

Complaint

IN THE MATTER OF

RITE AID CORPORATION
AND
THE JEAN COUTU GROUP (PJC), INC.

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

Docket C-4191; File No. 061 0257
Complaint, June 1, 2007 – Decision, September 17, 2007

This consent order addresses the \$3.5 billion acquisition by Rite Aid Corporation (“Rite Aid”) of certain assets from the Brooks/Eckerd retail pharmacies of The Jean Coutu Group (PJC), Inc. (“Jean Coutu”) (collectively “Respondents”). The complaint alleges that Respondents combined account for up to 100 percent of the pharmacies in the market, and the acquisition, if consummated, would likely allow Rite Aid to raise prices for pharmacy services to cash customers in several markets nationwide. There is a significant disparity in profit margins between sales to cash customers and sales to customers covered by third party payors. The consent order requires Respondents to divest one store in each of the twenty-three geographic areas to a Commission-approved acquirer.

Participants

For the *Commission*: Thomas A. Cohn, Daniel P. Ducore, Alan Loughnan, Jonathan W. Platt, and David P. Wales, Jr.

For the *Respondents*: Philip Proger, Jones Day; David T. Beddow, O’Melveny & Meyers.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission (“Commission”), having reason to believe that Respondent Rite Aid Corporation (“Rite Aid”) has entered into an agreement to (1) acquire 100 percent of the common and preferred shares of the wholly-owned subsidiary, The

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Jean Coutu Group (PJC) USA, Inc. (“Jean Coutu USA”) from its parent company, Respondent The Jean Coutu Group (PJC), Inc. (“Jean Coutu”), and (2) issue 30 percent of its own common stock to Jean Coutu, all subject to the jurisdiction of the Commission, in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, 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 that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

RITE AID CORPORATION

PARAGRAPH ONE: Respondent Rite Aid is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 30 Hunter Lane, Camp Hill, Pennsylvania 17011.

PARAGRAPH TWO: Respondent Rite Aid is a retail drug store chain which, at all times relevant hereto, has been engaged in the retail sale of pharmaceutical items, cosmetics, beauty supplies and perfume, convenience foods, and other items in the United States. Rite Aid operates 3,319 stores under the Rite Aid trade name.

PARAGRAPH THREE: Respondent Rite Aid is, and at all times relevant hereto has been, engaged in commerce as “commerce” is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and is a corporation whose business is in or affecting commerce as “commerce” is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

JEAN COUTU

PARAGRAPH FOUR: Respondent Jean Coutu is a corporation organized, existing, and doing business under and by virtue of the

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laws of the Province of Quebec, with its office and principal place of business located at 530 Beriault Street, Longueuil, Quebec, Canada J4G1S8.

PARAGRAPH FIVE: Respondent Jean Coutu owns and operates retail drug store chains and at all times relevant hereto, has been engaged in the retail sale of pharmaceutical items, cosmetics, beauty supplies and perfume in the United States. Jean Coutu, through its wholly-owned subsidiary, Jean Coutu USA, operates 1,858 stores under the Brooks and Eckerd trade names.

PARAGRAPH SIX: Respondent Jean Coutu is, and at all times relevant hereto has been, engaged in commerce as “commerce” is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and is a corporation whose business is in or affecting commerce as “commerce” is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

THE PROPOSED ACQUISITION

PARAGRAPH SEVEN: On or about August 23, 2006, Rite Aid entered into a Stock Purchase Agreement to acquire and merge with Jean Coutu USA (“the Acquisition”). Pursuant to this Stock Purchase Agreement, Rite Aid will acquire Jean Coutu USA, and thus the Eckerd and Brooks retail pharmacy chains, in exchange for approximately \$3.5 billion worth of cash and stock. As a result of the merger, Rite Aid will hold 100 percent of the common and preferred shares of Jean Coutu USA and Jean Coutu will acquire approximately 30 percent of the voting securities of Rite Aid.

THE RELEVANT MARKETS

PARAGRAPH EIGHT: For purposes of this Complaint, the relevant line of commerce (*i.e.*, the product market) in which to analyze the Acquisition is the retail sale of pharmacy services to cash customers in local markets. Pharmacy services include the provision of prescription medications by a licensed pharmacist who is able to provide usage advice and other relevant information as

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may be required by law. Cash customers are consumers of pharmacy services that do not pay a price negotiated by or paid through a third party (such as an insurance plan or a pharmacy benefits manager). Cash customers generally pay the full posted or list price set by a pharmacy for a prescription drug or some discounted amount of a posted or list price set by a pharmacy.

PARAGRAPH NINE: For purposes of this Complaint, the relevant sections of the country in which to analyze the effects of this Acquisition are:

- a. the town of Stafford, Connecticut;
- b. the town of Denton, Maryland;
- c. the town of Gardiner, Maine, and the town and census-designated place of Randolph, Maine;
- d. the city of Berlin, New Hampshire;
- e. the town of Pelham, New Hampshire;
- f. the town of Peterborough, New Hampshire;
- g. the borough of Penns Grove, New Jersey;
- h. the towns of Arcade and Yorkshire, New York;
- i. the town of Boonville, New York;
- j. the town of Grand Island, New York;
- k. the village of Lake Placid, New York;
- l. the village of Le Roy, New York;

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- m. the city of Mechanicville, New York;
- n. the town of Owego, New York;
- o. the borough of Brownsville, Pennsylvania, and the census-designated place of Grindstone-Rowes Run, Pennsylvania;
- p. the borough of Mercer, Pennsylvania;
- q. the borough of Moscow and the township of Covington, Pennsylvania;
- r. the census-designated place of Mountain Top, Pennsylvania;
- s. the boroughs of Zelienople and Harmony, Pennsylvania;
- u. the incorporated village of Bellows Falls, Vermont, and the town of Walpole, New Hampshire;
- v. the village of Lyndonville, Vermont;
- w. the town of St. Johnsbury, Vermont; and
- x. the city of Franklin, Virginia.

