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NO. 57850-2

Snohomish County No. 02-2-08819-6

COURT OF APPEALS FOR DIVISION I
STATE OF WASHINGTON

MICHAEL S. JONES R.Ph.,

Respondent/Plaintiff,

v.

STATE OF WASHINGTON AND ITS DEPARTMENT OF HEALTH,
WASHINGTON STATE BOARD OF PHARMACY; PHYLLIS WENE;
and STAN JEPPESEN, individually and as investigators for the
Washington State Board of Pharmacy, and DONALD WILLIAMS,
individually and as executive director of the Board of Pharmacy,

Petitioners/Defendants.

RESPONSE BRIEF OF RESPONDENT MICHAEL S. JONES R.Ph.

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I. MOTION TO STRIKE PORTIONS OF PETITIONERS' APPEAL

For the first time on appeal, Petitioners present new arguments in favor of qualified immunity. *Petitioners' Opening Brief*, pp. 27-43. As explained in Section B below, the Court should refuse to consider these new arguments because they were not before the trial court and because Respondent had no opportunity to introduce facts in response to these new arguments. RAP 2.5(a).

Petitioners make numerous references to out-of-state cases involving pharmacy misconduct. *Opening Brief*, pp. 39-42. For the reasons described in Section C4 below, Respondent moves to strike all such references because Petitioners previously sought – and secured – a protective order barring Respondent's discovery of in-state pharmacy misconduct on grounds that such evidence “was not probative of any issue in this case. Given Petitioners' surprising reliance on such out-of-state misconduct in this brief, the Court should now order Petitioners to produce the discovery previously requested by Respondent.

II. ISSUES FOR REVIEW

1. In light of Executive Director Donald Williams' participation in the investigation and his administrative referral of the motion for summary suspension to an assistant attorney general for prosecution, did

the trial court err when it ruled that Petitioners had not established as a matter of law that Williams was entitled to prosecutorial immunity from 42 U.S.C. § 1983?

2. Should the Commissioner refuse to consider Petitioners' arguments in favor of qualified immunity because they were not presented to the trial court?

3. In light of the evidence of arbitrary and inconsistent scoring and in light of the Petitioners' *delay* in seeking the summary order of suspension, did the trial court err when it ruled that Petitioners had not established as a matter of law that an emergency existed so as to justify the suspensions of Jones's licenses without notice?

4. In light of the evidence that the state repeatedly opposed Jones's efforts for an expedited hearing, such that prior to the scheduled hearing, he had already lost his franchise, his lease, and his business, did the trial court err it ruled the Petitioners had not established as a matter of law that Jones waived his state law claims when he signed the stipulated order?

5. Did the trial court err when it considered certain portions of Jones's declaration for background purposes?

III. STATEMENT OF THE CASE

Under Washington law, pharmacies operating in Washington are subject to periodic inspections by the Board of Pharmacy. WAC 246-869-190. In order to pass inspection, a pharmacy must receive a score of 90 or higher. If a pharmacy receives a score below 90, it is given 60 days to raise its inspection score to 90 or better; if upon re-inspection after 60 days, it fails to raise its score to 90 or better, it is subject to disciplinary action. WAC 246-869-190(4). If a pharmacy receives a score below 80, it is given 14 days to raise its inspection score to 90 or better; if upon re-inspection after 14 days, it fails to raise its score to 90 or better, it is subject to disciplinary action. WAC 246-869-190(5). Pharmacies which receive a score of 80 or below – either at the initial inspection or at the re-inspection – and “which also represent a clear and present danger to the public health, safety and welfare will be subject to summary suspension of the pharmacy license.” WAC 246-869-190(8).

A. Prior Inspections

In 1995, Jones purchased The Medicine Shoppe franchise in Marysville, Washington. In addition to his professional license, he secured a location license for the pharmacy that same year. On October 30, 1996, inspectors with the Board of Pharmacy conducted an inspection

of his pharmacy, and Jones's pharmacy received a passing score of 95. CP 212.

On December 17, 1998, Phyllis Wene conducted another inspection of Jones's pharmacy. The pharmacy received a failing score of 79. On February 3, 1999, Phyllis Wene re-inspected Jones's pharmacy; the pharmacy received a passing score of 96. CP 212-13.

In Jones's experience, pharmacy inspectors perform inspections approximately once every two to three years. Since Jones began practicing pharmacy in the state of Washington in 1980, he has experienced numerous inspections by the state Board of Pharmacy. Prior to July 12, 1999, the inspectors had always performed their inspections in a quiet, professional manner, with minimum disruption to the operation of his pharmacy. Typically, their inspections had taken approximately one hour to complete. On July 12, 1999, that all changed. CP 213.

B. July 12 and August 10, 1999 Inspections

On July 12, 1999 – only five months after his last inspection - inspectors Phyllis Wene and Stan Jeppesen arrived unannounced at Jones's pharmacy. They informed Jones that Jeppesen was a new inspector and that they had come to Jones's pharmacy to conduct a training exercise for Jeppesen's benefit. Jones found this strange, and because he was very busy at the time, he objected and asked the inspectors

to conduct their training elsewhere. Wene ignored Jones's objection and pushed past him into the pharmacy. CP 213.

For four hours that morning – and again for three hours in the afternoon after they returned from a lunch break - Jones was subjected to non-stop harassment by Wene and Jeppesen. Jeppesen crowded Jones and interrupted him while he tried to fill prescriptions. Jeppesen stood directly behind Jones – often within six inches – and interrupted him while he entered information on the computer system, and attempted to intimidate him while he filled prescriptions or spoke with customers. Wene and Jeppesen stood on either side of Jones and made repeated demands in rapid-fire succession that he access computer records or answer their independent inquiries. Wene made exaggerated displays of photocopying documents in an obvious attempt to intimidate him. On more than one occasion, Jeppesen yelled at Jones and banged his hands on the pharmacy counter while Jones tried to select, count, and prepare medications. Jones's employees were shocked and intimidated. Jones's customers were aghast. CP 213-14.

The next morning, Jeppesen returned to the pharmacy. Jones asked Jeppesen why he had returned. Jeppesen said he was there for additional training. Jones told Jeppesen that he would not tolerate further harassment and intimidation. Jeppesen remained inside the pharmacy and

outside the pharmacy for approximately one hour. Jeppesen then handed Jones an inspection report with a failing grade of 48. CP 214.

Jones was shocked. Phyllis Wene had given Jones's pharmacy a score of 96 on February 3, 1999 – only five months earlier - and Jones knew his pharmacy was in better shape in July than it had been in February. CP 214.

The inspection report contained numerous errors. Contrary to the inspection report, Jones had entered allergy and chronic disease information about customers into his computer, but unbeknownst to Jones, his QS-1 computer system was recording the information but not processing it. (Jones corrected the problem by the second inspection, but was still erroneously docked points at the second inspection). Jones did have written records of patients' requests for non-child resistant caps. Jones had a regular process for checking outdated medications and did not have 38 outdated items on the shelves. Jones did have the required DEA order forms and invoices. CP 214.

On August 10, 1999, Stan Jeppesen and Phyllis Wene returned to Jones's pharmacy and conducted a re-inspection. This time Jones's pharmacy received a failing grade of 56. *See Exhibit 2 to Declaration of Murphy Evans in Support of Plaintiff's Opposition to Defendants' Motion*

*for Summary Judgment, attached hereto as Appendix A.*¹ The re-inspection report contained numerous errors. Since the first inspection, Jones had contacted officials with the QS-1 computer system, and they had turned on the part of the program which processed medical conditions. Jones did have records for authorization to use non-child resistant caps. Jones did not substitute a drug that had been prescribed by a doctor. Jones did not have outdated medications on his shelf. Jones had matched DEA order forms with invoices. Jones did perform the inventory for Schedule II and Schedule III drugs prior to the second inspection. Jones's prescriptions were in sequential order by prescription number. If there were any missing prescriptions, Jones believes that was the result of theft by a former employee, Mary Berlin, whom Jones had fired for misconduct, and who, unbeknownst to Jones, was an anonymous informant for the state. CP 214-15.

In addition to the numerous errors in each inspection report, the scoring of the deficiencies was conducted in an arbitrary and capricious manner. In numerous instances, the inspector deducted five points (the maximum per deficiency) for minor discrepancies. Such arbitrary and capricious scoring accounts, in part, for how Jones's pharmacy went from

¹ The pleadings included in the appendices were among the pleadings included in Respondent's supplemental designation of Clerk's Papers. As of the date of this brief, the Clerk had not assigned page numbers to these supplemental papers, and therefore Respondent includes these pleadings as appendices.

a score of 96 on February 3, 1999, to a score of 48 on July 12, 1999; the condition of Jones's pharmacy had improved since February 3, 1999, and only erroneous and capricious scoring could account for the differential. CP 215.

Since receiving his professional license, Jones has worked at numerous pharmacies and encountered numerous inspections by inspectors with the Board of Pharmacy. In July and August of 1999, Jones's pharmacy was in greater compliance with the pharmacy rules and regulations than many of those other pharmacies which have previously received passing scores. CP 215.

C. Prior Run-Ins With Board of Pharmacy

Jones believes the false and capricious scoring of the inspection reports was part of a calculated effort by Board of Pharmacy officials to drive him out of business. In 1994, while Jones was employed by a Safeway pharmacy in Shoreline, Washington, Jones received a call at home from a fellow pharmacist, Sharla Keeling. Keeling asked him to come to the pharmacy because a Board of Pharmacy inspector, Joe Honda, was harassing her. Jones went to the pharmacy and saw Honda staring at Keeling for no reason. Keeling obviously appeared intimidated. Jones told Honda to leave if he'd finished his inspection. CP 215.

Three weeks after this incident, Jones received a notice of a hearing before the Board of Pharmacy regarding his license to practice pharmacy. Jones attended the hearing and discovered that he had been charged with misfiling a prescription for proctocream with proctofoam. Both products contain the same amount of active ingredient, and both were used internally. Jones admitted the mistake, and the Board of Pharmacy put him on probation for one year. This seemed extremely harsh to Jones. CP 215-16.

Approximately six months later, Jones ran into his “accuser,” Claudia Tomlinson. He apologized to Tomlinson. She told him that she had initially contacted the Board of Pharmacy about the mistake, and about two months after reporting the incident, a group of inspectors had showed up at her home and urged her to press charges against him. The inspectors had showed up at her home after the encounter with Joe Honda in the Safeway store. CP 216.

D. No Notice of Hearing to Suspend Licenses

After Jones’s pharmacy failed the second inspection on August 10, 1999, Jones was given written interrogatories by Phyllis Wene. Jones was told to answer the interrogatories and submit them. Jones was never told that there might be a hearing to determine whether his licenses should be revoked summarily. Jones was never told that the condition of his

pharmacy constituted an emergency. CP 216-17. Furthermore, the written notice provided to Jones made no reference to the possibility that the state might seek the summary suspension of his licenses. *See Appendix A, Exhs. 3 and 4.*

On August 16, 1999 – more than five weeks after the initial inspection of Jones’s pharmacy – Donald Williams, the executive director of the Board of Pharmacy, and David Hankins, an assistant attorney general, filed a five-page Ex Parte Motion for Summary Action requesting the immediate suspension of Jones’s professional and pharmacy licenses and the closing of his pharmacy. CP 291-95. Neither Williams nor any official with the Board of Pharmacy notified Jones or his attorney of the motion, of the requested order, or of the hearing on the motion. CP 216-17. On this same date, Williams and Hankins also filed a 22-page Statement of Charges describing in great detail numerous instances of alleged misconduct based on the prior inspections of Jones’s pharmacy. CP 296-318.

On August 17, 1999, the Board of Pharmacy conducted an *ex parte* hearing, granted the motion, and issued an *ex parte* order summarily suspending Jones’s professional and pharmacy licenses. Again, no one notified Jones or his attorney of the hearing. Indeed, Jones’s attorney, Bernie Bauman, had been led to believe that no motion was pending. CP

216; CP 145. Had anyone notified either Jones or his attorney of the hearing, Jones and his attorney could have appeared on short notice. CP 216-17; CP 145.

Late in the day on August 17, 1999, Phyllis Wene delivered the order suspending Jones's licenses and closed down his pharmacy. The order and the closure shocked Jones. No one had told him that any of the deficiencies reported in the inspection reports were so serious as to warrant the suspension of his licenses. Indeed, the state had permitted Jones to continue operating his pharmacy since the first inspection on July 12, 1999, and in the intervening five weeks, the situation at his pharmacy had improved and not deteriorated. CP 216-17.

E. Jones seeks expedited hearing and settlement conference to avoid financial ruin. State opposes him.

The suspensions put Jones in a horrible financial bind. He tried desperately to have the summary suspensions lifted immediately so that he could keep the pharmacy open and save his business at least until a hearing could take place on the merits. CP 217. On August 27, 1999, Jones filed a motion to modify the Ex Parte Order of Summary Action and to stay the summary suspensions pending a hearing on the merits of the allegations contained in the Statement of Charges. *Appendix A, Exhs. 7, 8 and 9*. The motion and supporting declarations established that Jones's

business would suffer irreparable harm if he were not permitted to reopen pending the outcome of the hearing on the merits. On September 1, 1999, the Department of Health, Board of Pharmacy filed its opposition to Jones's motion for a stay of the summary suspensions. The Department of Health argued, in part, that Jones's motion to modify should be denied because it was moot. The Department's mootness argument was based on the fact that Jones's franchise had been terminated. *Appendix A, Exh. 10.* On September 7, 1999, the Board of Pharmacy denied Jones's motion to modify the summary suspensions of his licenses. *Appendix A, Exh. 11.*

On September 13, 1999, Jones requested a Petition for Expedited Hearing on the merits of the charges contained in the Statement of Charges. The petition made clear that unless Jones was given an immediate opportunity to have the summary suspensions overturned at a hearing on the merits, he would suffer almost certain financial ruin. *Appendix A, Exh. 12.*

On September 21, 1999, the Department of Health, Board of Pharmacy, opposed Jones's petition for an expedited hearing and proposed instead that the matter be heard on the Board's next regularly scheduled hearing date. *Appendix A, Exh. 13.*

On September 22, 1999, Jones, through counsel, contacted the Board of Pharmacy and requested an immediate settlement conference on

an emergency basis. The reason for this request was that unless Jones could have his professional and pharmacy licenses reinstated immediately through a settlement conference, he faced almost certain financial ruin. *Appendix A, Exh. 14.* The state refused to hold a settlement conference. CP 217.

On September 29, 1999, the Board of Pharmacy ostensibly granted Jones's motion for an expedited hearing. However, it refused to set a special hearing and instead scheduled the expedited hearing for the Board's next regularly scheduled hearing date, October 21, 1999. *Appendix A, Exh. 15.*

F. State's moves to continue hearing. Jones is ruined.

On October 18, 1999 -- three days before the scheduled hearing -- the Department of Health, Board of Pharmacy moved for a continuance of the October 21, 1999, hearing. The Department argued that a continuance was necessary because it intended to file an amendment to the Statement of Charges in order to add additional charges against Jones. Jones's attorney, Bernie Bauman, opposed the continuance and asked that the hearing go forward as scheduled. Bauman pointed out the continued economic hardship attending the summary suspensions and that his client had repeatedly requested an expedited hearing. The Presiding Officer, Health Law Judge Arthur E. DeBusschere, granted the Department's

motion for a continuance and reset the expedited hearing for the Board of Pharmacy's next regularly scheduled meeting on December 2, 1999.

Appendix A, Exh. 16.

By November 1999, Jones had lost everything. Because of the summary suspensions, the Medicine Shoppe International had terminated his franchise effective immediately on August 31, 1999. CP 217-20. But for the summary suspensions, Jones could have saved his franchise. Because of the summary suspensions, he lost his franchise, lost his commercial lease, and lost his business. CP 217.

G. Jones signs stipulated order after losing everything.

On January 11, 2000, Jones signed the Stipulated Findings of Fact, Conclusions of Law and Agreed Order. Pursuant to the Agreed Order, Jones's pharmacy license was revoked, and Jones's professional license was Suspended with Stay for five years from the date of February 17, 2000.

Jones signed the stipulated order because he no longer had the financial wherewithal to pay for an attorney and to fight the Board of Pharmacy's charges. He had already lost his pharmacy. He agreed to the stipulated order because he could not afford to risk losing his professional license as well. CP 217.

Although Jones signed the stipulated order, he did **not** admit to any wrongdoing. At the very outset of the Stipulated Facts at page 3 of the order, it states: “While Respondent does not admit to the following conduct, Respondent acknowledges that the evidence is sufficient to justify the following findings”. *Appendix A, Exh. 17*.

Jones never intended to waive his right to sue the Board of Pharmacy for what it had done to him. Jones always intended to pursue a lawsuit against the Board of Pharmacy once he could marshal the financial resources for a lawsuit. Jones’s understanding was that the stipulated order would have no impact on his right to sue the Board of Pharmacy. He would not have agreed to the stipulated order if he had understood that it waived his right to sue. CP 218.

IV. ARGUMENT

A. The trial court did not err when it ruled that Petitioners had not established – as a matter of law – that Executive Director Donald Williams was entitled to prosecutorial immunity from Respondent’s § 1983 claim.

Defendants rely on *Hannum v. Friedt*, 88 Wn.App. 881, 947 P.2d 760 (1997) to argue that Williams is entitled to prosecutorial immunity. The facts of this case, however, are distinct from *Hannum* in three fundamental and decisive ways: (1) unlike the executive director in *Hannum*, Williams is implicated in the wrongful investigation that gave

rise to the motion for summary suspension; (2) unlike the executive director in *Hannum*, Williams did not prosecute the motion for summary suspension; the assistant attorney general did; and (3) unlike the executive director in *Hannum*, Williams was not authorized by statute to summarily suspend Jones's license but instead was required by statute to refer the matter to a prosecutor for a hearing before an adjudicative panel.

1. Respondent has alleged that Williams participated in investigative misconduct that is clearly distinguished from any prosecutorial function.

Petitioners' brief focuses solely on Executive Director Williams' decision to initiate the summary proceedings against Jones based on the pharmacy inspection reports of inspectors Wene and Jeppesen.

Petitioners' Opening Brief, p. 23-24. However, Respondent's §1983 claim against Williams is based also on conduct that predates the decision to initiate summary proceedings and is clearly investigative in nature.

Respondent's First Amended Complaint contains the following allegations:

- On or about July 11, 1999, Wene and Jeppesen returned to Jones' pharmacy. They told Jones that they had come to the pharmacy to conduct a training exercise. Based on information and belief, this was not true. Based on information and belief, Wene and Jeppesen had returned to Jones's pharmacy with the intent of closing down the pharmacy and putting Jones out of business. Based on information and belief, Williams knew of and directed Wene's and Jeppesen's actions. Wene and

Jeppesen proceeded to harass Jones and his employees and to disrupt the operation of the pharmacy.

CP 472.

- On or about July 12, 1999, Jeppesen returned to Jones's pharmacy. Jeppesen told Jones that he had returned as part of a training exercise. Jones told Jeppesen that he was not welcome to repeat his harassing behavior. Jeppesen responded by giving Jones an inspection report with a failing grade of 48. The failing grade was based on false and inaccurate information contained in the inspection report. The failing grade was also based on subjective and arbitrarily imposed standards. Based on information and belief, the false and inaccurate information and score was compiled by Jeppesen and by Wene. Based on information and belief, Jeppesen and Wene knew or should have known that the failing grade was erroneous. Based on information and belief, Williams knew of and directed Jeppesen's and Wene's actions. In the alternative, the failing grade was the result of Wene's and Jeppesen's reckless and/or negligent inspection.

CP 472.

- On or about August 10, 1999, Wene and Jeppesen returned to Jones's pharmacy and conducted a reinspection. The reinspection resulted in a failing grade of 56. Again, the failing grade was based on false and inaccurate information contained in the reinspection report. Again, the failing grade was based on subjective and arbitrarily imposed standards. Based on information and belief, the false and inaccurate information was compiled by Jeppesen and by Wene. Based on information and belief, Jeppesen and Wene knew or should have known that the failing grade was erroneous. Based on information and belief, Williams knew of and directed Jeppesen's and Wene's actions. In the alternative, the failing grade was the result of Wene's and Jeppesen's reckless and/or negligent inspection.

CP 473.

The Declaration of Michael Jones In Support of Plaintiff's Opposition to Defendants' Motion for Summary Judgment alleges that the

investigations contained numerous factual errors (CP 214-15), false and capricious scoring (CP 215), and was part of a calculated and longstanding effort by Board of Pharmacy officials – including Williams – to drive Jones out of business. CP 215-17.

Taken in the light most favorable to Jones, these allegations—which Petitioners have not offered evidence to dispute – involve investigative misconduct. Prosecutorial immunity under 42 U.S.C. § 1983 does not reach such allegations. *Mullinax v. McElhenney*, 817 F.2d 711 (11th Cir. 1987).

In *Mullinax*, a district attorney and an assistant district attorney participated in efforts to entrap a woman participating in the defense of a man charged with first degree murder. First, the two prosecutors secured the release of a state prisoner, whom they housed in local hotels and directed to call the paralegal, Dianne Mullinax, and induce her to carry a package to the defendant in jail. The assistant attorney general, Sticher, and one of his investigators, McElhenney, planned to secrete contraband in the package and to arrest Mullinax when she delivered the package to her client. Because Mullinax refused to deliver the package unless she was allowed to examine its contents ahead of time, this attempt to entrap her failed.

Next, Mullinax informed the local sheriff's office of a planned escape from the jail by several inmates. Even though the escape was foiled thanks to Mullinax's assistance, Sticher, the assistant attorney general, claimed that Mullinax had assisted the plan by providing hacksaw blades to a number of the inmates. Sticher's allegation was based on the testimony of several of the inmates whose planned escape had been foiled by Mullinax's information. In exchange for immunity from prosecution on attempted escape charges, the inmates had agreed to testify against Mullinax. Mullinax was arrested on this charge and acquitted after trial.

Finally, an investigator in the district attorney's office, McElhenney, arranged to have a package containing marijuana and Quaaludes delivered to Mullinax's post office box. Mullinax regularly checked the post office box while her client was incarcerated. McElhenney intended to arrest Mullinax when she delivered the package to her client. Mullinax, however, suspected that the package contained contraband. She requested that a deputy accompany her to the post office to inspect the package. After this request was made, McElhenney called off the entrapment attempt.

Mullinax sued the district attorney, the assistant district attorney, and the investigator for – among other things -- false accusation and arrest, entrapment, and conspiracy to deprive her of her liberty without due

process in violation of 42 U.S.C. § 1983. The court ruled that the district attorney and assistant district attorney were entitled to prosecutorial immunity to any § 1983 claim based on bringing and prosecuting the false criminal charge because these claims were “intimately associated with the judicial phase of the criminal process.” *Mullinax v. McElhenney, supra*, 817 F.2d at 714 (citing *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976)). However, because the attempts to entrap Mullinax involved investigative – rather than prosecutorial – functions, there was no absolute immunity.

State prosecutors are entitled to absolute immunity from damages under Section 1983 for all acts ‘intimately associated with the judicial phase of the criminal process.’ *Imbler v. Pachtman*, 424 U.S. 409, 430, 96 S.Ct. 984, 995, 47 L.Ed.2d 128 (1976). For acts done as an ‘administrator or investigative officer rather than that of advocate,’ *id.* at 430-31, 96 S.Ct. at 995, however, state prosecutors receive only qualified immunity. *Marrero v. City of Hialeah*, 625 F.2d 499, 503-511 (5th Cir.1980), *cert. denied sub nom. Rashkind v. Marrero*, 450 U.S. 913, 101 S.Ct. 1353, 67 L.Ed.2d 337 (1981).

Id. at 714-15.

... Mullinax correctly observes that direct participation with the police in conducting a search far exceeds the prosecutor's necessary role in marshaling the facts of a case. *Fullman*, 739 F.2d at 559; *Marrero*, 625 F.2d at 505-06. Likewise, entrapping someone into committing a prosecutable offense undeniably constitutes investigative behavior. Therefore, Keller and Sticher are entitled to qualified immunity only for their involvement in the raid on the jail cell and for their attempts to entrap Mullinax.

Id. at 715. The § 1983 claims against Keller, Sticher, McElhenny, and many of the other defendants were remanded for trial.

Here, Jones has alleged that Williams oversaw the investigation of Jones's pharmacy by Wene and Jeppesen. Jones also has alleged that Williams, Wene and Jeppesen participated in a conspiracy to secure the summary suspension of his license and thus drive him out of business. Under *Mullinax, supra*, Williams is not entitled to absolute prosecutorial immunity for his participation in these investigative functions. The trial court did not commit obvious or probable error.

2. Petitioners have not established – as a matter of law – that Williams was functioning as a “prosecutor” when he referred the motion for summary suspension of Jones’s licenses to the assistant attorney general for prosecution.

As noted above, Petitioners' brief ignores the allegations of investigative misconduct and focuses solely on the allegations relating to Williams' referral of disciplinary charges to the assistant attorney general for prosecution. Even with respect to these allegations, Petitioners failed to establish – as a matter of law -- that Williams was “functioning as a prosecutor” and entitled to absolute immunity from Jones's § 1983 claim.

The Ex Parte Motion for Order of Summary Action was signed by Williams who is identified as “Executive Director of the State of Washington Department of Health, Board of Pharmacy” and by David M.

Hankins, who is identified as “Assistant Attorney General Prosecutor.” CP 294-95 (*emphasis added*). The Statement of Charges that accompanied the *ex parte* motion was signed by Williams who is identified as “Executive Director of the State of Washington Department of Health, Board of Pharmacy” and by David M. Hankins, who is identified as “Assistant Attorney General Prosecutor.” CP 317-18 (*emphasis added*). The Ex Parte Order of Summary Action states that the motion was “brought by the Department of Health by and through its attorneys, Christine O. Gregoire, Attorney General, and David M. Hankins, Assistant Attorney General.” CP 319-20. All of these facts establish that David Hankins – not Williams – functioned as the prosecutor with respect to the summary suspensions of Jones’s licenses. Jones has not asserted a claim against Hankins; his claim against Williams is not barred by the doctrine of prosecutorial immunity.

The United States Supreme Court has been “‘quite sparing’ in recognizing absolute immunity for state actors” in the context of § 1983 claims.” *Buckley v. Fitzsimmons*, 509 U.S. 259, 269 (1993). “The official seeking absolute immunity bears the burden of showing that such immunity is justified for the function in question.” *Id.* at 269.

Under § 1983, prosecutors enjoy absolute immunity only for conduct “intimately associated with the judicial phase of the criminal

process.” *Id.* at 270. Even a prosecutor enjoys only qualified immunity (not absolute immunity) when the prosecutor “functions as an administrator rather than as an officer of the court” or when the prosecutor “performs the investigative functions normally performed by a detective or police officer.” *Id.* at 273.

Williams’ participation in the inspections of Jones’s pharmacy was clearly administrative in nature and not subject to absolute immunity. Williams never acted as an “officer of the court.” At most, Williams only performed the administrative function of preparing the Statement of Charges; the record establishes that the prosecutorial functions were performed by Assistant Attorney General Hankins, to whom Williams referred the Statement of Charges. At the very least, Williams’ referral of the Statement of Charges to Hankins for prosecution creates a fact question that prevents the Court from finding as a matter of law that Williams functioned as a “prosecutor” with respect to the summary suspension of Jones’s licenses. The trial court did not commit obvious or probable error.

3. Williams lacked the “prosecutorial” authority granted the administrator in *Hannum v. Friedt, supra*.

Petitioners argue that Williams is entitled to absolute immunity because “by deciding to initiate disciplinary proceedings against Mr. Jones, [he] performed the same function that the Director of DOL, Friedt,

performed in *Hannum*.” *Opening Brief*, p. 24-25. But the statutory authority granted to the administrator in *Hannum* is both broader and distinct from the statutory authority granted to Williams.

In *Hannum*, the executive director of DOL summarily suspended Hannum’s license on her own authority. This authority is granted by statute (*Id.* at 884) – in particular by RCW 34.05.422(4) and RCW 46.70.101.² Thus, the executive director in *Hannum* acted as the decision-maker – or judge – in the summary suspension of Hannum’s license.

