

U. S. v. SCHERING CORP., ET AL.

IN THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF NEW JERSEY.

Civil Action No. 1919.

UNITED STATES OF AMERICA, PLAINTIFF

VS.

SCHERING CORPORATION, JULIUS WELTZIEN, GREGORY
STRAGNELL, ROCHE-ORGANON, INC., ELMER H. BOBST,
CIBA PHARMACEUTICAL PRODUCTS, INC., VINCENT A.
BURGHER, RARE CHEMICALS, INC., E. T. FRITZSCHING,
DEFENDANTS.

FINAL JUDGMENT.

The complainant, United States of America, having filed its complaint herein on December 17, 1941, the defendants having appeared and filed their answers to such complaint denying the substantive allegations thereof; all parties hereto by their attorneys herein having severally consented to the entry of this final decree herein without trial or adjudication of any issue of fact or law herein and without admission by any party in respect of any such issue;

Now, therefore, before any testimony has been taken herein, and without trial or adjudication of any issue of fact or law herein, and upon consent of all parties hereto, it is hereby

ORDERED, ADJUDGED AND DECREED as follows:

I

That this Court has jurisdiction of the subject matter herein and of all the parties hereto; that the complaint states a cause of action against each of the defendants under the Act of Congress of July 2, 1890, entitled, "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," and the acts amendatory thereof and supplemental thereto.

II

Defendant companies, their successors, subsidiaries, officers and employees, and all persons acting for or in behalf of said companies, are hereby enjoined and restrained from agreeing, combining, or conspiring:

1. To fix, determine, maintain or adhere to prices, mark-ups, discounts or rebates in connection with the sale, purchase, or distribution of hormones, hormone products or other pharmaceuticals;

2. To prevent or restrain any defendant company or any other person from manufacturing hormones in the United States, or from importing or exporting hormones or hormone products into or from the United States, except the prosecution in good faith of legal proceedings.

3. To divide or allocate among themselves or with other companies the various countries of the world, or to allocate markets within such countries, including the United States, as markets for the sale or distribution of hormones or hormone products or to divide or allocate types of hormones or particular hormone products to be sold within such markets; provided, however, that nothing in this Paragraph II

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(3) shall prohibit the defendants, their successors and subsidiaries, from doing any of the following acts in any territory outside the United States, its territories and possessions:

(a) Establishing exclusive agents, resellers or customers, or terminating such arrangements; or (b) securing the manufacture of their products or any parts thereof, or the packing thereof, locally; provided that such arrangements do not place the defendants under any obligation not to sell or not to have their products sold outside the area covered by such arrangements, and do not involve any agreement to withdraw from, or refrain from entering into, any foreign market with respect to defendants' products of commercially unlike character to those distributed under such arrangement.

4. To enter into or to enforce any provision of any contract which provides for the regular exchange or disclosure of information; or to exchange or disclose information relative to individual costs, the prices to be charged, the distributors or retailers to be used, or the methods to be employed in the distribution of hormones or hormone products.

5. To audit the books of any defendant company or its successors or subsidiaries, except with respect to a valid licensing agreement which does not involve the enforcement of any restrictive provision enjoined by this decree, and then only by an independent auditor who shall report solely the amount of royalties due and payable under such license agreement;

6. To enter into or enforce any agreement or arrangement with respect to terms or conditions of sale, the agents or resellers to be employed, or the types or kinds of articles to be sold in the United States, or in connection with imports or exports, directly or indirectly, to or from the United States, its territories or possessions;

7. To agree or to follow the practice of carrying out any prior agreement as to the standard provisions

or the standard practices in connection with license agreements;

8. To enter into or to enforce any provision in any licensing agreement relating to hormones or hormone products under which any licensee has a right to restrict in any manner the number of licenses to be issued under any patent, or to designate licensees, or receives any portion of the royalties charged by the licensor in connection with other licenses;

9. To enter into or to enforce any provision of any licensing agreement or arrangement relating to hormones or hormone products whereby any defendant company, its subsidiaries or successors, is obligated to exchange patents, patent applications, inventions, or processes with any other company, but this Section II-9 shall not affect rights on existing patents, patent applications, or licenses already vested at the time of the entry of this decree;

10. To enter into or to enforce any provision of any license under any existing patent relating to hormones or hormone products where such provision attempts to restrict the licensee as to the area in which he may sell, the type or conditions of sale, or the prices to be charged by the licensee in such sale;

11. To confer as to prices to be charged for hormones or hormone products, or the methods of distribution to be employed, or to confer in any other manner when the purpose and effect is to violate any of the provisions of this decree.

