BILL LOCKYER, Attorney General
of the State of California
JOSEPH N. ZIMRING, State Bar No. 185916
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Attorneys for Complainant

BEFORE THE
BOARD OF PHARMACY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the First Amended Accusation Against: R & W PHARMACY SERVICES, INC. 165 B Pointdexter Avenue Moorpark, CA 93021 PATTI JO REED, President/Treasurer/CEO ARTHUR HOWARD BERGER, Secretary Original Pharmacy Permit No. PHY 43143 And ARTHUR HOWARD BERGER 30061 Torre Pines Place Agoura Hills, CA 91301 Pharmacist-in-Charge Original Pharmacist License No. RPH 30997 Respondent.	Case No. 2279 OAH No. L-2003110259 **STIPULATED SETTLEMENT AND DISCIPLINARY ORDER**

In the interest of a prompt and speedy settlement of this matter, consistent with the public interest and the responsibility of the Board of Pharmacy of the Department of Consumer Affairs, Complainant Patricia F. Harris and Respondent Arthur Howard Berger agree to the following Stipulated Settlement and Disciplinary Order which will be submitted to the Board for approval and adoption as the final disposition of the Accusation solely with respect to Respondent Berger. This stipulation does not apply to R & W Pharmacy Services, Inc.

PARTIES

1. Patricia F. Harris (Complainant) is the Executive Officer of the Board of Pharmacy. She brought this action solely in her official capacity and is represented in this matter by Bill Lockyer, Attorney General of the State of California, by Joseph N. Zimring, Deputy Attorney General.

2. Respondent Arthur Howard Berger is represented in this proceeding by attorney Donald B. Brown, whose address is 3848 Carson Street, Suite 206, Torrance, CA 90503.

3. On or about July 29, 1977, the Board issued Pharmacy Original Pharmacist License No. RPH 30997 to Respondent Berger to practice pharmacy. The Original Pharmacist License will expire on April 30, 2006, unless renewed.

JURISDICTION

3. Accusation No. 2279 was filed before the Board of Pharmacy on September 29, 2003. A First Amended Accusation was filed on December 16, 2003 and is currently pending against Respondent. The accusations and all other statutorily required documents were properly served on Respondent. Respondent timely filed his Notice of Defense contesting the Accusation. The First Amended Accusation is incorporated by reference.

ADVISEMENT AND WAIVERS

4. Respondent has carefully read, fully discussed with counsel, and understands the charges and allegations in the First Amended Accusation. Respondent has also carefully read, fully discussed with counsel, and understands the effects of this Stipulated Settlement and Disciplinary Order.

5. Respondent is fully aware of his legal rights in this matter, including the right to a hearing on the charges and allegations in the Accusation; the right to be represented by counsel at his own expense; the right to confront and cross-examine the witnesses against him; the right to present evidence and to testify on his own behalf; the right to the issuance of subpoenas to compel the attendance of witnesses and the production of documents; the right to

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reconsideration and court review of an adverse decision; and all other rights accorded by the California Administrative Procedure Act and other applicable laws.

6. Respondent voluntarily, knowingly, and intelligently waives and gives up each and every right set forth above.

CULPABILITY

7. Respondent admits the truth of each and every charge and allegation in Accusation No. 2279.

8. Respondent agrees that his Original Pharmacy Permit is subject to discipline and he agrees to be bound by the Board's imposition of discipline as set forth in the Disciplinary Order below.

RESERVATION

9. The admissions made by Respondent are only for the purposes of this proceeding, or any other proceedings in which the Board of Pharmacy or other professional licensing agency is involved, and shall not be admissible in any other criminal or civil proceeding.

COOPERATION

10. Respondent Berger agrees that he will cooperate with the prosecution of this case. This includes providing all documents in his possession or control which are relevant to the allegations in the amended accusation to Complainant. Respondent Berger also agrees to testify at the hearing on the allegations in the amended accusation and will provide truthful testimony regarding his knowledge of the allegations in the amended accusation.

