

Trade Regulation Reporter - Trade Cases (1932 - 1992), United States v. Carter Products, Inc., and American Home Products Corporation,, U.S. District Court, S.D. New York, 1962 Trade Cases ¶70,473, (Nov. 9, 1962)

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United States v. Carter Products, Inc., and American Home Products Corporation,
1962 Trade Cases ¶70,473. U.S. District Court, S.D. New York. No. 60. Civ. 375. Entered November 9, 1962.
Case No. 1494 in the Antitrust Division of the Department of Justice.

Sherman Act

Use and Sale Controls—Patents—Tranquilizer Drug—Consent Judgment.—A tranquilizer manufacturer was prohibited by a consent judgment, with specified exceptions, from restricting the use to which patented meprobamate compound may be put by a purchaser, the sale of the compound by a purchaser to any qualified pharmaceutical house, the persons to whom or the areas in which meprobamate tranquilizing drugs may be sold by a purchaser of meprobamate compound, or the publication of research results by a pharmaceutical house, and from requiring a purchaser of meprobamate compound to pay any sums of money based upon his sale of meprobamate tranquilizing drugs and to engage in any form of advertising or sales promotion.

Price Fixing—Resale Prices—Consent Judgment.—A tranquilizer manufacturer was prohibited by a consent judgment from restricting the prices at which patented meprobamate compound may be sold by a purchaser, or the prices, terms, or conditions at which meprobamate tranquilizing drugs may be sold by a purchaser of meprobamate compound.

For the plaintiff: Lee Loevinger, Assistant Attorney General, William D. Kilgore, Jr., Harry G. Sklarsky, John J. Galgay, Bernard Wehrman, J. Paul McQueen, and Gerald R. Dicker, Attorneys, Department of Justice.

For the defendant: Carter Products, Inc., Breed, Abbott & Morgan, by Edward J. Ross.

Final Judgment

WEINFELD, District Judge [*In full text*]: Plaintiff, United States of America, having filed its complaint herein on January 27, 1960, the defendant Carter Products, Inc., having appeared and filed its answer to the complaint denying the substantive allegations thereof, and the plaintiff and said defendant, 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 any admission by or estoppel of either party as to any such issue; and due notice having been given of the proposed decree to all parties appearing herein, and after hearing the parties to the stipulation and consent in support, and the defendant American Home Products Corporation, in opposition to said decree, and the Court having filed its opinion, and having determined pursuant to Rule 54(b) of the Federal Rules of Civil Procedure that there is no just reason for delay in entering a Final Judgment as to all of plaintiff's claims asserted in said complaint against that defendant; it is hereby

Ordered, adjudged and decreed, as follows:

I.

[Sherman Act]

This Court has jurisdiction of the subject matter hereof and of the parties consenting hereto. The complaint states claims for relief against Carter 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) "Carter" shall mean defendant Carter Products, Inc., a corporation organized and existing under the laws of the State of Maryland;
- (B) "American" shall mean defendant American Home Products Corporation a corporation organized and existing under the laws of the State of Delaware;
- (C) "Meprobamate compound" shall mean the organic compound 2-methyl-2-n-propyl-1, 3-propanediol dicarbamate;
- (D) "Meprobamate tranquilizing drugs" shall mean drugs in a form suitable for ultimate consumption in which meprobamate compound is the sole active ingredient;
- (E) "Combination drugs" shall mean drugs in a form suitable for ultimate consumption in which meprobamate compound is one of two or more active ingredients;
- (F) "Person" shall mean any individual, partnership, corporation or other business or legal entity;
- (G) "Pharmaceutical house" shall mean American and any other person engaged both in the manufacture and sale of ethical drugs within the United States for a period of three years;
- (H) "Qualified pharmaceutical house" shall mean any pharmaceutical house which has a new drug application which has become effective pursuant to law and the regulations of the United States Food and Drug Administration for each meprobamate tranquilizing drug or combination drug it intends to manufacture and sell in the United States if such application is required, and which, with respect to any such drug not manufactured and sold by it prior to the date of entry of this Final Judgment, has furnished a copy of such application to Carter at least 20 days prior to submission thereof to the United States Food and Drug Administration;
- (I) "Consumer Price Index" shall mean the index for "All items," as contained in Table D-I, entitled "Consumer Price Index —All-city average: All items, groups, subgroups, and special groups of items," published by the United States Department of Labor, Bureau of Labor Statistics, or any other publication of the Federal Government containing the same information which may replace said table;
- (J) "United States" shall include its territories and possessions.