Unlike the executive director in *Hannum*, Williams lacked the statutory authority summarily to suspend Jones’s license. Instead, Williams was required to refer the matter to an assistant attorney general

² RCW 34.05.422(4) states:

Rate changes, licenses

(4) If the agency finds that public health, safety, or welfare imperatively requires emergency action, and incorporates a finding to that effect in its order, summary suspension of a license may be ordered pending proceedings for revocation or other action. These proceedings shall be promptly instituted and determined.

RCW 46.70.101 gives the DOL Director authority to summarily suspend a license. It states in relevant part (with emphasis added):

Denial, suspension, or revocation of licenses—Grounds

The director may by order deny, suspend, or revoke the license of any vehicle dealer or vehicle manufacturer or, in lieu thereof or in addition thereto, may by order assess monetary penalties of a civil nature not to exceed one thousand dollars per violation, if the director finds that the order is in the public interest and that the applicant or licensee...

for prosecution before an adjudicative panel of the Board of Pharmacy.³

³ The *Ex Parte Order of Summary Action* states that the Board of Pharmacy's authority (not Williams's) to summarily suspend Jones's license was based on RCW 34.05.422(4), RCW 34.05.479, RCW 18.130.050(7) and WAC 246-11-300. CP 323-24. RCW 34.05.422(4) is found in Footnote 1 above.

RCW 34.05.479 states (with emphasis added):

34.05.479. Emergency adjudicative proceedings.

- (1) Unless otherwise provided by law, **an agency** may use emergency adjudicative proceedings in a situation involving an immediate danger to the public health, safety, or welfare requiring immediate agency action.
- (2) The agency may take only such action as is necessary to prevent or avoid the immediate danger to the public health, safety, or welfare that justifies use of emergency adjudication.
- (3) The agency shall enter an order, including a brief statement of findings of fact, conclusions of law, and policy reasons for the decision if it is an exercise of the agency's discretion, to justify the determination of an immediate danger and the agency's decision to take the specific action.
- (4) The agency shall give such notice as is practicable to persons who are required to comply with the order. The order is effective when entered.
- (5) After entering an order under this section, the agency shall proceed as quickly as feasible to complete any proceedings that would be required if the matter did not involve an immediate danger.
- (6) The agency record consists of any documents regarding the matter that were considered or prepared by the agency. The agency shall maintain these documents as its official record.
- (7) Unless otherwise required by a provision of law, the agency record need not constitute the exclusive basis for agency action in emergency adjudicative proceedings or for judicial review thereof.
- (8) This section shall not apply to agency action taken pursuant to a provision of law that expressly authorizes the agency to issue a cease and desist order. The agency may proceed, alternatively, under that independent authority.

RCW 18.130.050(7) states:

18.130.050. Authority of disciplining authority

The disciplining authority has the following authority: . . .

The difference between the statutory powers of the director in *Hannum* and of the director (Williams) in this case is a difference between prosecutorial (and judicial) authority on the one hand and administrative authority on the other. No statute grants Williams the authority to act as a prosecutor (or judge), and in fact, Williams functioned as an administrator – not as a prosecutor – in initiating the motion for summary suspension of Jones’s licenses.

Petitioners have failed to establish that the trial court committed obvious or probable error.

B. The Court should strike Petitioners’ arguments on qualified immunity because they were not presented to the trial court. How can the trial court have committed error on issues that were not before it?

Petitioners’ Motion for Summary Judgment asserted that Wene and Jeppesen had qualified immunity under 42 U.S.C. § 1983 based on two

(7) To take emergency action ordering summary suspension of a license, or restriction or limitation of the licensee's practice pending proceedings by the disciplining authority;

WAC 246-11-300 states:

Conduct of emergency adjudicative proceedings.

(1) Summary action may be taken only after a review by the board of such evidence, including affidavits, if appropriate, to establish:

(a) The existence of an immediate danger to the public health, safety, or welfare;

(b) The board's ability to address the danger through a summary action, and

(c) The summary action necessary to address the danger.

(2) No notice to any person potentially affected by a summary action shall be required prior to issuance of a summary action.

arguments: (1) “Mr. Jones’ allegations that Wene, Jeppesen and Williams acted negligently do not give rise to a Constitutional violation” (CP 451-53); and (2) “there is no evidence that Wene, Jeppesen or Williams fabricated the emergency giving rise to the summary action as there was in *Armendiraz v. Penman.*” CP 453-55.

Petitioners’ Opening Brief now asserts that the trial court erred based on two new arguments: (1) investigators Wene and Jeppesen – merely by conducting an investigation and compiling an investigation report -- cannot be held liable for a §1983 procedural due process claim (*Opening Brief, pp 29-32*); (2) Jones failed to demonstrate a clearly established right to a pre-deprivation hearing and Petitioners had an “objectively reasonable” belief that an emergency existed to justify a summary proceeding (*Opening Brief, pp. 32-43*).

How can the trial court be found to have committed error if it was not even asked to rule on these two new arguments? This Court should refuse to review arguments that were not raised below. RAP 2.5(a).⁴ This

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RAP 2.5 Circumstances Which May Affect Scope of Review

(a) Errors Raised for First Time on Review. The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. A party or the court may raise at any time the question of appellate court jurisdiction. A party may

is especially true given that Petitioners appeal the trial court's denial of their summary judgment motion. Respondent cannot be faulted for failing to produce evidence on an issue that Petitioner did not even raise in the trial court. *See, e.g., Washburn v. Beatt Equipment Co.*, 120 Wn.2d 246, 840 P.2d 860 (1992); *State v. Lord*, 117 Wn.2d 829, 822 P.2d 177 (1991); *Concerned Coupeville Citizens v. Town of Coupeville*, 62 Wn.App. 408, 814 P.2d 243 (1991) (contentions not made to trial court in its consideration of summary judgment motion need not be considered on appeal).

C. If the Court elects to consider these two new arguments, the Commissioner should nevertheless deny review because Wene and Jeppesen (as well as Williams) can be liable under § 1983 for conspiracy to deprive Jones of procedural due process.

Even if the Court elects to consider the new arguments raised by Petitioners, the Court should still deny the appeal because Wene and Jeppesen (as well as Williams) are liable under § 1983 for conspiracy to deprive Jones of procedural due process.

Petitioners rely on *Hannum v. Friedt, supra*, to argue that Jones cannot bring a procedural due process claim under § 1983 against Wene and Jeppesen because Wene and Jeppesen merely investigated Jones's

present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground. A party may raise a claim of error which was not raised by the party in the trial court if another party on the same side of the case has raised the claim of error in the trial court.

pharmacy. *Opening Brief*, p. 31. Petitioners' argument ignores the factual distinction between this case and *Hannum*. Petitioners' argument also ignores clear case law holding that individuals like Wene and Jeppesen can be held liable for conspiracy to deprive Jones of his procedural due process rights.

1. Petitioners mischaracterize the facts of *Hannum* and misrepresent the facts of this case.

In *Hannum*, an automobile dealer brought a civil rights claim under 42 U.S.C. § 1983 against the director of the Department of Licensing, against an administrator for DOL, and against Jan Gerrish, an investigator for DOL. The lawsuit was based on DOL's suspension of Hannum's license. The suspension was based on DOL's finding that Hannum had sold 154 vehicles with odometers that he had rolled back an average of 40,000 miles each. Hannum's appeal was brought *pro se*. *Id.* at 881-885.

As noted above, the DOL director made the decision to charge Hannum and issued the order herself to summarily suspend his license. This is clearly different than this case, where David Hankins, an assistant attorney general, brought the motion for summary suspension before the Board of Pharmacy, prosecuted the motion, and the Board of Pharmacy – not the executive director – issued the order of summary suspension.

In *Hannum*, there was no allegation that the charges of wrongdoing brought against Hannum were false or manufactured. Indeed, the charges were apparently initiated after Hannum testified before a federal grand jury investigating odometer tampering. *Id.* at 882. In this case, however, Jones alleges that numerous statements contained in Wene's and Jeppesen's investigative reports were false, that the scoring of his deficiencies was arbitrary and capricious, and that the investigations were part of a calculated effort to drive him out of business. CP 214-17.

In *Hannum*, the only acts taken by Gerrish (the investigator) in support of the DOL disciplinary action was procuring certified title records for automobiles and interviewing Hannum as part of the federal grand jury investigation.⁵ There was no allegation that Gerrish, himself, did anything wrong or that there was anything out of the ordinary about his investigation; Hannum simply objected to the prosecution to which Gerrish had contributed.

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Gerrish, an investigator with the Dealer and Manufacturer Services Division of DOL, was assigned to investigate Hannum's odometer tampering case. Gerrish obtained 152 certified title records from the state of California and obtained the purchasing dealers' wholesale purchase and sale agreements admitted in the administrative hearing. Gerrish also interviewed Hannum in September 1993, on behalf of the Department of Justice, as part of the federal investigation of James Kosta and Jerry Case for odometer tampering. *Hannum v. Friedt, supra*, 88 Wn.App. at 889.

In this case, however, Jones testified that the investigation was extraordinary and that Wene and Jeppesen were guilty of numerous incidents of wrongdoing.

- Jones testified that in his roughly 20 years' experience, pharmacy investigators would visit a pharmacy once every two years and an investigation would last an hour at most. CP 213. Here, the July investigation followed only 5 months after a February reinspection, and it lasted seven hours on July 12 and another hour on July 13.
- Jones testified that throughout the seven hours on July 12, 1999, Wene and Jeppesen harassed him as if they were trying to make Jones commit errors. CP 213-14.
- Jones testified that on February 3, 1999, his pharmacy received a passing score of 96, and on July 12, 1999 -- just five months later - - it received a failing score of 48 even though the pharmacy was in as good shape as it had been in February. CP 213-14.
- Jones testified that the low score was due not only to false reports but also arbitrary scoring. CP 214-15.
- Jones testified that he had been the object of ongoing harassment by the Board of Pharmacy -- including trumped up charges and a suspension based on the substitution of proctofoam for proctocream. CP 215-16.
- Jones testified that the July inspection was due in part to the false allegations made by a disgruntled ex-employee, the identity of whom the investigators refused to disclose. CP 214-15.
- Jones testified that Wene and Jeppesen worked at Williams' direction in order to provide a basis for Williams' motion for an order of summary suspension. CP 215-16.
- Jones testified that Wene, Jeppesen, and Williams knew there was no emergency to justify such a motion. He testified that had there in fact been an emergency, Williams would not have waited until

more than a month – until August 17 -- after the initial failing score to pursue a summary suspension. CP 216-17.

- Jones's attorney, Bernie Bauman, testified that he spoke with Phyllis Wene on August 16 – the day before the hearing on the motion for a summary suspension -- about the status of the investigation and that Wene informed him that Jones could have more time to prepare answers to the Board's interrogatories and that there was no urgency in submitting his answers. CP 145.
- Bauman testified that Wene did not inform him of a hearing set for August 17 on the motion for an order or summary suspension. Bauman testified that he would have been available to participate in that hearing he been informed. CP 145.

In *Hannum*, the § 1983 claim against Gerrish was dismissed because the plaintiff failed to produce any evidence of wrongdoing on Gerrish's part. Here, Jones has provided ample evidence of wrongdoing by Wene and Jeppesen to support the § 1983 claim.

2. The case law clearly establishes that Williams, Wene, and Jeppesen can be held liable under § 1983 for conspiracy to deprive Jones of his rights to procedural due process.

Petitioners argue that Wene and Jeppesen cannot be held liable for procedural due process because they merely investigated Jones. *Opening Brief, p. 31*. This argument ignores the clear case law that establishes Wene and Jeppesen can be held liable for conspiracy to deprive Jones of his due process rights.

In *Slavin v. Curry*, 574 F.2d 1256 (5th Cir. 1978), the plaintiff applied for a beer and wine license for his grocery store and was denied.

After plaintiff threatened city officials with a lawsuit to get his license, plaintiff was arrested and later convicted on a charge of indecency with a child. After his conviction, plaintiff brought a civil rights lawsuit under 42 U.S.C. §1983 against 20 named individuals, including the prosecutor and an investigator in the prosecutor's office. The lawsuit alleged that the 20 people participated in a *conspiracy* to deprive him of due process. The trial court dismissed the claims on motions to dismiss or summary judgment. But the 5th Circuit reinstated most of the claims – including those against the prosecutor and investigator – holding that the plaintiff had properly alleged a conspiracy claim for deprivation of due process rights under 42 U.S.C. §1983.

An action for conspiracy may be maintained under section 1983. As this court said in *Nesmith v. Alford*, 318 F.2d 110, 126 (5th Cir. 1963), *cert. denied*, 375 U.S. 975, 84 S.Ct. 489, 11 L.Ed.2d 420 (1964):

Of course, for a claim under s 1983, a conspiracy as such is not an indispensable element as it is under s 1985. But it may be charged as the legal mechanism through which to impose liability on each and all of the Defendants without regard to the person doing the particular act. Conspiracy is asserted in that situation on more or less traditional principles of agency, partnership, joint venture, and the like.

Slavin v. Curry, supra, 574 F.2d at 1261, *modified on other grounds*, 583 F.2d 779 (1978), *overruled on other grounds, Sparks v. Duval County Ranch Co., Inc.*, 604 F.2d 976, 978 (5th Cir.1979).

The *Slavin* court made it clear that a defendant who did not directly participate in the deprivation of due process would nevertheless be liable under § 1983 if the defendant participated in a conspiracy to deprive the plaintiff of due process.

The contention that a conspiracy existed which deprived the petitioner of rights guaranteed by federal law makes each member of the conspiracy potentially liable for the effects of that deprivation. Liability arises from membership in the conspiracy and from traditional notions that a conspirator is vicariously liable for the acts of his co-conspirators. Liability does not arise solely because of the individual's own conduct. Some personal conduct may serve as evidence of membership in the conspiracy, but the individual's actions do not always serve as the exclusive basis for liability. It is therefore not sufficient justification to say that a claim against a particular defendant must be dismissed because that defendant would be immune from liability for his own conduct. Additional inquiry is required to determine whether the immunity extends also to participation in a conspiracy.

Slavin v. Curry, supra, 574 F.2d at 1263.

With respect to the county prosecutor and his investigators, the plaintiff alleged that the prosecutor presented false and illegal evidence to the grand jury, requested that the plaintiff's bond be cancelled, and – along with his investigators – participated in the alteration of the criminal trial's transcript in an effort to undermine the plaintiff's appeal of his criminal conviction. The trial court dismissed all of the claims against the prosecutor and staff under the theory of prosecutorial immunity. The 5th

Circuit held that prosecutorial immunity applied to the direct claims against the prosecutor for offering illegal testimony to the grand jury and asking the trial court to cancel the plaintiff's bond. However, prosecutorial immunity did not apply to the plaintiff's claim that the prosecutor and his investigators participated in a conspiracy to deprive the defendant of his due process rights. *Id.* at 1264. This § 1983 claim was remanded for trial.

After *Mullinax v. McElhenney*, *supra*, 672 F.Supp. was remanded for trial, the defendants Keller and Sticher (the district attorney and assistant district attorney) moved for summary judgment on plaintiff's § 1983 claim on grounds that plaintiff had failed to state a constitutional violation, and even if there was a constitutional violation, defendants were entitled to qualified immunity. The trial court agreed that plaintiff's allegations that defendants had conspired and attempted to entrap her into committing a crime – standing alone -- failed to state a claim under § 1983 because there exists no constitutional right to be free of entrapment. *Id.* at 1451. **However**, because plaintiff had also alleged that the *conspiracy* and attempted entrapment had led to deprivations of her liberty and property without due process, she had stated a claim under §1983.

Plaintiff alleges that defendants deprived her of her liberty without due process in violation of the Fourteenth Amendment. In her deposition, plaintiff stated that defendants had engaged in a variety of acts which actually deprived her of her constitutional rights. Plaintiff alleges

that defendants induced a prisoner to make harassing phone calls to her at her home and work, thus impinging on her ability to practice her profession. She further alleges that defendants attempted to get her to engage in the unlawful act of smuggling contraband into the Clayton County jail. After she was tried and acquitted for allegedly attempting to aid a jail escape, plaintiff contends defendants continued to smear her name, had her branded a security risk (causing her to be strip searched when she went to Reidsville State Prison on business) and precluded her from entering the Clayton County jail unaccompanied. See Deposition of Dianne Ruppert, Vol II, pp. 16-25 (Feb. 28, 1985). Plaintiff argues that these acts resulted in the actual deprivation of her liberty without due process.

In particular, plaintiff contends that the series of acts and alleged conspiracy to carry out such acts resulted in a violation of her constitutional right to liberty to freely associate with others and an infringement of her liberty and property interest to practice her chosen profession free from unreasonable government interference. These rights are constitutionally protected and plaintiff has presented enough evidence to create a question of fact as to whether defendants actually engaged in the acts or conspired to do so as alleged by plaintiff.

Id. at 1452.

The trial court noted that the question of whether Keller and Sticher were entitled to qualified immunity was necessarily fact-specific and therefore would have to be determined at trial. It denied defendants' motion for summary judgment.

The qualified immunity inquiry is a question of law which is "fact-specific." In their motion for summary judgment on the ground of qualified immunity, defendants did not set forth facts which would support a finding that their involvement in activities which allegedly infringed

plaintiff's liberty and property rights were lawful in light of clearly established law and the information they possessed at the time. Instead, defendants focused on the issue of plaintiff's entrapment claim which this court has dismissed. Accordingly, the court reserves the legal determination of defendants' qualified immunity for resolution at the trial.

Id. at 1453.

In this case, Jones has alleged an actual deprivation of his procedural due process rights: the summary suspension of his pharmacy licenses in the absence of any emergency. In this case, Jones has further alleged that Williams, Wene and Jeppesen conspired to generate false investigative reports in order to support a motion for summary suspension and effectively drive Jones out of business.

Under the holding of *Slavin v. Curry, supra*, Wene and Jeppesen are liable for conspiracy to generate false investigative reports and deprive Jones of his due process rights even though Wene and Jeppesen did not authorize the motion for an order of summary suspension. Under the holdings of *Mullinax*, Williams can clearly be liable for participating in a conspiracy to generate false investigative reports and deprive Jones of his due process rights.

3. Whether Petitioners Wene, Jeppesen and Williams “reasonably believed” that an emergency existed remains a fact question.

Government officials are entitled to qualified immunity from liability under § 1983 only if their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Courts have developed a two-part test to determine the application of qualified immunity in a particular case.

This standard requires a two-part analysis: (1) whether the law prohibiting the official conduct was clearly established; and (2) whether a reasonable official could have believed that his conduct complied with the law. *Act Up!/Portland v. Bagley*, 988 F.2d 868, 871 (9th Cir.1993). If the law prohibiting the conduct was clearly established and a reasonable official could not have believed his conduct lawful, then the official is not immune.

Stivers v. Pierce, 71 F.3d 732, 749 (9th Cir. 1995).

The due process clause clearly requires the state to provide a person with notice and an opportunity to be heard before depriving that person of a property right. The only exception to this due process requirement is when an emergency exists that requires public officials to act promptly and decisively to protect the public welfare.

Summary governmental action taken in emergencies and designed to protect the public health, safety and general welfare does not violate due process. *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 299-300, 101 S.Ct. 2352, 2372-73, 69 L.Ed.2d 1 (1981); *North Am. Cold Storage Co. v. Chicago*, 211 U.S. 306, 319-20, 29 S.Ct. 101, 105-06, 53 L.Ed. 195 (1908). Government officials need to act promptly and decisively when they perceive an emergency, and therefore, no pre-deprivation

process is due. However, the rationale for permitting government officials to act summarily in emergency situations does not apply where the officials know no emergency exists, or where they act with reckless disregard of the actual circumstances. *Sinaloa Lake Owners Ass'n v. Simi Valley*, 882 F.2d 1398, 1406 (9th Cir.1989), cert. denied, 494 U.S. 1016, 110 S.Ct. 1317, 108 L.Ed.2d 493 (1990)

Armendariz v. Penman, 31 F.3d 860, 866 (9th Cir. 1994) (*re'vsed on other grounds, Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996)).

Petitioners make reference to certain admissions made by Jones during the administrative proceedings, and Petitioners cast those admissions in the worst possible light in an effort to convince the Court that there is no fact question about whether an emergency existed to justify the summary suspension of Jones's licenses. *Opening Brief, pp. 38-43.*

Petitioners, however, ignore the following facts:

- Jones has always maintained that the inspections contained numerous errors and that the grading of any deficiencies that did exist was arbitrary, capricious and done in bad faith in order to submit his pharmacy to a failing score (CP 215);
- Jones has always maintained that the condition of his pharmacy on July 12, 1999 (when he received a failing score of 48) was virtually the same as the condition of his pharmacy on February 3 – when he received a passing score of 96. The only difference in the two inspections is the false reports made by Wene and Jeppesen and the scoring of the deficiencies (CP 214);
- Jones has always maintained that no emergency ever existed to justify the summary suspensions of his licenses. If there was an emergency after the pharmacy scored a 56 on August 10,

why did the Board of Pharmacy wait until August 17 to suspend his license? If there was an emergency after the pharmacy scored a 56 on August 10, why wasn't there an emergency after the pharmacy scored a 48 on July 12? Why wait five weeks to deal with an emergency? CP 214-17)

- Jones has always maintained that the false and capricious scoring of his pharmacy was part of a conspiracy to force the closure of his pharmacy. CP 215.

If anything, the facts suggest that no emergency existed. For

example:

- Jones's pharmacy receives a passing score of 96 on February 3 even though virtually all of the circumstances that led to the failing score on July 12 were present February 3: the functionality of the QS-1 system, the recordkeeping for non-child resistant caps, the recordkeeping for Schedule II drugs.
- Jones's pharmacy was allowed to remain open for more than five weeks after it received a failing score of 48 on July 12. If an emergency existed, Jones's pharmacy should have been shut down on July 13.
- Jones's pharmacy was allowed to remain open for seven days after it received a second failing score of 56 on August 10. If an emergency existed, Jones's pharmacy should have been shut down on August 11.

At the very least, when the facts are viewed in the light most favorable to Respondent, the existence – or non-existence – of an emergency remains a question of fact. *Weinberg v. Whatcom County*, 241 F.3d 746, 754 (9th Cir. 2001) (questions of fact remained about the existence of an emergency that justified issuance of stop work orders on construction project, but plaintiff developer was entitled to summary judgment on his §

1983 procedural due process claim based on county officials' vacation of his approved plats without a hearing). *See also, Kerman v. City of New York*, 374 F.3d 93 (2d Cir. 2004).⁶

Ultimately, a jury must decide whether it was objectively reasonable for Petitioners to believe that an emergency existed to justify the pursuit of the summary order of suspension. Therefore, the trial court was correct in denying Petitioner's motion for summary judgment.

6

The matter of whether a right was clearly established at the pertinent time is a question of law. *See, e.g., Crawford-El v. Britton*, 523 U.S. 574, 589, 118 S.Ct. 1584, 140 L.Ed.2d 759 (1998); *Mitchell v. Forsyth*, 472 U.S. 511, 528, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985); *Harlow v. Fitzgerald*, 457 U.S. at 818, 102 S.Ct. 2727, 73 L.Ed.2d 396; *X-Men Security, Inc. v. Pataki*, 196 F.3d 56, 66 (2d Cir.1999); *Genas v. State of New York Department of Correctional Services*, 75 F.3d 825, 830 (2d Cir.1996). **In contrast, the matter of whether a defendant official's conduct was objectively reasonable, i.e., whether a reasonable official would reasonably believe his conduct did not violate a clearly established right, is a mixed question of law and fact.** *See, e.g., Lennon v. Miller*, 66 F.3d 416, 422 (2d Cir.1995); *Oliveira v. Mayer*, 23 F.3d at 649-50. A contention that-- notwithstanding a clear delineation of the rights and duties of the respective parties at the time of the acts complained of--it was objectively reasonable for the official to believe that his acts did not violate those rights "has its principal focus on the particular facts of the case." *Hurlman v. Rice*, 927 F.2d 74, 78-79 (2d Cir.1991); *see, e.g., Oliveira v. Mayer*, 23 F.3d at 649- 50. **Although a conclusion that the defendant official's conduct was objectively reasonable as a matter of law may be appropriate where there is no dispute as to the material historical facts, *see, e.g., Lennon v. Miller*, 66 F.3d at 421; *Glass v. Mayas*, 984 F.2d 55, 58 (2d Cir.1993); *Robison v. Via*, 821 F.2d 913, 921 (2d Cir.1987), if there is such a dispute, the factual questions must be resolved by the fact finder, *see, e.g., Kerman II*, 261 F.3d at 241; *Oliveira v. Mayer*, 23 F.3d at 649; *Calamia v. City of New York*, 879 F.2d 1025, 1036 (2d Cir.1989). "Though '[i]mmunity ordinarily should be decided by the court,' ... that is true only in those cases where the facts concerning the availability of the defense are undisputed; otherwise, jury consideration is normally required" *Oliveira v. Mayer*, 23 F.3d at 649 (quoting *Hunter v. Bryant*, 502 U.S. 224, 228, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991)).**

Id., at 108-09 (emphasis added).

4. Petitioners should be estopped from making “Chicken Little” references to cases involving out-of-state pharmacy misconduct – at least until they permit the discovery of in-state pharmacy misconduct that they previously opposed on grounds that it “was not probative of any issue in this case.”

Petitioners offer citations to numerous out-of-state cases involving pharmacy misconduct. *Opening Brief, p. 39-42*. Apparently, the references are offered in support of the argument that the summary closure of Mr. Jones’s pharmacy avoided similar catastrophes here.

Mr. Jones previously sought discovery of other instances in which the Washington Board of Pharmacy summarily suspended a pharmacy license and other instances in which the Washington Board of Pharmacy allowed a pharmacy to remain open pending a license suspension hearing. The discovery requests sought evidence of prior circumstances that the Washington Board of Pharmacy deemed to be an emergency and prior circumstances that the Washington Board of Pharmacy deemed to be not an emergency (though the circumstances still constituted grounds for seeking license suspension through a non-summary procedure). Jones maintains that such evidence would tend to prove that no emergency existed in this circumstance so as to relieve the state of its obligation to

provide Jones with prior notice of its motion to suspend his license. *See Jones' Motion to Compel Answers and Responses to Jones' First Discovery Requests, attached hereto as Appendix B.*

Petitioners refused to provide any response to these discovery requests and moved for a protective order on the following grounds:

Plaintiff's discovery requests at issue also call for information that is not admissible and that is not reasonably calculated to lead to the discovery of admissible evidence. Information about disciplinary proceedings against pharmacists other than the Plaintiff are irrelevant to this case. . . . Given that these requests are not calculated to lead to the discovery of any evidence that would be admissible in this case, the court should find that the Defendants need not undergo the tremendous burden and expense of responding to them.

See Defendants' Motion for Protective Order, p. 6, attached hereto as Appendix C. The trial court denied Respondent's motion to compel and granted Petitioners' motion for a protective order. *See Order Granting Defendants' Motion for Revision of Commissioner's Rulings attached hereto as Appendix D.*

Judging from the *Opening Brief*, Petitioners apparently now believe that evidence of out-of-state disciplinary action taken against out-of-state pharmacies is relevant to the inquiry. In light of the Petitioners' apparent change of heart, the Court should order the Petitioners to produce the discovery previously requested by Respondent. Until that discovery is

produced, the Petitioners' references to such out-of-state cases should be stricken.

D. Jones was not required to exhaust his administrative remedies because doing so would not have mitigated his damages.

Petitioners cite *Laymon v. Wash. Dept. Natural Resources*, 99 Wn.App. 518, 994 P.2d 232 (2000) for the proposition that Jones's stipulation to the Agreed Order (or his failure to insist on a contested hearing and appeal the outcome of that hearing) bars this lawsuit. This is clearly wrong.

In *Laymon*, after an owner began clearing land in order to develop the property, a DNR forester served the owner with a stop work order alleging that the work was illegal because it was taking place within a mile of a bald eagle nest site. The stop work order stated that the owner could appeal the stop work order by filing an appeal with the Forest Practices Appeal Board within 15 calendar days. The owner did not appeal the order. Ten days after the stop work order, the Department of Fish and Wildlife presented the owner with a bald eagle management plan containing substantial restrictions on development of the property. The management plan also provided a process for appealing those restrictions. The owner did not appeal those restrictions. The financial backers of the development withdrew from the project after they learned of the

development restrictions. Subsequently, the DFW determined that the purported bald eagle nest never existed, and it withdrew the bald eagle management plan. The owner then sued DNR and DFW for damages related to the stop work order and bald eagle management plan.

