

IN THE MATTER OF

BROOKS DRUG, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3256. Complaint, July 12, 1989—Decision, July 13, 1989*

This consent order prohibits, among other things, the Pawtucket, R.I. based corporation from entering into any agreement with other pharmacy firms to withdraw from or refuse to enter into any participation agreement. It further prohibits respondent, for a period of ten years, from communicating to another pharmacy firm their decision or intention to enter or refuse to enter into such a participation agreement. In addition, for eight years, it prohibits respondent from advising another pharmacy firm on whether to enter into any participation agreement.

Appearances

For the Commission: *Karen Bokat and Michael D. McNeely.*

For the respondent: *Gayl W. Doster, in-house counsel, Pawtucket, R.I. and Neal R. Stoll, Skadden, Arps, Slater, Meagher & Flom, New York City.*

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of the complaint which the Bureau of Competition 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 respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all jurisdictional facts set forth in the aforesaid draft complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in

*Complaint previously published at 112 FTC 15 (1989).

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 respondent has 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, 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 Brooks is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business at 75 Sabin Street, Pawtucket, Rhode Island.

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

ORDER

I.

For purposes of the order, the following definitions shall apply:

A. "*Brooks*" means Brooks Drug, Inc., a Delaware corporation, its directors, officers, agents, employees, divisions, subsidiaries, successors and assigns;

B. "*Third-party payer*" means any person or entity that provides a program or plan pursuant to which such a person or entity agrees to pay for prescriptions dispensed by pharmacies to individuals described in such plan or program as eligible for such coverage ("Covered Persons"), and includes, but is not limited to, health insurance companies; prepaid hospital, medical, or other health service plans, such as Blue Cross and Blue Shield plans; health maintenance organizations; preferred provider organizations; prescription service administrative organizations; and health benefit programs for government employees, retirees or dependents;

C. "*Participation agreement*" means any existing or proposed agreement, oral or written, in which a third-party payer agrees to

reimburse a pharmacy for the dispensing of prescription drugs to Covered Persons, and the pharmacy agrees to accept such payment from the third-party payer for such prescriptions dispensed during the term of the agreement;

D. "*Pharmacy firm*" means any partnership, sole proprietorship or corporation, including all of its subsidiaries, affiliates, divisions and joint ventures, that owns, controls or operates one or more pharmacies, including the directors, officers, employees, and agents of such partnership, sole proprietorship or corporation as well as the directors, officers, employees, and agents of such partnership's, sole proprietorship's or corporation's subsidiaries, affiliates, divisions and joint ventures, but excludes any partnership, sole proprietorship or corporation, including all of its subsidiaries, affiliates, divisions and joint ventures, which own, are owned by, control or are under common control with Brooks. The words "subsidiary", "affiliate", and "joint venture" refer to any firm in which there is partial (10% or more) or total ownership or control between corporations.

II.

It is ordered. That Brooks, directly, indirectly, or through any corporate or other device, in or in connection with its activities in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, shall forthwith cease and desist from:

A. Agreeing or combining, attempting to agree or combine, or taking any action in furtherance of any agreement or combination, advocating an agreement, or organizing or cooperating with any Pharmacy Firm(s) to (1) boycott, refuse to enter into, withdraw from, or not participate in, any Participation Agreement or (2) threaten to boycott, threaten to refuse to enter into, threaten to withdraw from, or threaten not to participate in, any participation agreement;

B. For a period of ten (10) years after the date this order becomes final, stating or communicating in any way to any pharmacy firm the intention or decision of Brooks with respect to entering into, refusing to enter into, threatening to refuse to enter into, participating in, threatening to withdraw from, or withdrawing from any existing or proposed participation agreement into which Brooks and the other pharmacy firm have entered, could enter or are considering entering;

C. For a period of eight (8) years after the date this order becomes final, advising any pharmacy firm with respect to entering into.

refusing to enter into, participating in, or withdrawing from any existing or proposed participation agreement into which Brooks and the other pharmacy firm have entered, could enter or are considering entering.

