State of Tennessee
Department of State
Administrative Procedures Division
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8th Floor, William R. Snodgrass Tower
Nashville, Tennessee 37243-1102
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RECEIVED
DEC 10 2013
DEPT OF COMMERCE AND INSURANCE
LEGAL OFFICE

December 6, 2013

Commissioner Julie Mix McPeak
Tennessee Department of Commerce & Insurance
Office of Legal Counsel
12th Floor, Davy Crockett Tower
500 James Robertson Parkway
Nashville, Tennessee 37243-5065

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Nashville, TN 37243

Bart S. Posey
4676 Highway #41 North
Springfield, TN 37172

Bart S. Posey
3448 Forest Park Road
Springfield, TN 37172

RE: In the Matter of: Bart S. Posey Docket No. 12.01-121858J

Enclosed is an Initial Order rendered in connection with the above-styled case.

Administrative Procedures Division
Tennessee Department of State

/aem
Enclosure

The Department of State is an equal opportunity, equal access, affirmative action employer.

BEFORE THE COMMISSIONER OF THE TENNESSEE DEPARTMENT OF COMMERCE AND INSURANCE

IN THE MATTER OF:

BART S. POSEY **DOCKET NO. 12.01-121858J**

NOTICE

ATTACHED IS AN INITIAL ORDER RENDERED BY AN ADMINISTRATIVE JUDGE WITH THE ADMINISTRATIVE PROCEDURES DIVISION.

THE INITIAL ORDER IS NOT A FINAL ORDER BUT SHALL BECOME A FINAL ORDER UNLESS:

1. THE ENROLLEE FILES A WRITTEN APPEAL, OR EITHER PARTY FILES A PETITION FOR RECONSIDERATION WITH THE ADMINISTRATIVE PROCEDURES DIVISION NO LATER THAN **December 23, 2013.**

YOU MUST FILE THE APPEAL, PETITION FOR RECONSIDERATION WITH THE ADMINISTRATIVE PROCEDURES DIVISION. THE ADDRESS OF THE ADMINISTRATIVE PROCEDURES DIVISION IS:

SECRETARY OF STATE
ADMINISTRATIVE PROCEDURES DIVISION
WILLIAM R. SNODGRASS TOWER
312 ROSA PARKS AVENUE, 8th FLOOR
NASHVILLE, TENNESSEE 37243-1102

IF YOU HAVE ANY FURTHER QUESTIONS, PLEASE CALL THE ADMINISTRATIVE PROCEDURES DIVISION, **615/741-7008 OR 741-5042, FAX 615/741-4472.** PLEASE CONSULT APPENDIX A AFFIXED TO THE INITIAL ORDER FOR NOTICE OF APPEAL PROCEDURES.

BEFORE THE COMMISSIONER OF THE TENNESSEE DEPARTMENT COMMERCE AND INSURANCE

IN THE MATTER OF: **Tennessee Insurance Division,** **Petitioner,** **Vs.** **Bart Posey,** **Respondent.**	**DOCKET NO: 12.01-121858J**

INITIAL ORDER

This matter came to be heard on August 27, 2013, in Nashville, Tennessee, before Steve R. Darnell Administrative Law Judge, assigned by the Tennessee Secretary of State, Administrative Procedures Division, and sitting for the Commissioner of the Department of Commerce and Insurance. The Department was represented by attorney James R. Witham. Respondent was present for the hearing and not represented by counsel.

ISSUES FOR CONSIDERATION

1. Did Respondent offer, sell, market, advertise, or otherwise distribute a prescription drug discount plan in violation of Tennessee law?

2. What, if any, is the proper administrative penalty for Respondent's conduct?

SUMMARY OF DETERMINATION

After consideration the testimony, arguments of counsel, and the record as a whole, it is determined that Respondent made an inchoate attempt to distribute a prescription drug discount plain in violation of Tennessee law. It is further determined that a civil penalty of $500 is appropriate for his action. Revocation of Respondent's insurance producer's license is moot

since his license has already expired. This determination is based upon the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Respondent resides in Springfield, Tennessee. He is engaged in several business ventures including retail sales of frozen yogurt, management of rental properties, and selling insurance products. Respondent's insurance business was through a company named Smart Data Solutions. Respondent held Insurance Producer License 0807010 issued February 26, 1999. Respondent's Insurance Producer License license expired on March 31, 2009. He is not currently licensed to sell insurance in the State of Tennessee.

2. In April 2012, an investigator with the Department visited Respondent's office in Springfield, Tennessee concerning issues with Smart Data Solutions. Respondent's office was closed at the time of the visit. The investigator observed two websites advertised on Respondent's office door. One website was www.urplan.com and the other was www.freeurxplan.com.

3. The Department's investigator logged on both website when he returned to his office. Both websites offered to sell discount drug programs.

4. The Department's investigator submitted a request for information as directed by the websites using a fictitious name and e-mail account. The investigator was contacted by Respondent who requested additional information concerning which prescription drugs were needed.