The court held that the owner's suit was barred because the owner failed to pursue the available administrative remedies: namely, the appeal of the stop work order and the appeal of the bald eagle management plan. Had those appeals been taken, the owner might have succeeded in having the restrictions lifted in time to proceed with the development. In short, the owner's failure to pursue administrative remedies was tantamount to his failure to mitigate damages. *Id.* at 525. (“[A] plaintiff's failure to employ available legal remedies to avoid resulting damages is analogous to a failure to mitigate damages.”)

This case is different. Jones has alleged that Defendants Wene, Jeppesen, and Williams either negligently, recklessly, or intentionally caused false investigation reports to be issued against Jones and his pharmacy, and that these false reports led to the summary suspension of Jones's professional and pharmacy licenses. Jones made repeated efforts in the administrative proceeding to have the summary suspension lifted pending a hearing on the merits; the state opposed those efforts, and the summary suspension was not lifted. Jones repeatedly requested that the

hearing on the merits take place in an expedited fashion; the state opposed an expedited hearing, and no expedited hearing was held.

By the time of the scheduled hearing, Jones had already lost his pharmacy franchise, had already lost his lease, and had already lost his business. When Jones signed the Agreed Order, he had already lost everything – including the financial wherewithal to participate in a contested hearing. Jones never understood – nor agreed – that the Stipulated Order would waive his right to sue the state. By its terms, Jones did not admit to the facts contained in the Stipulated Order.⁷

Unlike the owner in *Laymon*, who conceivably might have saved his development with a timely appeal of the stop work order or eagle management plan, Jones could not have saved his franchise, could not have saved his lease, and could not have saved his business by contesting the administrative charges (and/or appealing from a contested order). The summary suspensions of his licenses deprived him not only of any meaningful opportunity to fight the administrative charges; it also deprived him of any meaningful reason to fight them. Unlike *Laymon*, the

⁷ The Stipulated Findings of Fact, Conclusions of Law and Agreed Order, at page 3 states:

Section 2: Stipulated Facts

While Respondent does not admit to the following conduct, Respondent acknowledges that the evidence is sufficient to justify the following findings:

exhaustion of his administrative remedies would have done nothing to mitigate Jones's damages.

E. Jones's testimony is not contradictory. "Judicial estoppel" does not resolve the fact issues relating to Petitioners' summary judgment motion.

Petitioners appear to argue – summarily -- that the doctrine of “judicial estoppel” resolves all factual issues relating to the question of whether the Petitioners' conduct was “objectively reasonable.” *Opening Brief, p. 50*. Petitioners, however, fail to explain how “judicial estoppel” should apply to the material facts of this case. The only example of contradictory testimony cited by Petitioners is an alleged discrepancy involving the functionality of his pharmacy's computerized patient records system. *Opening Brief, p. 49, fn 17*. But a review of the record reveals that there is no discrepancy.⁸ More importantly, the alleged “discrepancy”

⁸ In opposition to the summary judgment motion, Jones offered the following declaration testimony:

8. The inspection report contained numerous errors. Contrary to the inspection report, I did enter allergy and chronic disease information about customers into my computer record, but unbeknownst to me the QS-1 computer system was recording the information but not processing it. This was corrected by the second inspection. I did have written records of patients' requests for non-child resistant caps. I had a regular process for checking outdated medications and did not have 38 outdated items on the shelves. I did have the required DEA order forms and invoices but I kept them in different places.

9. On August 10, 1999, Stan Jeppesen and Phyllis Wene returned to my pharmacy and conducted a re-inspection. This time I received a failing grade of 56. The reinspection report contained numerous errors. I had contacted officials with the QS-1 computer system and they had turned on the part of the program which processed medical conditions. I did have records for authorization to use non-child resistant caps. I never substituted a drug that had been prescribed by a

does not resolve the key factual question of whether it was objectively reasonable for the Petitioners to believe that an emergency existed so as to justify seeking a summary order.

The functionality of Jones's QS-1 system on August 10th was no different from the functionality of the QS-1 system on February 3 (when Jones's pharmacy received a passing score of 96) or the functionality of the QS-1 system on July 12 (when Jones's pharmacy received a failing

doctor. I did not have outdated medications on the shelf. I had matched DEA order forms with invoices. I did perform the inventory for Schedule II and Schedule III drugs prior to the second inspection. My prescriptions were in sequential order by prescription number. I believe the missing prescriptions were the result of theft by a former employee, Mary Berlin, whom I had fired for misconduct and who unbeknownst to me at the time was an informant for the state.

CP 214-15. In the declaration submitted as part of the administrative proceeding, Jones testified:

Although information regarding allergies and chronic conditions has always been obtained from all patients, there was a question as to whether it was being properly inputted into the computer. Further, the disease state-drug interaction fields were thought (by the inspectors) to have been turned off. Therefore, while the inspectors were at lunch on August 10th, I contacted my computer vendor to discuss these problems. I was informed, much to my surprise, that these features were left off by the company (i.e. never turned on by them), unless they were specifically requested to do so. I had no idea that these features were not functioning and told them to activate them immediately, which they did. This explained why I could not explain their functioning to the inspectors and why they thought I had turned it off, which I had not done. Nevertheless, this function was operational by the time they returned from lunch. I even showed this to Mrs. Wene, so I am at a loss to understand why this is included in the S.O.C. ["Statement of Charges"], especially when I was not marked down by this on the Inspection Report. Lastly, all patients have been updated regarding chronic conditions and allergy information. If there is no such information in the computer for a patient, that is because the patient has no allergies or chronic conditions.

See Appendix A, Exh. 9. There is no discrepancy. The functionality of the computer system was corrected during the second inspection and prior to the inspection report.

score of 48 but was left open). Petitioners allowed Jones's pharmacy to remain open after February 3. Petitioners allowed Jones's pharmacy to remain open after July 12. Petitioners even allowed Jones's pharmacy to remain open from August 10 until August 17. In light of these facts, clearly there is clearly a fact question about whether the Petitioners reasonably believed that an emergency existed so as to justify seeking a summary order of suspension.

F. Any error with respect to the trial court's ruling on "hearsay" is clearly harmless.

Evidence that is not offered "for the truth of the matter asserted" is not hearsay. ER 801(c). By the terms of the order, the court did not consider the evidence to which Petitioners object for the truth of the matter asserted. Thus there is no error.

A trial court's evidentiary rulings are given broad discretion. *Sorenson v. Raymark Industries, Inc.*, 51 Wn.App. 954, 756 P.2d 740 (1988). ("Evidentiary rulings are reviewed only for an abuse of the trial court's sound discretion, which occurs only when evidence is admitted that is both inadmissible and prejudicial.") This is especially true of evidentiary rulings that do not involve possible prejudice to a jury. *State v. Majors*, 82 Wn.App. 843, 919 P.2d 1258 (1996). ("We do not find an abuse of discretion here, particularly because this was a bench trial in

which the court is presumed to give evidence its proper weight.") As such, it cannot be said that the trial court committed "obvious error" in allowing portions of Mr. Jones's declaration for "background purposes."

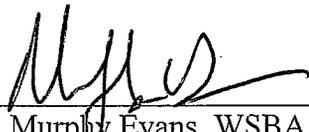
More to the point, most of the testimony to which Petitioners objected before the trial court was also found in the Declaration of Bernard Bauman. CP 144-46. This same testimony in Mr. Bauman's declaration is not hearsay, and the Petitioners did not object to it. Thus, any error associated with the trial court's ruling on the same evidence in Mr. Jones's declaration is harmless.

V. CONCLUSION

For the reasons stated above, the trial court did not err in denying Petitioners' motion for summary judgment, and Petitioner's appeal should be denied.

RESPECTFULLY SUBMITTED this 5th day of October, 2006.

BROWNLIE EVANS WOLF & LEE, LLP

By: 
Murphy Evans, WSBA #26293
100 Central Avenue
Bellingham, WA 98225
(360) 676-0306
Attorneys for Respondent

INDEX TO APPENDICES

- Appendix A:** Declaration of Murphy Evans in Support of Plaintiff's Opposition to Defendants' Motion for Summary Judgment with Exhibits 1-17
- Appendix B:** Jones' Motion to Compel Answers and Responses to Jones' First Discovery Requests (Snohomish County Superior Court Cause No. 02-2-10037-4)
- Appendix C:** Defendants' Motion for Protective Order (Snohomish County Superior Court Cause No. 02-2-08819-6)
- Appendix D:** Order Granting Defendants' Motion for Revision of Commissioner's Rulings (Snohomish County Superior Court Cause No. 02-2-10037-4)

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2006 OCT -6 AM 11:04

APPENDIX A

1 4. Attached as Exhibit 2 is a true and correct copy of the Pharmacy Inspection
2 Report relating to the reinspection of plaintiff's pharmacy on or about August 10, 1999.

3 5. Attached as Exhibit 3 is a true and correct copy of the Respondent Written Notice
4 provided to Jones by inspector Wene on or about August 10, 1999.

5 6. Attached as Exhibit 4 is a true and correct copy of Respondent Statement
6 Instructions provided to Jones by inspector Wene on or about August 10, 1999.

7 7. Attached as Exhibit 5 is a true and correct copy of the Statement of Charges
8 prepared by Donald Williams, the executive director of the State of Washington Department of
9 Health, Board of Pharmacy, on or about August 16, 1999.

10 8. Attached as Exhibit 6 is a true and correct copy of the Ex Parte Order of Summary
11 Action dated August 17, 1999.

12 9. Attached as Exhibit 7 is a true and correct copy of Respondents' Motion to
13 Modify Ex Parte Order of Summary Action.

14 10. Attached as Exhibit 8 is a true and correct copy of the Declaration of W. Bernard
15 Bauman in Support of Respondents' Motion to Modify and to Stay Summary Suspensions.

16 11. Attached as Exhibit 9 is a true and correct copy of the Declaration of Michael
17 Jones.

18 12. Attached as Exhibit 10 is a true and correct copy of Department's Response to
19 Respondent's Motion to Modify Order of Summary Action.

20 13. Attached as Exhibit 11 is a true and correct copy of the Order on Motion to
21 Modify Ex Parte Order of Summary Action.

22 14. Attached as Exhibit 12 is a true and correct copy of Letter of W. Bernard Bauman
23 dated September 13, 1999 to Ms. Pam Mena of the Office of Professional Standards.
24
25

1 15. Attached as Exhibit 13 is a true and correct copy of the State's Response to
2 Motion for Expedited Trial.

3 16. Attached as Exhibit 14 is a true and correct copy of September 22, 1999, Letter of
4 Bernard Bauman to Sue Somers.

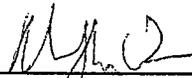
5 17. Attached as Exhibit 15 is a true and correct copy of the Order on Motion to *(sic)*
6 for Expedited Hearing.

7 18. Attached as Exhibit 16 is a true and correct copy of the Prehearing Order No. 4:
8 Order Granting Motion for Continuance.

9 19. Attached as Exhibit 17 is a true and correct copy of the Stipulated Findings of
10 fact, Conclusions of Law and Agreed Order.

11 I declare under penalty of perjury under the laws of the State of Washington that the
12 foregoing is true and correct.

13 Dated: November 11, 2003.
14 Bellingham, WA

15 By: 
16 Murphy Evans

The Medicine Shoppe

5400 STATE AVENUE MARYSVILLE, WA 98270 Phone (360) 858-4520

PHARMACY INSPECTION REPORT

DEPARTMENT OF HEALTH WASHINGTON STATE BOARD OF PHARMACY 1300 QUINCE ST., S.E.; P. O. BOX 47863 OLYMPIA, WASHINGTON 98504-7863 TEL: 360/236-4825 FAX: 360/586-4359

INSPECTION PURPOSE NEW PERIODIC OWNER CHANGE LOCATION CHANGE REINSPECTION SELF

7-12-1999 INSPECTION DATE PH 10993 LICENSE NUMBER

TELEPHONE NUMBER (Include Area Code)

MICHAEL S. JONES RESPONSIBLE MANAGER

LAST INSPECTED: 2-3-1999

CLASS A OWNERSHIP: C P B PHARMACY TYPE: C H F L N O

A. GENERAL REQUIREMENTS (10 POINTS)

- 1. PHARMACY INSPECTION CERT. POSTED (WAC 246-889-190)
2. PERSONNEL LICENSES POSTED (RCW 18.84.140)
3. PHARMACY LICENSES POSTED (RCW 18.04.048)
4. DEA REGISTRATION (WAC 246-887-025)
LOCATION LICENSE NUMBER CF 53751
REGISTRATION NUMBER BT 510804

Table with columns: PHARMACISTS, LICENSE #, PRECEPTOR, INTERNS & TECHNICIANS, CERTIFICATE #, INTERN DR TECH. Includes entry for SHANNON Boston - Level 2.

UP TO 3 POINTS SUBTRACTED FOR EACH DEFICIENCY (USE ADDITIONAL PAGE IF NECESSARY)

SECTION A TOTAL

B. PATIENT HEALTH & SAFETY REQUIREMENTS (30 POINTS)

- 1. PATIENT MED. RECORDS (WAC 246-887-020)
2. PATIENT INFORMATION (WAC 246-889-220)
3. DRUG PRODUCT SUBSTITUTION GENERIC SIGN (RCW 68.41 & WAC 246-889)
4. DRUG COMPLIANCE (WAC 246-889-220)
5. POISON REQUIREMENTS (WAC 246-889-200)
6. OUTDATED/DETERIORATED STOCK (WAC 246-889-150)
NUMBER OF OUTDATED ITEMS: 00 TO 09 ITEMS = 00 POINTS, 10 TO 17 ITEMS = 03 POINTS, 18 TO 23 ITEMS = 10 POINTS, 24 PLUS ITEMS = 16 POINTS

UP TO 5 POINTS SUBTRACTED FOR EACH DEFICIENCY

SECTION B TOTAL

C. PROFESSIONAL REQUIREMENTS (40 POINTS)

- 1. DEA ORDER FORMS (WAC 246-887-020)
2. DEA INVENTORY RECORD (WAC 246-887-020)
3. SCHEDULE V DR REGISTER (WAC 246-887-030)
4. RESPONSIBLE RPH MANAGER (WAC 246-889-070)
5. LAWBOOK (WAC 246-889-180)
6. REFERENCE SOURCE (WAC 246-889-180)
7. PHARMACY ANCILLARY STAFF (WAC 246-801)
8. PROFESSIONAL RESPONSIBILITIES (WAC 246-889-068)
9. ALL DRUGS PROPERLY LABELLED (WAC 246-889-130)
10. COMPLETED PRESCRIPTION LABELS (WAC 246-889-210)
11. PRESCRIPTION FILES (WAC 246-889-103)
12. REGULATION COMPLIANCE (RCW 18.24.150 & 165)

UP TO 5 POINTS SUBTRACTED FOR EACH DEFICIENCY

SECTION C TOTAL

D. FACILITIES (20 POINTS)

- 1. DIFFERENTIAL HOURS (WAC 246-889-020)
2. RX AREA SECURE FROM PUBLIC (WAC 246-889-180)
3. APPEARANCE OF STAFF (WAC 246-889-170)
4. RX AREA WORKING SPACE (WAC 246-889-180)
5. PRESCRIPTION AREA SINK (WAC 246-889-180)
6. REFRIGERATOR (WAC 246-889-180)
7. TRASH RECEPTACLES (WAC 246-889-170)
8. REST ROOMS (WAC 246-889-170)
9. GENERAL CLEANLINESS & SANITATION (WAC 246-889-150, 160, & 170)
10. NECESSARY EQUIPMENT (WAC 246-889-180)

UP TO 2 POINTS SUBTRACTED FOR EACH DEFICIENCY

SECTION D TOTAL

100 TO 90 POINTS = A

89 TO 80 POINTS = CONDITIONAL (WAC 246-889-150)

BELOW 80 POINTS = UNSATISFACTORY

COMMENTS: YES NO

Comments are set forth on the reverse side of this report.

GRADE TOTAL

48

Signature of Pharmacist

Signature of Investigator

DOH 880-012A (Rev. 6/99)

EXHIBIT I

AFFIX STORE LABEL HERE OR FILL IN INFORMATION

PHARMACY INSPECTION REPORT

#5

- INSPECTION PURPOSE: NEW, PERIODIC, OWNER CHANGE, LOCATION CHANGE, REINSPECTION, SELF

PHARMACY NAME: The Medicine Shoppe Pharmacy
STREET ADDRESS: 9430 State Ave
CITY: Marysville ZIP CODE: 98270

DEPARTMENT OF HEALTH
WASHINGTON STATE BOARD OF PHARMACY
1300 QUINCE ST., S.E.; P. O. BOX 47863
OLYMPIA, WASHINGTON 98504-7863
TEL: 360/236-4825 FAX: 360/586-4359

TELEPHONE NUMBER (Include Area Code): 360 653-4520

RESPONSIBLE MANAGER: MICHAEL JONES

INSPECTION DATE: 8-10-99
LICENSE NUMBER: PH 10793

LAST INSPECTED: 7-12-99

CLASSIFICATION: UNREGISTERED OWNERSHIP: C P S PHARMACY TYPE: C H P L N O

A. GENERAL REQUIREMENTS (10 POINTS)

- 1. PHARMACY INSPECTION CERT. POSTED (WAC 246-869-190)
2. PERSONNEL LICENSES POSTED (RCW 18.64.140)
3. PHARMACY LICENSES POSTED (RCW 18.64.043)
4. DEA REGISTRATION (WAC 246-867-020)
LOCATION LICENSE NUMBER: CF 55751
REGISTRATION NUMBER: BTS10B041

Table with columns: PHARMACISTS, LICENSE #, PRECEPTOR, INTERNS & TECHNICIANS, CERTIFICATE #, INTERN OR TECH. Includes names SHANNDY BOSTON and KRISTA BOLOBANIC.

UP TO 3 POINTS SUBTRACTED FOR EACH DEFICIENCY (USE ADDITIONAL PAGE IF NECESSARY)

SECTION A TOTAL

10

B. PATIENT HEALTH & SAFETY REQUIREMENTS (30 POINTS)

- 1. PATIENT MED. RECORDS (WAC 246-875)
2. PATIENT INFORMATION (WAC 246-869-220)
3. DRUG PRODUCT SUBSTITUTION (RCW 89.41 & WAC 246-898)
4. CRC COMPLIANCE (WAC 246-869-230)
5. POISON REQUIREMENTS (WAC 246-869-200)
6. OUTDATED/DETERIORATED STOCK (WAC 246-869-160)
NUMBER OF OUTDATED ITEMS: 00 TO 09 ITEMS = 00 POINTS, 10 TO 17 ITEMS = 05 POINTS, 18 TO 23 ITEMS = 10 POINTS, 24 PLUS ITEMS = 15 POINTS

UP TO 5 POINTS SUBTRACTED FOR EACH DEFICIENCY

SECTION B TOTAL

10

C. PROFESSIONAL REQUIREMENTS (40 POINTS)

- 1. DEA ORDER FORMS (WAC 246-887-020)
2. DEA INVENTORY RECORD (WAC 246-887-020)
3. SCHEDULE V CS REGISTER (WAC 246-887-030)
4. RESPONSIBLE RPH MANAGER (WAC 246-869-070)
5. LAWBOOK (WAC 246-869-150)
6. REFERENCE SOURCE (WAC 246-869-150)
7. PHARMACY ANCILLARY STAFF (WAC 246-901)
8. PROFESSIONAL RESPONSIBILITIES (WAC 246-863-095)
9. ALL DRUGS PROPERLY LABELED (WAC 246-869-150)
10. COMPLETED PRESCRIPTION LABELS (WAC 246-869-210)
11. PRESCRIPTION FILES (WAC 246-869-100)
12. REGULATION COMPLIANCE (RCW 18.64.160 & 165)

UP TO 5 POINTS SUBTRACTED FOR EACH DEFICIENCY

SECTION C TOTAL

16

D. FACILITIES (20 POINTS)

- 1. DIFFERENTIAL HOURS (WAC 246-869-020)
2. RX AREA SECURE FROM PUBLIC (WAC 246-869-180)
3. APPEARANCE OF STAFF (WAC 246-869-170)
4. RX AREA WORKING SPACE (WAC 246-869-180)
5. PRESCRIPTION AREA SINK (WAC 246-869-180)
6. REFRIGERATOR (WAC 246-869-160)
7. TRASH RECEPTACLES (WAC 246-869-170)
8. REST ROOMS (WAC 246-869-170)
9. GENERAL CLEANLINESS & SANITATION (WAC 246-869-150, 160, & 170)
10. NECESSARY EQUIPMENT (WAC 246-869-180)

UP TO 2 POINTS SUBTRACTED FOR EACH DEFICIENCY

SECTION D TOTAL

20

100 TO 90 POINTS = A

89 TO 80 POINTS = CONDITIONAL (WAC 246-862-190)

BELOW 80 POINTS = UNSATISFACTORY

COMMENTS: YES NO

GRADE TOTAL 56

Comments are set forth on the reverse side of this report.

Signature of Pharmacist: Michael Jones RPh

Signature of Investigator: Steve Johnson

EXHIBIT 2

DEPARTMENT OF HEALTH
WASHINGTON STATE BOARD OF PHARMACY
1300 Quince Street S.E., P.O. Box 47863
Olympia, Washington 98504-7863
(360) 236-4825

for Sue Somers

RESPONDENT WRITTEN NOTICE

Date: August 10 1999

Time: 8:10

Michael S. Jones,

This notice is to inform you that the Washington State Board of Pharmacy has received a complaint alleging that:

On July 12, 1999 Investigators from the Board of Pharmacy conducted a routine periodic inspection of the Medicine Shoppe Pharmacy. At that time, the pharmacy received an extremely low, failing score of 48. Upon re-inspection on 08/10/99, the pharmacy received a failing grade of 56. You are now required to address the following issues thoroughly, completely and with sufficient detail to provide a clear response specifically directed at the questions below. Your failure to answer these questions may result in formal disciplinary action pursuant to RCW 18.130.180 (8) despite the disciplinary determination regarding the failure of the pharmacy for two successive inspections.

1. Were you aware that the pharmacy received a falling score of 48 on the previous inspection?
2. What specific actions did you take after that inspection to remedy the deficiencies noted during that inspection?
3. For what reason do you fill the majority of prescriptions in non child resistant containers, when there has been no written request by the patient or prescriber to do so?
4. Where were (are) the required records for schedule II through V Controlled substances? Include in your response the location of the schedule III-V Inventory, prescriptions, invoices, daily printouts of prescriptions filled and DEA 222 Forms.
5. Are both pharmacy and non-pharmacy related items, records, etc., stored in the storage area outside. How do you keep this area secure? Are pharmacy records stored in such a way in the storage area to protect them from damage by moisture etc. What other pharmacy related items are stored in the storage area? How do you assure that these items are stored under appropriate conditions?

EXHIBIT 3

page 2- Respondent Written Notice

- 6. Why are so many Rx hard copies missing? On 8-4-99 and 8-5-99 I compared the daily print out to the rx file - 21 Rx numbers had no hard copy. Why?
- 7. It appears that many patient profiles note both the date a Rx was dispensed and also the date it was billed. There are also profiles where the same Rx appears to be billed multiple times ^{on the same day -} Why does the medication profile ^{not} reflect what was actually dispensed? How can you do a Drug Utilization Review if you cannot determine when the patients actually received meds?
- 8. Why are there still so many outdated drugs on your stock shelves?
- 9. Why are you still unable to get the proper manufacturer (the one that was actually dispensed) on the Rx label and into the computer?
- 10. Why did you fail to go back and complete the DEA 222 forms and why did you fail to sign the LII inventory and include the pharmacy DEA # on either the CII or the CII-V inventory?

An investigation has been initiated under the authority of the Uniform Disciplinary Act, Revised Code of Washington (RCW) Chapter 18.130.

You may consult with an attorney, at your expense, prior to making a written statement. Your statement may be used in a hearing if disciplinary action is deemed necessary in this matter.

Acknowledgment:

I received this notice from Phyllis Wene before providing my written statement.

Signed: Mudra Jones RPh.
Respondent

RESPONDENT STATEMENT INSTRUCTIONS

Please be advised that you have the right to consult with an attorney at your expense before providing a response, and that any statement you make can be used in a hearing if disciplinary action is deemed necessary under RCW 18.130.

Under the provisions of RCW 18.130.180(8)(b), you are required to cooperate with the disciplining authority (licensing board) by furnishing in writing a full and complete explanation covering the matter contained in the complaint filed with the disciplining authority.

You may either hand write or type your statement. If there are any typo's or errors, please initial them. Begin the statement by filling in your name on the first line after: "I, _____".

Before you begin your narrative, you must identify who you are by providing your name, date of birth, where you work and live. You may do this by writing the following: "I am (your name, date of birth). I am employed as a (your occupation & title) at (business name, address, telephone number). I reside at (home address, telephone number)."

Then begin your statement. When supplying statements be as specific as you can. For example, supply specific names, dates, times, and circumstances when known. Keep in mind that the information you are providing will raise the questions of who, what, when, where, why, and how in the reader's mind. If you can supply answers to those questions, please do. Do not write on the back side of a page. If you need more pages you may photocopy as many additional pages as you will need.

Do not sign or complete any of the lines on the bottom of the statement forms until you are ready to have your signature witnessed. You may do this in one of three ways:

1. Any two individuals may witness your signature(s) and they must also sign on the appropriate lines.
2. Have your signature(s) witnessed by a notary and each page of the statement notarized.
3. Have your attorney or the investigator present to witness your signature(s).

You must sign each page, and initial where indicated; in the presence of your witness/es and have their signatures on each page.

Please provide a full and complete explanation concerning the following matter and/or allegation(s):

See Respondent Written Notice

If you have any questions please give me, Phyllis Wene, a call at (425) 649-4359. If there are any other individuals who may have something to contribute, please provide them with copies of the statement forms and these instructions. I must ask that you return your statement to my office no later than 8-16-99.

EXHIBIT 4

STATE OF WASHINGTON
DEPARTMENT OF HEALTH
BOARD OF PHARMACY

In the Matter of the License to Practice Pharmacy of)	
	)	Docket No. 99-08-A-1016PH
)	
MICHAEL S. JONES, R.Ph., License No. 10993	)	Docket No. 99-08-A-1017CF
)	
	)	STATEMENT OF CHARGES
In the Matter of the Pharmacy Location License of)	
)	
)	
The Medicine Shoppe Pharmacy, License No. 55751,)	
)	
Respondents.)	
)	
)	

Donald H. Williams, Executive Director of the Washington State Department of Health, Board of Pharmacy on designation by the Board of Pharmacy makes the allegations below which are supported by evidence contained in program case file(s) No. 99020071, 99020003, 99040002, 99040004, 99050003.

Section 1: ALLEGED FACTS

1.1 Respondent Michael S. Jones was issued a license to practice pharmacy in the state of Washington in June 1980. Respondent's license to practice pharmacy in the state of Washington expires on October 24, 1999.

1.2 Respondent Medicine Shoppe Pharmacy located at 9430 State Avenue, Marysville, Washington was issued a location license to operate as a pharmacy in the state of Washington in October 1996. The current location license expires on June 1, 2000.

EXHIBIT 5

1.3 Respondent Michael Jones is the owner, responsible manager, and only pharmacist listed as working at the Medicine Shoppe in Marysville, Washington.

1.4 On March 1, 1994, a Statement of Charges was issued against Respondent Michael Jones related to a prescription filling error while Respondent was working as a pharmacist at Safeway Pharmacy # 497 in Seattle, Washington

1.5 On July 6, 1994, the Board entered a Findings of Fact, Conclusions of Law and Order placing Respondent's license to practice pharmacy in the state of Washington on probation for a period of one year and imposing certain terms and conditions. One of the conditions imposed on Respondent was a requirement that he create and submit a plan to avoid violations of pharmacy law related to the filling of prescriptions.

1.6 On December 7, 1995, Respondent's license to practice pharmacy in the state of Washington was fully reinstated.

1.7 In approximately November 1996, Respondent Jones purchased and operated The Medicine Shoppe in Marysville, Washington.

