

IN THE MATTER OF

ROBERT E. HARVEY, M.D., P.A., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3239. Complaint, Aug. 26, 1988—Decision, Aug. 26, 1988*

This consent order prohibits, among other things, a group of Victoria, Tx. allergists from impeding the use of any allergy testing product by any physician, clinic, hospital, ambulatory care center or other health facility in order to restrict competition from physicians who are not allergists. Respondents are also prohibited from boycotting the manufacturers that produce allergy testing devices used by physicians who are not allergy specialists.

Appearances

For the Commission: *Erika R. Wodinsky.*

For the respondents: *R. Owen Ricker, Jr., Woody, Gumm, Villafranca, Villafranca & Ricker, Victoria, Tx.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Robert E. Harvey, M.D., a professional association, doing business as Victoria Allergy and Asthma Clinic ("Harvey, P.A."), and Robert E. Harvey, M.D. ("Harvey") and Gullapali K. Rao, M.D. ("Rao"), individually, herein-after sometimes referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondents Harvey and Rao are physicians licensed by the State of Texas who devote a substantial portion of their practice to the diagnosis and treatment of allergic disease. Respondent Harvey directs and controls the business practices of Harvey, P.A., which does business under the name Victoria Allergy and Asthma Clinic. The principal place of business of each of the respondents is located at 3901 North Navarro, Victoria, Texas.

PAR. 2. Respondents are engaged in the business of providing medical services for a fee. Except to the extent that competition has been restrained as alleged herein, respondents have been and are now in competition with other physicians in the State of Texas who engage in the diagnosis and treatment of allergic disease.

PAR. 3. The acts and practices of respondents, including the acts and practices alleged herein, have been in or are affecting commerce within the meaning of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

PAR. 4. An allergist is a physician, a substantial portion of whose practice is the diagnosis and treatment of allergic disease. Some physicians who are not allergists also diagnose and treat allergic disease. Except to the extent that competition has been restrained as alleged herein, allergists compete among themselves and with non-allergist physicians in the diagnosis and treatment of allergic disease.

PAR. 5. The methods used to diagnose allergic disease include, but are not limited to, *in vivo* allergy tests (interdermal or skin tests) and *in vitro* allergy tests (tests identifying allergen specific Immunoglobulin E antibodies in blood serum). *In vivo* allergy tests involve the introduction of a series of allergenic extracts under or on a patient's skin. A physician trained in the use of this test may then diagnose whether the patient is allergic to particular substances by, *inter alia*, observing the reaction on the skin where allergenic extracts have been introduced. *In vitro* allergy tests involve taking a blood sample from a patient and using a laboratory test to determine whether the patient is allergic to particular substances.

PAR. 6. Substantial technical training and experience are required to administer and make the subjective judgments necessary to interpret *in vivo* allergy tests. *In vitro* allergy tests require less technical training and experience to administer and interpret because the results of such tests are objective. For this reason, the development of *in vitro* allergy tests expanded the number and types of physicians who could diagnose allergic disease. Prior to the development of *in vitro* allergy tests, allergists largely competed only among themselves, and faced limited competition from physicians who were not allergists. After *in vitro* allergy tests were developed, allergists began to face the prospect of substantial competition from physicians who are not allergists.

PAR. 7. Pharmacia, Inc. ("Pharmacia") is a diversified manufacturer of medical diagnostic products, including materials used in testing

for allergic disease. Pharmacia markets products for use in *in vivo* and *in vitro* allergy tests to physicians throughout the United States.

PAR. 8. Beginning no later than March 1984, Pharmacia, which had been marketing its allergy testing products primarily to allergists, began to market its *in vitro* allergy testing products to physicians in Texas who were not allergists.

PAR. 9. Beginning in April 1984, Harvey, Rao and other allergists in Texas, acting in combination or conspiracy, joined in a common plan to coerce and boycott Pharmacia in order to force it to stop marketing and selling *in vitro* allergy testing products to physicians in Texas who were not allergists.

PAR. 10. MAST Immunoseystems, Inc. ("MAST") is a manufacturer of *in vitro* allergy testing products. MAST markets its allergy testing products to physicians, hospitals, clinics and ambulatory care centers throughout the United States.