5. Respondent provided the investigator the cost of the discount prescription plan and the cost of the identified prescription drugs using the plan. Respondent notified the Department's

investigator that his inquiry would be referred to another agent who would contact him shortly by telephone. The investigator provided a telephone number to Respondent.

6. The Department's investigator was later contacted by Eric with Ultimate RX in Houston, Texas by telephone. Eric advised the investigator what the cost would be to enroll in Ultimate RX discount prescription program. Eric further advised the investigator that Respondent would waive his fees.

7. Respondent has never obtained or held a valid certificate of registration from the Commissioner of Commerce and Insurance to operate a prescription drug discount plan.

8. Respondent established the two websites with the intention of charging a fee to consumers for referring them to prescription drug discount plans. The websites were functional for approximately six to ten months. Respondent's endeavor only went as far as setting up the websites.

9. Respondent's discount prescription endeavor had no employees, the inquiry by the Department's investigator was his only "business" generated by the website, no discount prescription plans were sold to consumers and no fees were ever collected.

10. According to Respondent, he intended to advise consumers on how to save money on prescription drugs and charge a fee for this advice.

11. Respondent was unaware of the need to register with the Commissioner to sell prescription drug discount plans in Tennessee. Respondent's testimony was credible.

12. Respondent, through his websites, undertook to "sell, market, promote, advertise or otherwise distribute a prescription drug discount plan in Tennessee without first complying with the registration provisions of" T.C.A. §§ 47-18-2701 and 47-18-2702.

CONCLUSIONS OF LAW

1. The Petitioner in this case has the burden to introduce evidence that, by a preponderance of the evidence, would prove the issues should be resolved in his favor. Rule 1360-4-1-.02.

2. TENN. CODE ANN. § 56-57-101 provides in relevant part as follows:

   (1) "Commissioner" means the commissioner of commerce and insurance;

   (2) "Department" means the department of commerce and insurance;

   (3) "Member" means any person who enrolls at no cost, or who pays fees, dues, charges or other consideration for the right to enroll to receive the purported benefits of a prescription drug discount plan;

   (4) "Operator" means any person that engages as principal in the business of offering, selling, marketing, advertising or otherwise distributing a prescription drug discount plan within this state. Operator does not include discount cards offered by a nonprofit association to its members as an incidental benefit to membership in the association; provided, that membership in the association entitles members to apply for insurance or other health benefits that are available only to members of the association;

   (5) "Person" means an individual, corporation, partnership, association, joint venture, joint stock company, trust, unincorporated organization, limited liability company, any similar entity, or any combination of these entities;

   (6) "Prescription drug" has the same meaning as the term is defined in § 63-10-204; and

(7) "Prescription drug discount plan" means any card or other purchasing mechanism or device, that is not insurance, that purports to offer discounts or access to discounts to any person for the retail purchase of prescription drugs from licensed pharmacies. A prescription drug discount plan does not include any drug discount card or drug benefit plan provided by a self-insured employer's group health benefits plan, or any prescription drug discount plan offered by an insurer licensed under this title in conjunction with health insurance.

3. TENN. CODE ANN. § 56-57-103 provides in relevant part as follows:

(a) An operator of a prescription drug discount plan must obtain a valid certificate of registration from the commissioner. The certificate shall be valid for one (1) year from the date of issuance. In order to receive a valid certificate of registration, the operator shall file an application on a form adopted by the commissioner, and provide or demonstrate to the commissioner each of the following:

(1) The name and principal place of business of the operator;

(2) A copy of the operator's promotional materials that are distributed to prospective members;

(3) A list of drugs and drug classifications that make up the drug discount plan, or a notation that the plan is an open formulary; and

(4) The name and address of the agent in this state for service of process.

(b) Notwithstanding any law to the contrary, it shall be unlawful and a violation of this chapter for any operator, after August 1, 2005, to sell, market, promote, advertise or otherwise distribute a prescription drug discount plan in Tennessee

without first complying with the registration provisions of this chapter, and complying with §§ 47-18-2701 and 47-18-2702.

4. TENN. CODE ANN. § 56-57-106 provides in relevant part as follows:

> After notice and hearing, the commissioner may levy an administrative penalty, in an amount up to ten thousand dollars ($10,000), for each violation of the registration provisions of this chapter. Each day of a continuing violation constitutes a separate violation for purposes of this chapter.

