

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
) Civ. No. 80-1570
 v.) Filed: April 23, 1980
)
 FMC CORPORATION,)
)
 Defendant.)
 _____)

COMPLAINT

The United States of America, plaintiff, by its attorneys, acting under the direction of the Attorney General of the United States, brings this civil action against the above-named defendant, and complains and alleges as follows:

I.

JURISDICTION AND VENUE

1. This complaint is filed and this action is instituted under 28 U.S.C. §§ 1338, 1345, 1391, 2201, and 2202, in order to redress the violation by the defendant, as herein alleged, of 35 U.S.C. § 135(c).

2. FMC Corporation is licensed to do business and does business within the Eastern District of Pennsylvania.

II.

THE DEFENDANT

3. FMC Corporation ("FMC") is made a defendant herein. FMC, which is incorporated in the State of Delaware, is a multinational corporation engaged in a variety of businesses, including the manufacture, distribution, and sale of

agricultural chemicals and pesticides for commercial use through its Agricultural Chemical Group headquartered in Philadelphia, Pennsylvania. In 1978 FMC had total assets of approximately \$2.2 billion and sales of approximately \$2.9 billion.

III.

DEFINITIONS

4. As used in this complaint:

(a) "Bayer" means Bayer AG, a corporation of the Federal Republic of Germany, engaged in a variety of businesses, including the manufacture, distribution, and sale of agricultural chemicals and pesticides for commercial use. Bayer's headquarters are located in the Federal Republic of Germany.

(b) "Mobay" means Mobay Chemical Corporation, a New Jersey corporation engaged in the manufacture, distribution, and sale of chemical products, including agricultural chemicals and pesticides for commercial use. Mobay's headquarters are in Pittsburgh, Pennsylvania. Mobay's agricultural chemical and pesticide business is conducted primarily through its Chemagro Agricultural Chemicals Division ("Chemagro"). Chemagro's principal offices are in Kansas City, Missouri. Mobay is a wholly-owned subsidiary of Miles Laboratories, Inc., a Delaware corporation, itself wholly owned by Bayer International Finance N.V., a Netherlands Antilles corporation, which in turn is wholly owned by Bayer.

(c) "Carbofuran" means, and is the American Standard Common Name administratively sponsored by the United States Department of Agriculture for, the chemical compound 2, 2-dimethyl-2, 3-dihydrobenzofuranyl-7-N-methylcarbamate.

(d) "Technical grade carbofuran" means a product containing at least 97 percent (by weight) carbofuran.

(e) "Carbofuran products" means formulations of technical grade carbofuran and other materials that contain less than 97 percent (by weight) carbofuran.

IV.

TRADE AND COMMERCE

5. Carbofuran is a chemical with demonstrated pesticidal effectiveness against a broad range of insects. FMC and Chemagro have marketed carbofuran products commercially in interstate commerce under the trademark FURADAN since at least 1969. Combined FMC and Chemagro domestic sales of carbofuran products to wholesalers were approximately \$100 million in 1976.

6. In 1965, the United States Patent Office (now named the United States Patent and Trademark Office) declared Interference No. 95,192 in order to decide priority of invention between interfering patent applications filed by FMC and Bayer for a patent covering carbofuran. The party found to have priority would be awarded a patent by which it could exclude all others from the production, use, or sale of carbofuran. In 1967, a similar proceeding was instituted in Canada between corresponding Canadian patent applications covering carbofuran filed by FMC and Bayer. At the time of these proceedings, FMC and Bayer individually had filed applications for patents on carbofuran in many other countries. In certain countries, particularly those of western Europe, both FMC and Bayer had filed patent applications, while in others only FMC had filed an application.

7. Prior to the termination of Interference No. 95,192, on or about September 10, 1968, FMC and Bayer executed three written agreements:

(a) an untitled agreement dated September 10, 1968 (herein called the "U.S. Patent Interference Settlement") which provides, inter alia, that the United States Patent Office will determine the priority question in Interference No. 95,192, but that regardless of which party obtains the patent rights concerning carbofuran, FMC will hold the exclusive right to make, use, and sell carbofuran in the United States subject to Chemagro's right to purchase carbofuran products from FMC for resale;

(b) an agreement entitled "Canadian Conflict Settlement Agreement" dated September 10, 1968 which concerns settlement of the Canadian carbofuran patent interference between FMC and Bayer; and

(c) an agreement entitled "License Agreement" dated September 10, 1968 which concerns cross-licensing of carbofuran patent rights in Mexico and in Central and South America.

8. Prior to the termination of Interference No. 95,192, FMC and Bayer also reached an understanding that FMC would withdraw its opposition to certain of Bayer's patents or patent applications concerning carbofuran in countries other than the United States and Canada.

9. Prior to the termination Interference No. 95,192, on or about September 30, 1968, FMC and Chemagro also executed two additional written agreements:

(a) an agreement entitled "Production Agreement" dated September 30, 1968 which sets the price to Chemagro for carbofuran products manufactured by FMC at a uniform discount of 25 percent from FMC's price to distributors until 1972 and at a uniform discount of 30 percent thereafter; and

(b) an agreement entitled "Trademark Licensing Agreement" dated September 30, 1968 which licenses FMC's trademark, FURADAN, to Chemagro and requires Chemagro to use the trademark for the life of the United States carbofuran patent.

10. The U.S. Patent Interference Settlement was filed by FMC and Bayer with the United States Patent Office in connection with Interference No. 95,192 on or about September 18, 1968.

11. None of the agreements or understandings referred to in paragraphs 7(b), 7(c), 8, or 9, above, were filed with the United States Patent Office.

12. Each of the agreements or understandings referred to in paragraphs 7, 8, or 9, above, was made in connection with or in contemplation of the termination of Interference No. 95,192.

13. Interference No. 95,192 was terminated by the United States Patent Office Board of Patent Interferences on October 31, 1968. Priority was awarded to FMC, resulting in the issuance of United States Patent No. 3,474,171 on October 21, 1969, which claims the compound carbofuran, insecticidal compositions of that compound, and the method of using such compositions for the control of insects. FMC is still the owner of United States Patent No. 3,474,171, which expires in 1986.

14. Enacted in 1962, 35 U.S.C. § 135(c) requires parties to a patent interference proceeding to put in writing and file with the United States Patent Office, prior to termination of the interference, any agreement or understanding between the

parties, including any collateral agreements referred to therein, made in connection with or in contemplation of the termination of an interference. Pursuant to the notice provisions of this statute, on or about September 28, 1965 the United States Patent Office notified FMC of this filing requirement.

15. In enacting 35 U.S.C. § 135(c), Congress intended to give the Department of Justice access to the agreements or understandings referred to in paragraph 14, above, for inspection in connection with the Department's antitrust law enforcement duties. Failure to comply with this provision interferes with those enforcement duties.

V.

VIOLATION ALLEGED

16. Defendant FMC, in violation of 35 U.S.C § 135(c), failed to put in writing and file with the United States Patent Office, or failed to file with the United States Patent Office, the agreements or understandings, or collateral agreements or understandings, described in paragraphs 7(b), 7(c), 8, and 9, above, made in connection with or in contemplation of the termination of Interference No. 95,192.

PRAYER

WHEREFORE, plaintiff prays:

1. That the Court adjudge and decree that the defendant has violated 35 U.S.C. § 135(c).

2. That the defendant be permanently enjoined from enforcing United States Patent No. 3,474,171 and that this patent be declared permanently unenforceable.

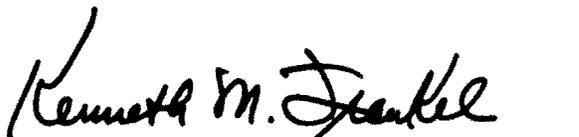
3. That the plaintiff have such other and further relief as the case may require and the Court may deem just and proper under the circumstances.

4. That the plaintiff recover the costs of this suit.

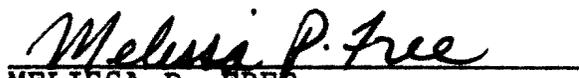

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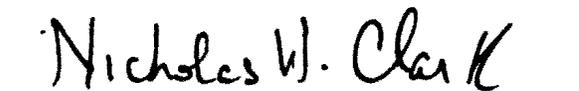

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