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STATE OF MISSOURI

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COMMISSIONER OF SECURITIES
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September 20, 2010

VIA FACSIMILE & U.S. MAIL

Amanda Gohlke Fields
General Counsel for American Pharmacies
802 North Carancahua, Suite 1830
Corpus Christi, Texas 78401

Re: Request for a No-Action Determination under Section 409.6-605(d), RSMo.
Southwest Pharmacy Solutions, Inc. d/b/a American Pharmacies
Missouri File No 2010-1,453

Dear Ms. Fields,

This letter responds to your September 16, 2010 request that I adopt a no-action position concerning certain activities of your client, Southwest Pharmacy Solutions, Inc. Specifically, you asked that I affirm that this office will take no action to require that Southwest Pharmacy Solutions register its offering or sale of its shares of stock under the Missouri Securities Act of 2003 or to register any personnel under the Missouri Securities Act of 2003 who will solicit pharmacists for possible membership in Southwest Pharmacy Solutions.

Based solely upon the representations you made in the enclosed letter, I will not institute a proceeding or an action under the Missouri Securities Act of 2003 against Southwest Pharmacy Solutions or its personnel for offering or selling its shares of stock without registration in the State of Missouri. This "no-action" position does not constitute an exclusion from the antifraud provisions of the Missouri Securities Act of 2003. This position is based on the facts presented, and, should the facts prove to differ from those presented in any manner, my position may differ. This determination is applicable only to the matter at hand and the specific facts related to the same by the requesting party. This determination sets no precedent and is no way binding on the Commissioner or the Missouri Securities Division when applied to any other matter, requesting party, or set of facts.

Sincerely,

A handwritten signature in black ink, appearing to read "M. D. Kitzi".

Matthew D. Kitzi
Commissioner of Securities

SEP 16 2010

MISSOURI
SECRETARY OF STATE

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September 16, 2010

Via Email roumen.manolov@sos.mo.gov

Secretary of State
Securities Division
Attention: Mr. Roumen Manolov
600 W. Main Street
P.O. Box 1276
Jefferson City, Missouri 65012

Re: Request for No-Action Letter

Dear Mr. Manolov:

On behalf of my client, Southwest Pharmacy Solutions, Inc. d/b/a American Pharmacies ("SPS"), a Texas corporation, I respectfully request that your office issue a no-action letter, based on the Facts and Discussion below.

FACTS

Overview.

SPS is a Texas for-profit corporation which operates as a pharmaceutical purchasing cooperative for approximately five hundred members in the independent pharmacy profession. SPS aggregates the buying power of its members to facilitate the negotiation of discounts for the purchase of pharmaceutical products and services. In addition, SPS provides or negotiates for miscellaneous services to or for its members.

SPS believes that Missouri independent pharmacies would be interested in obtaining the economies of scale purchasing power currently

enjoyed by SPS members and wishes to solicit them for membership in SPS. Membership in SPS will be available only to persons (individuals, partnerships, corporations or other business forms) which are engaged in the active conduct of a retail pharmacy business. Membership will be further conditions upon ownership of both Class A Stock and Class B Stock. The SPS Board of Directors ("Board") may require a member to purchase additional stock where a member owns or controls several stores.

Voting and Distributions.

Class A Stock. Each member of SPS must purchase 100 shares of Class A stock when joining the cooperative. However, each member is limited to only one vote on SPS matters, as voting rights are not based on each member's proportionate share of stock in SPS. The value of Class A stock is fixed for all purposes, including liquidation, termination, requirement and bankruptcy, etc. The purchase price of one share of Class A stock is \$14. Class A stock entitles a member to annual patronage dividend distributions based on each member's proportionate share of business conducted within SPS. Patronage dividends are paid out of net savings and overcharges from operating in connection with the sale of pharmaceutical goods to the members, less operating and administrative expenses and a reasonable allowance for reserves and working capital.

Class B Stock. Each member of SPS must also purchase 100 shares of Class B stock when joining the cooperative. Class B stock reflects the net book value of SPS and represents each member's final deferred right to participate in its proportionate share of the benefits of the combined purchases of all members. Net book value will be comprised of, and fluctuate up and down with, gain or loss on the sale of capital assets and retained amounts necessary for cash reserves and working capital and miscellaneous revenues. Member eligibility to purchase Class B stock is the same as Class A stock and must be repurchased at the same time as Class A Stock. The purchase price per share for the Class B stock is \$1. Ownership of Class B stock does not confer any voting or dividend rights upon its holders.

