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12 UNITED STATES DISTRICT COURT  
13 NORTHERN DISTRICT OF CALIFORNIA

14 UNITED STATES OF AMERICA, )  
15 )  
16 Plaintiff, )  
17 ) Civil No. C-76-854-SAW  
18 v. )  
19 ) Patent Antitrust  
20 UNION CARBIDE CORPORATION, ) Nonjury  
21 )  
22 Defendant. ) Filed: April 28, 1976  
23 )

24 COMPLAINT

25 The United States of America, plaintiff, by its attorneys,  
26 acting under the direction of the Attorney General of the United  
27 States, complains and alleges:

28 I

29 JURISDICTION AND VENUE

30 1. This complaint is filed and this action is instituted  
31 under Section 4 of the Act of Congress of July 2, 1890, as  
32 amended (15 U.S.C. § 4), commonly known as the Sherman Act,  
in order to prevent and restrain continuing violations by the  
defendant of Section 1 of that Act (15 U.S.C. § 1).

1 2. Union Carbide Corporation (hereinafter referred to as  
2 "Carbide") is a New York corporation. Carbide transacts business  
3 and is found at Salinas, in the Northern District of California.

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II

DEFENDANT

3. Carbide is named the defendant herein. Carbide is engaged in the manufacture, distribution and sale of chemical products, including agricultural chemicals and insecticides, for commercial and consumer use. In 1974, Carbide's sales were approximately \$5.3 billion; its total assets, \$4.9 billion; and its net income after taxes, \$530 million. Carbide transacts its agricultural chemical and insecticide business, and the portions thereof involved in this civil action, primarily through its Process Chemical Division, Agricultural Products and Services, the headquarters of which is at 1078 Merrill Street, Salinas, California 93901.

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DEFINITIONS

4. As used in this complaint:

(a) "carbaryl" means, and is the American Standard Common Name sponsored by the United States Department of Agriculture for, the chemical compound 1-naphthyl methyl-carbamate;

(b) "technical grade carbaryl" means a product comprising at least 99 percent (by weight) carbaryl; and

(c) "carbaryl-containing composition" means a mixture of carbaryl and other products, that contains less than 99 percent (by weight) carbaryl.

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IV

TRADE AND COMMERCE

5. Carbaryl is a product with demonstrated insecticidal effectiveness against a very broad range of insects. The product has both long-lasting residual insecticidal action and relatively low toxicity to humans and to most domestic animals, pets, and

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1 crops. Technical grade carbaryl is not used directly as an  
2 insecticidal product. Rather, technical grade carbaryl is  
3 processed into carbaryl-containing compositions, which are used  
4 as insecticidal products. Technical grade carbaryl is also  
5 combined with other products in multi-purpose compositions.  
6 Carbaryl-containing compositions are marketed for application  
7 to a wide variety of commercial agricultural crops, including  
8 vegetable, fruit, forage, and feed crops, and poultry. They  
9 are also marketed for home and garden use, and for application  
10 to pets.

11 6. Carbide has marketed carbaryl commercially under the  
12 trademark "SEVIN" since at least 1958. Carbide's sales of  
13 carbaryl products is approximately \$15 million annually. Carbide  
14 is the only manufacturer of technical grade carbaryl in the United  
15 States and is the sole source of supply for this material in the  
16 United States.

17 7. Carbide owns United States Patent No. 2,903,478 (issued  
18 September 8, 1959), which claims carbaryl as a composition of  
19 matter, and United States Patent No. 3,009,855 (issued November 21,  
20 1961), which claims as a process the use of carbaryl as an  
21 insecticide and also claims as compositions of matter various  
22 carbaryl-containing compositions that are usable as insecticides.

23 8. Carbide ships technical grade carbaryl, in commerce,  
24 to persons in other states from that in which it is manufactured,  
25 for processing into carbaryl-containing compositions. Carbide  
26 and such persons ship, distribute and sell such carbaryl-  
27 containing compositions, in commerce, to persons in various  
28 states other than those states in which such compositions were  
29 manufactured.

