

IN THE MATTER OF
ASOCIACION DE FARMACIAS REGION
DE ARECIBO, INC., ET AL.

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

Docket C-3855. Complaint, March 2, 1999--Decision, March 2, 1999

This consent order, among other things, prohibits an association of approximately 125 pharmacies operating in northern Puerto Rico and one of its officers from jointly negotiating prices or other terms for pharmacies and jointly boycotting, threatening to boycott, or refusing to provide pharmacy goods and services to any payer or provider.

Participants

For the Commission: *Gary Schorr, Steven Osnowitz, Michael Kades, Patricia Allen, David Pender, Anne Schenof, Daniel Ducore, William Baer, Louis Silvia and Peter Gulyn.*

For the respondents: *Eric Tulla, San Juan, Puerto Rico.*

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 Asociacion de Farmacias de Region Arecibo ("respondent AFRA") and Ricardo L. Alvarez Class ("respondent Alvarez") 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. This complaint concerns the respondents' agreement to set the price and other terms and conditions under which they would participate in "the Reform," the Puerto Rican program established under the Puerto Rico Health Insurance Administration Act of 1993, Act No. 72, Article II, to provide care to Puerto Rico's indigents. The Government of Puerto Rico established the Reform in order to provide high quality health care, including pharmacy goods and services, to its indigents.

RESPONDENTS

PAR. 2. Respondent AFRA is a nonprofit corporation organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Puerto Rico, with its principal place of business at Suite 336, GPO Box 3016, Manati, Puerto Rico.

PAR. 3. Respondent Alvarez is an owner of Empresas Alvasie, which operates Farmacia Elda in Manati, Puerto Rico. He served as AFRA's President from its inception until March 1997, and is currently AFRA's treasurer. Respondent Alvarez's principal place of business is located at Barrio Cantera Carr. #2, Km. 44.5, Manati, Puerto Rico.

JURISDICTION

PAR. 4. Respondent AFRA exists and operates in substantial part for the pecuniary benefit of its members. By virtue of its purposes and activities, respondent AFRA is a "corporation" within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

PAR. 5. The acts and practices of respondents, including those herein alleged, are in or affect commerce within the meaning of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

THE REFORM

PAR. 6. The government of Puerto Rico established the Reform in order to ensure that all island residents have access to quality health care, including pharmacy services, regardless of financial condition and capacity to pay. The Reform is financed by the Commonwealth, Federal Medicaid funds, other applicable Federal funds, contributions by employers and individual employees, and income from privatization funds (such as leases and sales of government-owned health care facilities). To date, the Reform has been implemented throughout much of Puerto Rico, although it is not yet in place in San Juan and its environs, or Ponce. The reform currently covers approximately 1.1 million individuals, 29% of Puerto Rico's total population. When fully operational, the Reform is expected to cover approximately 2 million individuals, over 50% of Puerto Rico's population.

PAR. 7. The law implementing the Reform created the Administración de Seguros de Salud ("ASES"), a public corporation, and charged it with implementing and administering the Reform. ASES divided Puerto Rico into seven regions. With respect to each region, ASES solicits bids from payers to administer the Reform, and to organize and provide services for beneficiaries. ASES then selects one payer per region. That payer then contracts with health care providers, including hospitals, physicians, pharmacies, and dentists.

PAR. 8. After reviewing bids from several payers, ASES selected Triple-S to administer the North Region of the Reform upon the Reform's inception in the Region on April 1, 1995. The North Region consists of the municipalities of Arecibo, Barceloneta, Camuy, Ciales, Florida, Hatillo, Lares, Manati, Morovis, Quebradillas, Utuado, and Vega Baja. The combined population of these municipalities is approximately 434,000, of which 260,000, are beneficiaries under the Reform.