CONTINGENCY

11. This stipulation shall be subject to approval by the Board of Pharmacy. Respondent understands and agrees that counsel for Complainant and the staff of the Board of Pharmacy may communicate directly with the Board regarding this stipulation and settlement, without notice to or participation by Respondent or its counsel. By signing the stipulation, Respondent understands and agrees that he may not withdraw his agreement or seek to rescind the stipulation prior to the time the Board considers and acts upon it. If the Board fails to adopt

this stipulation as its Decision and Order, the Stipulated Settlement and Disciplinary Order shall be of no force or effect, except for this paragraph, it shall be inadmissible in any legal action between the parties, and the Board shall not be disqualified from further action by having considered this matter.

12. The parties understand and agree that facsimile copies of this Stipulated Settlement and Disciplinary Order, including facsimile signatures thereto, shall have the same force and effect as the originals.

13. In consideration of the foregoing admissions and stipulations, the parties agree that the Board may, without further notice or formal proceeding, issue and enter the following Disciplinary Order:

DISCIPLINARY ORDER

IT IS HEREBY ORDERED that Original Pharmacist License No. RPH 30997 issued to Respondent Arthur Howard Berger is revoked. However, the revocation is stayed and Respondent is placed on probation for three (3) years on the following terms and conditions.

1. **Actual Suspension.** Original Pharmacist License No. RPH 30997 is suspended for a period of sixty (60) days.

During suspension, Respondent shall not enter any pharmacy area or any portion of the licensed premises of a wholesaler, veterinary food-animal drug retailer or any other distributor of drugs which is licensed by the Board, or any manufacturer, or where dangerous drugs and devices or controlled substances are maintained. Respondent shall not practice pharmacy nor do any act involving drug selection, selection of stock, manufacturing, compounding, dispensing or patient consultation; nor shall Respondent manage, administer, or be a consultant to any licensee of the Board, or have access to or control the ordering, manufacturing or dispensing of dangerous drugs and devices or controlled substances.

Respondent shall not engage in any activity that requires the professional judgment of a pharmacist. Respondent shall not direct or control any aspect of the practice of pharmacy. Respondent shall not perform the duties of a pharmacy technician or an exemptee for any entity licensed by the Board. Subject to the above restrictions, Respondent may continue to

own or hold an interest in any pharmacy in which he holds an interest at the time this decision becomes effective unless otherwise specified in this order.

2. **Obey All Laws.** Respondent shall obey all state and federal laws and regulations substantially related to or governing the practice of pharmacy.

Respondent shall report any of the following occurrences to the Board, in writing, within 72 hours of such occurrence:

- an arrest or issuance of a criminal complaint for violation of any provision of the Pharmacy Law, state and federal food and drug laws, or state and federal controlled substances laws;
- a plea of guilty or nolo contendere in any state or federal criminal proceeding to any criminal complaint, information or indictment;
- a conviction of any crime;
- discipline, citation, or other administrative action filed by any state and federal agency which involves Respondent's license or which is related to the practice of pharmacy or the manufacturing, obtaining, handling or distribution or billing or charging for any drug, device or controlled substance.

3. **Reporting to the Board.** Respondent shall report to the Board quarterly. The report shall be made either in person or in writing, as directed. Respondent shall state under penalty of perjury whether there has been compliance with all the terms and conditions of probation. If the final probation report **is not** made as directed, probation shall be extended automatically until such time as the final report is made and accepted by the Board.

4. **Interview with the Board.** Upon receipt of reasonable notice, Respondent shall appear in person for interviews with the Board upon request at various intervals at a location to be determined by the Board. Failure to appear for a scheduled interview without prior notification to Board staff shall be considered a violation of probation.

5. **Cooperation with Board Staff.** Respondent shall cooperate with the Board's inspectional program and in the Board's monitoring and investigation of Respondent's

compliance with the terms and conditions of the probation. Failure to comply shall be considered a violation of probation.

6. **Continuing Education.** Respondent shall provide evidence of efforts to maintain skill and knowledge as a pharmacist as directed by the Board.

7. **Notice to Employers.** Respondent shall notify all present and prospective employers of the decision in case number 2279 and the terms, conditions and restrictions imposed on Respondent by the decision. Within 30 days of the effective date of this decision, and within 15 days of Respondent undertaking new employment, Respondent shall cause their direct supervisor, pharmacist-in-charge and/or owner to report to the Board in writing acknowledging the employer has read the decision in case number 2279.