5. Pursuant to TENN. CODE ANN. § 56-6-112(a) (2011), "[t]he commissioner may place on probation, suspend, revoke or refuse to issue or renew a license issued under this part or may levy a civil penalty in accordance with this section or take any combination of those actions, for any one (1) or more of the following causes:

> . . .
>
> (2) Violating any law, rule, regulation, subpoena or order of the commissioner or of another state's commissioner;
>
> . . .
>
> (8) Using fraudulent, coercive, or dishonest practices, or demonstrating incompetence, untrustworthiness or financial irresponsibility in the conduct of business in this state or elsewhere;"

6. Pursuant to TENN. CODE ANN. § 56-6-112(g) (2011), "If, after providing notice consistent with the process established by § 4-5-320(c), and providing the opportunity for a contested case hearing held in accordance with the Uniform Administrative Procedures Act, compiled in title 4, chapter 5, the commissioner finds that any person required to be licensed, permitted, or authorized by the division of insurance pursuant to this chapter has violated any statute, rule or order, the commissioner may, at the commissioner's

discretion, order:

(1) The person to cease and desist from engaging in the act or practice giving rise to the violation;

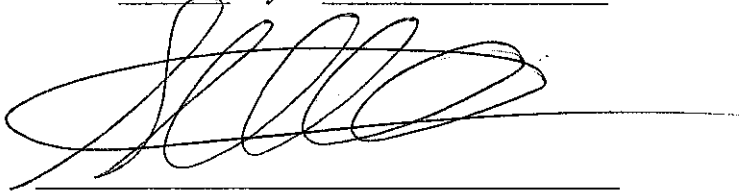
(2) Payment of a monetary penalty of not more than one thousand dollars ($1,000) for each violation, but not to exceed an aggregate penalty of one hundred thousand dollars ($100,000). This subdivision (g)(2) shall not apply where a statute or rule specifically provides for other civil penalties for the violation. For purposes of this subdivision (g)(2), each day of continued violation shall constitute a separate violation; and

~~(3) The suspension or revocation of the person's license."~~

7. Respondent offered, sold, marketed, advertised, or otherwise distributed a prescription drug discount plan in the State of Tennessee without first obtaining a valid certificate of registration from the Commissioner in violation of TENN. CODE ANN. § 56-57-103.

IT IS THEREFORE ORDERED that Petitioner is assessed an administrative penalty of $1,000 as well as the cost of this cause.

This Initial Order entered and effective this 6TH day of DEC. 2013.



Steve R. Darnell
Administrative Law Judge

Filed in the Administrative Procedures Division, Office of the Secretary of State, this 6TH day of DECEMBER 2013.

J. Richard Collier

J. Richard Collier, Director
Administrative Procedures Division

APPENDIX A TO INITIAL ORDER
NOTICE OF APPEAL PROCEDURES

Review of Initial Order

This Initial Order shall become a Final Order (reviewable as set forth below) fifteen (15) days after the entry date of this Initial Order, unless either or both of the following actions are taken:

(1) A party files a petition for appeal to the agency, stating the basis of the appeal, or the agency on its own motion gives written notice of its intention to review the Initial Order, within fifteen (15) days after the entry date of the Initial Order. If either of these actions occurs, there is no Final Order until review by the agency and entry of a new Final Order or adoption and entry of the Initial Order, in whole or in part, as the Final Order. A petition for appeal to the agency must be filed within the proper time period with the Administrative Procedures Division of the Office of the Secretary of State, 8th Floor, William R. Snodgrass Tower, 312 Rosa L. Parks Avenue, Nashville, Tennessee, 37243-1102. (Telephone No. (615) 741-7008). See Tennessee Code Annotated, Section (T.C.A. §) 4-5-315, on review of initial orders by the agency.

(2) A party files a petition for reconsideration of this Initial Order, stating the specific reasons why the Initial Order was in error within fifteen (15) days after the entry date of the Initial Order. This petition must be filed with the Administrative Procedures Division at the above address. A petition for reconsideration is deemed denied if no action is taken within twenty (20) days of filing. A new fifteen (15) day period for the filing of an appeal to the agency (as set forth in paragraph (1) above) starts to run from the entry date of an order disposing of a petition for reconsideration, or from the twentieth day after filing of the petition, if no order is issued. See T.C.A. §4-5-317 on petitions for reconsideration.

A party may petition the agency for a stay of the Initial Order within seven (7) days after the entry date of the order. See T.C.A. §4-5-316.

Review of Final Order

Within fifteen (15) days after the Initial Order becomes a Final Order, a party may file a petition for reconsideration of the Final Order, in which petitioner shall state the specific reasons why the Initial Order was in error. If no action is taken within twenty (20) days of filing of the petition, it is deemed denied. See T.C.A. §4-5-317 on petitions for reconsideration.

A party may petition the agency for a stay of the Final Order within seven (7) days after the entry date of the order. See T.C.A. §4-5-316.

YOU WILL NOT RECEIVE FURTHER NOTICE OF THE INITIAL ORDER BECOMING A FINAL ORDER

A person who is aggrieved by a final decision in a contested case may seek judicial review of the Final Order by filing a petition for review in a Chancery Court having jurisdiction (generally, Davidson County Chancery Court) within sixty (60) days after the entry date of a Final Order or, if a petition for reconsideration is granted, within sixty (60) days of the entry date of the Final Order disposing of the petition. (However, the filing of a petition for reconsideration does not itself act to extend the sixty day period, if the petition is not granted.) A reviewing court also may order a stay of the Final Order upon appropriate terms. See T.C.A. §4-5-322 and §4-5-317.