AFRA'S MEMBERSHIP

PAR. 9. All of respondent AFRA's members are pharmacies located in the North Region of the Reform. During the time period during which the acts and practices described in paragraphs fourteen through twenty-one below took place, respondent AFRA's membership included the vast majority of pharmacies operating in the North Region. For much of this time period, respondent AFRA had approximately 125 members, constituting approximately 80% of the pharmacies in the North Region, and at least 64% of the pharmacies in each municipality in the Region.

PAR. 10. Except to the extent that competition has been restrained as alleged herein, some or all of the members of respondent AFRA have been, and are now, in competition among themselves and with other pharmacies in the North region.

PAR. 11. Except to the extent that competition has been restrained as alleged herein, respondent Alvarez, through his ownership of Empresas Alvasie, which operates Farmacia Elda, has been, and is now, in competition with at least some of AFRA's member pharmacies and other pharmacies in the North region.

PAR. 12. Absent agreements among competing pharmacies on the price and other terms upon which they will provide services to third-party payers, competing pharmacies decide individually whether

to enter into contracts with third-party payers, and on the terms and conditions under which they are willing to enter into such contracts.

ANTICOMPETITIVE CONDUCT

PAR. 13. In engaging in the acts and practices described in paragraphs fourteen through twenty-one below, respondent AFRA has acted as a combination of its members and has conspired with at least some of its members including respondent Alvarez.

PAR. 14. Respondent AFRA was formed on November 22, 1994, as a vehicle for its members to deal concertedly with third party payers. Pursuant to a provision in its Articles of Incorporation, and upon agreement of its members, AFRA negotiated on behalf of its members with health plans. In furtherance of this agreement, in December 1994, each AFRA member signed an agreement designating AFRA as its bargaining agent.

PAR. 15. Respondent Alvarez was instrumental in the formation and activities of respondent AFRA. As respondent AFRA's President from its inception until March 1997, respondent Alvarez directed respondent AFRA's efforts to set price and other terms and conditions for participation in the Reform, and provided the leadership necessary to unite otherwise competing pharmacies.

PAR. 16. From approximately January 1995 to the present, respondent AFRA, under the leadership of respondent Alvarez, conspired to fix the terms and conditions, including terms of financial compensation, under which its members would contract with Triple-S and thereby participate in the Reform.

PAR. 17. Beginning in January 1995, respondent AFRA negotiated on behalf of its members with Triple-S the terms and conditions of member participation in the Reform. Specifically, respondent AFRA sought to increase compensation for its members, and to require Triple-S to contract with all its members that sought to do so. Respondent Alvarez was respondent AFRA's principal spokesperson and negotiator in discussions with Triple-S.

PAR. 18. On January 13, 1995, respondent AFRA's members met to discuss the payment terms pursuant to which they would participate in the Reform. Respondent AFRA's members prepared a proposed dispensing fee schedule. Respondent Alvarez exhorted respondent AFRA's members to refuse to sign contracts with Triple-S until advised to do so by respondent AFRA, and directed delegates

from each municipality to spread the word to pharmacies in their respective towns not to sign contracts with Triple-S.

PAR. 19. On January 15, 1995, respondent Alvarez and other AFRA members met with Triple-S, and presented AFRA's proposed dispensing fee schedule. Thereafter, Triple-S raised the dispensing fee for generic pharmaceuticals by one dollar, and AFRA members agreed that they would provide services when the Reform began in the North Region on April 1, 1995.

PAR. 20. In March 1996, Triple-S announced a new price schedule that lowered reimbursement to AFRA's member pharmacies. In response, respondent Alvarez requested a meeting with Triple-S, at which he demanded that Triple-S rescind the new price schedule. When Triple-S refused to rescind the price schedule, respondent Alvarez enlisted AFRA's attorneys to contact Triple-S and threaten legal action. Thereafter, Triple-S raised the dispensing fee paid to pharmacies in the North Region, but kept its new price schedule for pharmaceuticals in place.

