

IN THE MATTER OF
FAY'S INCORPORATED

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 25, 1991*

This consent order prohibits, among other things, a pharmaceutical firm 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 stating or communicating to any pharmacy firm the intent to 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. McNeeley*.

For the respondent: *Paul J. Curtin, Jr., Law Offices of C. Daniel Shulman*, Syracuse, N.Y.

DECISION AND ORDER

The commission having heretofore issued its complaint charging the respondent Fay's Drug Company, 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The Secretary of the Commission having thereafter withdrawn this

*Order amending complaint to reflect changed name of respondent issued August 17, 1990 (113 FTC 762). Complaint previously published at 114 FTC 327.

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 Fay's Incorporated 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 7245 Henry Clay Boulevard, Liverpool, 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. "*Fay's*" means Fay's Incorporated, 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 Fay's. 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 Fay's, 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 Fay's 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 Fay's 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 Fay's and the other pharmacy firm have entered, could enter or are considering entering.

Provided that, nothing in this order shall prevent Fay's 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 Fay's:

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 Fay'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 Fay's:

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

C. Notify the Commission at least thirty (30) days prior to any proposed change in Fay's 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.

Commissioner Azcuenaga dissenting.

IN THE MATTER OF

CANANDAIGUA WINE COMPANY

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT .

Docket C-3334. Complaint, June 26, 1991—Decision, June 26, 1991

This consent order prohibits, among other things, the maker of Cisco, a flavored wine product, from representing that Cisco is a low-alcohol product, from implying that a bottle of Cisco constitutes a single serving, and from displaying Cisco next to low-alcohol products like wine coolers. In addition, the consent order requires new packaging for the product.

Appearances

For the Commission: *Judith D. Wilkenfeld.*

For the respondent: *Ronald A. Block, McDermott, Will & Emery,*
Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that Canandaigua Wine Company ("respondent"), has violated Sections 5 and 12 of the Federal Trade Commission Act (15 U.S.C. 45 and 52), and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent Canandaigua Wine Company is a Delaware corporation with its office and principal place of business located at 116 Buffalo Street, Canandaigua, New York.

PAR. 2. Respondent has advertised, offered for sale, sold, and distributed fruit-flavored wine products with an alcohol content of 20% by volume to the public under the registered trademark Cisco. Cisco is a "food" as that term is defined in Section 12 of the Federal Trade Commission Act.

PAR. 3. The acts and practices of respondent alleged in this complaint have been in or affecting commerce.

PAR. 4. Respondent has distributed or caused to be distributed Cisco in packaging resembling that of a wine cooler or other low-alcohol, single-serving beverage. The Cisco bottles, depicted on attached