

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

FEDERAL TRADE COMMISSION)
600 Pennsylvania Avenue, N.W.)
Washington, DC 20580)
)
Plaintiff,)
)
v.)
)
SURESCRIPTS, LLC)
2550 South Clark Street, 10th Floor)
Arlington, VA 22202)
)
Defendant.)
)

Case No. 1:19-cv-01080

**STIPULATED ORDER FOR
PERMANENT INJUNCTION AND
EQUITABLE RELIEF**

Plaintiff Federal Trade Commission (“FTC”) filed its Complaint for Injunctive and Other Equitable Relief (“Complaint”) in this matter, pursuant to Section 13(b) of the Federal Trade

5. Surescripts waives all rights to appeal or otherwise challenge or contest the validity of this Order.

ORDER

I. DEFINITIONS

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

- A. “Surescripts” means Surescripts, LLC, its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates controlled by Surescripts, LLC, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “Affirmative Steps” means the following actions by Surescripts with respect to E-Prescribing Services:
 1. Within 10 days of the date of the entry of this Order, provide notice of this Order, a description of the contractual provisions this Order prohibits Surescripts from enforcing, and a description of Surescripts’ volume based pricing going forward (where applicable) pursuant to Paragraph II.G, by delivering a letter in the form of Exhibit A to each Customer;
 2. At the request of the Customer, allow each Customer to immediately enter into a new contract on the same terms except those prohibited by this Order;
 3. Remove provisions prohibited by this Order when Surescripts and the Customer next engage in renegotiation or renewal of a contract containing such prohibited provisions;
 4. If a contract containing provisions prohibited by this Order would otherwise automatically renew on existing terms without renegotiation, then, in advance of the first date the contract is set to automatically renew, send a new proposed contract to the Customer omitting the prohibited provisions;
 5. Within 10 days of the date of the entry of this Order, publish a notice on Surescripts’ website describing the provisions this Order prohibits Surescripts from enforcing; and
 6. Include specific instructions on not enforcing the provisions prohibited by this Order as part of Surescripts’ Compliance Program, with annual reminders to Surescripts’ in-house legal department that such provisions cannot be enforced and cannot be included in future contracts.
- C. “All-Unit Discount or Incentive” means a Price Advantage that is provided to a Customer *on every unit* based upon the Customer’s volume of E-Prescribing Services reaching a

specified threshold (in units, revenues, share, or any other measure). By way of example, a discount of X% on all volume if the volume transmitted exceeds Y volume (including on the volume transmitted up to and including Y) is an All-Unit Discount or Incentive, while a discount of X% on all volume transmitted that is in excess of Y (but not on the volume transmitted up to and including Y) is a Last-Unit Discount or Incentive.

- D. “Antitrust Compliance Officer” means the person appointed or retained to supervise Surescripts’ antitrust compliance program described in Section V of this Order.
- E. “Antitrust Laws” means the Federal Trade Commission Act, as amended, 15 U.S.C. § 41 et seq., the Sherman Act, 15 U.S.C. § 1 et seq., and the Clayton Act, 15 U.S.C. § 12 et seq.
- F. “Commission” means the Federal Trade Commission.
- G. “Competitor” means any Person, other than Surescripts, that intends to engage in or is currently engaged in the business of developing or providing its own E-Prescribing Services, and any such Person’s employees, agents, and representatives. A Competitor includes any Person entering into a direct connection between an EHR and a pharmacy or PBM to transact its own E-Prescribing Services (e.g., Routing, Eligibility, etc.).
- H. “Customer” means a pharmacy, PTV, pharmacy aggregator, value added reseller, PBM, EHR, prescriber aggregator, or any other corporation, partnership, unincorporated entity, or government agency that contracts directly with Surescripts for E-Prescribing Services (presently or in the future).

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Transactions, based on information reasonably available to Surescripts, including a Customer's historical transaction purchase volumes or any other information provided by the Customer to Surescripts.

- O. "Formulary" means the provision of data that identifies the patient's group or plan level prescription benefit information for the selected drug or any alternative drugs, as applicable.
- P. "Last-Unit Discount or Incentive" means a Price Advantage that is provided to a Customer based upon the Customer's volume of E-Prescribing Services reaching a specified threshold (in units, revenues, share, or any other measure) that *applies only above the threshold necessary* to qualify for the Price Advantage. By way of example, a discount of X% on all volume transmitted if the volume exceeds Y volume (including on the volume transmitted up to and including Y) is an All-Unit Discount or Incentive, while a discount of X% on all volume transmitted that is in excess of Y (but not on the volume up to and including Y) is a Last-Unit Discount or Incentive.
- Q. "Majority Share Requirement" means an absolute or conditional requirement, whether formal or informal, with respect to E-Prescribing Services, that a Customer, over the time period of the relevant requirement:
 - 1. Use the Surescripts network for more than 50% of the Customer's Total Transactions, whether in volume or dollars;
 - 2. Use the Surescripts network for a minimum volume of transactions if that

- W. “Price Advantage” means a payment, discount, discounted price, or rebate.
- X. “PTV” means pharmacy technology vendor.
- Y. “Routing” means the transmission of prescription and prescription-related information between a prescriber and a pharmacy via the prescriber’s EHR system and includes the following transactions: NewRx, Electronic Prescribing of Controlled Substances, RxRenewal Request, RxChange, CancelRx, NewRxRequest, RxTransfer, RxFill, and Long-Term and Post-Acute Care routing transactions.

