

No. 109-191 (Criminal)

In the District Court of the United States for
the Southern District of New York

UNITED STATES OF AMERICA

v.

THE DOW CHEMICAL COMPANY, ET AL.

INDICTMENT

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UNITED STATES OF AMERICA,

Southern District of New York, ss:

The Grand Jurors of the United States of America, being duly impaneled, sworn, and charged in the District Court of the United States for the Southern District of New York, at the July Term of the said Court in the year 1940, having begun but not finished during said July 1940 Term of said Court an investigation of the matters charged in this indictment; and having continued to sit, by the orders of said Court, in and for the said District during the August, September, October, November and December Terms of said Court in the year 1940, and the January Term in the year 1941 of said Court, for the purpose of finishing said investigation and certain other investigations begun but not finished during the July 1940 Term of said

(1)

Court; and inquiring within and for said District at the January 1941 Term of said Court, do upon their oaths present and find as follows:

PERIOD OF TIME COVERED BY THE INDICTMENT

1. The combination and conspiracy hereinafter alleged was entered into during or about the year 1933 and continued at all times thereafter to and including the date of the presentation of this indictment.

DEFINITIONS

2. The term "magnesium alloys" as used in this indictment means all alloys in which magnesium is the principal constituent. Unalloyed magnesium as distinguished from alloyed magnesium will be referred to as "pure magnesium." Magnesium alloys and pure magnesium are hereinafter referred to collectively as "magnesium."

3. The term "magnesium products" as used in this indictment refers to products fabricated from pure magnesium or magnesium alloys, and includes castings, forgings, sheet, extrusions, rods, tubing, wire, powder, and ribbon.

THE DEFENDANTS

4. The Dow Chemical Company (hereinafter sometimes referred to as Dow Chemical), a corporation organized and existing under the laws of the State of Michigan, with offices and principal place of business at Midland, Michigan, is hereby indicted and made a defendant herein. For many years, the exact number to the Grand Jurors unknown, Dow Chemical has maintained, and now maintains, an office in the Borough of Manhattan, City of New York, within the

Southern District of New York, and has transacted, and now transacts, business within said District. Dow Chemical is the only producer of magnesium, and the second largest fabricator of magnesium products in the United States. It has been for many years, and is now, engaged in the business of producing magnesium and fabricating magnesium products at its plants in Michigan, and using, distributing, and selling magnesium and magnesium products in interstate and foreign commerce.

5. Alumium Company of America (hereinafter sometimes referred to as Alcoa), a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, with offices and principal place of business at Pittsburgh, Pennsylvania, is hereby indicted and made a defendant herein. For many years, the exact number to the Grand Jurors unknown, Alcoa has maintained, and now maintains, an office in the Borough of Manhattan, City of New York, within the Southern District of New York, and has transacted, and now transacts, business within said District. Alcoa is one of the world's largest producers of aluminum and aluminum alloys, and the only producer of aluminum in the United States. It has been for many years, and is now, engaged in the business of fabricating aluminum products and aluminum products containing magnesium at several of its plants, including plants at New Kensington, Pennsylvania, and Buffalo, New York, and distributing and selling the same in interstate and foreign commerce. For some time prior to 1933, American Magnesium Corporation was a wholly owned subsidiary of Alcoa.

6. American Magnesium Corporation (hereinafter sometimes referred to as AMC), a corporation organized and existing under the laws of the State of New York, with offices and principal place of business at Cleveland, Ohio, is hereby indicted and made a defendant herein. AMC is the largest fabricator of magnesium products in the United States. It has been for many years, and is now, engaged in the business of buying magnesium and fabricating magnesium products at its plants throughout the United States, including plants in Cleveland, Ohio, and Los Angeles, California, and using, distributing, and selling magnesium and magnesium products in interstate and foreign commerce. AMC, since 1933, has been jointly owned by Alcoa and General Aniline & Film Corporation (formerly American I. G. Chemical Corporation).