III.

[*Applicability*]

The provisions of this Final Judgment applicable to Carter shall apply to such defendant, its subsidiaries and affiliates, the officers, directors, agents and employees of such defendant, subsidiaries, affiliates, successors and assigns, and to those persons in active concert or participation with Carter who receive actual notice of this Final Judgment by personal service or otherwise. For the purpose of this Final Judgment, Carter and its subsidiaries, officers, directors and employees, or any of them, shall be deemed to be one person.

IV.

[*Sales*]

- (A) Carter is ordered and directed to offer to sell and to sell meprobamate compound, commencing 60 days after the entry of this Final Judgment, without quantity discounts, and on unrestricted and nondiscriminatory terms and conditions, to every qualified pharmaceutical house placing a written order therefor.
- (B) Carter is ordered and directed to offer to sell and to sell meprobamate compound, without quantity discounts and on unrestricted and non-discriminatory terms and conditions, to every pharmaceutical house which places a written order therefor, in quantities sufficient for experimental purposes and necessary to support a new

drug application or applications with the United States Food and Drug Administration for each meprobamate tranquilizing drug or combination drug it intends to manufacture and sell in the United States.

(C) The maximum price at which Carter may offer to sell and sell meprobamate compound under subsections (A) and (B) hereof shall be Twenty (\$20.00) Dollars a pound; provided, however, that Carter may from time to time increase said maximum price by a percentage equal to the percentage increase in the Consumer Price Index over the last index for the month of June 1962, for the first increase, and over the index figure on which a prior increase was based, for each successive increase.

(D) Carter is ordered and directed to make every reasonable effort to assume a supply of meprobamate compound adequate to discharge its obligation under subsections (A) and (B) herein, including the licensing of others to manufacture meprobamate compound solely for sale to Carter if Carter and its then licensees are unable to supply the demand.

(E) Carter is enjoined and restrained from supplying meprobamate compound to any pharmaceutical house by means other than a sale, except where such supply is for research or experimental purposes.

(F) Carter is ordered and directed to place an advertisement or notice, setting forth subsections (G) and (H) of Section II herein, subsections (A), (B) and (C) of this Section IV, and Section VIII herein, in four successive issues of each of three major publications of general circulation in the pharmaceutical trade.

(G) All obligations imposed on Carter in this Section IV shall expire one year after the expiration of United States Letters Patent No. 2,724,720 issued to Frank M. Berger and Bernard J. Ludwig, dated November 22, 1955, and assigned by them to defendant Carter, and all reissues, divisions, continuations or extensions of said patent of which Carter is or shall become the owner, assignee or licensee.

V.

[Prohibited Restrictions]

Except as otherwise provided in Section IX herein, Carter is enjoined and restrained from offering to sell or selling meprobamate compound on any condition or understanding which:

(A) Prevents, limits, restricts or designates in any manner:

- (1) the uses to which meprobamate compound may be put by a purchaser thereof;
- (2) the sale of meprobamate compound by a purchaser thereof to any qualified pharmaceutical house;
- (3) the prices at which meprobamate compound may be sold by a purchaser thereof;
- (4) the persons to whom or the areas in which meprobamate tranquilizing drugs or combination drugs may be sold by a purchaser of meprobamate compound;
- (5) the prices, terms or conditions at which meprobamate tranquilizing drugs or combination drugs may be sold by a purchaser of meprobamate compound;
- (6) the publication or dissemination by any pharmaceutical house of the results of research conducted by it;

(B) Requires the purchaser of meprobamate compound to:

- (1) pay any sums of money based upon his sale of meprobamate tranquilizing drugs or combination drugs;
- (2) engage in any form of advertising or sales promotion in connection with his sale of meprobamate compound, meprobamate tranquilizing drugs or combination drugs.

VI.