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PARAGRAPH TEN: The relevant markets set forth in Paragraph Nine are highly concentrated, whether measured by the Herfindahl-Hirschmann Index (“HHI”) or two-firm and four-firm concentration ratios. The Acquisition would substantially increase concentration in each such market.

ENTRY CONDITIONS

PARAGRAPH ELEVEN: Entry would not be timely, likely, or sufficient to prevent anticompetitive effects in the relevant markets.

EFFECTS OF THE ACQUISITION

PARAGRAPH TWELVE: The effect of the acquisition, if consummated, may be to substantially lessen competition in the relevant markets in violation of 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, in the following ways, among others:

- a. by eliminating actual, direct, and substantial competition between Respondents Rite Aid and Brooks or Eckerd in the relevant markets; and
- b. by increasing the likelihood that the combined Rite Aid/Brooks-Eckerd will unilaterally exercise market power in the relevant markets; each of which increases the likelihood that the prices of pharmacy services to cash customers will increase, and the quality and selection of such services will decrease, in the relevant sections of the United States.

VIOLATIONS CHARGED

PARAGRAPH THIRTEEN: The acquisition agreement described in Paragraph Seven violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and the proposed

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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.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this first day of June, 2007, issues its Complaint against said Respondents.

By the Commission.

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission (“Commission”), having initiated an investigation of the proposed acquisition by Respondent Rite Aid Corporation (“Rite Aid”) of 100 percent of the common and preferred shares of The Jean Coutu Group USA, Inc. from Respondent The Jean Coutu Group (PJC), Inc. (“Jean Coutu”), and Jean Coutu’s proposed acquisition of 30 percent of the common stock of Rite Aid pursuant to the Stock Purchase Agreement between Rite Aid and Jean Coutu, hereinafter referred to collectively as “Respondents,” and Respondents having been furnished thereafter with a copy of a draft Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and that, if issued by the Commission, would charge Respondents with violations of 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

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (“Consent Agreement”), containing an admission by Respondents of all the jurisdictional facts set forth in the aforesaid

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draft of Complaint, a statement that the signing of said Consent 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, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined to accept the executed Consent Agreement and to place such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings and issues this Order to Maintain Assets:

1. Respondent Rite Aid is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 30 Hunter Lane, Camp Hill, Pennsylvania 17011.
2. Respondent Jean Coutu is a corporation organized, existing, and doing business under and by virtue of the laws of the Province of Quebec, with its office and principal place of business located at 530 Beriault Street, Longueuil, Quebec, Canada J4G1S8.

The Commission has jurisdiction of the subject matter of this proceeding and of the Respondents, and the proceeding is in the public interest.

Order to Maintain Assets

ORDER**I.**

IT IS ORDERED that, as used in this Order to Maintain Assets, the definitions used in the Consent Agreement and the attached Decision and Order shall apply. In addition, “Drug Store to be Maintained” means any Retail Drug Store business identified as a part of the Assets To Be Divested.

II.

IT IS FURTHER ORDERED that:

- A. Respondents shall maintain the viability, marketability, and competitiveness of the Assets To Be Divested, and shall not cause the wasting or deterioration of the Assets To Be Divested, nor shall they cause the Assets To Be Divested to be operated in a manner inconsistent with applicable laws, nor shall they sell, transfer, encumber or otherwise impair the viability, marketability or competitiveness of the Assets To Be Divested. Respondents shall comply with the terms of this Paragraph until such time as Respondents have divested the Assets To Be Divested pursuant to the terms of the attached Decision and Order. Respondents shall conduct or cause to be conducted the business of the Assets To Be Divested in the regular and ordinary course and in accordance with past practice (including regular repair and maintenance efforts) and shall use reasonable best efforts to preserve the existing relationships with suppliers, customers, third-party payors, employees, and others having business relations with the Assets To Be Divested in the ordinary course of business and in accordance with past practice.
- B. Respondents shall not terminate the operation of any Drug Store To Be Maintained. Respondents shall continue to maintain the inventory of each Drug Store To Be Maintained

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at levels and selections (*e.g.*, stock-keeping units) consistent with those maintained by such Respondent(s) at such Drug Store in the ordinary course of business consistent with past practice. Respondents shall use best efforts to keep the organization and properties of each Drug Store To Be Maintained intact, including current business operations, physical facilities, working conditions, and a work force of equivalent size, training, and expertise associated with the Drug Store. Included in the above obligations, Respondents shall, without limitation:

1. maintain operations and departments, and not reduce hours, at each Drug Store To Be Maintained;
2. not transfer inventory from any Drug Store To Be Maintained, other than in the ordinary course of business consistent with past practice;
3. continue to offer those customers who receive pharmacy services at each Drug Store To Be Maintained the same type and quality of pharmacy services that are offered at the Proposed Respondents' Retail Drug Stores that are not subject to the Decision and Order's divestiture provisions;
4. make any payment required to be paid under any contract or lease when due, and otherwise pay all liabilities and satisfy all obligations associated with any Drug Store To Be Maintained, in each case in a manner consistent with past practice;
5. maintain the books and records (including prescription records) of each Drug Store To Be Maintained in the regular course of business and in accordance with past practice;

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6. not display any signs or conduct any advertising (*e.g.*, direct mailing, point-of-purchase coupons) that indicates that any Respondent is moving its operations at a Drug Store To Be Maintained to another location, or that indicates a Drug Store To Be Maintained will close;
7. not conduct any “going out of business,” “close-out,” “liquidation,” or similar sales or promotions at or relating to any Drug Store To Be Maintained; and
8. not change or modify in any material respect the existing advertising practices, programs and policies for any Drug Store To Be Maintained, other than changes in the ordinary course of business consistent with past practice for Drug Stores of the Respondents not being closed or relocated.

III.

IT IS FURTHER ORDERED that within thirty (30) days after the date this Order to Maintain Assets becomes final, and every thirty (30) days thereafter until Respondents have fully complied with Paragraph II. of the Decision and Order (*i.e.*, have assigned, licensed, divested, transferred, delivered, terminated, or otherwise conveyed all relevant assets or rights to the Commission-approved Acquirer in a manner that fully satisfies the requirements of the Decision and Order), Respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with this Order to Maintain Assets and the Decision and Order; *provided, however*, that, after the Decision and Order in this matter becomes final, the reports due under this Order to Maintain Assets may be consolidated with, and submitted to the Commission at the same time as, the reports required to be submitted by Respondents pursuant to Paragraph VI. of the Decision and Order.

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IV.

IT IS FURTHER ORDERED that Respondent Rite Aid shall notify the Commission at least thirty (30) days prior to:

- A. any proposed dissolution of Respondent Rite Aid;
- B. any proposed acquisition, merger or consolidation of Respondent Rite Aid; or
- C. any other change in Respondent Rite Aid including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of this Order to Maintain Assets or the Decision and Order.

V.

IT IS FURTHER ORDERED that, for purposes of determining or securing compliance with this Order to Maintain Assets, and subject to any legally recognized privilege, and upon written request and upon five (5) days notice to Respondents made to their principal United States offices or headquarters address, Respondents shall, without restraint or interference, permit any duly authorized representative of the Commission:

- A. access, during business office hours of Respondents and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession or under the control of Respondent related to compliance with this Order, which copying services shall be provided by Respondents at the request of the authorized representative(s) of the Commission; and
- B. to interview officers, directors, or employees of

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Respondents, who may have counsel present, regarding such matters.

VI.

IT IS FURTHER ORDERED that this Order to Maintain Assets shall terminate on the earlier of:

- A. Three (3) business days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34; or
- B. With respect to each Drug Store To Be Maintained, the day after Respondents' completion of the divestiture of Assets to Be Divested related to such Retail Drug Store, as described in and required by the attached Decision and Order.

Provided, however, that if the Commission, pursuant to Paragraph II.A. or II.B. of the Decision and Order, requires the Respondents to rescind any or all of the divestitures contemplated by the Purchaser Agreement, then, upon rescission, the requirements of this Order shall again be in effect with respect to the relevant Assets To Be Divested until the day after Respondents' completion of the divestiture(s) of the relevant Assets To Be Divested, as described in and required by the attached Decision and Order.

By the Commission.

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The Federal Trade Commission (“Commission”) having initiated an investigation of the proposed acquisition by Respondent Rite Aid Corporation (“Rite Aid”) of 100 percent of the common and preferred shares of The Jean Coutu Group USA, Inc. from Respondent The Jean Coutu Group (PJC), Inc. (“Jean Coutu”), and Jean Coutu’s proposed acquisition of 30 percent of the common stock of Rite Aid pursuant to the Stock Purchase Agreement between Rite Aid and Jean Coutu, hereinafter referred to as “Respondents,” and Respondents having been furnished thereafter with a copy of a draft Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of 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;

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (“Consent Agreement”), containing an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent 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, or that the facts alleged in such Complaint, other than jurisdictional facts, are true, 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 has reason to believe that Respondents have violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having thereupon issued its Complaint, and Order to Maintain Assets, and accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, and having duly considered the comments received from interested persons pursuant to section

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2.34 of its Rules, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order (“Order”):

- A. Respondent Rite Aid is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 30 Hunter Lane, Camp Hill, Pennsylvania 17011.
- B. Respondent Jean Coutu is a corporation organized, existing, and doing business under and by virtue of the laws of the Province of Quebec, with its office and principal place of business located at 530 Beriault Street, Longueuil, Quebec, Canada J4G1S8.
- C. The Commission has jurisdiction of the subject matter of this proceeding and of the Respondents, and the proceeding is in the public interest.