PAR. 11. MAST first began to market its *in vitro* allergy testing products in Texas no later than January 1985. From the outset, MAST marketed these products to physicians (both allergists and non-allergists), hospitals, clinics and ambulatory care centers.

PAR. 12. Beginning in April 1985, Harvey, Rao and other allergists in Texas, acting in combination or conspiracy, joined in a common plan to coerce and boycott MAST in order to force it to stop marketing and selling *in vitro* allergy testing products in Texas to anyone but allergists.

PAR. 13. In furtherance of the aforesaid combinations or conspiracies, respondents and other allergists in Texas engaged in the following actions, among others:

(a) On or about April 16, 1984, respondents sent letters to all or nearly all allergists in Texas, urging them to "join forces" against the marketing of *in vitro* allergy testing products to physicians who were not allergists. In particular, the letter urged these allergists to refuse to deal with Pharmacia because Pharmacia marketed its allergy testing products to physicians who were not allergists. The letter also urged these allergists to act to prevent Pharmacia from being permitted to buy advertising in the *Journal of Allergy and Clinical Immunology* (the journal published by the American Academy of Allergy and Immunology ("AAAI")), and from being permitted to exhibit and promote its products at AAAI meetings.

(b) On or about April 30, 1984, respondents sent a second letter to all or nearly all allergists in Texas, again asking them to join in

refusing to deal with Pharmacia, and to act to prevent Pharmacia from advertising in AAAI publications or exhibiting at AAAI meetings. This letter urged recipients to contact "every allergist in the country" concerning Pharmacia's marketing practices.

(c) In response to these two letters, some allergists in Texas joined respondents in attempting to coerce Pharmacia to discontinue marketing its allergy testing products to physicians who were not allergists by, *inter alia*, threatening to terminate or terminating their purchases from Pharmacia. According to respondents, their "united efforts" with other allergists in Texas "successfully thwarted" Pharmacia's marketing efforts in Texas.

(d) On or about April 11, 1985, respondents sent a third letter to allergists in Texas, urging them to take concerted action to deter MAST from marketing its allergy testing products to anyone but allergists.

(e) In response to this letter, some allergists in Texas joined respondents in attempting to coerce MAST to discontinue marketing its allergy testing products to non-allergists by, *inter alia*, threatening to terminate or terminating their purchases from MAST, and urging the AAAI not to permit MAST to exhibit and promote its products at AAAI meetings.

PAR. 14. The purposes, effects, tendency or capacity of the combination or conspiracy and the acts and practices described above are and have been to restrain trade unreasonably and hinder competition in the provision of allergy diagnostic and treatment services in Texas, and to deprive consumers of the benefits of competition in the following ways, among others:

(a) By limiting the ability of patients to choose among a variety of alternative providers of diagnosis and treatment for allergic disease, competing on the bases of price, service, quality or other factors of significance to patients;

(b) By deterring manufacturers of *in vitro* allergy testing products from marketing or selling their products to anyone but allergists, thereby preventing other physicians, hospitals, clinics and ambulatory care centers from competing with allergists in the diagnosis and treatment of allergic disease; and

(c) By hindering the development and use of competitive, convenient, cost-effective and innovative forms of allergy testing.

PAR. 15. The combination or conspiracy described above constitutes an unfair method of competition in or affecting commerce in violation

of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, as amended. Such combination or conspiracy, or the effects thereof, is continuing and will continue in the absence of the relief herein requested.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the San Francisco Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondents, their attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law had been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Robert E. Harvey, M.D., P.A., is a professional association, existing and doing business under the laws of the State of Texas as Victoria Allergy and Asthma Clinic. Respondents Robert E. Harvey, M.D. and Gullapali K. Rao, M.D. are physicians licensed and doing business under the laws of the state of Texas. Respondents' principal place of business is located at 3901 North Navarro, City of Victoria, State of Texas.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

I.

