DIVISION OF OCCUPATIONAL AND PROFESSIONAL LICENSING
Heber M. Wells Building
160 East 300 South
P O Box 146741
Salt Lake City UT 84114-6741
Telephone. (801) 530-6628

BEFORE THE DIVISION OF OCCUPATIONAL AND PROFESSIONAL LICENSING OF THE DEPARTMENT OF COMMERCE OF THE STATE OF UTAH

IN THE MATTER OF THE LICENSES OF **JAMES ELIOT PICKENS, MD** TO PRACTICE AS A PHYSICIAN/SURGEON AND TO ADMINISTER AND PRESCRIBE CONTROLLED SUBSTANCES IN THE STATE OF UTAH	: : : : : :	**NOTICE OF AGENCY ACTION** Case No. DOPL-2010-90

THE DIVISION OF OCCUPATIONAL AND PROFESSIONAL LICENSING TO James Eliot Pickens, MD ("Respondent"), , Bountiful UT 84010:

The Division of Occupational and Professional Licensing ("the Division") hereby files this Notice of Agency Action Said action is based upon the Verified Petition of Jared Memmott, Investigator, State of Utah, a copy of which is attached hereto and incorporated herein by reference.

The adjudicative proceeding designated herein is to be conducted on a formal basis. **Within thirty (30) days of the mailing date of this Notice, you are required to file a written response with this Division.** The response you file may be helpful in clarifying, refining or narrowing the facts and violations alleged in the Verified Petition. Your written response should be mailed to the following address: Division of Occupational and Professional Licensing, Attn Disciplinary Files, 160 East 300 South, PO Box 146741, Salt Lake City UT 84114-6741

You may represent yourself or be represented by legal counsel, at your own expense, at all times while this action is pending. Your legal counsel shall file with the Division an Entry of Appearance and until that Entry of Appearance is filed, the presiding officer will deal directly with you.

You are entitled by law to an evidentiary hearing to determine whether your licenses to practice as a

physician/surgeon and to administer and prescribe controlled substances in the State of Utah should be subject to a disciplinary action. Unless otherwise specified by the Director of the Division, the Physicians Licensing Board will serve as fact finder in the evidentiary hearing. You will be notified by separate notice of the date, time, and place of that evidentiary hearing and of any other hearings

During the evidentiary hearing, you will have the opportunity to present evidence, argue, respond, conduct cross-examination and submit rebuttal evidence to the fact finder. After the hearing, unless otherwise specified by the Director of the Division, the fact finder will issue findings of fact, conclusions of law and a recommended order to the Director of the Division of Occupational and Professional Licensing for his review and action

The presiding officer for purposes of conducting hearings will be J Steven Eklund, Administrative Law Judge, Department of Commerce, who will preside over any evidentiary issues and matters of law or procedure. If you or your attorney have any questions as to the procedures relative to the hearing, Judge Eklund can be contacted at P O Box 146701, Salt Lake City, UT 84114-6701 His telephone number is (801) 530-6648.

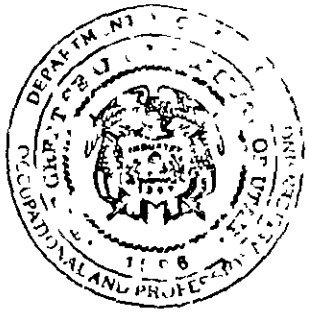
Counsel for the Division in this case is Dan Lau, Assistant Attorney General at (801) 366-0310 or P O Box 140872, Salt Lake City, UT 84114-0872 Within ten (10) days after the filing of your response, Mr Lau will request the scheduling of a prehearing conference.

You, or if you have an attorney, your attorney, may attempt to negotiate a settlement of the case without proceeding to a hearing by contacting Mr. Lau

Should you fail to timely file a response, as set forth above, or fail to attend or participate in any scheduled hearing in this case, including prehearing conference(s), you may be held in default without further notice to you. If you are held in default, the maximum administrative sanction consistent with the terms of the Verified Petition may be imposed against you. The maximum administrative sanction in this case is revocation of licensure and an administrative fine.

Please conduct yourself accordingly

Dated this 31st day of March, 2010.



