

ATTORNEY GENERAL OF THE STATE OF NEW YORK

In the Matter of
Investigation of LETITIA JAMES,
Attorney General of the State of New York, of
WALGREEN CO., Respondent.

AOD No. 24-022

ASSURANCE OF DISCONTINUANCE

1. Pursuant to the provisions of General Business Law (“GBL”) § 396-r and Executive Law § 63(12), the Office of Letitia James, Attorney General of the State of New York (“NYAG”), commenced an investigation into certain business practices of Respondent Walgreen Co. (“Walgreens”) concerning price gouging with respect to infant formula sold to consumers in New York State. This Assurance of Discontinuance (“Assurance”) contains the NYAG’s findings and the relief agreed to by the NYAG and Walgreens (collectively, the “Parties”).

FINDINGS OF THE NYAG

The Respondent

2. Respondent Walgreens is a corporation organized under the laws of Illinois, with offices at 200 Wilmot Road, Deerfield, Illinois 60015.

3. Walgreens operates hundreds of retail locations throughout New York State, where it sells various consumer items, including infant formula.

The February 2022 Abbott Recall Triggered an Abnormal Market Disruption

4. On February 17, 2022, Abbott Laboratories (“Abbott”) shut down its Sturgis, Michigan infant formula manufacturing plant and initiated a recall of

formula produced there. Abbott closed the Sturgis plant and initiated the recall due to deadly bacterial infections linked to the plant, which triggered a federal probe.

5. Abbott produces over 40% of the infant formula sold in the U.S. (including the Similac and Elecare brands), and the Sturgis plant alone was responsible for approximately one fifth of total U.S. production.

6. Abbott's plant closure and recall, exacerbated by subsequent stockpiling by consumers, created an acute shortage in infant formula, which was already in short supply due to supply-chain problems caused by the Covid-19 pandemic.

7. On May 18, 2022, President Biden, citing an "acute disruption" in the supply of infant formula, invoked the Defense Production Act to ensure that the U.S. had an adequate supply. In its accompanying memorandum, the White House found that "[a]dequate supply of infant formula is critical to the health and safety of the millions of children who depend on the formula for essential nutrition," and that the formula shortage "threatens the continued functioning of the national infant formula supply chain, undermining critical infrastructure that is essential to the national defense, including to national public health or safety."

8. On May 21, 2022, days after the President's invocation of the Defense Production Act, New York City Mayor Eric Adams declared a state of emergency related to the formula shortage, finding that "the inability of parents and caregivers to obtain infant formula poses an imminent threat to the health and safety of

infants in New York City.” Mayor Adams extended this state of emergency through October 17, 2022.

9. While other manufacturers strove to fill the gap caused by the Sturgis plant closure, and the federal government imported the equivalent of millions of bottles of infant formula, out-of-stock rates for formula climbed through the spring and early summer of 2022, peaking at the end of July.

10. The Sturgis plant restarted production of the Elecare brand in July 2022 and of the far more widely consumed Similac brand in September, with those products being shipped to stores six or more weeks after production recommenced.

11. In September 2022, approximately one-third of households with an infant younger than one year old said they had trouble finding formula, according to a survey conducted by the U.S. Census Bureau. This was true for 40% of adults with household incomes less than \$75,000.

12. Out-of-stock rates for formula did not return to roughly their pre-recall levels until October 2022.

Infant Formula Is a Vital and Necessary Good

13. The vast majority of infants in the U.S. are reliant on formula. According to the CDC, about three quarters of U.S. infants are fed infant formula, either partially or exclusively, in the first six months of life.

14. Infant formula provides vitamins and nutrients essential for a baby’s growth during an extremely important period of child development.

15. As a result of the shortage, families were forced to spend time and energy locating available formula, faced the prospect of running out of formula entirely, and were often forced to pay much higher prices for the formula they could find.

