

The Honorable Ronald B. Leighton

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA,

Plaintiff,

v.

RICHARD MARSCHALL,

Defendant.

NO. CR17-5226RBL

GOVERNMENT'S SENTENCING
MEMORANDUM

Sentencing Date: October 20, 2017

Richard Marschall is before this Court to be sentenced for his second felony conviction in six years for nearly identical offenses related to prescribing misbranded drugs. Following his federal felony conviction for introduction of misbranded drugs in 2011, the defendant continued to violate the Food Drug and Cosmetic Act's prohibitions related to the receipt, sale and interstate delivery of prescription drugs, because he placed his interpretation of appropriate patient care above the constraints of the law. The defendant's instant conviction warrants a sentence of imprisonment. The government respectfully requests that the Court sentence the defendant to a term of imprisonment of six (6) months, followed by the statutory maximum of one (1) year of supervised release, and a fine of four thousand dollars (\$4,000), subject to all of the conditions recommended by the Probation Office.

I. PROCEDURAL HISTORY

On July 6, 2017, the defendant pled guilty to a one-count information charging him with introducing misbranded drugs into interstate commerce, pursuant to 21 U.S.C. §§ 331(a), 333(a)(2). The defendant has been released on bond since that date. There have been no bond violations.

II. BACKGROUND

A. FDCA Statutory Framework.

The statutory background for this criminal prosecution involves certain provisions of the Food Drug and Cosmetic Act (FDCA) related to drugs, which are summarized in this section.

The FDCA defines “drugs” as, among other things, articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals; articles (other than food) intended to affect the structure or any function of the body of man or other animals; and articles intended for use as a component of any such articles. 21 U.S.C. § 321(g).

A drug intended for use in humans, which, because of its toxicity, or other potentiality for harmful effect, or the method of its use, or the collateral measures necessary to its use, is not safe for use except under the supervision of a practitioner licensed by law to administer such drug, can only be dispensed by a practitioner licensed by law pursuant to a lawful prescription. 21 U.S.C. § 353(b)(1). These drugs are commonly known as “prescription drugs.” Dispensing a prescription drug without a valid prescription written by a licensed practitioner is deemed by statute to be an act which caused the drug to be misbranded. 21 U.S.C. § 353(b).

A drug is also misbranded if, among other things, its labeling is false or misleading in any particular, or if the labeling on the drug does not bear adequate directions for use. 21 U.S.C. § 352(a), (f)(1). “Adequate directions for use” means directions under which a layman could use a drug safely and for the purposes for which it was intended without a doctor’s supervision. 21 C.F.R. § 201.5. Prescription drugs

dispensed without a valid prescription by a licensed provider are *per se* misbranded because they lack adequate directions for use, and do not meet a statutory exception. 21 U.S.C. § 353(b)(2).

Under the FDCA, the following acts are prohibited (among others):

a. The introduction into interstate commerce of any misbranded drug (21 U.S.C. § 331(a));

b. The receipt in interstate commerce of any misbranded drug, and the delivery or proffered delivery thereof for pay or otherwise (21 U.S.C. § 331(c)); and;

c. The doing of any act with respect to a drug, if such act was done while the drug was held for sale (whether or not the first sale) after shipment in interstate commerce, which resulted in the drug being misbranded (21 U.S.C. § 331(k)).

B. Human Chorionic Gonadotropin (HCG).

Human Chorionic Gonadotropin (HCG) is a hormone produced in women during pregnancy. HCG intended for therapeutic uses or to affect the structure or function of the human body is a drug under 21 U.S.C. § 321(g). Certain prescription drugs containing HCG are approved by the FDA for the treatment of infertility or other hormonal disorders. No HCG drug has been approved by the FDA to treat obesity or promote weight loss. Any injectable HCG drug intended to treat obesity or promote weight loss is a prescription drug.

