



STATE OF NEW JERSEY  
DEPARTMENT OF LAW & PUBLIC SAFETY  
DIVISION OF CONSUMER AFFAIRS  
STATE BOARD OF PHARMACY

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IN THE MATTER OF THE SUSPENSION :  
OR REVOCATION OF THE LICENSE OF: : **Administrative Action**  
:  
Peter J. Riccio, R.Ph. :  
License No. 28RI01476900 : **FINAL DECISION**  
:  
TO PRACTICE PHARMACY IN THE :  
STATE OF NEW JERSEY :  
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This matter was most recently presented to the New Jersey State Board of Pharmacy (the "Board") upon the filing of an Administrative Complaint on July 29, 2014, by Acting Attorney General John Hoffman (the "Attorney General"), by Deputy Attorney General Bindi Merchant. The Complaint alleged that respondent Peter Riccio, R.Ph., pled guilty to dispensing a controlled dangerous substance to customers across the United States through internet dispensing. The conduct occurred from approximately 2010 up to and including November 2012. The Complaint alleged that as part of his guilty plea, respondent admitted that he knew that he was dispensing Fioricet to patients who had not actually seen a doctor, and that prescriptions were being written by doctors who were reviewing internet questionnaires rather than seeing patients in their offices and establishing a doctor-patient relationship. The Complaint sought the suspension or revocation of respondent's

license to practice pharmacy in New Jersey, imposition of penalties pursuant to N.J.S.A. 45:1-22, imposition of costs and fees pursuant to N.J.S.A. 45:1-25, and such other relief as the Board may deem just and appropriate.

On September 12, 2014, respondent filed an Answer to the Complaint with Separate Defenses. Respondent acknowledged the conviction of a crime, but denied that it involved moral turpitude or related adversely to the profession, and denied that his conduct demonstrated a lack of good moral character. Respondent further asserted that the Board had no statute or regulation prohibiting internet dispensing. Respondent therefore requested that the Complaint be dismissed with prejudice.

Previously, the Board had reviewed a report of a January 26, 2010 inspection of Towne Pharmacy, located in Dunellen, New Jersey. Respondent was the holder of the pharmacy's permit until the sale of the pharmacy in February 2014. During the inspection, the inspector noted certain deficiencies and potential violations, and raised some questions about internet dispensing from the pharmacy. Respondent appeared at that time with counsel, Pamela Mandel, Esq., at an investigative inquiry to discuss the inspection and his practice of pharmacy. The Board raised some further concerns and protracted settlement discussions ensued which were ultimately unsuccessful.

Another inspection of the pharmacy occurred on November 29, 2012,<sup>1</sup> that also noted certain deficiencies and raised additional concerns as to the practices in the pharmacy. In addition to other issues, concern was raised regarding the presence of totes containing unlabeled vials of drugs in the back room of the pharmacy. Respondent was not present in the pharmacy on the day of the inspection, as earlier in the day he had been arrested and charged by the United States Attorney for the Southern District of New York with crimes, that formed the basis for the Administrative Complaint, in connection with his internet dispensing business.

Subsequent to the inspections, two Uniform Penalty Letters ("UPLs") seeking monetary penalties were issued by the Board on March 17, 2014. The first UPL related to the January 26, 2010 inspection (the "UPL-1"). Sixteen different violations were cited in UPL-1, including violations for outdated medications, unregistered pharmacy technicians, exempt narcotic register missing required information, permitting a customer to purchase excessive amounts of narcotic within a twelve-month period, and accepting and filling prescriptions even when there was no legitimate physician/patient relationship. The second UPL related to the November 29, 2012 inspection (the "UPL-2"). Six violations were cited, including outdated medications, improper use by dates on

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<sup>1</sup> There was an additional inspection in 2012 resulting from a remodeling of the pharmacy; the inspection report was introduced as mitigating evidence by respondent, as no violations were cited by the inspector in that report.

prescriptions and placing the incorrect doctor's name on several prescriptions. In addition, UPL-2 noted that in the back room, the pharmacy was operating a mail order service dispensing primarily Tramadol, Fioricet and Ultracet. The back room contained approximately 30 totes of unlabeled vials of tablets ready to be used to fill prescriptions. The totes were labeled with the name of the drug and the quantity; some contained lot numbers and expiration dates, but many did not contain that information.<sup>2</sup>

The parties agreed to a consolidated hearing to address the two UPLs and the Complaint. Prior to the hearing, the parties agreed to a Consent Order, which was entered the morning of the hearing, February 4, 2015. The Consent Order resolved fifteen of the sixteen allegations in UPL-1 and five of the six violations in UPL-2 with payment of a \$3,000 civil penalty, and reserved for hearing on liability and penalty the two remaining issues, the citation for accepting and filling prescriptions even when there was no legitimate physician/patient relationship in violation of N.J.A.C. 13:39-7.13 (UPL-1), and the unlabeled vials in totes in the backroom of the pharmacy in violation of N.J.A.C. 13:39-7.18 and -6.2(f)7 (UPL-2).

