

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

vs.

SWITZER BROTHERS, INC.,
GANTNER & MATTERN CO.,
THE FIRELURE CORPORATION,
THE SHERWIN-WILLIAMS COMPANY,
THE SHERWIN-WILLIAMS COMPANY OF
CALIFORNIA,
ABERFOYLE MANUFACTURING COMPANY,
LAWTER CHEMICALS, INC.,
ROBERT C. SWITZER,
JOSEPH L. SWITZER,
JOHN O. GANTNER, JR.,
EUGENE BURNS,
GERALD D. STRATFORD, and
W. BRUCE BECKLEY,

Defendants.

CIVIL ACTION NO. 29860

ORIGINAL
FILED
Oct. 22, 1953
With Clerk, U. S. Dist. Court
San Francisco

FINAL JUDGMENT AS TO DEFENDANTS
SWITZER BROTHERS, INC., ROBERT C.
SWITZER AND JOSEPH L. SWITZER

Plaintiff United States of America having filed its complaint herein on June 28, 1950, the consenting defendants hereto each having filed their several answers to said complaint denying the substantive allegations thereof, and the plaintiff and the defendants Switzer Brothers, Inc., and Robert C. Switzer and Joseph L. Switzer, by their

respective attorneys, having consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or of law herein and without admission by any party in respect of any such issue;

NOW, THEREFORE, before any testimony has been taken and without trial or adjudication of any issue of fact or law and upon consent of the parties aforesaid, and said consenting defendants still asserting their innocence of any violation,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED as follows:

I

As used in this Final Judgment:

(A) "Person" means an individual, partnership, firm, association, corporation, or other legal entity;

(B) "Defendants" means the defendants Switzer Brothers, Inc., Robert C. Switzer and Joseph L. Switzer and each of them;

(C) "Gantner" means the defendant, Gantner & Mattern Co.;

(D) "Firelure" means the defendant, The Firelure Corporation;

(E) "Sherwin-Williams" means the defendant, The Sherwin-Williams Co., and all its wholly-owned subsidiaries, including defendant The Sherwin-Williams Co. of California;

(F) "Aberfoyle" means the defendant, Aberfoyle Manufacturing Co., Inc.;

(G) "Lawter" means the defendant, Lawter Chemicals, Inc.;

(H) "Gabbs" means the partnership or tenancy in common of Eugene Burns, Gerald D. Stratford, John O. Gantner, Jr., and W. Bruce Beckley, doing business as Gabbs Supply Co.;

(I) "Daylight fluorescent" means a color comprised of a predominantly reflected wave band of incident visible light and, due to visible-light response, fluorescent emitted light of substantially the same wave length as the predominantly reflected wave band, said combined

reflected and emitted light having a brightness and purity of hue characterized by color distinguishability at a distance beyond the perceptibility range of any subtractive color of similar hue;

(J) "Daylight fluorescent devices", as distinguished from daylight fluorescent materials, denotes all types and kinds of end-use products, articles, and devices, without limitation, in whose manufacture, production, or processing, daylight fluorescent materials are utilized. Included among such devices which utilize daylight fluorescent coating compositions are advertising signs, billboards, posters and displays, fishing lures and tackle, aircraft and shipboard instrument boards and panels, and novelty jewelry. Included among such devices utilizing daylight fluorescent textiles are swim suits, hosiery, caps, and other garments and articles of apparel, advertising and theatrical banners, signal flags and fishing flies and other lures;

(K) "Daylight fluorescent materials" means, for example, certain lacquers, paints, pigments, screen process inks, and other coating compositions, yarns, filaments, threads and fibers, together with cloth and fabrics woven and made therefrom, various organic felted materials, in sheet and roll form, such as papers, cardboards, and the like, films and foils, all of which when properly applied, processed, and utilized, result in a daylight fluorescent effect;

(L) "Patents" means each and all United States Letters Patent and applications therefor, relating to daylight fluorescent materials or devices, or both;

(M) "Trademarks" means each and all trademarks and trade names, used by or registered for defendant, relating to daylight fluorescent materials or devices, or both.

II

The Court has jurisdiction of the subject matter hereof and of the parties signatory hereto. The complaint states a cause of action against the consenting 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", and under Section 3 of the Act of Congress of October 15, 1914, entitled "An Act to Supplement Existing Laws Against Unlawful Restraints and Monopolies and for other Purposes".

