

U. S. v. ALBA PHARMACEUTICAL COMPANY, INC.
(NEW YORK), ET AL.

IN THE DISTRICT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF NEW YORK.

Civil Action No. 15-363.

UNITED STATES OF AMERICA, PLAINTIFF

VS.

ALBA PHARMACEUTICAL COMPANY, INC. (NEW YORK);
THE BAYER COMPANY, INC. (NEW YORK); STERLING
PRODUCTS (INCORPORATED) (DELAWARE); WINTHROP
CHEMICAL COMPANY (DELAWARE); ALBERT H. DIE-
BOLD; WILLIAM E. WEISS, DEFENDANTS.

FINAL JUDGMENT.

The complainant, United States of America, having filed its complaint herein on September 5, 1941; all the defendants having appeared and severally filed their answers to such complaint denying the substantive allegations thereof; and all parties hereto, by their respective attorneys herein, having severally consented to the entry of this final decree herein without trial and without admission by any party in respect of any issue; and the complainant having moved the Court for this decree;

Now, THEREFORE, before any testimony has been taken herein and upon consent of all parties hereto, it is hereby

ORDERED, ADJUDGED AND DECREED as follows:

I.

That the Court has jurisdiction of the subject-matter of the various contracts specified herein and of all the parties hereto; that the complaint states a cause of action against the defendants under the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies."

II.

1. Alba Pharmaceutical Company, Inc., a New York corporation, shall be hereinafter referred to as "Alba"; The Bayer Company, Inc., a New York corporation, shall be hereinafter referred to as "Bayer"; Sterling Products (Incorporated), a Delaware corporation, shall be hereinafter referred to as "Sterling"; Winthrop Chemical Company, a Delaware corporation, shall be hereinafter referred to as "Winthrop"; I. G. Farbenindustrie Aktiengesellschaft of Frankfort, a. Main, Germany, shall be hereinafter referred to as "I. G. Farben"; Farbenfabriken vorm. Friedr. Bayer & Company of Leverkusen, Germany, shall be hereinafter referred to as "Leverkusen"; Chemosan Union A. G. of Vienna, Austria, shall be hereinafter referred to as "Chemosan"; Chemische-Pharmazeutische A. G. Bad Homburg of Frankfort a. Main, Germany, shall be hereinafter referred to as "Bad Homburg". Hereinafter I. G. Farben shall be taken to include Leverkusen, Chemosan and Bad Homburg.

2. The following contracts and agreements between the defendants and I. G. Farben or Leverkusen or Chemosan or Bad Homburg shall be hereinafter collectively referred to as "contracts with I. G. Farben":

The agreement made April 9, 1923, between Leverkusen and Winthrop Chemical Company, Inc. (New York) shall be hereinafter referred to as the "Winthrop contract of 1923";

The agreement made November 15, 1926, between I. G. Farben and Winthrop Chemical Company, Inc., (New York) shall be hereinafter referred to as the "Winthrop contract of 1926";

The agreement made October 28, 1920 (consummated November 23, 1920), between Bayer and Leverkusen shall be hereinafter referred to as the "Latin American contract";

The undertaking given by Sterling Products (Incorporated) (West Virginia) to Leverkusen on April

9, 1923, shall be hereinafter referred to as the "Sterling agreement";

The agreements dated January 29, 1938, between Chemosan and Alba shall be hereinafter collectively referred to as the "Chemosan contracts";

The agreement made December 24, 1936, between Bad Homburg and Alba shall be hereinafter referred to as the "Bad Homburg contract of 1936";

The agreement made May 3, 1937, between Bad Homburg and Alba shall be hereinafter referred to as the "Bad Homburg contract of 1937".

3. The term "pharmaceutical products" shall mean all products embraced within the definition of "said products" in the Winthrop contract of 1926.

III.

1. The Latin American contract dated October 28, 1920, between The Bayer Company, Inc. and Farbenfabriken vorm. Friedr. Bayer & Company [I. G. Farbenindustrie A. G. (its successor)] and all agreements amendatory or supplemental thereto between said parties are hereby adjudged and declared to be unlawful under the Anti-Trust Laws of the United States, and defendant The Bayer Company, Inc. is enjoined and restrained, subject to the provisions of Paragraph III (2) hereof, from the further performance of any of their provisions.

2. The defendant The Bayer Company, Inc. is ordered and directed to terminate prior to December 31, 1941 all arrangements with I. G. Farbenindustrie A. G. and persons, firms or corporations in the Central and South American countries and Mexico operating under the direction or control of I. G. Farbenindustrie A. G. for the distribution of aspirin, aspirin compounds or other drug products pursuant to said Latin American contract as amended or supplemented, and prior to such date to surrender any and all licenses for the use of trade-marks owned or controlled by said I. G. Farben, its successors or subsidiaries.

