

IN THE MATTER OF

BALTIMORE METROPOLITAN PHARMACEUTICAL
ASSOCIATION, INC., ET AL.

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

Docket 9262. Complaint, Sept. 28, 1993--Decision, Feb. 25, 1994

This consent order prohibits, among other things, two Maryland associations from entering into, or organizing or encouraging any agreement among pharmacy firms to refuse to participate in third-party payer prescription drug reimbursement plans and prohibits, for five years, the respondents from providing comments or advice to any pharmacist or pharmacy on the desirability, profitability, or appropriateness of participating in any existing or proposed participation agreement.

Appearances

For the Commission: *John R. Hoagland* and *Michael D. McNeely*.

For the respondents: *Joseph Kaufman, Fedder & Garten, P.A.*,
Baltimore, MD.

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 Baltimore Metropolitan Pharmaceutical Association and the Maryland Pharmacists Association, Inc. (hereinafter sometimes referred to as "BMPhA" and "MPhA," respectively, or as "respondents," collectively), 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 in that respect as follows:

PARAGRAPH 1. Respondent Baltimore Metropolitan Pharmaceutical Association, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland. Respondent Maryland Pharmacists Association, Inc., is

a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland. Both respondents have their offices and principal places of business located at 650 West Lombard Street, Baltimore, Maryland. Respondents are associations of pharmacists who practice or reside in the State of Maryland. In 1988, respondents were, and still are, affiliated.

PAR. 2. Respondents share common offices and staff, including a common executive director. Most of respondent BMPPA's members are also members of respondent MPhA.

PAR. 3. Members of respondents hold ownership interests in or manage pharmacy firms that, except to the extent that competition has been restrained as alleged herein, have been and are now in competition with each other and with other pharmacy firms and other health care providers in the State of Maryland.

PAR. 4. Respondents' general business or activities, and the acts and practices described below, are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. Respondents are and have been, at all times relevant to this complaint, corporations organized for the profit of their members within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

PAR. 6. Customers often receive prescriptions through health benefit programs under which a third-party payer compensates the pharmacy directly for the prescription according to a predetermined formula ("prescription drug benefit plan"). A pharmacy that has agreed to accept reimbursements under this formula is called a "participating pharmacy." One of the primary consumer benefits of such programs is that the customer is required to pay only a small set amount, known in the industry as the "customer co-pay," to the participating pharmacy for each prescription, regardless of the actual price of the prescription.

PAR. 7. PCS Plan #354 ("Plan") was a prescription drug benefit plan made available by the City of Baltimore, Maryland, ("City") to its employees, its retirees, and their dependents. There were approximately 100,000 beneficiaries covered by the Plan in 1988. Between August 1, 1987, and June 30, 1989, The Prudential Insurance Company of America ("Prudential") insured the Plan, and PCS, Inc. ("PCS") administered the Plan. While the contract between the City and Prudential did not set the reimbursement terms of the Plan, thus permitting Prudential to change the reimbursement rate at

any time, the contract did require Prudential to have at least 100 participating pharmacies within the City.

PAR. 8. Pharmacies were initially solicited to participate in the Plan for the period August 1, 1987, to June 30, 1989. Participating pharmacies in the Plan accepted as payment in full a reimbursement of the ingredient cost of the drug and a professional fee for dispensing the drug. A portion of the professional fee was in the form of the customer co-pay. The Plan set the Average Wholesale Price ("AWP") of the drug as the upper limit for the reimbursement of the ingredient cost of drugs dispensed. Prior to August 15, 1988, most pharmacies in the State of Maryland billed PCS at AWP for the drugs dispensed under the Plan.

PAR. 9. In 1988, respondents' members held ownership interests in pharmacy firms that participated in many prescription drug benefit plans offered by third-party payers, including the Plan as it existed prior to August 15, 1988. These pharmacy firms would have suffered a significant loss of customers had their competitors participated in the Plan when they were not participating.

PAR. 10. On August 5, 1988, PCS sent letters to all of the pharmacies participating in the Plan announcing that, on August 15, 1988, Prudential would reduce the upper limit of the reimbursement rate for ingredient costs for drugs to AWP minus 10%. The proposed reduction was intended to minimize costs by reducing the price paid the pharmacies for serving City employees, retirees, and their dependents, while offering a reimbursement rate high enough to attract a sufficient number of pharmacies to ensure that there were at least 100 participating pharmacies within the City.

PAR. 11. Absent collusion between or among pharmacy firms, each pharmacy firm would have decided independently whether to participate in the Plan, and the City would have enjoyed the benefits of competition among pharmacy firms.

PAR. 12. On about August 12, 1988, respondents' members began informing respondents of the proposed reduction in the Plan's reimbursement rate. Respondents held meetings where the reimbursement rate reduction and possible action in response to it were discussed. Respondents communicated to pharmacists the need for pharmacies within the City to refuse to participate in the Plan so that Prudential would be in violation of its contractual obligation to have at least 100 participating pharmacies within the City and thus be forced to raise the reimbursement rate to its original level.

Respondents requested pharmacists to notify them if their pharmacies did not intend to participate in the Plan. Respondents kept a list identifying those pharmacies that intended to stop participating in the Plan and communicated this information to their members. Through these exchanges of information, respondents' members were informed that a sufficient number of pharmacies had agreed to stop participating in the Plan to reduce the number of participating pharmacies within the City to below 100.

PAR. 13. At some point in late September or early October, 1988, many of respondents' members agreed to stop participating in the Plan as of November 1, 1988. Respondent BMPA sent a letter to City pharmacists in late October, 1988, which urged member pharmacists to "follow through with your November 1 commitment to no longer accept discounted AWP reimbursements." By October 31, 1988, more than 75 pharmacies operated by member pharmacists within the City had agreed to stop participating in the Plan. On November 1, 1988, these pharmacies began to boycott the Plan.