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<sup>2</sup> Initially, UPL-2 was issued missing a citation for the violation relating to the totes. This administrative error was corrected and UPL-2 was re-sent to respondent and his attorney in November 2014.

### Motion to Amend the Pleadings

Prior to beginning the liability phase of the hearing, the Board heard argument on the Attorney General's Motion to Amend the Pleadings pursuant to N.J.A.C. 1:1-6.2. Specifically, the Attorney General sought to amend UPL-1 to add the citation for engaging in professional misconduct, N.J.S.A. 45:1-21(e), to the previously cited violation of the Board's regulation on professional judgment, N.J.A.C. 13:39-7.13. The motion did not seek to add any new facts or change the underlying factual description of the conduct: that respondent had accepted and filled prescriptions even though there was no legitimate physician-patient relationship. DAG Merchant argued that amendments to the pleadings are freely granted in the interest of justice, unless there is a denial of due process or if the amendment would create undue prejudice. The DAG contended that respondent was aware that his professional judgment was being called into question, so that there would be no resulting prejudice if the amendment were granted.

In response to the motion, Pamela Mandel, Esq., counsel for respondent, contended that permitting the amendment five years after the initial allegations were made would be unfair to respondent.<sup>3</sup> Counsel argued that the motion was a result of settlement discussions where she had advised the State that the citation contained in UPL-1 was inappropriate and inapplicable.

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<sup>3</sup> The amendment of the pleading was sought less than a year after the Board issued UPL-1, not the five years cited by respondent.

She argued that an amendment under the circumstances was improper, as there had been ample time prior to the hearing to amend the UPL, and that a motion should not be permitted two weeks prior to the originally scheduled hearing date.<sup>4</sup> Counsel asserted, however, that respondent has a "legitimate, compelling defense" to the amended charge of professional misconduct.

#### Discussion on Motion

Following deliberations, the Board determined to grant the motion to amend the pleadings pursuant to N.J.A.C. 1:1-6.2. The Board found that amendment caused no undue prejudice to respondent. No new facts were pled; only a legal citation was added. The time period since the filing of UPL-1 was less than one year, as the Board awaited the late 2013 conclusion of the criminal proceedings, and substantial settlement discussions were ongoing. Importantly, counsel conceded that she has a vigorous defense to the amended charge. Therefore, the Board concluded that amendment of the pleadings would not be contrary to the interests of justice or fairness, and granted the Attorney General's motion to add the citation for professional misconduct -- N.J.S.A. 45:1-21(e) -- to UPL-1.

#### Hearing on Liability

The Board then proceeded to the liability phase of the hearing. Counsel for the State highlighted three issues. First,

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<sup>4</sup> The original hearing date was adjourned for one week due to inclement weather.

she pointed to a Joint Stipulation of Fact (Exhibit J-1).<sup>5</sup> There are no issues of fact on the Complaint, given respondent's admission that he pled guilty in federal court on October 16, 2013 to the charge of distribution of a controlled substance to customers across the United States without a valid prescription. Respondent also admitted that he was dispensing Fioricet, a drug that contained the scheduled drug Butalbital, and was distributing the drug to patients who had not actually seen a doctor, but instead had answered internet questionnaires. Thus, the issue for the Board was whether the facts result in a finding that respondent was convicted of a crime of moral turpitude and/or adverse to the profession of pharmacy, and whether respondent engaged in professional misconduct and exhibited a lack of good moral character, permitting discipline pursuant to N.J.S.A. 45:1-21(e), (f) and (h). As to UPL-1, the DAG indicated that respondent had admitted that he filled prescriptions knowing that the physicians had not seen the patients in their offices, thus there were no issues of fact to resolve, only the question of whether these facts would result in a finding of professional misconduct pursuant to N.J.S.A. 45:1-21(e) and a violation of the professional judgment rule, N.J.A.C. 13:39-7.13. Finally, as to the remaining violation set forth in UPL-2, the DAG argued that there would be testimony

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<sup>5</sup> All of the Exhibits entered by the parties in this proceeding were entered without objection. A complete list of exhibits is annexed hereto as Appendix A.

and evidence presented on the issue of alleged violations relating to the medications in the totes present in the back room of the pharmacy.

In her opening, counsel for respondent indicated that respondent would testify that he was found guilty of dispensing only because one of the ingredients in a drug was controlled, not the specific drug that he dispensed. Respondent also intended to vigorously dispute that he engaged in professional misconduct. As to the totes, counsel indicated that because respondent was not in the store on the day of the 2012 inspection, it is possible that there was a misunderstanding regarding the totes and that all questions raised by the inspectors were not answered; she intended to ensure that those questions were answered through respondent's testimony.

