Trade Regulation Reporter - Trade Cases (1932 - 1992), United States v. Becton, Dickinson and Company., U.S. District Court, D. New Jersey, 1964 Trade Cases ¶71,144, (Jul. 20, 1964)

United States v. Becton, Dickinson and Company.

1964 Trade Cases ¶71,144. U.S. District Court, D. New Jersey. Civil Action No. 567-60. Entered July 20, 1964. Case No. 1546 in the Antitrust Division of the Department of Justice.

Sherman Act

Patents—Compulsory Licensing—Consent Judgment.—A manufacturer of reusable hypodermic syringes which was charged with violating Section 2 of the Sherman Act by restrictive use of its patents agreed to a consent judgment which required it to grant any domestic applicant nonexclusive, unconditional and unrestricted licenses at a reasonable and nondiscriminatory royalty, together with technical information and drawings at cost, and not to dispose of its patents in any manner which would prevent it from granting licenses.
Price Fixing—Reusable Hypodermic Syringes—Consent Judgment.—A manufacturer of reusable hypodermic syringes was prohibited under the terms of a consent judgment from entering into, enforcing or claiming any rights under contracts or agreements fixing, restricting or limiting the price or prices, or terms or conditions of sale, upon which its customers could resell the products, except as authorized by the Miller-Tydings or McGuire Acts.

For the plaintiff: William H. Orrick, Jr.

For the defendant: Toner, Crowley, Woelper & Vanderbilt, by Willard G. Woelper, Newark, New Jersey, H. Allen Lochner, Royall, Koegel, Harris & Caskey, David S. Kane, Kane, Dalsimer & Kane, New York, N, Y.

Final Judgment

WORTENDYKE, District Judge: Plaintiff, United States of America, having filed its complaint herein on June 28, 1960, and defendant, Becton, Dickinson and Company, having filed its answer thereto denying the substantive allegations thereof; and the parties hereto, by their respective attorneys, having consented to the making and entry of this Final Judgment without trial or adjudication of any issue of fact or law herein, and without admission by any party in respect to any such issue;

Now, therefore, before the taking of any testimony and upon said consent of the parties hereto, it is hereby

Ordered, adjudged and decreed as follows:

I

[*Sherman Act*]

This Court has jurisdiction of the subject matter hereof and the parties hereto. The complaint states claims against defendant upon which relief may be granted 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 herein:

(A) “Defendant” means Becton, Dickinson and Company, a corporation organized and existing under the laws of the State of New Jersey, and any subsidiary thereof;

(B) “Hypodermic syringe” means any instrument (other than those designed for injection without a needle) used to inject various medicaments, serums, antibiotics, vitamins, palliatives and other liquids under the skin of humans or animals; “reusable hypodermic syringe” means any such instrument which is primarily designed for more than one use; “disposable hypodermic syringe” means any such instrument which is primarily designed for one use only and which is sold prior to being filled with any medicament, serum, antibiotic, vitamin, palliative or other liquid;

(C) “Hospital-surgical product” means any hypodermic syringe or any other product (excluding pharmaceuticals and hypodermic syringes pre-filled therewith) used by physicians, surgeons, veterinarians, hospitals, clinics and others, in connection with the prevention, treatment or study of illneses or diseases of humans or animals;

(D) “B-D product” means any hospital-surgical product manufactured or sold by defendant;

(E) “Existing patent” means any United States letters patent or patent application, and any division, continuation, reissue or extension thereof, relating to reusable hypodermic syringes (and excluding hypodermic syringes designed for injection without a needle) or processes or machinery for the manufacture thereof, owned or controlled, directly or indirectly, by the defendant on the date of the entry of this Final Judgment, or under which the defendant, on such date, has power or authority to grant licenses or sublicenses to others;