If Respondent works for or is employed by or through a pharmacy employment service, Respondent must notify the direct supervisor, pharmacist-in-charge, and/or owner at every pharmacy of the and terms conditions of the decision in case number 2279 in advance of the Respondent commencing work at each pharmacy.

"Employment" within the meaning of this provision shall include any full-time, part-time, temporary, relief or pharmacy management service as a pharmacist, whether the Respondent is considered an employee or independent contractor.

8. **No Preceptorships, Supervision of Interns, Being Pharmacist-in-Charge (PIC), or Serving as a Consultant.** Respondent shall not supervise any intern pharmacist or perform any of the duties of a preceptor, nor shall Respondent be the pharmacist-in-charge of any entity licensed by the Board unless otherwise specified in this order.

9. **Reimbursement of Board Costs.** Respondent shall pay to the Board its costs of investigation and prosecution in the amount of $6,000. Respondent shall make said payments in monthly installments of $500, beginning the first day of the month following the effective date of this decision.

The filing of bankruptcy by Respondent shall not relieve Respondent of their responsibility to reimburse the Board its costs of investigation and prosecution.

10. **Probation Monitoring Costs.** Respondent shall pay the costs associated with probation monitoring as determined by the Board each and every year of probation. Such costs shall be payable to the Board at the end of each year of probation. Failure to pay such costs shall be considered a violation of probation.

11. **Status of License.** Respondent shall, at all times while on probation, maintain an active current license with the Board, including any period during which suspension or probation is tolled.

If Respondent's license expires or is cancelled by operation of law or otherwise, upon renewal or reapplication, Respondent's license shall be subject to all terms and conditions of this probation not previously satisfied.

12. **License Surrender while on Probation/Suspension.** Following the effective date of this decision, should Respondent cease practice due to retirement or health, or be otherwise unable to satisfy the terms and conditions of probation, Respondent may tender his license to the Board for surrender. The Board shall have the discretion whether to grant the request for surrender or take any other action it deems appropriate and reasonable. Upon formal acceptance of the surrender of the license, Respondent will no longer be subject to the terms and conditions of probation.

Upon acceptance of the surrender, Respondent shall relinquish his pocket license to the Board within 10 days of notification by the Board that the surrender is accepted. Respondent may not reapply for any license from the Board for three years from the effective date of the surrender. Respondent shall meet all requirements applicable to the license sought as of the date the application for that license is submitted to the Board.

13. **Notification of Employment/Mailing Address Change.** Respondent shall notify the Board in writing within 10 days of any change of employment. Said notification shall include the reasons for leaving and/or the address of the new employer, supervisor or owner and work schedule if known. Respondent shall notify the Board in writing within 10 days of a change in name, mailing address or phone number.

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14. **Tolling of Probation.** Should Respondent, regardless of residency, for any reason cease practicing pharmacy for a minimum of 80 hours per calendar month in California, Respondent must notify the Board in writing within 10 days of cessation of the practice of pharmacy or the resumption of the practice of pharmacy. Such periods of time shall not apply to the reduction of the probation period. It is a violation of probation for Respondent's probation to remain tolled pursuant to the provisions of this condition for a period exceeding three years.

"Cessation of practice" means any period of time exceeding 30 days in which Respondent is not engaged in the practice of pharmacy as defined in Section 4052 of the Business and Professions Code.

15. **Violation of Probation.** If Respondent violates probation in any respect, the Board, after giving Respondent notice and an opportunity to be heard, may revoke probation and carry out the disciplinary order which was stayed. If a petition to revoke probation or an accusation is filed against Respondent during probation, the Board shall have continuing jurisdiction and the period of probation shall be extended, until the petition to revoke probation or accusation is heard and decided.

If Respondent has not complied with any term or condition of probation, the Board shall have continuing jurisdiction over Respondent, and probation shall automatically be extended until all terms and conditions have been satisfied or the Board has taken other action as deemed appropriate to treat the failure to comply as a violation of probation, to terminate probation, and to impose the penalty which was stayed.

16. **Completion of Probation.** Upon successful completion of probation, Respondent's license will be fully restored.