III

The defendants consenting to and entering into this Final Judgment are Switzer Brothers, Inc., Robert C. Switzer and Joseph L. Switzer. The provisions of this Final Judgment applicable to any of the said consenting defendants shall apply to such defendant and its or his officers, directors, agents, employees, subsidiaries, successors and assigns, and to all other persons acting under, through or for such defendant. For the purpose of this Final Judgment when either of the individual defendants, Robert C. Switzer and Joseph L. Switzer, is acting in his capacity as an officer or agent of the defendant Switzer Brothers, Inc., the said individual defendant and defendant Switzer Brothers, Inc. shall be deemed to be one person.

IV

(A) The following agreements, having been terminated:

(1) Agreements between the defendant Switzer and defendant Gantner, dated September 27, 1946; February 7, 1947; November 26, 1947; January 17, 1949; August 10, 1949; November 10, 1949 and October 23, 1950;

(2) Agreement between the defendant Switzer and defendant Aberfoyle dated July 14, 1949;

(3) Agreement between defendant Switzer and defendant Gabbs dated January 21, 1949;

defendants are enjoined and restrained from continuing or renewing any of the agreements above listed.

(B) Defendants are enjoined and restrained from maintaining, adhering to, claiming any rights under, reviving, adopting or enforcing

any provision of the following agreements which is inconsistent with any of the provisions of this Final Judgment:

- (1) Agreement between defendant Switzer and defendant Sherwin-Williams, dated January 25, 1949;
- (2) Agreements between defendant Switzer and defendant Lawter, both dated February 3, 1950;
- (3) Agreement between defendant Switzer and defendant Gantner dated September 25, 1951, as amended.

V

(A) Defendants are jointly and severally ordered and directed to grant to each applicant making written request therefor a non-exclusive, unrestricted, royalty-free license to manufacture, sell and use under United States Letters Patent Nos. 2,417,384; 2,475,529 or 2,450,085. In any such license notice may be given that said royalty-free license does not convey rights under other patents owned or controlled by defendants. Defendants are enjoined and restrained from transferring by assignment, or otherwise divesting themselves of, ownership or control of said patents Nos. 2,417,384; 2,475,529 or 2,450,085.

(B) Defendants are jointly and severally enjoined and restrained from instituting or threatening to institute any suit or proceeding against any person to restrain or enjoin, or collect damages for, infringement occurring prior or subsequent to the date of entry of this Final Judgment, of said patents Nos. 2,417,384; 2,475,529 or 2,450,085; provided, however, that nothing herein shall prevent defendants (1) from defending the validity of said patents, or (2) by way of claim (counterclaim) or defense, from asserting claims for past unlicensed, contributory or induced infringement of said patents.

(C) Except as to cases now on appeal or on certiorari defendants are ordered and directed to dismiss any of their pending actions for

infringement of the patents listed in subsection (B) above in which a counterclaim has not been pled, and to dismiss any such pending action in which a counterclaim, if pled, is dismissed. However, in case a counterclaim has been pled and is not dismissed, defendants may, but only to the extent of such counterclaim and only until the time of such dismissal, assert in such case the validity of said patents and plead by way of claim (counterclaim) or defense past unlicensed, contributory or induced infringement of said patents.

VI

(A) Defendants are ordered and directed to grant to each applicant making written request therefor a license to manufacture and sell daylight fluorescent fabrics under United States Letters Patent No. 2,606,809 upon terms and conditions as are prescribed for the licensing of patents relating to daylight fluorescent devices in Section VII herein, except for the terms of Section VII (B) (8).

(B) Nothing in the foregoing subsection (A) shall be deemed to prohibit defendants from taking appropriate action to enforce licenses issued under the above subsection (A), and asserting said patent against unlicensed manufacturers and sellers of daylight fluorescent fabrics.

(C) Defendants are jointly and severally enjoined and restrained from asserting or enforcing any rights under United States Letters Patent No. 2,606,809, except as are necessary to comply with and are permitted by subsections (A) and (B) of this Section VI.

VII

(A) The defendants are:

(1) Ordered and directed to grant to each person making written request therefor a non-exclusive license to make, use and sell any daylight fluorescent devices specified in the request under any, some or all United

States Letters Patent listed in Schedule A attached hereto; except that defendants need not be required to re-grant a license hereafter cancelled for breach; and

(2) Enjoined and restrained from making any disposition of said patents which deprives them of the power or authority to grant said licenses unless they sell, transfer or assign said patents and require as a condition of said sale, transfer or assignment that the purchaser, transferee or assignee thereof shall observe the provisions of this Section VII with respect to the patents so acquired.