W Ray Walker

W. Ray Walker
Regulatory & Compliance
Officer

DAN LAU (USB #8233)
Assistant Attorney General
MARK L SHURTLEFF (USB #4666)
Utah Attorney General
Commercial Enforcement Division
Heber M Wells Building
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Salt Lake City, UT 84114-6741
Telephone (801) 366-0310

BEFORE THE DIVISION OF OCCUPATIONAL & PROFESSIONAL LICENSING

OF THE DEPARTMENT OF COMMERCE, STATE OF UTAH

IN THE MATTER OF THE LICENSES OF **JAMES PICKENS, M.D.,** TO PRACTICE MEDICINE AND TO ADMINISTER AND PRESCRIBE CONTROLLED SUBSTANCES IN THE STATE OF UTAH,	)	**PETITION** Case No DOPL 2010- 90

PRELIMINARY STATEMENT

The following claims were investigated by the Utah Division of Professional and Occupational Licensing ("Division") following receipt of information that James Pickens, M D ("Respondent"), a licensee of the Division, has engaged in acts and practices that constitute violations of the Division of Occupational and Professional Licensing Act, Utah Code Ann §§ 58-1-101 to 58-1-504 (2004), the Utah Pharmacy Practice Act, Utah Code Ann §§ 58-17b-101 to 58-17b-701 (2004), the Utah Controlled Substance Act, Utah Code Ann §§ 58-37-1-to 58-37-21 (2004), and the Utah Medical Practice Act, Utah Code Ann §§ 58-67-101 to 58-67-803 (2004)

PARTIES

1 The Division is a division of the Department of Commerce of the State of Utah as established by Utah Code Ann § 13-1-2 (2004)

2 At all times material to the allegations contained herein, the Respondent was licensed by the Division to practice medicine under the Utah Medical Practice Act, Utah Code Ann §§ 58-67-101 to 58-67-803, and to administer and prescribe controlled substances under the Utah Controlled Substance Act, Utah Code Ann §§ 58-37-1 to 58-37-21

STATEMENT OF ALLEGATIONS

3 On or about June 6, 2006, A W , a registered pharmacist, submitted information to the Division that identified the Respondent as a prescribing practitioner for three Internet Facilitator Companies ("IFC's"), NGS Enterprises, Express Pills, and Terrace Rx Online The IFC's processed Internet prescription orders from patients based solely on the information provided by the patients in on-line medical questionnaires or from a toll free telephone number The IFC's would then contract out the prescribing and dispensing of the prescription medications to prescribing practitioners and pharmacies Terrace Rx Online was otherwise known as Terrace Pharmacy and was owned and operated by T F and A W

4 On or about January 4, 2007, a Division investigator completed an on-line medical questionnaire at www terracerxonline com in an attempt to obtain three (3) 100 mg tablets of Viagra On or about January 8, 2007, the investigator received three Viagra 100 mg tablets in a prescription bottle which identified Terrace Pharmacy as the dispensing pharmacy

and listed the Respondent as the prescribing practitioner

5 On or about February 20 2007, two Division investigators met with T F and A W at Terrace Pharmacy T F and A W acknowledged that Terrace Pharmacy owned and operated the internet site, www terracerxonline com They also admitted to the investigators that they contracted with the Respondent, who prescribed medications for the above website based solely upon on-line medical questionnaires submitted by patients and/or a toll-free telephone number that patients could call Medical questionnaires completed by individuals requesting prescription medications were printed out or created at Terrace Pharmacy and then faxed to the Respondent for review Once the Respondent reviewed the faxed medical questionnaires, he would then return the questionnaires to Terrace Pharmacy via fax with his signed approval or denial of the prescriptions

6 On or about February 28, 2007, a Division investigator obtained 14 prescription records from Terrace Pharmacy for legend drug prescriptions issued to Utah residents that had been approved by the Respondent Those prescriptions are identified by the following numbers

NGSE61414	NGSE61178	NGSE59487	NGSE59657
NGSE67779	NGSE67960	NGSE68036	NGSE68288
NGSE68491	NGSE60791	NGSE60793	NGSE60668
394008	NGSE61541		

7 On or about March 1, 2007, a subpoena duces tecum was issued by the Division and served on the Respondent on March 9, 2007 at his office located at 425 Medical Drive, Suite 110, Bountiful, Utah The subpoena duces tecum requested medical records on the patients who had been issued the 14 prescriptions identified in paragraph 6, *supra* A true and correct copy of the March 1, 2007 subpoena duces tecum is attached hereto as Exhibit A

8 On or about March 16, 2007, an attorney for the Respondent provided the Division with additional copies of questions and answers generated from on-line medical questionnaires, together with copies of the corresponding patient prescription labels created by the dispensing pharmacy The prescription numbers and labels produced to the Division were