PAR. 21. In May 1996, respondent AFRA's members, under respondent Alvarez's leadership and guidance, threatened to withhold services under the Reform as of June 10, 1996, because Triple-S had refused to accede to all of its demands concerning the terms of pharmacy compensation. Specifically, although Triple-S had agreed to raise the dispensing fee paid to pharmacies as demanded by respondent AFRA, Triple-S remained unwilling to comply with respondent AFRA's demands to raise its price schedule for pharmaceuticals. Upon receiving the boycott threat, Triple-S acceded to respondent AFRA's demands and raised the prices it paid to pharmacies for pharmaceuticals, thus averting the threatened boycott. The new fee schedule implemented by Triple-S amounted to a 22% increase over the level of prices paid to AFRA's members under the March 1996 fee schedule. Respondent Alvarez organized and presided over the meeting at which AFRA's members voted to threaten to boycott Triple-S, and composed the letter in which respondent AFRA communicated the boycott threat to Triple-S.

PAR. 22. The individual members of respondent AFRA have not integrated their businesses in any economically significant way, nor have they created any efficiencies that might justify the acts and practices described in paragraphs fourteen through twenty-one.

EFFECTS

PAR. 23. The purpose, tendency, effects, or capacity of respondents' acts and practices as described in paragraphs fourteen through twenty-one are and have been to restrain trade unreasonably and hinder competition in the provision of pharmacy goods and services in the North Region of the Reform in Puerto Rico, in the following ways, among others:

- (a) To restrain competition among pharmacies;
- (b) To fix the compensation and other terms and conditions upon which pharmacies would deal with Triple-S and participate in the Reform, thereby raising the cost of pharmacy goods and services to be furnished to beneficiaries of the Reform;
- (c) To deprive the Commonwealth of Puerto Rico, payers, and consumers of the benefits of competition among pharmacies.

PAR. 24. The combination or conspiracy and the acts and practices of respondents AFRA and Alvarez, as herein alleged, constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. The violation or the effects thereof, as herein alleged, will continue or recur in the absence of the relief herein requested.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of certain acts and practices of the respondents, named in the caption above, and the respondents having been furnished thereafter with a copy of the draft complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission would charge respondents with violation of the Federal Trade Commission Act; 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 of the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purpose only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true and waivers and other provisions as required by Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and the complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent 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 AFRA is a nonprofit corporation organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Puerto Rico, with its principal place of business located at Suite 336, GPO Box 3016, Manati, Puerto Rico.

2. Respondent Alvarez, an individual, is an owner of Empresas Alvasie which operates Farmacia Elda in Manati, Puerto Rico, and is AFRA's former President and current Treasurer. Respondent Alvarez's principal place of business is located at Barrio Cantera Carr. #2, Km. 44.5, Manati, Puerto Rico.

3. 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.

It is ordered, That, for the purposes of this order, the following definitions shall apply:

A. "*AFRA*" means Asociacion de Farmacias Region de Arecibo, Inc., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by the Asociacion de Farmacias Region de Arecibo, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "*Commission*" means the Federal Trade Commission.

C. "*Payer*" means any person that purchases, reimburses for, or otherwise pays for all or part of any health care services for itself or for any other person. Payer includes, but is not limited to, any health insurance company; preferred provider organization; prepaid hospital, medical, or other health service plan; health maintenance organization; government health benefits program; employer or other person

providing or administering self-insured health benefits programs; and patients who purchase health care for themselves.

D. "*Person*" means both natural persons and artificial persons, including, but not limited to, corporations, unincorporated entities, and governments.

E. "*Provider*" means any person that supplies health care goods or services to any other person, including, but not limited to, physicians, pharmacies, dentists, hospitals, and clinics.