It is ordered, That for purposes of this order, the following definitions apply:

A. "*Respondents*" means Robert E. Harvey, M.D., a professional association doing business as Victoria Allergy and Asthma Clinic, and Robert E. Harvey, M.D. and Gullapali K. Rao, M.D., individually or under any other name or names, and their representatives, agents and employees.

B. "*Allergy testing product*" means any product or device that has been approved by the Food and Drug Administration of the United States Department of Health and Human Services ("FDA") for the use in the diagnosis or treatment of allergic disease in human patients. This definition includes but is not limited to, products or devices used for *in vitro* allergy tests, as hereinafter defined.

C. "*In vitro* allergy test" means any test, approved by the FDA, that is conducted on blood or blood serum samples to diagnose or treat allergic disease. This definition includes, but is not limited to, tests that are known by the trade names "Radioallergosorbent tests," "Multiple Antigen Simultaneous tests," "Fluoroallergosorbent tests," and "Immunoperoxidase tests."

II.

It is ordered, That respondents, their successors and assigns shall cease and desist from, directly or through any device, entering into, threatening or attempting to enter into, organizing, continuing or participating in any agreement or combination to refuse or threaten to refuse to deal with, or otherwise coerce, any person or entity for the purpose or with the effect of impeding the use of any allergy testing product by any physician, clinic, hospital, ambulatory care center or other health care facility. This includes but is not limited to any agreement or combination to refuse or threaten to refuse to deal with any manufacturer or distributor of any allergy testing product

because that manufacturer or distributor offers to sell or sells allergy testing products to any physician who is not certified or eligible for certification by the American Board of Allergists, or to any clinic, hospital, ambulatory care center or other health care facility.

Provided, That nothing in this order shall prohibit a respondent from entering into any agreement with any physician with whom that respondent practices medicine in partnership or as a professional corporation or association, or who is employed by the same person as that respondent or whom that respondent employs.

III.

It is further ordered, That respondents shall:

A. Within thirty (30) days after this order becomes final, mail a copy of this order and of the complaint in this proceeding to each and every physician or facility to whom respondents sent correspondence referred to in paragraphs 13(a), 13(b), and 13(d) of the Commission's complaint in this matter.

B. Within sixty (60) days after this order becomes final, and at such other times as the Commission may by written notice to respondents require, file or cause to be filed with the Office of the Secretary of the Commission, Washington, D.C. 20580, or such other office as the Commission shall designate in writing, a verified written report setting forth in detail the manner and form in which they have complied with this order.

IV.

It is further ordered, That the respondents named herein promptly notify the Commission of the discontinuance of their present business or employment and of their affiliation with a new business or employment. In addition, for a period of ten (10) years from the date of service of this order, the respondents shall promptly notify the Commission of each affiliation with a new business or employment. Each such notice shall include the respondents' new business address and a statement of the nature of the business or employment in which the respondents are newly engaged as well as a description of respondents' duties and responsibilities in connection with the business or employment. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this order.

Complaint

111 F.T.C.

IN THE MATTER OF

THE VONS COMPANIES, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF
THE FEDERAL TRADE COMMISSION AND SEC. 7 OF THE CLAYTON ACTS

Docket C-3233. Complaint, Aug. 29, 1988—Decision, Aug. 29, 1988

This consent order requires, among other things, that The Vons Companies, an El Monte, Ca. corporation, divest certain Safeway stores in the California area.

Appearances

For the Commission: *Joan S. Greenbaum.*

For the respondents: *Joseph A. DeFrancis, Latham & Watkins,*
Washington, D.C. and *Gregg Stone, Manger, Tolles & Olson,* Los
Angeles, Ca.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission ("Commission"), having reason to believe that the respondents, The Vons Companies, Inc., SSI Associates, L.P., and Safeway Stores, Incorporated, entities subject to the jurisdiction of the Commission, have entered into an agreement, described in paragraph 9 herein, that, if consummated, would violate the provisions of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45; that said agreement, and the actions of the respondents to implement that agreement, constitute violations of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45; and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint pursuant to Section 11 of the Clayton Act, 15 U.S.C. 21, and Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), stating its charges as follows:

DEFINITIONS

1. For the purposes of this complaint, the following definitions shall apply: