Trade Regulation Reporter - Trade Cases (1932 - 1992), United States v. Glaxo Group Ltd. and Imperial Chemical Industries, Ltd., U.S. District Court, D. District of Columbia, 1974-1 Trade Cases ¶74,884, (Mar. 1, 1974)

United States v. Glaxo Group Ltd. and Imperial Chemical Industries, Ltd.

1974-1 Trade Cases ¶74,884. U.S. District Court, D. District of Columbia. Civil Action No. 558-68. Entered March 1, 1974. Case No. 1991, Antitrust Division, Department of Justice.

Sherman Act

Customer Relations—Bulk Sale Restrictions—Customer Selection—Final Judgment—A drug seller that unlawfully restricted its customers from reselling the drug griseofulvin in bulk form was prohibited by a judgment from agreeing to any such restrictions on its customers or any restrictions on the persons to whom the drug could be resold. Refusing to sell to persons who refuse to accept such restrictions was prohibited.
Department of Justice Enforcement—Injunctive Relief—Affirmative Relief—Sales to All Willing Buyers.—A drug firm that unlawfully restricted its customers from reselling the drug griseofulvin in bulk form was ordered by a judgment to sell the drug in bulk, on nondiscriminatory terms and prices, to each person in the U. S. who makes a request for deliveries to meet the purchaser's *bona fide* requirements. Sales are not required to be made to persons that do not meet reasonable credit requirements. If production is not sufficient to supply all purchasers' requirements, *pro rata* allocation is required.
Department of Justice Enforcement—Injunctive Relief—Patents—Compulsory Licensing Pending Validity Litigation.—Pending litigation of the government's challenge to patent validity, a drug seller that unlawfully restricted its customers from reselling the drug griseofulvin in bulk form was required by a partial judgment to grant licenses, on reasonable and nondiscriminatory terms and royalty rates, to make, use, and sell the drug under all existing patents and those issued for 5 years thereafter. Licensees retain the right to challenge the validity of any patent. The firm was also barred from transferring assets to any party attempting to acquire it.

Superseding final judgments in 1971 Trade Cases ¶ 73,715 and 1972 Trade Cases ¶ 73,901.

For plaintiff: Thomas E. Kauper, Baddia J. Rashid, Richard H. Stern, Thomas A. Schulz, John Wilson and Earl J. Silbert, Washington, D. C.

For defendants: Charles Lister, Francis D. Thomas, Jr., Hugh B. Cox and Henry P. Sailer, for Glaxo Group Ltd.; Sigmund Timberg, Willard Hayes, John W. Malley, Paul N. Kokulis and Lawrence A. Hyme, Washington, D. C, for Imperial Chemical Industries, Ltd.

Partial Final Judgment as to Glaxo Group Limited

GASCH, D. J.: Plaintiff, the United States of America, having filed its complaint herein on March 4, 1968; and defendant Glaxo Group Limited's two challenges to jurisdiction having been denied by orders of this Court dated April 30, 1968, and November 20, 1969; and the Court having granted plaintiff's several motions for summary judgment respecting the illegality of the challenged combination and agreements; and the Supreme Court of the United States having decreed that defendant Glaxo Group Limited should be required to sell bulk-form griseofulvin on reasonable and non-discriminatory terms and to license griseofulvin patents at reasonable royalty rates to all bona fide applicants; and the Supreme Court having further decreed that the United States should be permitted to amend its complaint herein to challenge the validity of defendant Glaxo Group Limited's U. S. Patent No. 3,330,727; such challenge not having been presented to the Court for decision as yet, but to be litigated in the future; the Court having considered all matters involved herein except the validity of U. S. Patent No. 3,330,727, and there being no just reason for delay in entering a judgment as to those matters which have been previously litigated, it is hereby

Ordered, Adjudged, and Decreed as follows:

I.

[*Definitions*]

As used in this Final Judgment:

(A) “Glaxo” means defendant Glaxo Group Limited;

(B) “ICI” means defendant Imperial Chemical Industries Limited;

(C)“Drug” shall be defined as it is in 21 U. S. C. § 321(g)(i); and such term shall also include any form of such drug (bulk, dosage form, or otherwise);

(D) “United States sale” means any sale of any drug, made in the United States or made abroad in contemplation of exportation to the United States;

(E)“Technical data” means know-how, technology, production manuals, drawings, and other information relating to the manufacture or processing of any product, and any material directly or indirectly submitted to the FDA by defendant Glaxo;

(F) “Person” means any individual, corporation, association, partnership, or other legal entity.

II.

[*Violations*]

(A) The Court has jurisdiction of the subject matter of this action and of the parties hereto.

(B) The defendants have, in violation of Section 1 of the Sherman Act (15 U. S. C. §1), entered into contracts with their respective purchasers in the United States restricting their freedom to resell the drug griseofulvin in bulk form; and have, in violation of said Section, agreed with each other that defendant ICI should so restrict its purchaser in the United States.

III.

[*Applicability*]

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

IV.

