

IN THE MATTER OF
EMPIRE STATE PHARMACEUTICAL SOCIETY, INC.

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

Docket 9238. Complaint, Mar. 15, 1990—Decision, Feb. 5, 1991

This consent order prohibits, among other things, a trade association from organizing or encouraging any agreement among pharmacy firms to refuse to enter into or to withdraw from any third-party prescription plan. The consent agreement, among other things, also prohibits the respondent, for a period of ten years, from continuing any meeting at which representatives of pharmacy firms exchange information concerning the firms' intention to enter into, refuse to enter into, or withdraw from any third-party prescription plan, and from communicating to any firm any information concerning any other pharmacy firm's intention to enter into, refuse to enter into, or to withdraw from any existing or proposed third-party prescription plan.

Appearances

For the Commission: *Karen G. Bokat* and *Michael D. McNeely*.

For the respondent: *Jerome I. Sager*, *Empire State Pharmaceutical Society*, New York, N.Y.

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 Empire State Pharmaceutical Society, Inc. has 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 Empire State Pharmaceutical Society, Inc. ("Empire") is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office located at 12 West 23rd Street, New York, New York. Respondent Empire is an association of pharmacy owners in the State of New York. In 1986, respondent Empire was affiliated with the Long Island Pharmaceutical Society.

PAR. 2. Members of respondent Empire hold ownership interests in pharmacy firms that, except to the extent that competition has been restrained as alleged herein, have been and now are in competition with each other and with other pharmacy firms and other health care providers in the State of New York.

PAR. 3. Respondent's 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, 15 U.S.C. 45.

PAR. 4. Respondent Empire is and has been, at all times relevant to this complaint, a corporation organized for the profit of its members within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

PAR. 5. Customers often receive prescriptions through health benefit programs under which a third-party payer compensates the pharmacy for the prescription according to a predetermined formula. The New York State Employees Prescription Program is a prescription drug benefit plan made available by the State of New York to its employees, its retirees, certain other persons, and their dependents. There were approximately 500,000 beneficiaries covered by the Employees Prescription Program in 1986. Since July 1, 1986, The Equitable Life Assurance Society of the United States has insured the Employees Prescription Program, and PAID Prescriptions, Inc., a wholly-owned subsidiary of Medco Containment Services, Inc., has administered it.

PAR. 6. Pharmacies are solicited to participate in the Employees Prescription Program. Pharmacies that participate in the Employees Prescription Program accept as payment in full a reimbursement of the ingredient cost of the drug and a professional fee for dispensing the drug. The Employees Prescription Program provides a formula for determining the reimbursement of the ingredient cost of drugs dispensed.

PAR. 7. Absent collusion between or among pharmacy firms, each pharmacy firm would decide independently whether to participate in the Employees Prescription Program, and the State of New York would enjoy the benefits of competition among pharmacy firms.

PAR. 8. In May 1986, PAID Prescriptions, Inc. formally solicited pharmacy participation in the Employees Prescription Program under terms to become effective on July 1, 1986. Among the proposed terms were changes in the reimbursement level for ingredient costs, an increase in the professional fee, and the offer of additional reimburse-

ment for the use of generic drugs. The proposed terms were intended to reduce the price the State paid for the Employees Prescription Program, and thus minimize costs, while offering reimbursement high enough to attract a sufficient number of participating pharmacies to ensure that Employees Prescription Program beneficiaries would have adequate access to medication.

PAR. 9. In 1986, members of respondent Empire held ownership interests in pharmacy firms that participated in many prescription drug benefit plans offered by third-party payers, including the Employees Prescription Program as it existed prior to July 1. Such pharmacy firms would have suffered a significant loss of customers had their competitors participated in the Employees Prescription Program at a time when they were not participating.

PAR. 10. In March 1986, New York State informed respondent Empire of the proposed terms of the Employees Prescription Program and respondent Empire then communicated this information to its members. Thereafter, respondent Empire held a meeting at which owners of pharmacy firms informed other owners of pharmacy firms that they would not participate in the proposed Employees Prescription Program. Respondent Empire exhorted pharmacy owners to refuse to participate in the proposed Employees Prescription Program. Through these exchanges of information and other acts, and through the activities of respondent Empire, pharmacy-owning members of respondent and other owners of pharmacy firms agreed to refuse to participate in the Employees Prescription Program at the proposed reimbursement level, for the purpose of increasing the level of reimbursement offered by the State of New York under the Employees Prescription Program.

