's 5.88 cents, --

MR. FRIEDMAN: But it's not just the --

Q -- on the OE price.

MR. FRIEDMAN: There's no question about the OE price, it's basically --

Q And that was standard throughout the industry?

MR. FRIEDMAN: That's right. It's basically the price on the replacement parts. It's basically the replacement plugs, which they sell for anywhere from 35 to 40 cents.

Because that's where the big profit is.

Q Sell them to Ford and Ford sends them to its distributors and dealers?

MR. FRIEDMAN: They sell them to Ford or to the warehouse distributor.

Q Yes.

MR. FRIEDMAN: And then, in turn, Ford sends them to its dealers, and Ford itself distributes them through the warehouse dealers.

Q I thought -- I thought in recent years a majority of the replacement, the after-market, was distributed through filling stations and service stations?

MR. FRIEDMAN: That is the majority of --

Q And not by Ford.

MR. FRIEDMAN: That is correct. But Ford itself -- but Ford itself, in addition to distributing to its dealers, also distributes through the warehouse distributors.

In other words, the Ford Autolite plug today appears not only in Ford dealers but also in service stations and garages, and so on.

Q Yes.

MR. FRIEDMAN: In other words, Ford has made a conscious effort to penetrate the replacement market.

Q Since the acquisition?

MR. FRIEDMAN: Since the acquisition.

Q Yes, but I'm talking about this moderating effect. And I --

MR. FRIEDMAN: Well, the moderating effect --

Q The moderating effect on price.

MR. FRIEDMAN: On Champion. The moderating -- this is the effect that Ford had, prior to the acquisition, on Champion, --

Q Right, on the price of Champion plugs --

MR. FRIEDMAN: On the price of Champion plugs --

Q -- in the after-market. Is that it?

MR. FRIEDMAN: -- in the after-market.

Q Yes.

MR. FRIEDMAN: With the corresponding impact, not only on Champion's prices before, but Champion's prices to the warehouse distributors because of the Federal Trade Commission's 1953 order requiring -- prohibiting Champion and all the other manufacturers --

Q From discriminating between the two customers.

MR. FRIEDMAN: -- from discriminating in price.

Q That also was an indirect impact on the whole -- on the other makers, on their price.

MR. FRIEDMAN: Yes.

Q Then we have the -- as far as I understand that, and I'm not sure I quite do; this moderating effect. But there is a finding that there is almost no price competi-

tion.

MR. FRIEDMAN: That is right. And I think that's conceded.

Q Yes.

MR. FRIEDMAN: And we're talking about price competition here, and now I want to reiterate, not the price charged by the serviceman when he tunes the motor, but the price charged in selling when the plugs get into the distribution channels.

Q Right.

MR. FRIEDMAN: Now, if I may, I'd like to --

Q Mr. Friedman, before you leave that, who was it who was speaking, Mr. Harry Davis, at page 35? Identify him again for me.

MR. FRIEDMAN: Yes, he's the vice president in charge of sales and the general sales manager of Champion. That's shown at 22 of the record. The title of each of these witnesses is set forth in considerable detail at page 22.

Q I'm interested in what he says two lines down from where you read, in response to a question. He said, "We are very vulnerable that Chrysler" -- and he's speaking of the relationship, the new relationship with Chrysler -- "I mean we don't rest on our laurels any single day, because we know that we have the specter of Prestolite in the background, willing to battle us for that business. And we have nothing

except our good product" and so forth.

What's the significance -- what do you read out of that statement?

MR. FRIEDMAN: Well, all that I read is that --

Q Does that mean that under the new situation they have to try harder?

MR. FRIEDMAN: No, I think that it's a recognition on his part that they previously had to try to deal with Ford, now they still have to try to keep the Chrysler account.

But the Chrysler account is, of course, a much smaller account.

Q A smaller account for them.

MR. FRIEDMAN: And also I think there's a recognition that the -- of course, as we've indicated, Prestolite at the moment does not have an OE, any OE tie.

As I say, I think there is competition here. Of course there's competition here. But the important thing is, what the acquisition did in terms of the prior competition. And Prestolite, which has a very small share of the market now, is certainly not the significant impact on the market that Ford, the principal customer, was upon Champion, the principal firm in the market.