[*Prohibited Agreements*]

Defendant Glaxo is enjoined and restrained:

(A)From entering into, adhering to, maintaining, or claiming any rights under any agreement or understanding pursuant to which any party thereto undertakes not to resell, or is limited, prohibited, or restrained in the manner or form in which, or the persons to whom, it resells, any drugs such party purchases in any United States sale.

(B)From refusing to sell any drug in a United States sale to a purchaser because of the purchaser's refusal to enter into a contract, agreement, or understanding prohibited by Section IV(A).

(C)From entering into, adhering to, maintaining, or claiming any rights under any agreement or understanding with any other persons providing that any party thereto is to enter into, adhere to, maintain, or claim any rights under any agreement or understanding of the type prohibited by subsection (A) above.

(D)From entering into, adhering to, maintaining, or claiming any rights under any agreement or understanding with any of its licensees under any United States patent relating to drugs, which prevents, restrains, or limits any party thereto from selling any drug in bulk form, or otherwise prevents, restrains, or limits any party thereto in its free choice, of customers or persons with whom it chooses to deal, provided, however, that this paragraph is

not to be construed to prevent defendant Glaxo from granting exclusive licenses or exclusive distributorships, or granting licenses limited to particular fields of use under any United States patent relating to drugs, and provided further that nothing herein shall immunize from the antitrust laws any such license or distributorship, and both parties to the litigation reserve their various rights and powers to challenge or defend any such license or distributorship in any future litigation.

(E) From entering into, adhering to, maintaining, or claiming any rights under any agreement or understanding with any other persons providing that any party thereto is to enter into, adhere to, maintain, or claim any rights under any agreement or understanding of the type prohibited by subsection (D) above.

V.

[*Required Sales*]

(A) Defendant Glaxo is ordered, subject to the provisions of this Article, to sell bulk griseofulvin (in each form in which Glaxo is at the time of sale selling bulk griseofulvin to any person in the United States), on non-discriminatory terms and prices, to each person in the United States making a written request therefor for delivery in the United States, in quantities sufficient to meet such person's *bona fide* stated requirements in the United States; provided, however, that nothing herein shall immunize from the antitrust laws any agreement or understanding with any purchaser restricting the territories in which he may sell griseofulvin. Glaxo shall not be obligated to sell griseofulvin to any person who does not meet reasonable credit requirements; and Glaxo may take reasonable steps consistent with the purposes of this Final Judgment to protect itself from the risk of product liability (or other similar legal liability) suits, or violation of federal or state regulatory statutes, so long as it gives the Assistant Attorney General in charge of the Antitrust Division reasonable notice before taking any such step. If at the time of any such request Glaxo's production is insufficient to meet such request, Glaxo shall fill such request and other orders (including pre-existing sales obligations) from persons in the United States, on a reasonable *pro rata* allocation basis.

[*Patent Licensing*]

(B) Defendant Glaxo is ordered to offer to each person in the United States who makes a written request therefor, on reasonable and non-discriminatory terms and at reasonable royalty rates, licenses to make, use, and sell under each United States patent (existing at the time of entry of this Final Judgment or issued within five years from such date of entry) relating to griseofulvin, for human or veterinary use, which Glaxo owns or has the right to license, and at the option of the person making such request, any or all technical data (existing in written form and in the possession, custody, or control of defendant Glaxo on the date of the entry of this judgment, or which Glaxo in the future makes available to any other licensee in the United States) necessary or commercially requisite to make or process (or secure FDA approval to market) griseofulvin by any mode now used by Glaxo in practicing the patent(s) owned by Glaxo. Such licenses shall be granted by Glaxo for a term equal to the life of such patent(s) or, at the option of the person requesting such license, for such term less than the life of the patent(s) as may be agreed upon by the parties to the license. Such license shall be cancelable on 30 days' notice by the licensee.

Glaxo shall have no right to collect royalties for the use of the technical data if it lawfully falls in the public domain. Glaxo shall have no obligation tinder this Article V (B) to furnish technical data to any person unless such person shall have finally accepted a license under the patent(s) to which the technical data pertains, and shall have agreed to pay reasonable and nondiscriminatory royalties for the right to receive and use said technical data. In furnishing any such technical data, Glaxo shall have the right to require the person receiving such technical data to execute an appropriate agreement forbidding its unauthorized disclosure to third parties, and shall have the right to apply legends to such technical data indicating its proprietary nature. Nothing in this Article V(B) shall be deemed to require Glaxo to make available or license technical data to any person unless such person intends to use such technical data in the manufacture or processing of griseofulvin by practicing patents pursuant to the license granted hereunder, or to forbid or authorize Glaxo to require any person seeking a license hereunder to enter into an agreement or understanding that it will use such technical data only for such

purpose; provided, however, that nothing contained herein shall immunize from the antitrust laws any agreement or understanding with any licensee restricting the use to which he may put unpatented technical data, and both parties to this judgment reserve their respective rights and powers to challenge or defend such practice in any future litigation.