F. "*Participating pharmacy*" means any pharmacy that is a member of AFRA.

G. "*Qualified risk-sharing joint arrangement*" means an arrangement to provide services in which (1) the arrangement does not restrict the ability, or facilitate the refusal, of pharmacy providers participating in the arrangement to deal with payers individually or through any other arrangement, and (2) all pharmacy providers participating in the arrangement share substantial financial risk from their participation in the arrangement through: (a) the provision of services to payers at a capitated rate; (b) the provision of services for a predetermined percentage of premium or revenue from payers; (c) the use of significant financial incentives (e.g., substantial withholds) for its participating providers, as a group, to achieve specified cost-containment goals; or (d) the provision of a complex or extended course of treatment that requires the substantial coordination of care by different types of providers offering a complementary mix of services, for a fixed, predetermined payment, where the costs of that course of treatment for any individual patient can vary greatly due to the individual patient's condition, the choice, complexity, or length of treatment, or other factors.

H. "*Qualified clinically-integrated joint arrangement*" means an arrangement to provide services in which (1) the arrangement does not restrict the ability, or facilitate the refusal, of pharmacy providers participating in the arrangement to deal with payers individually or through any other arrangement, and (2) all pharmacy providers participating in the arrangement participate in active and ongoing programs of the arrangement to evaluate and modify the practice patterns of, and create a high degree of interdependence and cooperation among, the pharmacies participating in the arrangement, in order to control costs and ensure quality of the services provided through the arrangement.

I. "*Reimbursement*" means any payment, whether cash or non-cash, or other benefit received for the provision of pharmacy goods and services.

II.

It is further ordered, That each respondent, directly or indirectly, or through any corporate or other device, in connection with the provision of pharmacy goods and services in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44, cease and desist from:

A. Entering into, adhering to, participating in, maintaining, organizing, implementing, enforcing, or otherwise facilitating any combination, conspiracy, agreement, or understanding to:

1. Negotiate on behalf of any participating pharmacies with any payer or provider;
2. Deal or refuse to deal with, or boycott or threaten to boycott, any payer or provider;
3. Determine any terms, conditions, or requirements upon which pharmacies deal with any payer or provider, including, but not limited to, terms of reimbursement; or
4. Restrict the ability of participating pharmacies to deal with payers individually or through any arrangement outside AFRA.

B. Encouraging, advising, pressuring, inducing, or attempting to induce any person to engage in any action that would be prohibited if the person were subject to this order.

Provided that nothing in this order shall be construed to prohibit any agreement or conduct by either respondent that is reasonably necessary to form, facilitate, manage, operate, or participate in:

- (a) A qualified risk-sharing joint arrangement; or
- (b) A qualified clinically integrated joint arrangement, if the applicable respondent has provided the prior notification(s) as required by this paragraph (b). Such prior notification must be filed with the Secretary of the Commission at least thirty (30) days prior to forming; facilitating; managing; operating; participating in; or taking any action, other than planning, in furtherance of any joint arrangement requiring such notice ("first waiting period"), and shall include for such arrangement the identity of each participant, the location or

area of operation, a copy of the agreement and any supporting organizational documents, a description of its purpose or function, a description of the nature and extent of the integration expected to be achieved and the anticipated resulting efficiencies, an explanation of the relationship of any agreement on reimbursement to furthering the integration and achieving the expected efficiencies, and a description of any procedures proposed to be implemented to limit possible anticompetitive effects resulting from such agreement(s). If, within the first waiting period, a representative of the Commission makes a written request for additional information, the applicable respondent shall not form; facilitate; manage; operate; participate in; or take any action, other than planning, in furtherance of such joint arrangement until thirty (30) days after substantially complying with such request for additional information ("second waiting period") or such shorter waiting period as may be granted by letter from the Bureau of Competition. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition.

Provided further that nothing in this order shall be construed to prohibit respondent Alvarez from negotiating with any payer or provider on behalf of pharmacies that he:

(a) Owns; or

(b) Operates pursuant to a contract, provided that respondent Alvarez submits written notification and a copy of the contract to the Commission within ten (10) days of entering into any such contract and refrains from negotiations with any payer or provider for at least thirty (30) after providing such notice.

Provided further that nothing contained in this order shall be construed to prevent any respondent or respondents from engaging in the bona fide exercise of 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.

III.