17. **No Ownership of Premises.** Respondent shall not own, have any legal or beneficial interest in, or serve as a manager, administrator, member, officer, director, associate, or partner of any business, firm, partnership, or corporation currently or hereinafter licensed by the Board. Respondent shall sell or transfer any legal or beneficial interest in any

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entity licensed by the Board within 90 days following the effective date of this decision and shall immediately thereafter provide written proof thereof to the Board.

18. **Tolling of Suspension.** If Respondent leaves California to reside or practice outside this state, for any period exceeding 10 days (including vacation), Respondent must notify the Board in writing of the dates of departure and return. Periods of residency or practice outside the state - or any absence exceeding a period of 10 days shall not apply to the reduction of the suspension period.

Respondent shall not practice pharmacy upon returning to this state until notified by the Board that the period of suspension has been completed.

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ACCEPTANCE

I have carefully read the above Stipulated Settlement and Disciplinary Order and have fully discussed it with my attorney, Donald B. Brown. I understand the stipulation and the effect it will have on my Original Pharmacy Permit. I agree to all of the terms of the stipulation. I enter into this Stipulated Settlement and Disciplinary Order voluntarily, knowingly, and intelligently, and agree to be bound by the Decision and Order of the Board of Pharmacy.

DATED: MAY 17 2005.

ARTHUR HOWARD BERGER
Respondent

I have read and fully discussed with Respondent R & W Pharmacy Services, Inc. the terms and conditions and other matters contained in the above Stipulated Settlement and Disciplinary Order. I approve its form and content.

DATED: MAY 17 2005.

DONALD B. BROWN
Attorney for Respondent Berger

ENDORSEMENT

The foregoing Stipulated Settlement and Disciplinary Order is hereby respectfully submitted for consideration by the Board of Pharmacy of the Department of Consumer Affairs.

DATED: _____.

BILL LOCKYER, Attorney General
of the State of California

JOSEPH N. ZIMRING
Deputy Attorney General

Attorneys for Complainant

DOJ Matter ID: LA2000AD0169
50040540.wpd

ACCEPTANCE

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DATED: _____.

ARTHUR HOWARD BERGER
Respondent

I have read and fully discussed with Respondent R & W Pharmacy Services, Inc. the terms and conditions and other matters contained in the above Stipulated Settlement and Disciplinary Order. I approve its form and content.

DATED: _____.

DONALD B. BROWN
Attorney for Respondent Berger

ENDORSEMENT

The foregoing Stipulated Settlement and Disciplinary Order is hereby respectfully submitted for consideration by the Board of Pharmacy of the Department of Consumer Affairs.

DATED: 5/17/2005.

BILL LOCKYER, Attorney General
of the State of California

JOSEPH N. ZIMRING
Deputy Attorney General

Attorneys for Complainant

DOJ Matter ID: LA2000AD0169
50040540.wpd

BEFORE THE
BOARD OF PHARMACY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the First Amended Accusation Against: R & W PHARMACY SERVICES, INC. 165 B Pointdexter Avenue Moorpark, CA 93021 PATTI JO REED, President/Treasurer/CEO ARTHUR HOWARD BERGER, Secretary Original Pharmacy Permit No. PHY 43143 And ARTHUR HOWARD BERGER 30061 Torre Pines Place Agoura Hills, CA 91301 Pharmacist-in-Charge Original Pharmacist License No. RPH 30997 Respondent.	Case No. 2279 OAH No. L-2003110259

DECISION AND ORDER

The attached Stipulated Settlement and Disciplinary Order is hereby adopted by the Board of Pharmacy, Department of Consumer Affairs, as its Decision in this matter.

This Decision shall become effective on August 12, 2005.

It is so ORDERED July 13, 2005.

BOARD OF PHARMACY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

By

STANLEY W. GOLDENBERG
Board President

BILL LOCKYER, Attorney General
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Attorneys for Complainant

BEFORE THE
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In the Matter of the Accusation Against: R & W PHARMACY SERVICES, INC. 165 B Pointdexter Avenue Moorpark, CA 93021 PATTI JO REED, President/Treasurer/CEO ARTHUR HOWARD BERGER, Secretary Original Pharmacy Permit No. PHY 43143 And ARTHUR HOWARD BERGER 30061 Torre Pines Place Agoura Hills, CA 91301 Pharmacist-in-Charge Original Pharmacist License No. RPH 30997 Respondent.	Case No. 2279 **FIRST AMENDED ACCUSATION**

Complainant alleges:

PARTIES

1. Patricia F. Harris (Complainant) brings this Accusation solely in her official capacity as the Executive Officer of the Board of Pharmacy, Department of Consumer Affairs (Board).

