

Court No. T- 1664-99

IN THE FEDERAL COURT OF CANADA
TRIAL DIVISION
(AT TORONTO)

BETWEEN

HER MAJESTY THE QUEEN

and

BASF AKTIENGESELLSCHAFT

Accused

REGISTRY - GREFFE FEDERAL COURT OF CANADA COUR FÉDÉRALE DU CANADA Copy of Document Received Copie du Document Reçu Date <u>September 17, 1999</u> Registry Officer Agent du greffe

AGREED STATEMENT OF FACTS

A BULK VITAMINS

I. THE ACCUSED

1. BASF Aktiengesellschaft

BASF Aktiengesellschaft ("BASF") is a company organized and existing under the laws of Germany. BASF's principal place of business is in Ludwigshafen, Germany. BASF has a Canadian subsidiary, BASF Canada Inc., in Toronto, Ontario, but it is not implicated in or charged with any offence herein.

2. Throughout the relevant time period, the accused was engaged in the manufacture abroad and the sale of bulk vitamins and related products (including vitamins A, B2, B5, C, and E, as well as betacarotene and vitamin premixes, referred to, herein, as "bulk vitamins") in Canada and elsewhere.

II. OTHER RELEVANT CORPORATIONS

3. The information set out in paragraphs 4-9 and 17-21 relates to parties whose conduct is relevant to the present proceeding. This information has been obtained from sources available to the Commissioner of Competition ("Commissioner"), of which BASF may not be aware, but for the purposes of this proceeding, does not contest.

F. Hoffmann-La Roche Ltd

4. F. Hoffmann-La Roche Ltd ("Roche") is a corporation organized and existing under the laws of Switzerland. Roche manufactures and supplies bulk vitamins, for human food and animal feed products. It also manufactures and supplies citric acid. Roche has a Canadian subsidiary, Hoffmann-La Roche Limited/Limitée, located in Mississauga, Ontario, which supplied the Canadian market for bulk vitamins with Roche products throughout the relevant period. This subsidiary is not implicated in or charged with any offence herein.

Rhône-Poulenc S.A.

5. Rhône-Poulenc S.A., ("Rhône-Poulenc") is a corporation organized and existing under the laws of France. Rhône-Poulenc manufactures and supplies certain bulk vitamins, including vitamins A and E, around the world. Rhône-Poulenc has a Canadian subsidiary, Rhône-Poulenc Canada Inc. of Mississauga, Ontario, which sold these vitamins in Canada during the relevant period, but is not implicated in or charged with any offence herein.

Eisai Co., Ltd.

6. Eisai Co., Ltd. ("Eisai") is a corporation organized and existing under the laws of Japan. Eisai manufactures vitamin E, which it sells around the world. Eisai distributes vitamin E in Canada through its wholly owned subsidiary, Eisai U.S.A.

Inc., a corporation organized and existing under the laws of the State of California.

Daiichi Pharmaceutical Co., Ltd.

7. Daiichi Pharmaceutical Co., Ltd. ("Daiichi") is a corporation organized and existing under the laws of Japan. Daiichi manufactures certain bulk vitamins abroad, including vitamins B5 and B6, which it distributes in Canada through Sumitomo Canada Ltd. of Toronto, Ontario.

Takeda Chemical Industries, Ltd.

8. Takeda Chemical Industries, Ltd. ("Takeda") is a corporation organized and existing under the laws of Japan. Takeda manufactures certain bulk vitamins, and, since 1993, has distributed them in Canada through its wholly owned subsidiary, Takeda Canada Vitamin and Food Inc., headquartered in Toronto, Ontario. Prior to that time, Takeda sold these products in Canada through Chorney Chemical Co.

Merck KGaA

9. Merck KGaA ("Merck") is a company organized and existing under the laws of Germany with its head office located in Darmstadt. Merck produces certain bulk vitamins abroad, which it sells in Canada through BDH Inc., located in Toronto, Ontario.

III. BULK VITAMINS AND THE CANADIAN MARKET FOR BULK VITAMINS

10. Vitamins are organic substances which are necessary for the growth, vitality and well-being of human and animal life. They are essential to the normal functioning of the body which cannot produce or synthesize them internally. On a commercial basis, these products are produced synthetically through highly

sophisticated processes. There are natural sources of certain of the relevant vitamins, but they are not economic substitutes for all of the volume of synthetic output that is marketed in Canada and elsewhere.