NGSE61414 NGSE594687 NGSE59657 NGSE38605
NGSE60791 NGSE81178 NGSE48519 NGSE60668

The Respondent's attorney also produced a completed on-line medical questionnaire for patient V P (name withheld for purposes of confidentiality) which indicated the prescription order had been denied by the Respondent

9 On or about March 27, 2007, the Division was provided with still more copies of questions and answers generated from on-line medical questionnaires, along with copies of the corresponding patient prescription label created by the dispensing pharmacy The prescription numbers and labels submitted to the Division were

NGSE58230 NGSE68491 NGSE88491 394008

One on-line medical questionnaire for patient M L was produced that indicated the pharmacist had denied the prescription

10 During the course of its investigation, the Division learned that the Respondent did not create and/or maintain records that contained patient histories, results of physical examinations, progress notes, or other medical background pertaining to the various patients who had requested on-line prescription medications and none existed as a part of the medical records provided to the Division by the Respondent Additionally, the majority of the patient medical records submitted to the Division by the Respondent had date and time facsimile

transmission information in the top margins that reflected they had recently been forwarded to the Respondent by either Terrace Pharmacy or by NGS Enterprises

11 On March 29, 2007, pursuant to the Division's inspection authority, a Division investigator requested and obtained prescription records from the Sundance Pharmacy in St George, Utah that revealed that the Respondent had issued 18 prescriptions for legend drugs based solely upon the information provided by patients in on-line medical questionnaires The patients, all of whom are Utah residents, were issued medications under the following prescription numbers

117861	125251	124089	119620	124556
122460	118958	118331	120146	121363
123881	119491	120394	123868	120252
121198	118363	120586		

The prescription records obtained from Sundance Pharmacy also reflected an additional 296 prescriptions for residents throughout the United States, all of which were written by the Respondent

12 On or about July 28, 2009, the Respondent was convicted in the U S District Court for the Middle District of Florida of the illegal distribution of controlled substances, a violation of 21 U S C § 841(a)(1) and 18 U S C § 2 The Respondent was sentenced to 21 months in federal prison for illegally distributing 90 Didrex tablets

13 On or about July 13, 2009, a Division investigator called the Respondent's office to inquire about the HCG program offered by the Respondent The Respondent's wife talked with the Division investigator and stated that the price of the program included the HCG prescription medication, itself, which was sold and dispensed directly from the Respondent's

office

APPLICABLE LAW

14 Utah Code Ann § 58-1-401(1)(a) and (b) provides that the [D]ivision may refuse to issue a license to an applicant and may refuse to renew or may revoke, suspend, restrict, place on probation, issue a public or private reprimand to, or otherwise act upon the license of any licensee in any of the following cases

> (a) the applicant or licensee has engaged in unprofessional conduct, as defined by statute or rule under this title,
>
> (b) the applicant or licensee has engaged in unlawful conduct as defined by statute under this title,

15 Utah Code Ann § 58-1-501(1)(f) defines unlawful conduct to mean conduct, by any person, that is defined as unlawful under this title and includes

> (f)(I) unless Subsection (2)(m) or (4) applies, issuing, or aiding and abetting in the issuance of, an order or prescription for a drug or device to a person located in this state
>
> > (A) without prescriptive authority conferred by a license issued under this title, or by an exception to licensure under this title,
> >
> > (B) with prescriptive authority conferred by an exception issued under this titled or a multistate practice privilege recognized under this title, if the prescription was issued,
> >
> > > (I) without first obtaining information, in the usual course of professional practice, that is sufficient to establish a diagnosis, to identify underlying conditions, and to identify contraindications to the proposed treatment, or
> > >
> > > (II) based on a questionnaire completed by the patient on the internet, or toll-free telephone number, when there exists no other bona fide patient-practitioner relationship, or

(C) in violation of subsection (2)(m), when the licensed person who issued, or aided and abetted another in the issuance of the prescription has violated (2)(m) on more than 100 prescriptions within a 30 day period of time,

16 Utah Code Ann § 58-1-502(2) defines unprofessional conduct to mean, in part, conduct, by a licensee or applicant, that is defined as unprofessional conduct under this title or under any rule adopted under this title and includes

(a) violating, or aiding or abetting any other person to violate, any statute, rule or order regulating an occupation or profession under this title,