BACKGROUND OF VIOLATIONS

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3 9. Carbide supplies technical grade carbaryl for manufacture  
4 of carbaryl-containing compositions, by three different marketing  
5 procedures, described in paragraphs 10-14.

6 10. Carbide enters into one-year "Conversion Agreements"  
7 under which Carbide ships technical grade carbaryl to the other  
8 party (the "Converter") during the contract year, with instructions  
9 that specified carbaryl-containing compositions are to be prepared  
10 from such carbaryl and that such compositions are to be packaged  
11 and shipped to Carbide or to persons that Carbide designates.  
12 Under these agreements, Carbide pays the Converter a processing  
13 fee and retains title to the technical grade carbaryl being so  
14 processed. Approximately 66 percent of the technical grade  
15 carbaryl Carbide manufactures is marketed pursuant to such  
16 Conversion Agreements.

17 11. Carbide enters into one-year "Formulator Agreements"  
18 under which:

19 (a) Carbide ships technical grade carbaryl during  
20 the contract year to the other party (the  
21 "Formulator"), who agrees to process it into  
22 carbaryl-containing compositions specified  
23 by Carbide, but only into those compositions  
24 which Carbide specifies;

25 (b) "title" to the technical grade carbaryl purportedly  
26 remains in Carbide, even after the product has  
27 been delivered to the Formulator and while the  
28 Formulator is mixing it with other ingredients  
29 and processing it in the Formulator's plant into  
30 carbaryl-containing compositions;

31 (c) the other ingredients with which the Formulator  
32 mixes technical grade carbaryl, in order to

1 prepare these compositions, purportedly becomes  
2 the "property" of Carbide as they are being  
3 mixed. "Title" to the carbaryl-containing  
4 compositions is stated to pass from Carbide  
5 to the Formulator as soon as, but no sooner  
6 than, the Formulator has completed manufacturing  
7 them;

8 (d) Carbide does not pay personal property tax on  
9 carbaryl in the possession of Formulators, and  
10 Carbide does not exercise personal control over  
11 such carbaryl. The Formulator bears the risk of  
12 loss due to his handling, storing, or formulation  
13 of technical grade carbaryl, as well as for personal  
14 injuries arising from the use of carbaryl-containing  
15 compositions;

16 (e) Carbide invoices the Formulator for technical grade  
17 carbaryl at the time that Carbide originally ships  
18 the carbaryl to the Formulator, rather than at the  
19 time that Carbide subsequently purportedly sells  
20 or passes "title" to the carbaryl-containing  
21 compositions to the Formulator; and

22 (f) the Formulator is authorized by Carbide to sell  
23 the carbaryl-containing compositions to the  
24 Formulator's customers, but the Formulator is  
25 not authorized to sell the technical grade carbaryl  
26 which Carbide delivers to the Formulator.

27 12. Despite the technical contract language which purports to  
28 delay passing of title, technical grade carbaryl is, in effect,  
29 sold to the Formulators at the time of transfer of possession.

30 13. Approximately 32 percent of the technical grade carbaryl  
31 Carbide manufactures is marketed pursuant to such Formulator  
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1 Agreements. Carbide presently maintains approximately 100 such  
2 agreements in effect.

3 14. Carbide finely grinds or mills the balance of the  
4 technical grade carbaryl it manufactures (less than 2 percent of  
5 the total), and mixes it with inert ingredients. Carbide then  
6 sells this product under the name "Manufacturing Concentrate"  
7 to manufacturers for further processing into and resale as  
8 carbaryl-containing compositions.

9 15. Carbide does not accept requests for the outright sale of  
10 technical grade carbaryl. Formulators and Converters do not  
11 accept requests for the outright sale of technical grade carbaryl  
12 in their possession pursuant to Formulator Agreements or Conversion  
13 Agreements, on the ground that they lack title to and therefore  
14 the right to sell the technical grade carbaryl in their possession.  
15 Carbide, upon becoming aware of efforts by others to purchase  
16 technical grade carbaryl from Formulators and Converters, advises  
17 them that such sales would be contrary to their one-year Con-  
18 version or Formulator Agreements.