1.8 On December 17, 1998, Respondent Medicine Shoppe received a failing inspection grade of 79 from Board of Pharmacy Investigator Wene while conducting a routine inspection of the pharmacy. An inspection score of 90-100 is classified as a passing pharmacy inspection score. An inspection score of 80-89 is classified as a conditional pharmacy inspection score. An inspection score of 0-79 is classified as a failing pharmacy inspection score. At that time, Respondent Michael Jones was the owner, responsible manager, and only pharmacist listed as working at the Medicine Shoppe in Marysville, Washington. The violations included but were not limited to:

1.8.1 Failing to obtain chronic conditions on patients of the pharmacy;

1.8.2 Dispensing the majority of prescriptions in non child-resistant containers without a written request from either the patient or the prescriber;

1.8.3 Various required records required by state and federal law were either inaccurate, incomplete or not available;

1.8.4 There was a box of filled prescription containers, many unlabeled, on the floor of the pharmacy.

1.8.5 Investigator Wene discovered a prescription filling error in the will call area. A prescription for Prozac was incorrectly filled with Prilosec;

1.8.6 Many of the prescriptions in the will call area had labeled expiration dates exceeding the manufacturer's expiration date;

1.8.7 Most of the prescriptions in the will call area contained the incorrect NDC number for the product in the prescription container;

1.9 On February 3, 1999, Board of Pharmacy Investigator Wene conducted a re-inspection in relation to the December 1998 failing score. During the February 3, 1999 inspection, the pharmacy, received a passing score of 94. The deducted points were related to inaccurate, incomplete or missing records required by state or federal law. At that time, Respondent Michael Jones was the owner, responsible manager, and only pharmacist listed as working at the Medicine Shoppe in Marysville, Washington.

1.10 On July 12, 1999, Board of Pharmacy Investigators Wene and Jeppesen conducted a routine inspection of the Medicine Shoppe Pharmacy in Marysville. At that time, Respondent Michael Jones was the owner, responsible manager, and only pharmacist listed as working at the Medicine Shoppe in Marysville, Washington. The pharmacy received an extremely low failing grade of 48. At that time the violations included but were not limited to:

1.10.1 Failing to obtain chronic conditions and allergies on patients of the pharmacy.

Disease state management is coded in ICD-9 codes and provides the information in coded form, not readily readable by the Pharmacist.

1.10.2 Numerous (greater than 10) prescriptions were labeled with a different generic product than indicated on the label or NDC Code. Several of these prescriptions were dispensed in the presence of the Board of Pharmacy Investigators.

1.10.3 Dispensing the majority (in excess of 90%) of prescriptions in non child-resistant containers without a written request from either the patient or the prescriber for non child-resistant packaging.;

1.10.4 Thirty eight (38) drug products were outdated. Of those, 18 drugs were legend or controlled substances and 20 were OTC products.

1.10.5 Various records required by federal law (DEA) were either inaccurate, incomplete or not available. DEA order forms and invoices could not be reconciled. Respondent was unable to locate several required DEA forms. There was poor organization of DEA inventory records, including non-sequential filing. Several DEA records did not include date and amount received on DEA 222 forms.

1.10.6 DEA Inventory incomplete, DEA inventory for Schedules III-V was missing. Respondent was unable to generate reports for Schedule II drugs. The daily refill reports were not signed, stored in various locations, out of sequence, with several months not located.

1.10.7 Facts and Comparisons, the only reference source in the pharmacy, had not been updated for at least nine (9) months.

1.10.8 Pharmacy Assistant did not have a name badge and none had been ordered. No Pharmacy Assistant certificate had been generated or signed. Modifications to the Pharmacy Assistant Utilization Plan were in place without Board approval.

1.10.9 The prescription records were inaccurate, missing and poorly organized. Examples include prescription files with non-sequential order. Several prescriptions, both C-II and other drugs were unaccounted for. Prescription files were kept with no organization. Respondent Jones was unable to locate files in a timely manner.

1.10.10 Minimum procedures for utilization of the patient medication system were inadequate.

1.10.11 During the inspection, a patient returned a prescription so that Respondent Jones could correct the instructions for use. The correction was made but no audit trail of the change was entered in the pharmacy computer

1.10.12 The pharmacy was generally disorganized and dirty. The pharmacy sink and immediate area were dirty and with numerous dirty food dishes.

1.11 On July 13, 1999, Investigator Jeppesen returned to the pharmacy to retrieve documents promised by Respondent Jones. At that time Respondent Jones stated he could not locate the documents. Respondent stated that his computer could generate the required reports but that he, (Respondent) did not know how to generate them.

1.12 On August 10, 1999, Investigators Wene and Jeppesen returned to the Medicine Shop Pharmacy in Marysville, Washington, to conduct the re-inspection in relation to the July 12, 1999 failing score. This inspection again resulted in an extremely low failing score of 56. At that time, Respondent Michael Jones was the owner, responsible manager, and only pharmacist listed

as working at the Medicine Shoppe in Marysville, Washington. At that time the violations included but were not limited to:

1.12.1 Six prescriptions selected randomly in the will call area did not have allergy or chronic conditions noted in the patient profile. The disease state - drug interaction fields had been turned off. Respondent Jones was unable to explain the purpose or the clinical significance of the clinical interaction levels that appeared for drug interaction messages.

1.12.2 Three prescriptions selected randomly from the will call area were labeled with a different generic product than indicated on the label and/or NDC Code.

1.12.3 Forty one (41) prescriptions were located in the will call area. Of those, forty (40) were packaged in non child-resistant containers and the one that was in a child resistant container was in a container supplied by the manufacturer.

1.12.4 Eleven legend or controlled substances on the shelf were beyond the manufacturer's expiration date.

1.12.5 As in the July 12, 1999 inspection, various records required by federal law (DEA) were either inaccurate, incomplete or not available. The invoices for the C II drugs were not filed separately. Several DEA records did not include date and amount received on DEA 222 forms.

1.12.6 DEA Inventory records incomplete. There was no signature on the C-II, C-III - C-V inventories. Requested records could not be located.

1.12.7 Five prescriptions which had been filled and returned to the stock area were checked for accuracy of product on the label and against correct NDC numbers. All five prescriptions failed to comply with state and/or federal law.

1.12.8 Minimum procedures for utilization of the patient medication system were inadequate. The pharmacy QS-1 system was not able to create an accurate and complete audit trail for changes made to the prescriptions after filling including directions for use and drug dispensed.

1.12.9 During the period August 4, 1999 through August 5, 1999, forty-eight prescriptions were processed in the pharmacy. Of those forty-eight prescriptions, twenty-one did not have a hard copy in the patient's files.

1.13 Respondent Michael S. Jones operated the Medicine Shoppe Pharmacy in a manner below the standard of care for the operation of a pharmacy and therefore placed the patients of his pharmacy at serious risk of significant harm.

Section 2: ALLEGED VIOLATIONS

2.1 The violations alleged in this section constitute grounds for disciplinary action pursuant to RCW 18.64.160 and RCW 18.130.180 and the imposition of sanctions under RCW 18.64.165 and RCW 18.130.160.

2.2 The allegations contained in paragraph 1.8 above constitute unprofessional conduct and are grounds for disciplinary action against Respondents' Michael Jones and the Medicine Shoppe licenses to practice pharmacy and/or as a pharmacy in the state of Washington pursuant to RCW 18.130.180(7); WAC 246-869-190.

2.3 The allegations contained in paragraph 1.8.1 above constitute unprofessional conduct and are grounds for disciplinary action against Respondents' Michael Jones and the Medicine Shoppe licenses to practice pharmacy and/or as a pharmacy in the state of Washington pursuant to RCW 18.130.180(4), (6), (7), RCW 18.64.165(2); WAC 246-875-020, WAC 246-875-040, WAC 246-863-095(f).

2.4 The allegations contained in paragraph 1.8.2 above constitute unprofessional conduct and are grounds for disciplinary action against Respondents' Michael Jones and the Medicine Shoppe licenses to practice pharmacy and/or as a pharmacy in the state of Washington pursuant to RCW 18.130.180(4), (6), (7), RCW 18.64.165(2); WAC 246-869-230, WAC 246-863-095(f).

2.5 The allegations contained in paragraph 1.8.3 above constitute unprofessional conduct and are grounds for disciplinary action against Respondents' Michael Jones and the Medicine Shoppe licenses to practice pharmacy and/or as a pharmacy in the state of Washington pursuant to RCW 18.64.165(2), RCW 18.64.245, RCW 69.50.306, RCW 18.130.180(4), (6), (7); WAC 246-863-110, WAC 246-875-020.

2.6 The allegations contained in paragraphs 1.8.4 through 1.8.7 above constitute unprofessional conduct and are grounds for disciplinary action against Respondents' Michael Jones and the Medicine Shoppe licenses to practice pharmacy and/or as a pharmacy in the state of Washington pursuant to RCW 18.130.180(4), (6), (7), RCW 18.64.165(2), RCW 18.64.246, RCW 18.64.270, RCW 69.04.450, RCW 69.04.490, RCW 69.04.510, RCW 69.41.042, RCW 69.41.050; WAC 246-863-095(f), WAC 246-869-130, WAC 246-869-150, WAC 246-869-210, WAC 246-875-020, WAC 246-875-040.

2.7 The allegations contained in paragraph 1.9 above constitute unprofessional conduct and are grounds for disciplinary action against Respondents' Michael Jones and the Medicine Shoppe licenses to practice pharmacy and/or as a pharmacy in the state of Washington pursuant to RCW 18.130.180(7), RCW 69.50.306; WAC 246-869-190, WAC 246-863-110.

2.8 The allegations contained in paragraph 1.10 above constitute unprofessional conduct and are grounds for disciplinary action against Respondents' Michael Jones and the Medicine

Shoppe licenses to practice pharmacy and/or as a pharmacy in the state of Washington pursuant to RCW 18.130.180(7); WAC 246-869-190.

2.9 The allegations contained in paragraph 1.10.1 above constitute unprofessional conduct and are grounds for disciplinary action against Respondents' Michael Jones and the Medicine Shoppe licenses to practice pharmacy and/or as a pharmacy in the state of Washington pursuant to RCW 18.130.180(4), (6), (7); RCW 18.64.165(2), RCW 18.64.245, RCW 18.64.246; WAC 246-863-095(f), WAC 246-875-020, WAC 246-875-040.

2.10 The allegations contained in paragraphs 1.10.2 through 1.10.7 above constitute unprofessional conduct and are grounds for disciplinary action against Respondents' Michael Jones and the Medicine Shoppe licenses to practice pharmacy and/or as a pharmacy in the state of Washington pursuant to RCW 18.130.180(4), (6), (7), RCW 18.64.165(2), RCW 18.64.245, RCW 18.64.246, RCW 18.64.270, RCW 69.04.450, RCW 69.04.490, RCW 69.04.510, RCW 69.41.042, RCW 69.41.050, WAC 246-863-095(f), WAC 246-869-130, WAC 246-869-150, WAC 246-869-210, WAC 246-875-020, WAC 246-875-040.

2.11 The allegations contained in paragraph 1.10.3 above constitute unprofessional conduct and are grounds for disciplinary action against Respondents' Michael Jones and the Medicine Shoppe licenses to practice pharmacy and/or as a pharmacy in the state of Washington pursuant to WAC 246-869-230.

2.12 The allegations contained in paragraphs 1.10.5, 1.10.6, 1.10.9, 1.11, 1.12.5, 1.12.6 above constitute unprofessional conduct and are grounds for disciplinary action against Respondents' Michael Jones and the Medicine Shoppe licenses to practice pharmacy and/or as a pharmacy in the state of Washington pursuant to RCW 69.50.306, WAC 246-863-110.

2.13 The allegations contained in paragraph 1.10.8 and 1.10.9 above constitute unprofessional conduct and are grounds for disciplinary action against Respondents' Michael Jones and the Medicine Shoppe licenses to practice pharmacy and/or as a pharmacy in the state of Washington pursuant to RCW 18.130.180(4), (6), (7), RCW 18.64.165(2); WAC 246-901-080(2), WAC 246-901-090, WAC 246-901-100(3).

2.14 The allegations contained in paragraph 1.10.10 above constitute unprofessional conduct and are grounds for disciplinary action against Respondents' Michael Jones and the Medicine Shoppe licenses to practice pharmacy and/or as a pharmacy in the state of Washington pursuant to RCW 18.130.180(4), (6), (7), RCW 18.64.165(2); WAC 246-875-020.

2.15 The allegations contained in paragraph 1.10.11 above constitute unprofessional conduct and are grounds for disciplinary action against Respondents' Michael Jones and the Medicine Shoppe licenses to practice pharmacy and/or as a pharmacy in the state of Washington pursuant to RCW 18.130.180(4), (6), (7), RCW 18.64.165(2), RCW 18.64.245, RCW 18.64.246, RCW 18.64.270, RCW 69.41.042, WAC 246-869-230, WAC 246-863-110.

2.16 The allegations contained in paragraph 1.10.12 above constitute unprofessional conduct and are grounds for disciplinary action against Respondents' Michael Jones and the Medicine Shoppe licenses to practice pharmacy and/or as a pharmacy in the state of Washington pursuant to RCW 18.130.180(4), (6), (7), RCW 18.64.165(2); WAC 246-869-160(5).

2.17 The allegations contained in paragraph 1.11 above constitute unprofessional conduct and are grounds for disciplinary action against Respondents' Michael Jones and the Medicine Shoppe licenses to practice pharmacy and/or as a pharmacy in the state of Washington pursuant to RCW 18.130.180(4), (6), (7), RCW 18.64.165(2); WAC 246-875-020, WAC 246-875-040.

2.18 The allegations contained in paragraph 1.12 above constitute unprofessional conduct and are grounds for disciplinary action against Respondents' Michael Jones and the Medicine Shoppe licenses to practice pharmacy and/or as a pharmacy in the state of Washington pursuant to RCW 18.130.180(7); WAC 246-869-190.

2.19 The allegations contained in paragraph 1.12.1 above constitute unprofessional conduct and are grounds for disciplinary action against Respondents' Michael Jones and the Medicine Shoppe licenses to practice pharmacy and/or as a pharmacy in the state of Washington pursuant to RCW 18.130.180(4), (6), (7), RCW 18.64.165(2); WAC 246-863-095(f).

2.20 The allegations contained in paragraph 1.12.2 above constitute unprofessional conduct and are grounds for disciplinary action against Respondents' Michael Jones and the Medicine Shoppe licenses to practice pharmacy and/or as a pharmacy in the state of Washington pursuant to RCW 18.130.180(4), (6), (7), RCW 18.64.165(2); RCW 18.64.246, RCW 18.64.270, RCW 69.04.450, RCW 69.04.490, RCW 69.04.510, RCW 69.41.042, RCW 69.41.050; WAC 246-836-095(f), WAC 246-869-130, WAC 246-869-150, WAC 246-869-210, WAC 246-869-230.

2.21 The allegations contained in paragraph 1.12.3 above constitute unprofessional conduct and are grounds for disciplinary action against Respondents' Michael Jones and the Medicine Shoppe licenses to practice pharmacy and/or as a pharmacy in the state of Washington pursuant to RCW 18.130.180(4), (6), (7), RCW 18.64.165(2), WAC 246-863-095(f), WAC 246-869-230.

2.22 The allegations contained in paragraph 1.12.4 above constitute unprofessional conduct and are grounds for disciplinary action against Respondents' Michael Jones and the Medicine Shoppe licenses to practice pharmacy and/or as a pharmacy in the state of Washington

pursuant to RCW 18.130.180(4), (6), (7), RCW 18.64.165(2); WAC 246-863-095(f), WAC 246-869-130, WAC 246-869-150.

2.23 The allegations contained in paragraph 1.12.5 above constitute unprofessional conduct and are grounds for disciplinary action against Respondents' Michael Jones and the Medicine Shoppe licenses to practice pharmacy and/or as a pharmacy in the state of Washington pursuant to RCW 18.130.180(4), (6), (7), RCW 18.64.165(2).

2.24 The allegations contained in paragraph 1.12.6 above constitute unprofessional conduct and are grounds for disciplinary action against Respondents' Michael Jones and the Medicine Shoppe licenses to practice pharmacy and/or as a pharmacy in the state of Washington pursuant to RCW 18.130.180(4), (6), (7), RCW 18.64.165(2).

2.25 The allegations contained in paragraph 1.12.7 above constitute unprofessional conduct and are grounds for disciplinary action against Respondents' Michael Jones and the Medicine Shoppe licenses to practice pharmacy and/or as a pharmacy in the state of Washington pursuant to RCW 18.130.180(4), (6), (7), RCW 18.64.165(2), RCW 18.64.270, RCW 69.04.450, RCW 69.04.490, RCW 69.04.510, RCW 69.41.050, RCW 69.41.042; WAC 246-836-095(f).

2.26 The allegations contained in paragraph 1.12.8 above constitute unprofessional conduct and are grounds for disciplinary action against Respondents' Michael Jones and the Medicine Shoppe licenses to practice pharmacy and/or as a pharmacy in the state of Washington pursuant to RCW 18.130.180(4), (6), (7), RCW 18.64.165(2).

2.27 The allegations contained in paragraph 1.12.9 above constitute unprofessional conduct and are grounds for disciplinary action against Respondents' Michael Jones and the Medicine Shoppe licenses to practice pharmacy and/or as a pharmacy in the state of Washington

pursuant to RCW 18.130.180(4), (6), (7), RCW 18.64.165(2); WAC 246-875-020, WAC 246-875-040.

2.28 The allegations contained in paragraph 1.13 above constitute unprofessional conduct and are grounds for disciplinary action against Respondents' Michael Jones and the Medicine Shoppe licenses to practice pharmacy and/or as a pharmacy in the state of Washington pursuant to RCW 18.130.180(4), (6), (7).

(5) He or she has compounded, dispensed, or caused the compounding or dispensing of any drug or device which contains more or less than the equivalent quantity of ingredient or ingredients specified by the person who prescribed such drug or device: PROVIDED, HOWEVER, That nothing herein shall be construed to prevent the pharmacist from exercising professional judgment in the preparation or providing of such drugs or devices.

RCW 18.64.160(5).

The board shall have the power to refuse, suspend, or revoke the license of any manufacturer, wholesaler, pharmacy, shopkeeper, itinerant vendor, peddler, poison distributor, health care entity, or precursor chemical distributor upon proof that:

(2) The licensee has violated or has permitted any employee to violate any of the laws of this state or the United States relating to drugs, controlled substances, cosmetics, or nonprescription drugs, or has violated any of the rules and regulations of the board of pharmacy or has been convicted of a felony.

RCW 18.64.165(2).

Every proprietor or manager of a pharmacy shall keep readily available a suitable record of prescriptions which shall preserve for a period of not less than two years the record of every prescription dispensed at such pharmacy which shall be numbered, dated, and filed, and shall produce the same in court or before any grand jury whenever lawfully required to do so. The record shall be maintained either separately from all other records of the pharmacy or in such form that the information required is readily retrievable from ordinary business records of the pharmacy. All record-keeping requirements for controlled substances must be complied with. Such record of prescriptions shall be for confidential use in the pharmacy, only. The record of prescriptions shall be open for inspection by the board of pharmacy or any officer of the law, who is authorized to enforce chapter 18.64, 69.41, or 69.50 RCW.

RCW 18.64.245.

To every box, bottle, jar, tube or other container of a prescription which is dispensed there shall be fixed a label bearing the name and address of the pharmacy wherein the prescription is compounded, the corresponding serial number of the prescription, the name of the prescriber, his directions, the name of the medicine and the strength

per unit dose, name of patient, date, the expiration date, and initials of the licensed pharmacist who has compounded the prescription, and the security of the cover or cap on every bottle or jar shall meet safety standards promulgated by the state board of pharmacy: PROVIDED, That at the physician's request, the name and dosage of the drug need not be shown. If the prescription is for a combination drug product, the generic names of the drugs combined or the trade name used by the manufacturer or distributor for the product shall be noted on the label. This section shall not apply to the dispensing of medicines to in-patients in hospitals.

RCW 18.64.246.

Every proprietor of a wholesale or retail drug store shall be held responsible for the quality of all drugs, chemicals or medicines sold or dispensed by him except those sold in original packages of the manufacturer and except those articles or preparations known as patent or proprietary medicines. Any person who shall knowingly, willfully or fraudulently falsify or adulterate any drug or medicinal substance or preparation authorized or recognized by an official compendium or used or intended to be used in medical practice, or shall willfully, knowingly or fraudulently offer for sale, sell or cause the same to be sold for medicinal purposes, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine in any sum not less than seventy-five nor more than one hundred and fifty dollars or by imprisonment in the county jail for a period of not less than one month nor more than three months, and any person convicted a third time for violation of any of the provisions of this section may suffer both fine and imprisonment. In any case he shall forfeit to the state of Washington all drugs or preparations so falsified or adulterated.

RCW 18.64.270.

The following conduct, acts, or conditions constitute unprofessional conduct for any certificate holder or applicant under the jurisdiction of this chapter:

(4) Incompetence, negligence, or malpractice which results in injury to a patient or which creates an unreasonable risk that a patient may be harmed. The use of a nontraditional treatment by itself shall not constitute unprofessional conduct, provided that it does not result in injury to a patient or create an unreasonable risk that a patient may be harmed;

(6) The possession, use, prescription for use, or distribution of controlled substances or legend drugs in any way other than for legitimate or therapeutic purposes, diversion of controlled substances or legend drugs, the violation of any drug law, or prescribing controlled substances for oneself;

(7) Violation of any state or federal statute or administrative rule regulating the profession in question, including any statute or rule defining or establishing standards of patient care or professional conduct or practice;

RCW 18.130.180(4)(6)(7).

Drugs-Misbranding by false labeling. A drug or device shall be deemed to be misbranded if its labeling is false or misleading in any particular.

RCW 69.04.450.

If a drug is not designated solely by a name recognized in an official compendium it shall be deemed to be misbranded unless its label bears (1) the common or usual name of the drug, if such there be; and (2), in case it is fabricated from two or more ingredients, the common or usual name of each active ingredient, including the quantity, kind, and proportion of any alcohol, and also including, whether active or not, the name and quantity or proportion of any bromides, ether, chloroform, acetanilid, acetphenetidin, amidopyrine, antipyrine, atropine, hyoscine, hyoscyamine, arsenic, digitalis, glucosides, mercury, ouabain, strophanthin, strychnine, thyroid, or any derivative or preparation of any such substances, contained therein: PROVIDED, That to the extent that compliance with the requirements of clause (2) of this section is impracticable, exemptions shall be established by regulations promulgated by the director.

RCW 69.04.490.

A drug or device shall be deemed to be misbranded if it purports to be a drug the name of which is recognized in an official compendium, unless it is packaged and labeled as prescribed therein: PROVIDED, That the method of packing may be modified with the consent of the director, as permitted under section 502(g) of the federal act. Whenever a drug is recognized in both the United States pharmacopoeia and the homeopathic pharmacopoeia of the United States, it shall be subject to the requirements of the United States pharmacopoeia with respect to packaging and labeling unless it is labeled and offered for sale as a homeopathic drug, in which case it shall be subject to the provisions of the homeopathic pharmacopoeia of the United States, and not to those of the United States pharmacopoeia.

RCW 69.04.510.

A pharmaceutical manufacturer, wholesaler, pharmacy, or practitioner who purchases, dispenses, or distributes legend drugs shall maintain invoices or such other records as are necessary to account for the receipt and disposition of the legend drugs.

The records maintained pursuant to this section shall be available for inspection by the board and its authorized representatives and shall be maintained for two years.

RCW 69.41.042.

To every box, bottle, jar, tube or other container of a legend drug, which is dispensed by a practitioner authorized to prescribe legend drugs, there shall be affixed a label bearing the name of the prescriber, complete directions for use, the name of the drug either by the brand or generic name and strength per unit dose, name of patient and date: PROVIDED, That the practitioner may omit the name and dosage of the drug if he determines that his patient should not have this information and that, if the drug dispensed is a trial sample in its original package and which is labeled in accordance with federal law or regulation, there need be set forth additionally only the name of the issuing practitioner and the name of the patient.

RCW 69.41.050.

Persons registered, or exempted from registration under RCW 69.50.302(d), to manufacture, distribute, dispense, or administer controlled substances under this chapter shall keep records and maintain inventories in conformance with the record-keeping and inventory requirements of federal law and with any additional rules the state board of pharmacy issues.

RCW 69.50.306.

- (1) A pharmacist shall not delegate the following professional responsibilities:
- (a) Receipt of a verbal prescription other than refill authorization from a prescriber.
 - (b) Consultation with the patient regarding the prescription, both prior to and after the prescription filling and/or regarding any information contained in a patient medication record system provided that this shall not preclude a pharmacy assistant from providing to the patient or the patient's health care giver certain information where no professional judgment is required such as dates of refills or prescription price information.
 - (c) Consultation with the prescriber regarding the patient and the patient's prescription.
 - (d) Extemporaneous compounding of the prescription provided that bulk compounding from a formula and IV admixture products prepared in accordance with chapter 246-871 WAC may be performed by a level A pharmacy assistant when supervised by a pharmacist.
 - (e) Interpretation of data in a patient medication record system.
 - (f) Ultimate responsibility for all aspects of the completed prescription and assumption of the responsibility for the filled prescription, such as: Accuracy of drug, strength, labeling, proper container and other requirements.
 - (g) Dispense prescriptions to patient with proper patient information as required by WAC 246-869-220.
 - (h) Signing of the poison register and the Schedule V controlled substance registry book at the time of sale in accordance with RCW 69.38.030 and WAC 246-887-030 and any other item required by law, rule or regulation to be signed or initialed by a pharmacist.
 - (i) Professional communications with physicians, dentists, nurses and other health care practitioners.
- (2) Utilizing personnel to assist the pharmacist.
- (a) The responsible pharmacist manager shall retain all professional and personal responsibility for any assisted tasks performed by personnel under his or her responsibility, as shall the pharmacy employing such personnel. The responsible pharmacist manager shall determine the extent to which personnel may be utilized to assist the pharmacist and shall assure that the pharmacist is fulfilling his or her supervisory and professional responsibilities.
 - (b) This does not preclude delegation to an intern or extern.

WAC 246-863-095.

The term "monitoring drug therapy" used in RCW 18.64.011(11) shall mean a review of the drug therapy regimen of patients by a pharmacist for the purpose of evaluating and rendering advice to the prescribing practitioner regarding adjustment of the regimen. Monitoring of drug therapy shall include, but not be limited to:

WAC 246-869-130.

(1) The pharmacy must maintain at all times a representative assortment of drugs in order to meet the pharmaceutical needs of its patients.

(2) Dated items--All merchandise which has exceeded its expiration date must be removed from stock.

(3) All stock and materials on shelves or display for sale must be free from contamination, deterioration and adulteration.

(4) All stock and materials must be properly labeled according to federal and state statutes, rules and regulations.

(5) Devices that are not fit or approved by the FDA for use by the ultimate consumer shall not be offered for sale and must be removed from stock.

(6) All drugs shall be stored in accordance with USP standards and shall be protected from excessive heat or freezing except as those drugs that must be frozen in accordance with the requirements of the label. If drugs are exposed to excessive heat or frozen when not allowed by the requirements of the label, they must be destroyed.

WAC 246-869-150.

(4) The prescription counter shall be uncluttered and clean at all times. Only those items necessary to the filling of prescriptions shall be thereon. (Profile systems are excepted.)

(5) There shall be a sink with hot and cold running water in the prescription compounding area.

WAC 246-869-160 (4)(5).

(1) All pharmacies shall be subject to periodic inspections to determine compliance with the laws regulating the practice of pharmacy.

(2) Each inspected pharmacy shall receive a classification rating which will depend upon the extent of that pharmacy's compliance with the inspection standards.

(3) There shall be three rating classifications

(a) "Class A" - for inspection scores of 90 to 100;

(b) "Conditional" - for inspection scores of 80 to 89; and,

(c) "Unsatisfactory" - for inspection scores below 80.

(4) Any pharmacy receiving a conditional rating shall have sixty days to raise its inspection score rating to 90 or better. If upon reinspection after sixty days, the pharmacy fails to receive a rating of 90 or better, then the pharmacy will be subject to disciplinary action.

(5) Any pharmacy receiving an unsatisfactory rating shall have fourteen days to raise its inspection score rating to 90 or better. If upon reinspection after fourteen days, the pharmacy fails to receive a rating of 90 or better, then the pharmacy will be subject to disciplinary action.