II. PROHIBITION ON MAJORITY SHARE AND RELATED REQUIREMENTS

IT IS FURTHER ORDERED that, acting directly or indirectly, or through any corporate or other device, in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, Surescripts, in connection with the sale of E-Prescribing Services, is restrained and enjoined from:

- A. Entering into, maintaining, or enforcing a contract, agreement, or understanding that imposes upon a Customer or commits a Customer to a Majority Share Requirement, including by:
 1. Conditioning the sale of E-Prescribing Services on a Majority Share Requirement for such services;
 2. Conditioning a Price Advantage for E-Prescribing Services on a Majority Share Requirement for such services; or
 3. Conditioning a flat or lump sum payment or monies (or any other item of pecuniary value) on a Majority Share Requirement for E-Prescribing Services.

Provided, that the prohibition in Paragraph II.A does not apply to Last-Unit Discounts or Incentives.

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that violate Paragraphs II.A-F, Surescripts shall not be deemed to be “maintaining” such provisions prohibited in Paragraphs II.A-F.

IV. SURESCRIPTS EMPLOYEE NON-COMPETE AGREEMENTS

IT IS FURTHER ORDERED that:

- A. Surescripts shall not enter into or enforce any contract, agreement, provision, or understanding that restricts or restrains the right or ability of any former or current employee (whether employed directly or indirectly or through any corporation, company, business, partnership, subsidiary, division, or agent) to seek or accept employment with any Competitor or entrant in E-Prescribing Services for any period of time after the conclusion of the employee’s employment with Surescripts.
- B. No later than 10 days after the date of the entry of this Order, Surescripts shall provide notice of the prohibitions contained in Paragraph IV.A to any current or former employee (whether employed directly or indirectly or through any corporation, company, business, partnership, subsidiary, division, or agent) that is bound by a contract, agreement, provision, or understanding described in Paragraph IV.A. Surescripts shall be deemed to have provided notice to a former employee by sending such notice to the former employee’s last known email address or last known mailing address.

V. ANTITRUST COMPLIANCE PROGRAM

IT IS FURTHER ORDERED that:

- A. Surescripts shall design, maintain, and operate an antitrust compliance program to ensure compliance with this Order and the Antitrust Laws, and as part of such program shall:
 - 1. No later than 30 days from the date this Order is issued, appoint or retain an Antitrust Compliance Officer to supervise Surescripts’ antitrust compliance program (Surescripts may replace the Antitrust Compliance Officer with another person at any time);
 - 2. Upon issuance of this Order, provide in-person or online training concerning Surescripts’ obligations under Sections II-IV of this Order and an overview of the Antitrust Laws as they apply to Surescripts’ activities to Surescripts’ Executive, Legal, Sales, and Marketing Staff:
 - a. No later than 30 days after this Order is issued;
 - b. No later than 30 days after an employee first becomes Executive, Legal, Sales, and Marketing Staff; and
 - c. At least annually.
 - 3. Maintain policies and procedures for:

3. A copy of the form(s) of notice provided to employees to comply with Paragraph IV.B, and a description of how and to whom such notice was provided;
4. Unless identified in an earlier compliance report, the identity of all parties who received the notice required by Section III of this Order, together with proof of service of the notice;
5. For each E-Prescribing Service, copies of Surescripts' contracts with the 10 largest customers (by transaction volume) on each side of each service (e.g. for routing, contracts for the 10 largest EHRs and 10 largest pharmacies/PTVs; for eligibility, contracts for the 10 largest EHRs and 10 largest PBMs), along with a random sample of 10 contracts from the remaining customers on each side of each service. Unless previously identified in an earlier compliance report, Surescripts will identify in the provided contracts the provisions no longer being enforced in accordance with the Order. In addition, Surescripts will provide a list of all the contracts (other than the contracts provided) that contain provisions that Surescripts is no longer enforcing, and describe its efforts to enter revised contracts that do not contain provisions prohibited by the Order; and
6. Unless identified in an earlier compliance report, the name and description of any E-Prescribing Service transaction that replaces or is comparable to any of the

- A. The dissolution of Surescripts, LLC;
- B. The acquisition, merger, or consolidation of Surescripts, LLC; or
- C. Any other change in Surescripts, including assignment and the creation, sale, or dissolution of subsidiaries, if such change might affect compliance obligations arising out of this Order.

VIII.