[Prohibited Agreements]

Except as otherwise provided in Section IX herein, Carter is enjoined and restrained from entering into, adhering to, maintaining or enforcing any contract, agreement or understanding with American or with any other person, the purpose or effect of which is to:

(A) Prevent, limit, restrict or designate in any manner:

- (1) the uses to which meprobamate compound may be put by any person;
- (2) the sale of meprobamate compound by any person to any qualified pharmaceutical house;
- (3) the prices, terms or conditions at which meprobamate compound may be sold by any person;
- (4) the persons to whom or the areas in which meprobamate tranquilizing drugs or combination drugs may be sold by any person;
- (5) the prices, terms or conditions at which meprobamate tranquilizing drugs or combination drugs may be sold by any person.;
- (6) the publication or dissemination by any pharmaceutical house of the results of research conducted by it;

(B) Require any purchaser of meprobamate compound to pay any sums of money based upon his sale of meprobamate tranquilizing drugs or combination drugs;

(C) Prescribe, fix or determine the amount or type of advertising or sales promotion used or to be used by any person in connection with the sale by that person of meprobamate compound, meprobamate tranquilizing drugs or combination drugs.

VII.

[*Existing Agreements*]

Carter is enjoined and restrained from entering into, adhering to, maintaining or enforcing any provision of any contract, agreement or understanding which is contrary to or inconsistent with any provision of this Final Judgment, and it is ordered and directed forthwith to terminate and cancel any provision of any contract, agreement or understanding which is contrary to or inconsistent with any of the provisions of this Final Judgment.

VIII.

[*Technical Information*]

(A) Carter is ordered and directed to make available upon request and on unrestricted and non-discriminatory terms and conditions, to each and every qualified pharmaceutical house to whom it sells meprobamate compound pursuant to subsection (A) of Section IV herein:

- (1) Any, some or all technical information requested by such qualified pharmaceutical house and heretofore employed by Carter which pertains to the properties and uses of such compound and to the manufacture of such compound into meprobamate tranquilizing drugs and combination drugs;
- (2) any, some or all safety and effectiveness information requested by such qualified pharmaceutical house and employed by Carter at any time which pertains to such compound and drugs, including unpublished clinical data; and
- (3) any, some or all information requested by such qualified pharmaceutical house and employed by Carter at any time, which is necessary for indication claims pertaining to such drugs, including unpublished clinical data.

(B) Carter is ordered and directed to make available upon request and on unrestricted and non-discriminatory terms and conditions, to each and every pharmaceutical house to whom it sells meprobamate compound

pursuant to subsections (A) or (B) of Section IV herein, any, some or all information requested by such pharmaceutical house and employed by Carter at any time, which is necessary to support a new drug application or applications with the United States Food and Drug Administration, including unpublished clinical data.

(C) The information to be made available by Carter pursuant to subsections (A) and (B) of this Section VIII shall be made available without charge other than the expense to Carter of furnishing such information.

IX.

[*Permissive Provisions*]

Nothing contained in this Final Judgment shall be construed to:

(A) Enjoin or restrain Carter, in any instance in which Carter reasonably believes that the use intended to be made of meprobamate compound by a purchaser thereof from it will expose it to a substantial risk of liability, from requiring, as a term of sale, that the purchaser agree in writing to hold Carter harmless and to carry such products liability insurance as is normally carried by pharmaceutical houses;

(B) Enjoin or restrain Carter from making sales of meprobamate compound to persons other than American, for the duration of its contracts or agreements with such persons, if such contracts or agreements were in existence on March 1, 1962, at the price provided for in such contracts or agreements, even though such price may differ from the price at which Carter shall sell meprobamate compound under Section IV herein;

(C) Enjoin or restrain Carter from preventing a person licensed by it to manufacture meprobamate compound from selling such compound to anyone but Carter;

(D) Enjoin or restrain Carter from agreeing with any person as to steps to be taken, including litigation, with respect to infringement of its patents or patent rights anywhere in the world;

(E) Enjoin or restrain Carter from preventing any person from manufacturing or selling a combination drug where the manufacture and sale of such combination drug would constitute infringement of any patents or patent rights of Carter or of any other persons covering ingredients other than meprobamate compound;