(6) The certificate of inspection must be posted in conspicuous view of the general public and shall not be removed or defaced.

(7) Noncompliance with the provisions of chapter 18.64A RCW (Pharmacy assistants) and, chapter 246-901 WAC (Pharmacy assistants) resulting in a deduction of at least five points shall result in an automatic unsatisfactory rating regardless of the total point score.

(8) Pharmacies receiving an unsatisfactory rating which represent a clear and present danger to the public health, safety and welfare will be subject to summary suspension of the pharmacy license.

WAC 246-869-190.

To every prescription container, there shall be fixed a label or labels bearing the following information:

(1) All information as required by RCW 18.64.246, provided that in determining an appropriate period of time for which a prescription drug may be retained by a patient after its dispensing, the dispenser shall take the following factors into account:

- (a) The nature of the drug;
- (b) The container in which it was packaged by the manufacturer and the expiration date thereon;
- (c) The characteristics of the patient's container, if the drug is repackaged for dispensing;
- (d) The expected conditions to which the article may be exposed;
- (e) The expected length of time of the course of therapy; and
- (f) Any other relevant factors.

The dispenser shall, on taking into account the foregoing, place on the label of a multiple unit container a suitable beyond-use date or discard-by date to limit the patient's use of the drug. In no case may this date be later than the original expiration date determined by the manufacturer.

(2) The quantity of drug dispensed, for example the volume or number of dosage units.

(3) The following statement, "Warning: State or federal law prohibits transfer of this drug to any person other than the person for whom it was prescribed."

(4) The information contained on the label shall be supplemented by oral or written information as required by WAC 246-869-220.

WAC 246-869-210.

(1) All legend drugs shall be dispensed in a child-resistant container as required by federal law or regulation, including CFR Part 1700 of Title 16, unless:

(a) Authorization is received from the prescriber to dispense in a container that is not child-resistant.

(b) Authorization is obtained from the patient or a representative of the patient to dispense in a container that is not child-resistant.

(2) Authorization from the patient to the pharmacist to use a regular container (nonchild-resistant) shall be verified in one of the following ways:

(a) The patient or his agent may sign a statement on the back of the prescription requesting a container that is not child-resistant.

(b) The patient or his agent may sign a statement on a patient medication record requesting containers that are not child-resistant.

(c) The patient or his agent may sign a statement on any other permanent record requesting containers that are not child-resistant.

(3) No pharmacist or pharmacy employee may designate himself or herself as the patient's agent.

WAC 246-869-230.

An automated patient medication record system is an electronic system that must have the capability of capturing any data removed on a hard copy of microfiche copy. The hard copy of the original prescription and all documents in the audit trail shall be considered a part of this system.

(1) All automated patient medication record systems must maintain the following information with regard to ambulatory patients:

(a) Patient's full name and address.

(b) A serial number assigned to each new prescription.

(c) The date of all instances of dispensing a drug.

(d) The identification of the dispenser who filled the prescription.

(e) The name, strength, dosage form and quantity of the drug dispensed.

(f) Any refill instructions by the prescriber.

(g) The prescriber's name, address, and DEA number where required.

(h) The complete directions for use of the drug. The term "as directed" is prohibited pursuant to RCW 18.64.246 and 69.41.050.

(i) Any patient allergies, idiosyncrasies, or chronic condition which may relate to drug utilization. If there is no patient allergy data the pharmacist should indicate none or "NKA" (no known allergy) on the patient medication record.

(j) Authorization for other than child-resistant containers pursuant to WAC 246-869-230, if applicable.

(2) All automated patient medication record systems must maintain the following information with regard to institutional patients:

(a) Patient's full name.

(b) Unique patient identifier.

(c) Any patient allergies, idiosyncrasies, or chronic conditions which may relate to drug utilization. If there is no patient allergy data the pharmacist should indicate none or "NKA" (no known allergy) on the patient medication record.

(d) Patient location.

(e) Patient status, for example, active, discharge, or on-pass.

(f) Prescriber's name, address, and DEA number where required.

(g) Minimum prescription data elements:

(i) Drug name, dose, route, form, directions for use, prescriber.

(ii) Start date and time when appropriate.

(iii) Stop date and time when appropriate.

(iv) Amount dispensed when appropriate.

(h) The system shall indicate any special medication status for an individual prescription, for example, on hold, discontinued, self-administration medication, investigational drugs, patient's own medications, special administration times, restrictions, controlled substances.

(i) The system shall indicate on the labeling, and in the system, (for the pharmacist, nursing and/or physician alert) any special cautionary alerts or notations deemed necessary by the dispenser for the patient safety.

WAC 246-875-020.

Upon receipt of a prescription or drug order, a dispenser must examine visually or via an automated data processing system, the patient's medication record to determine the possibility of a clinically significant drug interaction, reaction or therapeutic duplication, and to determine improper utilization of the drug and to consult with the prescriber if needed. Any order modified in the system must carry in the audit trail the unique identifier of the person who modified the order. Any change in drug name, dose, route, dose form or directions for use which occurs after an initial dose has been given requires that a new order be entered into the system and the old order be discontinued, or that the changes be accurately documented in the record system, without destroying the original record or its audit trail.

WAC 246-875-040.

(2) Record of certifications. All pharmacies employing Level B pharmacy assistants shall complete a certification application on a form approved by the board, such form to include a declaration by the applicant that he or she has never been found guilty by any court of competent jurisdiction of any violation of any laws relating to drugs or the practice of pharmacy, for each Level B pharmacy assistant employed. The completed form will be witnessed by the responsible pharmacist for the pharmacy and will be produced for inspection on the request of the board or its agents. The fee for certification will be included in the fee for authorization to utilize the services of pharmacy assistants.

WAC 246-901-080(2).

All Level A pharmacy assistants must wear badges or tags clearly identifying them as Level A pharmacy assistants while on duty. Those pharmacy assistants working within the pharmacy and having contact with patients or the general public shall wear badges or tags clearly identifying their status.

WAC 246-901-090.

(3) Utilization plan for Level B pharmacy assistants. The application for approval shall list the job title or function of the pharmacy assistant.

WAC 246-901-100(3).**Section 3: NOTICE TO RESPONDENT**

IT IS FURTHER alleged that the allegations specified and conduct referred to in this Statement of Charges affect the public health, safety and welfare, and the Board of Pharmacy directs that a notice be issued and served on the Respondent as provided by law, giving the Respondent the opportunity to defend against the allegations of the Statement of Charges. If the

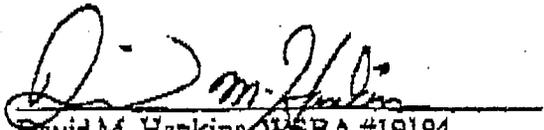
Respondent fails to defend against these allegations, the Respondent shall be subject to discipline as is appropriate under RCW 18.130.160.

DATED this 16th day of August, 1999.

STATE OF WASHINGTON
DEPARTMENT OF HEALTH
BOARD OF PHARMACY



DONALD H. WILLIAMS
EXECUTIVE DIRECTOR



David M. Hankins, WSBA #19194
Assistant Attorney General Prosecutor

FOR INTERNAL USE ONLY. INTERNAL TRACKING NUMBERS:

99020003, 99040002, 99040004, 99030003, 99020071

STATE OF WASHINGTON
DEPARTMENT OF HEALTH
BOARD OF PHARMACY

In the Matter of the License to Practice Pharmacy of)
MICHAEL S. JONES, R.Ph.,) Docket No. 99-08-A-1016PH
License No. 10993,)
In the Matter of the Pharmacy Location) Docket No. 99-08-A-1017CF
License of)
The Medicine Shoppe Pharmacy,) EX PARTE ORDER OF SUMMARY
License No. 55751,) ACTION
Respondents.)
_____)

This matter came before the Board of Pharmacy (the Board) on August 17, 1999, on an Ex Parte Motion for Order of Summary Action brought by the Department of Health (the Department) by and through its attorneys, Christine O. Gregoire, Attorney General, and David M. Hankins, Assistant Attorney General. The Presiding Officer for the Board was Eric B. Schmidt, Senior Health Law Judge. The Board members deciding the Ex Parte Motion for Order of Summary Action were: Sharron Sellers, Public Member; Donna Docktor, R.Ph.; and C.A. Leon Alzola, R.Ph. The Board, having reviewed the motion and the documents submitted in support of the motion, hereby enters the following:

Section 1: ALLEGATIONS

1.1 Respondent Michael S. Jones was issued a license to practice pharmacy in the state of Washington in June 1980. Respondent's license to practice pharmacy in the state of Washington expires on October 29, 1999.

1.2 Respondent Medicine Shoppe Pharmacy located at 9430 State Street in Marysville, Washington was issued a location license to operate as a Pharmacy in the state of Washington in October 1996. The current location license expires on June 1, 2000.

1.3 Respondent Michael Jones is the owner, responsible manager, and only pharmacist listed as working at the Medicine Shoppe in Marysville, Washington.

1.4 On March 1, 1994, a Statement of Charges was issued against Respondent Michael Jones related to a prescription filling error while Respondent was working as a pharmacist at Safeway Pharmacy # 497 in Seattle, Washington

1.5 On July 6, 1994, the Board entered Findings of Fact, Conclusions of Law and Order placing Respondent's license to practice pharmacy in the state of Washington on probation for a period of one year and imposing certain terms and conditions. One of the conditions imposed on Respondent was a requirement that Respondent create and submit a plan to avoid violations of pharmacy law related to the filling of prescriptions.

1.6 On December 7, 1995, Respondent's license to practice pharmacy in the state of Washington was fully reinstated.

1.7 On December 17, 1998, Respondent Medicine Shoppe received a failing inspection grade of 79 from Board of Pharmacy Investigator Wene while conducting a routine inspection of the pharmacy. At that time, Respondent Michael Jones was the owner, responsible manager, and only pharmacist listed as working at the Medicine Shoppe in Marysville, Washington. The violations observed during the inspection may be seen in detail in the Statement of Charges and on the Inspection sheet and report attached as Exhibit 1 to the Ex Parte Motion for Summary Action.

1.8 An inspection score of 90-100 is classified as a passing pharmacy inspection score. An inspection score of 80-89 is classified as a conditional pharmacy inspection score. An inspection score of 0-79 is classified as an unsatisfactory (failing) inspection score.

1.9 On February 3, 1999, Board of Pharmacy Investigator Wene conducted a re-inspection in relation to the December 1998 failing score. During the February 3, 1999 inspection, the pharmacy received a passing score of 94. The deducted points were related to inaccurate, incomplete or missing records required by state or federal law. At that time, Respondent Michael Jones was the owner, responsible manager, and only pharmacist listed as working at the Medicine Shoppe in Marysville, Washington. The report of this inspection is attached as Exhibit 2 to the Ex Parte Motion for Summary Action.

1.10 On July 12, 1999, Board of Pharmacy Investigators Wene and Jeppesen conducted a routine inspection of the Medicine Shoppe Pharmacy in Marysville. At that time, Respondent Michael Jones was the owner, responsible manager, and only pharmacist listed as working at the Medicine Shoppe in Marysville, Washington. The pharmacy received an unsatisfactory extremely low failing grade of 48. The violations observed during the inspection may be seen in detail in the Statement of Charges and on the Inspection sheet and report attached as Exhibit 3 to the Ex Parte Motion for Summary Action.

1.11 On July 13, 1999, Investigator Jeppesen returned to the pharmacy to retrieve documents promised by Respondent Jones. At that time Respondent Jones stated he could not locate the documents. Respondent stated that his computer could generate the required reports but that he, Respondent, did not know how to generate them. Investigator Jeppesen's report of this matter is attached as Exhibit 4 to the Ex Parte Motion for Summary Action.

1.12 On August 10, 1999, Investigators Wene and Jeppesen returned to the Medicine Shop Pharmacy in Marysville, Washington, to conduct the re-inspection in relation to the July 12, 1999 unsatisfactory (failing) score. This inspection again resulted in an extremely low failing score of 56. At that time, Respondent Michael Jones was the owner, responsible manager, and only pharmacist listed as working at the Medicine Shoppe in Marysville, Washington. The violations observed during the

inspection may be seen in detail in the Statement of Charges and on the Inspection sheet and report attached as Exhibit 5 to the Ex Parte Motion for Summary Action.

1.13 Respondent Michael S. Jones operated the Medicine Shoppe Pharmacy in a manner below the standard of care for the operation of a pharmacy in the state of Washington and therefore placed the patients of his pharmacy at serious risk of significant harm.

1.14 Due to the condition of the pharmacy, especially the violations related to record-keeping, summary suspension of both Respondent Jones and the Medicine Shoppe Pharmacy is the least restrictive means of protecting the pharmacy. The pharmacy is not in an operable condition to allow another pharmacist to operate the Pharmacy in Respondent Jones' absence.

Section 2: FINDINGS OF FACT

2.1 Respondent Jones was licensed as a pharmacist by the State of Washington at all times applicable to this matter.

2.2 Respondent Medicine Shoppe Pharmacy was licensed as a pharmacy by the State of Washington at all times applicable to this matter.

2.3 The Board issued a Statement of Charges alleging Respondents violated RCW 18.64.160(5), RCW 18.64.165(2), RCW 18.64.245, RCW 18.64.246, RCW 18.64.270, RCW 18.130.180(4), (6), (7), RCW 69.04.450, RCW 69.05.510, RCW 69.41.042, RCW 69.41.050, RCW 69.50.306, WAC 246-863-095, WAC 246-863-110, WAC 246-869-130, WAC 246-869-150, WAC 246-869-160(4) and (5), WAC 246-869-190, WAC 246-869-210, WAC 246-869-230, WAC 246-875-020, WAC 246-875-040, WAC 246-875-080(2), WAC 246-901-090 and WAC 246-901-100(3). The Statement of Charges was accompanied by all other documents required by WAC 246-11-250.

2.4 The Board finds that the public health, safety and welfare imperatively require emergency action pending further proceedings due to the nature of the allegations as stated above and in the Statement of Charges.

2.5 The alleged conduct, as set forth in the Allegations above and as supported by the documents attached to the Ex Parte Motion for Order of Summary Action, is directly related to Respondent Jones's ability to practice as a pharmacist, and Respondent Medicine Shoppe Pharmacy's ability to operate as a pharmacy, in the state of Washington. The Board finds, based on the declarations and evidence submitted with the Ex Parte Motion for Order of Summary Action, that summary suspension of Respondent Jones's license to practice as a pharmacist and of Respondent Medicine Shoppe Pharmacy's license to operate as a pharmacy are the least restrictive actions necessary to prevent or avoid immediate danger to the public health, safety, or welfare.

Section 3: CONCLUSIONS OF LAW

3.1 The Board has jurisdiction over Respondent Jones's license to practice as a pharmacist in the state of Washington.

3.2 The Board has jurisdiction over Respondent Medicine Shoppe Pharmacy's license to operate as a pharmacy in the state of Washington.

3.3 The Board has authority to take emergency adjudicative action to address an immediate danger to the public health, safety, or welfare. RCW 34.05.422(4), RCW 34.05.479, RCW 18.130.050(7); and WAC 246-11-300.

3.4 The above Findings of Fact and Allegations establish:

(a) The existence of an immediate danger to the public health, safety, or welfare;

(b) That the requested summary action adequately addresses the danger to the public health, safety, or welfare; and

(c) The requested summary action is necessary to address the danger to the public health, safety, or welfare.

3.5 The requested summary action is the least restrictive agency action justified by the danger posed by Respondent Jones's continued practice as a pharmacist and by Respondent Medicine Shoppe Pharmacy's continued operation as a pharmacy in the state of Washington.

3.6 The above Findings of Fact and Allegations establish conduct which warrants summary action to protect the public health, safety, or welfare.

Section 4: ORDERS

Based on the above Findings of Fact, Allegations and Conclusions of Law, the Board enters the following orders:

4.1 IT IS HEREBY ORDERED that the license issued to Respondent Michael S. Jones, R.Ph., to practice as a pharmacist in the state of Washington is **SUMMARILY SUSPENDED** pending further disciplinary proceedings by the Board.

4.2 IT IS HEREBY ORDERED that the license issued to Respondent Medicine Shoppe Pharmacy, located at 9430 State Street in Marysville, Washington, to operate as a pharmacy in the state of Washington is **SUMMARILY SUSPENDED** pending further disciplinary proceedings by the Board.

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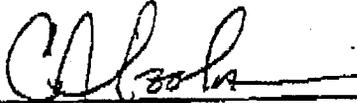
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4.3 Respondents shall immediately surrender both portions of their licenses to practice to a representative from the Board of Pharmacy upon demand.

DATED THIS 17th DAY OF AUGUST, 1999.

STATE OF WASHINGTON
DEPARTMENT OF HEALTH
BOARD OF PHARMACY


C.A. LEON ALZOLA, R.Ph.
Panel Chair

FOR INTERNAL USE ONLY. INTERNAL TRACKING NUMBERS:
99010002, 99010013
CPS No. 99-03-14-079P

EXHIBIT 6

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**STATE OF WASHINGTON
DEPARTMENT OF HEALTH
BOARD OF PHARMACY**

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In the Matter of the License to Practice Pharmacy of)	Docket No. 99-08-A-1016PH
MICHAEL S. JONES, R.Ph.,	)	Docket No. 99-08-A-1017CF
License No. 10993,)	
In the Matter of the Pharmacy Location License of	)	RESPONDENTS' MOTION TO MODIFY EX-PARTE ORDER OF SUMMARY ACTION
The Medicine Shoppe Pharmacy, License No. 55751,)	
Respondents.)	

COME NOW the respondents herein, MICHELE S. JONES and the MEDICINE SHOPPE PHARMACY, by and through their attorney of record, W. Bernard Bauman, and move this court for an Order Modifying the Ex-Parte Order of Summary Action and STAYING the Summary Suspension of the licenses issued to Respondent Michael S. Jones, R.Ph. and Medicine Shoppe Pharmacy, located at 9430 State Street in Marysville, Washington, said licenses having been suspended on August 17, 1999. This Motion is based on the subjoined Declarations of W. Bernard Bauman and Michael S. Jones.

DATED this 27th day of August, 1999.


W. BERNARD BAUMAN, WSBA #8849
Attorney for Respondents

EXHIBIT 7

W. BERNARD BAUMAN
ATTORNEY AT LAW
SUITE 601 PIONEER BUILDING
ONE PIONEER SQUARE
SEATTLE, WASHINGTON 98104
(206) 464-1860

STATE OF WASHINGTON
DEPARTMENT OF HEALTH
BOARD OF PHARMACY

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5 In the Matter of the License to Practice) Docket No. 99-08-A-1016PH
6 Pharmacy of)
7 MICHAEL S. JONES, R.Ph.,) Docket No. 99-08-A-1017CF
8 License No. 10993,)
9 In the Matter of the Pharmacy Location) DECLARATION OF W. BERNARD
10 License of) BAUMAN IN SUPPORT OF
11 The Medicine Shoppe Pharmacy,) RESPONDENTS' MOTION TO
12 License No. 55751,) MODIFY AND TO STAY SUMMARY
13 Respondents.) SUSPENSIONS
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13 I, W. Bernard Bauman, do hereby declare as follows:

14 I am the attorney for the Respondents herein and make this Declaration regarding
15 facts and information about which I have personal knowledge.
16

17 I have reviewed the Declaration of Michael S. Jones and confirm and agree with the
18 statements made therein. Mr. Jones is quite accurate in his position that the Board's action
19 has very nearly, if not completely, ruined him financially. The continued viability of his
20 pharmacy after this lengthy closure is in serious jeopardy and the only possibility of
21 resurrecting it and reversing the irreparable harm being caused by the Board's closure is to
22 reinstate both licenses and re-open the pharmacy under the control of Mr. Jones no later than
23 Tuesday, August 31, 1999.
24

25 It should be clear from Mr. Jones' Declaration that the only thing he is really
26 "guilty" of is disorganization and this does not constitute unprofessional conduct nor does it
27

28 **EXHIBIT 8**

1 represent any threat to the health, safety and welfare of his customers. To summarize the
2 concerns of the Board and Mr. Jones' responses:

3 1. Medical Information. Mr. Jones has always obtained allergy and medical
4 condition information from his patients and, when available, inputted it into his computer.
5 His QS-1 computer has the capability of recognizing and alerting the user to drug interaction
6 and disease date information and Mr. Jones logically assumed this feature was operating.
7 However, QS-1 had not activated it and, when he learned this, he had them do it
8 immediately. Obviously, this was not his fault, he has corrected the problem, and he has
9 also gone over his patient files and updated this information.
10

11 2. NDC Numbers. Mr. Jones was already in the process of correcting this
12 problem when the inspectors returned on August 10, 1999. However, he was penalized a
13 second time for the same prescriptions because they had not been picked up by the
14 customers. Since the August 10th inspection, Mr. Jones has instituted a new system that is
15 designed to make sure that, henceforth, all products dispensed match the NDC numbers in
16 the computer. Nevertheless, this type of infraction does not jeopardize the safety of his
17 customers.
18

19 3. CRC/Non-CRC. Mr. Jones has, at all times, been in complete compliance
20 with regard to the caps used on his prescription bottles. The worst thing that can be said is
21 that his record-keeping system for the signatures did not allow for one to readily verify
22 specific signatures. However, this was not pointed out to him as a problem during his
23 inspection in February 1999! Further, the high percentage of non-CRC caps used is not a
24 violation of any regulation. Nevertheless, in order to avoid any further questions in this
25 regard, Mr. Jones has voluntarily changed his system as he has described. This was,
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1 apparently, a big concern of the inspectors but this, too, did not present a safety concern to
2 "the public".

3 4. Outdates. In light of the fact that a few products slipped through the cracks,
4 Mr. Jones has changed his procedure for discovering and removing outdated products.
5 Nevertheless, the few items that were missed and inadvertently not pulled did not pose a
6 health risk to "the public".

7 5. Records and Files. These issues were fully addressed by Mr. Jones in his
8 Declaration, the situation has been corrected and it will not happen again due to the
9 institution of new record-keeping procedures. Here, again, the record-keeping problems,
10 posed absolutely no risk to "the public".

11 6. QS-1 Computer Functions. As stated in Mr. Jones' Declaration, his computer
12 system is capable of performing all the functions that are necessary and required for any
13 pharmacy to adequately monitor the medical and pharmaceutical information for their
14 patients, including, but not limited to, drug interactions and audit trails.
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16
17 It should be abundantly clear to all concerned that Mr. Jones is a capable and
18 concerned Pharmacist. He has, at all times, provided professional care to his customers and
19 has done nothing to jeopardize the health, safety, and welfare of "the public". The foregoing
20 discussion makes this very clear. None of the Board's concerns, alone or even in
21 combination, rise to the level of concern professed by the inspectors and the Board. This
22 matter could, and should, have been handled in a much more constructive, pharmacist-
23 friendly and customer-friendly manner, regardless of the results of his last two inspections.
24 It is presumably the function of the Board to not only protect the public but to also assist
25 pharmacists throughout the state to improve the level of their practice.
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1 It should not be the purpose of the Board to hinder and intimidate pharmacists in
2 their practice, or to plunge ahead with sanctions without giving any thought to the
3 seriousness of the consequences and ramifications of their actions. These are precisely the
4 things that have occurred in this case. Instead of assisting Mr. Jones to improve the level of
5 his practice, the inspectors descended on him with the intention of finding fault, intimidating
6 him and disrupting his business. Their noticeable presence throughout the entire day was
7 disruptive and intimidating, especially when an inspector stood directly behind him, looking
8 over his shoulder, for an entire day. His intent was obvious and this type of conduct is
9 completely inappropriate. Further, instead of trying to determine the truth as to what
10 violations/infractions really occurred, by discussing their concerns and giving him the time
11 and opportunity necessary to show that, for the most part, the real problem was simply
12 disorganization, they treated him like a criminal instead of a fellow professional.
13

14 This attitude and approach led directly to the ex-parte summary suspensions for
15 which there was absolutely no justification, not even under the circumstances described by
16 the Board. The Board's action was clearly excessive and unwarranted and served to destroy
17 a pharmacist and the business he has worked so hard to build. The Board has destroyed
18 years of hard work overnight! There is no rational reason or justification for sending a man
19 into bankruptcy for the violations discussed herein!
20

21 The time has come to lift the suspensions of both licenses, put an end to the financial
22 and emotional damage that he is suffering, and allow him to try and salvage what is left of
23 his business. He deserves this consideration. He does not deserve the damage the Board has
24 caused him. And he has faithful customers standing behind him, waiting for him to re-open.
25 They deserve to have their needs met, too, and the Board should be concerned about that.
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1 Mr. Jones is prepared to have the inspectors come out immediately so that his
2 pharmacy can receive their approval. He must open his doors for business within the next
3 48 hours or the damage will be irreversible, if it isn't already. **We request, and look**
4 **forward to, the immediate consideration of this Motion and an immediate stay of the**
5 **suspensions.**

6 I declare under penalty of perjury under the laws of the State of Washington that the
7 foregoing is true and correct to the best of my information, knowledge and belief.
8

9 EXECUTED this 27th day of August, 1999, at Seattle, Washington.

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12 W. BERNARD BAUMAN, WSBA #8849
13 Attorney for Respondents
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STATE OF WASHINGTON
DEPARTMENT OF HEALTH
BOARD OF PHARMACY

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5 In the Matter of the License to Practice) Docket No. 99-08-A-1016PH
Pharmacy of)
6 MICHAEL S. JONES, R.Ph.,) Docket No. 99-08-A-1017CF
7 License No. 10993,)
8 In the Matter of the Pharmacy Location) DECLARATION OF
License of) MICHAEL S. JONES
9)
10 The Medicine Shoppe Pharmacy,)
License No. 55751,)
11)
12 Respondents.)

13 I, Michael S. Jones, R.Ph., do hereby declare as follows:

14 I am the Respondent herein and make this Declaration regarding facts and
15 information about which I have personal knowledge and information.
16

17 I want to preface this statement by saying that I sincerely regret the fact that my
18 pharmacy was considered to be below the accepted minimum standard for pharmacies in
19 Washington when it was last inspected on August 10, 1999. Since that time, I have spent a
20 great deal of time addressing the concerns of the investigators. I believe that the following
21 discussion, which addresses each of the concerns raised in the Statement of Charges
22 (S.O.C.) as well as by the inspectors, will show that all of the concerns had simple
23 explanations, were not violations, and/or were quickly and easily rectified. I am truly sorry
24 that the following matters had not been completely taken care of by August 10, 1999, so as
25 to alleviate the concerns of the investigators:
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EXHIBIT 9

1 1. Although information regarding allergies and chronic conditions has always
2 been obtained from all patients, there was a question as to whether it was being properly
3 inputted into the computer. Further, the disease state-drug interaction fields were thought
4 (by the inspectors) to have been turned off. Therefore, while the inspectors were at lunch on
5 August 10th, I contacted my computer vender to discuss these problems. I was informed,
6 much to my surprise, that these features were left off by the company (i.e., never turned on
7 by them), unless they were specifically requested to do so. I had no idea that these features
8 were not functioning and told them to activate them immediately, which they did. This
9 explained why I could not explain their functioning to the inspectors and why they thought I
10 had turned it off, which I had not done. Nevertheless, this function was operational by the
11 time they returned from lunch. I even showed this to Mrs. Wene, so I am at a loss to
12 understand why this is included in the S.O.C., especially when I was not marked down for
13 this on the Inspection Report. Lastly, all patients have been updated regarding chronic
14 conditions and allergy information. If there is no such information in the computer for a
15 patient, that is because the patient has no allergies or chronic conditions.

18 2. Many of the prescriptions that were randomly selected and described as
19 having products in them that did not match the NDC numbers were ones that were still there
20 from the prior inspection and had not been picked up by the customers by the time of the
21 August 10th inspection. Consequently, I was cited for them twice (double jeopardy) even
22 though they were not new infractions. I should not have lost points a second time for the
23 same prescriptions.

25 Nevertheless, I had already instituted a new system prior to the last inspection to
26 make sure that the NDC numbers matched the product, and the necessary changes were
27
28

1 being made, and have been made, in the computer. Henceforth, there will be no variance.