Price Gouging

16. GBL § 396-r prohibits the sale of goods or services for an unconscionably excessive price during any abnormal disruption of the market. GBL § 396-r(2) provides that:

During any abnormal disruption of the market for goods and services vital and necessary for the health, safety and welfare of consumers or the general public, no party within the chain of distribution of such goods or services or both shall sell or offer to sell any such goods or services or both for an amount which represents an unconscionably excessive price. For purposes of this section, the phrase “abnormal disruption of the market” shall mean any change in the market, whether actual or imminently threatened, resulting from stress of weather, convulsion of nature, failure or shortage of electric power or other source of energy, strike, civil disorder, war, military action, national or local emergency, or other cause of an abnormal disruption of the market which results in the declaration of a state of emergency by the governor.

17. The infant formula shortage resulting from the February 2022 Abbott recall constituted an “abnormal disruption of the market” resulting from a “national or local emergency” under GBL § 396-r(2).

18. Goods covered by New York’s price-gouging statute include consumer goods, defined as “those used, bought or rendered primarily for personal, family or

household purposes,” and “any other essential goods and services used to promote the health or welfare of the public.” GBL § 396-r(2).

19. Infant formula is an essential consumer good “necessary for the health, safety and welfare of consumers.”

20. GBL § 396-r(3)(b) provides that a price may be “unconscionably excessive” if:

(i) the amount charged represents a gross disparity between the price of the goods or services which were the subject of the transaction and their value measured by the price at which such goods or services were sold or offered for sale by the defendant in the usual course of business immediately prior to the onset of the abnormal disruption of the market; or (ii) the amount charged grossly exceeded the price at which the same or similar goods or services were readily obtainable in the trade area.

21. Executive Law § 63(12) prohibits repeated or persistent fraud or illegality in the conduct of any business.

Walgreens’s Sales of Infant Formula During the Market Disruption

22. Records provided by Walgreens for the period from November 2021 through October 2022 indicate that, after the February 17, 2022 Abbott recall, Walgreens unconscionably increased prices with respect to at least 20 infant formula products, including several popular Enfamil and Similac products.

23. As compared to its pre-recall prices, as adjusted upwards for any corresponding product-specific cost increases, Walgreens raised prices on those 20 products by 10% or more after the February 17, 2022 Abbott recall. For several of the products in question, Walgreens raised its prices by over 20% (compared to pre-

recall prices adjusted upwards to account for corresponding cost increases) and, in at least one case, by over 70%.

24. Between the time of the Abbott recall and the end of the abnormal market disruption, Walgreens made over 2,400 individual formula sales at these inflated prices, selling over 3,400 cans or bottles of formula. As a result of these sales, Walgreens brought in over \$150,000 in gross receipts.

25. The NYAG finds that the prices Walgreens charged for infant formula were unconscionably excessive and not solely attributable to additional costs imposed by suppliers, in violation of GBL § 396-r, and constituted repeated and persistent illegality, in violation of Executive Law § 63(12).

26. Walgreens neither admits nor denies the NYAG's Findings in paragraphs 1-25 above.

27. The NYAG is willing to accept the terms of this Assurance pursuant to Executive Law § 63(15) in lieu of commencing a statutory proceeding and to discontinue its investigation.

28. The Parties each believe that the obligations imposed by this Assurance are prudent, appropriate, and in the public interest.

AGREEMENT

WHEREAS Walgreens neither admits nor denies the NYAG's findings and is willing to compromise to avoid litigation, and the NYAG is willing to accept the terms of this Assurance pursuant to New York Executive Law § 63(12) and to discontinue its investigation, and the Parties accept the obligations imposed;

1. IT IS HEREBY AGREED, by and between the Parties, that this Assurance shall be binding on and apply to Walgreens and upon its officers, directors, agents, employees, assigns, and any individual or entity through which Walgreens may now or hereafter act.