(F) “Future patent” means any United States letters patent or patent application (exclusive of existing patents), and any division, continuation, reissue or extension thereof, relating to reusable hypodermic syringes (and excluding hypodermic syringes designed for injection without a needle) or processes or machinery for the manufacture thereof, owned or controlled, directly or indirectly, by the defendant at any time during the period of five (5) years following the date of the entry of this Final Judgment, or under which the defendant, during such period, has power or authority to grant licenses or sublicenses to others;

(G) “Person” means any individual, corporation, partnership, association, firm or other legal entity and includes, wherever applicable, any federal, state or local government or instrumentality thereof;

(H) “Subsidiary” means a corporation controlled, or more than 50% of whose stock entitled to vote upon election of directors (other than preferred stock entitled to vote upon failure of the corporation to pay certain dividends) is, directly or indirectly, owned or controlled by the defendant;

(I) “Distributor” means any person engaged in the business of purchasing hospital-surgical products from the manufacturers thereof and selling and distributing such products to hospitals and others;

(J) “Distribution agreement” means any agreement between the defendant and any other person (other than an agent of defendant) relating to the distribution by such other person of any B-D product;

(K) “Commercial manufacture” means the manufacture and production by defendant B-D, in its normal and regular course of business, of hypodermic syringes which it regularly sells or offers for sale. The term “commercial manufacture” as used herein does not include exclusively experimental manufacture;

(L) “Domestic applicant” as used in Section X of this Final Judgment means any person resident in, or incorporated under the laws of, the United States or any one of the States thereof.

III

[*Applicability*]

(A) The provisions of this Final Judgment applicable to the defendant shall also be applicable to each of its subsidiaries, directors, officers, employees and agents, and to its successors and assigns with respect to the business and products acquired from defendant, and to all persons in active concert or participation with it who receive actual notice of this Final Judgment by personal service or otherwise; provided that they shall not be applicable to a person who ceases to be a subsidiary of the defendant and who is not engaged in the manufacture or sale of hypodermic syringes on the date of the entry of this Final Judgment, if defendant in good faith has divested itself completely of all interest, ownership and control, directly and indirectly, in said person.

(B) Defendant is ordered and directed forthwith to take all such steps as may be necessary to secure compliance by its officers, directors, employees, agents and subsidiaries, with the terms of this Final Judgment.

(C) The provisions of this Final Judgment shall not be applicable to activities of the defendant, its successors or assigns, conducted exclusively outside the United States and not in unreasonable restraint of the domestic or foreign commerce of the United States. Any sale of, or offer to sell, any hospital-surgical product to, or for the use of the plaintiff or any instrumentality or agency thereof shall be deemed to be a sale, or offer to sell, within the United States.

IV

[*Notice Required*]

Defendant is ordered and directed:

(A)(1) Forthwith to serve a copy of this Final Judgment upon (a) each member of its Board of Directors? (b) each of its principal managerial officers who are not members of its Board of Directors; (c) each of its sales employees who has sales responsibility over a regional geographical area; (d) each of the principal managerial officers of each of its subsidiaries;

(2) Within ninety (90) days after the date of the entry of this Final Judgment, to file with this Court, and serve upon the plaintiff, an affidavit setting forth the fact and manner of its compliance with the foregoing paragraph (1);

(B) Forthwith to mail a copy of this Final Judgment to each distributor in the United States with whom defendant, on the date of this Final Judgment, has a distribution agreement, and to each distributor outside of the United States with whom defendant, on the date of this Final Judgment, has a distribution agreement, and who, to the knowledge of the defendant, has been selling, or is planning to sell, B-D products in the United States, and thereafter, for a period of five (5) years after the date of entry of this Final Judgment, to each such distributor at the time he first enters into a distribution agreement with defendant;

(C) Within ninety (90) days after the date of the entry of this Final Judgment, to file with this Court and serve upon the plaintiff a full and complete list of all existing patents to which this Final Judgment may be applicable;

(D) For a period of five (5) years after the date of the entry of this Final Judgment, to furnish, without cost, to any person so requesting, a copy of this Final Judgment, and also, to any person so requesting a copy of the list, kept up to date, referred to in the foregoing subsection (C).

