

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, Glovsky & 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

the following individual member firms: Brooks Drug, Inc., 75 Sabin St., Pawtucket, RI; Carl's Drug Co., Success Drive, Box 203, Rome, NY; CVS, One CVS Drive, Woonsocket, RI; Duane Reade, 4929 Thirtieth Place, Long Island City, NY; Fay's Drug Co., 7245 Henry Clay Blvd., Liverpool, NY; Genovese Drug Stores, 80 Marcus Dr., Melville, NY; Kinney Drugs, Inc., 29 Main St., Gouverneur, NY; The Kroger Co., 1014 Vine St., Cincinnati, OH; Peterson Drug Co., 68 Main St., P.O. Box 166, Oakfield, NY; Revco D.S., Inc., 1925 Enterprise Parkway, Twinsburg, OH; Rite Aid Corp., P.O. Box 3165, Harrisburg, PA; Supermarkets General Corp., 301 Blair Rd., Woodbridge, NJ; Super X Drugs Corp., 1933 Victory Blvd., Staten Island, NY; Walgreen Co., 200 Wilmont Rd., Deerfield, IL. Chain Association's members are engaged in the business of the retail sale of prescription drugs.

PAR. 3. Respondent Fay's Drug Company, Inc. ("Fay's") is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal offices located at 7245 Henry Clay Boulevard, Liverpool, New York. In 1986, the retail sale of prescription drugs accounted for a significant portion of the sales of the 110 to 120 pharmacies that respondent Fay's operated in New York State.

PAR. 4. Respondent Kinney Drugs, Inc. ("Kinney") is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal offices located at 29 Main Street, Gouverneur, New York. The retail sale of prescription drugs accounts for a significant portion of the sales of the approximately 23 pharmacies that respondent Kinney operates in New York State.

PAR. 5. Respondent Melville Corporation ("Melville") is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal offices located at 3000 Westchester Ave., Harrison, New York. CVS (a/k/a CVS Pharmacies or Consumer Value Stores), with principal offices located at One CVS Drive, Woonsocket, Rhode Island, is a division of Melville. In 1986, the retail sale of prescription drugs accounted for a significant portion of sales of the approximately 115 pharmacies that respondent Melville operated under the CVS name in New York State.

PAR. 6. Respondent Peterson Drug Company of North Chili, New York, Inc. ("Peterson") is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal offices located at 68 North Main Street, Oakfield,

New York. The retail sale of prescription drugs accounts for a significant portion of the sales of the approximately 18 pharmacies that respondent Peterson operates in New York State.

PAR. 7. Respondent Rite Aid Corporation ("Rite Aid") is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal offices located at Railroad Ave. and Trindle Road, Shiremanstown, Pennsylvania. In 1986, the retail sale of prescription drugs accounted for a significant portion of the sales of the approximately 260 pharmacies that respondent Rite Aid operated in New York State.

PAR. 8. Respondent James E. Krahulec is an individual and was employed by respondent Rite Aid as Vice-President, Government and Trade Relations in 1986 in respondent Rite Aid's principal offices at Railroad Ave. and Trindle Road, Shiremanstown, Pennsylvania.

PAR. 9. Except to the extent that competition has been restrained as alleged herein, members of respondent Chain Association have been and now are in competition among themselves and with other pharmacy firms and other health care providers in the state of New York.

PAR. 10. Respondents' general businesses or activities, and the acts and practices described below, are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act, 15 U.S.C. 45.

PAR. 11. Respondent Chain Association is, and has been at all times relevant to this complaint, a corporation organized for the profit of its members within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

PAR. 12. Customers often receive prescriptions through health benefit programs under which a third-party payer compensates the pharmacy for the prescription according to a predetermined formula. The New York State Employees Prescription Program is a prescription drug benefit plan made available by the State of New York to its employees, its retirees, certain other persons, and their dependents. There were approximately 500,000 beneficiaries covered by the Employees Prescription Program in 1986. Since July 1, 1986, The Equitable Life Assurance Society of the United States has insured the Employees Prescription Program, and PAID Prescriptions, Inc., a wholly-owned subsidiary of Medco Containment Services, Inc., has administered it.