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ORDER**I.**

IT IS ORDERED that, as used in this Decision and Order, the following definitions shall apply:

- A. “Rite Aid” means Rite Aid Corporation, its directors, officers, employees, agents, representatives, successors, and assigns; its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Rite Aid Corporation and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “Jean Coutu” means The Jean Coutu Group (PJC), Inc., its directors, officers, employees, agents, representatives, successors, and assigns; its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by The Jean Coutu Group (PJC), Inc. and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. “Respondents” means Rite Aid and Jean Coutu, individually and collectively.
- D. “Acquisition” means Rite Aid’s proposed acquisition of the outstanding voting securities of Jean Coutu and Jean Coutu’s proposed acquisition of 30 percent of the voting securities of Rite Aid pursuant to the Stock Purchase Agreement Dated as of August 23, 2006, between Rite Aid and Jean Coutu.
- E. “Assets To Be Divested” means the assets that comprise the retail pharmacy businesses identified in Schedule A of this Order.

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- F. "Commission-Approved Acquirer" means any entity approved by the Commission to acquire any or all of the Assets To Be Divested pursuant to this Order.
- G. "Divestiture Trustee(s)" means any person or entity appointed by the Commission pursuant to Paragraph III. of this Order to act as a trustee in this matter.
- H. "Person" means any individual, partnership, joint venture, firm, corporation, association, trust, unincorporated organization, joint venture, or other business or governmental entity, and any subsidiaries, divisions, groups or affiliates thereof.
- I. "Pharmacy" means any entity engaged in the retail sale of pharmaceuticals, other than entities whose retail sales are conducted exclusively via the internet, mail-order or telephone and whose transfer of pharmaceuticals to customers occurs exclusively through the mails or any other delivery service.
- J. "Prescription Files" means any and all files or databases containing customer prescription information.
- K. "Purchaser Agreements" means the asset purchase agreements listed below and all amendments, exhibits, attachments, related agreements, and schedules thereto, that have been approved by the Commission to accomplish the requirements of this Order:
 - 1. Asset Purchase Agreement between Rite Aid and Kinney Drugs, Inc., dated May 3, 2007;
 - 2. Asset Purchase Agreement between Rite Aid and Big Y Foods, Inc., dated May 3, 2007;

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3. Asset Purchase Agreement between Rite Aid and Weis Markets, Inc., dated May 11, 2007;
 4. Asset Purchase Agreement between Rite Aid and Walgreen Co. and Walgreen Eastern Co., dated May 15, 2007 ; and
 5. Asset Purchase Agreement between Rite Aid and Pharmacy Operations, Inc. and its subsidiary Pharmacy Operations of New York, Inc. (hereinafter “Medicine Shoppe International, Inc.”), dated May 9, 2007.
- L. “Retail Drug Store” means a full-line retail store that carries a wide variety of prescription and non-prescription pharmaceuticals and miscellaneous items, including, but not limited to, health and beauty aids, sundries, and other merchandise.
- M. “Apothecary-Style Drug Store” means a retail store that carries a wide variety of prescription and non-prescription pharmaceuticals, including specialty, compounded, or customized pharmaceuticals, nutritional and medical supplies, and provides services relating to, but not limited to, diabetes care and long-term care.
- N. “Third Party Consents” means all consents from any person other than the Respondents, including all landlords, that are necessary to effect the complete transfer to the Commission-Approved Acquirer(s) of the Assets To Be Divested.

II.**IT IS FURTHER ORDERED** that:

- A. Respondents shall divest, absolutely and in good faith, the Assets To Be Divested, in accordance with the Purchaser

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Agreements (which agreements shall not vary or contradict, or be construed to vary or contradict, the terms of this Order), no later than

1. twenty (20) days after the date on which the Acquisition is consummated, or, in the case of the Assets To Be Divested to Medicine Shoppe International, Inc., forty (40) days after the date on which the Acquisition is consummated, or
2. four (4) months after the date on which Respondents sign the Agreement Containing Consent Order, whichever is earlier.

Provided, however, that if Respondents have divested any of the Assets To Be Divested pursuant to a Purchaser Agreement prior to the date this Order becomes final, and if, at the time the Commission determines to make this Order final, the Commission notifies Respondents that a purchaser identified at Definition K of this Order is not an acceptable acquirer of any of the Assets To Be Divested or that the manner in which the divestiture was accomplished is not acceptable, then Respondents shall immediately rescind the transaction with that purchaser and shall divest the assets transferred to that purchaser within three (3) months of the date the Order becomes final, absolutely and in good faith, at no minimum price, to a Commission-Approved Acquirer and only in a manner that receives the prior approval of the Commission.

- B. Any Purchaser Agreements that have been approved by the Commission between the Respondents (or a Divestiture Trustee) and an acquirer of the Assets To Be Divested shall be deemed incorporated into this Order, and any failure by Respondents to comply with any term of such Purchaser Agreements shall constitute a failure to comply with this Order.

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- C. Respondents shall obtain all required Third Party Consents prior to the closing of the Purchaser Agreements or any other agreement pursuant to which the Assets To Be Divested are divested.
- D. Pending divestiture of the Assets To Be Divested, Respondents shall take such actions as are necessary to maintain the full economic viability and marketability of the business associated with those assets, to minimize any risk of loss of competitive potential for such business, and to prevent the destruction, removal, wasting, deterioration, or impairment of any of those assets except for ordinary wear and tear.
- E. The purpose of the divestitures is to ensure the continuation of the Assets To Be Divested as ongoing viable enterprises engaged in the Retail Drug Store or Apothecary-Style Drug Store business and to remedy the lessening of competition resulting from the Acquisition alleged in the Commission's Complaint.