The State called Investigator David Menendez as its witness. He is employed by the Division of Consumer Affairs, Enforcement Bureau, conducting drug diversion investigations, but had previously been a pharmacy inspector. Menendez testified that he inspected Towne Pharmacy on November 29, 2012, and he was the author of the inspection report, marked as S-5 and entered into evidence. Menendez inspected the prescription drug inventory and spoke with Michael Della Ventura, R.Ph., the pharmacist-in-charge of the pharmacy ("RPIC"), about the dispensing of Tramadol and Fioricet. Menendez described the layout of the pharmacy: there

was a medium-sized dispensing area behind the retail counter, and a separate room that looked like a typical stockroom with shelving along the walls. The shelving contained totes of drugs: labels on the front of the totes identified the drugs as Tramadol and Fioricet, but the totes contained large numbers of unlabeled vials of drugs. Photographs of the totes were introduced into evidence as S-6 through S-12.

Menendez offered his opinion that based on what he observed in the room, including the presence of a computer and printer used for filling prescriptions, as well as the number of prescriptions and inventory in the dispensing area, the vials in the totes were part of the pharmacy's active drug inventory because the drugs in those vials were being used to fill prescriptions.

On cross examination, Menendez was questioned about the presence of investigators from other agencies at the inspection. Menendez testified that he knew that respondent was arrested that day and would not be present in the pharmacy. He reiterated his testimony about the totes and their contents, acknowledged that some of the vials in the totes contained lot numbers and expiration dates, but asserted that the vast majority were unlabeled.

Following the testimony of Menendez, the State rested. Respondent then testified.

Respondent stated that on the date of the inspection, he had been arrested and was in jail, not in the pharmacy. He described

the renovations to the store and the creation and use of the back room where the totes were located. Respondent testified that the room was used to store inventory, and to set up the totes to be brought out to the dispensing area to fill prescriptions. The drugs in the totes were not ready for dispensing because they did not yet have patient labels with patient names, expiration dates and lot numbers. The drugs in the totes came from manufacturer bottles, so respondent knew the expiration date and lot number for each individual container. He ordered large quantities of the two drugs, but ordered only a single lot to make the recordkeeping easier and the process safer, as he did not need to make any changes to the computer system for recordkeeping as long as the same lot number was being used.

Respondent conceded that his method for counting the drugs in the totes had changed approximately six to eight months before the inspection. At first, the staff counted out the pills for each vial, but they changed the procedure in order to become faster and more efficient as the volume of internet dispensing increased. They placed rings around certain bottles to use as a visual comparison for fills, then checked each batch by weight and also did some random checks by counting the drugs in only a few of the bottles.

On cross examination, respondent explained in more detail the use of the totes for filling prescriptions. He explained that

prescriptions were printed from the computer and the necessary information was assembled by the pharmacy technicians and presented to a pharmacist for review. The prescription would then be reviewed by a pharmacist and filled in the dispensing area, which respondent referred to as the "lab". The vials in the totes in the back room would then be moved into the dispensing area to fill prescriptions. Respondent claimed that one or two totes of drugs were always in the dispensing area, and that when one was almost empty, another would be brought from the back room.

Respondent was also questioned by Board members. Respondent explained that the pills in the unlabeled vials were from manufacturers' stock bottles also stored in the totes. But when questioned why there were 3,600 pills in twenty unlabeled vials, but the stock bottles stored with them contained only 2,000 pills, respondent admitted that more than the two manufacturers' bottles in the totes were used to fill the vials. He insisted that there was no possibility of drugs with different lot or expiration dates being mixed in a single vial because cases of single lots of drugs were purchased to prevent any possible confusion or concern. He again acknowledged that the counting and weighing of the drugs took place in the store room before the totes were brought out to the dispensing area.

In closing, respondent's counsel asserted that the violation cited in UPL-2 was a "gross misunderstanding." She argued that the

room where the totes were located was a storage room, and no prescriptions were filled in that room. Respondent had a large volume of prescriptions to fill, so he ordered many cases of drugs, all with the same lot number, to be efficient. She argued there was no harm or threat to public health, safety or welfare from the use of the totes in the storage room. She contended that the totes were being stored after the delivery from the manufacturer and before the ultimate dispensing of the drugs to patients. The lab area did not have room for all of the vials, so they were stored in the back room for efficiency.

Counsel argued that the original citation in UPL-1, N.J.A.C. 13:39-7.13 "Professional judgment in dispensing drugs," is inapplicable to the current circumstance. The cited regulation provides, in pertinent part, that the pharmacist has a right to refuse to fill a prescription if, using his or her professional judgment, the pharmacist has "reason to question the validity of the prescription; or to protect the health and welfare of the patient." Counsel contended that the purpose of the regulation is to protect the pharmacist who refuses to fill a prescription, but it does not impose an affirmative duty on a pharmacist to reject a prescription.

As to the amended citation of professional misconduct, N.J.S.A. 45:1-21(e), counsel asserted that engaging in a mail order prescription business is not obviously professional misconduct as

there is no New Jersey law expressly prohibiting it. She argued that if the conduct is wrong, a law should be enacted to make it clear. She stated that the professional misconduct citation is generally used by Boards in conjunction with another statute or regulation that specifically prohibits certain conduct. She reminded the Board that respondent did not dispense to New Jersey residents out of respect for the Board, and stopped the business entirely once he was indicted. She concluded that even though the Board might have some concern that respondent's conduct was improper, there was no law prohibiting it, and she claimed pharmacists are not on notice that this conduct is unlawful.