PAR. 14. As a result of the activities described above and the resulting boycott, Prudential was placed in violation of its contract with the City and was forced to raise the reimbursement rate back to AWP on November 5, 1988.

PAR. 15. Respondents have restrained competition among pharmacy firms by conspiring with their members and with others, and by acting as a combination of their members, to increase the price paid to participating pharmacies under the Plan.

PAR. 16. The combination or conspiracies and the acts and practices described above have unreasonably restrained competition among pharmacists and pharmacies in the State of Maryland, and have injured consumers in the following ways, among others:

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

B. The cost of providing prescription drug benefit plans was increased.

PAR. 17. The combination or conspiracies and the acts and practices 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 conspiracies, or the

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

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondents named in the caption hereof with violation of Section 5 of the Federal Trade Commission Act, as amended, and the respondents having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondents, their attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all 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 respondents 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 sixty (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 Baltimore Metropolitan Pharmaceutical Association is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Maryland. Respondent Maryland Pharmacists Association is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Maryland. Both respondents have their offices and principal places of business at 650 West Lombard Street, Baltimore, Maryland.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

I.

For purposes of this order, the following definitions shall apply:

A. “*BMPA*” means the Baltimore Metropolitan Pharmaceutical Association, Inc., and its directors, committees, officers, agents, representatives, employees, successors and assigns;

B. “*MPhA*” means the Maryland Pharmacists Association, Inc., and its directors, committees, officers, agents, representatives, employees, successors and assigns;

C. “*Third-party payer*” means any person or entity that provides a program or plan pursuant to which such person or entity agrees to pay for prescriptions dispensed by pharmacies to individuals described in the plan or program as eligible for 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;

D. “*Participation agreement*” means any existing or proposed agreement, oral or written, in which a third-party payer agrees to reimburse a pharmacy firm for the dispensing of prescription drugs to Covered Persons, and the pharmacy firm agrees to accept such payment from the third-party payer for such prescriptions dispensed during the term of the agreement;

E. “*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 BMPA and MPhA, directly, indirectly, or through any corporate or other device, in or in connection with their 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 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 BMPA or MPhA fails to eject such person from the meeting, or 2) two persons make any such statements;

C. For a period of five (5) years after the date this order becomes final, communicating in any way to, or soliciting in any way from, any pharmacist or pharmacy firm 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 five (5) years after the date this order becomes final, providing comments or advice to any pharmacist or pharmacy firm on the desirability, profitability or appropriateness of participating in any existing or proposed participation agreement. However, nothing in this paragraph shall prohibit BMPA or MPhA 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 BMPA or MPhA from exercising rights protected under the First

Amendment to the United States Constitution to petition any federal, state, or local government executive agency or legislative body concerning legislation, rules, programs, procedures, or plans, or to participate in any federal, state, or local administrative or judicial proceeding.

III.

It is further ordered, That:

A. BMPA distribute by first-class mail a copy of this order and the accompanying complaint to each of its members within sixty (60) days after the date this order becomes final;

B. MPhA distribute by first-class mail a copy of this order and the accompanying complaint to each of its members that is not also a member of BMPA, within sixty (60) days after the date this order becomes final;

C. MPhA publish this order and the accompanying complaint in an issue of The Maryland Pharmacist or in any successor publication published no later than ninety (90) days after the date this order becomes final, in the same type size normally used for articles that are published in The Maryland Pharmacist or successor publication;

D. BMPA and MPhA, for a period of five (5) years after the date this order becomes final, provide each new BMPA member and MPhA member with a copy of this order at the time the member is accepted into membership of BMPA or MPhA;

E. BMPA and MPhA each 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 BMPA or MPhA, require, setting forth in detail the manner and form in which it has complied and is complying with the order;

F. BMPA and MPhA 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 BMPA or MPhA or that come into BMPA's or MPhA's possession, custody, or control regardless

of source, that embody, discuss or refer to the terms or conditions of any participation agreement; and

G. BMDPA and MPhA notify the Commission at least thirty (30) days prior to any proposed change in BMDPA or MPhA 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.

Complaint

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IN THE MATTER OF

ALVEY HOLDINGS, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF
THE FEDERAL TRADE COMMISSION ACT

Docket C-3488. Complaint, Mar. 30, 1994--Decision, Mar. 30, 1994

This consent order requires, among other things, a Missouri-based corporation and its wholly-owned subsidiary to divest, to a Commission-approved buyer, its own horizontal carousel business within six months of acquiring White Storage & Retrieval Systems, Inc., otherwise, a Commission-appointed trustee will complete the divestiture. In addition, the respondents are required to comply with all the terms of a Hold Separate Agreement, and are prohibited, for a period of ten years, from acquiring, without prior Commission approval, any interest in any entity engaged in the manufacture or sale of horizontal carousels in the United States within the previous two years.

Appearances

For the Commission: *M. Howard Morse, Allee A. Ramadhan and Morris A. Bloom.*

For the respondents: *James Clark and Kenneth Doran, Gibson, Dunn & Crutcher, Los Angeles, CA.*

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 ("Commission"), having reason to believe that respondents Alvey Holdings, Inc., and Alvey, Inc. (collectively Alvey), have entered into a Stock Purchase Agreement in which Alvey agreed to purchase from Donald J. Weiss 100% of the voting securities of White Storage & Retrieval Systems, Inc. ("White"), in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and that such acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and it appearing to the Commission that a proceeding