

Trade Regulation Reporter - Trade Cases (1932 - 1992), United States v. American Optical Company, an Association; American Optical Company, a Corporation; and Bausch & Lomb Incorporated., U.S. District Court, E.D. Wisconsin, 1966 Trade Cases ¶71,781, (Jun. 28, 1966)

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United States v. American Optical Company, an Association; American Optical Company, a Corporation; and Bausch & Lomb Incorporated.

1966 Trade Cases ¶71,781. U.S. District Court, E.D. Wisconsin. Civil No. 62 C 206. Entered June 28, 1966. Case No. 1640 in the Antitrust Division of the Department of Justice.

Sherman Act

Acquisitions—Manufacturer—Wholesaler of Eyeglass Lenses—Consent Judgment.— A manufacturer-wholesaler of eyeglass lenses was prohibited by a consent judgment from acquiring any wholesale laboratory for a period of 20 years and from opening any new wholesale laboratory, with certain exceptions, for the same period of time.

Acquisitions—Manufacturer—Dispenser of Eyeglasses—Consent Judgment.—A manufacture-wholesaler of eyeglass lenses was prohibited by a consent judgment from engaging in business as a dispenser of eyeglasses for a period of five years and, for a further period of 15 years thereafter, from acquiring any dispenser without the consent of the government or the approval of the court.

Divestiture—Price Fixing Contingency—Right to Seek Relief—Consent Judgment.—The government, under the terms of a consent judgment, could seek a court order requiring two manufacturers-wholesalers of eyeglass lenses to divest themselves of certain wholesale branches, in the event that the manufacturers-wholesalers, within 20 years, willfully entered into any agreement between themselves or with any other major manufacturer-wholesaler to fix the wholesale prices of lenses, for the purpose or with the effect of eliminating any independent wholesaler.

Practices—Operating Branches at a Loss—Filing of Financial Statements—Consent Judgment—A manufacturer-wholesaler of eyeglass lenses was required by a consent judgment to submit, for a period of 20 years, annual financial statements for each of its wholesale laboratory branches for the purpose of preventing the operation of laboratories at a loss in unfair competition. The sale or closing of a branch operating at a loss could be required.

Refusal to Sell—Threats—Consent Judgment.—A manufacturer-wholesaler of eyeglass lenses was prohibited by a consent judgment, for a period of 20 years, from refusing to sell or threatening to refuse to sell lenses to any wholesale laboratory because of the price or prices at which such laboratory had sold lenses.

For the plaintiff: Donald F. Turner, Assistant Attorney General, and Gordon B. Spivack, William D. Kilgore, Jr., and John E. Sarbaugh, Attorneys, Department of Justice.

For the defendants: Kent V. Lukingbeal, Steven E. Keane, Rogers M. Doering, and Robert V. Abendroth.

Final Judgment

E. T. GIGNOUX, D. J.: The plaintiff, United States of America, having filed its complaint on December 29, 1961, the cause thereafter having been transferred to this Court, the defendants having filed answers, and the parties hereto by their respective attorneys having consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law herein and without this Final Judgment constituting evidence or an admission by any party hereto with respect to any such issue:

Now, therefore, before the taking of any testimony and without trial or adjudication of any issue of fact or law herein, and upon the consent of the parties hereto, it is hereby

Ordered, adjudged and decreed as follows:

I

[*Sherman Act*]

This Court has jurisdiction of the subject matter of this action and of the parties hereto. The complaint states claims upon which relief may be granted against the defendants under Sections 1 and 2 of the Act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act., as amended.

II

[*Definitions*]

As used in this Final Judgment:

- (A) "Person" shall mean an individual, partnership, firm, association, corporation or other legal or business entity;
- (B) "American Optical" shall mean the defendant American Optical Company, an association, and such defendants shall be deemed to be one defendant for the purposes of this Final Judgment;
- (C) "Bausch & Lomb" shall mean the defendant Bausch & Lomb Incorporated;
- (D) "Dispenser" shall mean any person engaged in the United States in selling spectacles, which incorporate ophthalmic lenses ground to prescription, to the ultimate user;
- (E) "Wholesale laboratory" shall mean any person engaged in the United States in servicing dispensers by maintaining and selling stocks of ophthalmic lenses, frames, mountings, and other materials to make complete or repair spectacles or by performing the precision operations involved in grinding, polishing, edging, and mounting lenses to prescriptions sent to them by dispensers.