(B) The defendants are enjoined and restrained from including any restriction or condition whatsoever in any license granted pursuant to the provisions of this Section VII except that:

(1) The license may be non-transferable;

(2) A reasonable non-discriminatory royalty may be charged; however, a bona fide compromise settlement of royalty claims due and payable shall not be deemed to be discriminatory;

(3) A reasonable provision may be made for periodic inspection of the books and records of the licensee by an independent auditor or any other person acceptable to the licensee who shall report to the licensor only the amount of royalty due and payable;

(4) Reasonable provisions may be made for cancellation of the license by licensor for breach;

(5) A description of the type of device which the licensee is to make, use or sell may be included;

(6) The marking of patent numbers on licensed devices in accordance with the patent statutes may be required;

(7) The license must provide that the licensee may cancel the license at any time by giving thirty (30) days' notice in writing to the licensor;

(8) Notice may be included that the license does not convey the right to manufacture or to have manufactured patented daylight fluorescent materials covered by any patent owned or controlled by the defendants.

(C) Upon receipt of a written request for a license under the provisions of this Section VII, the applicant shall be advised in writing of the royalty which the defendant deems reasonable for the patent or patents to which the request pertains. If the parties are unable to agree upon a reasonable royalty within 60 days from the date such request for the license was received by the defendant, the applicant therefor may forthwith apply to this Court for the determination of a reasonable royalty, and the defendant shall, upon receipt of notice of the filing of such application, promptly give notice thereof to the plaintiff. Upon application of defendants, this Court will appoint a Special Master in Cleveland, Ohio to take all evidence in such proceedings and to make appropriate reports to this Court. In any such proceedings the burden of proof shall be on the defendant to establish the reasonableness of the royalty requested, and whatever reasonable royalty rates are determined by the Court shall apply to the applicant and to all other licensees making the same type or kind of device pursuant to this judgment under the same patent or patents. Pending the completion of negotiations or any such proceedings, the applicant shall have the right to make, use and vend daylight fluorescent devices under the patents to which its application pertains but subject to the payment of such reasonable royalty as may be determined by the Court. Pending the determination of a reasonable royalty, the applicant or defendant may apply to this Court to fix an interim royalty rate. If the Court fixes such interim royalty rate, the defendant shall then issue, and the applicant shall

accept, a license providing for the periodic payment of royalties at such interim rate from the date of the filing of the application for a license. If the applicant fails to accept the license or fails to pay the interim royalty, such action shall be cause for the dismissal of his application, and his rights, within the scope of his application, under this Section shall terminate without relieving him of liability for payment of a reasonable royalty during such time as said patent or patents were used.

(D) Nothing contained in this Final Judgment shall prevent any applicant for such patent license from attacking in the aforesaid proceedings, or in any other controversy, the validity or scope of any of said patents, nor shall this Final Judgment be construed as importing or impairing any validity or value to any of said patents.

VIII

Defendants are enjoined and restrained from entering into, adhering to or enforcing any agreement, understanding, plan or program with any person engaged in the manufacture of daylight fluorescent materials or devices which:

(A) Requires the use of only daylight fluorescent materials and devices manufactured or sold by the defendants or any source approved by the defendants;

(B) Restricts, limits or controls the channels through which daylight fluorescent materials or devices may be sold or distributed.

IX

Defendants are enjoined and restrained from entering into, adhering to or enforcing any agreement, understanding, plan or program with any manufacturer, distributor or user, or any other person:

(A) Not to sell to or buy from others daylight fluorescent materials or devices;

(B) Not to use, purchase or deal in daylight fluorescent materials or devices manufactured or sold by any third person;

(C) Preventing any person from competing in the manufacture, processing, distribution or sale of daylight fluorescent materials or devices.

X

Defendants are enjoined and restrained from:

(A) Requiring any person to use only daylight fluorescent materials and devices manufactured or sold by the defendants, or by any source approved by the defendants;

(B) Conditioning the processing by defendants of daylight fluorescent materials upon any agreement or understanding restricting or limiting the distribution, sale or use of daylight fluorescent materials or devices manufactured or owned by any person other than the defendants;

(C) Without obstructing the exercise of trade-mark rights, limiting, controlling or restricting the end use of daylight fluorescent materials or devices by purchasers thereof;

(D) Selling or processing, or offering to sell or process, or fixing the price for the sale of, daylight fluorescent materials or devices, upon the condition, agreement or understanding that the purchaser thereof shall not purchase, use or deal in the daylight fluorescent materials or devices, or ingredients or goods of any person other than defendants;

(E) Refusing to grant a license under any patent where the refusal is, in whole or in part, due to the refusal of the applicant for the license to grant back a license to the defendants under any patent or improvement patent;

(F) Requiring any person to agree in a license agreement to refrain from contesting the validity of patents not specifically covered by such license.