(F) Enjoin or restrain Carter from receiving royalties provided for in its agreements with American in existence at the time of the filing of the complaint herein which are applicable to the selling price of all meprobamate tranquilizing drugs and combination drugs sold by American at any time and which contain meprobamate compound which Carter has supplied to American prior to the entry of this Final Judgment; or which Carter has supplied to American during a period ending sixty days after the entry of this Final Judgment in a quantity during such period not to exceed 180,000 pounds of such compound;

(G) Enjoin or restrain Carter from receiving royalties based exclusively upon Carter's patents or patent rights in ingredients of combination drugs other than meprobamate compound;

(H) Invalidate any provisions of any contracts in existence as of March 1, 1962 between Carter and any person other than American insofar as such provisions provide for payments for meprobamate compound and of royalties to Carter, or otherwise impose any limitations, restrictions or obligations on such person; provided, however, that if such person is a qualified pharmaceutical house it shall be eligible to purchase meprobamate compound from Carter in accordance with the provisions of this Final Judgment and for purposes other than those provided for in such contracts;

(I) Apply to any of the provisions of any contracts, existing or hereafter entered into, between Carter and any person pertaining to: (1) the manufacture, purchase or sale of meprobamate compound outside the United States; (2) the manufacture and sale of meprobamate tranquilizing drugs or combination drugs outside the United States; (3) the sale by Carter of meprobamate compound, meprobamate tranquilizing drugs or combination drugs to Carter's distributors or agents outside the United States; or (4) the sale or distribution of meprobamate compound, meprobamate tranquilizing drugs or combination drugs outside the United States by Carter's distributors or agents outside the United States; provided, however, that such contracts between Carter and any person hereafter entered into shall not violate the antitrust laws of the United States;

(J) Determine the validity or scope of Carter's patents;

(K) Enjoin or restrain Carter from exercising its patent rights anywhere in the world, or from using its United States patent rights to prevent the importation into the United States of meprobamate compound, meprobamate tranquilizing drugs, or combination drugs;

(L) Compel Carter to permit any other person to use Carter's trademarks.

X.

[Licenses]

(A) If Carter licenses any person to itself manufacture or have manufactured meprobamate compound, such license shall be non-exclusive and may prevent the licensee from using such compound for any purpose other than the manufacture and sale of meprobamate tranquilizing drugs and combination drugs by such licensee in final dosage and packaged form.

(B) If Carter licenses any additional person or persons to manufacture or have manufactured meprobamate compound, such license or licenses shall be nondiscriminatory as compared to the license granted under subsection (A) hereof.

(C) Carter is enjoined and restrained from agreeing with any person that it will not grant a license to manufacture or have manufactured meprobamate compound to any other person.

XI.

[Inspection and Compliance]

(A) For the purpose of securing compliance with this Final Judgment duly authorized representatives of the Department of Justice shall, on written request of the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to Carter given to its principal office, be permitted, subject to any legally recognized privilege:

(1) Access during the office hours of such defendant to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of such defendant relating to any matters contained in this Final Judgment, including all contracts covered by subsection (I) of Section IX;

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

(B) Upon written request of the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division, Carter shall submit such reports in writing with respect to the matters contained in this Final Judgment as may from time to time be necessary to the enforcement of this Final Judgment.

(C) No information obtained by any means provided in this Section XI 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 plaintiff except in the course of legal proceedings in which the United States is a party for the purpose of securing compliance with this Final Judgment or as otherwise required by law.

XII.

[Foreign Commerce]

Neither the making nor the entry of this Final Judgment shall be deemed to constitute any bar or estoppel to the institution and prosecution of any action by plaintiff under the antitrust laws with respect to any and all existing agreements, understandings or arrangements, between Carter and any other person which relate to the foreign

commerce of the United States in meproba-mate compound, meprobamate tranquilizing drugs or combination drugs.

XIII.

[*Jurisdiction Retained*]

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 or modification of any of the provisions thereof, for the enforcement of compliance therewith and for the punishment of violations thereof.

XIV.

[*Contract Rights*]

This Final Judgment is entered without any adjudication of any private rights which defendant American may have under any contract with defendant Carter.