

similar products in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

(1) Knowingly inducing, or knowingly receiving or accepting, any discrimination in the price of such products by directly or indirectly inducing, receiving or accepting from any seller a net price respondents know or should know is below the net price at which said products of like grade and quality are being sold by such seller to other customers who in fact compete with respondents in the resale and distribution of such products.

(2) Maintaining, operating, or utilizing respondent National Parts Warehouse or any other organization as a means or instrumentality to induce or receive discounts or rebates which result in a net price respondents know or should know is below the net price at which said products of like grade and quality are being sold by such seller to other customers who in fact compete with respondents in the resale and distribution of such products. The provisions of this paragraph (2) are not applicable to respondent National Parts Warehouse or respondent Bryant M. Smith, Sr.

For the purpose of determining the "net price" under the terms of this order, there shall be taken into account all discounts, rebates, allowances, deductions or other terms and conditions of sale by which net prices are effected.

It is further ordered, That the aforesaid respondents shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist.

By the Commission, Commissioner Elman not concurring and Commissioner Higginbotham concurring.

IN THE MATTER OF

AMERICAN CYANAMID CO. ET AL.

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE
COMMISSION ACT

Docket 7211. Complaint, July 28, 1958—Decision, Dec. 17, 1963

Final order modifying desist order of August 8, 1963, page 1895 herein requiring six antibiotic manufacturers and distributors accounting for 100% of the industry's sale of tetracycline, to cease concerted price fixing and collusive

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bidding in the sale of that product—by (1) deleting from paragraph 1 the words “knowingly common course of action”; (2) changing paragraphs 1 and 2 so as to apply to “tetracycline sold in dosage forms for human consumption”; (3) inserting a proviso which would allow respondents to use fair trade agreements pursuant to the McGuire Act; and (4) adding a proviso to paragraph 2 to allow respondents opportunity to take advantage of price changes made before the effective date of the order and not in the record; and

Adding the requirements that Pfizer grant a non-exclusive, non-discriminatory license to any domestic applicant to make tetracycline under all claims of its patent obtained by unfair means, that American Cyanamid grant a similar license to any domestic applicant to make chlortetracycline for conversion into tetracycline, and that both furnish to licensees all necessary information, know-how and cultures for such manufacture; and requiring that any assignee or purchaser of the patents concerned observe the provisions of the instant order.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act (38 Stat. 717, 15 U.S.C.A. Sec. 41, 52 Stat. 111), and by virtue of the authority vested in it by said Act, the Federal Trade Commission having reason to believe that American Cyanamid Company, a corporation; Bristol-Myers Company, a corporation; Bristol Laboratories Inc., a corporation; Chas. Pfizer & Co., Inc., a corporation; Olin Mathieson Chemical Corporation, a corporation; and The Upjohn Company, a corporation, more particularly described and referred to hereinafter as respondents, have violated the provisions of Section 5 of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby names the previously mentioned corporations, each and all as respondents herein, and issues its complaint against each of the named parties stating its charges in that respect as follows:

PARAGRAPH 1. Respondent American Cyanamid Company, hereinafter referred to as Cyanamid, is a corporation organized and existing under the laws of the State of Maine, with its principal office and place of business located at 30 Rockefeller Plaza, New York 20, New York.

Respondent Bristol-Myers Company is a corporation organized and existing under the laws of the State of Delaware, with its principal office and place of business located at 630 Fifth Avenue, New York, New York

Respondent Bristol Laboratories Inc. is a corporation organized and existing under the laws of the State of Delaware, with its principal office and place of business located at Syracuse, New York. Re-

spondents Bristol-Myers Company and Bristol Laboratories Inc. are hereinafter jointly referred to as Bristol unless otherwise indicated.

Respondent Chas. Pfizer & Co., Inc., hereinafter referred to as Pfizer, is a corporation organized and existing under the laws of the State of Delaware, with its principal office and place of business located at 11 Bartlett Street, Brooklyn 6, New York.

Respondent Olin Mathieson Chemical Corporation, hereinafter referred to as Olin Mathieson, is a corporation organized and existing under the laws of the State of Virginia, with its principal office and place of business located at 460 Park Avenue, New York 22, New York.