III

[*Applicability*]

The provisions of this Final Judgment applicable to a defendant shall also apply to each of its officers, directors, agents, employees, subsidiaries, successors, and assigns, and to all persons in active concert or participation with the defendant who receive actual notice of this Final Judgment by personal service or otherwise.

IV

[*Acquisition of Wholesalers*]

Each defendant is enjoined from acquiring any wholesale laboratory for a period of 20 years from the date of entry of this Final Judgment.

Each defendant is enjoined from opening any new wholesale laboratory for a period of 20 years from the date hereof, where the effect of such opening would be that such defendant at the end of any calendar year was operating more than five more such wholesale laboratories than it was operating at the beginning of such calendar year.

Nothing contained in the preceding paragraphs shall prevent the defendant Bausch & Lomb from establishing a wholesale laboratory distribution system of not more than 38 branches in the territory set forth in Appendix 1 hereto. In the event it is proposed to establish such a system in whole or in part by the acquisition of existing wholesale laboratories Bausch & Lomb shall either (a) obtain the consent of the Department of Justice to any such acquisition or (b) apply to this Court for permission to acquire any such wholesaler. Such permission will be granted if Bausch & Lomb shall establish to the satisfaction of the Court that the acquisition will not substantially lessen competition or tend to create a monopoly in the manufacture or distribution of ophthalmic goods in any section of the country. In the event such a system is established in the territory set forth in Appendix 1 by

acquisitions approved by the Department of Justice or the Court or by the opening of new Bausch & Lomb branches, the new branches so opened or acquired shall not be taken into account in determining whether the limitations of the immediately preceding paragraph have been exceeded.

V

[*Acquisition of Dispensers*]

Each defendant is enjoined from engaging in business as a dispenser for a period of 5 years from the date of entry of this Final Judgment.

For a further period of 15 years thereafter, each defendant is enjoined from directly or indirectly acquiring any dispenser without the consent of the Department of Justice or the approval of the Court. If after 60 days notice in writing with respect to any such proposed acquisition is not forthcoming, application for permission to make such acquisition may be made to this Court and such permission will be granted if the defendant establishes to the satisfaction of the Court that the acquisition will not substantially lessen competition or tend to create a monopoly in the manufacture or distribution of ophthalmic goods in any section of the country.

VI

[*Contingent Divestiture*]

A. If the defendants within 20 years from the date of entry of this Final Judgment should wilfully enter into any agreement between themselves to fix the factory or the wholesale prices of ophthalmic goods sold by them, for the purpose or with the effect of eliminating any independent wholesale laboratory, the plaintiff may apply to this Court for an order divesting defendants of all or any part of their wholesale laboratory branches and the Court shall order divestiture of any such branch or branches as to which the Court finds either (1) that such branch or branches were thus directly employed or intended to be employed as a means of eliminating or attempting to eliminate any independent wholesale laboratory or (2) that divestiture of such branch or branches is necessary to eliminate the effects or to preclude the intended effects of such agreement.

B. If either of the defendants within 20 years from the date of entry of this Final Judgment should wilfully enter into any agreement with any other manufacturer having any wholesale laboratory and having a substantial share of the market for ophthalmic goods at the factory to wholesale level, to fix the factory or the wholesale prices of ophthalmic goods sold by them, for the purpose or with the effect of eliminating any independent wholesale laboratory, the plaintiff may apply to this Court for an order divesting said defendant of all or any part of its wholesale laboratory branches and, if divestiture of any wholesale laboratory of such other manufacturer shall have been ordered to a comparable extent in the same or in any other proceeding based on such agreement, the Court shall order divestiture of such branch or branches of such defendant as to which the Court finds either (1); that such branch or branches were thus directly employed or intended to be employed as a means of eliminating or attempting to eliminate any independent wholesale laboratory or (2) that divestiture of such branch or branches is necessary to eliminate the effects or to preclude the intended effects of such agreement.

G If an order of divestiture is entered it shall require the submission of a plan for divestiture within not more than 6 months from the date of such order and shall require that such divestiture be accomplished within a reasonable time after such plan is approved by the Court.

VII

[*Laboratories—Profit or Loss*]

With respect to each of the 20 calendar years commencing January 1, 1967, each of the defendants shall prepare for each of its wholesale laboratories a statement of the profit or loss resulting from such laboratory's operations during such year. Such statements shall be prepared in accordance with generally accepted accounting principles and shall treat such laboratory, as nearly as may be, as a separate economic unit. This shall mean among other things that

A. The prices charged such laboratory for goods manufactured or sold by such defendant shall be the same as would have been received by such defendant from an independent wholesale laboratory ordering on the same basis.