2 However, at the time of the August 10th inspection, I had not had time to make all the
3 necessary changes. This is an ongoing process and does not take place overnight. We now
4 use checkmarks to double check and make sure the product matches the NDC. If it doesn't,
5 the NDC is changed. I do not expect to have any further problems in this regard.

6 3. With respect to the CRC/NCRC issue, this has already been explained. It is a
7 fact that at least 95 percent of my customers have specifically requested that I use NCRC
8 lids on their containers and I have signatures for every one of them! There is no rule or
9 regulation that mandates a maximum percentage of NCRC's that can be used. Anyone can
10 request NCRC containers and it is not limited to the elderly. The only qualification is that
11 they sign a record indicating this request and I did that with all my customers. While my
12 records may not have been organized for ease of reference, it was wrong to single me out
13 simply because the percentage of NCRC's is high. It was also my understanding that Mrs.
14 Wene approved of my system when I received a 94 on February 3, 1999. That was the same
15 system that was in place in July and August.

16
17
18 Nevertheless, as a result of the difficulties that this has caused me, I have already
19 changed my system for recording these signatures. They will now be filed alphabetically on
20 index cards so that they can be easily retrieved, in addition to this request being indicated in
21 the computer. Everyone, including those who have already signed my signature book, will
22 sign my new index cards. Further, everyone working in the pharmacy will be vigilant to
23 make sure that no NCRC's are used without the necessary signatures. Further, no
24 prescription will be dispensed without a CRC unless the receipt says "NRC".
25
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1 4. All outdated legend and OTC products have been removed from my shelves.
2 In order to avoid any problems with this in the future, we will now do a monthly review
3 instead of quarterly, for outdates. This will ensure that no outdates remain on the shelves. I
4 also had "Returns by Howard" come out, inspect for outdates, too, and process our returns.

5 5. With regard to the "inaccurate, incomplete or unavailable" records, I have
6 already rectified these concerns. Signatures have been provided, where needed, on
7 controlled substance inventories. CII invoices have been separated from all other invoices
8 and will continue to be filed separately. They are also being stapled to DEA 222 forms per
9 the inspector's recommendation.
10

11 I also had an employee spend a week going through all of our prescription files to
12 make sure they were in proper order and otherwise in compliance. The records and
13 prescription hard copies that could not be located at the time of the inspection have since
14 been located. They had simply been misfiled. We will, hereafter, be cognizant of this
15 problem and vigilant to make sure that this doesn't happen. One plan for avoiding this
16 problem is to organize these records and files on as nearly a daily basis as possible.
17

18 One of the primary reasons I had a problem with missing information at the last
19 inspection was because of a lack of knowledge and information as to exactly what was
20 expected or required. I would be told at one inspection that e.g. I was missing signatures.
21 Having been made aware of this, I complied. However, nothing else was pointed out as
22 being deficient. Then, at the next inspection, something else, e.g., DEA numbers, would be
23 pointed out. If I had simply been advised, all at one time, what I needed to do, I would not
24 have had a problem with these requirements on a piecemeal basis. However, I think I now
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1 know what is required and I can assure you that my records will be in full compliance
2 hereafter.

3 6. All records, invoices, etc. that were of concern to the inspectors have been
4 located, organized, and separated per their instructions and recommendations.

5 7. There were three DEA 222 forms that were in question at the time of the
6 inspection regarding the quantities and dates. With one, the order had not yet been received
7 at the pharmacy. Another blank had been lost between my pharmacy and the wholesaler. I
8 verified this with them, and the fact that the order had not been received or filled by them.
9 With respect to the third form, the order had not been checked in yet. I subsequently
10 checked the quantity and dated the form. We now staple the CII invoice to the blue 222
11 form. We had never been advised, or instructed, to do this before, but we are doing it now.

12 8. Lastly, the inspectors were concerned that our QS-1 system was inadequate
13 for the minimum procedures for utilization of the patient medication system and for creating
14 an accurate and complete audit trail for changes made to the prescriptions after filling.
15 These concerns were unfounded. I have spoken with the QS-1 technical support personnel,
16 the system is fully capable of performing these functions, and I am able to utilize these
17 functions. The process is too lengthy to describe, but I would gladly show an inspector how
18 it is done.
19
20

21 I believe the foregoing fully and completely addresses all matters and concerns
22 raised by the inspectors and alleged in the S.O.C. that have affected the licenses of myself
23 and my pharmacy. I feel very strongly about the fact that none of these concerns have ever
24 had even the potential for adversely affecting the health, safety or welfare of any of my
25 customers. The health, safety and welfare of my customers has always been of paramount
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1 importance and I would never do anything to compromise this, nor have I. I take great pride
2 in my professionalism and will continue to do so.

3 I do not believe that the summary suspensions of both mine and my pharmacy's
4 licenses were necessary or justified. The action of the Board has very likely ruined me,
5 financially, and it is doubtful that I will ever be able to recover. At the very least, I will
6 never recoup my substantial losses. The Board has also caused me to suffer, unnecessarily,
7 a great deal of personal humiliation and trauma.

8
9 I have done everything possible to bring my pharmacy into compliance and to satisfy
10 the concerns of the Board. Further, I steadfastly resolve to maintain this compliance and to
11 maintain my pharmacy's rating at the highest level.

12 I have been punished, and made an example of, long enough. Nothing more can
13 possibly be gained by continuing the Board's course of action. I have been penalized in
14 virtually every possible way. The punishment should fit the "crime", not exceed it, as it has
15 in my case. It is time to stop the bleeding.

16
17 I respectfully request that the summary suspensions of my license and Medicine
18 Shoppe's license be stayed immediately so that I can attempt to pull my business and my
19 livelihood out of the ashes. In addition to the preservation of one of a dying breed of
20 community pharmacies, it is imperative to open the pharmacy immediately so that I can
21 service the medical needs of my customers. They, too, have been seriously affected by the
22 board's action which has been counterproductive to the stated goal of "protecting" them.

23
24 There is absolutely no need, or justification, for preventing me from returning to my
25 pharmacy immediately as the responsible pharmacist pending the resolution of any other
26 matters with the Board, if any. I am the only one who knows the QS-1 system and I am
27
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1 perfectly capable, and competent, of continuing to operate my pharmacy in a very
2 professional manner, and of continuing to provide my customers with the excellent care they
3 have come to expect from me and my staff. Once again, I ask that, before I am ruined
4 completely, the licenses be reinstated and my pharmacy reopened immediately.

5 I declare under penalty of perjury under the laws of the State of Washington that the
6 foregoing is true and correct to the best of my information, knowledge and belief.

7 EXECUTED this 27th day of August, 1999, at Bothell, Washington.

8
9 
10 _____
11 MICHAEL S. JONES

STATE OF WASHINGTON
DEPARTMENT OF HEALTH
BOARD OF PHARMACY

In the Matter of the License to Practice Pharmacy of	)	Docket No. 99-08-A-1016PH
)	
	)	Docket No. 99-08-A-1017CF
)	
MICHAEL S. JONES, R.Ph. License No. 10993	)	DEPARTMENT'S RESPONSE TO RESPONDENT'S MOTION TO MODIFY ORDER OF SUMMARY ACTION
)	
In the Matter of the Pharmacy Location License of)	
)	
The Medicine Shoppe Pharmacy, License No. 55751, Respondents)	
)	

COMES NOW the State of Washington, Department of Health, Board of Pharmacy, by and through its attorneys, CHRISTINE O. GREGOIRE, Attorney General, and LORI LEBON SALO, Assistant Attorney General, and requests that Respondent's motion to modify the Board's summary action and requesting a stay of the summary suspensions be denied. The Department's response is based on the following argument and attached exhibits.

ARGUMENT

The Respondent's motion to modify the summary action and requesting a stay of the summary suspensions should be denied for three reasons. First the motion is untimely. The deadline for Respondent to file the motion was August 27, 1999. Respondent did not file the motion until August 30, 1999. Second, the condition of Respondent's pharmacy practice remains an immediate danger to the public health, safety or welfare. Respondent's assertions that he has made the necessary changes to his practice so that he can safely comply with the pharmacy laws

should be viewed with skepticism. The Respondent does not offer any evidence to support his assertions. Respondent has a history of committing violations of the pharmacy laws and then coming into compliance for awhile, only to violate again. Finally, if the court decides to hear the motion in spite of its untimeliness, the issue is moot because the Medicine Shoppe has terminated its franchise agreement with the Respondent. The Respondent currently does not have a pharmacy within which to practice.

First, Respondent's motion is untimely. Respondent was personally served with notice of the Department's summary action against his license on August 17, 1999. (See Exhibit 1, Declaration of Investigator Wene). Respondent was required to file his motion by August 27, 1999. WAC 246-11-340(3) gives a Respondent ten days from date of service of the summary action to request a prompt adjudicative hearing. This WAC can also be interpreted as establishing the timeframe for filing a motion to contest the summary action. The Respondent knew about this deadline because the Answer form filed by the Respondent on August 27, 1999 contains a check mark indicating he chose to proceed by filing a motion to contest the summary action. (See Exhibit 2, Respondent's Answer to the Statement of Charges). Next to Respondent's check mark are instructions for this procedure which indicate that his motion must be received by the adjudicative clerk office by August 27, 1999. The language of the instruction clearly states that the **motion itself** must be filed by August 27, 1999, so filing the Answer on August 27, 1999 does not satisfy this requirement. Timelines are created to establish certainty and finality in the legal process and should be enforced. Since the Respondent did not file his motion to contest the Department's summary action in this case on time, the court should not consider it at all.

If the Board is willing to overlook the Respondent's untimely filing of this motion, his motion should still be denied. The Respondent committed serious violations of the pharmacy laws by operating the pharmacy below the standard for care. Concerns remain that his operation of a pharmacy and practice as a pharmacist are a danger to public health, safety and welfare. Respondent's allegations that he has made the necessary corrections to operate the pharmacy safely

and in compliance with the pharmacy laws should be viewed with skepticism. Respondent does not offer any evidence to support his allegations. He has a history of going through a cycle of violating the pharmacy laws and then complying and then violating the laws again. Additionally, it is clear from Respondent's declaration that he is not taking responsibility for the nature of his violations. He minimizes the seriousness of the violations and blames the investigator for not instructing him in the law. As a result of his denial of his responsibility it is likely he will commit violations again.

First and foremost, the Board's role is to protect the public. Respondent's emphasis on the impact of the Board's decision to suspend him is inappropriate and the Board should disregard it. The Respondent's violations of the pharmacy laws are serious, in spite of Respondent's assertions to the contrary. Several of the charges involve activities that directly impact patients. The following are examples of these violations: filling prescriptions with a different labeled generic product than indicated on the label or NDC code; failing to obtain patient information about allergies; having legend or controlled substances on the shelf that were beyond the manufactured expiration date; and dispensing the majority of prescriptions in non child resistant containers without a written request form the patient of prescriber.

Additionally, Respondent's poor record keeping constitutes an immediate danger to the public because he is unable to retrieve either patient or drug records. Clearly all of these actions constitute an immediate danger to the public.

The Respondent claims to have made changes to his practice since August 10, 1999, but he has been suspended since August 17, 1999; is it believable that he made these changes in seven days when he was unable to make them in thirty days? He was given a month between inspections to make changes to his practice and he failed to make them. The inspectors visited his location on July 12, 1999 and then again on August 10, 1999. At the August 10, 1999 inspection the inspectors found many of the same problems still in existence at the Respondent's pharmacy. (See Exhibit 3, Affidavit of Susan M. Somers, and Exhibit 4, Statement of Charges paragraphs 1.10 – 1.12.9).

Additionally, Respondent's assertions that he has corrected the problems and will remain in compliance are questionable. Respondent has a history of committing violations of the pharmacy law, coming into compliance only to violate the laws again. The attached affidavit of Sue Sommers, Exhibit 3, and the Statement of Charges, Exhibit 4, support the following facts.

In March 1994, a Statement of Charges was issued against Respondent related to a prescription filling error. July 1994 the Board entered an Order placing Respondent's license on probation for one year and imposing conditions and terms. In December 1995, Respondent's pharmacy license was fully reinstated.

Then in December 1998, the Respondent committed violations of the pharmacy laws which resulted in his receiving a failing pharmacy inspection score of 79. Some of the December 1998 violations are identical to the violations alleged in our present Statement of Charges. For instance he violated the pharmacy laws by: failing to obtain chronic conditions on patients of the pharmacy; dispensing the majority of prescription in non child resistant containers without a written request from either the patient or prescriber, having prescription with expiration dates exceeding the manufacturer's expiration date. But by the next inspection in February 1999 he appeared to be in compliance with most of the pharmacy laws and received a passing score of 94.

Then in July 1999, the Respondent again violated the pharmacy laws so that he received an extremely low inspection score of 48. The July 1999 violations were similar to the December 1998 violations. He was given an opportunity to regain compliance with the pharmacy laws and another inspection was held in August 1999. However, the Respondent had not improved much and received a failing score of 56. Again many of the same violations were found. As a result of Respondent's history of violations, the respondent's assertions that he has corrected the problems and his promises to maintain the corrections should be viewed with skepticism.

Finally, the Respondent's motion should be denied because the issue of whether the summary suspension should be stayed so that Respondent can return to practice at the Medicine Shoppe located in Marysville is moot. The Medicine Shoppe formally terminated its franchise

agreement with the Respondent on August 31, 1999. (See Exhibit 5, letter from the Medicine Shoppe to Michael Jones, dated August 31, 1999).

Respondent's motion should be denied because, given the Respondent's history, and the lack of evidence to support his assertions, the public protection concerns outweigh the Respondent's promises.

RELIEF REQUESTED

The Respondent's motion to modify the Board's summary order and to stay the summary suspensions should be denied.

RESPECTFULLY SUBMITTED this 1st day of September, 1999.

CHRISTINE O. GREGOIRE
Attorney General



LORI LEBON SALO
Assistant Attorney General, WSBA #22518
1125 Washington Street S.E.
P.O. Box 40110
Olympia, Washington 98504-0110
(360) 586-2644

**STATE OF WASHINGTON
DEPARTMENT OF HEALTH
BOARD OF PHARMACY**

In the Matter of the License to Practice) as a Pharmacist of:)	Docket No. 99-08-A-1016PH
)	Docket No. 99-08-A-1017CF
MICHAEL S. JONES, R.Ph.,) License No. 10993,)	
)	
In the Matter of Pharmacy Location) License of:)	ORDER ON MOTION TO MODIFY EX PARTE ORDER OF SUMMARY ACTION
)	
The Medicine Shoppe Pharmacy,) License No. 55751)	
)	
Respondents.)	
)	

This matter came before Health Law Judge Arthur E. DeBusschere, Presiding Officer for the Board of Pharmacy (the Board), on a Motion to Modify Ex Parte Order of Summary Action, brought by the Respondent, Michael S. Jones, R.Ph., by and through his counsel, W. Bernard Bauman, Attorney at Law. Lori Lebon Salo, Assistant Attorney General, represents the Department of Health (the Department). The Board members deciding this motion were Sharron Sellers, Public Member; Donna Docktor, R.Ph.; and C.A. Leon Alzola, R.Ph., Panel Chair.

The Board having reviewed the motion and the documents submitted in support of this motion, hereby enters the following:

I. PROCEDURAL HISTORY

1.1 On August 17, 1999, the following documents were served upon the Respondent: (1) Statement of Charges; (2) Notice and Opportunity for Prompt Hearing, Regularly Scheduled Hearing or Settlement; (3) Answer to Statement of Charges and

1999, is necessary to address this danger to the public and is the least restrictive action justified by the danger posed. The Respondent's Motion to Modify Ex Parte Order of Summary Action should be denied.

IV. ORDER

Based upon the above, the Board hereby ORDERS that the Respondent's Motion to Modify Ex-Parte Order of Summary Action in this matter is DENIED.

DATED THIS th 7 DAY OF SEPTEMBER, 1999.

BOARD OF PHARMACY



SHARRON SELLERS, Public Member, for
C.A. LEON ALZOLA, R.Ph., Panel Chair



W. BERNARD BAUMAN

Attorney at Law

Suite 601, Pioneer Building

One Pioneer Square

Seattle, Washington 98104

Telephone

(206) 464-1860

FAXED

TO AVOID DELAY
AND SENT VIA MAIL

September 13, 1999

URGENT ACTION REQUESTED

Ms. Pam Mena
Office of Professional Standards
1107 Eastside St.
P.O. Box 47879
Olympia, WA. 98504-7879

RE: MICHAEL JONES, R.Ph. & MEDICINE SHOPPE PHARMACY
Docket Nos. 99-08-A-1016PH & 98-08-A-1017CF

Dear Ms. Mena:

Pursuant to our conversation of today's date, please consider this correspondence as my **PETITION FOR EXPEDITED HEARING** in the above matter.

As you know, I previously brought a Motion to Modify Summary Suspension that was considered by three Board members on the basis of the pleadings last week and denied. Prior to that, I had been assured by O.P.S. that if we did not prevail on that motion, we could request an expedited hearing, since we would no longer be able to have this heard on the prompt hearing calendar on September 10th. I was also assured that the Board would be convened as quickly as possible after September 10th.

It is imperative that this matter be heard in the very near future. Mr. Jones has been unable to operate his pharmacy or practice pharmacy for over a month! This has created serious financial hardship for him. We estimate his losses to be approaching \$30,000 now, and he is in jeopardy of being unable to make his mortgage payments as well as the lease payments for the premises where his business is no longer even operating. There can be no delay in having this matter heard. Mr. Jones has suffered serious and irreversible financial harm and faces certain ruin if we don't act immediately.

Your assistance in this regard will be most appreciated, Pam. Please let me know if you need anything else from me. Thank you very much.

Very truly yours,

W. BERNARD BAUMAN

WBB:seh

EXHIBIT 12

**STATE OF WASHINGTON
DEPARTMENT OF HEALTH
BOARD OF PHARMACY**

In the Matter of the License to Practice Pharmacy of	)	Docket No. 99-08-A-1016PH
)	
MICHAEL S. JONES, R.Ph. License No. 10993	)	Docket No. 99-08-A-1017CF
)	
In the Matter of the Pharmacy Location License of	)	STATE'S RESPONSE TO MOTION FOR EXPEDITED TRIAL
)	
The Medicine Shoppe Pharmacy, License No. 55751, Respondents)	
<hr/>		

COMES NOW, the State of Washington, Department of Health, Board of Pharmacy (Board) by and through its attorneys, CHRISTINE O. GREGOIRE, Attorney General and DAVID M. HANKINS, Assistant Attorney General and responds to respondent's petition for expedited hearing.

BACKGROUND

On or about August 17, 1999, the Board issued a Summary Suspension Order summarily suspending the license to practice pharmacy of the respondent and respondent's license to operate the pharmacy. On or about August 30, 1999 respondent through his attorney filed a motion to modify the summary action of the Board. The state responded to respondent's motion. On or about September 7, 1999, the Board reviewed the motion and denied respondent's motion. On or about September 14, 1999, respondent filed a faxed letter addressed to the Office of Professional Standards, requesting an expedited hearing date.

ARGUMENT

The State does not object to this matter being placed on the Board's regularly scheduled meeting dates, but does object to this matter being specially set outside the Board's regularly scheduled hearing dates. Respondent answered the statement of charges, by marking the following box:

STATE'S RESPONSE TO MOTION
FOR EXPEDITED TRIAL 1

EXHIBIT 13

I will file a motion to contest the summary action. I understand that by doing so I waive my opportunity to a prompt hearing. [*but not my right to an expedited hearing*]

NOTE: IF YOU SELECT THIS OPTION, YOUR MOTION MUST BE RECEIVED BY THE ADJUDICATIVE CLERK OFFICE BY August 27, 1999.

Respondent's counsel altered the form by including the language, "but not my right to an expedited hearing." Respondent's altering of the form is not binding on the Board. The Administrative Procedures Act, chapter 34.05 RCW or the Uniform Disciplinary Act, chapter 18.130. RCW do not require an expedited hearing date, if the motion to modify the summary action has been denied. Respondent made his motion and was not successful. Respondent acknowledged that he waived his right to a prompt hearing. This waiver is absolute. Therefore, respondent should not be granted a prompt hearing, when he already, knowingly waived his right to a prompt hearing.

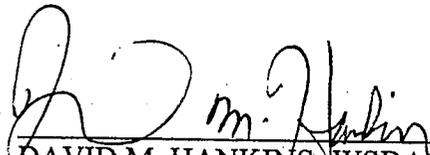
The state is not opposed to having this matter set on an expedited basis at the Board's next regularly scheduled meeting date, but is adamantly opposed to this matter being placed on a date outside the Board's regular meeting calendar.

CONCLUSION

The state requests the presiding officer deny respondent's request to have this matter set on an expedited basis outside the Board's regularly scheduled meeting dates. The state is not opposed to having this matter set at the Board's next available, regularly scheduled hearing date.

RESPECTFULLY SUBMITTED this 21st day of September, 1999.

CHRISTINE O. GREGOIRE
Attorney General



DAVID M. HANKINS, WSBA #19194
Assistant Attorney General



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(206) 464-1860

FAXED

(360) 586-4359

September 22, 1999

**EXTREMELY URGENT
FAXED TO AVOID DELAY**

Ms. Sue Somers, Esq.
Board of Pharmacy
P.O. Box 47863
Olympia, WA. 98504-7863

RE: LICENSES OF MICHAEL JONES & MEDICINE SHOPPE PHARMACY

Dear Sue:

Per our telephone conversation this morning, it is my understanding that you have not been given any authority to negotiate a settlement in this matter and that the only recommendation at the present time is the revocation of my client's license. Therefore, in accordance with our discussion, this is intended to serve as my formal request, on behalf of my client, Mr. Michael Jones, for an immediate settlement conference. This is extremely urgent and I respectfully request that this conference be set on an emergency basis with yourself, myself, my client, and the reviewing Board member present. As you are well aware of the emergent nature of this request and the dire need for an immediate conference, I will not undertake to outline these circumstances in this letter.

Please call me as soon as possible in this regard. I realize everyone is very busy, but this matter cannot linger another minute. I look forward to hearing from you later today.

Thank you very much for your kind attention to this extremely urgent matter.

Very truly yours,



W. BERNARD BAUMAN

WBB:seh

cc: Mr. Michael Jones

EXHIBIT 14

Washington was summarily suspended. The Board also ordered that the license issued to Respondent Medicine Shoppe Pharmacy, located at 9430 State Street in Marysville, Washington, to operate as a pharmacy was summarily suspended

1.2 On August 27, 1999, the Respondent filed an Answer to Statement of Charges.

1.3 On August 30, 1999, the Respondent filed a Motion to Modify Ex-Parte Order of Summary Action and on September 1, 1999, the Department filed a Response. On September 2, 1999, the Respondent filed a reply. On September 2 & 3, 1999, the Presiding Officer conducted telephone conferences on the Motion to Modify.

1.4 On September 7, 1999, the Board issued an Order denying the Respondent's Motion to Modify Ex-Parte Order of Summary Action.

1.5 On September 15, 1999, the Respondent filed a Petition for Expedited Hearing in this matter. The Respondent requested that the hearing in this matter be held in the very near future and that there be no delay in having it heard.

1.6 On September 22, 1999, the Department filed a Response to Motion for Expedited Trial. The Department did not oppose this matter being set at the Board's next available regularly scheduled hearing date, but opposed this matter being set on a date outside the Board's regular meeting times. The Department had argued that the Respondent had already waived his right to a prompt hearing.

II. CONCLUSIONS OF LAW

The Scheduling Order may be modified by order of the Presiding Officer upon his/her own initiative or upon motion of a party. WAC 246-11-290(2)(b). In this case,

the Presiding Officer had informed the Respondent that he had waived his right to a prompt hearing when he selected in his Answer to Statement of Charges to file a motion to contest the summary action and waived his opportunity for a prompt hearing. The Presiding Officer also informed the Respondent that if the Board's ruling on his Motion to Modify Ex-Parte Order of Summary Action was to his disfavor, then he could file a motion to expedite the date for the hearing. Thus, the Respondent had filed such a motion. The Department did not object to expediting the hearing date as long as it was set at the Board's next available, regularly scheduled hearing date. The Presiding Officer concludes that the Scheduling Order/Notice of Hearing in this matter can be issued so that a hearing in this matter can be held when the Board convenes at its next regularly scheduled time, which is on October 21, 1999. Thus, this is expediting the hearing date and is allowing the Respondent an opportunity to have a hearing in this matter without delay. Further, a prehearing conference shall be scheduled in preparation for the hearing.

III. ORDER

Based upon the above, the Presiding Officer hereby issues the following

ORDERS:

3.1 The Respondent's Petition for an Expedited Hearing is GRANTED as follows:

3.2 The hearing in this matter shall be held on **October 21, 1999**. The Adjudicative Clerk Office shall issue a Scheduling Order/Notice of Hearing providing the starting time and location of the hearing.

3.5 There shall be a telephonic prehearing conference in this matter on **October 13, 1999, at 9:00 a.m.** The Presiding Officer will initiate the telephone conference call. FURTHER, no later than **October 12, 1999**, each party shall file with the Adjudicative Clerk Office a prehearing memorandum and their exhibits.

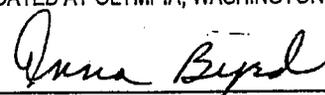
DATED THIS 29 DAY OF SEPTEMBER, 1999.


ARTHUR E. DeBUSSCHERE, Health Law Judge
Presiding Officer

DECLARATION OF SERVICE BY MAIL

I declare that today I served a copy of this document upon the following parties of record: **DAVID HANKINS AND W. BERNARD BAUMAN** by mailing a copy properly addressed with postage prepaid.

DATED AT OLYMPIA, WASHINGTON THIS 30 DAY OF SEPTEMBER, 1999.


Adjudicative Clerk Office

cc: GEORGIA ROBINSON-SAGE

FOR INTERNAL USE ONLY: (Internal tracking numbers)
Program No. 99-02-0003, 99-04-0007, 99-04-0004, 99-05-0003, 99-02-0071

**STATE OF WASHINGTON
DEPARTMENT OF HEALTH
OFFICE OF PROFESSIONAL STANDARDS**

In the Matter of the License to Practice) as a Pharmacist of:)	Docket No. 99-08-A-1016PH
)	and
MICHAEL S. JONES, R.Ph.,) License No. 10993,)	Docket No. 99-08-A-1017CF
)	PREHEARING ORDER NO. 4:
In the Matter of Pharmacy Location) License of:)	ORDER GRANTING MOTION
)	FOR CONTINUANCE
THE MEDICINE SHOPPE PHARMACY,)	
License No. 55751,)	
)	
Respondents.)	
_____)	

A prehearing conference was held before Health Law Judge Arthur E. DeBusschere, Presiding Officer for the Board of Pharmacy (the Board), on October 18, 1999. Appearing by telephone and representing Michael R. Jones, R.Ph. & the Medicine Shoppe Pharmacy (the Respondents) was W. Bernard Bauman, Attorney at Law. Also appearing by telephone and representing the Department of Health (the Department) was David M. Hankins.

I. UPDATED PROCEDURAL HISTORY AND MOTION FOR A CONTINUANCE

1.1 On September 29, 1999, the Presiding Officer issued an Order on Motion for Expedited Hearing. The Presiding Officer ordered that the hearing in this matter shall be on October 21, 1999. The Presiding Officer also ordered a telephonic prehearing conference on October 13, 1999, at 9:00 a.m., and parties were to file prehearing statements.

1.2 On October 6, 1999, the Adjudicative Clerk Office served the Notice of Hearing notifying the parties of the date, starting time and location of the hearing.

1.3 During the prehearing conference on October 13, 1999, the Presiding Officer scheduled another prehearing conference for October 18, 1999. Mr. Hankins had reported that the Department planned to amend the Statement of Charges prior to the hearing date. Further, Mr. Bauman needed to review the new charges to determine whether to elect to go forward with the hearing as scheduled. Prehearing Order No. 3.

1.4 During the prehearing conference on October 18, 1999, the Department moved for a continuance of the hearing. Mr. Hankins argued that the Department will be filing an amendment to the Statement of Charges before the hearing. Mr. Hankins asserted that the additional charges are significant in nature. He asserted that it would not be a judicious use of time to have the hearing on the present changes and then have another hearing regarding the additional charges. Mr. Hankins argued that the new charges will most likely require additional exhibits and witnesses and most likely the Department will be seeking revocation of the Respondent's license. Mr. Hankins also stated that the Corporation for the Medicine Shoppe Pharmacy has issued a preliminary injunction prohibiting him from going back to this store. Mr. Hankins requested to reschedule the hearing to December 2, 1999, when the Board has its next regularly scheduled meeting.