11. Vitamins are widely used in animal feed, food and pharmaceuticals. In animal feed products, vitamins are added to compound feeds to obtain optimal growth, to aid in disease prevention and to promote healthy growth of each species. For some animal feed applications, vitamins are distributed as a product known as "premix"; that is, a specific formulation or mixture of vitamins and other nutritional additives which is supplied on a vegetable or other carrier. In food products, vitamins are used mainly to replace losses in processing or to fortify the products and thus supplement the nutritional value of human foods. Vitamins are also used in food as antioxidants or colorants. In the pharmaceutical industry, vitamins are used for the production of vitamin supplements such as tablets and capsules.

12. The bulk vitamins affected by these conspiracies that were sold in Canada and elsewhere include the following:

Vitamin A	January 1990 to February 1999;
Vitamin E	January 1990 to February 1999;
Vitamin B2 (Riboflavin)	July 1991 to the Fall 1995;
Vitamin B5 (Calpan)	January 1991 to December 1998;
Vitamin C	January 1991 to the Fall 1995;
Betacarotene	Fall 1991 to December 1998;
Vitamin premixes	1991 to December 1997.

As more fully described in paragraph 15, the above dates represent the duration of the agreement for each product that constitutes the offence. Other vitamins and related products involving other parties not named herein are the subject of an on-going inquiry by the Commissioner.

13. Bulk vitamins are sold by the producers identified above, who produced a substantial majority of the world supply of the above listed products during the period of the offences. Vitamin products were sold in Canada by the participants in the illegal agreements through wholly owned subsidiaries or through distributors, but no subsidiary or distributor of BASF is implicated in or charged with an offence herein.
14. Based upon facts obtained by the Commissioner of which BASF is not necessarily aware, but for the purposes of this proceeding, does not contest. the relevant volume of commerce in Canada of bulk vitamins during the period of the offences for the three largest producers was \$646 million, with BASF's relevant Canadian sales at \$152 million.

IV. THE AGREEMENTS

15. For each of the vitamin products listed herein and during the time period stated above, senior executives and employees of BASF engaged in conversations and attended meetings with other senior executives and employees of the other major bulk vitamin producing companies named herein. In these conversations and meetings, unlawful agreements were reached: 1) to allocate the market share or to set specific volumes of certain bulk vitamins that each company would supply in Canada and elsewhere; and 2) to fix, increase and maintain the prices at which each company would sell bulk vitamins to customers in Canada and elsewhere. The agreements for each specific product may be summarized as follows:

Vitamin A

- (a) The agreement on vitamin A involved BASF, Roche, Rhône-Poulenc and existed from January, 1990 to February, 1999. At the outset, senior executives from

each firm met and agreed to allocate market shares or volume of sales for Canada and elsewhere. Over the period of the conspiracy, yearly meetings among senior executives were held to agree on a "budget" for the following year, to agree on an estimate of future demand for Canada and elsewhere, based on sales information exchanged during quarterly meetings of lower level employees of each firm. At the meetings, the participants also agreed to fix, increase and maintain the prices at which vitamin A would be sold in Canada and elsewhere.

Vitamin E

- (b) The parties to the conspiracy on vitamin E were BASF, Roche, Rhône-Poulenc and Eisai. The agreement on vitamin E among the European producers operated from January, 1990 to February, 1999 but the participation of Eisai was confirmed only in late 1990. The nature of the agreement on vitamin E was essentially the same as vitamin A, as both products were discussed, at least among the European manufacturers, at the same meetings. Based upon facts obtained by the Commissioner of which BASF is not necessarily aware, but for the purposes of this proceeding, does not contest, in December 1990 and early in 1991, a senior executive of Eisai met separately with senior executives of BASF, Roche and Rhône-Poulenc and confirmed that it would participate in the vitamin E agreement. Eisai representatives subsequently met bilaterally, on a continuing basis, with Roche representatives to exchange information prior to or following the trilateral meetings of the European producers and to confirm its continuing agreement.

Vitamin B2 (Riboflavin)

- (c) The parties to this conspiracy were BASF, Roche and Takeda. The conspiracy started in July 1991, with an agreement on market shares and prices which was reached among senior representatives, followed by periodic bilateral and trilateral meetings of other employees of the three companies. At these

meetings, the parties exchanged information and agreed on volume allocations and on the price of riboflavin in Canada and elsewhere. When Takeda did not attend the meetings, it provided its information to a Roche employee. The riboflavin conspiracy ended in the Fall of 1995.