Issuance; Transferability. Class A Stock and Class B Stock are subject to identical substantial issuance and transfer restrictions. SPS may not issue to nor may any holder of Class A or Class B stock transfer such stock to any third party unless the Board approves such issuance or transfer by a two-thirds (2/3) vote and the person to whom the stock will be issued or transferred is engaged directly or indirectly in the retail pharmacy business. All shareholders must be licensed and practicing pharmacists, but

the fact that the person is a licensed pharmacist does not mean that SPS will authorize shares; the approval for issuance of shares is vested with the Board (by two thirds vote), and again, ownership is restricted to pharmacists engaged in the active conduct of a retail pharmacy business. Since members are required to pledge their stock as collateral security for their SPS purchases or outstanding loan balances, members are prohibited from pledging or hypothecating SPS stock. Further, the members (or such representatives in the case of death or disability) are required to sell their stock back to SPS upon the occurrence of certain pre-determined events, such as retirement from the practice of pharmacy, death, permanent loss or suspension of license, bankruptcy and failure to transact a substantial business with or through SPS for a specified period of time.

Redemption Event. Upon the occurrence of a redemption event, a shareholder with respect to whom the redemption event has occurred or his estate, guardian or representative, as the case may be, must offer to sell to SPS, and SPS may, but is not obligated to purchase all, but not less than all, of the selling shareholder's shares of Class A stock and Class B stock. Redemption events are as follows: 1) a shareholder ceases to operate, directly or indirectly a retail pharmacy business; 2) a shareholder fails or refuses to fulfill his primary business commitment with SPS for a six (6) consecutive month period; 3) a shareholder dies, becomes incapacitated, or declares bankruptcy; or is a party to a merger in which it is not the surviving company, or is otherwise liquidated or dissolves; 4) the Board determines a shareholder has failed or refused to comply with any standard or regulation established by the Board, and as may be adopted or amended from time to time; or 5) a shareholder makes written request to the Board on or before the annual meeting of the Board for the year in which such shareholder desires to redeem his shares requesting that SPS redeem such shareholder's shares.

Redemption Price.

Class A. Class A Stock will be redeemed by paying the initial purchase price of the Class A Stock to the redeeming member. Thus, the Class A Stock's value does not fluctuate. The redemption price of Class A Stock will be paid within thirty (30) days of its redemption. SPS may offset the redemption payment with any amounts owed to SPS by the redeeming member.

Class B. Redemption of Class B Stock will be subject to substantial restrictions, all of which are designed to preserve SPS's operations and continued viability for its membership. The Board may not

approve the redemption of Class B Stock if such redemption would impair or jeopardize the financial condition and further operations of SPS, as determined by the Board in its sole discretion, violate any applicable law, or violate the articles of incorporation or bylaws of SPS. In addition, the Board may not approve the redemption of Class B Stock if the effect of such redemption together with redemptions of other members would have the effect of reducing the net book value of SPS by more than two percent (2%) in the fiscal year of the redemption payment. The Board, in its sole discretion, may issue a promissory note in lieu of a cash payment for the Class B stock payable in up to five (5) years. All notes will be payable annually and on such other terms and conditions set by the Board. The redemption price will be an amount equal to the member's proportionate share of the business transacted by such member with or through SPS over the preceding twelve (12) month period from the date the member elects to redeem such member's Class B Stock multiplied by the net book value of SPS. Net book value will be established annually by the Board, which will be the book value as reflected by the last preceding annual statement of SPS.

In the event the aggregate price for all Class B stock redemption requests exceeds the redemption limit in any fiscal year, the Board may approve only those redemption requests in the order in which they are received.

DISCUSSION

We are submitting this letter to request a no action position. Like the definition of a security in the Missouri Securities Act, the federal definitions of "security" in the Securities Act of 1933 and the Securities Exchange Act of 1934 include the word "stock." However, courts have recognized that although an intangible right may be designated "stock," such right may not be a security subject to regulation under the securities laws. The United States Supreme Court has stated in *United Housing Foundation v. Forman*, 421 U.S. 837 (1975), that stock issued in a housing cooperative was not a "security" within the meaning of the Securities Act of 1933 ("Securities Act") or the Securities Exchange Act of 1934 ("Exchange Act") because the stock issued by the housing cooperative lacked the common characteristics normally associated with "stock."

The Supreme Court used two analyses in its determination that the "stock" at issue in *Forman* was not a security. The Court first analyzed whether the "stock" possessed five common characteristics which the Court determined were traditionally associated with common stock which is a

security: 1) the right to receive dividends contingent upon apportionment of profits; 2) negotiability; 3) the ability to pledge or hypothecate the stock; 4) voting rights in proportion to number of shares owned; and 5) the capacity of the stock to appreciate in value. The Court also analyzed the "stock" at issue using the criteria established by *SEC v. W.J. Howey Company*, 328 U.S. 293, 90 L.Ed. 1244, 66 S.Ct. 1100 (1946) "whether the scheme involved an investment of money in a common enterprise with profits to come solely from the efforts of others." 328 U.S. at 299.