(C) Upon receipt of written application for a license under Paragraph (B), above, defendant Glaxo shall within 30 days advise the applicant in writing of the royalties which it deems reasonable for the license. If the applicant rejects the royalties proposed by defendant Glaxo, and if defendant Glaxo and applicant are unable to agree upon reasonable royalties or a method of determining the same within 60 days from the date such rejection is communicated in writing to defendant Glaxo, the applicant or defendant Glaxo may, upon notice to the plaintiff and to the other party to the dispute, apply to this Court for the determination of (1) reasonable royalties and (2) in the case of a patent such reasonable interim royalties (pending the completion of any such proceeding) as the Court may deem appropriate. In any such proceeding, the burden of proof shall be on defendant to establish the reasonableness of the royalties requested by it. Pending the completion of negotiations or any such proceedings, the applicant shall have a provisional license of the scope provided in his application for a license to practice the patent(s) to which his application pertains, subject to the payment of reasonable interim royalties; provided, however, that no provisional license shall contravene any of the provisions of this Final Judgment. A final Court determination of reasonable royalties shall be applicable to the applicant from the date upon which the applicant requested a license, and after such determination, unless otherwise ordered by the Court in proceedings instituted under this Article, shall be applicable to any other licensee then having or thereafter obtaining the same rights under the same patent(s). If the applicant fails to accept the license, such applicant shall pay the royalties found by the Court to be due to defendant and such costs as the Court may determine to be just and reasonable.

[*Patent Validity*]

(D) Nothing herein shall prevent any applicant from attacking", in the aforesaid proceeding or in any other controversy, the validity or scope of any patent or patents nor shall this Final Judgment be construed as imputing any validity or value to any of said patents.

(E) Defendant Glaxo is enjoined from making any sale or other disposition of any patent, right or license which deprives it of the power or authority to grant licenses in accordance with the provisions of this Final Judgment, unless the purchaser, transferee, or assignee shall file with this Court, prior to the consummation of said trans action, an undertaking to be bound by its provisions.

[*Transfer of Assets*]

(F) Defendant Glaxo is prohibited from transferring any assets subject to this Final Judgment, other than goods sold, or other wise transferred in the ordinary course of business, to any third party ("Takeover Party") that at such time, to Glaxo's knowl edge, proposes to make or has extant any tender offer or takeover bid in respect to the stock and assets of Glaxo, or has acquired such stock or assets or has entered into any merger with Glaxo or agreement therefor, or any affiliate thereof, or to any person acting in concert with or on behalf of any of the foregoing; and Glaxo is also prohibited from failing to engage in any activity subject to this Final Judgement in order that the Takeover Party, or any affiliate thereof, or any person acting in concert with or on behalf of any of the foregoing, may engage in such activity in lieu of Glaxo, unless the Takeover Party, affiliate, or per son acting in concert therewith or on its behalf, shall first have submitted to the jurisdiction of the Court in this proceeding and consented to be bound by this Final Judgment to the extent provided by law, provided, that Glaxo shall be free to take any action referred to above, if after 30 days' prior notice to plaintiff of its intent to do so plaintiff has not filed with this Court any objection, and provided further that if plaintiff has filed any such objection Glaxo shall not take such action until (a) the Takeover Party, affiliate, or person acting in concert therewith or on behalf thereof has submitted to the jurisdiction of the Court in this proceeding and has consented to be bound by this Final Judgment to the extent provided by law, or (b) the Court shall have ruled that Glaxo may take such action without such submission.

VI.

[*Compliance/Inspection*]

For the purpose of securing compliance with this Final Judgment and for no other purpose, and subject to any legally recognized privilege:

(A) A duly authorized representative 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 on reasonable notice to defendant Glaxo, made to its principal office, be permitted (1) access in the United States during regular office hours of defendant, to inspect and copy any and all books, ledgers, accounts, correspondence, memoranda, and other records, and documents in the possession or under the control of such defendant relating to any of the subject matter contained in this Final Judgment and (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 such matters, provided that defendant Glaxo shall not be obligated to bring to the United States any records or documents or to bring to the United States for the purpose of interview any officer or employee except on order of this Court specifically so providing.

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

No information obtained by the means provided in this Section VI 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 United States Government, 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.

VII.

[*Reports*]

The defendant is ordered to file with the plaintiff, on or about June 16 of each year through 1981, a report setting forth the steps which it has taken during the prior year to advise the defendant's appropriate officers, directors, and management personnel of its and their obligations under this Final Judgment.

VIII.

[*Retention of Jurisdiction*]

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

IX.

[*Termination of Judgment*]

This Final Judgment shall terminate on June 16, 1981, and shall thereafter have no force or effect, except that the provisions of Articles V(B)-(F), VI, and VIII shall continue in full force and effect until the expiration of the last of the United States patents required to be licensed by Article V(B).

X.

[*Costs*]

Defendants shall pay all taxable costs herein.

XI

[*Superseded Judgment*]

It is further ordered that this Final Judgment shall supersede the Final Judgment of June 17, 1971, [1971 TRADE CASES ¶ 73,715] as amended on August 12, 1971, and March 9, 1972, [1972 TRADE CASES ¶ 73,901] insofar as that Judgment and the Amendments thereto applies to defendant Glaxo.