V

[*Price Fixing*]

(A) Defendant is ordered and directed, not later than ninety (90) days after the entry of this Final Judgment, to cancel each distribution agreement to which, on the date of entry of this Final Judgment, it is a party, where the other party thereto is a distributor in the United States, or is a distributor outside of the United States who, to the knowledge of the defendant, has been selling, or is planning to sell, B-D products in the United States.

(B) Subject to Section VI of this Final Judgment, defendant is enjoined and restrained from entering into, adhering to, maintaining or claiming any rights under, any contract, agreement or understanding, with any other person, any term or provision of which is, or may be, inconsistent with an}r of the provisions of this Final Judgment, including specifically, but without limitation, any contract, agreement or understanding with any person which (except to the limited extent specifically permitted by Section VI of this Final Judgment) fixes, restricts or limits the price or prices, or the terms or conditions relating thereto, at or upon which such other person may or shall sell any hospital-surgical product purchased from the defendant.

(C) Defendant is enjoined and restrained from entering into, adhering to, maintaining or claiming any rights under, any contract, agreement or understanding, with any other person in the United States, which fixes, restricts, or limits the persons to whom such other person may or shall sell reusable hypodermic syringes purchased from the defendant.

(D) Defendant is enjoined and restrained from, directly or indirectly, entering into, adhering to, maintaining, enforcing, or claiming any rights (except for the recovery of sums of money already due and payable prior to the date of entry of this Final Judgment) under any contract, agreement or understanding with any other person which requires or obligates such other person to purchase all, or any stated percentage or proportion of such persons' requirements for, reusable hypodermic syringes from defendant Becton, Dickinson, or any source designated by defendant Becton, Dickinson, provided that nothing herein contained shall apply to reusable syringes sold by defendant pursuant to an award received by defendant on invitation for competitive bids, or, if the purchaser has the right to cancel on no more than two (2) weeks' written notice, to reusable syringes sold by defendant which are to be resold under the brand name or private label of a distributor.

(E) Defendant is ordered and directed to cancel within ninety (90) days after the date of the entry of this Final Judgmet any contract, agreement or understanding, to which it may be a party on the date of the entry of this Final Judgment and which is or may be in any manner inconsistent with the foregoing subsection (D) of this Section V.

VI

[*Fair Trade*]

(A) Nothing contained in Section V of this Final Judgment shall be deemed to prohibit defendant from lawfully exercising such legal rights, if any, as it may have under the Act of Congress of August 17, 1937, commonly known as the Miller-Tydings Act, and of the Act of Congress of July 14, 1952, commonly known as the McGuire Act.

(B) Nothing contained in Section V of this Final Judgment shall be deemed to prevent defendant from issuing and circulating its suggested resale prices for B-D products; provided that (i) each and every paper (for example, price lists, order blanks, packages or advertisements) containing any reference to defendant's suggested resale prices contains on its face, and in bold and conspicuous letters, a clear statement, except where fair trade may be applicable, that the resale prices therein contained are suggested prices; and (ii) defendant takes no action, directly or indirectly (except as specifically authorized by the preceding subsection (A) of this Section VI), to enforce or attempt to enforce, such suggested resale prices against any distributor or other seller of B-D products or any other person.

VII

[*Refusal to Deal*]

For a period of five (5) years following the entry of this Final Judgment, defendant is ordered and directed to sell upon request and upon its usual and customary terms including credit, and availability in periods of short supply, to any person *in* the United States who, at the time of such request, is a distributor of hospital-surgical products, any reusable hypodermic syringe which it regularly manufactures and sells, or offers for sale, in the normal course of its business in the United States.