3. Each of the defendants, and its respective successors and subsidiaries, is hereby enjoined and restrained from paying any royalties or share of the profits pursuant to said Latin American contract as amended or supplemented.

4. The Winthrop contract of 1923, the Winthrop contract of 1926, the Sterling agreement, the Chemosan contracts and the Bad Homburg contracts of 1936 and 1937, and any and all agreements amendatory or supplemented thereto, are hereby adjudged and declared to be unlawful under the Anti-Trust Laws of the United States, and defendants Alba, Bayer, Sterling and Winthrop, and respective successors and subsidiaries, are hereby enjoined and restrained from the further performance of any of their provisions.

5. (A) Each of the defendants Alba, Bayer, Sterling and Winthrop, and its respective successors, subsidiaries, officers and employees, is hereby enjoined and restrained from combining, conspiring or agreeing with (B) I. G. Farben, its successors or subsidiaries, or (C) any other manufacturer of pharmaceutical products or other drug products (other than the corporations and persons referred to in (A) above) to:

(i) Prevent or restrain shipment or sale to or into the United States and its territories and possessions of pharmaceutical products or other drug products, or to allocate quotas to importers in said territory;

(ii) Fix prices or increase the market price to be charged in any part of the United States by them to others in the sale of any pharmaceutical product or other drug product imported into the United States.

(iii) Withdraw from or refrain from entering into any foreign market; provided, however, that nothing in this Paragraph III (5) (iii) 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.

Provided, however, that nothing contained in this Section III shall:

Affect or diminish any right, title or interest of said defendants, their successors, subsidiaries or assigns, or any of them, in or to or under any heretofore acquired and presently existing patents, patent applications, patent licenses, trademarks, trade names (such as the name "Bayer" and the "Bayer Cross" mark and registrations thereof), processes or formulae relating to the manufacturing, processing, use or sale of aspirin, aspirin compounds, pharmaceutical or other drug or chemical products, or impair any rights or remedies of said defendants, their successors, subsidiaries or assigns, provided by statute or convention, and by suits for damages, injunction or other remedy with respect to any such patents, patent applications, patent licenses or trade-marks, or

Increase, diminish or affect presently existing claims of third parties other than I. G. Farben, its successors, subsidiaries or assigns, under United States patent license agreements, or

Affect the validity or enforceability of any agreements or covenants by or with any third parties other than I. G. Farben, its successors or subsidiaries, for the payment of monies, royalties or profits to any of the defendants, its successors, subsidiaries or assigns, in so far as such agreements or covenants do not require performance by the defendants of acts enjoined by this decree, or

Affect the payment by said defendants, their successors, subsidiaries and assigns, of patent or license royalties to or for the account of individual inventors who presently have a claim to such royalties, or

Restrict any dealings between any or all of the defendants, their respective successors, subsidiaries and assigns, not otherwise in violation of the Anti-Trust Laws of the United States, or

Restrict the right of any of said defendants, its successors, subsidiaries and assigns, to select its customers and to decline any business, or to require any of said defendants, its successors, subsidiaries and assigns, to engage in marketing programs deemed by it to be commercially disadvantageous (where such forbearance is not with the purpose and intent of acting pursuant to any restrictions imposed upon the defendants Alba, Bayer, Sterling, Winthrop, their respective successors or subsidiaries, pursuant to said contracts with I. G. Farben, nor in accordance with the program of territorial restrictions of said contracts), or to require any of said defendants, its successors, subsidiaries and assigns, to infringe any patents, trade-marks or trade names, or

Restrict the defendants, their respective successors, subsidiaries and assigns, from prosecuting any legal, administrative, or departmental proceeding with respect to importation or exportation in violation of the law of the United States.

IV.

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 defendants made to the principal office of the defendants, be permitted, subject to any legally recognized privilege, (1) access, during the office hours of the defendants, to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or

under the control of the defendants, relating to any matters contained in this decree, (2) subject to the reasonable convenience of the defendants and without restraint or interference from them, to interview officers or employees of the defendants, who may have counsel present, regarding any such matters. The defendants, on such written 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.

V.

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 (having regard for such laws or regulations of any state or country in which the parties bound by this decree may be doing business as may be relevant), for the enforcement of compliance therewith, and for the punishment of violations thereof.

VI.

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 amplifica-

tion 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.

VII.

This decree shall have no effect with respect to operations or activities wherever performed, authorized or permitted by the Act of Congress of April 10, 1918, commonly called the Webb-Pomerene Act, or by acts amendatory thereto.

SAMUEL MANDELBAUM,
United States District Judge.

Dated: September 5, 1941.

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 antitrust 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.