Q There is no -- ELTRA, you mean?

MR. FRIEDMAN: ELTRA.

Q ELTRA.

MR. FRIEDMAN: ELTRA. Well, ELTRA makes the Prestolite plug, that's why I -- ELTRA, which is the successor to the old --

Q Right.

MR. FRIEDMAN: -- Autolite, is now making the Prestolite plug.

Q Right.

MR. FRIEDMAN: Now, we were discussing the fact that Ford, on the edge of the market, was a mediating influence because of the pressures that it could exert on Champion, and the possibility it might enter. There's another aspect of the case, another ground on which the District Court rested its decision, and that's the fact that the effect of this acquisition was to foreclose sellers of spark plugs from the significant share of the market I have mentioned.

Ford, at the time it was buying from Champion, before the acquisition, had approximately ten percent of the entire spark plug market. And this was roughly 40 million plugs, and the value of these plugs was almost \$10 million.

And the impact, of course, of this foreclosure was even the greater because of the fact that GM, which made approximately 50 percent of the cars, had in effect pre-empted almost 50 percent, 45 percent at that time, of the OE market, and thus the OE -- and this closed off this big share of the OE market, and when Ford acquired its share of the market, there

was a foreclosure of a greater share of the OE market than the actual ten percent shows.

Now, Ford's answer to this, to this foreclosure point is saying, Well, there is really no significant foreclosure here, because the market was really tied up with Champion. We have been buying from Champion for 50 or 60 years, and if the acquisition hadn't taken place, it would have continued.

Therefore, there was no foreclosure because all these people were excluded from was a market they could never have hoped to have gotten in any --

Q Well, what percentage of the total market was the OE market?

MR. FRIEDMAN: It's roughly -- oh, I'd say about 15 percent, roughly.

Q So Champion, say, was selling, in its prior arrangement, selling 85 percent of its plugs in the after-market?

MR. FRIEDMAN: Roughly -- well, it may vary a little bit. It may vary a little.

Q Then, so we're really talking about when Ford gets out of a customer position, we're talking about foreclosing Ford's share of 15 percent?

What has Ford got, 40 percent of the -- 30 percent --

MR. FRIEDMAN: Ford has roughly 30 percent of the

total.

Q So we're talking about 30 percent of the 15 percent.

MR. FRIEDMAN: Well, but it's more than the -- it's both the -- it's both -- it's more than 30 percent, more than 15 percent of 30 percent. The 15 percent is only the initial equipment. But in addition Ford was also selling in the after-market.

In other words --

Q I understand that, but Ford's selling in the after-market doesn't foreclose others from competing for the after-market.

MR. FRIEDMAN: Well, it does --

Q It only fore- -- why?

MR. FRIEDMAN: It does, Mr. Justice. Once Ford owns its own -- once Ford acquires Electric Autolite. Because Ford is now selling the Electric Autolite plugs in the after-market.

Q I know, but if Ford is -- Ford may have a lien on its dealers. But it certainly isn't going to own all the people who are tuning up cars, who need new plugs to put in cars.

MR. FRIEDMAN: No, no --

Q Ford can't foreclose competitors from trying to sell in these channels.

MR. FRIEDMAN: No, of course not. But what has been foreclosed is a substantial segment of the market, a substantial segment of the total spark plug purchases Ford made prior to the acquisition.

Q Well, I'm just trying to find out how much of that market you can really say was foreclosed. The OE market is only 15 percent of the total market. Ford's share of it is only a third. That's 5 percent of the OE market that's foreclosed.

How much percent of the after-market has actually been foreclosed by Ford's acquisition, in the sense that places competitors used to be able to sell in, they could no longer sell?

MR. FRIEDMAN: Well, but they used to be able to sell to Ford, they would sell to Ford and Ford, in turn, would distribute in the after-market, and they're foreclosed from selling to Ford the products that Ford would sell in the after-market. And that total, that plus the OE market, comes to ten percent of total spark plug production.

Q When you say "they", you mean Champion?
For 50 years, when you say "they" used to be able to sell to Ford.

MR. FRIEDMAN: No --

Q It was Champion that sold to Ford.

MR. FRIEDMAN: No, what I'm suggesting is that a firm

like Autolite at least could try to sell.

Q But they weren't able to?