Prohibited Practices

2. Walgreens shall not engage in any acts or practices in violation of GBL § 396-r, including but not limited to the following: During any abnormal disruption in the market, Walgreens shall not offer or sell consumer goods or services that are vital and necessary for the health, safety, and welfare of consumers for an amount that represents a gross disparity between the price of the goods or services sold or offered for sale and their value measured by the price at which such consumer goods or services were sold or offered by Walgreens in the usual course of business immediately prior to the onset of the abnormal disruption of the market, or, if such goods or services were not sold or offered for sale prior to the market disruption, at an amount that grossly exceeds the price at which the same or similar goods or services were readily obtainable by other consumers in the trade area.

3. In defense of any alleged violation of Agreement, paragraph 2, Walgreens may present evidence to the NYAG that additional costs not within their control were imposed on Walgreens for the goods and services.

Payment to the State

4. In consideration of the making and execution of this Assurance, Walgreens agrees that, within ten (10) business days of the Effective Date of this

Assurance, it will pay by wire transfer, certified check, or bank check payable to the State of New York \$50,000 for penalties, fees, and costs.

5. If payment is made by check, it shall be payable to the State of New York and delivered to the State of New York Office of the Attorney General, Bureau of Consumer Frauds and Protection, Attention: Benjamin C. Fishman, Assistant Attorney General, 28 Liberty Street, 20th Floor, New York, NY 10005. Any payments and all correspondence related to this Assurance must reference Assurance No. 24-022.

Donation

6. Within 30 days of the execution of this Assurance, Walgreens, as restitution, shall donate a total of 9,564 cannisters of the following two products: (i) Walgreens Sensitivity Premium Infant Formula With Iron, container size 22.5 OZ (WIC number 792959); and (ii) Walgreens Advantage Premium Baby Formula Powder With Iron, container size 23.2 OZ (WIC number 792274). This donation shall be made to one or more non-profit or government organizations dedicated, at least in part, to providing aid to needy or low-income New Yorkers who are parents of infant children (the “Donee Organizations”). The details of such donations, including a determination of the identity and location of the Donee Organizations, shall be determined by the NYAG, upon reasonable consideration of any proposals made by Walgreens.

7. Infant formula donated by Walgreens pursuant to this Assurance shall be of a quality identical to that of infant formula sold by Walgreens to customers in

New York State. Walgreens shall deliver such infant formula to one or more locations in New York State identified by the Donee Organizations at Walgreens's own expense, on dates and at times reasonably convenient for the Donee Organizations, either in single deliveries or in multiple deliveries, whichever is reasonably convenient for the Donee Organizations. Walgreens shall charge no price or fees to the Donee Organizations in consideration of the donated infant formula or of their storage, shipping, or any other task necessitated by their donation. Walgreens shall notify the NYAG of the date, time, and place of delivery at least five business days prior to any such delivery to a Donee Organization.

Miscellaneous

Subsequent Proceedings

8. Walgreens expressly agrees and acknowledges that, if the Agreement is voided, breached, or violated, the NYAG thereafter may commence a civil action or proceeding related to the Assurance, in addition to any other appropriate investigation, action, or proceeding, and that evidence that the Assurance has been voided, breached, or violated shall constitute prima facie proof of the statutory violations described in Findings, paragraphs 1-25 above, pursuant to Executive Law § 63(15).

9. In any subsequent investigation, action, or proceeding by the NYAG to enforce this Assurance, for violations of the Assurance, or if the Assurance is voided pursuant to Agreement, paragraph 8, Walgreens expressly agrees and acknowledges:

- a. That any otherwise applicable statute of limitations or other time-related defense is tolled from and after the effective date of this Assurance;
- b. That the NYAG may use statements, documents, or other materials produced or provided by Walgreens prior to or after the effective date of this Assurance; and
- c. That any such action or proceeding must be adjudicated by the courts of the State of New York, and that Walgreens irrevocably and unconditionally waives any objection based upon personal jurisdiction, inconvenient forum, or venue.