VIII

[*Coercive Practices*]

Defendant is enjoined and restrained from directly or indirectly,

(A) Unreasonably restricting, limiting or preventing or attempting unreasonably to restrict, limit or prevent any person in the United States, including specifically, but without limitation, any distributor of B-D products

(1) from purchasing, distributing, selling (except to a purchaser who specifies at the time of each order that only a B-D product or B-D products be supplied in response to each such order), handling or otherwise dealing in, any reusable hypodermic syringes manufactured, or sold, by persons other than the defendant;

(2) from engaging in the manufacture of reusable hypodermic syringes;

(3) from selling reusable hypodermic syringes purchased from defendant to any person.

(B) Conditioning the sale of any reusable hypodermic syringe upon the purchase of any other hospital-surgical product or conditioning the sale of any hospital-surgical product upon the purchase of any reusable hypodermic syringe; provided, however, that this subsection (B) shall not be deemed to prohibit defendant from requiring, as a term of its distribution agreements, that its distributors maintain such reasonable stock of B-D products as may be necessary in order to service, from stock, the normal and reasonable demand upon such distributor for such B-D products, and from requiring such distributors to stock new B-D products of a type normally marketed by defendant through distributors and to devote a reasonable amount of promotional and selling effort to such new B-D products.

IX

[*Acquisitions*]

Defendant is enjoined and restrained:

(A) For the period of five (5) years after the date of the entry of this Final Judgment from, directly or indirectly, acquiring any of the shares of stock, business or assets (other than a nonexclusive license under the United States or foreign Letters Patent or applications therefor) of, or other financial interest in, any other person engaged in the manufacture of reusable hypodermic syringes;

(B) After the expiration of five (5) years after the date of the entry of this Final Judgment, and for an additional period of five (5) years thereafter, from, directly or indirectly, acquiring any of the shares of stock, business or assets (other than a nonexclusive license under the United States or foreign Letters Patent or applications therefor) of, or other financial interest in any other person engaged in the manufacture of reusable hypodermic syringes, except (1) with the prior approval of the plaintiff, or (2) after an affirmative showing to the satisfaction of this Court, upon sixty (60) days' notice to the plaintiff, that the effect of such acquisition will not be substantially to lessen competition or tend to create a monopoly in the manufacture, sale or distribution of reusable hypodermic syringes.

[*Terms of Sale*]

(C) For a period of ten (10) years after the date of entry of this Final Judgment, by its officers, employees, agents and salesmen, from soliciting, taking or accepting, or requesting its distributors to solicit, take or accept from any purchaser or potential purchaser in the United States, any order to be filled either by defendant or a distributor for reusable hypodermic syringes manufactured or sold by defendant (whether such reusable hypodermic syringes so ordered are to be supplied by direct shipment from the defendant or through a distributor) except to the extent, and only to the extent, that (i) the entire quantity of such reusable hypodermic syringes so ordered are to be, and actually are, shipped to such purchaser as a single shipment, and (ii) the entire amount due from, and payable by, the purchaser for the entire quantity of such reusable hypodermic syringes so ordered and shipped is billed to such purchaser by defendant or its distributor as a single charge and is payable by the purchaser in accordance with the normal and usual trade terms and conditions including credit terms of defendant or its distributor; provided that this subsection shall not apply to (a) any order with respect to which the purchaser or potential purchaser is specifically notified in writing by defendant with respect to each order that any unshipped balance of such order for reusable syringes may be cancelled by the purchaser or potential purchaser upon notice to defendant and without any penalty; (b) orders submitted pursuant to awards received on invitation for competitive bids; and (c) orders for non-catalogued reusable hypodermic syringes manufactured specially for the purchaser. For the purpose of this subsection shipments to more than one destination requested in an order and shipments made to fill an order from more than one shipping point shall be deemed a single shipment;

(D) From including the volume of reusable hypodermic syringes purchased or to be purchased by any person as a factor in determining the extent to which such person shall be given or offered any discount, allowance or rebate from defendant's established prices for hospital-surgical products, where the basis for such discount, allowance or rebate is the total volume of hospital-surgical products purchased or to be purchased by such person from defendant or any source designated by defendant.