The State asserted that based on the testimony and evidence presented, the Board must find respondent was in violation of N.J.S.A. 45:1-21 (e) and (f) and N.J.S.A. 45:9-6<sup>6</sup> as to the Administrative Complaint, in violation of N.J.A.C. 13:39-7.13 and N.J.S.A. 45:1-21(e) on UPL-1 and in violation of N.J.A.C. 13:39-7.18 and -6.2(f)<sup>7</sup> on UPL-2. The DAG asserted that the conviction is a serious offense. Respondent pled guilty to filling and dispensing of prescriptions containing controlled dangerous substances knowing that there was no doctor-patient relationship. The facts are not in dispute, and the crime is one of moral turpitude that also adversely affects the profession of pharmacy.

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<sup>6</sup> N.J.S.A. 45:9-6 is part of the Medical Practice Act, not the Pharmacy Practice Act.

As to the professional judgment issue in dispensing raised by UPL-1, the DAG pointed to the Board's definition of professional judgment in its regulations, which states it is an "understanding of the relationship of [the knowledge of the practice of pharmacy] and its application to the well-being of the patient and the judgment of the practitioner."<sup>7</sup> She noted that "patient" is not limited to New Jersey patients, but rather includes all patients; moreover, respondent was engaging in this conduct from his New Jersey registered pharmacy. Thus the Board's regulations would apply to respondent's conduct. Additionally, the DAG contended that the professional judgment regulation exists not for the protection of the pharmacist, but rather to protect patients. She asserted that respondent did not care for the welfare of his patients, but instead exercised his judgment in order to increase his revenue stream.

Finally, counsel for the State summarized Investigator Menendez's testimony concerning the totes in the back room and the use of the drugs from the totes to fill prescriptions based upon the questionnaires. She reminded the Board that it would need to find that these medications were part of active drug stock in order for the regulatory misbranding violation to be found, and it was her contention that the facts proved that the drugs were indeed active drug stock and being used to fill prescriptions.

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<sup>7</sup> N.J.A.C. 13:39-1.2.

Respondent was given a brief opportunity to respond to the DAG's closing. Counsel argued that that Investigator Menendez never asked any pharmacist whether the pills in the totes were part of active drug stock, and the inspector admitted that he did not see any patient names or labels on any of the vials in the totes. Therefore she contended that the drugs were not in active drug stock, but were instead inventory that respondent used to fill his high volume of prescriptions.

#### Discussion as to Liability

The Board then moved into executive session for deliberation as to liability, and returned to public session to vote and issue its determination orally on the record.

Respondent admitted that he accepted and filled prescriptions for patients that had not actually seen a doctor, and that the prescriptions were written by doctors who only reviewed internet questionnaires rather than seeing patients in their offices. He did not dispense to New Jersey residents, as he had been told that New Jersey physicians were required to examine patients prior to issuing a prescription, and there had been a bill pending that would prohibit internet dispensing. He pled guilty to distribution of a controlled substance via the internet, because he dispensed Fioricet, which contained the scheduled drug Butalbital. The dispensing of these drugs was done by respondent in his New Jersey pharmacy during the course of his practice as a New Jersey licensed

pharmacist and owner and permit holder of a New Jersey registered pharmacy.

The Board finds respondent's conduct placed patients' health at risk. Prescription drug abuse is a scourge on society. Pharmacists have a responsibility to ensure that they are not engaging in the indiscriminate dispensing of any drugs, but particularly those with significant addiction potential, such as Tramadol and Fioricet. By dispensing these medications pursuant to prescriptions from physicians who he knew had not examined patients but instead had only reviewed internet questionnaires, respondent abdicated his responsibility to his patients. He knew that the prescribing physicians were not reviewing prior patient histories or consulting with other treating physicians. Furthermore, the prescribing physicians were not available to address adverse effects nor were they monitoring whether patients were obtaining drugs from multiple sources.

The Board finds that respondent's crime was one of moral turpitude and/or adverse to the profession of pharmacy, and the actions underlying the crime constitute professional misconduct. Despite the lack of physician-patient relationship, respondent continued to dispense medications in complete disregard for the welfare of his patients, failing to exercise his professional judgment as to the validity of these prescriptions and ignoring the

possible addiction potential and risk of adverse effects to these patients.