10. In the event the NYAG believes that Walgreens has violated a provision of the Assurance, prior to taking legal action to enforce this Assurance as a result of the alleged violation, the NYAG shall notify Walgreens, identifying the alleged violations and the provision in question. Walgreens shall have thirty (30) days (the "Notice Period") to provide a written response. The NYAG shall not attempt to void this Assurance or commence any civil action to enforce this Assurance concerning any such alleged violation until after this Notice Period has run, provided, however, that the NYAG shall not be obligated to provide Respondent with notice of an alleged violation and an opportunity to provide a written response on more than two occasions in any one calendar year or if the NYAG determines in good faith that an imminent threat (defined as a threat more

probable than not to occur in the very near future) to the health or safety of the public requires immediate action.

11. If a court of competent jurisdiction determines that Walgreens has violated the Assurance, Walgreens shall pay to the NYAG the reasonable cost, if any, of obtaining such determination and of enforcing this Assurance, including without limitation legal fees, expenses, and court costs.

12. To the extent not already provided under this Assurance, Walgreens shall, upon request by the NYAG, provide documentation and information sufficient for the NYAG to verify compliance with this Assurance and to effectuate the terms of this Assurance.

Effects of Assurance

13. Acceptance of this Assurance by the NYAG is not an approval or endorsement by the NYAG of any of Walgreens's practices or procedures, and Walgreens shall make no representation to the contrary.

14. This Assurance is not intended for use by any third party in any other proceeding.

15. This Assurance shall be binding on and inure to the benefit of the Parties and their respective successors and assigns, provided that no party, other than the NYAG, may assign, delegate, or otherwise transfer any of its rights or obligations under this Assurance without the prior written consent of the NYAG.

16. Nothing contained herein shall be construed to deprive any person of any private right under the law.

17. Any failure by the NYAG to insist upon the strict performance by Walgreens of any of the provisions of this Assurance shall not be deemed a waiver of any of the provisions hereof, and the NYAG, notwithstanding that failure, shall have the right thereafter to insist upon the strict performance of any and all of the provisions of this Assurance to be performed by Walgreens.

Communications

18. All notices, reports, requests, and other communications pursuant to this Assurance must reference Assurance No. 24-022, shall be in writing, and shall, unless expressly provided otherwise herein, be given by hand delivery, express courier, or electronic mail at an address designated in writing by the recipient, followed by postage prepaid mail, and shall be addressed as follows:

- a. If to Walgreens, to Kristi Wolff, Kelley Drye & Warren, LLP, 3050 K St. NW Ste. 400, Washington, DC 20007, kwolff@kelleydrye.com, or in her absence, to the person holding the title of General Counsel of Walgreen Co.
- b. If to the NYAG, to Benjamin C. Fishman, Assistant Attorney General, Bureau of Consumer Frauds and Protection, Office of the New York State Attorney General, 28 Liberty Street, New York, New York 10005, Benjamin.Fishman@ag.ny.gov, or in his absence, to the person holding the title of Bureau Chief, Consumer Frauds and Protection Bureau.

Representations and Warranties

19. The NYAG has agreed to the terms of this Assurance based on, among other things, the representations made to the NYAG by Walgreens and its counsel and the NYAG's own factual investigation as set forth in Findings, paragraphs 1-25 above. Walgreens represents and warrants that neither it nor its counsel has made any material representations to the NYAG that are inaccurate or misleading. If any material representation by Walgreens or its counsel is later found to be inaccurate or misleading, this Assurance is voidable by the NYAG in its sole discretion.

20. No representation, inducement, promise, understanding, condition, or warranty not set forth in this Assurance has been made to or relied upon by Walgreens in agreeing to this Assurance.