MR. FRIEDMAN: They weren't able --

Q For 50 to 60 years it was Champion and only Champion.

MR. FRIEDMAN: They weren't able to, but they tried. They weren't able to, but they tried. And that, it seems to us, is the significant thing. The knowledge that they were there, the knowledge -- the opportunity, at least, had a mediating effect on the market, and also prevent any of these people from ever getting in. They hadn't been able to sell for 50 or 60 years. Maybe they could. Maybe they could come up with some new spark plug which would enable them to cut the price substantially. We don't know.

But this has foreclosed them, irrevocably. They're out. They can't sell. As I said, there's no more hope of their selling to Ford now than there is of selling to General Motors.

Q Well, is that necessarily so? Suppose, hypothetically, that Champion now came up with a plug that they could sell for three cents. Wouldn't that give them the possibility of getting back into Ford?

MR. FRIEDMAN: It's unlikely, Mr. Justice, because Ford is now --

Q Well, who buys for six cents when they can buy

for three cents? It's just a very strong supposition, but I was testing your absolute statement.

MR. FRIEDMAN: Well, but, as a practical matter, I think, Mr. Chief Justice, as a practical matter, the Champion now, Champion now, under ordinary circumstances, is effectively foreclosed from selling to Ford. It's -- I mean there's no point in their even trying to sell to Ford.

And even though, conceivably, if they could come up with some revolutionary new plug, maybe -- I don't know what would happen. But I think in dealing with Section 7 we have to consider, consider what is the impact at the time of the acquisition on the competitors.

Q But, surely, the government has no interest in trying to make Champion bigger or make its position more secure, has it?

MR. FRIEDMAN: Certainly, certainly not. What we're trying to do -- what we're trying to do, Mr. Chief Justice, is to restore, restore to this market, as much as we can, the conditions that existed before the acquisition took place.

Q Well, that would mean, with Champion, a more dominant position that it's in now, wouldn't it?

MR. FRIEDMAN: No. When I suggest restore, what I mean by restore is not to restore the Champion-Ford relationship, what I mean is to try to restore the situation

that existed before the acquisition, where you had only one automobile manufacturer engaged in manufacturing spark plugs, and where you had the other two manufacturers existing as customers for spark plug firms. That's what we're trying to do, to restore to the market a second independent, not affiliated with an automobile manufacturer, a second independent manufacturer of spark plugs. To give this company a chance to build up and to develop.

Now, let me, if I may, --

Q Who supplies --

MR. FRIEDMAN: Pardon me?

Q Just before you start again, who supplies American Motors, or do they make their own?

MR. FRIEDMAN: Champion supplies American Motors.

Q 100 percent?

MR. FRIEDMAN: 100 percent. Now, at one point they divided their business between, I think, Champion and Autolite, when there was a merger of Nash and another company in 1954. And the testimony indicates they decided they preferred Champion, and Champion supplies them, all of their plugs now.

Q And there's something in the record to the effect that American -- there is some risk that American Motors might not get this way-below-cost price.

MR. FRIEDMAN: Well, I would -- I would say --

Q Or the danger that they might lose it, is what I mean.

MR. FRIEDMAN: I don't know. That was -- I mean that might present some problems under the Robinson-Patman Act if they discriminated -- that would be a nice question, whether they could discriminate and sell them below cost.

Q In any event, they now do get this?

MR. FRIEDMAN: They now do get that, yes.

I'd like now briefly to turn to the question of the appropriate relief in the case.

We think that in light of the violation found in this case, only divestiture would be an appropriate and proper remedy.

Q What is divested, just the plant?

MR. FRIEDMAN: Just the plant and the name.

Q And the name. But how about -- I guess Ford acquired a distribution system?

MR. FRIEDMAN: That's right. That is not divested.

Q What did they acquire as a distribution system?

MR. FRIEDMAN: They acquired some sales people, they acquired contracts with distributors; they acquired, if you might call it, an introduction to the distributors --

Q And this divestiture of just the name and the plant is open to a new company?

MR. FRIEDMAN: It's to be a new company.

Q Capitalized by whom?

MR. FRIEDMAN: That's uncertain. It's --

Q But this company hasn't -- isn't getting -- isn't taking over any of the distribution system that Ford acquired?