In addition, the Board rejected respondent's contention that the drugs in the totes were not part of active drug stock. Active drug stock is commonly understood by pharmacists to be drugs used in the filling of prescriptions. The Board finds that by respondent's own admission, the drugs were counted, measured and weighed in the back store room and placed in vials in the totes, waiting to be used to fill prescriptions; these were not outdated drugs awaiting destruction. The Board members, with expertise in the practice of pharmacy, are well aware that the dispensing process includes removal of drugs from the manufacturers' stock bottles and placing drugs in vials. When pills are removed from a manufacturer's stock bottle, the regulations governing pharmacy practice, at N.J.A.C. 13:39-7.12(a)12(i), require a change in the "use by" date for the medication to the earlier of the manufacturer's expiration date or one year from dispensing. The Board, relying on its expertise and interpreting its regulation, finds that the dispensing process began when medications were removed from the manufacturers' stock bottles. Misbranding occurred when respondent placed the drugs in unlabeled vials, with no indication of the date when they were removed from the original manufacturers' stock bottles prior to final dispensing to patients, in violation of N.J.A.C. 13:39-7.18. Respondent also failed to

ensure that the misbranded drugs were not in the active drug stock or dispensed to patients, in violation of N.J.A.C. 13:39-6.2(f)7.

### Findings of Fact

Based on the testimony and evidence presented, the Board finds as follows:

1. Respondent pled guilty in federal court on October 16, 2013 to the charge of distribution of a controlled substance to customers across the United States without a valid prescription.

2. Respondent was convicted on June 20, 2014, based upon his guilty plea, to the crime of distribution of a controlled substance to customers across the United States without a valid prescription, and was sentenced to two years of probation and a \$100 fine.

3. Respondent accepted and filled prescriptions for patients that had not actually seen a doctor, and prescriptions were written by doctors who only reviewed internet questionnaires rather than seeing the patients in their offices and establishing a doctor-patient relationship.

4. The actions underlying respondent's guilty plea occurred while respondent was acting as a licensed pharmacist in the State of New Jersey and as a permit-holder of Towne Pharmacy.

5. The drugs in the totes were part of active drug stock. They were being used to fill prescriptions, regardless of where in the pharmacy they were being kept.

6. Pills were counted, weighed and/or measured and placed in the vials in the back room or store room of the pharmacy, thus part of the dispensing process occurred in that room.

7. The drugs in the totes became misbranded when they were removed from the manufacturer's stock bottles and placed in empty vials with no label indicating the name of the drug, the date the drug was placed in the vial, or any "use by" or expiration date.

8. As a permit holder, respondent was responsible for compliance with all the rules, regulations and laws governing the practice of pharmacy.

#### Conclusions of Law

The Board concludes that respondent's criminal conviction was a crime of moral turpitude and/or adverse to the profession of pharmacy, and the underlying actions constituted professional misconduct in violation of N.J.S.A. 45:1-21(e) and (f). Respondent's conduct in dispensing Tramadol and Fioricet was in complete disregard of his professional judgment and responsibility, and constituted professional misconduct in violation of N.J.A.C. 13:39-7.13 and N.J.S.A. 45:1-21(e). As permit holder, pursuant to N.J.A.C. 13:39-4.18, respondent is responsible for compliance with all laws pertaining to the practice of pharmacy. The drugs found in totes in the back room of the pharmacy were misbranded, in violation of N.J.A.C. 13:39-7.18. Respondent's failure to ensure

the misbranded drugs were not in active drug stock or dispensed to patients violated N.J.A.C. 13:39-6.2(f)7.

#### Hearing as to Mitigation

The Board then proceeded directly to the mitigation phase of the hearing. Respondent introduced numerous documents into evidence relating to respondent's financial situation, including tax returns, financial statements, and deeds for property. Counsel noted that respondent was financially depleted by the federal criminal case, with counsel fees of approximately \$400,000 and funds frozen by the government. She represented he borrowed money from his retirement account and from family and friends to pay counsel fees. It was also claimed that the pharmacies he owned in Pennsylvania were not sold, but closed at a monetary loss. Respondent receives rental income from the building where the pharmacy was located, and income from the note that he holds following the sale of Towne Pharmacy. His expenses include taxes and a mortgage, as well as payments for an aide for his disabled adult son. As a result of these and other living expenses, respondent contended that he has no ability to pay any penalty. Counsel argued that imposition of any fines or penalties would be punitive and that respondent had suffered enough.

DAG Merchant argued that a revocation of license and significant penalties were appropriate in this case. Respondent made millions of dollars through internet dispensing and the Board

can and should take into account the high volume of his business for the two years. Moreover, although the criminal authorities kept the assets seized at the time of his arrest, no additional penalties were assessed.

Respondent read a prepared statement describing the "unusual circumstances that [he] had gotten [him]self into." He stated that he accepted full responsibility for everything he had done, including the federal charges to which he pled guilty, "despite the fact that I and no one else understands that charge to this day."<sup>8</sup>

Respondent described his involvement in the internet mail order business, which began in 2009 with a fax solicitation to his pharmacy. Although initially opposed to internet pharmacy, he found a new federal law that clearly prevented internet dispensing only of controlled dangerous substances ("CDS"). He then became interested in internet pharmacy as a new opportunity to subsidize the losses in his practice. Respondent researched state and federal laws and also consulted with an attorney to learn everything he could. Although a New Jersey bill that would regulate mail order pharmacies was not enacted, he decided that out of respect for the State, he would not fill internet prescriptions for New Jersey residents.