7. Interessengemeinschaft Farbenindustrie, Aktiengesellschaft (hereinafter sometimes referred to as I. G. Farben), a corporation or association organized and existing under the laws of Germany, with offices and principal place of business at Frankfurt am Main, Germany, is hereby indicted and made a defendant herein. For many years, the exact number to the Grand Jurors unknown, I. G. Farben has been represented, and is now represented, in the Borough of Manhattan, City of New York, within the Southern District of New York, and has transacted, and now transacts, business within said District. I. G. Farben is one of the largest manufacturers of dyes and fertilizers in the world. It has been for many years, and is now, engaged in the business of manufacturing magnesium and magnesium products at its plants in Germany,

using, distributing, and selling the same. In 1932, I. G. Farben and Alcoa organized Magnesium Development Corporation and, since that time, both I. G. Farben and Alcoa have jointly owned and controlled Magnesium Development Corporation. In 1929, I. G. Farben organized the American I. G. Chemical Corporation (now known as General Aniline & Film Corporation). From the organization of American I. G. Chemical Corporation in 1929 until 1939, various members of the Management Board of I. G. Farben, also served as officers or directors of the Board of Directors of American I. G. Chemical Corporation. At all times, to and including the date of the presentation of this indictment, I. G. Farben has controlled, directly or indirectly, the stock of American I. G. Chemical Corporation.

8. Magnesium Development Corporation (hereinafter sometimes referred to as MDC), a corporation organized and existing under the laws of the State of Delaware, with offices and principal place of business at Newark, New Jersey, is hereby indicted and made a defendant herein. MDC, a patent holding company, holding many patents relating to the production and fabrication of magnesium, has been for many years, and is now, engaged in the business of acquiring and holding United States patents. MDC has granted Dow Chemical and AMC licenses under certain of such patents. MDC has, since its creation in 1932, been jointly owned and controlled by I. G. Farben and Alcoa.

9. The following individuals are hereby indicted and made defendants herein. The defendant corporation

with which each such defendant was or is connected, his position with such corporation, and his present address, so far as is ascertainable to the Grand Jurors, are set forth below:

Defendants	Position and company	Address
Irving W. Wilson.....	Vice President of Aluminum Company of America; President of American Magnesium Corporation.	Pittsburgh, Pennsylvania.
Wilfred D. Keith.....	Director of Magnesium Development Corporation; Member of Patent Department of Aluminum Company of America.	New Kensington, Pennsylvania.
Karl Hochswender....	President and Director of Magnesium Development Corporation.	New York, New York.
Willard H. Dow.....	President and Director of The Dow Chemical Company.	Midland, Michigan.
Earl W. Bennett.....	Vice President, Secretary and Treasurer, and Director of The Dow Chemical Company.	Midland, Michigan.

10. The following individuals are not indicted, but are named as co-conspirators herein. The defendant corporation with which each is connected and the address of each such individual co-conspirator, so far as is known to the Grand Jurors, are set forth below:

Person	Corporation	Address
Walter H. Duisberg....	American Magnesium Corporation (formerly also with Magnesium Development Corporation).	Englewood, New Jersey.
Gilbert A. Currie.....	The Dow Chemical Company.....	Midland, Michigan.

11. During the period covered by this indictment, including the three years next preceding the date of the presentation of this indictment, each of the above-named individual defendants and co-conspirators has actively engaged in the management of the business of the defendant corporation which he represents and on his own behalf and on behalf of such corporation, has conferred in his official capacity with certain of the

other defendants and co-conspirators named herein, and each has participated in, approved, authorized, ordered, or done, in whole or in part, the activities constituting the offenses hereafter charged in this indictment.

12. Whenever it is hereafter alleged in this indictment that a defendant corporation or association did or performed any act or thing, the allegation shall be deemed to charge that its duly authorized directors, officers, and agents, including the individual defendants and co-conspirators named herein, together with the co-conspirators and other persons to the Grand Jurors unknown, have approved, authorized, ordered, directed, or done such act or thing.

NATURE OF TRADE AND COMMERCE

13. Magnesium can be produced from a variety of raw materials by a number of means. It is an element found extensively in the earth and in sea water in combination with other elements. In its metallic form it is the lightest commercially used metal, being approximately one-third lighter than an equal volume of aluminum. Pursuant to the Act of June 7, 1939 (c. 190; 53 Stat. 811), magnesium has been designated as a strategic material which is essential to national defense. All of the magnesium produced in the United States is produced by Dow Chemical. Most of this is produced from anhydrous magnesium chloride which Dow Chemical obtains from brine wells in Michigan. In recent months this company has extracted magnesium salts from sea water at its plant in Freeport, Texas. Large quantities of pure magnesium thus pro-

duced are converted by Dow Chemical into alloys. Magnesium thus produced by Dow Chemical is shipped by it from Michigan and Texas in interstate and foreign trade and commerce throughout the United States and to foreign countries in the following manner:

(a) Large quantities of pure magnesium are shipped by Dow Chemical to manufacturers and metallurgists throughout the United States and foreign countries who use it as an alloying agent, as a reducing agent in the manufacture of nickel, lead and zinc, and as an incendiary agent in the manufacture of flares, tracer ammunition, incendiary bombs, flash-light powder and flash-bulbs;

(b) Large quantities of pure magnesium are shipped by Dow Chemical in interstate trade and commerce to AMC and Alcoa for use by Alcoa and others as an alloying agent in high-strength aluminum alloys from which are made, among other things, parts of aircraft, including both military and non-military planes;

(c) Large quantities of magnesium thus produced by Dow Chemical are converted by it into high-strength magnesium alloys and shipped in interstate trade and commerce to fabricators located throughout the United States, including AMC;

(d) Large quantities of magnesium thus produced by Dow Chemical are used by Dow Chemical and AMC and Dow Chemical's fabricating licensees (hereinafter more fully described) to make magnesium products.

The magnesium products made by Dow Chemical, at its plants in the States of Michigan and Texas, by AMC, at its plants in the States of Pennsylvania,

Ohio and New York, and by the fabricating licensees of Dow Chemical at their plants in the various States of the United States, are shipped in interstate and foreign trade and commerce throughout the United States and to foreign countries. These magnesium products include parts of busses and trucks, bomb casings, fast-moving parts of machines, portable tools, parts of aircraft and aircraft engines, such as wheels, crank cases, supercharger diffusers, blowers, intake manifolds, oil pumps and instrument panels.

BACKGROUND OF THE CONSPIRACY

14. Prior to the first World War, no magnesium was produced commercially in the United States; all domestic requirements were imported, principally from Germany. Between 1914 and 1918 Dow Chemical and AMC both started producing magnesium. Three other companies in the United States also started producing magnesium, but one of them had discontinued business and the other two had been absorbed by AMC by 1920. In 1919 Alcoa obtained a majority of the stock of AMC, and by 1924 Alcoa had obtained complete control of AMC.

15. From 1920 to some time in 1927, Dow Chemical and AMC were the only domestic producers of magnesium. During most of this period both Dow Chemical and AMC were also engaged in the fabrication of magnesium products and were in active competition with each other, both in the production and sale of magnesium and the fabrication and sale of magnesium products. At some time during 1926 Alcoa

began to formulate certain plans for the elimination of competition in the production and fabrication of magnesium, and shortly thereafter broached these plans to Dow Chemical.

16. In 1927 Dow Chemical and AMC entered into an agreement cross-licensing each other under certain patents. These patents dealt with the fabrication and alloying of magnesium. The agreement further provided that any sublicenses issued by Dow Chemical or AMC under these patents should require each sublicensee to use said sublicense only with magnesium purchased from Dow Chemical or AMC.

17. During 1931, after protracted negotiations, I. G. Farben and Alcoa entered into an agreement known as the Alig agreement. In this agreement I. G. Farben and Alcoa agreed to form a jointly-controlled patent holding company (later organized as MDC), to which both were to assign their United States patents relating to the production, fabrication, and alloying of magnesium. The patent holding company was then to grant back to Alcoa and I. G. Farben, royalty-free fabrication licenses. Alcoa and I. G. Farben further agreed that if either one of them undertook the production of magnesium in the United States, the other would be entitled to equal participation in the production enterprise.

18. During 1932 the patent holding company referred to in paragraph 17 of this indictment was organized as defendant MDC. During 1933 various other agreements were entered into between Dow Chemical, Alcoa, I. G. Farben, MDC and AMC. These agreements provided, among other things, for a reorganization of

AMC and the granting to I. G. Farben of a 50% interest in AMC, and for a magnesium purchase contract between Dow Chemical and AMC.

THE COMBINATION AND CONSPIRACY

19. Beginning on or about August 10, 1933, and continuing at all times thereafter to and including the date of the presentation of this indictment, the defendants and co-conspirators named herein and other persons to the Grand Jurors unknown, well knowing all of the facts alleged herein, have been engaged in a wrongful and unlawful combination and conspiracy, formed in part and carried on in part within the Southern District of New York in restraint of interstate and foreign trade and commerce in magnesium and magnesium products in violation of Section 1 of the Act of July 2, 1890, as amended, entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies," commonly referred to as "The Sherman Act," that is to say:

20. All the defendants and co-conspirators named herein, together with other persons to the Grand Jurors unknown, beginning on or about August 10, 1933, to the date of the presentation of this indictment, have been continuously engaged in an unlawful combination and conspiracy, formed in part and carried on in part, in the Southern District of New York, to unreasonably restrain, suppress and limit competition in the production, distribution, fabrication and sale of magnesium and magnesium products by:

(a) requiring all fabricators of magnesium products to purchase their requirements of

magnesium from defendants Dow Chemical or AMC as a condition precedent to granting such fabricator the right to use fabrication patents owned and controlled by the defendants herein;

(b) preventing and restraining the production, distribution and sale of magnesium by others than defendants Dow Chemical and AMC.

