

**Office of Professional Licensure and Certification
Enforcement Division
New Hampshire Board of Pharmacy
7 Eagle Square
Concord, N.H. 03301**

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The information in this report is CONFIDENTIAL and exempt from the provisions of RSA 91-A. Its contents may not be disclosed except as permitted by Statute and the Administrative Rules of this Board. *See* RSA 318:30, I; Ph 204.08 (a).

Licensee: Omnicare of New Hampshire
License No.: 0514
OPLC Case No: 2022-PHA-OMNICARE-0620 & 2022-PHA-WENO-0093
Hearing Counsel: TBD
Investigator: James (Jay) M. Queenan, R.Ph. MBA
Date of Report: July 25, 2022

REPORT OF INVESTIGATION

I. Origin and Nature of Allegations

Dr. Kim Whitesell, a New Hampshire licensed psychiatrist, attempting to comply with a recently passed legislation, was unable to electronically prescribe controlled substances to several pharmacies including Omnicare of New Hampshire (Omnicare). Omnicare is located 13 Commerce Drive Londonderry, New Hampshire 03053. The facility would not accept eprescriptions from the Weno Exchange, Dr. Whitesell's electronic prescription application.

II. Sources of Information

Documents

4/17/19 Federal Trade Commissioner vs Surescripts
Complaint for Injunction and other Equitable relief filed 4/17/19 Exhibit1
1/20/20 Civil Action No. 19-1080 (JDB) Exhibit 2
5/21/20 Civil Action No. 19-1080 (JDB) Exhibit 3
12/23/21 Prescription to CVS Pharmacy 118 Central Ave. Dover NH
1/13/22 & 1/14/22 Email Exchange Dr. Kim Whitesell, Robert Stout R.Ph. and State Rep. Gary Merchant
1/18/22 Email from Dr. Kim Whitesell to OPLC
1/21/22 Email from Dr. Kim Whitesell to OPLC
3/17/22 Email from Dr. Kim Whitesell to CI Queenan
3/16/22 Email request from CI Queenan to Dr. Kim Whitesell

3/17/22 Email from Dr. Kim Whitesell

4/26/22 FTC Accus0es Superscripts of 'alternative reality' in antitrust case

5/2/22 Report of Controlled Substance prescriptions filled from January 1, 2022, through March 18, 2022, ordered by Dr. K. Whitesell to Omnicare.

5/2/22 Report of Non-Controlled prescriptions filled from January 1, 2022, through March 18, 2022, ordered by Dr. K. Whitesell to Omnicare

5/2/22 Twelve (12) Prescriptions prescribed by Dr. Kim Whitesell and signed after 1/1/22 (Not electronically prescribed)

5/2/22 Eight (8) Prescriptions prescribed by Dr. Kim Whitesell and signed before 12/31/21 (Not electronically prescribed) prior to the initiation of RSA 318:47-c III.

III. Background

Dr. Kim Whitesell is a 1990 graduate of the University of California San Francisco School of Medicine. She did her residency at Yale in New Haven Connecticut. She was certified by the American Board of Psychiatry and Neurology. She is licensed to practice medicine in New Hampshire.

Switch / Switches. Switch / Switches connect different devices to send, receive or forward data packets or data frames over the network. In health care they interconnect and route secure data to targeted providers, pharmacies, Prescription Benefit Manager (PBM) and insurance companies.

Weno Exchange is a Texas based electronic prescribing and transmitting intermediary. According to their website *"WENO Online is our stand-alone eRx system which connects to WENO's intermediary service and has a DEA approved audit for EPCS use (electronic prescribing of controlled substances for US DEA registrant practitioners)."* It is both a prescribing application and a "switch" that facilitates electronic prescribing transactions / transmissions of the prescription directly to the pharmacy.

Surescripts according to the website *"Surescripts aligns nearly all electronic health records (EHR) vendors, pharmacy benefit managers, pharmacies and clinicians in the U.S., plus health plans, long-term and post-acute care organizations, specialty hubs and specialty pharmacy organizations. All of these people and organizations working together make up the Surescripts Network Alliance."*

"Arlington, Va.-based Surescripts is owned by the National Association of Chain Drug Stores (NACDS), National Community Pharmacists Association (NCPA), CVS Health and Express Scripts. Its Surescripts Network Alliance includes virtually all electronic health records, pharmacy benefit managers, pharmacies and clinicians, plus an increasing number of health plans, long-term and post-acute care organizations and specialty pharmacy organizations." According to an article by Health Care Innovations.

IV. Results of Investigation

On January 13 and 14 Dr. Kim Whitesell reached out then President of the New Hampshire Pharmacist Association, Robert Stout, with a complaint. Her complaint was that pharmacies would not accept her electronically prescribed controlled substance prescriptions.

Dr. Whitesell enrolled in an electronic prescribing prescription application called Weno Exchange. Weno Exchange, according to their web site complies with DEA Federal regulation for electronic prescribing. Weno Exchange is approved in several states such as California and Nevada.

Mr. Stout referred Dr. Whitesell to both OPLC Enforcement, specifically CI Queenan, and State Representative Gary Merchant a sponsor of the prescribing legislation RSA 318:47-c III. The legislation requires electronic prescribing with several notable exceptions but does not mandate that all electronic prescription transaction companies be accepted by pharmacies.

Weno Exchange has developed software and performs “switches” allowing the transfer of prescriptions from a provider to the pharmacy circumventing Surescripts. Weno Exchanges claims “Pharmacies who receive eprescriptions or EPCS orders from Weno Prescribers will be given a free Weno online account which allows them to stay in compliance with DEA, federal and state rules until their own pharmacy software systems can connect to Weno’s eprescribing intermediary service.”

OMNICARE SPECIFIC

From January 1, 2022, through February 16, 2022, Dr. Whitesell attempted to send nine electronic controlled substances prescriptions via Weno Exchange to Omnicare. From January 1, 2022, through March 18, 2022, Omnicare filled twelve controlled prescriptions ordered by Dr. Whitesell all being transmitted as faxed prescriptions. Omnicare did not accept any electronic prescriptions from Weno Exchange.

CVS Corporation owns Omnicare. Surescripts, according to their website, is privately owned by CVS Health and Express Scripts. the National Association of Chain Drug Stores (NACDS), National Community Pharmacists Association (NCPA), Surescripts generates revenue from transactions regardless of the prescription preparation. Surescripts oversaw over 17.7 billion transactions in 2018 according to Healthcare Innovation.

Surescripts appears to be a monopoly. An extract from the Civil Action 19-1080 (JDB) states “The Federal Trade Commission (FTC) brought action against health information technology company {Surescripts} alleging a monomialization claim under the Sherman act for maintaining a monopoly in two markets through anticompetitive conduct...” Surescripts generates revenue from the a fee charged to pharmacies for electronic transmissions of prescriptions from the prescriber to the pharmacy. It also generated revenue when pharmacies send electronic transmissions to PBM for formulary compatibility. This fee is billed to the PBM.

I. LAWS AND RULES FOR CONSIDERATION:

Ph 501.01 Standards of Conduct.

(a) The ethical standards set forth in this part shall bind all licensees, and violation of any such standard shall be a basis for the imposition of disciplinary sanctions.

(b) A licensed pharmacist shall:

(5) Observe the law, uphold the dignity and honor of the profession, and accept its ethical principles;

(6) Not engage in any activity that will bring discredit to the profession and shall expose, without fear or favor, illegal or unethical conduct in the profession;

(7) Seek at all times only fair and reasonable remuneration for services rendered;

(8) Never agree to or participate in transactions with practitioners of other health professions or any other person under which fees are divided or which might cause financial or other exploitation in connection with the rendering of their professional services;

II. RECOMMENDATION:

The documentation indicates that the decision to not accept eprescription orders from Weno Exchange is made on a corporate level. The major violation is a restraint of trade which is likely outside than the scope of the Board of Pharmacy, but the Board is not powerless to act.

The New Hampshire Board of Pharmacy may refer this complaint to the State of New Hampshire Attorney General for criminal investigation.

The New Hampshire Board of Pharmacy may initiate and support legislation that amends RSA 318:47-c III to require that all compliant electronic prescribing computer applications be accepted by pharmacies.