

From a review of the evidence relating to Cyanamid's conduct during the Patent Office proceedings, we have no doubt that this respondent wanted Pfizer to obtain a patent on the product tetracycline in order that other firms could be excluded from the broad spectrum market. Cyanamid would, as its patent officials stated, "rather pay royalties to a bona fide patentee than see the pharmaceutical business in which it has a major interest ruined by irresponsible price cutting". (CX 12, p. 115.)

Insofar as Pfizer is concerned, the statements made by officials of this firm clearly disclose that after entering into the cross-licensing agreement with Cyanamid it intended to exclude all other firms from the tetracycline market in order to avoid price competition on this product. The importance Pfizer attached to a controlled tetracycline market is graphically demonstrated by the methods it employed to obtain a patent on this product.

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THE PRICING PRACTICES CHARGE

We now turn to the charge that the respondents engaged in illegal pricing practices. The facts establish (1) that all respondents, Pfizer, Bristol, Squibb, Upjohn and Cyanamid, conspired with one another to fix and stabilize tetracycline prices.

(The published prices to retailers of broad spectrum antibiotics sold by Cyanamid, Pfizer, Bristol, Squibb and Upjohn during the period relevant to this proceeding are set forth in the following tabulations):

1951-1958 Tabulation of Price to Retailer of Tetracycline, Aureomycin and Terramycin

	Cyanamid Achromycin	Pfizer Tetracyclin	Bristol Polycycline	Squibb Steclin	Upjohn Panmycin	Cyanamid Aureomycin	Pfizer Terramycin
Capsules:							
100 MG 25's.....	\$3.61	\$3.61	\$3.61	\$3.61	\$3.61	\$3.61	\$3.60
100 MG 100's.....	13.77	13.77	13.77	13.77	13.77	13.77	13.77
250 MG 16's.....	5.10	5.10	5.10	5.10	5.10	5.10	5.10
250 MG 100's.....	30.60	30.60	30.60	30.60	30.60	30.60	30.60
Intramuscular: 100 MG Vial.....	.94	.94	.94	.94	.94	-----	.94
Intravenous:							
250 MG Vial.....	1.62	1.62	1.62	1.62	1.62	1.62	1.62
500 MG Vial.....	2.91	2.91	2.91	2.91	2.91	2.91	2.90
Ped. Drops: 100 MG/cc 10cc.....	1.47	1.47	1.47	1.47	1.47	1.47	1.47
Oral Susp.: 250 MG/5cc 1 oz.....	2.54	2.55	2.54	2.54	2.55	-----	2.55
Syrup:							
125 MG/5cc 2 oz.....	2.54	2.55	2.54	2.54	2.55	-----	2.55
125 MG/5cc 16 oz.....	18.36	18.36	18.36	-----	18.36	18.36	18.36

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Respondents' Price to Retailer of Combination Products

Company	Product	Dosage form	Package size	Retail price
TETRACYCLINE-VITAMINS				
Cyanamid	Aureomycin SF	250 mg cap.	16's	5.28
Cyanamid	Achromycin SF	250 mg cap.	16's	5.28
Pfizer	Terramycin SF	250 mg cap.	16's	5.28
Pfizer	Tetracycln SF	250 mg cap.	16's	5.28
Cyanamid	Aureomycin SF	250 mg cap.	100's	31.60
Cyanamid	Achromycin SF	250 mg cap.	100's	31.60
Pfizer	Terramycin SF	250 mg cap.	100's	31.60
Pfizer	Tetracycln SF	250 mg cap.	100's	31.60
Cyanamid	Achromycin SF	Oral susp.	2 oz.	2.64
Pfizer	Tetracycln SF	Oral susp.	2 oz.	2.64
TETRACYCLINE-ANTIHISTAMINES				
Cyanamid	Achrocidin	125 mg tablets	24's	4.26
Bristol	Tetrex APC	125 mg cap.	24's	4.26
Pfizer	Tetracydin	125 mg tablets	24's	4.26
Cyanamid	Achrocidin	125 mg tablets	100's	17.04
Bristol	Tetrex APC	125 mg cap.	100's	17.04
Pfizer	Tetracydin	125 mg tablets	100's	17.04
TETRACYCLINE-NYSTATIN				
Cyanamid	Achrostatin	250 mg cap.	16's	5.60
Squibb	Mysteclin	250 mg cap.	16's	5.60
Upjohn	Comycin	250 mg cap.	16's	5.60
Cyanamid	Achrostatin	250 mg cap.	100's	33.50
Squibb	Mysteclin	250 mg cap.	100's	33.50
Upjohn	Comycin	250 mg cap.	100's	33.50
Squibb	Mysteclin	125 mg cap.	100's	17.23
Upjohn	Comycin	125 mg cap.	100's	17.23

In reviewing that part of the initial decision dealing with this phase of the case, we find the following errors on the part of the hearing examiner:

(1) He erred in assuming that it would have been illogical for any of respondents to have fixed prices prior to the settlement of the tetracycline patent infringement suit.

