

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

COMMISSIONERS:

**William E. Kovacic, Chairman
Pamela Jones Harbour
Jon Leibowitz
J. Thomas Rosch**

In the Matter of

**North Dakota Pharmacists Association,
a corporation, and**

**North Dakota Pharmacist Service Corporation,
a corporation.**

Docket No. C-

August 15, 2008, Draft

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of the North Dakota Pharmacists Association ("NDPhA") and the North Dakota Pharmacist Service Corporation ("NDPSC"), hereinafter sometimes collectively referred to as "Respondents," and Respondents having been furnished thereafter with a copy of the draft Complaint that counsel for the Commission proposed to present to the Commission for its consideration and which, if issued, would charge Respondents with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondents, their attorney, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order to Cease and Desist ("Consent Agreement"), containing an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft 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 that it had reason to believe that Respondents have violated said Act, and that a Complaint should issue stating its charges in that respect, and having 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, 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 the following Order:

1. The North Dakota Pharmacists Association is a non-profit corporation organized, existing, and doing business under and by virtue of the laws of the State of North Dakota with its principal address at 1661 Capitol Way, Suite 102, Bismarck, North Dakota 58501-5600.

- H. "Principal address" means either (1) primary business address, if there is a business address, or (2) primary residential address, if there is no business address.

II.

IT IS FURTHER ORDERED that Respondents, directly or indirectly, or through any corporate or other device, in connection with a Pharmacy Participation Agreement 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 between or among any Pharmacies with respect to Pharmacy Participation Agreements:
1. to negotiate on behalf of any Pharmacy with any Payor;
 2. to deal, refuse to deal, or threaten to refuse to deal with any Payor;
 3. regarding any term, condition, or requirement upon which any Pharmacy deals, or is willing to deal, with any Payor, including, but not limited to, price terms; or
 4. not to deal individually with any Payor, or not to deal with any Payor other than through any Respondent(s);
- B. Inviting any Pharmacy to Participate in any action prohibited by Paragraph II.A;
- C. Exchanging or facilitating in any manner the exchange or transfer of information among Pharmacies concerning any Pharmacy's willingness to deal with a Payor, or the terms or conditions, including price terms, on which the Pharmacy is willing to deal with a Payor;
- D. Attempting to engage in any action prohibited by Paragraphs II.A through II.C above; and
- E. Encouraging, suggesting, advising, pressuring, inducing, or attempting to induce any Person to engage in any action that would be prohibited by Paragraphs II.A through II.D above.

PROVIDED, HOWEVER, that, subject to the requirements of Paragraph III of this Order, nothing in this Paragraph II shall prohibit any conduct related to negotiating with regard to any Pharmacy Participation Agreement pursuant to which:

1. the State of North Dakota establishes the prices, or
2. all Pharmacies who Participate in the Pharmacy Participation Agreement share substantial financial risk through the use of significant financial incentives (e.g., substantial withholds) for Pharmacies who Participate to achieve, as a group, specified cost-containment goals.

III.

IT IS FURTHER ORDERED that for three (3) years from the date this Order becomes final, Respondents shall provide to the Commission in writing the notification required by Paragraph IV of this Order ("Paragraph IV Notification") at least sixty (60) days prior to:

- A. Participating in, organizing, or facilitating any discussion or understanding with or among any Pharmacies in a Pharmacy Participation Agreement that satisfies the requirements of the Paragraph II proviso to this Order ("Qualifying Agreement") relating to price terms or conditions of dealing with any Payor; or
- B. Contacting a payor, pursuant to a Qualifying Agreement, to negotiate or enter into any agreement concerning price or other terms or conditions of dealing with any Payor, on behalf of any Pharmacies in such Qualifying Agreement.

IV.

IT IS FURTHER ORDERED that:

- A. Paragraph IV Notification shall include the following information regarding each Qualifying Agreement for which such notice is being given:
 - 1. the total number of Pharmacies Participating in the Qualifying Agreement;
 - 2. a description of the Qualifying Agreement, including its purpose and geographic area of operation; and
 - 3. the financial terms of the Qualifying Agreement, including identifying the price being established by the State of North Dakota or the withhold or other substantial risk involved.
- B. If, within sixty (60) days from the Commission's receipt of the Paragraph IV Notification, a representative of the Commission makes a written request to a Respondent for additional information, then that Respondent shall not Participate in any Qualifying Agreement described in Paragraph III.A or Paragraph III.B of this Order prior to the expiration of thirty (30) days after substantially complying with such request for additional information, or such shorter waiting period as may be granted in writing from the Bureau of Competition;
- C. The expiration of any waiting period described herein without a request for additional information, or without the initiation of an enforcement proceeding, shall not be construed as a determination by the Commission, or its staff, that the proposed Qualifying Agreement does or does not violate this Order or any law enforced by the Commission;
- D. The absence of notice that the proposed Qualifying Agreement has been rejected, regardless of a request for additional information, shall not be construed as a determination by the Commission, or its staff, that the proposed Qualifying Agreement has been approved;

- E. Receipt by the Commission of any Paragraph IV Notification regarding Participation pursuant to a proposed Qualifying Agreement shall not be construed as a determination by the Commission that any such proposed Qualifying Agreement does or does not violate this Order or any law enforced by the Commission; and
- F. Paragraph IV Notification shall not be required prior to Participating in any Qualifying Agreement for which Paragraph IV Notification has previously been given.