Provided, that nothing in this order shall prevent Brooks from:

(1) Exercising rights permitted under the First Amendment to the United States Constitution to petition any federal or state government executive agency or legislative body concerning legislation, rules or procedures, or to participate in any federal or state administrative or judicial proceeding;

(2) Subcontracting, preparing joint bids, or jointly undertaking with pharmacy firms to provide prescription drug services under a participation agreement if requested to do so in writing by the third-party payer;

(3) Communicating to the public truthful, nondeceptive statements concerning any existing or proposed participation agreement.

In the event that Brooks is merged into or consolidated with its parent corporation, Hook-SuperRx, Inc., the provisions of Paragraph II.B. and C. shall only apply to activities related to or affecting participation agreements in New York, Massachusetts, Vermont, New Hampshire, Rhode Island, Pennsylvania, Connecticut, Maine, New Jersey, and Maryland.

III.

It is further ordered, That Brooks:

A. Provide a copy of this order within thirty (30) days after the date this order becomes final to each officer, director, employee pharmacist who is employed in New York state, and each employee whose responsibilities include recommending or deciding whether to enter into any participation agreement, and each employee who regularly attends meetings on Brooks' behalf that include representatives of other pharmacies; and

B. For a period of five (5) years after the date this order becomes final, provide each new director and each employee who enters a position described in Paragraph A a copy of the order within ten (10) days of the date the employee or director assumes the new position.

IV.

It is further ordered, That Brooks:

A. File a verified, written report with the Commission within ninety (90) days after the date this order becomes final, and annually thereafter for five (5) years on the anniversary of the date this order becomes final, and at such other times as the Commission may, by written notice to Brooks, require, setting forth in detail the manner and form in which it has complied and is complying with this order;

B. For a period of five (5) years after the date this order becomes final, maintain and make available to Commission staff for inspection and copying upon reasonable notice all documents generated by Brooks or that come into Brooks' possession, custody, or control regardless of source, that embody, discuss or refer to the decision or upon which Brooks relies in deciding whether to enter into any participation agreement in which Brooks participates, has participated, or has considered participating; and

C. Notify the Commission at least thirty (30) days prior to any proposed change in Brooks such as, assignment or sale resulting in the emergence of a successor corporation or association, change of name, change of address, dissolution, the creation, sale or dissolution of a subsidiary, or any other change that may affect compliance with this order. Provided however that with respect to the sale of a single subsidiary consisting of three or fewer retail locations, Brooks shall provide such advance notice as is practicable.

Commissioners Azcuenaga and Machol dissenting.

IN THE MATTER OF
MEDICAL STAFF OF DICKINSON COUNTY
MEMORIAL HOSPITAL, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3259. Complaint, July 17, 1989—Decision, July 17, 1989

This consent order prohibits, among other things, 12 doctors, the medical staff and two medical societies of Michigan from combining or conspiring to coerce, intimidate, threaten to boycott or boycott other physicians, hospitals and health care providers. In addition, the order requires the respondent Medical Staff to mail a copy of the complaint and order to certain medical officials.

Appearances

For the Commission: *David Pender and Paul Nolan.*

For the respondents: *Larry J. Saylor, Miller, Canfield, Paddock & Stone, Detroit, Mi.*

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 the Medical Staff of Dickinson County Memorial Hospital ("Medical Staff"), the individuals named ("individual respondents"), the Dickinson-Iron County Medical Society, and the Delta County Medical Society 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 in that respect its charges as follows:

PARAGRAPH 1. Respondent Medical Staff is an unincorporated association, organized and existing under and by virtue of the laws of the State of Michigan, and is located at Dickinson County Memorial Hospital, 400 Woodward Avenue, Iron Mountain, Michigan. The Medical Staff is composed of physicians and other health care practitioners who have privileges to attend patients at Dickinson