(2) He erred in finding that there was extensive and substantial price competition in the NPA⁶⁵ and CCS⁶⁶ hospital markets and in the Federal market.⁶⁷

(3) He erred in finding that the totality of the evidence relating to the pricing practices of any of the respondents warrants an inference that there was no conspiracy among any of them to fix prices.

⁶⁵ Nonprofit association consisting of privately owned hospitals and clinics, whether or not operated for profit; hereinafter referred to as NPA.

⁶⁶ City, County and State hospitals consisting of tax supported hospitals operated by municipalities, cities, counties and states; hereinafter referred to as CCS.

⁶⁷ The Federal market includes such federal agencies as GSA, VA and Defense Department facilities; hereinafter referred to as the Federal market.

(4) He erred in considering the evidence relating to pricing separately and apart from the other circumstances of record.

(5) He erred, finally, in drawing the inference from the shift in market shares that there was price competition among respondents.

1. The hearing examiner declared:

It seems highly improbable that persons bitterly fighting each other over a patent infringement matter would at the same time enter into a conspiracy or agreement to fix the prices of the same product which was the subject matter of the patent, and which Pfizer was doing everything within its power to keep Bristol, Squibb and Upjohn from marketing. (Initial Decision pp. 143-144)

Thus the hearing examiner inferred that a price-fixing agreement would hold no attraction to these alleged participants. This reasoning not only ignores facts of record but reflects a lack of understanding of the close relationship which existed among respondents.

The Supreme Court has often noted that it is not necessary for the Government to fix with exactitude the time when a conspiracy was conceived. In *United States v. United States Gypsum Co., et al.*, 333 U.S. 364, 393 (1948), the Court held:

We do not attempt to fix a date when the conspiracy was first formed. At least the declarations which we have quoted were made with the purpose of advancing a plan which ultimately eventuated in the licenses of 1929.

See also: *United States v. Masonite Corp.*, 316 U.S. 264 at 275 (1942).

It is sufficient to note here that the conspiracy as to all of the respondents was in effect at least as early as 1955—thus during the pendency of what Pfizer terms its “hard fought patent infringement litigation”⁶⁸ against Bristol, Squibb and Upjohn.

In a sense the argument that the patent infringement case is “inconsistent with any possibility”⁶⁹ of Pfizer’s involvement in a price fixing conspiracy is simply a more poignant variant of the old and rejected theme that the Government must prove that a price-fixing scheme permeated through every facet of corporate activity and every related corporate transaction. In rejecting such premises, the District Court noted in *United States v. Minneapolis Electrical Contractors Association*, 1952-53 Trade Cases, Par. 67,488 (D.C. Minn. 1953):

⁶⁸ Pfizer’s Answering Brief, Part II p. 24.

⁶⁹ Pfizer’s Answering Brief, Part II, p. 24.

Moreover, in *United States v. The Singer Manufacturing Company*, 31 U.S. L. Week, 4674 (U.S. June 17, 1963), the Court rejected “as a question of law, the * * * inference that the attitude of suspicion, wariness and self-preservation negated a conspiracy”. Previously in *United States v. Line Material Co.*, 333 U.S. 287, 297 (1948), the Court found a price-fixing conspiracy among patent licensees many of whom actively opposed the plan to which they were required to accede as the price of the patent license.

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* * * [T]hat this scheme was not successful in all of its ramifications is no defense, and that at times even the conspirators did not in every transaction comply with all the mandates of the planners is not controlling as to whether the conspiracy was launched * * * and participated in.

See also: *U.S. v. Trenton Potteries Co.*, 273 U.S. 392, at 402 (1927).

Indeed, in contrast to respondents' arguments which assume an unvarying monolithic consistency within a corporation, it is more probable, as contended by many high echelon executives, that today's corporation is a hydra-headed affair in which policies promulgated by the sales department may sometimes be at variance with directives from the Board of Directors.⁷⁰ Indeed, in instances where it has been *proven* that subordinates were involved in price-fixing criminal conspiracies, one of the defenses often urged with sincerity and truthfulness for exculpation of their corporate superiors is that the price-fixing policy was inconsistent with other announced corporate directives and policies promulgated by the Board of Directors or senior executive officers. Even in theory, we are not completely convinced that, within a single corporate empire, price fixing and patent infringement suits are mutually exclusive alternatives. Moreover, this issue of a single unified posture versus conflicting corporate practices need not be resolved by speculation; for the record of this case established that during the existence of the hard fought litigation the bitterness of the courtroom never affected the continuing cordiality between the marketing divisions of at least two of the litigants. Thus, at the very height of the infringement suit in June 1955, Pfizer and Upjohn were careful to exchange precise and detailed price information. On June 2, 1955, Pfizer wrote:

Under separate cover we are sending you a complete new set of price pages for your Pfizer Laboratories loose-leaf catalog. Kindly remove all pages from your present cover and insert this refill.

When new products are added to our line, you will receive announcements in the form of "Pfizer Scripts", a new series of price and product information folders. These pages when inserted in the proper sequence will keep your copy of our price list up-to-date.

⁷⁰The Broady incident corroborates our analysis that agents or employees sometimes take positions repugnant to some other announced company policies with or without authorization. From December 1954 to February 1955, Pfizer admits that "Broady was a private investigator who had been employed by Pfizer". *Pfizer's Answering Brief*, Part II, page 23. Broady was paid \$60,000 for a three month security investigation; during this time he tapped the wires of Squibb, Bristol and other parties, for which he was subsequently convicted. McKeen, now President of Pfizer, testified that the wire tap was unauthorized and thus, assuming his veracity, his testimony established another instance in which Pfizer's employees or agents blithely ignored corporate policy and exercised individual initiative in a highly questionable manner. See also Bristol's Answering Brief, Appendix 1-12, Excerpts from the Record on Appeal in the Broady Wiretap Case, *The People of the State of New York v. John G. Broady*, 6 A.D. 2d 674 (1st Dept. 1958).

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Please continue to send me new product and price information on your line so that my copy of your catalog will always be current.

Thank you for your cooperation.

Very truly yours,

H. H. KIBBE,
Manager, Pricing Department.

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On June 9, 1955, Upjohn replied as follows:

Thank you very much for sending us a copy of the new Pfizer Laboratories loose-leaf price schedule. We will also look forward to receiving the "Pfizer Scripts" and will see that they are inserted promptly to keep your price list up to date. Information folders should be directed to my attention.

We have mailed you a copy of the Upjohn catalog, and your name has been placed on our mailing list so that you will receive reprinted pages as they are prepared.

Very truly yours,

THE UPJOHN COMPANY,
H. E. SHEPARD.

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Admittedly the simple exchange of price information can be a neutral factor in the proof of a conspiracy. But as was stated by the Supreme Court in *Sugar Institute v. United States*, 297 U.S. 553, 600, in weighing the relevance of the exchange of such trade statistics "each case demands a close scrutiny of its own facts". See also: *Tag Manufacturers, et al. v. Federal Trade Commission*, 174 F. 2d 452 (1959). Upon scrutiny of the facts of each case, the dissemination of pricing information plus other anti-competitive and conspiratorial conduct could tip the scales for a finding against respondents. Numerous principles announced in *Morton Salt Company v. United States*, 235 F. 2d 573, 576 (10th Cir., 1956), are applicable in the instant case. There the Court noted:

* * * They [defendants] produced expert witnesses who testified that since all salt is virtually alike and the major consumers are generally informed buyers a fraction of a cent difference in price will cause a major shift in business; thus by operation of the laws of economic behavior the tendency is to highly uniform prices in a market area. Nevertheless, it seems clear that the free disclosure to each other of pricing data and proposed bids speeded the achievement of uniform prices. Appellants urge otherwise because they say the information was readily accessible from other trade sources. While the publication of prices bid to government agencies and a spy system would undoubtedly reveal partial pricing information on competitors, some of the evidence shows extensive information was not easily acquired.

* * * * *
In the instant case we have more than a dissemination of statistics, there was a frank exchange, between competitors controlling 95% of the market, of all

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the details of a fairly complicated pricing system. *Certainly the exchange is a factor appropriately considered in determining the existence of a conspiracy.* (Emphasis added.)

We note that on the facts of this case, there is no evidence of a beneficial industry-wide purpose to be served by the exchange of the information; nor is there evidence of chaos in the tetracycline industry to suggest the necessity for exchange of such information. Cf. *Appalachian Coals, Inc., et al. v. United States*, 288 U.S. 344 (1933).

In the instant case, we find that between the competitors controlling 100% of the market, there was an exchange of the details of a reasonably complicated pricing, manufacturing and distribution system. As in *Morton Salt* such exchange of information made it unlikely for any of the respondents to inadvertently engage in active price competition.

Also disregarded is the contemporaneously expressed dissatisfaction with the vigorous competition which had broken out in previous antibiotic markets, *e.g.*, penicillin. As hereinabove found, respondents wanted tetracycline to be controlled by patent and as discussed herein each of them desired to avoid price competition in the sale of this product. Early in these proceedings, the entrance of Bristol, Squibb and Upjohn was opposed by Pfizer and Cyanamid. These two firms feared that additional entries in the market would cause a price decline. But Bristol, Squibb and Upjohn wished to take advantage of the existing price structure. Any ill will felt by Bristol, Squibb and Upjohn would probably yield to a profit motive. In these circumstances, on the basis of our cumulative experience and judgment, a price agreement would have been just as logical as engaging in price cutting or any other form of price competition, adversely affecting the price level of tetracycline. Thus, disagreement on other matters, including the patent infringement case, is not dispositive of the price fixing charge.

2. Nor does the record support the hearing examiner's finding of extensive or substantial price competition in the hospital and Federal markets. Clearly the existence of the congruent pricing practices of respondents in these markets does not support the hearing examiner's conclusion that there was "no conspiracy to fix prices" among Pfizer, Cyanamid, Bristol, Squibb and Upjohn. While we think this evidence, when viewed separately from other facts of record, may be consistent with an inference of individual action, upon considering the record as a whole, we find it more consistent with an inference of agreement.