It is further ordered, That respondent AFRA shall:

A. Within thirty (30) days after the date on which this order becomes final, distribute by first-class mail a copy of this order and the accompanying complaint, as well as certified Spanish translations thereof to each person who, at any time since November 22, 1994, has been an officer, director, manager, employee, or participating pharmacy in AFRA.

B. Within thirty (30) days after the date on which this order becomes final, distribute by first-class mail a copy of this order and the accompanying complaint, as well as certified Spanish translations thereof to each payer or provider who, at any time since November 22, 1994, has communicated with AFRA concerning any desire, willingness, or interest in contracting for pharmacy goods and services with AFRA members.

C. For a period of five (5) years after the date this order becomes final:

1. Distribute by first-class mail a copy of this order and the accompanying complaint, as well as certified Spanish translations thereof, to each new AFRA member within thirty (30) days of his or her initial participation, and

2. Annually publish in any official annual report or newsletter sent to all participating pharmacies, a copy of this order and the complaint, as well as certified Spanish translations thereof, with such prominence as is given to regularly featured articles. If no such annual report or newsletter is sent to participating pharmacies, AFRA shall annually, on the anniversary of the date this order becomes final as to AFRA, distribute a copy of this order and the complaint, as well as certified Spanish translations thereof, by first-class mail, or at a formal meeting of AFRA, to all participating pharmacies.

IV.

It is further ordered, That:

A. Within sixty (60) days after the date this order becomes final, each respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with paragraphs II and III of this order.

B. One (1) year from the date this order becomes final, annually for the next five (5) years on the anniversary of the date this order becomes final, and at other times as the Commission may require,

each respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with paragraphs II and III of this order.

V.

It is further ordered, That AFRA shall notify the Commission at least thirty (30) days prior to any proposed change in AFRA, such as dissolution, assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in AFRA that may affect compliance obligations arising out of this order.

VI.

It is further ordered, That, for the purpose of determining or securing compliance with this order, upon written request, each respondent shall permit any duly authorized representative of the Commission:

A. Access, during office hours and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda, calendars, and other records and documents in the possession or under the control of that respondent relating to any matter contained in this order; and

B. Upon five business days' notice to a respondent and without restraint or interference from that respondent, to interview that respondent, or officers, directors, employees, or other representatives of that respondent.

VII.

It is further ordered, That this order shall terminate on March 2, 2019.

IN THE MATTER OF
NEW VISION INTERNATIONAL, INC., ET AL.

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

Docket C-3856. Complaint, March 3, 1999--Decision, March 3, 1999

This consent order, among other things, prohibits an Arizona-based multi-level marketing company, that sells nutritional supplements, its affiliated company and their officers from making unsubstantiated advertising claims for a combination of supplements they called "God's Recipe," that the respondents promote in the prevention, treatment, cure or mitigation of Attention Deficit Disorder and Attention Deficit Hyperactivity Disorder or their symptoms. Also, the consent order prohibits the misrepresentation of testimonials or endorsements for the product.

Participants

For the Commission: *Matthew Gold, Sylvia Kundig, and Jeffrey Klurfeld.*

For the respondents: *Barry Cutler and Julia Oas, Baker & Hostetler, Washington, D.C.*

COMPLAINT

The Federal Trade Commission, having reason to believe that New Vision International, Inc., and NVI Promotions, L.L.C., corporations, and Jason P. Boreyko and Benson K. Boreyko, individually and as officers of the corporations, ("respondents"), have 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:

1. Respondent New Vision International, Inc. ("New Vision") is an Arizona corporation with its principal office or place of business at 7762 East Gray Road, Suite 500, Scottsdale, AZ.

2. Respondent NVI Promotions, L.L.C., is an Arizona corporation with its principal office or place of business at 7762 East Gray Road, Suite 500, Scottsdale, AZ.

3. Respondent Jason P. Boreyko is an officer of the corporate respondents. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of the corporations, including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of the corporations.