C. Richard Marschall's Prior Felony Conviction and License Revocation.

Richard Marschall was charged and convicted in this Court for introduction of misbranded drugs in interstate commerce, pursuant to 21 U.S.C. §§ 331(a) and 333(a)(2) in 2011. *United States v. Richard Marschall*, CR11-5222BHS (“*Marschall I*”). In the defendant’s plea agreement in that case he admitted to ordering HCG from overseas, using it to treat patients with whom he only consulted by phone, and to lying to the FDA investigator to get that agency to release impounded HCG. *See Exhibit A (Marschall I Plea Agreement)* ¶ 7(b)-(h). Defendant was sentenced to 24 months of probation and a \$2000 fine. *See Marschall I*, Dkt. 19 (Judgment).

In part as a result of the defendant's conviction, the Washington State Department of Health (DOH) initiated proceedings to suspend defendant's doctor of naturopathy license.¹ That order became final on November 15, 2013. *See* Exhibit B (Stipulated Findings of Fact, Conclusions of Law, and Agreed Order, Case No. M2010-1493), at 9. Approximately two years later, the Board determined Dr. Marschall had practiced on a suspended license, and issued a cease and desist order prohibiting the defendant from engaging in any conduct constituting the practice of naturopathic medicine. *See* Attachment C (Stipulated Findings of Fact, Conclusions of Law and Agreed Order To Cease and Desist, Case No. M2015-742). At the same time, DOH issued an order prohibiting Dr. Marschall for applying for reinstatement of his naturopathy license for at least 18 months. Dr. Marschall has not possessed a license to practice medicine at any point between November 15, 2013 and the present. *See* Plea Agreement ¶ 7(c).

D. 2016 Investigation and Interstate Shipment of HCG to Undercover.

The investigation that resulted in the criminal conviction before the Court was initiated by DOH, based on that Agency's renewed concerns that Dr. Marschall continued to practice on a suspended license in violation of the cease and desist order. The DOH learned that, notwithstanding his license suspension, the defendant was continuing to prescribe HCG for weight loss and initiated an investigation. On September 1, 2016, two DOH investigators posing as potential patients met Marschall and discussed HCG. Marschall stated that he could provide treatment that would result in weight loss at a rate of 30 pounds within 23 to 40 days with injections of HCG. Marschall stated that he would set up injection treatments at his office and then provided instructions about how to conduct the injections.

FDA-OCI became involved in the fall of 2016. Defendant communicated with an undercover (UC) FDA-OCI agent in October 2016. After the UC told Dr. Marschall she

¹ Washington State is one of seventeen states that license naturopathic doctors. *See* American Association of Naturopathic Physicians, at <http://www.naturopathic.org/content.asp?contentid=57> (last accessed October 11, 2017).

1 was in Portland and interested in his advertised weight loss services, he responded by
2 email:

3 “So, I use a natural, bio-identical hormone. It MUST be injected. It's
4 painless, uses a 1/2 needle as thin as an acupuncture needle, you can easily
5 do it yourself, it goes into the area 2 inches on either side of the belly
6 button where there are almost no nerve endings. It goes under the skin
7 only, not into the muscles where the nerves are. Diabetics do it 3 times a
8 day without issue. It releases 1,500 calories a day for 26 days. You eat a
9 protein, vegetable and fruit [sic] for lunch and dinner. You're not hungry
10 and the hormone causes you to release fat ONLY from the hips, buttocks,
11 thighs, belly, breasts, arms and legs, the secure fat reserves. Most diets
12 release fat from the muscles and even worse protein from the muscles
13 because they can't get into this storage fat area for 2 months. I am the first
14 naturopathic clinic to offer and teach this program to my colleagues in the
15 United States going on 12 years now. You get my 85 page book that has all
16 the instructions on how to do the program. You get a special multiple
17 vitamin-mineral and a trace mineral. You get a prescription grade garlic
18 antibiotic to remove yeast, bacteria, parasites, viruses that harm the appetite
19 and metabolism regulating center in the hypothalamus. You also get an
20 actual human strain good bacteria capsule imported from England (there are
21 NO human strain products available in the United States currently due to
22 poor FDA regulation). The program starts with a one hour phone consult
23 and continues with a phone consult every 2 weeks throughout stage one and
24 stage two (7 weeks total). The cost for all of this is only \$595. If you ever
25 have to do it again the cost is \$245 because you already have the book and
26 require less coaching. You're also my patient now for life if you ever need
27 help with any other issues; I have 30 years of experience.”