1.5 Mr. Bauman stated that if the Statement of Charges are not amended before the hearing, then he would oppose the motion and would want to go forward with the hearing as scheduled. He stated that his client is not working and is having a

difficult time meeting his expenses. Mr. Bauman pointed out that this matter has been delayed long enough and has not met his client's expectations to have an expedited hearing.

II. CONCLUSIONS OF LAW

2.1 The Presiding Officer shall rule on motions. Continuances may be granted by the Presiding Officer for good cause. WAC 246-11-380. The hearing in this case was expedited by the setting of the hearing at the Board's next regularly scheduled meeting and by request of the Respondent. However at this time, to go forward with this hearing without also considering the amendments would be of no benefit to either party, because the parties would know that this matter would not have been resolved until the additional allegations have been addressed by the Board. Considering the additional allegations and the evidence presented, the Board will have a different response than it would without considering the new allegations. Moreover, to go forward with the hearing without the amendments would be doubling the efforts, resources and time for everyone involved, the parties and the Board. Thus, by continuing the hearing, this matter would be addressed judiciously and economically.

2.2 Next, the Respondent has had an opportunity for the Board to reconsider the summary suspension by responding to the Respondent's Motion to Modify the Summary Action. After considering it, the Board still has determined that the Respondent's actions presently pose a risk to the public. The Respondent's license has been restricted before and the Respondent is aware of the Board's concerns. Further, an expedited hearing should not be considered to be another opportunity for a

prompt hearing. By setting the hearing time at the next scheduled meeting of the Board, this matter is being handled expeditiously and is being made a priority matter. The Presiding Officer concludes that good cause exist to continue the hearing and to place it on the docket when the Board meets at it next regularly scheduled meeting on December 2, 1999. The Presiding Officer also coordinated with the parties a new prehearing conference date.

III. ORDER

Based upon the above, the Presiding Officer hereby ORDERS the following:

3.1 The Department's Motion for a Continuance in this matter is GRANTED.

3.2 There shall be a **telephonic** prehearing conference at **11:00 a.m., November 8, 1999**. The Presiding Officer shall initiate the telephone conference call.

3.3 The hearing date, now set for October 21, 1999, is CONTINUED to **December 2, 1999**. The Adjudicative Clerk Office will issue a notice of hearing, stating the date, time and location of the hearing.

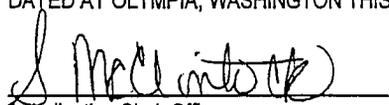
DATED THIS 26 DAY OF OCTOBER, 1999


ARTHUR E. DeBUSSCHERE, Health Law Judge
Presiding Officer

DECLARATION OF SERVICE BY MAIL

I declare that today I served a copy of this document upon the following parties of record:
DAVID HANKINS, AAG AND W. BERNARD BAUMAN by mailing a copy properly addressed with postage prepaid.

DATED AT OLYMPIA, WASHINGTON THIS 26 DAY OF OCTOBER, 1999.


Adjudicative Clerk Office

cc: GEORGIA ROBINSON-SAGE

FOR INTERNAL USE ONLY: (Internal tracking numbers)
Program No. 99-02-0003, 99-04-0007, 99-04-0004, 99-05-0003, 99-02-0071

State of Washington
Department of Health
Board of Pharmacy

In the Matter of the License to Practice Pharmacy of:)
MICHAEL S. JONES, R.Ph.,) Docket No. 99-08-A-1016PH
License No. 10993) Docket No. 99-08-A-1017CF
In the Matter of the Pharmacy Location License of:) STIPULATED FINDINGS OF FACT,
The Medicine Shoppe Pharmacy,) CONCLUSIONS OF LAW AND
License No. 55751,) AGREED ORDER
Respondents.)

COPY

The State of Washington Board of Pharmacy, by and through David M. Hankins, Assistant Attorney General Prosecutor and Michael S. Jones, R.Ph., represented by W. Bernard Bauman stipulate and agree to the following:

Section 1: Procedural Stipulations

1.1 Michael S. Jones, Respondent, was issued a license to practice pharmacy in the state of Washington in June 1980. Respondent's license to practice pharmacy in the state of Washington expires on October 24, 1999.

1.2 On October 25, 1999 the Board of Pharmacy issued an Amended Statement of Charges against Respondent.

1.3 The Statement of Charges alleges that Respondent violated RCW 18.64.160(5), .165(2), .245, .246, 270, 18.130.180(1), (4), (6), (7), (12), (13), 69.04.450, .490, .510, 69.41.030,

.042, .050, 69.50.306, .308(d)(e), .401(1)(d); WAC 246-863-095(f), -110, 246-869-100(1)(2)(a)-(c), -130, -150, -160(4)(5), -190, -210, -230, 246-875-001, -020; -040, 246-901-080(2), -090, -100(3).

1.4 Respondent understands that the State is prepared to proceed to a hearing on the allegations in the Statement of Charges.

1.5 Respondent understands that he has the right to defend himself against the allegations in the Statement of Charges by presenting evidence at a hearing.

1.6 Respondent understands that, should the State prove at a hearing the allegations in the Statement of Charges, the Board of Pharmacy has the power and authority to impose sanctions pursuant to RCW 18.130.160.

1.7 Respondent and the Board of Pharmacy agree to expedite the resolution of this matter by means of this Stipulated Findings of Fact, Conclusions of Law, and Agreed Order (Agreed Order).

1.8 Respondent waives the opportunity for a hearing on the Statement of Charges contingent upon signature and acceptance of this Agreed Order by the Board of Pharmacy.

1.9 This Agreed Order is not binding unless and until it is signed and accepted by the Board of Pharmacy.

1.10 Should this Agreed Order be signed and accepted it will be subject to the reporting requirements of RCW 18.130.110, Section 1128E of the Social Security Act, and any applicable interstate/national reporting requirements.

1.11 Should this Agreed Order be rejected, Respondent waives any objection to the participation at hearing of all or some of the Board members who heard the Agreed Order presentation.

Section 2: Stipulated Facts

While Respondent does not admit to the following conduct, Respondent acknowledges that the evidence is sufficient to justify the following findings:

2.1 Respondent Medicine Shoppe Pharmacy located at 9430 State Avenue, Marysville, Washington was issued a location license to operate as a pharmacy in the state of Washington in October 1996. The current location license expires on June 1, 2000.

2.2 Respondent Michael Jones is the owner, responsible manager, and only pharmacist listed as working at the Medicine Shoppe in Marysville, Washington.

2.3 On March 1, 1994, a Statement of Charges was issued against Respondent Michael Jones related to a prescription filling error while Respondent was working as a pharmacist at Safeway Pharmacy # 497 in Seattle, Washington

2.4 On July 6, 1994, the Board entered a Findings of Fact, Conclusions of Law and Order placing Respondent's license to practice pharmacy in the state of Washington on probation for a period of one year and imposing certain terms and conditions. One of the conditions imposed on Respondent was a requirement that he create and submit a plan to avoid violations of pharmacy law related to the filling of prescriptions.

2.5 On December 7, 1995, Respondent's license to practice pharmacy in the state of Washington was fully reinstated.

2.6 In approximately October 1996, Respondent Jones purchased and operated The Medicine Shoppe in Marysville, Washington.

2.7 On December 17, 1998, Respondent Medicine Shoppe received a failing inspection grade of 79 from Board of Pharmacy Investigator Wene while conducting a routine inspection of the pharmacy. An inspection score of 90-100 is classified as a passing pharmacy

inspection score. An inspection score of 80-89 is classified as a conditional pharmacy inspection score. An inspection score of 0-79 is classified as an unsatisfactory pharmacy inspection score. At that time, Respondent Michael Jones was the owner, responsible manager, and only pharmacist listed as working at the Medicine Shoppe in Marysville, Washington. The violations included but were not limited to:

2.7.1 Failing to obtain chronic conditions on patients of the pharmacy;

2.7.2 Dispensing the majority of prescriptions in non child-resistant containers without a written request from either the patient or the prescriber;

2.7.3 Various required records required by state and federal law were either inaccurate, incomplete or not available;

2.7.4 There was a box of filled prescription containers, many unlabeled, on the floor of the pharmacy.

2.7.5 Investigator Wene discovered a prescription filling error in the will call area. A prescription for Prozac was incorrectly filled with Prilosec;

2.7.6 Many of the prescriptions in the will call area had labeled expiration dates exceeding the manufacturer's expiration date;

2.7.7 Most of the prescriptions in the will call area contained the incorrect NDC number for the product in the prescription container;

2.8 On February 3, 1999, Board of Pharmacy Investigator Wene conducted a re-inspection in relation to the December 1998 failing score. During the February 3, 1999 inspection, the pharmacy, received a passing score of 94. The deducted points were related to

inaccurate, incomplete or missing records required by state or federal law. At that time, Respondent Michael Jones was the owner, responsible manager, and only pharmacist listed as working at the Medicine Shoppe in Marysville, Washington.

2.9 On July 12, 1999, Board of Pharmacy Investigators Wene and Jeppesen conducted a routine inspection of the Medicine Shoppe Pharmacy in Marysville. At that time, Respondent Michael Jones was the owner, responsible manager, and only pharmacist listed as working at the Medicine Shoppe in Marysville, Washington. The pharmacy received an extremely low failing grade of 48. At that time the violations included but were not limited to:

2.9.1 Failing to obtain chronic conditions and allergies on patients of the pharmacy. Disease state management is coded in ICD-9 codes and provides the information in coded form, not readily readable by the Pharmacist.

2.9.2 Numerous (greater than 10) prescriptions were labeled with a different generic product than indicated on the label or NDC Code. Several of these prescriptions were dispensed in the presence of the Board of Pharmacy Investigators.

2.9.3 Dispensing the majority (in excess of 90%) of prescriptions in non-child-resistant containers without a written request from either the patient or the prescriber for non child-resistant packaging.;

2.9.4 Thirty-eight (38) drug products were outdated. Of those, 18 drugs were legend or controlled substances and 20 were OTC products.

2.9.5 Various records required by federal law (DEA) were either inaccurate, incomplete or not available. DEA order forms and invoices could not be reconciled. Respondent was unable to locate several required DEA forms. There was poor organization of DEA inventory records,

including non-sequential filing. Several DEA records did not include date and amount received on DEA 222 forms.

2.9.6 DEA Inventory incomplete, DEA inventory for Schedules III-V was missing. Respondent was unable to generate reports for Schedule II drugs. The daily refill reports were not signed, stored in various locations, out of sequence, with several months not located.

2.9.7 Facts and Comparisons, the only reference source in the pharmacy, had not been updated for at least nine (9) months.

2.9.8 Pharmacy Assistant did not have a name badge and none had been ordered. No Pharmacy Assistant certificate had been generated or signed. Modifications to the Pharmacy Assistant Utilization Plan were in place without Board approval.

2.9.9 The prescription records were inaccurate, missing and poorly organized. Examples include prescription files with non-sequential order. Several prescriptions, both C-II and other drugs were unaccounted for. Prescription files were kept with no organization. Respondent Jones was unable to locate files in a timely manner.

2.9.10 Minimum procedures for utilization of the patient medication system were inadequate.

2.9.11 During the inspection, a patient returned a prescription so that Respondent Jones could correct the instructions for use. The correction was made but no audit trail of the change was entered in the pharmacy computer.

2.9.12 The pharmacy was generally disorganized and dirty. The pharmacy sink and immediate area were dirty and with numerous dirty food dishes.

2.10 On July 13, 1999, Investigator Jeppesen returned to the pharmacy to retrieve documents promised by Respondent Jones. At that time Respondent Jones stated he could not locate the documents. Respondent stated that his computer could generate the required reports but that he, (Respondent) did not know how to generate them.

2.11 On August 10, 1999, Investigators Wene and Jeppesen returned to the Medicine Shop Pharmacy in Marysville, Washington, to conduct the re-inspection in relation to the July 12, 1999 failing score. This inspection again resulted in an extremely low failing score of 56. At that time, Respondent Michael Jones was the owner, responsible manager, and only pharmacist listed as working at the Medicine Shoppe in Marysville, Washington. At that time the violations included but were not limited to:

2.11.1 Six prescriptions selected randomly in the will call area did not have allergy or chronic conditions noted in the patient profile. The disease state - drug interaction fields had been turned off. Respondent Jones was unable to explain the purpose or the clinical significance of the clinical interaction levels that appeared for drug interaction messages.

2.11.2 Three prescriptions selected randomly from the will call area were labeled with a different generic product than indicated on the label and/or NDC Code.

2.11.3 Forty-one (41) prescriptions were located in the will call area. Of those, forty (40) were packaged in non child-resistant containers and the one that was in a child resistant container was in a container supplied by the manufacturer.

2.11.4 Eleven legend or controlled substances on the shelf were beyond the manufacturer's expiration date.

2.11.5 As in the July 12, 1999 inspection, various records required by federal law (DEA) were either inaccurate, incomplete or not available. The invoices for the C II drugs were not filed separately. Several DEA records did not include date and amount received on DEA 222 forms.

2.11.6 DEA Inventory records incomplete. There was no signature on the C-II, C-III - C-V inventories. Requested records could not be located.

2.11.7 Five prescriptions which had been filled and returned to the stock area were checked for accuracy of product on the label and against correct NDC numbers. All five prescriptions failed to comply with state and/or federal law.

2.11.8 Minimum procedures for utilization of the patient medication system were inadequate. The pharmacy QS-1 system was not able to create an accurate and complete audit trail for changes made to the prescriptions after filling including directions for use and drug dispensed.

2.11.9 During the period August 4, 1999 through August 5, 1999, forty-eight prescriptions were processed in the pharmacy. Of those forty-eight prescriptions, twenty-one did not have a hard copy in the prescriptions.

2.12 Respondent Michael S. Jones operated the Medicine Shoppe Pharmacy in a manner below the standard of care for the operation of a pharmacy and therefore placed the patients of his pharmacy at serious risk of significant harm.

2.13 That on or about 4-1-99, respondent refilled a prescription for patient A for Vicoprofen, a controlled substance. Respondent misfilled the prescription by filling it with Adalat 60 mg. Patient A consumed 8 Adalat tablets over an 8-12 hour period. Respondent had to be taken to the emergency room at Providence Hospital Colby Campus, Everett, Washington for treatment for a medication reaction.

2.14 That on or about 2-8-99, patient C was prescribed 30 capsules of Cardizem 180 SR by his physician and phoned in to respondent's pharmacy. The original prescription permitted substitution, but did not permit refills. Respondent failed to note in his phone prescription if substitution was permitted.

2.15 On or about 2-8-99, respondent filled the prescription for patient C with Diltia XT 180 mg. Respondent without authorization from the physician refilled Diltia 180 mg. prescription, and misfilled and mislabeled the medication with an increase in dosage strength on 3-1-99 and on 3-7-99 with 90 capsules Diltia XT 240 mg.

2.16 Respondent failed to maintain the prescription hardcopy, failed to maintain accurate records and/or altered or manipulated the computer records by:

2.16.1 On 5-7-99, the pharmacy investigator obtained records from respondent's pharmacy. Patient C's medication profile record indicate respondent filled the prescription for Cardizem 180 SR with a generic substitute Diltia XT 240 mg. on 2-8-99, 3-1-99 and 3-7-99. The patient's son indicated that they never received the medication on 3-7-99. Respondent's daily audit log for 2-8-99 indicates he filled the prescription with Diltia XT 240 mg. The investigator also received a previous copy of respondent's daily audit log for 2-8-99 which indicates that on 2-8-99, respondent filled the medication with Diltia XT 180 mg.

2.17 That on or about 9-14-98, patient D obtained a prescription of Wellbutrin SR 150 mg 60 tablets and had the prescription filled by respondent. The patient indicated he did not obtain a refill of the medication. The prescription authorized only one refill. Respondent's records indicate that he refilled the Wellbutrin on 1-8-99, 2-16-99, and 3-27-99 without authorization from the prescriber and/or billed the state for prescriptions never obtained by the patient.

2.18 That on or about 10-23-98 patient D had respondent fill a prescription for #30 Toprol XL 100 mg. The patient's physician only prescribed Toprol XL 100 mg. Respondent's records indicate that he filled a prescription for #30 Toprol XL 100 mg and #15 Toprol XL 200 mg. He refilled the Toprol XL 100 mg on 11-19-98, 11-30-98, and 3-27-98. Respondent's records indicate he also refilled the Toprol XL 200 mg on 11-19-98, 11-30-98, 12-5-98, 1-8-99, 2-16-99 and 3-27-99. The patient indicated that he never received any Toprol XL 200 mg. Respondent failed to maintain a hardcopy of the prescription and filled a prescription without authorization from the physician and/or billed the state for medication that a patient did not receive.

2.19 That on or about 2-15-99, respondent filled a prescription for patient D for Phenergan with codeine cough syrup, a controlled substance. Respondent's medication profile records for patient D show that respondent filled the prescription as Promethazine with codeine cough syrup and also filled a prescription for hydrocodone bitartrate syrup. Respondent filled and refilled the hydrocodone bitartrate prescription without the physician's authorization on 2-15-99, 2-25-99 and 3-22-99. Respondent also refilled on 3-22-99, the patient's prescription for Promethazine with codeine. The investigator was unable to locate a hard copy of the prescription for hydrocodone bitartrate syrup. The patient indicated to the pharmacy investigator that he received the hydrocodone bitartrate syrup, but not the Promethazine cough syrup.

2.20 That on or about December 1998, patient D observed respondent provide an unlabeled prescription vial containing large white caplet shaped tablets, which appear to be hydrocodone/APAP tablets, a controlled substance, to a person in exchange for respondent's car repair.

2.21 That respondent without the physician's authorization or approval refilled a prescription for Cipro 500 mg tablets for patient E on 4-3-99 and 4-29-99.

2.22 That respondent misfilled patient F's prescription for Coumadin with 1mg. instead of 5mg, as prescribed by the physician.

Section 3: Conclusions of Law

The State and Respondent agree to the entry of the following Conclusions of Law:

3.1 The Board of Pharmacy has jurisdiction over Respondent and over the subject matter of this proceeding.

3.2 The above facts constitute unprofessional conduct in violation of RCW 18.64.160(5), .165(2), .245, .246, 270, 18.130.180(1), (4), (6), (7), (12), (13), 69.04.450, .490, .510, 69.41.030, .042, .050, 69.50.306, .308(d)(e), .401(1)(d); WAC 246-863-095(f), -110, 246-869-100(1)(2)(a)-(c), -130, -150, -160(4)(5), -190, -210, -230, 246-875-001, -020, -040, 246-901-080(2), -090, -100(3).

3.3 For purposes of settlement, the state **withdraws** allegation 1.15 in the amended statement of charges and the violations outlined in paragraph 2.30.

3.4 The above violations are grounds for the imposition of sanctions under RCW 18.130.160.

Section 4: Agreed Order

Based on the preceding Stipulated Facts and Conclusions of Law, Respondent agrees to entry of the following Order:

4.1 The Pharmacy location license of Medicine Shoppe Pharmacy, license No. 55751 shall be **REVOKED**. Respondent shall have no right to re-apply for a pharmacy location license for at least five (5) years from the date of this order. Respondent shall promptly deliver to the Board the original license and current registration.

4.2 The license to practice pharmacy issued to Michael S. Jones, shall be **SUSPENDED WITHOUT STAY** effective from the date of August 17, 1999.

4.3 The respondent is prohibited from functioning in a pharmacy or any other drug-related employment during the respondent's suspension. The respondent will not make public appearances representing himself as a pharmacist.

4.4 Respondent's license to practice pharmacy shall be **Suspended With Stay** for at least 5 years from the date of January 13, 2000.

4.5 Respondent shall obey all federal, state and local laws and all administrative rules governing the practice of the profession in Washington.

4.6 Respondent shall assume all costs of complying with this Order.

4.7 If Respondent violates any provision of this Order in any respect, the Board of Pharmacy may take further action against Respondent's license.

4.8 Respondent shall inform the Board of Pharmacy, in writing, of changes in his residential address.

4.9 In the event respondent should leave Washington to reside or to practice outside the state, respondent must notify in writing the Board of Pharmacy of the date of departure and return. Periods of residency or practice outside Washington will not apply to the reduction of this probationary or suspension period.

4.10 The respondent shall submit written notification to the Board of Pharmacy, addressed to the Program Manager, of any employment or residence address changes. The notification shall include the complete new address and telephone number. The notification must be made within twenty (20) days of the change in employment or residence address.

4.11 The respondent shall submit periodic declarations under penalty of perjury stating whether there has been compliance with all conditions of this Order. Failure to submit information and/or to make true statements may subject the respondent to referral for prosecution under RCW 9A.76.020 and/or RCW 9A.72.030.

4.12 The respondent shall advise any employer who hires him or her, to function in the capacity of a health care practitioner, of the terms of this Order imposed by the Board of Pharmacy. The Respondent's employer must submit written notification to the Board indicating he or she has seen the Board's Order.

4.13 The respondent shall submit a quarterly declaration under penalty of perjury stating whether there has been compliance with all conditions of this Order. The first report is due 30 days, and on the first day of April, July, Oct or Jan and thereafter until / / unless otherwise ordered by the Board of Pharmacy.

4.14 Respondent shall notify Board of Pharmacy of any employment in the health care field, including any change in employment or practice status. Respondent shall, within twenty (20) days of the effective date of this Order, or as soon thereafter as deemed by the Board of Pharmacy, submit to the Board of Pharmacy for the Board of Pharmacy's approval, a job description or description of practice and clinical privilege of respondent's present practice or position. Thereafter respondent shall submit a job description or description of practice and clinical privilege of respondent's practice or position to the Board of Pharmacy for their approval prior to making the contemplated change.

4.15 Respondent shall cause the respondent's employer to submit quarterly performance reports directly to the Board of Pharmacy on forms provided by the Board of Pharmacy. The first report is due 30 days and on the first day of April, July, Oct or Jan.

and thereafter. The respondent shall ensure that the respondent's employer has been given a copy of this Order and the employer understands the decision of the Board of Pharmacy in this case. The respondent shall ensure that the employer makes reference to Board of Pharmacy decision in the reports to the Board of Pharmacy.

4.16 The respondent is hereby placed on notice that it is the responsibility of the respondent to ensure that all required reports are submitted to the Board of Pharmacy in a timely manner.

4.17 Within thirty (30) days of the effective date of this Order, or as soon thereafter as deemed by the Board of Pharmacy, respondent shall make an appointment to undergo a psychological evaluation by a psychologist designated by the Board of Pharmacy who shall furnish a report to the Board of Pharmacy according to the following protocol adopted by the Board of Pharmacy:

Please perform a psychological examination to assess:

1. Psychological diagnosis, if any.
2. Treatment recommendations, if any.

The evaluation should consist of the following components:

1. A complete social, past medical, developmental and psychological history.
2. A review of this Agreed Order.
3. Any other physical examinations, psychological or laboratory studies deemed necessary by the evaluator.

The report of examination should discuss fully and with specificity the basis for the diagnosis, if any, conclusions and recommendations made pursuant to items 1-3 in the first paragraph above. The report of examination should be sent to:

Board of Pharmacy
PO Box 47863
Olympia WA 98504-7863

A copy shall be provided to the Respondent.

4.18 Within sixty (60) days of the effective date of this decision, or as soon thereafter as deemed by the Board of Pharmacy, respondent shall submit to the Board of Pharmacy for its prior approval, a program of remedial education, related to the violations found in the decision. The exact number of hours and the specific content of the program shall be determined by the Board of Pharmacy and shall not total less than twenty-five (25). This program shall be in addition to the Continuing Education requirement for re-licensure. The Board of Pharmacy may also require respondent to pass an examination related to the content of the program.

4.19 Respondent shall submit to the Board of Pharmacy for its prior approval, a clinical education program related to the violations found in the decision. The exact number of hours and the specific content of the program shall be determined by the Board of Pharmacy and shall total not less than four (4) nor more than twenty (20) hours per week. Respondent shall complete the clinical training program prior to seeking modification. The Board of Pharmacy may require the respondent to pass an examination related to the content of the program.

4.20 Respondent shall take and pass the MPJE examination within 60 days from the date of this order. Failure to pass the examination may result in the suspension of the license until such time as a passing score is achieved. Respondent shall not engage in the practice of the profession until respondent has passed the examination and has been so notified by the Board in writing.

4.21 Respondent is prohibited from serving as the responsible manager of a pharmacy or supervising pharmacy interns.

4.22 SUPERVISING PHARMACIST AGREEMENT

The supervising pharmacist signs an agreement that they:

1. Have reviewed, are aware of, and understands the terms of the Order.

2. Agree to be a supervising pharmacist and provide quarterly reports concerning:
 - a. obey the laws and rules of practice of pharmacy;
 - b. obey rules of employment and job performance;
 - c. relationship with other employees and customers;
 - d. any other relevant matters.

LEVELS OF SUPERVISION

- X Specific Percentage Supervision requires that a supervising pharmacist have contact with and/or personally be present for supervision at least forty (40) percent of the time or 2 ½ hours – 3 ½ hours per day;

This percentage may be decreased by the reviewing board member upon submission of an employment description to 40 percent the first year, 30 percent the second year, and 20 the third year or less as the discretion of the reviewing board member.

- 4.23 The respondent shall submit to the Board of Pharmacy, within thirty (30) days of the effective date of the Order, policy and procedures relating to:

the process of receiving written and telephone prescriptions, filling the prescriptions, and checking the label and the product to prevent errors;

disposition of prescription filling errors which shall include, but not be limited to: documentation of filling errors, description of filling errors, explanation of how filling errors occurred, notification of patient and physician, and steps to be taken to prevent future errors;

error reports shall be kept for two (2) years;

A Pharmacy Board Investigator will contact the respondent to determine if the respondent is in compliance with the policy and procedures.

- 4.24 The respondent must implement a quality assurance program with thirty (30) days of receipt of the Order.

— The quality assurance program is directed at prescription filling and misfilling and the number of errors in filling or labeling prescriptions. The respondent shall maintain a log of all errors in prescription filling. The log shall be maintained at the pharmacy and made available to Pharmacy Board Investigators and Staff at their request.

— Develop an effective quality assurance set of criteria or guidelines by which to monitor patient profiles for inappropriate, excessive or non-therapeutic quantities of medications. An outline of the process and screening questions must be submitted to the Disciplinary Authority for approval.

A Pharmacy Board Investigator will contact the Respondent to determine if the respondent is in compliance with the quality assurance program.

4.25 The Respondent shall comply with the Board's probation surveillance program including appearing in person for interviews upon request at various intervals and with reasonable notice.

4.26 Respondent may submit a written request for modification of the Board's Order for his pharmacist license only, no sooner than three years from the date of this order. Respondent, at the Board's discretion shall personally appear before the Board of Pharmacy

4.27 At the conclusion of the stayed suspension, Respondent, if requested by the Board, shall appear before the Board of Pharmacy prior to seeking reinstatement of his license to practice pharmacy.

4.28 Respondent shall assume all costs associated with the compliance of this Order.

4.29 If the respondent violates any provision of this Order in any respect, the Board of Pharmacy, after giving the respondent notice and the opportunity to be heard, may **SET ASIDE THE STAY ORDER AND IMPOSE THE SUSPENSION OF THE RESPONDENT'S LICENSURE OR MAY** impose any sanction as appropriate under RCW-18.130.160 to protect the public, or may take emergency action ordering summary suspension or restriction or limitation of the respondent's practice as authorized by RCW 18.130.050.

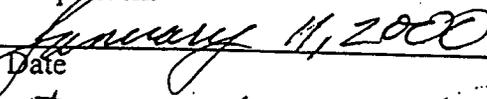
4.30 Within 10 days of the effective date of this order, Respondent shall thoroughly complete the attached Healthcare Integrity and Protection Data Bank Reporting Form (Section 1128E of the Social Security Act) and return it to the disciplining authority.

IT IS FURTHER ORDERED that all parties shall be bound by the terms and conditions of this Order. Any failure to comply with the terms and conditions of this Order will subject the respondent's license to practice as a pharmacist to further disciplinary action.