21. Said unlawful combination and conspiracy has been effectuated and furthered by divers means and methods, including, among others, the following:

22. Beginning on or about August 10, 1933, and subsequent thereto, to on or about January 10, 1934, defendants Wilson and Keith for defendant Alcoa, defendants Dow and Bennett for defendant Dow Chemical, defendants Wilson and Keith for defendant AMC and co-conspirator Duisberg and G. A. Hendrie (now deceased) for defendants MDC and I. G. Farben, and other persons to the Grand Jurors unknown, negotiated by letters, telegrams, and other forms of communication, and by meetings held, among other places, in the City of New York, within the Southern District of New York, a three-party license agreement dated January 1, 1934 between defendants MDC, Dow Chemical, and AMC. By the terms of this agreement:

(a) Defendant MDC granted defendant Dow Chemical "a non-exclusive, non-assignable license, including the right to sublicense others, in, to and under all fabrication patents owned by MDC, during the life of this agreement, or under which MDC may have the right to grant such license."

(b) Defendant Dow Chemical granted defendant AMC "a non-exclusive, non-assignable license, including the right to sublicense others, in, to and under all fabrication patents owned by Dow, during the life of this agreement, or under which Dow may have the right to grant such license."

(c) The rights to sublicense others granted by defendant MDC to defendant Dow as set forth in subparagraph (a) of this paragraph and the rights to sublicense others granted by defendant Dow to defendant AMC as set forth in subparagraph (b) of this paragraph was:

* * * subject only to the following provisions:

(a) Dow or AMC will not issue a sublicense for a definite or indefinite time or term without demanding and collecting from the sublicensee a royalty of at least one and one-half cents ($1\frac{1}{2}\phi$) per pound on every pound of magnesium in connection with which the sublicensee practices or uses one or more of the licensed inventions * * * provided that nothing in this agreement shall deprive Dow or AMC of the right to issue royalty-free sublicenses to the extent, but only to the extent, of the magnesium sold and delivered by Dow or AMC to the sublicensee.

(d) Defendants Dow Chemical and AMC agreed to notify each other and defendant MDC "at the time of granting any sublicense."

(e) The agreement was to extend for ten years or until terminated after that time by one year's notice.

23. From on or about January 12, 1934 to on or about August 1, 1936, defendants Keith and Wilson, for

defendants Alcoa and AMC, defendants Dow and Bennett, including co-conspirator Currie for defendant Dow Chemical, and co-conspirator Duisberg for defendant MDC and I. G. Farben, and other persons to the Grand Jurors unknown, negotiated by letters, telegrams, and other forms of communication, and by meetings held, among other places, in the City of New York, within the Southern District of New York, a standard form of royalty-free sublicense agreement to be used in connection with the January 1, 1934 three-party license agreement referred to in paragraph 22 of this indictment by the terms of which:

(a) A royalty-free, non-transferable, non-exclusive fabrication sublicense was to issue to each sublicensee "but only in connection with magnesium purchased from" defendants Dow Chemical or AMC as the case might be "and then only in connection with said magnesium so long as it does not lose its identity."

(b) Loss of identity was defined so that scrap magnesium could not be used by the sublicensee.

(c) The sublicense was to terminate "when the magnesium to which it specifically applies has lost its identity or has passed from the ownership of the licensee."

24. From on or about August 10, 1936 to and including the three years next preceding the date of the presentation of this indictment, defendant Dow Chemical has issued, has maintained in force and effect, and now maintains in force and effect, standard royalty-free sublicense agreements, identical with the standard form of royalty-free sublicense agreement set out and re-

ferred to in paragraph 23 of this indictment with sublicensees throughout the United States.

25. Thereafter, on or about May 11, 1939, defendants Dow Chemical, AMC, and Alcoa agreed that a new standard form of royalty-free sublicense be used in connection with the January 1, 1934 three-party license agreement set out in paragraph 22 of this indictment. This new form of royalty-free sublicense agreement did not bear on its face any provision requiring the fabricating sublicensee to buy his requirements of magnesium from his licensor.