(b) violating, or aiding or abetting any other person to violate, any generally accepted professional or ethical standard applicable to an occupation or profession regulated under this title,

(g) practicing or attempting to practice an occupation or profession regulated under this title through gross incompetence, gross negligence, or a pattern of incompetency or negligence,

(m) unless Subsection (4) applies, issuing, or aiding and abetting in the issuance of, an order or prescription for a drug or device

(i) without first obtaining information in the usual course of professional practice, that is sufficient to establish a diagnosis, to identify conditions, and to identify contraindications to the proposed treatment, or

(ii) based on a questionnaire completed by the patient on the internet, or toll free telephone number when there exists no other bona fide patient-practitioner relationship or bona fide referral by a practitioner involved in an existing patient-practitioner relationship,

17 Utah Code Ann § 58-67-803 (1996) provides

(1) Medical records maintained by a licensee shall

(a) meet the standards and ethics of the profession, and
(b) be maintained in accordance with division rules made in collaboration with the board

18 Utah Admin Code R156-1-601(1)(c) (2007), provides

(1) In accordance with Subsection 58-1-501(4), a person licensed to prescribe under this title may prescribe legend drugs to a person located in this state following an online assessment and diagnosis in accordance with the following conditions

(b) an assessment and diagnosis is based upon a comprehensive health history and an assessment tool that requires the patient to provide answers to all the required questions and does not rely upon default answers, such as a branching questionnaire,

(c) only includes legend drugs and may not include controlled substances,

19 Utah Admin Code R156-67-602 (2007), provides

In accordance with Subsection 58-67-803(1), medical records shall be maintained to be consistent with the following

(1) all applicable laws, regulations, and rules, and

(2) the "AMA Code of Medical Ethics," 2008-2009, which is hereby incorporated by reference

20 21 CFR § 1306 04(a) provides

(a) A prescription for a controlled substance to be effective must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice The responsibility for the proper prescribing and dispensing of controlled substances is upon the prescribing practitioner, but a corresponding responsibility rests with the pharmacist who fills the prescription An order purporting to be a prescription issued not in the usual course of professional treatment or in legitimate and authorized research is not a prescription within the meaning and intent of section 309 of the Act (21 U S C 829) and the person knowingly filling such a purported prescription, as well as the

person issuing it, shall be subject to the penalties provided for violations of the provisions of law relating to controlled substances

21 Utah Code Ann § 58-17b-501(11) defines unlawful conduct as "selling, dispensing, or otherwise trafficking in prescription drugs when not licensed to do so or when not exempted from licensure[ ]"

COUNT I

UNLAWFUL CONDUCT: ISSUING PRESCRIPTION DRUGS BASED ON A QUESTIONNAIRE COMPLETED BY THE PATIENT ON THE INTERNET, OR A TOLL-FREE TELEPHONE NUMBER, WHEN NO BONA FIDE PATIENT-PRACTITIONER RELATIONSHIP EXISTED.

22 Paragraphs 1 through 21 are incorporated by reference as though fully stated herein

23 As described herein, the Respondent issued prescription drugs based upon the submission of on-line medical questionnaires or toll-free telephone number submissions when no bona fide patient-practitioner relationship existed for patients throughout the United States, including Utah Therefore, the Respondent has engaged in unlawful conduct as defined under Utah Code Ann § 58-1-501(1)(f), thereby establishing grounds for sanctioning the Respondent's licenses as provided under Utah Code Ann § 58-1-401(2)(b)

COUNT II

UNPROFESSIONAL CONDUCT: ISSUING OR AIDING AND ABETTING IN THE ISSUANCE OF DRUG PRESCRIPTIONS WITHOUT FIRST OBTAINING INFORMATION IN THE NORMAL COURSE OF PROFESSIONAL PRACTICE OR BASED ON A QUESTIONNAIRE COMPLETED BY THE PATIENT ON THE INTERNET, OR TOLL-FREE TELEPHONE NUMBER, WHEN NO OTHER BONA FIDE PATIENT-PRACTITIONER RELATIONSHIP EXISTED.

24 Paragraphs 1 through 23 are incorporated by reference as if fully stated herein

25 As described herein, the Respondent issued prescription drugs or aided and abetted in the issuance of prescription drugs based upon the submission of on-line medical questionnaires or toll-free telephone number submissions when no bona fide patient-practitioner relationship existed for patients throughout the United States, including Utah Therefore, the Respondent has engaged in unprofessional conduct as defined under Utah Code Ann § 58-1-501(2)(m), thereby establishing grounds for sanctioning the Respondent's licenses as provided under Utah Code Ann § 58-1-401(2)(a)

COUNT III

UNPROFESSIONAL CONDUCT: A FEDERAL CONVICTION FOR THE ILLEGAL DISTRIBUTION OF CONTROLLED SUBSTANCES.