Vitamin B5 (Calcium d- Pantothenate or "Calpan")

- (d) This product was sold mainly in the feed industry. The participants in the Calpan conspiracy were Roche, BASF and Daiichi. Based upon facts obtained by the Commissioner of which BASF is not necessarily aware, but for the purposes of this proceeding, does not contest, the conspiracy was initiated in January, 1991. The participants allocated a specific market share or volume quota for Canada and elsewhere. Periodic meetings were held to exchange sales information on the agreed upon volumes. Periodic agreements on prices were reached between 1991 and 1998. The Calpan conspiracy concluded at the end of 1998.

Vitamin C

- (e) Vitamin C is primarily used in the food and pharmaceutical industries. The participants in this conspiracy were Roche, Takeda, Merck and BASF. Based upon facts obtained by the Commissioner of which BASF is not necessarily aware, but for the purposes of this proceeding, does not contest, the conspiracy started in January, 1991. Thereafter, the representatives of the four producers met periodically and agreed to allocate their market shares in Canada and elsewhere. At these meetings, the parties periodically agreed to fix, increase and maintain prices. This conspiracy terminated in the Fall of 1995.

Betacarotene

- (f) Betacarotene is not technically a vitamin but it is used as a nutrient in foods and animal feed, and to give colour to foods, beverages, and pharmaceutical products. The participants in the conspiracy were BASF and Roche, whose

representatives agreed to allocate sales volumes in Canada and elsewhere. Based upon facts obtained by the Commissioner of which BASF is not necessarily aware, but for the purposes of this proceeding, does not contest. this agreement commenced as early as the Fall of 1991. Annual budget meetings were held among senior executives of each firm, who agreed on market shares. At these meetings the parties also agreed to fix, increase and maintain the price of betacarotene in Canada and elsewhere. The betacarotene agreement ended in late 1998.

Vitamin Premix

- (g) This product is a mixture containing minerals, vitamins and trace elements for animal feed formulations. Vitamins A and E are a significant portion of vitamin premixes ("premix"). Between 1991 and 1997, senior representatives of BASF and Roche periodically met and agreed upon the price for premix sales in Canada and elsewhere. This conspiracy ended in December 1997.

B CHOLINE CHLORIDE

I. THE ACCUSED

BASF Aktiengesellschaft

16. During the relevant period, BASF was one of the principal European manufacturers and marketers of choline chloride. BASF sold virtually none of the product in Canada, during the period of the offence.

II. OTHER RELEVANT CORPORATIONS

Bioproducts Incorporated

17. Bioproducts Incorporated ("Bioproducts") is a corporation organized and existing under the laws of the state of Ohio with its principal place of business in Fairlawn, Ohio. Bioproducts, a subsidiary of Mitsui & Co. (USA) Inc., is one of the three principal North American producers of choline chloride. During the relevant period, Bioproducts distributed, sold and supplied choline chloride, which it manufactured, to customers in Canada and elsewhere.

Chinook Group Ltd.

18. Chinook Group Limited ("Chinook") is a corporation incorporated under the laws of Ontario with its principal place of business in Toronto, Ontario. Chinook is the only Canadian manufacturer of choline chloride and is one of the three principal North American producers of choline chloride. During the relevant period, Chinook Group, an Ontario Limited Partnership, manufactured, distributed, sold and supplied choline chloride to customers in Canada and elsewhere. Chinook is the successor to Chinook Group.

DuCoa Animal Health and Nutrition, Division of DCV Inc. (formerly DuCoa, L.P.)

19. DuCoa (DuCoa Animal Health and Nutrition Division) is one of five divisions of DCV Inc. DCV Inc. is organized and existing under the laws of the State of Delaware and its principal place of business is Wilmington, Delaware. Prior to 1997, DuCoa operated as a limited partnership, DuCoa, L.P. ("DuCoa"), with ConAgra Inc. and E.I. DuPont de Nemours & Co. as the partners. DuCoa, L.P. was organized and existing under the laws of the State of Illinois. DuCoa is one of the three principal North American producers of choline chloride, with its

principal place of business in Highland, Illinois. During the relevant period, DuCoa distributed, sold and supplied choline chloride, which it manufactured, to customers in Canada and elsewhere.

Akzo Nobel Chemicals BV

20. Akzo Nobel Chemicals BV ("Akzo") is a company organized and existing under the laws of the Netherlands with its principal place of business in Amersfoort, Netherlands. During the relevant period, Akzo was one of the principal European manufacturers and marketers of choline chloride. Akzo has a Canadian subsidiary, Akzo Nobel Chemicals Ltd., Mississauga, Ontario. During the relevant period, Akzo sold virtually none of the product in Canada.

UCB S.A.

