

IN THE MATTER OF

SOUTHEAST COLORADO PHARMACAL ASSOCIATION

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

Docket C-3410. Complaint, Jan. 15, 1993--Decision, Jan. 15, 1993

This consent order prohibits, among other things, a Colorado-based association of pharmacies, that dispense prescriptions which are paid for by third-party payers according to predetermined formulas, from entering into or threatening to enter into any agreement with pharmacies to withdraw or to refuse to participate in these kinds of reimbursement programs in the future.

Appearances

For the Commission: *Claude W. Wild, III* and *Jeffery Dahnke*.

For the respondent: *John Geddes*, President, La Junta, CO.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and by virtue of the authority vested in it by the Act, the Federal Trade Commission, having reason to believe that the Southeast Colorado Pharmacal Association, hereinafter sometimes referred to as respondent, has violated the provisions of the 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:

RESPONDENT

PARAGRAPH 1. Respondent Southeast Colorado Pharmacal Association ("SCPhA") is an unincorporated association of pharmacies doing business in the State of Colorado, with its office and principal place of business located at 15 W. 22nd Avenue, La Junta, Colorado.

PAR. 2. SCPhA's members are generally engaged in the business of the retail sale of prescription drugs. At all times relevant to this complaint, SCPhA members included the following pharmacies located in southeastern Colorado: Ordway Pharmacy, Harris Pharmacy, Sunnyside Pharmacy, Gibson's Pharmacy (La Junta), Jeffers Pharmacy, Loma Vista Pharmacy, Opera House Pharmacy, City Pharmacy, Val-U-Med Healthmart, Coles Prescription Pharmacy, Corner Pharmacy, Geddes Drug, Gibson's Pharmacy (Lamar), Jim's Pharmacy, L-M Healthmart, Gale Drug, Ray's Pharmacy, Walsh Drug, and Kiowa Drug. Except to the extent that competition has been restrained as alleged herein, SCPhA's members have been and now are in competition among themselves and with other pharmacy firms in southeastern Colorado.

JURISDICTION

PAR. 3. SCPhA is and has been at all times relevant to this complaint 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. 4. In the course and conduct of their businesses and through the policies, acts, and practices described below, SCPhA and its members are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act, 15 U.S.C. 45.

COMPETITION

PAR. 5. In their course of business, pharmacy firms fill prescriptions for customers which are often paid for by health insurance plans which provide coverage for prescription drugs. Through the Public Employees' Retirement Association of Colorado ("PERA"), the State of Colorado offers a Health Care Program to retired employees ("beneficiaries") which includes a prescription drug plan ("the Plan"). Since January 1, 1987, Pharmaceutical Card Services, Inc. ("PCS"), a nationwide administrator, has administered the Plan on behalf of PERA.

PAR. 6. In order to administer prescription drug plans sponsored by third-party payers such as PERA, PCS enters into participation agreements with pharmacies under which pharmacies accept as payment in full (1) a reimbursement of the ingredient cost of the drug, and (2) a dispensing fee, for those prescriptions filled for individuals covered by a prescription drug plan. Under the Plan offered by PERA, part of the payment in full accepted by pharmacies is paid by the beneficiary as a co-payment. Payment by third-party payers under PCS administered prescription drug plans is usually made to the participating pharmacy.

PAR. 7. Absent collusion between or among pharmacies, each pharmacy firm would decide independently whether to enter into a participation agreement with PCS. Such independent action would insure that PERA and the beneficiaries of the Plan would enjoy the benefits of competition among pharmacies.

PAR. 8. Effective July 1, 1988, PERA and PCS lowered the reimbursement level for the ingredient cost of prescriptions filled under PERA's prescription drug plan in order to contain escalating costs for the prescription drugs used by the Plan's beneficiaries.

ANTICOMPETITIVE ACTS AND PRACTICES

PAR. 9. During July 1988, in response to the change in reimbursement level, respondent SCPhA, acting through its president, John W. Geddes, communicated with other SCPhA members regarding participation in the Plan and scheduled a meeting of SCPhA members. In his communications with SCPhA members, Mr. Geddes also advised them of his own intention not to participate in the Plan.

PAR. 10. SCPhA conducted the above referenced meeting in July 1988, and SCPhA members there agreed not to participate in the Plan. SCPhA members also agreed to send a letter to PERA, drafted by Mr. Geddes and signed by all members, to urge PERA to reconsider and change the new reimbursement formula. In connection with this letter, SCPhA members agreed to give PERA until September 30, 1988, to resolve their concerns. Finally, SCPhA

members agreed to place notices in local newspapers announcing to the public their refusal to participate in the Plan if PERA did not change the reimbursement formula by the September 30, 1988, deadline.