MR. FRIEDMAN: No. No. No, the company isn't. Ford continues to have the distribution system that it acquired, and of course that also includes --

Q Although it can't make spark plugs or sell under the Ford name?

MR. FRIEDMAN: That is correct. But it will have its distribution system, to enable it to distribute the spark plugs that it will purchase during this period. And of course, eventually, if Ford wishes to get into the manufacturing business, Ford will then have the benefit of this distribution system that it has built up over the past ten years.

Q Would ELTRA be an eligible purchaser of new Fostoria?

MR. FRIEDMAN: I would suppose so. I hesitate to commit myself on that, because it might require a fairly careful examination of all the circumstances in the industry, and I just would be reluctant to express an offhand opinion on that.

Q As I understand it, ELTRA is what remains of the

original Autolite?

MR. FRIEDMAN: It's what remains of the original Autolite, plus a lot more. ELTRA, since that time, has merged with a number of other companies --

Q Acquired some other --

MR. FRIEDMAN: -- and it's a \$200 million corporation itself.

Q But only, as you told us, a tiny share of the spark plug business.

MR. FRIEDMAN: Of the spark plug market, that is correct.

I would suppose -- I would think ELTRA might well be a possible --

Q Possible purchaser.

MR. FRIEDMAN: -- possible purchaser; but I would not want to commit myself to that, because this is something we would have to study very carefully at the Department.

Q We were talking about this -- my brother White suggested in his question that there is just one plant in Fostoria, Ohio, are we not?

MR. FRIEDMAN: Yes. Just one plant. That's all that they acquired. And ELTRA, now, by the way, has three plants. It's now operating three plants, one of which is in Canada. But we're just talking of the single plant --

Q What is meant by that plant being a fixed-output

plant?

MR. FRIEDMAN: The Fostoria plant?

Fixed-output plant is the fact that it's a large facility, and it needs to have a very substantial volume of spark plug production, apparently, in order to make a go of it economically.

It has the capacity of about 175 million plugs a year. I don't know how many it would have to have in order to function.

Q That's a total sales volume of how much?

MR. FRIEDMAN: Oh, I suppose --

Q \$60 million?

MR. FRIEDMAN: -- 60, 70 million, something in that range.

Now, we start, I think, with a basic proposition, that the normal remedy for an acquisition that violates Section 7 is to undo the acquisition. That is, if it was illegal for a firm to acquire another company, that the simple and most effective remedy is to require them to get rid of it.

In this case there were two anti-competitive effects that the District Court found, and of course, in getting to questions of relief we must of course exhume the correctness of the findings.

And therefore what we had was two things: one, the foreclosure of the sellers of spark plugs from the ten percent

share of the market that Champion was supplying to Ford, and to the removal of these mediating or pro-competitive effects that resulted in Ford's remaining on the sidelines while it was purchasing from Champion.

And it seems to us that the only effective way we can remedy those violations is to restore as much as we can the situation that existed. That is, to have once again Ford as a customer, not manufacturing, sitting on the sidelines, exerting the pro-competitive influence.

Q Well, sitting on the sidelines as a potential entrant?

MR. FRIEDMAN: As a potential entrant. Once again as a potential entrant.

Q And yet it's enjoined from being one.

MR. FRIEDMAN: For ten years. For ten years. It's not permanently enjoined. It's not -- it's enjoined for ten years. In order to give the divested company the chance to build itself up in the market. In order to give the divested company the opportunity, once again, to become a strong, vigorous competitive factor in the market.

And once that happens, once the -- that happens, then Ford is perfectly free, if it wishes, to enter the market. And even at the time -- even at the time while this is going on, of course, the divested company will be well aware of this possibility, and this itself will exert pressures on the

divested company, to deal most favorably with Ford.

Q Well, really, you -- by divesting, you're really creating one more company, as compared with what there was before?

MR. FRIEDMAN: That -- that's in effect -- in effect that's correct. You will --

Q Well, unless ELTRA does purchase it.

MR. FRIEDMAN: Unless ELTRA does purchase it. But even if ELTRA purchases it, you will have a very different market than you had. You have a market comparable to what you had before, not exactly; but you'd have a comparable market with two significant independent spark plug manufacturers, and only one of the Big Three automobile companies engaged in the manufacture of spark plugs.