26 Paragraphs 1 through 25 are incorporated by reference as if fully stated herein

27 As described specifically in paragraph 12, on or about July 28, 2009, the Respondent was convicted in the U S District Court for the Middle District of Florida of the illegal distribution of controlled substances, a violation of 21 U S C § 841(a)(1) and 18 U S C § 2 The Respondent was sentenced to 21 months in federal prison Therefore, the Respondent has engaged in unprofessional conduct as described in Utah Code Ann § 58-1-501(2)(a) and (c), thereby establishing grounds for sanctioning the Respondent's licenses as provided under Utah Code Ann § 58-1-401(2)(a)

COUNT IV

UNPROFESSIONAL CONDUCT: PRACTICING MEDICINE THROUGH GROSS INCOMPETENCE, GROSS NEGLIGENCE OR A PATTERN OF GROSS INCOMPETENCY OR NEGLIGENCE.

28 Paragraphs 1 through 27 are incorporated by reference as if fully stated herein

29 The Respondent did not create and/or maintain records that contained patient histories, results of physical examinations, progress notes, or other medical background pertaining to the various patients who had requested on-line prescription medications and none existed as a part of the medical records provided to the Division by the Respondent Therefore, the Respondent practiced medicine through gross negligence, gross incompetence or a pattern of incompetency or negligence That being the case, the Respondent has engaged in unprofessional conduct as described in Utah Code Ann § 58-1-501(2)(g), thereby establishing grounds for sanctioning the Respondent's licenses as provided under Utah Code Ann § 58-1-401(2)(a)

COUNT V

UNLAWFUL CONDUCT: SELLING, DISPENSING, OR OTHERWISE TRAFFICKING HCG, A PRESCRIPTION DRUG, WHEN NOT LICENSED TO DO SO OR WHEN NOT EXEMPTED FROM LICENSE.

30 Paragraphs 1 through 29 are incorporated by reference as if fully stated herein

31 As described specifically in paragraph 13, a Division investigator called the Respondent's office to inquire about the HCG program offered by the Respondent The Respondent's wife talked with the Division investigator and stated that the price of the program included the HCG prescription medication, itself, which was sold and dispensed directly from the Respondent's office Therefore, the Respondent has engaged in unlawful conduct as

described in Utah Code Ann § 58-17b-501(11), thereby establishing grounds for sanctioning the Respondent's licenses as provided by Utah Code Ann § 58-1-401(2)(b)

WHEREFORE, the Division respectfully requests an order granting the following relief

1 Determining that the Respondent be adjudged and decreed to have engaged in the acts alleged herein,

2 Determining that by engaging in said acts, the Respondent violated the provisions of the Division of Occupational and Professional Licensing Act, the Utah Controlled Substance Act, and the Utah Medical Practice Act,

3 Imposing appropriate sanctions on the licenses of the Respondent to practice as a physician and surgeon in the State of Utah and to prescribe and administer controlled substances in the State of Utah A non-exclusive list of potentially appropriate sanctions against the Respondent's licenses includes suspension, educational classes, probation, revocation and the issuance of appropriate fines, pursuant to Utah Code Ann § 58-67-402 and/or Utah Admin Code R156-17b-402

4 That the Respondent's licenses to practice as a physician and surgeon in the State of Utah and to prescribe and administer controlled substances in the State of Utah be revoked

DATED this 29th day of March, 2010

DAN LAU
Assistant Attorney General

VERIFICATION

STATE OF UTAH)
ss
COUNTY OF SALT LAKE)

Jared Memmott, being first duly sworn, hereby states as follows

1 I am an Investigator for the Bureau of Investigation, Division of Occupational and Professional Licensing, and have been assigned to investigate this case

2 I have read the foregoing Petition and am familiar with the contents thereof All of the factual allegations contained in the Petition are true and correct to the best of my knowledge, information and belief

JARED MEMMOTT
Investigator, Division of Occupational and Professional Licensing

SUBSCRIBED AND SWORN to before me, a Notary Public in and for the state of Utah, this 29th day of March, 2010

NOTARY PUBLIC