III.**IT IS FURTHER ORDERED** that:

- A. If Respondents have not divested all of the Assets To Be Divested as required by Paragraph II. of this Order, the Commission may appoint a trustee to divest ("Divestiture Trustee") the remaining Assets To Be Divested in a manner that satisfies the requirements of Paragraphs II. and III. In the event that the Commission or the Attorney General brings an action pursuant to § 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a Divestiture Trustee in such action to

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divest the relevant assets in accordance with the terms of this Order. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Respondents to comply with this Order.

- B. The Commission shall select the Divestiture Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed Divestiture Trustee, Respondents shall be deemed to have consented to the selection of the proposed Divestiture Trustee.
- C. Within ten (10) days after appointment of a Divestiture Trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the relevant divestiture or transfer required by the Order.
- D. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Order, Respondents shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:
 - 1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to assign, grant, license, divest, transfer,

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deliver, or otherwise convey the relevant assets that are required by this Order to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed.

2. The Divestiture Trustee shall have twelve (12) months from the date the Commission approves the trust agreement described herein to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve (12) month period, the Divestiture Trustee has submitted a plan of divestiture or believes that the divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission; provided, however, the Commission may extend the divestiture period only two (2) times.
3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records, and facilities related to the relevant assets that are required to be assigned, granted, licensed, divested, delivered, or otherwise conveyed by this Order and to any other relevant information as the Divestiture Trustee may request. Respondents shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondents shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondents shall extend the time for divestiture under this Paragraph III.D.3 in an amount equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court.
4. The Divestiture Trustee shall use commercially reasonable best efforts to negotiate the most favorable

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price and terms available in each contract that is submitted to the Commission, subject to Respondents's absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestiture shall be made in the manner and to an Acquirer as required by this Order; provided, however, if the Divestiture Trustee receives bona fide offers from more than one acquiring Person, and if the Commission determines to approve more than one such acquiring Person, the Divestiture Trustee shall divest to the acquiring Person selected by Respondents from among those approved by the Commission; provided further, however, that Respondents shall select such Person within five (5) days of receiving notification of the Commission's approval.

5. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed Divestiture Trustee, by the court, of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of Respondents, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement

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contingent on the divestiture of all of the relevant assets that are required to be divested by this Order.

6. Respondents shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the Divestiture Trustee.
 7. The Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order.
 8. The Divestiture Trustee shall report in writing to Respondents and to the Commission every sixty (60) days concerning the Divestiture Trustee's efforts to accomplish the divestiture.
 9. Respondents may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; provided, however, such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.
- E. If the Commission determines that a Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Divestiture Trustee in the same manner as provided in this Paragraph III.

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- F. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this Order.

IV.

IT IS FURTHER ORDERED that for a period of ten (10) years commencing on the date this Order becomes final, Respondents shall not acquire, directly or indirectly, through subsidiaries, partnerships or otherwise, without providing advance written notification to the Commission:

- A. Any ownership or leasehold interest in any facility that has operated a pharmacy within five (5) miles of any store to be divested pursuant to this Order within six (6) months prior to the date of such proposed acquisition.
- B. The prescription files from or any stock, share capital, equity, or other interest in any entity that owns any interest in or operates any pharmacy or owned any interest in or operated any pharmacy within five (5) miles of any store to be divested pursuant to this Order within six (6) months prior to such proposed acquisition.

Said notification shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended, and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of Respondents and not of any other party to the transaction.

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Respondents shall provide the notification to the Commission at least thirty (30) days prior to consummating any such transaction (hereinafter referred to as the “first waiting period”). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), Respondents shall not consummate the transaction until thirty (30) days after substantially complying with such request. Early termination of the waiting periods in this Paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition. Provided, however, that prior notification shall not be required by this Paragraph for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a.

V.

IT IS FURTHER ORDERED that, for a period of ten (10) years commencing on the date this Order becomes final, Respondents shall neither enter into nor enforce any agreement that restricts the ability of any person (as defined in Section 1(a) of the Clayton Act, 15 U.S.C. § 12(a)) that acquires any pharmacy, any leasehold interest in any pharmacy, or any interest in any retail location used as a pharmacy on or after January 1, 2007, within five (5) miles of any store divested pursuant to this Order, to operate a pharmacy at that site if such pharmacy was formerly owned or operated by Respondents.

VI.

IT IS FURTHER ORDERED that:

- A. Within thirty (30) days after the date this Order becomes final and every thirty (30) days thereafter until the Respondents have fully complied with the provisions of

Decision and Order

Paragraphs II. and III. of this Order, Respondents shall submit to the Commission verified written reports setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with Paragraphs II. and III. of this Order. Respondents shall include in their compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with this Order, including a description of all substantive contacts or negotiations for the divestitures and the identity of all parties contacted. Respondents shall include in their compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning completing the obligations; and

- B. Beginning twelve (12) months after the date this Order becomes final, and annually thereafter on the anniversary of the date this Order becomes final, for the next nine (9) years, Respondents shall submit to the Commission verified written reports setting forth in detail the manner and form in which they are complying and have complied with this Order and the Purchaser Agreements.

VII.

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least thirty (30) days prior to:

- A. Any proposed dissolution of such Respondents;
- B. Any proposed acquisition, merger or consolidation of Respondents; or
- C. Any other change in the Respondents, including, but not limited to, assignment and the creation or dissolution of

Decision and Order

subsidiaries, if such change might affect compliance obligations arising out of the Order.