The Securities Exchange Commission ("SEC") has taken the position in numerous "no-action" letters that the "capital stock" of cooperatives that are similar to SPS is not a security for the purposes of the federal securities laws based on the fact that the stock in question does not possess most of the common characteristics of capital stock that is a security set forth by the Supreme Court in *Forman*. In general, when the SEC has found that "stock" in cooperatives is not a security, the SEC has determined that such "stock" does not have unrestricted transferability and ordinary dividend rights, does not have significant potential for appreciation in value, and that the "stock" merely represents membership interests in a cooperative operating in the form of a corporation. See *Professional Veterinary Products, Ltd.*, made available July 1996; *NBF Acquisition, Inc.*, made available April 1, 1997; *Service Centers Corporation*, made available May 21, 1993; *Associated Grocers of New England*, made available October 5, 1989; *Feltus Hardware Incorporated*, made available November 9, 1988; and *American Hardware Supply Company*, made available December 7, 1983.

SPS obtained an indication of no-action be taken from the Texas Securities Board when SPS began its operations in Texas. In 2009, SPS also obtained an indication of no-action from the New Mexico Regulation and Licensing Department, Securities Division. In 2010, SPS also obtained an indication of no-action from the Arkansas Securities Department.

SPS believes the relevant factors regarding a determination that capital stock of SPS is not a security for the purposes of the Missouri Securities Act are:

- No dividends are payable proportionate to any SPS profits or the number of shares of capital stock owned. Instead, patronage dividends are based entirely upon each member's proportionate share of business conducted with SPS regardless of the number of shares owned. Patronage dividends are paid out of net savings and overcharges from

the sale of pharmaceutical goods to the members, less operating and administrative expenses and a reasonable allowance for reserves and working capital. Consequently, the shares do not entitle a member to a profit distribution. Because they are based upon the proportionate patronage of the recipient, the patronage dividends will be, in reality, a deferred realization by each member of the discount resulting from combined buying power of the members.

- The redemption price of the Class A Stock is equal to the price that was paid for such Class A Stock. Thus, Class A Stock's value does not fluctuate, and the redemption price is not related in any way to the profitability of SPS.
- The redemption price of the Class B stock is intended to be a means of capturing on a deferred basis any residual discount benefit that has not previously been passed on to such holder through direct discounts or patronage dividends. The reason these discount benefits are deferred is to insure that SPS will have the working capital necessary to continue its operations. Like the patronage dividends, the Class B redemption price is based solely upon the redemption recipient's proportionate share of patronage of SPS and not upon its proportionate share of Class B stock, nor is the redemption price related to the profitability of SPS.
- The shares of SPS are subject to substantial restriction on transfer, as they may not be transferred to any third party, unless the Board of Directors of SPS approves such transfer by a two-thirds (2/3) vote and the transferee is engaged directly or indirectly in the retail pharmacy business. Since members are required to pledge their stock as collateral security for their SPS purchases or outstanding loan balances, members are prohibited from pledging or hypothecating SPS stock. Further, the members (or such representatives in the case of death or disability) will be required to sell their stock back to SPS upon the occurrence of any of the pre-determined events, such as retirement from the practice of pharmacy, death, permanent loss or suspension of license, bankruptcy and failure to transact business with or through SPS for a specified period of time.

- Finally, each holder of shares of SPS will have equal voting rights (one vote per holder) regardless of the number of shares owned and the amount of business conducted with SPS.

I respectfully submit that the proposed activities and organization of SPS satisfy the tests of the *Forman* case and related authorities for an interest which may be nominally a share of stock but not a security. A holder of capital stock of SPS 1) will not receive dividends contingent upon an apportionment of profits based upon share ownership; 2) will not be able to negotiate, pledge, hypothecate or otherwise transfer such capital stock without Board approval; 3) will not have voting rights in proportion to the number of shares of stock owned; and 4) will not have stock which will appreciate in value other than as the result of the member's patronage in SPS. Finally, because a member's return will be based entirely upon such member's patronage of SPS, there has been no investment of money in a common enterprise with profits to come solely from the efforts of others.

REQUEST FOR NO-ACTION LETTER

My client, SPS, respectfully requests a no-action letter, in that SPS should not be required to register its offering or sale of such shares of stock under the Missouri Securities Act or to register any SPS personnel under the Missouri Securities Act who will solicit pharmacists for possible membership in SPS. Please also note these personnel will not receive any form of a commission for soliciting pharmacists for possible membership. Thank you for your timely attention to this request. Should you require further information, please do not hesitate to contact me.

Sincerely,

/s/ Amanda Gohlke Fields