19 VI

20 VIOLATIONS ALLEGED

21 16. Beginning at least as early as 1960 and continuing  
22 thereafter up to and including the date of filing of this com-  
23 plaint, defendant Carbide has, in violation of Section 1 of the  
24 Sherman Act, entered into a series of contracts and has combined  
25 with Formulators, as described in paragraph 11, in unreasonable  
26 restraint of the aforesaid interstate trade and commerce in  
27 technical grade carbaryl and carbaryl-containing compositions,  
28 the substantial terms of such violations having been:

- 29 (a) to restrain the sale of technical grade carbaryl  
30 by the Formulators; and  
31 (b) to require such Formulators to manufacture the  
32 technical grade carbaryl which they receive

1 from Carbide into only those carbaryl-containing  
2 compositions specified by Carbide, and into no  
3 others.

4 17. The violations alleged are continuing to the present  
5 and will continue unless the relief prayed for is granted.

6 VII

7 EFFECTS

8 18. The violations alleged have had the following effects,  
9 among others:

- 10 (a) the sale, use, and disposition of technical grade  
11 carbaryl by Formulators has been unlawfully  
12 restrained, prevented, or eliminated;  
13 (b) the manufacture, distribution, and sale of various  
14 carbaryl-containing compositions by Formulators  
15 has been restrained, prevented, or eliminated; and  
16 (c) the public has been denied the benefits of free  
17 and open competition in the manufacture, sale  
18 and distribution of technical grade carbaryl  
19 and carbaryl-containing compositions.

20 VIII

21 PATENT VALIDITY

22 19. Carbide's United States Patent No. 3,009,855 ("the 1961  
23 patent") expires over two years later than Carbide's United States  
24 Patent No. 2,903,478 ("the 1959 patent"). The 1959 patent covers  
25 carbaryl as such, and confers on Carbide a 17-year statutory  
26 monopoly (from 1959 to 1976) over the manufacture, use, and sale  
27 of carbaryl and compositions or other products containing it.  
28 The 1961 patent contains a disclosure identical to that of the  
29 1959 patent; covers the use of carbaryl as an insecticide; covers  
30 carbaryl-containing insecticidal compositions; and confers on  
31 Carbide a 17-year statutory monopoly (from 1961 to 1978) over  
32 the use of carbaryl and compositions or other products containing

1 it as an insecticide and over the manufacture, use, and sale of  
2 carbaryl-containing compositions. The only use for carbaryl dis-  
3 closed or claimed in either patent is making carbaryl-containing  
4 compositions and using these compositions as insecticides. The  
5 1961 patent therefore impermissibly extended Carbide's 17-year  
6 statutory monopoly on the only disclosed use for carbaryl, for an  
7 additional term of more than two years (1976 to 1978); and the  
8 1961 patent is thus invalid for double patenting.

9 PRAYER

10 WHEREFORE, plaintiff prays that the Court:

11 1. Adjudge and decree that defendant Carbide has entered  
12 into a series of contracts and a combination in restraint of trade  
13 and commerce, in violation of Section 1 of the Sherman Act.

14 2. Permanently enjoin defendant Carbide, its successors,  
15 assigns, and transferees, from maintaining in effect any of its  
16 present carbaryl Formulator Agreements, or entering into any  
17 further agreements having the same or a similar purpose or effect.

18 3. Order defendant Carbide to sell technical grade  
19 carbaryl on reasonable and non-discriminatory terms to each  
20 United States applicant therefor for a period of years following  
21 the entry of final judgment.

22 4. Permanently enjoin defendant Carbide from enforcing  
23 United States Patent No. 3,009,855 and declare such patent  
24 invalid and unenforceable.

25 5. Grant to plaintiff such other and further relief as  
26 is just and proper under the circumstances.

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1 6. Award to plaintiff its just and reasonable costs.  
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