VIII.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, upon written request with reasonable notice to Respondents made to their principal United States office, Respondents shall permit any duly authorized representative of the Commission:

- A. Access, during office hours of Respondents and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and all other records and documents in the possession or under the control of Respondents relating to any matters contained in this Order; and
- B. Upon five (5) days notice to Respondents and without restraint or interference from Respondents, to interview officers, directors, or employees of Respondents, who may have counsel present, regarding any such matters.

IX.

IT IS FURTHER ORDERED that this Order shall terminate on September 17, 2017.

By the Commission.

Decision and Order

SCHEDULE A

Pursuant to the terms of the Consent Agreement and this Decision and Order the following assets shall be divested as follows:

1. Rite Aid Store #3342 located at 261 Utica Boulevard, Boonville, NY 13309 will be sold to Kinney Drug Inc.
2. Rite Aid Store #4119 located at Route 5 Memorial Drive, Lyndonville, VT 58511 will be sold to Kinney Drug Inc.
3. Rite Aid Store #4973 located at 957 Memorial Drive, St. Johnsbury, VT 05819 will be sold to Kinney Drug Inc.
4. Brooks Store #0590 located at 87-C West Stafford Road, Stafford Springs, CT 06076 will be sold to Big Y Foods, Inc.
5. Eckerd Store #6240 located at 225 South Mountain Blvd., Mountain Top, PA 18707 will be sold to Weis Markets Inc.
6. Rite Aid Store #0799 located at 234 South Main St., Zelienople, PA 16063 will be sold to Walgreen Co.
7. Brooks Store #0891 located at SWC Bridge & Willow Streets, Pelham, NH 03076 will be sold to Walgreen Co.
8. Rite Aid Store #2570 located at 14 Pinnacle Lane, Walpole, NH 03608 will be sold to Walgreen Co.
9. Eckerd Store #0797 located at 2 North Virginia Avenue, Penns Grove, NJ 08069 will be sold to Walgreen Co.
10. Rite Aid Store #1211 located at 3242 Route 39, Yorkshire, NY 14173 will be sold to Walgreen Co.
11. Rite Aid Store #3641 located at 100 South College Drive, Franklin, VA 23851 will be sold to Walgreen Co.

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12. Eckerd Store #6296 located at 40 Denton Plaza, Denton, MD 21629 will be sold to Medicine Shoppe International Inc.
13. Brooks Store #0386 located at 415 Water Street, Gardiner, ME 04345 will be sold to Medicine Shoppe International Inc.
14. Rite Aid Store #3355 located at 145 Main Street, Berlin, NH 03570 will be sold to Medicine Shoppe International Inc.
15. Rite Aid Store #4164 located at 5 Main Street, Peterborough, NH 03458 will be sold to Medicine Shoppe International Inc.
16. Rite Aid Store #0577 located at 941 State Route 17C, Owego, NY 13827 will be sold to Medicine Shoppe International Inc.
17. Rite Aid Store #1861 located at 2156 Grand Island Blvd., Grand Island, NY 14072 will be sold to Medicine Shoppe International Inc.
18. Rite Aid Store #2678 located at #2 Price Chopper Plaza, Mechanicville, NY 12118 will be sold to Medicine Shoppe International Inc.
19. Eckerd Store #5825 located at 45 Hadjus Way, Lake Placid, NY 12946 will be sold to Medicine Shoppe International Inc.
20. Eckerd Store #5961 located at 12 Bank Street, LeRoy, NY 14482 will be sold to Medicine Shoppe International Inc.

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21. Eckerd Store #5850 located at 208 South Main Street, Moscow, PA 18444 will be sold to Medicine Shoppe International Inc.
22. Eckerd Store #6008 located at 37 Market Street, Brownsville, PA 15417 will be sold to Medicine Shoppe International Inc.
23. Eckerd Store #8706 located at 533 Greenville Road, Mercer, PA 16137 will be sold to Medicine Shoppe International Inc.

Analysis to Aid Public Comment

**ANALYSIS OF CONSENT ORDER TO AID PUBLIC
COMMENT****I. Introduction**

The Federal Trade Commission (“Commission”) has accepted, subject to final approval, an Agreement Containing Consent Order with Rite Aid Corporation (“Rite Aid”) and The Jean Coutu Group (PJC), Inc. (“Jean Coutu”) (collectively “the Proposed Respondents”). The Agreement is designed to remedy the likely anticompetitive effects arising from Rite Aid’s proposed acquisition of the Brooks and Eckerd retail pharmacies from Jean Coutu. The Agreement has been placed on the public record for thirty days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty days, the Commission will again review the Agreement and the comments received, and will decide whether it should withdraw from the agreement or make the proposed Order final.

The purpose of this analysis is to invite public comment on the proposed consent Order. This analysis does not constitute an official interpretation of the agreement and proposed Order, and does not modify the terms in any way. Further, the proposed consent Order has been entered into for settlement purposes only, and does not constitute an admission by the Proposed Respondents that they violated the law or that the facts alleged in the Complaint against the Respondents (other than jurisdictional facts) are true.