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<sup>8</sup> During the course of the statement, there were several objections from DAG Merchant as to the relevance of the testimony to the mitigation being sought. Respondent was permitted to continue his testimony, but was directed to focus on mitigation.

After he signed a contract with NRX Partners, he began dispensing prescriptions via the internet. At the outset, he received \$4.00 per prescription plus the approved cost of the drugs. He began filling 50 prescriptions per day, including drugs for erectile dysfunction, birth control, and topical acne medication, as well as Tramadol, Carisoprodol, and Fioricet. But he testified that by 2012, the mail order business had changed, due to changes in state and federal laws and the scheduling of Carisoprodol as CDS. He continued to do internet dispensing to patients in States that permitted it, and filed reports in States such as Kansas that required it.<sup>9</sup>

Respondent then testified about the day of his arrest, referred to as "invasion day". He was later charged with a seven-count indictment, including mail fraud, wire fraud and conspiracy, all of which related to his internet dispensing of Fioricet, which contained the scheduled drug Butalbital. It was alleged that because Butalbital was scheduled, the dispensing of Fioricet was similarly a violation of federal drug laws. Respondent insisted that no pharmacist would think that Fioricet would be a controlled dangerous substance simply because it contained Butalbital. The federal judge imposed a sentence of two years of probation and a

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<sup>9</sup> In response to an objection as to relevance for mitigation, Ms. Mandel argued that if the conduct at issue was permissible in other states it would explain why respondent engaged in the conduct.

\$100 fine, which respondent described as the lowest possible sentence she could impose.

Respondent testified that he has no money, and owes money to his friends and family. The government froze his accounts and seized his profits. He turned over his license to his counsel on February 14, 2014, the date he sold the pharmacy. He admitted that he made approximately \$2,000,000 from internet dispensing. He stated that he was "here to end this" and that he could not believe that more charges and more costs were being "thrown" at him.

On cross examination, respondent was asked if he still held an active pharmacy license, and he responded that he had given his license to his counsel, who stated that she would request that respondent be given retroactive credit on discipline as "his license has already been suspended for a year." The State asserted that respondent's attorney merely "holding" his license does not constitute discipline.

The Board members then questioned respondent about his financial situation. As to rental income on his 2012 tax return, respondent stated that "I never saw these things. I'm sure I should see them. I just sign them." He explained that the building on his property which currently houses only the pharmacy and a deli would need to be improved to obtain other tenants. As to his day trading accounts that showed in excess of \$51 million, respondent explained that the number was indicative of heavy

trading activity and in reality the accounts only had "a couple of hundred thousand" dollars in them which he claimed was taken by the government. A house in Lavalette was sold by respondent to his children several years before the events at issue in this matter. Representations were made that the children mortgaged the house to provide money for respondent's criminal defense.<sup>10</sup>

In closing, after entering a cost certification, the State argued that respondent's credibility was at issue, as his criminal attorney had advised the court during criminal sentencing that he had turned in his license to the Board, when in fact he had not done so. The DAG reiterated that revocation would be the appropriate sanction for the conduct. During criminal sentencing, respondent had stated "I would never give out a prescription I thought was hurting anybody," yet respondent dispensed Fioricet and Tramadol to patients with complete disregard of the drugs' high addiction potential, and he was shipping out very large quantities of these drugs to patients who merely filled out questionnaires without seeing physicians. There were no physical examinations, no one to address adverse reactions and no one to assure there was no overprescribing or possible drug interactions.

Respondent's counsel emphasized that respondent had turned over his license on February 14, 2014, and as he has not practiced

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<sup>10</sup> Carl Riccio, respondent's son and co-counsel for this hearing, also provided responses to the Board's questions, as he was one of the owners of the house and asserted that respondent did not have the knowledge to answer the questions. Carl Riccio was not sworn in as a witness.

since that date, she urged the Board to begin any suspension on that date retroactively and have it continue through the period of his criminal probation. She argued that respondent would not give out a prescription that would hurt anybody and disputed the characterization of Fioricet and Tramadol as "highly addictive", though she conceded that they were subject to abuse. She asked the Board to consider respondent's limited sources of income and suggested that losing his license and selling the store were punishment enough. She argued that there was no "clear notice to the profession" that would support a revocation. She also asserted that even if the Board thought he should have handled the totes differently, the conduct does not support a \$70,000 penalty. She concluded by reminding the Board that respondent had been very forthright in admitting his conduct, and asked the Board to treat him with compassion.

#### Discussion as to Penalty

The Board has serious concerns about respondent's understanding of his responsibilities as a pharmacist and permit holder. Respondent repeatedly insisted he would never dispense anything that would harm patients, but his actions in connection with his internet dispensing business belie his words.