The -- our economist indicated that the only real hope of ultimately achieving deconcentration in this market, and I just pause to point out that in a market of this type, an oligopolistic, very tightly structured market, with high barriers to entry and no price competition, it's vital that we do everything in the hope of procuring the deconcentration. Every step that may lead to deconcentration that will lead -- may lead to more vigorous competition, should be incurred.

The only hope of any real deconcentration in this market is breaking the OE tie. That is, trying to persuade the automobile mechanics that really they don't have to use

the original equipment plugs.

Now, Mr. Seymour suggested that while you have these all-purpose plugs, they're really not quite as good. The average service station or garage has charts which show substitutability of plugs. And it's rather interesting that Ford's own witness testified that he recognized that the plugs that Ford makes, the all-purpose -- they all make, all three of them, Champion, Ford, and General Motors, that is, Autolite, make all-purpose plugs.

And he testified, he said, well, he thought that the Ford plugs would do just as good a job as the Champion and the AC plugs that were original equipment in Chrysler and General Motors cars, and he was asked, and he said, I suppose you'd have to acknowledge that the Champion and AC plugs that are a substitute for your plugs will do just as well; and he said, well, yes.

Evidence, for example, shows that Ford was much elated when they discovered a few years ago that, at some trials, automotive trials down in Florida, all the people who were driving the stock Pontiac automobiles were using Electric Autolite spark plugs. They said: This just shows how good our plugs are.

And the indication is that the real hope, the real hope of any deconcentration in this market is to break the OE tie and to persuade people that they don't have to buy the

original equipment plug, that the other plug will do.
if

And of course/there's going to be an automobile manufacturer owning a spark plug firm, it's going to be much less likely to be pushing the sales of the private brands in the after-market than an independent who was -- particularly this independent, the divested company, that knows its ultimate future may depend on success in penetrating into the after-market.

Now, Ford complains about the requirement that it purchase this half of its needs from Autolite, because it says, This is going to cause all sorts of problems in terms of pollution control, that we won't have adequate control over the quality of the plugs, and this is going to be very unfortunate; that we can do a much better job ourselves.

Well, first of all, the decree says that Ford in purchasing the half of its requirements from Autolite, under Autolite's name, that the product must conform to Ford's designs, specifications, quality standards, and delivery requirements, and to be priced competitively.

So that Ford is protected because the decree does guarantee it, and then the requirements are contingent on the plugs meeting those standards.

Moreover, as I have indicated, the divested company would be under very great pressure to satisfy Ford, both in the hope of getting more than 50 percent of the business and in the

hope of retaining that business after the five years.

Q But if all Ford could do about it, if the plugs didn't conform, is to try to buy them from somebody else. They wouldn't be free to make them themselves, I guess?

MR. FRIEDMAN: They would not be free to make them themselves, but it seems, Mr. Justice, realistically, considering the nature of the relationship, I'm sure that the divested company is going to do everything it can to meet Ford's standards.

Q But just assuming that that's true, are you suggesting that that's just as good as having either General Motors or itself or Ford or Chrysler, or those companies, to make and completely control their own development and design and manufacture and research?

MR. FRIEDMAN: Well, I think -- the record shows there's very close collaboration between the independent spark plug manufacturers; prior, for example, to the acquisition Ford worked very closely with Champion, and they worked close together. It seems that Ford, for 50 years, was fully satisfied with the product it was getting from Champion.

Even today Chrysler has not, thus far, attempted to integrate, and there's no indication that Chrysler is not getting satisfactory quality, and there is not -- no indication that Chrysler is not able to -- If I may, Mr. Justice, I'd like to just close with one thought, if I may,

which is on the question of the use of Ford's own trade name on plugs.

Ford makes the point that this is a harsh remedy, that it's a penalty, that it's unfair, that it's unnecessary, and they say this goes far beyond anything that's ever happened here, because even prior to the acquisition Ford was perfectly free at any time to manufacture under its own trade name, and now it is precluded.

And I think the answer to this intention is something that this Court stated some years ago in Federal Trade Commission v. National Lead Company, in 352 U.S. And when the complaint was there made that a decree subjected the defendants to very strict strictures and was unfair, the Court said that those caught violating the Act must expect some fencing in.

