

IN THE MATTER OF

CHAIN PHARMACY ASSOCIATION OF
NEW YORK STATE, INC.CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket 9227. Complaint, April 19, 1989—Decision, June 20, 1991*

This consent order prohibits, among other things, the pharmaceutical association from organizing or entering into any agreement among pharmacy firms to withdraw from or refuse to enter into a third-party payer prescription drug plan; for ten years, from continuing any meeting of representatives of pharmacy firms at which any person makes any statement concerning whether any firm will enter into or refuse to enter into any third-party payer prescription drug plan; and for eight years, from providing comments or advice to any pharmacist or pharmacy firm on the desirability or appropriateness of entering into or refusing to enter into any third-party payer prescription drug plan.

Appearances

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

For the respondent: *Michael E. Rosen, Valatie, N.Y. and Willard K. Tom, Sutherland, Asbill & Brennan, 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 respondent 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 or 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 consumers 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. Though 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 Chain Pharmacy Association of New York State, Inc. 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, the Commission hereby makes the following jurisdictional findings and enters the following order:

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.

1. Respondent Chain Pharmacy Association of New York State, Inc., is a corporation organized, 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 28 Fairway Lane, in the City of Schenectady, 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 this order, the following definitions shall apply:

A. "*Chain Association*" means the Chain Pharmacy Association of New York, Inc., and its directors, committees, officers, representatives, agents, employees, 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 any of the above which contract with the State of New York or other governmental units to provide 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 Chain Association, 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. 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 a meeting of representatives of pharmacy firms at which 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;

C. For a period of ten (10) years after the date this order becomes final, communicating to any pharmacist or pharmacy firm any information concerning any other 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;

D. For a period of eight (8) years after the date this order becomes final, providing comments or advice to any pharmacist or pharmacy firm on the desirability or appropriateness of participating in any existing or proposed participation agreement. However, nothing in this paragraph shall prohibit Chain Association from communicating purely factual information describing the terms and conditions of any participation agreement or operations of any third-party payers; and

Provided that nothing in this order shall be construed to prevent

Chain Association 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 Chain Association:

A. Distribute by first-class mail a copy of this order and the accompanying complaint to each of its members within thirty (30) days after the date this order becomes final;

B. Publish this order and the accompanying complaint in an issue of the Chain Association newsletter or in any successor publication published no later than sixty (60) days after the date this order becomes final, in the same type size normally used for articles that are published in the Chain Association Newsletter or successor publication;

C. For a period of five (5) years after the date this order becomes final, provide each new Chain Association member with a copy of this order at the time the member is accepted into membership;

D. 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 Chain Association, require, setting forth in detail the manner and form in which it has complied and is complying with the order;

E. 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, records adequate to describe in detail any action taken in connection with the activities covered by Parts II and III of this order, including, but not limited to, all documents generated by Chain Association or that come into Chain Association's possession, custody, or control regardless of source, that embody, discuss or refer to the terms or conditions of any participation agreement; and

F. Notify the Commission at least thirty (30) days prior to any proposed change in Chain Association such as, assignment or sale resulting in the emergence of a successor corporation or association,

change of name, change of address, dissolution, or any other change that may affect compliance with this order.

Commissioner Azcuenaga dissenting.

IN THE MATTER OF

RICHARD B. PALLACK, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE
WOOL PRODUCTS LABELING ACT AND THE
FEDERAL TRADE COMMISSION ACT

Docket C-3333. Complaint, June 24, 1991—Decision, June 24, 1991

This consent order prohibits, among other things, a California retailer of men's clothing and accessories, and an officer of the corporation, from importing, transporting, distributing, delivering, or selling wool products that are misbranded; from removing or mutilating any stamp, tag, label or other identification required by the Wool Products Labeling Act, prior to the time the wool product is sold/delivered; and from misrepresenting the country of origin of such products. In addition, the respondents are required to distribute a copy of the order to all present and future personnel.

Appearances

For the Commission: *Paul R. Roark.*

For the respondents: *Ralph F. Hirschmann, Hennigan and Mercer,*
Los Angeles, CA.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, 15 U.S.C. 41 *et seq.*, and the Wool Products Labeling Act of 1939, 15 U.S.C. 68 *et seq.*, (hereinafter "Wool Act") and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Richard B. Pallack, Inc., a corporation, and Richard B. Pallack, individually and as an officer of said corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Acts, 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. Respondent Richard B. Pallack, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 4554 Sherman Oaks Avenue, Sherman Oaks, CA.