PAR. 13. Pharmacies are solicited to participate in the Employees

Prescription Program. Pharmacies that participate in the Employees Prescription Program accept as payment in full a reimbursement of the ingredient cost of the drug and a professional fee for dispensing the drug. The Employees Prescription Program provides a formula for determining the reimbursement of the ingredient cost of drugs dispensed.

PAR. 14. Absent collusion between or among pharmacy firms, each pharmacy firm would decide independently whether to participate in the Employees Prescription Program, and the State of New York would enjoy the benefits of competition among pharmacy firms.

PAR. 15. In May 1986, PAID Prescriptions, Inc. formally solicited pharmacy participation in the Employees Prescription Program under terms to become effective on July 1, 1986. Among the proposed terms were changes in the reimbursement level for ingredient costs, an increase in the professional fee, and the offer of additional reimbursement for the use of generic drugs. The proposed terms were intended to reduce the price the State paid for the Employees Prescription Program, and thus minimize costs, and yet to offer reimbursement high enough to attract a sufficient number of participating pharmacies to ensure that Employees Prescription Program beneficiaries would have adequate access to medication.

PAR. 16. In 1986, respondents Melville, Fay's, Kinney, Peterson, and Rite Aid ("respondent pharmacy firms") participated in many prescription drug benefit plans offered by third-party payers, including the Employees Prescription Program as it existed prior to July 1. Each respondent pharmacy firm purchased prescription drugs at a cost which on average was below the Employees Prescription Program's proposed level of reimbursement for ingredient costs. Each respondent pharmacy firm would have suffered a significant loss of customers had its competitors participated in the Employees Prescription Program at a time when it was not participating.

PAR. 17. Even before PAID formally solicited pharmacy participation in the Employees Prescription Program, New York State began to inform pharmacists' associations of the proposed terms. In or before March 1986, respondent Chain Association became aware of the proposed terms of the Employees Prescription Program, and, in response, communicated to members that the extent to which pharmacies participated in the Employees Prescription Program could affect state officials' consideration of the reimbursement level. Respondent Chain Association held meetings at which some respon-

dent pharmacy firms informed other pharmacy firms that they would not participate in the proposed Employees Prescription Program. Respondent pharmacy firms communicated information regarding their own intentions concerning participation in the Employees Prescription Program to other pharmacy firms. Respondent Chain Association and respondent Krahulec communicated, to Chain Association members and other pharmacy firms, information regarding the intentions of Chain Association members and other pharmacy firms concerning participation in the Employees Prescription Program. Through these exchanges of information and other acts, and through the activities of respondent Chain Association and respondent Krahulec, respondent pharmacy firms and other pharmacy firms agreed to refuse to participate in the Employees Prescription Program at the proposed reimbursement level, for the purpose of increasing the level of reimbursement offered by the State of New York under the Employees Prescription Program.

PAR. 18. Respondents have restrained competition among pharmacy firms by conspiring among themselves and others, or by acting as a combination, to increase the price paid to participating pharmacies under the Employees Prescription Program and to deny to the State the benefits of competition.

PAR. 19. The combination of conspiracy and the acts and practices described above have unreasonably restrained and continue unreasonably to restrain competition among pharmacists and pharmacies in New York, and have injured consumer in the following ways, among others:

A. Price competition among pharmacy firms with respect to third-party prescription benefit plans has been and continues to be reduced;

B. The State of New York was coerced into raising the prices paid to pharmacies under the Employees Prescription Program; and,

C. The State of New York has been and continues to be forced to pay substantial additional sums for prescription drugs provided to Employees Prescription Program beneficiaries, including approximately seven million dollars for the eighteen-month period beginning on July 1, 1986.

PAR. 20. The combination or conspiracy and the acts described above constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. The combination or conspiracy, or the effects thereof, are

continuing, will continue, or will recur in the absence of the relief herein requested.

