

UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION



In the Matter of )  
 )  
Revco D.S., Inc. ) Docket No. C-<sup>3540</sup>~~3450~~  
a corporation. )  
 )

**Application for Approval, Expedited Review, and Waiver**

CVS Corporation ("CVS"), by its attorneys, and pursuant to section 2.41 of the Commission's rules, 16 C.F.R. § 2.41, hereby files this application for approval of a proposed acquisition subject to review under the above-captioned order. CVS also requests expedited review of its application and waiver of the 30-day public notice provisions in the rules so as to complete the purchase by December 27, 2001.

**I. Background and Statement of Facts**

On March 31, 1994, Revco D.S., Inc. ("Revco") and Hook-SuperRx, Inc. ("HSI") executed an Agreement and plan of merger providing for the acquisition by Revco of all of the voting securities of HSI. The Commission issued a Complaint alleging that the proposed acquisition, if consummated, would constitute a violation of applicable law. See Revco, D.S., Inc.; Proposed Consent Agreement With Analysis to Aid Public Comment, 59 Fed. Reg. 38188 (July 27, 1994) ("Consent Agreement").<sup>17</sup>

<sup>17</sup> See also Revco D.S., Inc.; Prohibited Trade Practices, and Affirmative Corrective Actions, 59 Fed. Reg. 65638 (Dec. 19, 1994). The Consent Agreement covered pharmacies in Covington, Marion and Radford, Virginia.

At the time the Consent Agreement was entered, there were four pharmacies in Covington, Virginia. These pharmacies were Friendly Rx, K-Mart, Revco and HSI. Pursuant to the Consent Agreement, Revco and its successors and assigns were prohibited for a period of ten (10) years from the date the Order became final from acquiring any "stock, share capital, equity, leasehold, or other interest in any concern . . . presently engaged in . . . the business of selling prescription drugs at retail stores located in [Covington]." Consent Agreement, at Section IV. HSI's Covington store was sold in 1996 to Horizon Pharmacies, Inc. through the trustee process outlined in the Consent Agreement. See In the Matter of Revco, D.S., Inc., Docket No. C-3540, Decision and Order issued October 31, 1994.

In May of 1997, CVS acquired the stock of Revco. See In the Matter of CVS Corporation and Revco D.S.; Proposed Consent Agreement and Analysis to Aid Public Comment, File No. 971-0060, Docket No. C-3762, 62 Fed. Reg. 31103 (June 6, 1997). CVS therefore became subject to the requirements of the Consent Agreement.

CVS has been in compliance with the Consent Agreement since 1997.<sup>27</sup> CVS has provided high-quality customer service to consumers in Covington. Since CVS purchased Revco, Wal-Mart has entered Covington and Friendly Rx has closed. There has been no other entry into the market. As a result, while the number of pharmacies has remained the same, there are now three well-funded, national chain pharmacies in Covington. When the Consent Agreement was entered, there were two.

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<sup>27</sup> See Letter from Thomas S. Moffat, Esq., CVS Senior Legal Counsel - Corporate, confirming compliance with the Consent Agreement for the applicable period, attached hereto at Exhibit I. This letter has been filed separately with the Commission.

On July 23, 2001, Horizon filed for bankruptcy under Chapter 11, Title 11 of the United States Code. A plan of reorganization has been approved by the Court and is scheduled to be completed on December 27, 2001. See Affidavit of Jeffrey A. Brimer, attached hereto as Exhibit 2. Pharmacy Operations, Inc. ("POI"), which purchased the Horizon store in Covington, intends to close it. See id. CVS wishes to purchase certain assets of the Covington store, including its prescription files, and extend the benefits of its prescription benefit plans to Horizon's customers. A purchase agreement is being negotiated to this end between CVS and POI. See id.

This purchase requires Commission approval under the Consent Agreement. Because of the timing of the asset disposition, CVS requires expedited approval and waiver of the applicable comment period under the Commission's rules in order to close the acquisition. Failure to approve the purchase could create disruption of service and leave customers without access to their prescription records during a transition period over the winter. It would create hardship for consumers if this transition were to be interrupted. Patients seeing multiple specialists or preparing end-of-year tax returns would be extremely inconvenienced.