2. On or about October 7, 1997, the Board issued Original Pharmacy Permit No. PHY 43143 to R & W Pharmacy Services, Inc. (Respondent "R & W Pharmacy") to do

business at 165 B Pointdexter Avenue, Moorpark, CA 93021. The corporate officers from October 7, 1997 through December 31, 1999 were Peter B. Wollons, President, and Patti Jo Reed, Vice President. Board records further show that Patti Jo Reed has been President, Treasurer, and Chief Executive Officer, and Arthur Howard Berger has been Secretary, since December 31, 1999. The Original Pharmacy Permit was in full force and effect at all times relevant to the charges brought herein and will expire on October 1, 2003, unless renewed.

3. On or about July 29, 1977, the Board issued Pharmacy Original Pharmacist License No. RPH 30997 to Arthur Howard Berger to practice pharmacy. (Respondent "Berger"). Respondent Berger has been the Pharmacist-in-Charge for Respondent R & W Pharmacy, since October 7, 1997. The Original Pharmacist License will expire on April 30, 2004, unless renewed.

JURISDICTION

4. This Accusation is brought before the Board, under the authority of the below mentioned statutes and regulations.[1]

5. Section 4300 provides, in pertinent part, that every license issued by the Board is subject to discipline, including suspension or revocation.

6. Section 4301states:

"The board shall take action against any holder of a license who is guilty of unprofessional conduct or whose license has been procured by fraud or misrepresentation or issued by mistake. Unprofessional conduct shall include, but is not limited to, any of the following:

. . . .

"(f) The commission of any act involving moral turpitude, dishonesty, fraud, deceit, or corruption, whether the act is committed in the course of relations as a licensee or otherwise, and whether the act is a felony or misdemeanor or not.

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1. All statutory references are to the Business and Professions Code (Code) unless otherwise indicated.

"(g) Knowingly making or signing any certificate or other document that falsely represents the existence or nonexistence of a state of facts.

. . . .

"(j) The violation of any of the statutes of this state of the United States regulating controlled substances and dangerous drugs.

. . . .

"(o) Violating or attempting to violate, directly or indirectly, or assisting in or abetting the violation of or conspiring to violate any provision or term of this chapter or of the applicable federal and state laws and regulations governing pharmacy, including regulations established by the board."

7. Section 118, subdivision (b) of the Code, provides that the suspension, expiration, or forfeiture by operation of law of a license does not deprive the Board of authority or jurisdiction to institute or continue with disciplinary action against the license or to order suspension or revocation of the license, during the period within which the license may be renewed, restored, reissued or reinstated.

8. Section 4081 states, in pertinent part:

"(a) All records of manufacture and of sale, acquisition, or disposition of dangerous drugs or dangerous devices shall be at all times during business hours open to inspection by authorized officers of the law, and shall be preserved for at least three years from the date of making. A current inventory shall be kept by every manufacturer, wholesaler, pharmacy, veterinary food-animal drug retailer, physician, dentist, podiatrist, veterinarian, laboratory, clinic, hospital, institution, or establishment holding a currently valid and unrevoked certificate, license, permit, registration, or exemption under Division 2 (commencing with Section 1200) of the Health and Safety Code or under Part 4 (commencing with Section 16000) of Division 9 of the Welfare and Institutions Code who maintains a stock of dangerous drugs or dangerous devices.

"(b) The owner, officer, and partner of any pharmacy, wholesaler, or veterinary food-animal drug retailer shall be jointly responsible, with the pharmacist-in-charge or exemptee,

for maintaining the records and inventory described in this section."

9. Section 4113, subdivision (b) states:

"The pharmacist-in-charge shall be responsible for a pharmacy's compliance with all state and federal laws and regulations pertaining to the practice of pharmacy."

10. Section 4160, subdivision (a) states:

"No person shall act as a wholesaler of any dangerous drug or dangerous device unless he or she has obtained a license from the board. Upon approval by the board and the payment of the required fee, the board shall issue a license to the applicant."