Respondent The Upjohn Company, hereinafter referred to as Upjohn, is a corporation organized and existing under the laws of the State of Michigan, with its principal office and place of business located at 301 Henrietta Street, Kalamazoo, Michigan.

PAR. 2. The respondents hereinbefore named and described, either directly or through operating divisions or subsidiaries, are engaged in the manufacture, sale and distribution, or the sale and distribution of antibiotics, antibiotic substances and antibiotic products hereinafter referred to as antibiotics.

Each of the respondents is engaged in the business of selling and distributing antibiotics to customers located in States other than the State in which each respondent respectively maintains production or processing facilities and in some instances to customers located outside the continental limits of the United States. There has been and is now a pattern and course of interstate commerce in said antibiotics by respondents within the intent and meaning of the Federal Trade Commission Act.

PAR. 3. Each of the respondents is in substantial competition with each and all of the other respondents named herein and with other members of the antibiotics industry in the manufacture, sale, processing and distribution of antibiotics in interstate commerce, except to the extent that competition has been hindered, lessened, restricted and eliminated by the unfair methods of competition and unfair acts and practices hereinafter set forth.

PAR. 4. Antibiotics are substances produced by certain microorganisms and have the capacity to inhibit the growth of infectious and disease producing microorganisms and destroy them. Among the antibiotics manufactured or distributed by the respondents herein, and those with which this complaint is primarily concerned, are those popularly known as "wonder drugs" because of their rapid action,

life-saving qualities and abilities to counteract effectively and cure a broad variety of illnesses and diseases.

Antibiotics are among the most recent and most effective weapons against infection and infectious diseases caused by microorganisms such as the gram-positive bacteria, gram-negative bacteria, acid-fast bacteria, the rickettsiae, certain spirochetes, large viruses and certain protozoa. Among the diseases which respond to antibiotics therapy are: pneumonia, mastoiditis, syphilis, gonorrhea, typhoid fever, meningitis, peritonitis, typhus, bacterial endocarditis, tuberculosis, plague, streptococcal sore throat, rocky mountain spotted fever, and many others. Antibiotics are effective in preventing and controlling secondary infections in measles, influenza, and in other diseases not directly responsive to antibiotic therapy. Antibiotics are also employed prophylactically to prevent infection or disease as, for example, prior to surgery, and to prevent recurrences of infection and disease as in the case of rheumatic fever. Antibiotics are, therefore, of vital and unique importance to the health and welfare of the general public.

PAR. 5. From its inception with the discovery of penicillin in the era prior to World War II, the modern antibiotics industry has been characterized by dynamic growth and phenomenal sales. The industry sales are presently in excess of \$330 million per year with tetracycline being the largest selling antibiotic by dollar volume.

Antibiotics are sold by each of these respondents to wholesalers, retailers, hospitals, sanitariums, government institutions, dispensaries, and sometimes to physicians. The respondents herein account for 100% of the industry's sales of tetracycline and domestic sales of this one antibiotic alone exceeded \$100 million in 1957.

Each of the respondents sells its antibiotics, among other products, under a number of brand names. Among the antibiotics sold and brand names utilized, respectively, by the respondents are the following:

Cyanamid, through its Lederle Laboratories Division, manufactures and sells chlortetracycline, marketed under the trade name, among others, of Aureomycin; and tetracycline marketed under the trade names, among others, of Achromycin, Achromycin V, Archrostatin, and Achrocidin.

Bristol-Myers Company, through its subsidiary Bristol Laboratories Inc., manufactures and sells tetracycline, marketed under the trade names, among others, of Polycycline and Tetrex.

Pfizer manufactures and sells oxytetracycline, marketed under the trade names, among others, of Terramycin, Terrabon, and Terra-cortril; and tetracycline marketed under the trade names, among others,

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of Tetracyn, Tetracyn V, Tetrabon, Tetrabon V, Tetracydin, Signamycin and Signemycin.

Olin Mathieson Chemical Corporation, through its E.R. Squibb & Sons Division, is engaged in the sale and distribution of tetracycline, marketed under the trade names, among others, of Steclin, Mysteclin, Mysteclin V, and Sumycin.