## **II. The Commission Should Approve The Acquisition**

The Consent Agreement clearly was intended to protect the market for direct retail pharmaceutical sales to consumers. For that reason, the Commission agreed to accept divestiture as a remedy in Covington, Virginia. The Commission has also been concerned with the provision of network pharmacy services to pharmaceutical benefit

managers (“PBMs”) and other managed care providers. PBMs rely on networks of pharmacies to deliver pharmaceutical benefits to consumers.

The proposed acquisition leaves consumers and PBMs with three viable, national chain pharmacies in the local market. In light of the circumstances surrounding the Horizon bankruptcy, and the lack of other interested and qualified buyers for the store, there is no reason to believe that competition and consumers would be ill-served by three strong competitors in the market. Moreover, POI has indicated its intention to close the store. Thus, in the absence of a sale to CVS, Horizon’s customers would be directly affected by the bankruptcy and their service could be disrupted during the winter months. Merely re-directing customers to other stores, or requiring them to initiate the process of recovering their prescription records on their own, could create confusion and inconvenience, disrupting the delivery of health services or the preparation of financial records.

Finally, “the purposes of the Clayton Act are not served by prohibiting companies from purchasing failing competitors when there are no other alternatives.” Dr. Pepper/Seven-Up Companies, Inc. v. Federal Trade Commission, 991 F.2d 859, 864 (D.C.Cir. 1993). Clearly, the Horizon pharmacy in Covington, Virginia is in imminent danger of failure. Id. There is no “realistic prospect for a successful reorganization” or “other viable alternative purchaser,” id., since the Court has approved the sale to POI, and POI intends to close the store. See Exhibit 2. Failure to approve this acquisition will therefore allow the Horizon assets to waste and do absolutely nothing for consumers. There is no other reasonable alternative available to the purchase by CVS. Thus, the injury to competition and consumers will clearly be less if CVS assumes the Horizon

store assets than if these assets were to “disappear[] entirely from the market.” United States v. General Dynamics Corp., 415 U.S. 486, 507 (1974).

### **III. The Commission Should Expedite Its Approval And Waive Public Notice**

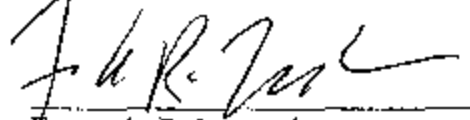
Timely approval of the sale by December 27, 2001 will allow the transfer of assets in bankruptcy to proceed without undue disruption. The Commission understands the importance of allowing such disposition to proceed on an expedited basis in the absence of anticompetitive effects. Cf. 11 U.S.C. § 363(b)(2) (providing expedited pre-merger notification waiting period for acquisitions out of bankruptcy).

The Commission also has the authority, in this “appropriate case[],” to “eliminate” the comment period. 16 C.F.R. § 2.41(f)(2). See also 5 U.S.C. § 553(b)(B) (authorizing waiver of procedural requirements for good cause). In light of the public interest in approving the acquisition, a thirty-day period for public comment is unnecessary in this case because the bankruptcy process established by the Court has already provided notice and an opportunity for the most interested parties to come forward. See Exhibit 2.

### **Conclusion**

For the foregoing reasons, the Commission should grant this Application, and approve the purchase of the assets as set forth herein on an expedited basis, including waiver of the applicable public notice period.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "F. R. Laguarda", written over a horizontal line.

Fernando R. Laguarda  
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(202) 434-7300

Attorneys for CVS

Dated: December 7, 2001

WDC 252404v1





THOMAS S. MOFFATT  
Senior Legal Counsel - Corporate

December 5, 2001

Bureau of Competition  
U.S. Federal Trade Commission  
600 Pennsylvania Ave, NW  
Washington, D.C. 20580

Re: In the Matter of Revco D.S., Inc.  
Docket No.: C-3540  
Date: October 31, 1994

Dear Sirs:

I am Senior Legal Counsel - Corporate of CVS. In May 1997, CVS acquired Revco D.S., Inc. in a stock-for-stock merger transaction. CVS is thus subject to the Decision and Order in the above-captioned matter (the "Order") as successor to Revco D.S., Inc. ("Revco").

Pursuant to Paragraph V. (B) of the Order, I hereby certify that CVS has been in compliance with the Order at all times since the 1997 acquisition of Revco by CVS. Specifically, CVS has not completed any acquisition of pharmacy assets in the cities or towns specified in Paragraph I. (J) of the Order.