26. While defendant Dow Chemical did change the standard form of its sublicense agreement as agreed, it did not change its method of doing business. Defendant Dow Chemical, from the granting of its first royalty-free sublicense to the date of the presentation of this indictment, has compelled and required each prospective sublicensee, as a condition precedent to the issuance of a royalty-free sublicense, to enter into a purchase contract with defendant Dow Chemical for its requirements of magnesium, and has not and does not issue any sublicenses on a royalty basis.

EFFECT OF THE COMBINATION AND CONSPIRACY

27. The combination and conspiracy hereinbefore described has, within the three years next preceding the date of the presentation of this indictment, had the following results:

(a) The defendants have directly, substantially and unreasonably restrained interstate and foreign trade and commerce in magnesium and magnesium products.

(b) The defendants have prevented and limited free and vigorous competition in the distribution, sale and marketing of magnesium.

(c) The defendants have prevented and restrained the production of magnesium.

(d) The defendants have made it impossible for any person to obtain a license to fabricate magnesium products under the patents owned or controlled by the defendants without purchasing magnesium from the defendants.

(e) The defendants have abused the patent privilege by using patents not in order to obtain reasonable compensation for use of the inventions disclosed thereby, but in order to augment profits derived from sales of unpatented magnesium.

JURISDICTION AND VENUE

28. The combination and conspiracy hereinbefore alleged has operated in part and has been carried out in part within the Southern District of New York. The defendants, in effectuating and carrying out said combination and conspiracy, have, within the said District, performed, among others, the following acts:

(a) The defendants Alcoa, Dow Chemical, MDC, AMC, and the other defendants named herein, negotiated in part in the Southern District of New York by letter, telegram, telephone and other forms of communication and by meetings held in the City of New York, in the Southern District of New York, the agreements set out and referred to in paragraphs 22, 23 and 25 of this indictment.

(1) Defendant Bennett, for defendant Dow Chemical, met co-conspirator Duisberg, for defendants MDC and AMC on or about August 10, 1933, and discussed and negotiated the agreement set out in paragraph 22 of this indictment.

(2) Defendants Dow and Bennett, for defendant Dow Chemical, and defendant Wilson, for defendants Alcoa and AMC, and co-conspirator Duisberg, for defendants MDC and AMC on or about December 7, 1933 met, discussed and negotiated the agreement set out in paragraph 22 of this indictment.

(3) Co-conspirator Duisberg, president of defendant MDC, presided at the board meeting of defendant MDC on or about January 10, 1934, at which defendant MDC ratified and approved the January 1, 1934 three-party license agreement set out in paragraph 22 of this indictment.

(4) Defendant Bennett, for defendant Dow Chemical, on or about October 21, 1936, paid defendant MDC \$3,637.95 by check as royalty under the January 1, 1934 three-party license agreement set out in paragraph 22 above.

(5) Co-conspirator Duisberg forwarded the \$3,637.95 check, referred to in subparagraph (4) of this paragraph, to defendant Alcoa's New York office on or about October 26, 1936.

(b) Defendants Dow Chemical, Alcoa, and AMC maintain, and have maintained throughout the three years next preceding the date of the presentation of this indictment, offices in the City of New York, within the Southern District of New York, and have carried out throughout the aforementioned period and carry out the

distribution and sale of magnesium and fabricated magnesium products.

(c) Defendant Dow Chemical, during and throughout the three years next preceding the date of the presentation of this indictment, has discussed and negotiated, by agents and officers in this District and through its New York office within the Southern District of New York, certain royalty-free license agreements referred to in paragraphs 23 and 24 of this indictment.

(d) Licensees of defendant Dow Chemical throughout the three years next preceding the date of the presentation of this indictment and at the present time have distributed and sold, and distribute and sell magnesium and fabricated magnesium products in New York City, within the Southern District of New York.

And so the Grand Jurors aforesaid, upon their oaths aforesaid, do find and present that the defendants, including the corporate defendants, throughout the period aforesaid, including the three years next preceding the date of the return of this indictment, at the places and in the manner and form aforesaid, continuously have engaged in unlawful combination and conspiracy unreasonably restraining, suppressing and limiting trade and commerce in the fabrication, sale and distribution of magnesium and of magnesium products, among the several States of the United States of America, and with foreign nations, contrary to the form of the statute of the United States of America, in such

case made and provided, and against the peace and dignity of the United States of America.

A true bill:

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