

IN THE MATTER OF

ALAN KADISH

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket 9239. Complaint**, Mar. 15, 1990—*Decision*, Feb. 7, 1991

This consent order prohibits, among other things, the owner of an independent pharmacy from organizing or encouraging any agreement among pharmacy firms to refuse to enter into or to withdraw from any third-party prescription plan. The consent agreement, among other things, also prohibits the respondent, for a period of ten years, from continuing any meeting at which representatives of pharmacy firms exchange information concerning the firms' intention to enter into, refuse to enter into, or withdraw from any third-party prescription plan, and from communicating to any firm any information concerning any other pharmacy firm's intention to enter into, refuse to enter into, or to withdraw from any existing or proposed third-party prescription plan.

Appearances

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

For the respondent: *Thomas Fitzpatrick*, New York, N.Y. and *Jonathan Harvey, Harvey, Harvey, & Mulford*, Albany, N.Y.

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondent Alan Kadish with a violation of Section 5 of the Federal Trade Commission Act, as amended, and the respondent having been served with a copy of that complaint, together with a notice of the contemplated relief; and

The respondent, his attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the 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 such complaint, and waivers and other provisions as required by the Commission's Rules; and

* Complaint previously published at 114 FTC 159 (1991).

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of (60) days, now in further conformity with the procedure prescribed in Section 3.25(f) of its rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Kadish resides at 24 Quincy Court, Goldens Bridge, New York. His office and principal place of business are at Kadish Pharmacy, 670 North Broadway, White Plains, New York.

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 this order, the following definitions shall apply:

A. "*Mr. Kadish*" means Alan Kadish, his representatives, agents, and employees;

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 benefits programs for government employees, retirees and 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. 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 Mr. Kadish, directly, indirectly, or through any device, in or in connection with his 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. Entering into, threatening or attempting to enter into, organizing, encouraging, continuing, cooperating in, or carrying out any agreement between or among pharmacy firms, either express or implied, to withdraw from, threaten to withdraw from, refuse to enter into, or threaten to refuse to enter into, any participation agreement;

B. For a period of ten (10) years after the date this order becomes final, continuing to attend, in the capacity of an officer or a director of any society or association of pharmacists or pharmacy firms, a formal or informal meeting of representatives of pharmacy firms not owned or controlled by Mr. Kadish or Mr. Kadish's employer after 1) any person makes any statement concerning one or more firms' intentions or decisions 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 and such person is not ejected from the meeting, or 2) two persons make such statements;

C. For a period of ten (10) years after the date this order becomes final, communicating to any pharmacist not employed by Mr. Kadish or Mr. Kadish's employer or any pharmacy firm not owned or controlled by Mr. Kadish or Mr. Kadish's employer any information concerning any pharmacy firm's intention or decision 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; and

D. For a period of eight (8) years after the date this order becomes final, providing comments or advice to any pharmacist not employed by Mr. Kadish or Mr. Kadish's employer or to any pharmacy firm not owned or controlled by Mr. Kadish or Mr. Kadish's employer on the desirability or appropriateness of participating in any existing or proposed participation agreement. However, nothing in this paragraph shall prohibit Mr. Kadish from communicating purely factual information describing the terms and conditions of any participation agreement or operations of any third-party payers.

Provided, that nothing in this order shall be construed to prevent Mr. Kadish from 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, programs or procedures, or to participate in any federal or state administrative or judicial proceeding.

III.

It is further ordered, That Mr. Kadish:

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

B. For a period of five (5) years after the date of service of this order, maintain and make available to Commission staff for inspection and copying upon reasonable notice, records adequate to describe in detail any action taken in connection with the activities covered by Part II of the order, including but not limited to, all documents generated by Mr. Kadish or that come into his possession, custody, or control regardless of source, that embody, discuss or refer to the terms or conditions of any participation agreement; and

C. Notify the Commission within thirty (30) days of any change that may affect compliance with the order.

Commissioner Azcuenaga dissenting and Commissioner Starek not participating.

IN THE MATTER OF
MELVILLE CORPORATION

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

Docket 9227. Complaint, Apr. 19, 1989—Decision, Feb. 8, 1991

This consent order prohibits, among other things, the pharmacy chain from entering into any agreement with other pharmacy firms to withdraw from or to refuse to enter into any third-party payer prescription drug participation agreement. For ten years, the chain is also prohibited from communicating to another pharmacy firm the decision or intention to enter or to refuse to enter into such a participation agreement, and for eight years, from advising any pharmacy firm on whether to enter into any participation agreement.

Appearances

For the Commission: *Karen G. Bokart and Michael D. McNeely.*

For the respondent: *Bruce D. Sokler, Mintz, Levin, Cohn, Ferris, Glowsky & Popeo, Washington, D.C.*

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 Chain Pharmacy Association of New York State, Inc.; Melville Corporation; Fay's Drug Company, Inc.; Kinney Drugs, Inc.; Peterson Drug Company of North Chili, New York, Inc.; Rite Aid Corporation; and James E. Krahulec 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 as follows:

PARAGRAPH 1. Respondent Chain Pharmacy Association of New York State, Inc. ("Chain Association") is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office located at 17 Elk Street, Albany, New York.

PAR. 2. Respondent Chain Association is an association composed of