B. In respect of activities of such defendant at its head office, regional, or any other non-laboratory levels, such laboratory shall be charged the cost of all services received by it of a character which an independent wholesale laboratory would have to do for itself or pay another to do.

C. Account shall be taken of the income from and expenses incurred in connection with all operations relating to the sale of ophthalmic goods and associated supplies and equipment in which such laboratory participates (including, without limitation, prescription business generated in such laboratory's territory and processed at another location), and of such laboratory's role in selling to distributors in its territory.

Each year's statements shall be submitted to the Department of Justice by April 30 of the following calendar year.

Any laboratory which shall be shown to have operated at a loss for 3 years out of any 5-year period, 2 of which 3 years shall have been consecutive, shall be closed or sold and the defendant involved shall not open another wholesale laboratory within the same local trading area for a period of 2 years after such closing or sale, provided, however, that since the object of this provision is to protect against using such laboratories to compete unfairly with others engaged in the wholesale laboratory business, any year in which any such loss resulted from economic, casualty, or other forces or conditions beyond the control of such defendant shall not be counted for this purpose. Examples of such forces or conditions shall include, but shall not be limited to, the following:

- (i) Losses caused by the charging in good faith of prices to meet the prices charged by a competitor.
- (ii) Losses resulting from increased operating costs incurred in good faith to meet competitive forces or conditions.
- (iii) Losses of a start-up character of a newly-opened laboratory.
- (iv) Losses caused by economic conditions having an adverse effect on such defendant's operations, or by labor disputes, wartime, or other emergency conditions.

VIII

[*Refusal to Deal*]

For a period of 20 years after entry of this Final Judgment each defendant is enjoined and restrained from refusing to sell or threatening to refuse to sell ophthalmic goods to any wholesale laboratory because of the price or prices at which such wholesale laboratory has sold ophthalmic goods.

IX

[*Notice of Judgment*]

Each defendant is ordered and directed to furnish a copy of this Final Judgment to each of its present and future officials, including regional and branch officials, having duties or responsibilities relating to sales of ophthalmic goods and to retain in its files for a period of 20 years from the date of this Final Judgment a written statement signed by each such person setting forth the date he received and read a copy of this Final Judgment, his title, his place of employment, and the name of his immediate supervisor.

X

[*Inspection and Compliance*]

For the purpose of determining or securing compliance with this Final Judgment, duly authorized representatives of the Department of Justice shall upon written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division upon reasonable notice to a defendant made to its principal office be permitted, subject to any legally recognized privilege:

A. Access during the office hours of said defendant to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or control of said defendant relating to any of the matters contained in this Final Judgment; and

B. Subject to the reasonable convenience of said defendant and without restraint or interference from it, to interview the officers and employees of said defendant, who may have counsel present, regarding any such matters.

Upon such a request a defendant shall submit written reports regarding any of the matters contained in this Final Judgment. No information obtained by the means provided in this Section shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the plaintiff except in the course of legal proceedings to which the United States is a party for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

XI

[*Jurisdiction Retained*]

Jurisdiction is retained for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, or the modification or termination of any of the provisions thereof, or for the enforcement of compliance therewith, and for the punishment of violations of any of the provisions contained herein.

Appendix 1

All of the Lower Peninsula of the State of Michigan; all of the State of Ohio; all of the State of West Virginia; all of the State of Kentucky except the Counties of Ballard, Carlisle, Hickman, Fulton, Graves, Calloway, Marshall, McCracken; all of the State of Indiana except the Counties of Davies, DuBois, Givson, Knox, Lake, La-porte, Martin, Perry, Pike, Porter, Posey, Spencer, Vanderburg, and Warrick; the Counties of Garrett and Alleghany in the State of Maryland; the following counties of the State of Illinois: Peoria, Woodford, Livingston, Tazewell, McLean, Ford, Mason, Logan, DeWitt, Piatt, Champaign, Vermilion, Cass, Menard, Scott, Morgan, Sangamon, Macon, Douglas, Greene, Macoupin, Montgomery, Christian, Shelby, Moultrie, Coles and Edgar; and the following counties in the Commonwealth of Pennsylvania: Allegheny, Armstrong, Beaver, Bedford, Butler, Cambria, Fayette, Greene, Indiana, Lawrence, Mercer, Somerset, Washington and Westmoreland.