Very truly yours,

A handwritten signature in black ink, appearing to read "Thomas S. Moffatt", written over a horizontal line.

Thomas S. Moffatt  
Senior Legal Counsel - Corporate





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

In the Matter of	)	
	)	
Revco D.S., Inc.	)	Docket No. C-3450
a corporation.	)	
	)	

Affidavit of Jeffrey A. Brimer:

1. My name is Jeffrey A. Brimer and I am Vice President at Pharmacy Operations, Inc., a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its executive offices located at 1100 North Lindbergh, St. Louis, Missouri 63132 ("POI").

2. On July 23, 2001, Horizon Pharmacies, Inc., Horizon Home Care, Inc., Horizonscripts.com, Inc. and Jones Low Priced Drugs, Inc. (collectively, "debtors") filed voluntary petitions for relief under Chapter 11 of Title 11 of the United States Code, as amended. Among the affected businesses was the debtors' pharmacy located at 1268 South Craig Avenue, Covington, Virginia 24426 ("Store #11"). Pending relief, the debtors continued to operate their business and manage their properties pursuant to applicable law.

3. On July 23, 2001, the debtors filed a motion to establish bidding procedures for their assets, including the Store #11 assets. After a hearing, the Court granted the relief sought by the debtors and notice was given to interested parties. As a result, the Court conducted a bidding process involving an arm's-length, good-faith

negotiation. POI bid on twenty-one stores, and it was determined to have the highest and best offer for at least ten stores, including Store #11.

4. It is my good faith belief that there were in fact no other qualified bidders for Store #11.

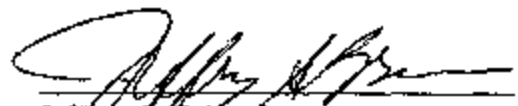
5. On November 14, 2001 and November 16, 2001, respectively, Orders were issued by the United States Bankruptcy Court for the Northern District of Texas, Dallas Division pursuant to which POI's proposed purchase of seven of the ten stores, including Store #11, was approved. A copy of the Order is attached hereto at Exhibit A.

6. Due to a variety of business-related issues, POI intends to close Store #11.

7. It is my understanding that CVS is interested in purchasing certain assets of Store #11, including its prescription files. The parties have therefore begun negotiating a Purchase Agreement pursuant to which CVS will purchase the Store #11 assets, subject to Commission approval.

8. POI's purchase of the Store #11 assets is scheduled to close on December 27, 2001, at the same time as the purchase of certain other debtors' assets out of bankruptcy by POI. Timely approval by the Commission of the application by CVS in this matter would therefore avoid disruption and protect the interests of affected consumers in this market.

I declare under penalty of perjury of the laws of the United States of America that the forgoing is true and correct. Executed on December 6, 2001.

  
Jeffrey A. Brimer  
Vice President



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assets located at Debtors' Covington, VA location (the "Assets") free and clear of all liens, claims and encumbrances and pursuant to the terms and conditions set forth in the Motions. After due deliberation and finding good and sufficient cause to grant the relief requested, the Court makes the following findings of fact and conclusions of law:

A. This Court has jurisdiction over these Motions pursuant to 28 U.S.C. §§157 and 1334. This is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(A), (M), (N) and (O), seeking relief under 11 U.S.C. §§363(b), (f) and 365. Venue is proper pursuant to 28 U.S.C. §§1408 and 1409.

B. On July 23, 2001 (the "Petition Date"), each of the Debtors filed with this Court its voluntary petition for relief under Chapter 11 of Title 11 of the United States Code, as amended (the "Bankruptcy Code"). Pursuant to sections 1107(a) and 1108 of the Bankruptcy Code, since the Petition Date the Debtors have continued to operate their businesses and manage their properties in an orderly fashion as debtors in possession.

C. On July 23, 2001, the Debtors filed their Motion for Establishment and Approval of Bidding Procedures and Approval of Form and Manner of Notice Relating to Prospective Sales of Certain of Debtors' Pharmacies and Certain Other Businesses and Assets (the "Bid Procedures Motion"), seeking approval of certain uniform bid procedures to be used by the Debtors in the orderly sale of the Debtors' assets for the majority of its retail locations.