Upjohn is engaged in the sale and distribution of tetracycline marketed under the brand names, among others, of Panmycin, Panmycin Phosphate, Comycin and Panalba.

PAR. 6. The ownership of United States letters patent on antibiotics is of critical importance within the industry. A valid patent confers an exclusive right to manufacture and sell and the right to license others to manufacture and sell and the right to license others to manufacture and sell a particular antibiotic or antibiotic product. Through ownership of a valid patent the patentee may prevent competition by other companies in the manufacture and sale of the patented product.

On September 13, 1949, Cyanamid was granted United States Letters Patent No. 2,482,055 on chlortetracycline (Aureomycin). No other company was licensed to produce or sell this antibiotic in the United States until 1954 when Pfizer received a license to manufacture chlortetracycline for the purpose of extracting tetracycline therefrom. Pfizer agreed to pay a 2½% royalty to Cyanamid on the former's sales of tetracycline under said license. Thereafter, in 1955, Bristol was licensed by Cyanamid to produce up to 6% chlortetracycline in the production of tetracycline and to sell tetracycline products containing not more than 6% chlortetracycline. Bristol agreed to pay a 5% royalty to Cyanamid on Bristol's sales of tetracycline under said license. At the same time Bristol granted Cyanamid rights to manufacture and sell tetracycline under any tetracycline patents which might issue to Bristol as a result of applications then on file with the United States Patent Office.

On July 18, 1950, Pfizer was granted United States Letters Patent No. 2,516,080 on oxytetracycline (Terramycin). No other company has been licensed to manufacture or sell this antibiotic in the United States.

On January 11, 1955, Pfizer was granted United States Letters Patent No. 2,699,054 on tetracycline. Under prior arrangements Pfizer issued a license to Cyanamid to also manufacture and sell this newly patented antibiotic. Cyanamid agreed to pay a 2½% royalty to Pfizer on all of Cyanamid's sales of tetracycline. Later, during March 1956, a license to manufacture and sell tetracycline was granted

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to Bristol Laboratories Inc. by Pfizer with Bristol agreeing to pay a 3½% royalty to Pfizer on all of Bristol's sales of tetracycline, and a license to sell tetracycline was granted Olin Mathieson and Upjohn. The Pfizer license to Cyanamid was agreed upon at the time Cyanamid licensed Pfizer under the chlortetracycline patent. The Pfizer licenses to Bristol, Olin Mathieson and Upjohn followed settlement of litigation between Pfizer and the licensed companies.

Chlortetracycline (Aureomycin), oxytetracycline (Terramycin) and tetracycline, which are marketed in identical dosage forms by the various respondents, are sometimes referred to as the "tetracyclines" and are characterized in the industry as "broad spectrum" antibiotics because of their wide range of effectiveness against both gram-positive and gram-negative microorganisms.

PAR. 7. Respondent Pfizer has in the past and is now engaging in unfair methods of competition and unfair acts and practices in commerce, in connection with the production and sale of antibiotics in that Pfizer has done and performed the following acts and practices:

- (a) Unreasonably foreclosed access to substantial markets to competitors and potential competitors;
- (b) Denied to competitors and potential competitors a reasonable opportunity to compete;
- (c) Attempted to monopolize the antibiotics industry;
- (d) Attempted to monopolize and has monopolized the tetracycline industry;
- (e) Made false, misleading and incorrect statements to the United States Patent Office with the purpose and effect of inducing the United States Letters Patent No. 2,699,054;
- (f) Caused United States Letters Patent No. 2,699,054 to be issued as a result of misrepresentations advanced by Pfizer on behalf of the applicant for the patent;
- (g) Caused United States Letters Patent No. 2,699,054 to issue where there was no real novelty or invention in the claims of said patent;
- (h) Caused United States Letters Patent No. 2,699,054 to issue although the claims of said patent disclose no patentable invention in view of the prior state of the art at the time the application was filed;
- (i) Caused United States Letters Patent No. 2,699,054 to issue although the alleged invention was made known or used by others in this country before the alleged invention by the applicant for said patent;