Respondent admitted that he dispensed a very high volume of Fioricet and Tramadol to patients across the country. He was aware that the prescribing physicians had only reviewed internet

questionnaires and had not examined the patients. He knew that there was no physician-patient relationship, and he acknowledged that the New Jersey Board of Medical Examiners required a physical examination of a patient for there to be a valid prescription. As a pharmacist, respondent certainly should have known that the drugs he was dispensing had addictive potential as well as the potential for serious adverse effects. In complete disregard of his responsibilities as a pharmacist, respondent nevertheless dispensed these drugs to patients who were not being monitored by the prescribing physician to ensure their safety. Respondent did not have a complete patient profile for these patients, and therefore could not perform an appropriate drug utilization review to determine if the patients were taking any other medications or had other risk factors that would call into question the appropriateness of the prescription. The risk of harm to these patients was great, but respondent neither acknowledged nor seemed to understand this risk. His testimony implies a belief that because the drugs he was dispensing were not scheduled controlled dangerous substances, there was no risk to patients; if so, his mistaken belief presents a risk of harm to the health, safety and welfare of his patients.

Additionally, respondent's process for storage of drugs and preparation of vials is cause for grave concern. The drugs in the totes were located in a room that was part of the permitted

premises and were being used to fill prescriptions for patients. Counting pills and placing them in vials is part of the dispensing process, even though the process respondent used to place the drugs in the vials was aberrant. Regardless of whether they were in the dispensing area of the pharmacy, these drugs were part of the active drug stock. As a pharmacist, respondent should have known that the drugs were part of active drug stock and should have been properly labelled.

Based upon the Board's expertise, respondent's procedures caused uncertainty and risk for patients, who could not be sure that the "use by" date on the medication they received was correct and consistent with legal requirements. When the drugs were removed from the manufacturers' stock bottles and placed into unlabeled vials, the "use by" date of the drugs changed to one year from the date removed from the stock bottle. Nowhere in respondent's records is there any indication of that date for any of the vials. Respondent's insistence that there was no risk to the public from his use of the totes again demonstrates a fundamental failure of understanding of his responsibilities as a pharmacist and permit holder.

Because the violations found by the Board are extremely serious and as it appears that respondent has not acknowledged or fails to comprehend the serious ramifications of his conduct, the Board has determined that a substantial period of suspension of

license is appropriate in this matter. The Board accepts counsel's representation that she is holding respondent's license as of February 14, 2014. Yet the fact remains that as of the date of the hearing, respondent's license was still listed as "active" in the Board's records. His failure to surrender his license to the Board did not put the public on notice that respondent could not practice as a pharmacist. The Board will not begin the period of suspension as of the date respondent gave his license to his counsel, but in consideration of the circumstances presented, the Board will begin the period of suspension retroactive to June 20, 2014, the date of entry of respondent's criminal Judgment of Conviction, in that there was public notice as of that date that he was not practicing.

The Board also believes that the seriousness of respondent's conduct warrants significant penalties, and those provided for in UPL-1 and UPL-2 are consistent with the Board's practice. Nevertheless, the Board finds the mitigation evidence, including the tax returns and financial statements, and respondent's family obligations, especially for the care of his son, warrants some reduction in the penalties. Therefore, the Board is reducing the civil penalties to \$45,000, including \$10,000 for the violation set forth in UPL-1 and \$35,000 for the violation in UPL-2. The risk to patients and respondent's disregard for these risks warrant these significant penalties. However, the Board will not require that

the penalties be paid unless and until respondent seeks to apply for reinstatement of his license to practice pharmacy.

As to the imposition of costs in this matter, the Board has reviewed the attorneys' fees sought by the State and finds the application sufficiently detailed and the amount reasonable, given the length of time expended and the various issues that were discussed, both those that were settled and those that were presented at this hearing. Costs are traditionally imposed pursuant to N.J.S.A. 45:1-25 so as not to pass the cost of the proceedings onto licensees who support Board activities through licensing fees. The Board's analysis follows.

The Attorney General's certification in this matter extensively documented the time DAG Merchant expended in these proceedings, detailing costs which reflected a total of attorney fees in the amount of \$18,688.50. The rate charged by the Division of Law of \$135<sup>11</sup> for a Deputy Attorney General with 0-5 years of experience and \$155 for a Deputy Attorney General with 5-10 years of experience has been approved in prior litigated matters and appears to be well below the community standard. The Board finds the overall application to be sufficiently detailed to permit the conclusion that the amount of time spent, and the overall fees sought are objectively reasonable as well. (See, Poritz v. Stang,

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<sup>11</sup> The Certification of Costs submitted by DAG Merchant contains a typographical error in paragraph 5, where she states that her rate prior to January 2013 was \$150 per hour. The total calculation of costs was based upon the correct hourly rate of \$135 per hour for the hours prior to January 2013.

288 N.J. Super. 217 (App. Div. 1996)). However, the Board chose to exercise discretion and reduced the total attorneys' fees because of respondent's financial situation. The reduction also reflects that some of the attorney's time was spent communicating with an expert witness who was consulted, but not used in this matter. Thus the requested attorneys' fees of \$18,688.50 shall be reduced by \$4,000.00 to \$14,688.50. The Board finds that the Attorney General has adequately documented the legal work necessary to advance the prosecution of this case. The Board is thus satisfied that the Attorney General's claims are reasonable, especially when viewed in the context of the seriousness of respondent's conduct in this matter and the lengthy settlement negotiations.