PAR. 11. Respondent Empire has restrained competition among pharmacy firms by acting as a combination of at least some of its members and others, to increase the price paid to participating pharmacies under the Employees Prescription Program and to deny to the State the benefits of competition.

PAR. 12. The combination or conspiracy and the acts and practices described above have unreasonably restrained and continue unreasonably to restrain competition among pharmacists and pharmacies in New York, and have injured consumers in the following ways, among others:

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

B. The State of New York was coerced into raising the prices paid to pharmacies under the Employees Prescription Program; and,

C. The State of New York has been and continues to be forced to pay substantial additional sums for prescription drugs provided to Employees Prescription Program beneficiaries, including approximately seven million dollars for the eighteen-month period beginning on July 1, 1986.

PAR. 13. The combination or conspiracy and the acts described above constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. The combination or conspiracy, or the effects thereof, are continuing, will continue, or will recur in the absence of the relief herein requested.

Commissioner Azcuenaga dissenting.

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondent Empire State Pharmaceutical Society with a violation of Section 5 of the Federal Trade Commission Act, as amended, and the respondent having been served with a copy of that complaint, together with a notice of the contemplated relief; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of (60) days, now in further conformity with the procedure prescribed in Section 3.25(f) of its rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Empire State Pharmaceutical Society is a corporation

organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 12 West 23rd Street, New York, New York.

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

ORDER

I.

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

A. "*Empire*" means the Empire State Pharmaceutical Society, Inc. and its directors, committees, officers, representatives, agents, employees, successors and assigns;

B. "*Third-party payer*" means any person or entity that provides a program or plan pursuant to which such a person or entity agrees to pay for prescriptions dispensed by pharmacies to individuals described in such plan or program as eligible for such coverage ("Covered Persons"), and includes, but is not limited to, health insurance companies; prepaid hospital, medical, or other health service plans, such as Blue 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;

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

D. "*Pharmacy firm*" means any partnership, sole proprietorship or corporation, including all of its subsidiaries, affiliates, divisions and joint ventures, that owns, controls or operates one or more pharmacies, including the directors, officers, employees, and agents, of such partnership, sole proprietorship or corporation as well as the directors, officers, employees, and agents of such partnership's, sole proprietorship's or corporation's subsidiaries, affiliates, divisions and joint ventures. The words "subsidiary", "affiliate", and "joint venture"

refer to any firm in which there is partial (10% or more) or total ownership or control between corporations.

II.

It is ordered, That Empire, directly, indirectly, or through any corporate or other device, in or in connection with its activities in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, shall forthwith cease and desist from:

A. 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 ten (10) 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 Empire fails to eject such person from the meeting, or 2) two persons make such statements;

C. For a period of ten (10) years after the date this order becomes final, communicating to any pharmacist or pharmacy firm any information concerning any other pharmacy firm's intention or decision with respect to entering into, refusing to enter into, threatening to refuse to enter into, participating in, threatening to withdraw from, or withdrawing from any existing or proposed participation agreement; and

D. For a period of eight (8) years after the date this order becomes final, providing comments or advice to any pharmacist or pharmacy firm on the desirability or appropriateness of participating in any existing or proposed participation agreement. However, nothing in this paragraph shall prohibit Empire 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 Empire from exercising rights permitted under the First Amendment to the United States Constitution to petition any federal or state

government executive agency or legislative body, concerning legislation, rules, programs or procedures, or to participate in any federal or state administrative or judicial proceeding.

III.

It is further ordered, That Empire:

A. Publish this order and the accompanying complaint in an issue of the Empire newsletter or in any successor publication published no later than sixty (60) days after the date this order becomes final, in the same type size normally used for articles that are published in the Empire Newsletter or successor publication;

B. For a period of five (5) years after the date this order becomes final, provide each new Empire member, at the time the member is accepted into membership, with a copy of the Empire newsletter in which this order, and the accompanying complaint was published as required by paragraph III.A.;

C. File a verified, written report with the Commission within ninety (90) days after the date this order becomes final, and annually thereafter for five (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 Empire, require, setting forth in detail the manner and form in which it has complied and is complying with the order;

D. For a period of five (5) years after the date this order becomes final, maintain and make available to Commission staff for inspection and copying upon reasonable notice, records adequate to describe in detail any action taken in connection with the activities covered by Parts II and III of this order, including, but not limited to, all documents generated by Empire or that come into Empire's possession, custody, or control regardless of source, that embody, discuss or refer to the terms or conditions of any participation agreement; and

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

Commissioner Azcuenaga dissenting and Commissioner Starek not participating.