V.

IT IS FURTHER ORDERED that Respondent NDPhA shall:

- A. Within thirty (30) days after the date this Order becomes final:
 - 1. send by first-class mail with return receipt or delivery confirmation, or by facsimile, or electronic mail with return confirmation, a copy of this Order and the Complaint to:
 - a. every NDPSC member;
 - b. the chief executive officer of each Payor that is providing Medicare Part D coverage in North Dakota; and
 - 2. publish in the NoDak Rxpress, or any successor publication sent to NDPhA members, this Order and the Complaint with such prominence as is given to regularly featured articles.
- B. For three (3) years from the date this Order becomes final, send by first-class mail with return receipt or delivery confirmation, or by facsimile, or electronic mail with return confirmation, a copy of this Order and the Complaint to each Pharmacy that joins NDPSC, within thirty (30) days of its joining.

VI.

IT IS FURTHER ORDERED that Respondent NDPhA shall file verified written reports within sixty (60) days from the date this Order becomes final, annually thereafter for three (3) years on the anniversary of the date this Order becomes final, and at such other times as the Commission may by written notice require. Each report shall include, among other information that may be necessary:

- A. A copy of each written communication from NDPhA or NDPSC regarding any Participation Agreement in which any North Dakota Pharmacy is Participating or is considering Participating.
- B. A copy of each verification of the distributions of this Order and the Complaint required by Paragraph V.A.1 and Paragraph V.B.
- C. A detailed description of the manner and form in which Respondents have complied and are complying with this Order.

VI.

IT IS FURTHER ORDERED that each Respondent shall notify the Commission:

- A. Of any change in its Principal Address within twenty (20) days of such change in address; and
- B. At least thirty (30) days prior to: (1) any proposed dissolution of such Respondent; (2) any proposed acquisition, merger, or consolidation of such Respondent; or (3) any other change in such Respondent 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.

VII.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and upon five (5) days notice to a Respondent, that Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

- A. Access, during office hours of Respondent, 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 relating to compliance with this Order, which copying services shall be provided by Respondent at its expense; and
- B. To interview officers, directors, or employees of a Respondent, who may have counsel present, regarding such matters.

VIII.

IT IS FURTHER ORDERED that this Order shall terminate on _____ 2028
[Fill in 20 years from the date it is issued.]

By the Commission.

Donald S. Clark
Secretary

SEAL

2. The North Dakota Pharmacist Service Corporation is a for-profit corporation organized, existing, and doing business under and by virtue of the laws of the State of North Dakota with its principal address at 1661 Capitol Way, Suite 102, Bismarck, North Dakota 58501-5600.
3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondents, and the proceeding is in the public interest.

ORDER

I.

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

- A. "NDPhA" means North Dakota Pharmacists Association; its officers, directors, employees, agents, attorneys, representatives, successors, and assigns; and the subsidiaries (including, but not limited to the North Dakota Pharmacist Service Corporation ("NDPSC"), divisions, groups, and affiliates controlled by it; and the respective officers, directors, employees, agents, attorneys, representatives, successors, and assigns of each.
- B. "NDPSC" means North Dakota Pharmacist Service Corporation; its officers, directors, employees, agents, attorneys, representatives, successors, and assigns; and the subsidiaries divisions, groups, and affiliates controlled by it; and the respective officers, directors, employees, agents, attorneys, representatives, successors, and assigns of each.
- C. "Participate" in an entity or an arrangement means (1) to be a partner, shareholder, owner, member, or employee of such entity, or (2) to provide services, agree to provide services, or offer to provide services, to a Payor through such entity. This definition also applies to all tenses and forms of the word "participate," including, but not limited to, "participating," "participated," and "participation."
- D. "Payor" means any Person that pays or arranges for payment, for all or any part of any prescriptions dispensed by Pharmacies to itself or any other Person, as well as any Person that develops, leases, or sells access to networks of Pharmacies.
- E. "Person" means both natural persons and artificial persons, including, but not limited to corporations, unincorporated entities, and governments.
- F. "Pharmacy" means any person licensed by the State of North Dakota to dispense pharmaceuticals.
- G. "Pharmacy Participation Agreement" means any existing or proposed agreement, oral or written, in which a Payor agrees to reimburse a Pharmacy for the provision of Pharmacy services, and the Pharmacy agrees to accept such payment from a Payor for such Pharmacy services during the term of the agreement.