I, Michael S. Jones, Respondent, certify that I have read this Stipulated Findings of Fact, Conclusions of Law and Agreed Order in its entirety; that my counsel of record, if any, has fully explained the legal significance and consequence of it; that I fully understand and agree to all of it; and that it may be presented to the Board of Pharmacy without my appearance. If the Board accepts the Stipulated Findings of Fact, Conclusions of Law and Agreed Order, I understand that I will receive a signed copy.



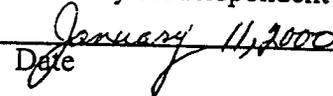
Michael S. Jones, R.Ph.
Respondent



Date



W. Bernard Bauman
WSBA #8849
Attorney for Respondent



Date

Section 5: Order

The Board of Pharmacy accepts and enters this Stipulated Findings of Fact, Conclusions of Law and Agreed Order.

DATED this 4 day of February, 2025.

State of Washington
Department of Health
Board of Pharmacy

C. Alzola R.Ph.

C. ALZOLA, R.PH
Panel Chair

Presented by:

David M. Hankins

DAVID M. HANKINS

WSBA #19194

Assistant Attorney General Prosecutor

Notice of Presentation Waived and Approved
As to Form:

W. Bernard Bauman

W. Bernard Bauman

WSBA #8849

Attorney for Respondent

Section 5: Order

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DATED this 4 day of february, 2020.

State of Washington
Department of Health
Board of Pharmacy

C. A. Leon Alzola R.Ph.

M

Presented by:

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Section 5: Order

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DATED this _____ day of _____,

State of Washington
Department of Health
Board of Pharmacy

Michael Kleinberg, CHAIR
CALCON 1/20/10

Presented by:

David M. Hankins

DAVID M. HANKINS
WSBA #19194
Assistant Attorney General Prosecutor

Notice of Presentation Waived and Approved
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W. Bernard Bauman

W. Bernard Bauman
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Attorney for Respondent

APPENDIX B

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SEP 08 2004

ATTORNEY GENERAL OFFICE
SEATTLE

FILED

SEP 08 2004

KAM L. DANIELS
SNOHOMISH COUNTY CLERK
SUPERIOR COURT

IN THE SUPERIOR COURT OF WASHINGTON FOR SNOHOMISH COUNTY

MICHAEL S. JONES, R. Ph.,

Plaintiff,

vs.

STATE OF WASHINGTON AND ITS
DEPARTMENT OF HEALTH;
WASHINGTON STATE BOARD OF
PHARMACY; PHYLLIS WENE and STAN
JEPPESEN, individually and as investigators
for the Washington State Board of Pharmacy,
and DONALD WILLIAMS, individually and
as executive director of the Board of
Pharmacy,

Defendants

Case No.: 02-2-10037-4

JONES' MOTION TO COMPEL
ANSWERS AND RESPONSES TO
JONES' FIRST DISCOVERY REQUESTS

I. RELIEF REQUESTED

PLAINTIFF Michael Jones ("Jones") moves the court for an order which provides the following relief:

1. Requires Defendants (collectively "State of Washington") to answer the interrogatories nos. 5, 6, 7, 8, 9, 10 and 12 and to produce documents pursuant to requests for production nos. 9, 10, 11, 12, 17 and 18 from Plaintiff's First Interrogatories and Requests for Production to Defendants that were served on the State of Washington on or about October 24, 2003.

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1 Jones attempted, without success, to lift the summary suspensions pending a hearing on
2 the merits. Because of the summary suspensions, Jones lost his pharmacy and suffered
3 substantial economic damages.

4 Jones claims that the defendants violated his constitutional right to due process when they
5 summarily suspended his licenses without notice or an opportunity to be heard. In addition to his
6 civil rights claim based on 42 U.S.C. §1983, Jones seeks injunctive relief and damages for the
7 defendants' recklessness, negligence, tortious interference with a business expectancy.
8

9 Defendants admit that they failed to give Jones notice or an opportunity to be heard at the
10 *ex parte* hearing that resulted in the suspensions and closure of Jones's pharmacy. Defendants,
11 however, maintain that they were not required to give Jones notice and an opportunity to be
12 heard because the *ex parte* hearing was in response to an emergency situation.

13 Jones maintains that the shortcomings noted in the inspection reports were *de minimus*
14 and that there was no emergency that justified the defendants' failure to give him notice and an
15 opportunity to be heard prior to the summary suspensions.

16 On or about October 21, 2003, Jones served Defendants with his first discovery requests.
17 Among other things, those requests seek discovery of information relating to disciplinary actions
18 taken by the State of Washington against other pharmacists and pharmacies. Jones believes this
19 information will demonstrate that in fact no emergency existed to justify the State of
20 Washington's summary suspensions, that in numerous other instances far more grievous
21 shortcomings in inspection reports had resulted in neither a summary suspension nor any
22 disciplinary action whatsoever.
23

24 The State of Washington answered these discovery requests on or about November 21,
25 2003. To date, the State of Washington has refused to produce any information about other

1 disciplinary actions taken against other pharmacies and other pharmacists. The State of
2 Washington claims that some of the information is privileged and that the production of non-
3 privileged information would be too burdensome.

4 On September 3, 2004, counsel participated in a discovery conference in an effort to
5 resolve this discovery dispute. Counsel for the state of Washington indicated that it was
6 unwilling to produce any information about disciplinary actions taken against other pharmacists
7 and other pharmacies because of the burden associated with such production. Jones maintains
8 that the State's position violates the civil rules.

9 10 IV. EVIDENCE RELIED UPON

11 This motion is based on the Declaration of Murphy Evans in Support of Jones's Motion
12 to Compel Discovery, Plaintiff's First Set of Interrogatories and Request for Production of
13 Documents to Defendants attached to the declaration as **Exhibit 1**, and Plaintiff's First Set of
14 Interrogatories and Request for Production of Documents to Defendants **With Answers** attached
15 to the declaration as **Exhibit 2**, Defendant Brunhaver's Answers to Jones's First Discovery
16 Requests attached to the declaration as **Exhibit 2**.

17 V. ARGUMENT

18 Civil Rule 26 allows for discovery of anything material to the litigation, except for things
19 protected by privilege. In re Firestorm 1991, 129 Wn.2d 130, 916 P.2d 411 (1996). The purpose
20 of the rule is to provide the parties an opportunity to understand the evidence, the facts and
21 opinions upon which the parties base their claims, defenses and theories of liability, damages,
22 and defense. Under Civil Rule 26, the scope of discovery is broad and subject to only narrow
23 exceptions. Hertog v. City of Seattle, 88 Wn.App. 41, 943 P.2d 1153 (1997). "Good cause" for
24 discovery is present if the information sought is material to the party's trial preparation. Such
25 requirement for discovery and production of documents is ordinarily satisfied by a factual

1 allegation showing that the requested information is necessary to establish a party's claim or
2 defense. Id.

3 **1. The requested information is necessary for Jones to establish that no emergency**
4 **existed that would have relieved the state of its obligation to provide him notice of its**
5 **motion to summarily suspend his license.**

6 The Fourteenth Amendment to the United States Constitution requires the state to provide
7 an individual with notice and an opportunity to be heard before it deprives the individual of a
8 protected property right. Zinermon v. Burch, 494 U.S. 113, 132 (1990) ("In situations where the
9 State feasibly can provide a predeprivation hearing before taking property, it generally must do
10 so regardless of the adequacy of a postdeprivation tort remedy to compensate for the taking. *See*
11 Loudermill, 470 U.S., at 542, 105 S.Ct., at 1493; Memphis Light, 436 U.S., at 18, 98 S.Ct., at
12 1564; Fuentes, 407 U.S., at 80-84, 92 S.Ct., at 1994-96; Goldberg, 397 U.S., at 264, 90 S.Ct., at
13 1018"). *See also*, Van Blaricom v. Kronenberg, 112 Wn.App. 501, 508, 50 P.3d 266 (2002)
14 ("Due process requires, at a minimum, that deprivation of property be preceded by notice and
15 opportunity for a hearing appropriate to the case. Mullane v. Central Hanover Bank & Trust, 339
16 U.S. 306, 313, 70 S.Ct. 652, 94 L.Ed. 865 (1950); Mennonite Board of Missions v. Adams, 462
17 U.S. 791, 103 S.Ct. 2706, 77 L.Ed.2d 180 (1983)). Although in instances of public emergency,
18 the state is permitted to deprive an individual of property without predeprivation process, such
19 instances are rare.

20 "Ordinarily, due process of law requires an opportunity for 'some kind of hearing' prior to
21 the deprivation of a significant property interest." Memphis Light, Gas & Water Div. v.
22 Craft, 436 U.S. 1, 19, 98 S.Ct. 1554, 1565, 56 L.Ed.2d 30 (1978) (emphasis added). Thus,
23 **it is only in extraordinary circumstances** involving "the necessity of quick action by
24 the State or the impracticality of providing any [meaningful] pre-deprivation process" that
25 the government may dispense with the requirement of a hearing prior to the deprivation.
Logan v. Zimmerman Brush Co., 455 U.S. 422, 436, 102 S.Ct. 1148, 1158, 71 L.Ed.2d
265 (1982).

Armendariz v. Penman, 31 F.3d 860, 865-66 (9thCir. 1994)(emphasis added).

1 In Armendariz, plaintiffs sued city attorney, mayor, planning directors and other city
2 officials for civil rights violations under 42 U.S.C. §1983 stemming from the city's closure of
3 certain apartment buildings due to city code violations. The closures were made without notice
4 and an opportunity for a hearing. The plaintiffs claimed the closures violated their procedural
5 due process rights under the Fourteenth Amendment to the United States Constitution. The city
6 officials claimed qualified immunity for their decisions to close the building and sought to
7 dismiss the procedural due process claims on summary judgment. The district court denied the
8 official's motion for summary judgment, and the court of appeals affirmed.

9
10 The Ninth Circuit acknowledged that in cases of public emergency a government official
11 can deprive a person of a property right without prior due process. However, in this case, the
12 plaintiffs alleged that the government official knew that no emergency existed. When a
13 government official knows or should have known that there was no emergency, the official is not
14 entitled to qualified immunity.

15 Summary governmental action taken in emergencies and designed to protect the public
16 health, safety and general welfare does not violate due process. Hodel v. Virginia Surface
17 Mining & Reclamation Ass'n, 452 U.S. 264, 299-300, 101 S.Ct. 2352, 2372-73, 69
18 L.Ed.2d 1 (1981); North Am. Cold Storage Co. v. Chicago, 211 U.S. 306, 319-20, 29
19 S.Ct. 101, 105-06, 53 L.Ed. 195 (1908). Government officials need to act promptly and
20 decisively when they perceive an emergency, and therefore, no pre-deprivation process is
21 due. However, the rationale for permitting government officials to act summarily in
22 emergency situations does not apply where the officials know no emergency exists, or
23 where they act with reckless disregard of the actual circumstances. Sinaloa Lake Owners
24 Ass'n v. Simi Valley, 882 F.2d 1398, 1406 (9th Cir.1989), cert. denied, 494 U.S. 1016,
25 110 S.Ct. 1317, 108 L.Ed.2d 493 (1990).

Armendiaz, at 866 (*r'vsed* on other grounds, Armendiaz, 75 F.3d 1311 (9th Cir. 1996)).

23 In this case, the defendants summarily suspended Jones's pharmacy licenses without
24 notice or an opportunity to be heard. The defendants claim that they were not required to
25 provide Jones with notice because of an emergency situation. Jones denies that an emergency

1 existed; if an emergency had existed, the defendants would not have waited for five weeks –
2 from July 11 to August 17 – to seek the order of summary suspension.

3 Jones's discovery requests seek information relating to other instances in which the
4 Board of Pharmacy has sought to summarily suspend a pharmacy license. Jones requires this
5 information in order to establish that in fact no emergency existed in this case and that the
6 constitutional right to due process required that the Defendants provide him with notice and
7 opportunity to be heard before suspending his licenses.

8 Jones also seeks information relating to other instances in which the Board of Pharmacy
9 his disciplined a pharmacist or pharmacy. Jones requires this information in order to establish
10 that the allegations contained in the inspection reports and Statement of Charges – even if proven
11 to be true – would not have justified the suspension of his licenses following a hearing on the
12 merits.

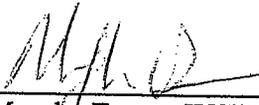
13 The defendants have not demonstrated good cause for why this information should be
14 withheld. Therefore, Jones is entitled to an order compelling the discovery of his information as
15 well as costs in the amount of \$500 for reasonable attorney's fees incurred in preparing his
16 motion.

17 VI. CONCLUSION

18 For all of the reasons stated above, the Court should grant Jones's motion to compel
19 discovery and award Jones reasonable attorney's fees in the amount of \$500.

20 DATED this 7th day of September, 2004.

21 **BROWNLIE EVANS & WOLF, LLP**

22
23 By: 
24 Murphy Evans, WSBA #26293
25 Attorney for Jones

APPENDIX C

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STATE OF WASHINGTON
SNOHOMISH COUNTY SUPERIOR COURT

MICHAEL S. JONES, R.Ph.,
Plaintiff,

NO. 02-2-08819-6

DEFENDANTS' MOTION FOR
PROTECTIVE ORDER

v.

STATE OF WASHINGTON; STATE
OF WASHINGTON, DEPARTMENT
OF HEALTH; STATE OF
WASHINGTON, DEPARTMENT OF
HEALTH, BOARD OF PHARMACY;
PHYLLIS WENE; and STAN
JEPPESEN,

Defendants.

I. Relief Requested

Defendants respectfully request that the court enter a protective order providing that they need not respond to Interrogatories 5 – 10 and Requests for Production 6 – 12 from Plaintiff's First Interrogatories and Requests for Production.¹

II. Statement of Facts

Plaintiff is a pharmacist who was involved in disciplinary proceedings before the Washington State Board of Pharmacy. See First Amended Complaint. On August 17, 1999,

¹ Plaintiff has filed two identical actions against the same defendants: one under the instant cause number and one under Snohomish County Cause No. 02-2-10037-4. Defendants request that the court's order on their motion for a protective order apply to both of these duplicative lawsuits.

DEFENDANTS' MOTION FOR
PROTECTIVE ORDER

COPY

ATTORNEY GENERAL OF WASHINGTON
Tort Claims Division
900 Fourth Avenue Ste 2200
Seattle, WA 98146-1012
(206) 464-7352

1 his pharmacy license was summarily suspended by the Board of Pharmacy as an emergency
2 action pursuant to RCW 18.130.050 (7). First Amended Complaint, ¶ 3.9. Later, Plaintiff
3 stipulated to findings of fact, conclusions of law, and an agreed order that was entered by the
4 Board. First Amended Complaint, ¶3.13. Plaintiff has now brought a lawsuit against the
5 Board of Pharmacy, two pharmacy investigators, and the Executive Director of the Board of
6 Pharmacy. Plaintiff has alleged claims seeking money damages for denial of procedural due
7 process under 42 USC § 1983, negligent investigation, tortious interference with a business
8 relationship, as well as a claim for injunctive relief. *See* First Amended Complaint.

9 On October 22, 2003, Defendants received Plaintiffs' First Interrogatories and
10 Requests for Production. Nicholson Declaration, Ex. 1 (Plaintiff's Discovery Requests). This
11 set of discovery requests contained a series of interrogatories asking for the identification of
12 **information relating to disciplinary actions taken against pharmacists other than the Plaintiff:**

13
14 **INTERROGATORY NO. 5:** Identify all instances in which the Board of
15 Pharmacy has summarily suspended a pharmacist's license pursuant to an ex parte
16 order within the past ten years, and with respect to each instance answer the
17 following:

- 18 a. Date of summary suspension;
19 b. Identify the pharmacist;

20 **INTERROGATORY NO. 6:** Identify all instances in which the Board
21 Pharmacy summarily suspended a pharmacy license pursuant to an ex parte order,
22 and with respect to each instance answer the following:

- 23 a. Date of summary suspension;
24 b. Identify the pharmacy;
25 c. Describe in particularity and detail the allegations contained in the
26 statement of charges against the pharmacy;
a. Was a representative of the pharmacy given an opportunity to be
heard prior to the issuance of the ex parte order;
b. Did the pharmacy move for a stay of the suspension pending a
hearing on the merits; and if the answer is yes, was the motion for
a stay of suspension granted;
c. Describe in particularity and detail any administrative action taken
by the Board of Pharmacy on the statement of charges.

INTERROGATORY NO. 7: Identify all instances in which the Board of
Pharmacy took any administrative action to discipline a pharmacist within the
past ten years, and with respect to each instance answer the following:

- a. Date of action;

- 1 b. Identify the pharmacist;
2 c. Describe in particularity and detail the allegations which gave rise
3 to the administrative action against the pharmacist;
4 d. Describe in particularity and detail the administrative action taken.

5 **INTERROGATORY NO. 8:** Identify all instances in which the Board of
6 Pharmacy took any administrative action to discipline a pharmacy within the past
7 ten years, and with respect to each instance answer the following:

- 8 a. Date of action;
9 b. Identify the pharmacy;
10 c. Describe in particularity and detail the allegations which gave rise
11 to the administrative action against the pharmacy;
12 d. Describe in particularity and detail the administrative action taken.

13 **INTERROGATORY NO. 9:** Have you ever been a party to any civil
14 legal proceedings of any kind in which a pharmacist or pharmacy alleged that
15 Phylis Wene or Stan Jeppesen conducted an improper investigation of the
16 pharmacy? If so, for each such lawsuit or proceeding, please state the name and
17 location of the court, agency, or other tribunal, state the title and cause number of
18 each matter, and describe the nature of the lawsuit or proceedings and defendant's
19 involvement therein.

20 **INTERROGATORY NO. 10:** Have you ever been a party to any civil
21 legal proceedings of any kind in which a pharmacist or pharmacy alleged the
22 disciplinary action taken by the Board of Pharmacy or Department of Health or
23 either of its employees or agents violated the pharmacist's or pharmacy's civil
24 rights? If so, for each lawsuit or proceeding, please state the name and location of
25 the court, agency, or other tribunal, state the title and cause number of each
26 matter, and describe the nature of the lawsuit or proceedings and defendant's
 involvement therein.

Nicholson Declaration, Ex. 1 (Plaintiff's Discovery Requests).

Plaintiff's requests for production also requested that many of the records identified in
response to the above interrogatories be produced. *Id.*

On November 21, 2003, the Defendants served their responses on Plaintiff, objecting
to the above interrogatories and requests for production, because they were unduly
burdensome and not reasonably calculated to lead to the discovery of admissible evidence.

Id., Ex. 2 (Responses to Plaintiff's Discovery Requests). The Department of Health maintains
a computer database where some of the information in these records is indexed, but only for
records for the last eight years. Hodgson Declaration, ¶ 5. The information retrievable from
this database is limited. *Id.* Neither the archived paper copies of Pharmacy Board records nor

1 the computer database of the records are indexed according to (1) whether an *ex parte* order
2 was sought or obtained, (2) whether a pharmacist's license was summarily suspended, (3)
3 what administrative action against a pharmacist or pharmacy was taken, (4) names of
4 investigators involved in the proceedings, or (5) whether a pharmacist involved in the
5 proceedings alleged a civil rights violation. *Id.*, ¶¶ 5 – 6. Therefore, responding to the above
6 discovery requests would require a hand search of all of the disciplinary records, which would
7 take between 80 and 90 hours. *Id.*, ¶ 7. Necessary redaction of confidential whistleblower
8 and medical information contained in the files would take additional time. *Id.*, ¶ 8. On Friday,
9 September 3, 2004, counsel for Plaintiff and Defendants had a telephonic conference pursuant
10 to CR 26 (i) to discuss the above discovery requests. Nicholson Decl., ¶ 4.

11 III. Statement of Issues

12 Should the court relieve Defendants from responding to several of Plaintiff's
13 discovery requests where the requests are unduly burdensome and expensive and
14 call for information that is not reasonably calculated to lead to the discovery of
admissible evidence?

15 IV. Evidence Relied Upon

16 Defendants rely on the pleadings and the court's file in this matter, the Declaration of
17 John R. Nicholson and the exhibits thereto, the Declaration of Steve Hodgson and the exhibits
18 thereto (with the appended GR 17 Declaration of John R. Nicholson Re: Facsimile from Steve
19 Hodgson), and the authorities and arguments herein.

20 V. Authority

21 While the scope of discovery is broad, CR 26 (c) allows the court to limit discovery
22 upon motion for a protective order:

23 Upon motion by a party or by the person from whom discovery is sought, and for
24 good cause shown, the court in which the action is pending...may make any order
25 which justice requires to protect a party or person from annoyance,
26 embarrassment, oppression, or undue burden or expense, including one or more of
the following: (1) that the discovery not be had; (2) that the discovery may be had

1 only on specified terms and conditions, including a designation of the time or
2 place...

3 CR 26 (c).

4 In this case, the court should order that the Defendants need not respond to Plaintiff's
5 Interrogatories 5 – 10 and Requests for Production 9 – 12.

6 **A. Plaintiff's Interrogatories 5 – 10 and Requests for Production 9 – 12 Are Unduly
7 Burdensome and Expensive**

8 This court has authority to limit discovery where responding to a discovery request
9 would be unduly burdensome or expensive for the responding party. CR 26 (b) provides:

10 The frequency or extent of use of the discovery methods set forth in section (a)
11 shall be limited by the court if it determines that: ... (C) the discovery is unduly
12 burdensome or expensive, taking into account the needs of the case, the amount in
13 controversy, limitations on the parties' resources, and the importance of issues at
14 stake in the litigation.

15 CR 26 (b).

16 A motion for a protective order based on a discovery request's undue burden or
17 expense is appropriate where the moving party submits an affidavit with a specific
18 demonstration of fact in support of its motion. *Aikens v. Deluxe Financial Services*, 217 FRD
19 533, 536 (D. Kansas 2003). Here, Plaintiff's interrogatories 5 – 10 and Requests for
20 Production 6 – 12 are unduly burdensome and expensive. The records of the Department are
21 not indexed according to the criteria called for in Plaintiff's discovery requests. Thus,
22 answering these interrogatories and requests for production would require a hand search
23 through all of the Department's archived records. 80 to 90 hours of work will be required
24 merely to parse through the Department's archived files from the past ten years to identify
25 files that are responsive to these requests.

26 The files from the Board of Pharmacy requested by Plaintiff also will contain
confidential information. The identity of whistleblowers who file complaints against
pharmacists for unprofessional conduct must remain confidential. RCW 43.70.075. In

1 addition, these files typically contain medical information that is confidential and must also be
2 removed to protect the privacy interests of the patients. The process of redacting the great
3 amount of confidential information from the files requested by Plaintiff would require even
4 more time. Whatever interest Plaintiff has in obtaining this information is outweighed by the
5 tremendous burden and expense of the search required to provide a response.

6 **B. Any Interest Plaintiff Has in Obtaining the Information and Documents**
7 **Requested in Interrogatories 5 – 10 and Requests for Production 9 – 12 is**
8 **Outweighed by the Enormous Burden to the Defendants in Responding**

9 Plaintiff's discovery requests at issue also call for information that is not admissible
10 and that is not reasonably calculated to lead to the discovery of admissible evidence.
11 Information about disciplinary proceedings against pharmacists other than the Plaintiff are
12 irrelevant to this case. The fact that the Pharmacy Board may have summarily suspended
13 some unknown pharmacist's in a completely unrelated disciplinary proceeding makes it
14 neither more nor less likely (1) that Plaintiff's constitutional rights were violated; (2) that the
15 Defendants intentionally interfered with one of Plaintiff's business expectancies; (3) that the
16 Defendants were somehow negligent in investigating the Plaintiff; or (4) that Plaintiff is
17 entitled to the injunctive relief he requests. Given that these requests are not calculated to lead
18 to the discovery of any evidence that would be admissible in this case, the court should find
19 that the Defendants need not undergo the tremendous burden and expense of responding to
20 them.

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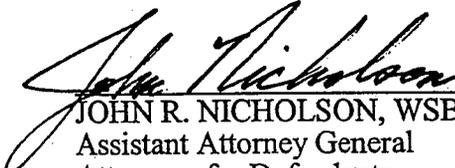
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VI. Conclusion

Responding to Plaintiff's Interrogatories 5 – 10 and Requests for Production 9 – 12 would be unduly burdensome and expensive. Given that the requests do not request information that is relevant or that could somehow lead to the discovery of admissible evidence, the burden and expense of responding far outweighs any benefit to Plaintiff of obtaining this information. This court should therefore excuse the Defendants from answering these discovery requests.

DATED this 9th day of September, 2004.

CHRISTINE O. GREGOIRE
Attorney General


JOHN R. NICHOLSON, WSBA No. 30499
Assistant Attorney General
Attorneys for Defendants

APPENDIX D

FILED

OCT 07 2004

PAM L. DANIELS
SNOHOMISH COUNTY CLERK
EX-OFFICIO CLERK OF COURT

STATE OF WASHINGTON
SNOHOMISH COUNTY SUPERIOR COURT

MICHAEL S. JONES, R.Ph.,

NO. 02-2-10037-4

Plaintiff,

ORDER GRANTING DEFENDANTS'
MOTION FOR REVISION OF
COMMISSIONER'S RULINGS

v.

[PROPOSED]

STATE OF WASHINGTON; STATE
OF WASHINGTON, DEPARTMENT
OF HEALTH; STATE OF
WASHINGTON, DEPARTMENT OF
HEALTH, BOARD OF PHARMACY;
PHYLLIS WENE; and STAN
JEPPESEN,

RECEIVED

OCT 08 2004

Defendants.

BROWNLIE EVANS & WOLF, LLP

THIS MATTER came before the undersigned judge of the above-entitled court on Defendants' Motion for Revision of the Commissioner's September 21, 2004 rulings on Defendants' motion for a protective order and Plaintiff's motion to compel. The Court considered all the pleadings that were before the commissioner, as follows:

- (1) Defendants' Motion for Protective Order;
- (2) Declaration of John R. Nicholson (filed on September 13, 2004, contemporaneously with Defendants' motion for a protective order under Snohomish County Cause No. 02-2-08819-6) and the exhibits thereto;

1 (3) Declaration of Steve Hodgson (filed on September 13, 2004,
2 contemporaneously with Defendants' motion for a protective order under Snohomish County
3 Cause No. 02-2-08819-6) and the exhibits thereto;

4 (4) Order Denying Defendants' Motion for Protective Order;
5 (5) Plaintiff's Motion to Compel;

6 (6) Declaration of Murphy Evans (filed contemporaneously with Plaintiffs' motion
7 to compel) and the exhibits thereto;

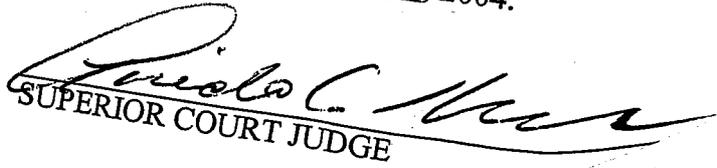
8 (7) Defendants' Response in Opposition to Plaintiff's Motion to Compel;
9 (8) Declaration of John R. Nicholson in opposition to Plaintiff's motion to compel
10 and the exhibits thereto;

11 (9) Plaintiff's Reply in Support of Motion to Compel;
12 (10) Order Granting Plaintiff's Motion to Compel;

13 and the court being fully advised, now therefore, **IT IS HEREBY ORDERED** that
14 Defendants' Motion for Revision of the Commissioner's September 21, 2004 rulings on
15 Defendants' Motion for a Protective Order and Plaintiff's Motion to Compel **is GRANTED.**
16 The commissioner's September 21, 2004 rulings on these motions are revised as follows:

- 17 1. Defendants' motion for a Protective Order is **GRANTED**;
- 18 2. Plaintiff's motion to Compel is **DENIED**;
- 19 3. Plaintiff's request for attorney's fees is **DENIED**;
- 20 4. Defendants need not provide further responses to Interrogatories 5, 6, 7, 8, 9,
21 10 or Requests for Production 9, 10, 11, or 12 of Plaintiff's First Interrogatories **and Requests**
22 **for Production.**

23 DONE IN OPEN COURT this 21st day of Oct, 2004.

24 
25 SUPERIOR COURT JUDGE

26 ORDER GRANTING DEFENDANTS'
MOTION FOR REVISION OF
COMMISSIONER'S RULINGS