11. Section 4332 states:

"Any person who fails, neglects, or refuses to maintain the records required by Section 4081 or who when called upon by an authorized officer or a member of the Board, fails, neglects, or refuses to produce or provide the records within a reasonable time, or who willfully produces or furnishes records that are false, is guilty of a misdemeanor."

12. Section 4380 provides, in pertinent part, that the resale, by any person, of drugs acquired at preferentially low prices permitted under federal law only because of the Nonprofit Institutions Act (15 U.S.C. Sec.13c) is prohibited.

13. California Code of Regulations, title 16, section 1718 states:

"Current Inventory" as used in Sections 4081 and 4332 of the Business and Professions Code shall be considered to include complete accountability for all dangerous drugs handled by every licensee enumerated in Sections 4081 and 4332. The controlled substances inventories required by Title 21, CFR, Section 1304 shall be available for inspection upon request for at least 3 years after the date of inventory."

14. California Code of Regulations, title 16, section 1709.1 provides, in pertinent part, that the pharmacist-in-charge of a pharmacy shall be employed at that location and shall have responsibility for the daily operation of the pharmacy.

15. Section 125.3 states, in pertinent part, that the Board may request the administrative law judge to direct a licentiate found to have committed a violation or violations of the licensing act to pay a sum not to exceed the reasonable costs of the investigation and

enforcement of the case.

FIRST CAUSE FOR DISCIPLINE

(Failure to Produce Records)

16. Respondents and each of them are subject to disciplinary action under sections 4301(g), 4301(j), 4081(a), 4081(b), and 4332 of the Code, in conjunction with California Code of Regulations, title 16, section 1718, for unprofessional conduct, in that Respondents failed to produce the records of acquisition and disposition on June 16, 1999, during normal business hours when demanded by a Board inspector. Specifically, Respondents failed to provide complete records in a timely manner, in that Respondents provided only acquisition records for an amount of $485,164.71 in dangerous drugs for the audit period of January 1 through June 16, 1999, when Respondents had purchased $6,968,612.84 in dangerous drugs.

SECOND CAUSE FOR DISCIPLINE

(Violated Federal Prescription Drug Marketing Act)

17. Respondents and each of them are subject to disciplinary action under sections 4301 and 4380 of the Code, for unprofessional conduct, in that Respondents purchased millions of dollars of drugs at preferentially low prices for the use of eligible non-profit institutions and their patients. Respondents then knowingly and intentionally distributed them to unknown recipients for their use, for other than the intended and legal purpose, under the circumstances and at prices that took unfair advantage of competing pharmacies.

THIRD CAUSE FOR DISCIPLINE

(Wholesaling Without a License)

18. Respondents and each of them are subject to disciplinary action under section 4160 and of the Code, for unprofessional conduct, in that Respondents sold dangerous drugs to Montana Pharmacy Services, Inc., in Kalispell, Montana for the use of that pharmacy, in the amount of $6,590,117.02, between January 11, 1999 and June 28, 1999, without being licensed to do so.

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FOURTH CAUSE FOR DISCIPLINE

(Unprofessional Conduct)

19. Respondents and each of them are subject to disciplinary action under sections 4301(f) and (o) of the Code, for unprofessional conduct, in that Respondents violated the provisions of the state and federal laws and regulations governing pharmacy, as more full set forth in paragraphs 16 through 18 above.

PRAYER

WHEREFORE, Complainant requests that a hearing be held on the matters herein alleged, and that following the hearing, the Board of Pharmacy issue a decision:

1. Revoking or suspending Original Pharmacy Permit No. PHY 43143, issued to R & W Pharmacy Services, Inc.;

2. Revoking or suspending Original Pharmacist License No. RPH 30997, issued to Arthur Howard Berger;

3. Ordering R & W Pharmacy Services, Inc. and Arthur Berger to pay the Board of Pharmacy the reasonable costs of the investigation and enforcement of this case, pursuant to Business and Professions Code section 125.3;

4. Taking such other and further action as deemed necessary and proper.

DATED: 12/16/03

P. F. Harris

PATRICIA F. HARRIS
Executive Officer
Board of Pharmacy
Department of Consumer Affairs
State of California
Complainant

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