X

[*Licenses*]

(A) Subject to subsection (C) of this Section X, defendant is ordered and directed to grant to any domestic applicant making written request therefor, a nonexclusive, unconditional and unrestricted license to make, have made, use and sell in the United States reusable hypodermic syringes or processes or machinery for the manufacture thereof under any, some or all, as the applicant may choose, existing or future patent or patents.

(B) Any license granted by defendant pursuant to the foregoing subsection (A) shall include, as to reusable syringes so manufactured, without specific request therefor from the applicant, a non-exclusive, unconditional, unrestricted and royalty-free grant of immunity from suit under foreign letters patent owned or controlled by defendant and corresponding to the United States letters patent under which the licensee is licensed.

(C)(1) Any license granted by the defendant under subsection (A) of this Section X may provide that:

(a) a reasonable and non-discriminatory royalty may be charged and collected;

(b) reasonable provision may be made for periodic reports to defendant by the licensee as to the amount of the royalty due and payable and no other information;

(c) reasonable provision may be made for periodic inspection of the books and records of the licensee by an independent auditor who may report to defendant only the amount of royalty due and payable and no other information;

(d) the license may be nontransferable;

(e) reasonable provision may be made for cancellation of the license upon failure of the licensee to make the reports which may be required by (b) above, pay the royalties due or permit the inspection of its books and records as herein provided;

(f) 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.

(2) Upon any application to it for a license pursuant to subsection (A) of this Section X, defendant is ordered and directed to advise the applicant of the royalty it deems reasonable for the patent or patents to which the application pertains. If defendant and the applicant are unable to agree upon what constitutes a reasonable royalty, defendant or the applicant may apply to this Court for a determination of a reasonable royalty, giving notice thereof to the other person and the plaintiff, and defendant shall make such application forthwith upon request of the applicant. In any such proceeding the burden of proof shall be upon defendant to establish the reasonableness of the royalty requested by it. Pending completion of any such court proceeding, the applicant shall have the right to make, have made use and sell in the United States reusable hypodermic syringes or processes or machinery for the manufacture thereof, under the patents to which the application pertains, without the payment of royalty or other compensation, subject, however, to the following: Defendant may, with notice to the applicant and plaintiff, apply to this Court to fix an interim royalty rate pending final determination of what constitutes a reasonable royalty. If this Court fixes such interim royalty rate, a license shall then issue to the applicant providing for the periodic payment of royalties at such interim rate from the date of the making of such application by the applicant; and whether or not such interim rate is fixed, any final order may provide for such readjustments, including retroactive royalties, as this Court may order after final determination of a reasonable and nondiscriminatory royalty; if the applicant fails to accept the license under this paragraph (2) of subsection (C) of this Section X, or fails to pay the royalties agreed upon or established by this Court, such action shall be ground for the dismissal of his application, and his rights under subsection (A) of this Section X shall terminate.

(D) Nothing herein shall prevent any applicant from attacking in the aforesaid proceedings or in any other controversy the validity or scope of any of the patents nor shall this Judgment be construed as importing any validity or value to any of said patents.

(E) Nothing contained in this Section X shall be deemed to prohibit defendant from prosecuting to final judgment any suit or proceeding against any person instituted prior to, and pending on the date of, entry of this Final Judgment.

(F) After the date of the entry of this Final Judgment defendant is enjoined and restrained from issuing or granting any license under any existing or future patent or patents except in accordance with and pursuant to this Section X.

(G) Defendant is enjoined and restrained from instituting or threatening to institute any suit or other proceeding against any person, or claiming or recovering any damages or other compensation, based upon any infringement, prior to the date of entry of this Final Judgment, of any patent to which Section X(A) of this Final Judgment may be applicable.