PAR. 11. Pursuant to the agreements arrived at during the above referenced meeting, John W. Geddes sent a letter to PERA on or about August 1, 1988, signed by most SCPhA members, urging PERA to increase its reimbursement level. The letter stated that the pharmacies expected PERA to resolve their concerns no later than September 30, 1988. Mr. Geddes also wrote to PERA on or about October 1, 1988, on behalf of SCPhA, to inform PERA that SCPhA members would not participate in the plan and that notices would be placed in local newspapers announcing to the public that SCPhA members would not participate in the Plan. On or about October 1, 1988, Mr. Geddes placed such notices in at least two local newspapers.

PAR. 12. The refusal of SCPhA's members to participate in the Plan has required individuals covered by the Plan to pay for prescriptions directly and seek reimbursement from PERA through PCS. Individual consumers have incurred additional expenses since the difference in the amount of money paid to the pharmacy and the amount reimbursed by PCS is greater than the co-payment under the Plan.

ANTICOMPETITIVE EFFECTS

PAR. 13. Respondent SCPhA has restrained competition among pharmacies by conspiring with at least some of its members to engage in a concerted refusal to deal with PERA, in order to increase the price paid for prescriptions filled for individuals covered by the Plan and to deny PERA and these individuals the benefits of competition.

PAR. 14. The combination or conspiracy and the acts and practices described above have unreasonably restrained competition among pharmacy firms in southeastern Colorado, and have injured consumers by increasing prices paid to pharmacies for prescription drugs with respect to third-party prescription benefit plans.

PAR. 15. 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 are likely to recur in the absence of the relief herein requested.

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 complaint which the Denver Regional Office 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, by its duly authorized officer, 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 aforesaid draft of 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 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 Southeast Colorado Pharmacal Association is an unincorporated association of pharmacies, existing and doing busi-

ness under the laws of the State of Colorado, with its office and principal place of business located at 15 W. 22nd Avenue, in the City of La Junta, State of Colorado.

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. “*SCPhA*” means the Southeast Colorado Pharmacal Association 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 Shield and Blue Cross plans; health maintenance organizations; preferred provider organizations; government health benefits programs; prescription service administrative organizations; administrators of self-insured health benefits programs; and employers or other entities providing self-insured health benefits programs;

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 SCPhA, 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, 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 proposed or existing participation agreement;

B. For a period of five (5) years after the date this order becomes final, continuing a formal or informal meeting of representatives of pharmacy firms 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 SCPhA fails to eject such person from the meeting, or (2) two persons make such statements;

C. For a period of five (5) years after the date this order becomes final, providing advice to any pharmacy firm on the desirability or appropriateness of participating in any existing or proposed participation agreement. *Provided, however*, that nothing in this paragraph II.C. shall prohibit SCPhA from communicating purely

factual information describing the terms and conditions of any participation agreement or operations of any third-party payer;

D. For a period of five (5) years after the date this order becomes final, communicating in any way to any 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;

E. For a period of five (5) years after the date this order becomes final, soliciting from any pharmacy firm any information concerning that firm's or 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;

Provided, however, that nothing in this order shall be construed to prevent SCPhA 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 SCPhA:

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

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

C. 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

becomes final, and at such other times as the Commission may require, by written notice to SCPhA, setting forth in detail the manner and form in which it has complied and is complying with this order;

D. 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 paragraphs II. and III. of this order, including but not limited to, all documents generated by SCPhA or that come into SCPhA's possession, custody, or control regardless of source, that embody, discuss or refer to the terms or conditions of any participation agreement; and

E. Notify the Commission at least thirty (30) days prior to any proposed change in SCPhA 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.

IN THE MATTER OF
SITE FOR SORE EYES, INC.

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

Docket C-3411. Complaint, Jan. 15, 1993--Decision, Jan. 15, 1993

This consent order requires, among other things, a California chain of retail stores that sell eye-care products and services to have competent and reliable scientific evidence to substantiate any future claim that any lens, shade, coating or other material sold in connection with eyeglasses protects eyes from radiation from any source. In addition, the respondent is required to maintain materials relied upon to substantiate claims covered by the order and to distribute copies of the order to specified individuals and entities.

Appearances

For the Commission: *Linda K. Badger* and *Matthew D. Gold*.

For the respondent: *Pro se*.

COMPLAINT

The Federal Trade Commission, having reason to believe that Site for Sore Eyes, Inc., a corporation, ("respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Site for Sore Eyes, Inc., is a California corporation, with its principal office or place of business at 3512 Breakwater Court, Hayward, California.

PAR. 2. Respondent operates a chain of retail stores offering a variety of eye care products and services. In the course and conduct of its business, respondent has engaged in the promotion, offering for sale, sale, and distribution to the public of a coating for eyeglasses to