21. Walgreens represents and warrants, through the signatures below, that the terms and conditions of this Assurance are duly approved, and execution of this Assurance is duly authorized. Except as stated herein, Walgreens shall not take any action or make any statement denying, directly or indirectly, the propriety of this Assurance, or expressing the view that this Assurance is without factual basis. Nothing in this paragraph affects Walgreens's (i) testimonial obligations or (ii) right to take legal or factual positions in defense of litigation or other legal proceedings to which the NYAG is not a party.

General Principles

22. If Walgreens has maintained substantial compliance with Agreement Paragraph 2 above for a period of five (5) years after the effective date, the New York Attorney General releases and discharges Walgreens from all civil or administrative claims that the New York Attorney General could have brought based on Walgreens's conduct related to infant formula pricing in 2022 as alleged in this Assurance. For purposes of this Paragraph, "substantial compliance" means that the NYAG has not alleged in a public filing, including a settlement, that Walgreens has violated GBL § 396-r. Provided, however, that nothing in this Assurance shall be construed as excusing or exempting Respondent from complying with any state or federal law, rule, or regulation.

23. Nothing contained herein shall be construed to limit the remedies available to the NYAG in the event that Walgreens violates the Assurance after its effective date.

24. This Assurance may not be amended except by an instrument in writing signed on behalf of the Parties.

25. In the event that any one or more of the provisions contained in this Assurance shall for any reason be held by a court of competent jurisdiction to be invalid, illegal, or unenforceable in any respect, in the sole discretion of the NYAG, such invalidity, illegality, or unenforceability shall not affect any other provision of this Assurance.

26. Walgreens acknowledges that it has entered this Assurance freely and voluntarily and upon due deliberation with the advice of counsel.

27. This Assurance shall be governed by the laws of the State of New York without regard to any conflict-of-laws principles.

28. The Assurance and all its terms shall be construed as if mutually drafted with no presumption of any type against any party that may be found to have been the drafter.

29. This Assurance may be executed in counterparts, each of which shall be deemed to be an original, but all of which, taken together, shall constitute one and the same agreement.

30. This Assurance constitutes the entire agreement between the NYAG and Walgreens and supersedes any prior communication, understanding, or agreement, whether written or oral, concerning the subject matter of this Assurance.


31. The effective date of this Assurance shall be March 7, 2024.

IN WITNESS THEREOF, the undersigned subscribe their names:

LETITIA JAMES
Attorney General of the State of New York
Attorney for Petitioners

By: *Jane M. Azia*
Jane M. Azia
Bureau Chief
Bureau of Consumer Frauds and Protection

28 Liberty Street
New York, New York 10005

By: 
Benjamin C. Fishman
Assistant Attorney General
Bureau of Consumer Frauds and Protection
28 Liberty Street
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Of Counsel:
Laura J. Levine, Deputy Bureau Chief

WALGREEN CO.

By: _____
Ms. Heather Hughes
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COUNSEL FOR WALGREEN CO.

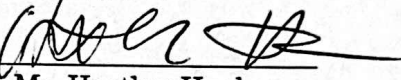
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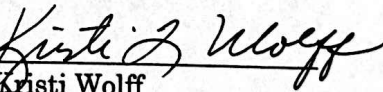
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Of Counsel:
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WALGREEN CO.

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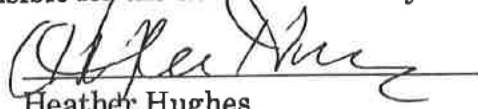
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CORPORATE ACKNOWLEDGMENT


STATE OF ILLINOIS)
) ss.:
COUNTY OF LAKE)

I, Heather Hughes the undersigned, being duly sworn, depose and say:

I am Group V.P. of Respondent Walgreen Co. I have executed the foregoing Assurance of Discontinuation on behalf of, and with the consent and authority of, Walgreen Co. and those responsible for the acts of said entity.


Heather Hughes
Group Vice President

Sworn before me this 11 day of March, 2024



Notary Public
State of IL
My Commission Expires 3/23/25