On August 23, 2006, Rite Aid entered into a Stock Purchase Agreement whereby Rite Aid would acquire Jean Coutu’s Eckerd and Brooks retail pharmacy chains in exchange for approximately \$3.5 billion worth of cash and stock. As a result of the transaction, Rite Aid would hold 100% of the common and preferred shares of The Jean Coutu Group USA, Inc., and Jean Coutu would acquire approximately 30% of the voting securities of Rite Aid.

Analysis to Aid Public Comment

II. Respondents

Respondent Rite Aid, a publicly-traded Delaware corporation, is the third largest retail pharmacy chain in the United States. Rite Aid owns 3,333 stores in the United States, which are primarily located on the East and West Coasts.

Respondent Jean Coutu is a publicly-traded corporation headquartered in Longueuil, Quebec, Canada. Jean Coutu is the parent of The Jean Coutu Group USA, Inc., which owns and operates the Brooks and Eckerd retail pharmacy chains. Jean Coutu currently owns 1,517 Eckerd and 341 Brooks stores, which are located exclusively in the Northeast and Mid-Atlantic regions of the United States. The Jean Coutu stores collectively constitute the fourth largest retail pharmacy chain in the United States.

III. The Complaint

The complaint alleges that the relevant product market in which to analyze the acquisition is the retail sale of pharmacy services to cash customers in local markets. Pharmacy services include the provision of medications by a licensed pharmacist who is able to provide usage advice and other relevant information as may be required by law. Cash customers are consumers of pharmacy services that do not pay a price negotiated by or paid through a third party (such as an insurance plan or a pharmacy benefits manager). Cash customers generally pay the full posted or list price set by a pharmacy for a prescription drug or an amount reflecting a discount off of those prices. The evidence indicates that the sale of pharmacy services to cash customers is a separate market from the sale of pharmacy services to customers covered by third party payors. This is consistent with prior Commission investigations regarding pharmacy services.

The evidence indicates that pricing in the cash prescription market is not constrained by competitive conditions in the third party payor prescription market, nor by mail order pharmacies or discount cards. Cash customers pay prices that are consistently

Analysis to Aid Public Comment

higher than prices on the same drugs paid for by third party payors, and there is a significant disparity in profit margins between sales to cash customers and sales to customers covered by third party payors.

Cash customers are most likely unable to purchase health insurance or obtain health benefits from an employer in response to a post-merger price increase for cash prescriptions.

Evidence indicates that cash customers typically do not travel far to fill prescriptions and that pharmacies evaluate competition for cash customers on a localized basis. Therefore, it is appropriate to analyze the competitive effects of the proposed transaction in local geographic markets. The complaint identifies the specific twenty-three relevant geographic markets in which to analyze the effects of the proposed transaction, which include individual towns, cities, boroughs, villages and census-designated areas, or combinations thereof.

The local markets for the retail sale of pharmacy services to cash customers identified in the complaint are highly concentrated. In each of these markets, Rite Aid and Eckerd/Brooks are two of a small number of pharmacies offering cash services, and combined account for at least half, and up to 100 percent, of the pharmacies in the market. Moreover, there is evidence that a significant number of customers view the Rite Aid and Eckerd/Brooks pharmacies in these markets as their first and second choices based on their physical proximity, convenient locations and services offered. Therefore, the complaint alleges that the proposed transaction likely would allow Rite Aid to unilaterally exercise market power, thereby making it likely that cash pharmacy customers would pay higher prices in these areas.

The complaint further alleges that entry would not be timely, likely or sufficient to prevent the anticompetitive effects from the proposed transaction. Certain specific factors make entry into the twenty-three cash prescription markets unlikely. First, because the vast majority of a pharmacy's profits come from sales other than

Analysis to Aid Public Comment

cash prescriptions, including prescription sales to insured customers and the sale of front-end items (e.g., toothpaste), it is unlikely that an anticompetitive price increase in cash prescription sales would attract new entry. Second, most of the twenty-three markets are small towns or rural areas that may not have a sufficient number of potential customers to support a new pharmacy. Third, opening a new pharmacy requires obtaining zoning, planning and environmental approvals, which can take a significant amount of time. Finally, the limited availability of new pharmacists may serve as an impediment to entry in these areas.

The complaint also alleges that the proposed acquisition, if consummated, may substantially lessen competition in the retail sale of pharmacy services to cash customers in twenty-three local areas, in violation of 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, by eliminating actual, direct, and substantial competition between Proposed Respondents in the relevant markets and by increasing the likelihood that the combined Rite Aid/Brooks-Eckerd will unilaterally exercise market power in the relevant markets, each of which increases the likelihood that the prices of pharmacy services to cash customers will increase, and the quality and selection of such services will decrease.