III

1. Each defendant company, its successors, subsidiaries, officers, and employees and all persons acting for or on behalf of said company, is hereby individually enjoined and restrained:

A. From enforcing any provision in any existing licensing agreement under which any licensee has a right to restrict in any manner the number of licenses to be issued under any patent, or to designate licen-

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sees, or receives any portion of the royalties charged by the licensor in connection with other licenses;

B. From enforcing any provision of any existing licensing agreement or arrangement whereby any defendant company, its subsidiaries or successors, is obligated to exchange patents, patent applications, inventions, processes, or other rights with any other company, but this Section III-1-B shall not affect rights on existing patents, patent applications, or licenses already vested at the time of the entry of this decree;

C. From enforcing any provision of any existing licensing agreement where such provision attempts to restrict the licensee as to the area in which he may sell, the type or conditions of sale, or the prices to be charged by the licensee in such sale;

D. From following the policy of adhering to any restrictions agreed upon by others, including but not limited to, any foreign cartel, as to territories for sale, the terms or conditions of sale or any other matters affecting trade or commerce within, to or from the United States of America, its territories and possessions.

2. Each defendant company, its successors, subsidiaries, officers, and employees and all persons acting for or on behalf of said company, is hereby individually ordered to file with the Department of Justice copies of all contracts, agreements, or arrangements, not hitherto filed, affecting the business of said defendants and entered into or adhered to by any company affiliated with or connected with said defendants where said contracts, agreements, or arrangements restrict or determine territories for sale or the terms or conditions of sale. The failure of the Attorney General of the United States or the Assistant Attorney General in charge of the Anti-trust Division to take any action following the receipt of any such information from any defendant pursuant to this Paragraph III shall not be construed as an approval of the matters and things so informed, and shall

not operate as a bar to any action or proceeding, civil or criminal, which may later be brought pursuant to any law of the United States based on the matters and things so informed.

The four agreements to which the defendant Schering Corporation is a party, entered into as of January 1, 1938, and known as "the royalty agreement," "the alkali-hormonate agreement," "the Bassorit agreement," and "the Bassorit fee agreement," and the agreement entered into by the defendant Schering Corporation on October 21, 1938, and known as "the raw materials agreement" and any and all amendments or supplements thereto, are declared and adjudged to be unlawful under the antitrust laws of the United States, and the defendant Schering and its successors or subsidiaries and all of them be and they hereby are enjoined and restrained from carrying out or enforcing any of the aforesaid contracts or any supplements, amendments, or modifications thereof, or making any royalty payments, or any other payments pursuant to said agreements and each of them, without express order from this Court.

Provided, however, that this Paragraph IV shall not affect the title of any of the defendants under existing patents, or patent applications, or to trade-marks already vested at the time of the entry of this decree, or the rights of the defendants to continue to manufacture and sell under any licenses already vested at the time of the entry of this decree, but shall be applicable to future patents, future patent applications, and to future licenses and shall also be applicable to any and all restrictive provisions in connection with all patents or licenses the enforcement of which restrictive provisions is enjoined by this decree, and further shall be applicable to all penalty, forfeiture, and termination provisions, the operation of which would have the purpose or effect of carrying out any of the restrictive provisions enjoined by this decree.

V

The agreement entered into on or about January 1938

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between N. V. Organon and defendant Roche-Organon and any and all amendments or supplements thereto are declared and adjudged to be unlawful under the anti-trust laws of the United States, and the defendant Roche-Organon and its successors or subsidiaries or any of them be and they hereby are enjoined and restrained from carrying out or enforcing any of the aforesaid contracts or any supplements, amendments, or modifications thereof.

Provided, however, that this Paragraph V shall not affect the title of any of the defendants under existing patents, or patent applications, or to trade-marks already vested at the time of the entry of this decree, or the rights of the defendants to continue to manufacture and sell under any licenses already vested at the time of the entry of this decree, but shall be applicable to future patents, to future patent applications, and to future licenses and shall also be applicable to any and all restrictive provisions in connection with all patents or licenses the enforcement of which restrictive provisions is enjoined by this decree, and further shall be applicable to all penalty, forfeiture, and termination provisions, the operation of which would have the purpose or effect of carrying out any of the restrictive provisions enjoined by this decree.

VI

The provisions of any and all existing agreements, other than those enumerated in Paragraphs IV and V of this decree, between or among the defendants or with other companies which restrict the sales of the defendant companies as to the areas in which they may sell, the types of article to be sold or the packaging thereof, other terms or conditions of sale, or the price to be charged by the defendant companies in such sales, are hereby declared and adjudged to be unlawful under the antitrust laws of the United States, and the defendants and their respective successors or subsidiaries or any of them are hereby enjoined and restrained from the further performance of any of these provisions.

Provided, however, that this Paragraph VI shall not affect rights to existing patents, patent applications, trade-marks or licenses already vested at the time of the entry of this decree but shall be applicable to future patents, to future patent applications, and to future license rights and shall also be applicable to any and all restrictive provisions in connection with all patents or licenses, the enforcement of which restrictive provision is enjoined by this decree, and further shall be applicable to all penalty, forfeiture and termination provisions the operation of which would have the purpose or effect of carrying out any of the restrictive provisions enjoined by this decree.