XI

Defendants are enjoined and restrained from:

(A) Granting any license or sub-license or immunity under any patents upon a condition or requirement that the other party to such transaction shall agree:

(1) To manufacture, sell or use only daylight fluorescent devices of specified kinds or types;

(2) To manufacture, sell or use only such daylight fluorescent devices as may be covered by a specified patent or patents, or which are produced by or are the result of any process covered by a specified patent or patents;

(3) To accept a license under, or otherwise to adopt and to use on daylight fluorescent devices, trade-marks or trade names owned or controlled by any person;

(4) To utilize in the manufacture or processing of the licensed daylight fluorescent devices only materials to be obtained from designated sources or only materials obtained from sources approved or in any way specified or designated by defendants;

(5) To utilize in the manufacture of the licensed daylight fluorescent devices only materials manufactured or processed by manufacturers or processors approved or in any way specified or designated by defendants;

(6) Not to manufacture, sell, or use any daylight fluorescent device not covered by the patent or patents specifically licensed.

(B) Instituting or maintaining, or threatening to institute or maintain, any suit or proceeding against any person for infringement of any patent without first giving written notice to such person of the particular claim or claims of which patent is deemed to have been infringed.

(C) Granting any license under any trade-mark upon a condition or requirement that the other party to such transaction shall agree:

(1) To manufacture, sell, or use only such daylight fluorescent devices or materials as may be covered by a specified patent or patents, or which are produced by or are the result of any process covered by a specified patent or patents;

(2) To utilize in the manufacture of the licensed daylight fluorescent devices or materials only materials manufactured or processed by manufacturers or processors approved or in any way specified or designated by defendants.

(D) Granting any trade-mark license to any manufacturer, seller or user of daylight fluorescent materials or devices which:

(1) Does not permit the trade-mark licensee to cancel the license, with or without reason or cause, upon thirty (30) days' notice to the licensor;

(2) Requires the licensee to use the licensed trade-mark on daylight fluorescent materials or devices of any given type or kind to the exclusion of other trade-marks.

XII

Within sixty (60) days from the date of the entry of this Final Judgment defendant Switzer shall give notice in writing, approved as to form and content by the plaintiff, of the contents of:

(A) Sections V and IX hereof to each person licensed or otherwise authorized on the date of this Final Judgment by said defendant to employ or to use any of the said patents covered by said Section V.

(B) Section IX hereof to each of its dealers and distributors of daylight fluorescent materials.

A list of the names and addresses of the persons to whom the above required notice has been sent shall be submitted to plaintiff herein.

XIII

Nothing in this Final Judgment shall be deemed to prohibit the defendants:

(A) From issuing or maintaining a trade-mark license which requires the use of materials designated by name or manufacturer, in cases where it is not possible to use any other designation and the licensee is in fact free to obtain equivalent materials from other sources.

(B) From issuing a patent license in connection with a trade-mark license; provided, the licensee, at his option, may take either a patent license or a trade-mark license.

(C) From issuing patent licenses describing the scope of the grant therein.

XIV

For the purpose of securing compliance with this Final Judgment and for no other purpose, 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, and upon reasonable notice to defendants, be permitted, subject to any legally recognized privilege, (a) access, during the office hours of defendants, to all books, papers, ledgers, accounts, correspondence,

memoranda and other records and documents in the possession of or under the control of defendants relating to any of the matters contained in this Final Judgment; and (b) subject to the reasonable convenience of defendants, to interview officers and employees of defendants, who may have counsel present, regarding such matters. Upon written request of the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division, on reasonable notice to defendants, defendants shall submit such written reports as may from time to time be reasonably necessary to the enforcement of this Final Judgment. No information obtained by the means provided in this Section XIV shall be divulged by 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 to which the United States is a party for the purpose of securing compliance with this Final Judgment or as otherwise provided by law.

XV

Jurisdiction is retained by this Court 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, for the amendment, modification, or termination of any of the provisions thereof, for the enforcement of compliance therewith and for the punishment of violations thereof.

San Francisco, California
DATED: October 22, 1953

LOUIS E. GOODMAN

United States District Judge

We hereby consent to the entry of the foregoing Final Judgment.

STANLEY N. BARNES
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EXHIBIT A

List of patents owned or controlled by defendants
having claims covering daylight fluorescent
devices.

<u>United States Letters Patent No.</u>	<u>Claims</u>
2,277,169	1-24
2,302,645	1-14
2,417,383	3-8
2,498,592	16-24
2,629,956	1-13