Commissioners Azcuenaga and Machol voted in the negative.

STATEMENT OF COMMISSIONER MARGOT E. MACHOL

The case as presented to the Commission was a very complex one, both factually and legally. It alleged a conspiracy among the Chain Pharmacy Association, a number of drugstore chains operating in New York State, and an executive of one of the chains, to coerce the State into raising proposed prescription drug payments to pharmacies under its employee benefit program by threats of refusal to participate in that program.

Each of the pharmacies and pharmacy chains eligible to participate in the program, of course, was free to make its own decision on whether to agree to do so or to threaten to withhold participation. Liability, under the law we administer, would attach only to conspiracy or collusion in reaching such decisions.

Further, the *Noerr/Pennington* line of cases in the Supreme Court teaches us that even commercial enterprises may not be held accountable under the antitrust laws for conspiring or colluding to exercise their right to petition governments, a right protected under the First Amendment. Through this area of the law is itself complex, it is clear that many of the activities in which the parties engaged in this case were thus protected.

As to the activities alleged in this case which would not be protected by *Noerr*, the information we received clearly contained no "smoking gun" evidence of conspiracy. We could find the necessary "reason to believe" that a violation had occurred only on the basis of circumstantial evidence. But, in the *Matsushita/Monsanto* line of Supreme Court cases, we are taught that an inference of conspiracy must be supported by at least some significant evidence of activity which was logically consistent only with conspiracy. That is, if the activity of each member of an alleged conspiracy was wholly consistent with its pursuit of its unilateral self-interest, that inference must fail.

In my view, the inference in this case—on the information available to support issuance of a complaint—fails for that reason. I believe—again on this information—that it was in the independent interest of each chain pharmacy to threaten to refuse to participate in the program unless prices were raised, because, if the threat had failed to

achieve a price increase, the pharmacy could then have reversed itself and participated. The costs of such a strategy were very limited; the potential gains were very large.

It seems clear that the parties to the alleged conspiracy exchanged a good deal of information. It seems very doubtful that it can be established that they conspired with respect to their decisions to threaten non-participation, however, because they did not need to. Their conversations appear to me to have taken place in the context of protected lobbying activity; their actions seem to have been entirely consistent with their individual economic self-interest; and there simply was not sufficient evidence from which I could find reason to believe in the existence of an unlawful conspiracy.¹

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondent Melville Corporation 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, its 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

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, and Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Melville Corporation is a corporation organized,

¹ Should I have occasion to review this matter following a proceeding before an administrative law judge, I will of course reconsider the factual issues presented solely on the basis of the adjudicative record.

existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at One Theall Road, in the City of Rye, State of 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 the order, the following definitions shall apply:

A. "*Melville*" means Melville 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 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, 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 Melville. 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 Melville, directly, indirectly, or through any corporate or other device, in or in connection with its pharmacy operations and activities, including but not limited to those of its CVS division, 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 Melville 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 Melville 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 Melville and the other pharmacy firm have entered, could enter or are considering entering.

Provided, that nothing in this order shall prevent Melville 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 otherwise 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; or

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

III.

It is further ordered, That Melville:

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 Melville's 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 Melville:

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 Melville, 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 Melville or that come into Melville's possession, custody, or control regardless of source, that embody, discuss or refer to the decision or upon which Melville relies in deciding whether to enter into any participation agreement in which Melville participates, has participated, or has considered participating; and

C. Notify the Commission at least thirty (30) days prior to any proposed change in Melville such as, assignment or sale resulting in

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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.

Commissioner Azcuenaga dissenting and Commissioner Starek not participating.

IN THE MATTER OF

RITE AID 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 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. Bokat and Michael D. McNeely.*

For the respondent: *William C. Pelster, Skadden, Arps, Slate, Meagher & Flom, New York, N.Y.*

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondent Rite Aid Corporation 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, its 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

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

* Complaint previously published at 114 FTC 171 (1991).