IV. The Terms of the Agreement Containing Consent Orders

The proposed consent order effectively remedies the proposed acquisition's likely anticompetitive effects in the relevant product markets. Pursuant to the proposed consent order, the Proposed Respondents are required to divest one store in each of the twenty-three geographic areas to a Commission-approved acquiror. Specifically, the proposed consent order requires the proposed Respondents to divest one store in each relevant geographic area to one of five up-front buyers including Kinney Drugs, Medicine Shoppe International, Inc. ("Medicine Shoppe"), Walgreen Co., Big Y, and Weis Markets. Kinney Drugs is an employee-owned company headquartered in New York that has 80 retail drug stores in

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central and northern New York and Vermont. Medicine Shoppe, headquartered in Missouri, operates 24 company-owned apothecary-style drugs stores and is the franchisor of approximately 1,000 apothecary-style franchised locations throughout the country. Walgreen Co., headquartered in Illinois, is the second largest retail drug store chain in the U.S., operating approximately 5,675 stores in 48 states and Puerto Rico. Big Y is one of New England's largest independent supermarket chains, with more than 50 locations throughout Massachusetts and Connecticut. Weis Markets is a Pennsylvania-based supermarket that operates more than 150 grocery stores, some of which contain pharmacy counters, in Pennsylvania, Maryland, New Jersey, West Virginia, and New York. Each of the up-front buyers is competitively and financially viable and each is well qualified to operate the divested stores. AS a result, the required divestitures to these companies will be sufficient to maintain competition in the relevant markets. A list of the specific pharmacies that the Proposed Respondents must divest to each of the up-front buyers is attached as Schedule A to the proposed Decision and Order.

The proposed consent order requires the divestitures to occur no later than twenty days, or, in the case of the divestitures to Medicine Shoppe, no later than forty days after the acquisition is consummated, or four months after the date on which the Proposed Respondents sign the proposed consent order, whichever is earlier. However, if the Proposed Respondents consummate the divestitures to any of the up-front buyers during the public comment period, and if, at the time the Commission decides to make the proposed consent order final, the Commission notifies the Proposed Respondents that any of the up-front buyers is not an acceptable acquirer or that any up-front buyer agreement is not an acceptable manner of divestiture, then the Proposed Respondents must immediately rescind the transaction in question and divest those assets within three months of the date the proposed consent order becomes final. At that time, the Proposed Respondents must divest those assets only to an acquirer, and only in a manner, that receives the prior approval of

Analysis to Aid Public Comment

the Commission.

The proposed consent order also contains an Order to Maintain Assets. This will serve to: (1) maintain the full economic viability and marketability of the pharmacies identified for divestitures, (2) minimize any risk of loss of competitive potential for such businesses, and (3) prevent the destruction, removal, wasting, deterioration, or impairment of any of these assets except for ordinary wear and tear.

The proposed consent order also gives the Commission the power to appoint a trustee to divest any pharmacies identified in the order that Proposed Respondents have not divested to satisfy the requirements of the order. In addition, the proposed consent order permits the Commission to seek civil penalties against the Proposed Respondents for non-compliance with the order.

For a period of ten years from the date the proposed consent order becomes final, the Proposed Respondents are required to provide written notice to the Commission prior to acquiring any ownership or leasehold interest in any facility that has operated as a pharmacy within the previous six months and is located within five miles of any store to be divested pursuant to the proposed consent order. The ten-year written notice requirement also applies to the acquisition by the Proposed Respondents of any prescription files, stock, share capital, equity, or other interest in any entity that owns any interest in or operates any pharmacy that is located within five miles of any store to be divested pursuant to the proposed consent order and has been in existence as a pharmacy within the previous six months. This provision does not restrict the Proposed Respondents from constructing new pharmacies in the relevant markets; nor does it restrict the Proposed Respondents from leasing facilities not operated as pharmacies within the previous six months.

The proposed consent order further prohibits the Proposed Respondents, for a period of ten years, from entering into or enforcing any agreement that restricts the ability of any person that

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acquires any pharmacy, any leasehold interest in any pharmacy, or any interest in any retail location used as a pharmacy on or after January 1, 2007 in the relevant markets to operate a pharmacy at that site if such pharmacy was formerly owned or operated by the Proposed Respondents.

The Proposed Respondents are required to provide to the Commission a report of compliance with the proposed consent order within thirty days following the date on which they sign the proposed consent order, every thirty days thereafter until the divestitures are completed, and annually for ten years.

Complaint

IN THE MATTER OF

**AMERICAN RENAL ASSOCIATES, INC.,
AND
FRESENIUS MEDICAL CARE HOLDINGS, INC.**

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

Docket C-4202; File No. 051 0234

Complaint, October 17, 2007 – Decision, October 17, 2007

This consent order addresses the \$4.4 million acquisition by American Renal Associates, Inc. (“ARA”) of certain assets from Fresenius Medical Care Holdings, Inc. In 2005, Fresenius and ARA, competitors in the provision of outpatient dialysis services, agreed to close three Fresenius clinics. The parties further agreed that Fresenius would not reopen any outpatient dialysis clinics within 10 to 12 miles of the closed facilities for at least five years, and would attempt to enforce the non-compete provisions of its agreements with the medical directors of the closed facilities for ARA’s benefit. The complaint alleges that this agreement was a horizontal agreement to eliminate competition and a *per se* violation of antitrust laws. The complaint further alleges that ARA’s purchase of outpatient dialysis clinics from Fresenius would reduce dialysis capacity; allocate dialysis customers, territories, or markets; and lessen competition in the outpatient dialysis services market in the Warwick/Cranston area. The consent order prohibits ARA and Fresenius from agreeing with other dialysis clinic operators to close any clinics or from allocating any dialysis service markets.

Participants

For the *Commission*: Bradley S. Albert, Leslie Farber, Mark Frankena, William Layher, Markus H. Meier, Martha H. Oppenheim, James E. Rhilinger, Gary H. Schorr, and Karan R. Singh.

For the *Respondents*: Robert Bloch, Mayer, Brown, Rowe & Maw; and Daniel L. Goldberg, Bingham McCutchen.