I think Ford here has violated the Act through this acquisition, and it, too, must except some fencing in.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Friedman.

Mr. Seymour.

REBUTTAL ARGUMENT OF WHITNEY NORTH SEYMOUR, ESQ.,

ON BEHALF OF THE APPELLANT

MR. SEYMOUR: I would just take a moment or two.

In the colloquy there developed the basic question: Did this acquisition substantially less competition, or have the probability of doing so?

I submit that it's amply clear that not only did it not lessen competition or eliminate any competitors, it added competition, it aided competition, it promoted competition. And what Mr. Friedman has told Your Honors points that out.

Chrysler and Champion are in a more competitive relationship than when Champion didn't have to scrounge for business. Champion is also in the after-market -- in the private brand market. ELTRA, which is the fourth company in the business, and if this divestiture took place there would still only be four. There wouldn't be a new company because new Fostoria would just take the place of Ford as a supplier.

But the result of this acquisition was to create a fourth competitor, and that's ELTRA, which is active in the private brand market, where it's competing actively with Champion, still the biggest company in the business, or having the largest part of the business.

And ELTRA sales, the last figures in the record, were 17 million plugs. Now, that isn't very much compared with the sales of General Motors and others, but it's coming up. ELTRA's president testified that he expected the market, by 1980, to be around 150 million plugs. This is a contribution to competition.

Now, let me explain the way this private brand market works, as I understand it in connection with automobiles.

The mass merchandisers have put in repair bays in many of their retail outlets in the suburbs and so on, and you come in to shop at Sears, Roebuck, you pull your car in there and get them to tune it up, and unless you tell them that what you want is an AC plug, what they do is to put in a Sears plug.

And so this business of overcoming the OE tie by direction of the guy that runs the station is what happens in connection with these private brand sales, and apparently it's happening on enough of a scale so that it's getting to be a more significant part of the market.

Now, I submit that this was a pro-competitive activity. If that's so, that ends the case; and the judge had to struggle so hard to get away from that inference, and I must say it was clearer in 1969 than it was when the government brought the suit. In 1961 it might have looked less pro-competitive than it turned out to be. But the judge had to really take this concept of being on the edge of the market, but he transposed the notion of being on the edge of the market from your potential competition decisions to a mere customer status, where, I submit, it doesn't have any place. A customer is always on the edge of the market. But he's not on the edge of the market as one anxiously waiting to come in, which is what your cases deal with.

My learned friend has said that Champion was quite a

loss to business, people were nibbling at it; but Champion showed no signs of concern. The testimony, including the testimony quoted in our reply brief, shows that Champion wasn't worried about it. It felt that it would go on forever just the way it had been.

And Chrysler had some inquiries. But nobody ever made a bid to Chrysler, and so when you talk, or when the judge talks about the terrible thing being the denial of the opportunity to try, this is really, just as I said before, a charade. It isn't a real effort, because it isn't really open to people to come in and make the sacrifice involved in selling below cost and waiting eight years to develop the market.

Now, finally, it's clear from counsel's argument, I think, and I think from the opinion on relief, that the court below really was concerned about the OE tie, and was trying to find a way to break it. And that he thought that with divestiture and holding Ford's head under water with these injunctions, maybe something would happen to break the tie.

But, quite aside from the fact that that was a judicial experiment, which is beyond, I should submit, the ordinary activities proper under the statute, there is no prospect of breaking it that way. The prospect of breaking it is by competition. Competition was encouraged by this trans-

action.

And just one word on the injunctions.

Counsel says it took ten years to get the judgment in this case, and therefore Ford should be banned for ten years from entering the market.

I submit that that doesn't follow at all, and that to be banned at all from entering the market is anti-competitive, and there's no basis for it.

As far as Ford's name is concerned, to deny it an opportunity, to delay the basis for ultimate entry in the market for many, many years by preventing it from letting its name be connected with spark plugs made by others is quite, quite wrong.

Aside from everything else, those injunctions were excessive beyond, I think, any proper exercise of the court's discretion.

But, basically, my view is that this was a pro-competitive acquisition, and the judgment should be reversed.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Seymour.

Thank you, Mr. Friedman.

The case is submitted.

(Whereupon, at 11:44 a.m., the case was submitted.)