IT IS THEREFORE on this 23rd day of March 2015,

ORDERED, as announced orally on the record and effective February 4, 2015:

1. Respondent's license to practice pharmacy in the State of New Jersey be and hereby is suspended for a minimum period of five (5) years effective retroactive to and giving him credit for cessation of practice as of June 20, 2014, the date of his criminal sentence. The entire period of suspension shall be served as a period of active suspension. The Board will not entertain an application for reinstatement of respondent's license until at the earliest, June 20, 2019.

2. Respondent shall continue to cease and desist from engaging in the practice of pharmacy, which includes, but is not limited to the following: respondent shall not handle, order, inventory, compound, count, fill, refill, or dispense any drug; he shall not handle anything requiring a prescription, including devices and medications; he shall not handle prescriptions; he shall not advise or consult with patients, and he is prohibited from being present within a prescription filling area of a pharmacy in the State of New Jersey.

3. Respondent shall surrender his wall certificate, wallet certificate, and his most recent renewal card of his license to the Executive Director of the Board immediately upon the notification to him of entry of this Order by mailing them to Anthony Rubinaccio, Executive Director, Board of Pharmacy, P.O. Box 45013, Newark, New Jersey 07101. If the certificates and renewal card are not in respondent's possession or cannot be located, respondent shall provide a certification indicating that he is not in possession of these items.

4. Any practice in this State in violation of the above conditions shall constitute grounds for discipline for violation of a Board Order and professional misconduct pursuant to N.J.A.C. 13:45C-1.4.

5. Respondent is hereby assessed civil penalties, pursuant to N.J.S.A. 45:1-25, in the amount of \$45,000, including \$10,000

for the violations of N.J.S.A. 45:1-21(e) and N.J.A.C. 13:39-7.13, as set forth in UPL-1; and \$35,000 for the violations of N.J.A.C. 13:39-7.18 and -6.2(f)3, as set forth in UPL-2. Payment shall be submitted by bank check, or money order made payable to the State of New Jersey, or arrangements shall be made for wire transfer or payment by credit card. Payments shall be sent to Anthony Rubinaccio, Executive Director, Board of Pharmacy, 124 Halsey Street, Sixth Floor, P.O. Box 45033, Newark, New Jersey 07101. Any other form of payment will be rejected by the Board and returned to respondent. No application by respondent seeking reinstatement of his license to practice pharmacy will be considered prior to the full payment of penalties.

6. Respondent is hereby assessed attorneys' fees pursuant to N.J.S.A. 45:1-25 in the amount of \$14,688.50, payable by bank check or money order made payable to the State of New Jersey, or arrangements shall be made for wire transfer or payment by credit card. Payments shall be sent to Anthony Rubinaccio, at the address set forth in paragraph 5 above. Any other form of payment will be rejected by the Board and returned to respondent. Payment of costs shall be made within sixty (60) days of entry of this Order.

7. Prior to any application for reinstatement of his license to practice pharmacy in New Jersey, Respondent shall:

- a. At the discretion of the Board, appear before the Board or a committee thereof to discuss his readiness to reenter practice as a pharmacist. At that time,

Respondent shall be prepared to propose his plans for future practice in New Jersey and demonstrate evidence of rehabilitation to the Board's satisfaction.

- b. Affirmatively establish his fitness, competence and capacity to actively practice as a pharmacist in New Jersey. As part of this requirement, Respondent shall take and pass the MPJE examination and the PARE examination. Respondent may take these examinations no earlier than six months prior to any application for reinstatement.
- c. Provide proof of successful completion, at his own expense, of the ProBE or PRIM-E Ethics course, or another similar course pre-approved by the Board. Successful completion means that all sessions were attended, all assignments were properly and appropriately completed, and a passing grade was achieved which was unconditional and without reservations. Respondent shall send the Board proof of successful completion of the course at the time of any application for reinstatement.
- d. Provide the Board with a full account of his conduct during the intervening period of time from June 20, 2014 to any application for reinstatement of his license.
- e. Provide the Board with documentary proof that he has satisfied all the terms and conditions of his criminal sentence, including but not limited to the period of probation.
- f. Provide documentation of successful completion of all continuing education credits required by N.J.A.C. 13:39-3A.1 to 13:39-3A.7.
- g. Provide documentation of successful completion of all application requirements including a Criminal History Background Check and payment of all reinstatement fees.
8. In the event the Board grants reinstatement of respondent's license, the Board, in its discretion, may impose any conditions or restrictions on licensure it deems necessary to protect the public health, safety and welfare. Those conditions

may include, but are not limited to, prohibition on pharmacy ownership or serving as pharmacist-in-charge or preceptor.

NEW JERSEY STATE BOARD OF PHARMACY

By: Thomas F.X. Bender, Jr., R.Ph.  
Thomas F.X. Bender, R.Ph.  
Board President