21. UCB S.A. ("UCB") is a company organized and existing under the laws of Belgium with its principal place of business in Brussels, Belgium. During the relevant period, UCB was one of the principal European manufacturers and marketers of choline chloride. UCB has an American subsidiary, UCB Chemicals Corporation, in Atlanta, Georgia, but has no subsidiary in Canada. During the relevant period, UCB sold virtually none of the product in Canada.

II. CHOLINE CHLORIDE

22. Choline chloride is a member of the B-complex group of water-soluble vitamins. It is used as an animal feed additive, especially for poultry and swine, to increase growth, reduce mortality rate, increase feed efficiency, increase egg production and improve meat quality. It is not a substitute for any other feed supplement and has no direct substitutes itself. The six producers identified above supplied a substantial majority of the entire world market in the period of

the conspiracy.

III. THE CANADIAN MARKET FOR CHOLINE CHLORIDE

23. Choline chloride for use as a feed additive is typically marketed in either an aqueous solution of 70 percent choline chloride or is sprayed on a dry cereal carrier (or silica) for a choline chloride potency of 50 to 60 percent. In Canada, most choline chloride is sold in a 60 percent formulation.

24. Based upon facts obtained by the Commissioner of which BASF is not necessarily aware, but for the purposes of this proceeding, does not contest, total sales of choline chloride during the period of the offence were approximately \$59 million. In that period, approximately 90 percent of the Canadian choline chloride requirements were supplied by Chinook, with the remaining 10 percent having been supplied by other foreign manufacturers and marketers of choline chloride.

V. THE AGREEMENT

25. In or about October 1992, senior representatives of BASF met in Mexico City, Mexico, with executives from Akzo, UCB, Bioproducts, Chinook and DuCoa. At that meeting, the parties discussed, but did not agree on, a market allocation arrangement and the desirability of a price increase for choline chloride.

26. In November 1992, senior representatives of the parties met again, at the headquarters of BASF in Ludwigshafen, Germany. At that meeting, they agreed that the European producers would terminate their current sales and refrain from any future sales in North America, including Canada, and that the three North

American producers would withdraw from the European market. The parties also agreed to raise the price of choline chloride in Canada and elsewhere.

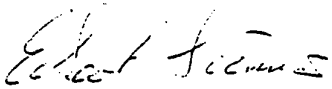
27. The representatives of the six companies continued to meet at various locations throughout the world, including, on the basis of information available to the Commissioner, of which BASF is not aware, but does not contest for the purpose of this proceeding, a meeting in Toronto, until the spring of 1994. From that time, there were no other meetings of all six parties. However, the parties continued to communicate on a bilateral basis through meetings and by telephone, through to June, 1995.

C OTHER CONSIDERATIONS

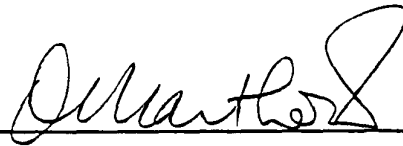
28. Pursuant to his responsibilities for the administration and enforcement of the *Competition Act*, the Commissioner has conducted and continues to conduct extensive inquiries into the bulk vitamins and choline chloride industries in Canada. Because of the complex nature of the industry, its international ramifications and jurisdictional considerations, BASF's early cooperation with these inquiries has made a significant contribution to the investigation of other individuals and corporations for violations of the *Competition Act* in relation to bulk vitamins and choline chloride.
29. The decision by BASF to appear and submit to the jurisdiction of the Canadian Courts for the purpose of this proceeding, to plead guilty and consent to a prohibition order has saved considerable costs of further investigation and trial which would otherwise have been incurred by the Government of Canada.

D CONCLUSION

30. Except where specifically indicated above, BASF admits the above facts, pursuant to section 655 of the *Criminal Code*, solely for the purpose of dispensing with their proof at trial in this proceeding.
31. BASF acknowledges, on the basis of its admission of the facts set out herein, that with respect to the agreements alleged in each count of the Indictment, all the constituent elements of an indictable offence under subsection 45(1)(c) of the *Competition Act* have been established.
32. The parties agree that this document may be executed by signature conveyed by facsimile transmission or in counterparts.



BASF Aktiengesellschaft
By
September 16, 1999



The Attorney General of Canada
by her counsel, D. Martin Low, Q.C.
September 13, 1999

No. T-

FEDERAL COURT OF CANADA
(TRIAL DIVISION)

BETWEEN:

HER MAJESTY THE QUEEN

- and -

BASF AKTIENGESELLSCHAFT

Accused

AGREED STATEMENT OF FACTS

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