XI

[*Disposition of Patents*]

(A) Defendant is enjoined and restrained from making any disposition of any existing or future United States or foreign patent or patents or rights thereunder which deprives it of the power or authority to grant the licenses or immunities required by subsections (A) and (B) of Section X of this Final Judgment, unless, when selling, transferring or assigning said patent or patents, or rights thereunder, it requires, as a condition of such sale, transfer or assignment that the purchaser, transferee or assignee shall observe the provisions of said Section X with respect to the patent or patents, or rights thereunder, so acquired, and the purchaser, transferee or assignee files with this Court, prior to consummation of said transaction, an undertaking to be bound by the provisions of said Section X with respect to the patent or patents, or rights thereunder, so acquired.

(B) Nothing contained in this Section XI shall be deemed to prevent the defendant from abandoning or withdrawing a patent application at any time before the patent issues thereon, or from compromising or settling interference proceedings upon such terms as may be lawful.

XII

[*Technical Information*]

(A) For a period of five (5) years from the date of entry of this Final Judgment, defendant is ordered and directed, upon written request, to furnish, to any person licensed, pursuant to this Final Judgment, under any existing or future patent or patents, the following:

(1) A description, in writing, of the commercial practices and technical information used by defendant at the time of such request relating to the commercial manufacture by defendant of reusable hypodermic syringes, or processes or machinery for the manufacture thereof, under the patent or patents under which the licensee is licensed;

(2) A copy of all then current blueprints, drawings and specifications, owned or controlled by defendant, relating to any machine, device or process manufactured, or used, by defendant at the time of such request in its commercial manufacture of reusable hypodermic syringes under the patent or patents under which the licensee is licensed;

(3) The name and address of each person who, within two (2) years preceding such request, has manufactured for or sold to defendant any machine or machines used by defendant at the time of such request in its commercial manufacture of reusable hypodermic syringes under the patent or patents under which the licensee is licensed.

(B) In furnishing any of the information required by subsection (A) of this Section XII, defendant is enjoined and restrained from making any charge to such licensee other than a nominal charge to reimburse defendant for its costs in reproducing and furnishing the same;

(C) Nothing contained in Sections X, XI and this Section XII of this Final Judgment shall be construed to impose upon defendant any responsibility or liability to others except the responsibility thereby imposed to furnish licenses, information or other matters therein specifically described, and defendant shall not be deemed, by having furnished the same, to have made any representation other than that such licenses, information and other matters conform to those used by defendant in its commercial manufacture of reusable hypodermic syringes, nor shall said sections be construed to create in anyone other than the plaintiff herein any rights, claims or rights of action against defendant that do not otherwise exist.

XIII

[*Publication Required*]

Defendant is ordered and directed to insert, in a trade journal of general circulation, three (3) times, in the second, fourth and sixth months following the date of the entry of this Final Judgment, a notice that, pursuant to this Final Judgment, it is required to grant licenses under, and technological information concerning, existing and future patents relating to reusable hypodermic syringes, and processes or machinery for the manufacture thereof, and that a list of such patents and a copy of this Final Judgment will be furnished, upon written request, by the defendant

XIV

[*Inspection and Compliance*]

For the purpose of securing compliance with this Final Judgment, and subject to any legally recognized privilege, 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 on reasonable notice to defendant, made to its principal office, be permitted (1) access during reasonable office hours to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of the defendant relating to any of the subject matters contained in this Final Judgment, and (2), subject to the reasonable convenience of defendant, and without restraint or interference from, it, to interview officers or employees of the defendant, who may have counsel present, regarding any such matters; and, upon such request, defendant shall submit such reports in writing to the Department of Justice with respect to matters contained in this Final Judgment as may from time to time be necessary to the enforcement of this Final Judgment. No information obtained by the means provided in this Section XIV 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 to which the United States of America is a party for the purpose of securing compliance with this Final Judgment or as otherwise required by law.

XV

[*Jurisdiction Retained*]

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 carrying out of this Final Judgment or for the modification or termination of any of the provisions thereof, and for the enforcement of compliance therewith and punishment of violations thereof.