D. After a hearing held on the Bid Procedures Motion on August 8, 2001, the Court granted the relief sought by the Debtors and entered on August 9, 2001 its Order Granting Motion for Establishment and Approval of Bidding Procedures and Approval of Form and Manner of Notice Relating to Prospective Sales of Certain of Debtors' Pharmacies and Certain Other Businesses and

Assets, finding that the proposed bid procedures would expedite the sales process and maximize the proceeds from the sale of the Debtors' assets.

E. The procedures were clarified by the Court in minor regard in the Clarified Bid Procedures Order Granting Debtors' Motion for Establishment and Approval of Bidding Procedures and Approval of Form and Manner of Notice Relating to Prospective Sales of Certain of Debtors' Pharmacies and Certain Other Businesses and Assets (the "Clarified Bid Procedures Order") entered on or about September 14, 2001. Those procedures were followed by the Debtors and formed the basis of the bids received on the assets being sold hereby.

F. Proper notice of the Motions was given by the Debtors to all interested parties. Proper notice of the Motions and other matters was given with respect to the Clarified Bid Procedures Order.

G. The proposed sale of the Assets to Pharmacy Operations, Inc. ("Pharmacy Operations") is the result of an arm's-length, good-faith negotiation, and Pharmacy Operations is a "good-faith" purchaser within the meaning of Section 363(m) of the Bankruptcy Code.

H. The sale of the Assets to Pharmacy Operations, which is outside of the ordinary course of business, is justified, because the offer made by Pharmacy Operations contained in the Asset Purchase Agreement attached to the Motions (the "Purchase Agreement") is the highest and best offer received by the Debtors for the purchase of the Assets and thus maximizes the value of the Assets to the benefit of the Debtors' estates and their creditors. The estimated purchase price, which is subject to the terms of the Purchase Agreement, is \$347,164.00.

I. The Debtors' lenders, McKesson Corporation ("McKesson") and AmeriSource Corporation ("AmeriSource"), who assert liens on all of the Assets proposed to be sold, have both



consented to the sale. The Debtors are unaware of any other holders of validly perfected liens or claims against the Assets.

J. The unexpired leases and executory contracts to be assumed and assigned under the Motions are subject to assumption under 11 U.S.C. §365(a). The Debtors knows of no present cure amount owed on the leases that would prevent assumption and assignment under §365(b), but that the Debtor, or where provided otherwise by the Purchase Agreement, Pharmacy Operations, will cure monetary defaults upon due notice. Pharmacy Operations has demonstrated the ability to adequately assure the future performance of the leases and executory contracts during the bidding process.

K. Any objections to the Motions and the sale are hereby overruled or resolution of the objection is contained in the provisions of the order below.

It is therefore:

**ORDERED** that the Motions are granted; it is further

**ORDERED** that the Debtors shall have authority to sell the Assets to Pharmacy Operations on the terms described in the Motions and in the Purchase Agreement and subject to the Clarified Bid Procedures Order and pursuant to 11 U.S.C. §363(b) and (f) free and clear of all liens, claims and encumbrances with such liens, claims and encumbrances (including those of McKesson and AmeriSource) to attach to the proceeds of the sale in the same priority and amount as existed on the Assets prior to the sale, and this Order shall not constitute a finding or determination concerning the relative priority of any liens or claims of any of AmeriSource or McKesson; it is further

**ORDERED** that the Debtors' commingling of funds from the sale of assets of multiple Debtors shall not impair, affect or extinguish the rights of interest holders in such funds

notwithstanding the commingling, any such funds shall remain the property of the respective selling Debtor.

ORDERED that the proceeds of the sale of the Assets shall be deposited in a separate account into which only sales of assets of the Debtors outside the ordinary course of business will be deposited, and that the proceeds of the sale of the Assets shall not be distributed from the account or otherwise used by the Debtors without further order of the Court after notice and hearing on no less than twenty (20) days, unless shortened by order of the Court upon agreement of McKesson and the Committee; it is further

ORDERED that the Debtors shall have authority to assume and assign all executory contracts and/or unexpired leases as requested in the Motions or as set forth herein.

SIGNED: NOV 13 2001, 2001.

  
HONORABLE ROBERT C. MCGUIRE  
UNITED STATES BANKRUPTCY JUDGE

UPON ENTRY RETURN TO:

I. Richard Levy  
GERARD SINGER & LEVICK, P.C.  
16200 Addison Road, Suite 140  
Addison, Texas 75001