VII

For the purpose of securing compliance with this decree, and for no other purpose, duly authorized representatives of the Department of Justice shall, on written request of the Attorney General or an Assistant Attorney General and on reasonable notice to the defendant corporations, made to the principal offices of the defendant corporations, be permitted (1) access, during the office hours of the defendant corporations, to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of the defendant corporations, relating to any matters contained in this decree (2) subject to the reasonable convenience of the defendant corporations and without restraint or interference from them, to interview officers or employees of the defendant corporations, who may have counsel present, regarding any such matters, and (3) the defendant corporations, on such request, shall submit such reports in respect of any such matters as may from time to time be reasonably necessary for the proper enforcement of this decree: *Provided, however,* that information obtained by the means permitted in this paragraph shall not be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice except in the course of legal

proceedings for the purpose of securing compliance with this decree in which the United States is a party or as otherwise required by law.

VIII

Nothing in this decree shall be construed to restrict or prohibit in any way any action taken by any defendant, its successors, subsidiaries, officers or employees in good faith and within the fair intendment of the letter of the Attorney General of the United States to the General Counsel of the Office of Production Management, dated April 29, 1941 (a copy of which is attached hereto as Exhibit "A"),¹ or with any amendment or amplification thereof by the Attorney General, or in accordance with any arrangement of similar character between the Attorney General and any National Defense Agency in effect at the time, provided such letter or arrangement has not at the time of such action been withdrawn or cancelled with respect thereto.

IX

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

WILLIAM F. SMITH,

United States District Judge.

1. For Exhibit "A" See Page 3304.

EXHIBIT "A"

APRIL 29, 1941

JOHN LORD O'BRIAN, ESQUIRE,
*General Counsel, Office of Production Management,
Washington, D. C.*

DEAR JOHN: The marshaling of the nation's industrial assets for a maximum productive effort in the national defense will doubtless require the allocation of orders, the curtailment of some kinds of production so as to increase production in defense fields, and the establishment of priorities and price ceilings. Furthermore, many of these steps must necessarily affect the production of goods used to satisfy our normal needs, as well as the production of materials and implements used directly in our defense effort.

Some of these acts if accomplished by private contract or arrangement within an industry and carried on for private advantage would probably constitute violations of the anti-trust laws. On the other hand, it is obvious that in the present emergency acts performed by industry under the direction of public authority, and designed to promote public interest and not to achieve private ends, do not constitute violations of the antitrust laws. In these circumstances, the Department of Justice recognizes that business interests which are asked to comply with public plans for increasing production and preventing inflation are entitled to the cooperation of agencies of the Government in eliminating any uncertainties which may exist as to the application of the antitrust laws to their activities.

Accordingly, this Department has formulated a policy which it proposes to follow in its relations with the Office of Production Management and the Office of Price Administration and Civilian Supply and with all industries or contractors acting in compliance with the orders or request of either of these organizations. The important points of this policy are:

Meetings of the industry with the Office of Production Management and the Office of Price Administration and Civilian Supply or their representatives are not illegal. In-

dustrial committees may be formed at the request of the Office of Production Management or the Office of Price Administration and Civilian Supply, to work with representatives of such offices on problems involving defense. There will be nothing unlawful in the industry cooperating in the selection of its representatives or in selecting members for committees, or in the activities of such committees provided they are kept within the scope of this letter.

Questions as to whether there is need for such a committee, and if so, how it shall be chosen, and by whom constituted, shall be the sole responsibility of the Office of Production Management or the Office of Price Administration and Civilian Supply. This Department will not participate in these decisions beyond the suggestion now made that any such committee should be generally representative of the entire industry and satisfactory to the Office of Production Management or the Office of Price Administration and Civilian Supply.

Each industry committee shall confine itself to collecting and analyzing information and making recommendations to the Office of Production Management or the Office of Price Administration and Civilian Supply, and shall not undertake to determine policies for the industry, nor shall it attempt to compel or to coerce any one to comply with any request or order made by a public authority.

All requests for action on the part of any unit of an industry shall be made to such unit by the Office of Production Management or the Office of Price Administration and Civilian Supply and not by the industry committee. That is to say, the function of determining what steps should be taken in the public interest should in each case be exercised by the public authority which may seek the individual or collective advice of the industry. But the determination shall not be made by the industry itself or by its representatives.

Requests for action within a given field, such as the field of allocation of orders, shall be made only after the general character of the action has been cleared with the Department of Justice. If the general plan is approved, thereafter each request for specific action in carrying out such plan shall be

made in writing and shall be approved by the Office of the General Counsel of the Office of Production Management or the office of the General Counsel of the Office of Price Administration and Civilian Supply, but need not be submitted to the Department of Justice. In the case of any change in the personnel of such offices or if serious practical difficulties arise, this latter arrangement may be revoked upon notice from me.

Acts done in compliance with the specific requests made by the Office of Production Management or the Office of Price Administration and Civilian Supply and approved by their General Counsel in accordance with the procedure described in this letter will not be viewed by the Department of Justice as constituting a violation of the antitrust laws and no prosecutions will be instituted for acts performed in good faith and within the fair intendment of instructions given by the Office of Production Management or the Office of Price Administration and Civilian Supply pursuant to this procedure.

In the case of all plans or procedure, however, the Department reserves complete freedom to institute civil actions to enjoin the continuing of acts or practices found not to be in the public interest and persisted in after notice to desist.

With kind personal regards,

Sincerely,

(S) ROBERT H. JACKSON,

Attorney General.