20 Dr. Marschall then asked the UC to complete some new patient forms and
21 conducted an approximately one-hour phone consultation with the UC. The UC
22 then paid \$608 by credit card to Marschall's clinic. A few days later, Dr. Marschall sent
23 her the HCG from Port Angeles, Washington to an address in Portland, Oregon.

24 Records obtained during the subsequent investigation demonstrated that
25 Dr. Marschall had obtained HCG and other prescription drugs from a number of
26 compounding pharmacies throughout the United States. He made material
27 misrepresentations and omissions to these pharmacies, both about the status of his
28

license, and the physician-patient relationship he maintained with the individuals to whom he prescribed the drugs.

Between February 2014 and February 2017, Dr. Marschall prescribed injectable HCG to approximately 60 individuals for weight loss. He did not inform these patients that he did not possess an active and valid naturopathic license, and that the drugs were therefore misbranded under the FDCA. Plea Agreement ¶ 7(g), (h).

III. ADVISORY GUIDELINES RANGE

The Probation Office has made the following Guideline calculations:

Base Offense Level (USSG § 2N2.1(a)).	6
Conviction under 21 U.S.C. § 333 after sustaining a prior conviction under this Section (USSG § 2N2.1(b)(1)).	4
Abuse of position of public or private trust (USSG § 3B1.3).	2
Acceptance of responsibility (USSG § 3E1.1).	(2)
Total Offense Level	10

The defendant's 2011 conviction under the same statute results in one criminal history point and a Category I Criminal History. As a result, the Probation Office has determined that the defendant's Guidelines range for imprisonment is 6-12 months. The government agrees that this is the correct Guidelines range in this case. Defendant has not filed objections to any of the above Guideline calculations.

In the plea agreement, the government agreed to recommend a sentence of imprisonment no greater than six (6) months, and the defendant agreed to recommend a term of custody of no fewer than sixty (60) days. Plea Agreement ¶ 11. This agreement is not binding on the Court. The statutory maximum for the count of conviction is three years.

IV. SENTENCING RECOMMENDATION

The government recommends a sentence of six months to be followed by one year of supervised release. As set forth in the Supreme Court's decision in *United States v. Booker*, 125 S. Ct. 738 (2005), this Court is required to consider the sentencing range calculated under the United States Sentencing Guidelines, together with the other factors set forth in Title 18, United States Code, Section 3553(a) ("3553(a) factors"), including: (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed (a) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense, (b) to afford adequate deterrence to criminal conduct, (c) to protect the public from further crimes of the defendant, and (d) to provide the defendant with educational and vocational training, medical care, or other correctional treatment in the most effective manner; (3) the kinds of sentences available; (4) the kinds of sentences and the sentencing range established for the offense as set forth in the Guidelines; (5) any pertinent policy statement; (6) the need to avoid unwarranted sentence disparity among defendants involved in similar conduct who have similar records; and (7) the need to provide restitution to victims. In the instant case, consideration of all the above factors suggests that a sentence at the low-end of the Guidelines range is a reasonable and just sentence. A number of the relevant Section 3553(a) factors are discussed in more detail below.

1. The Nature and Circumstances of the Offense are Aggravating.

The defendant has blatantly flouted the requirements of the FDCA for more than eight years, as the investigation that lead to his 2011 conviction began in 2008. For purposes of this prosecution, that statute requires, simply, that prescription drugs be prescribed by a licensed provider, otherwise they are misbranded. The shipment of such drugs in interstate commerce is a violation of the statute. When such distribution occurs after a prior conviction under the same statute, or with the intent to defraud or mislead, the violation is a felony.

1 Dr. Marschall's crime here is not victimless. The government anticipates that
 2 Dr. Marschall will tout satisfied patients, including a number who have completed impact
 3 statements and character letters. Myopic focus on these cherry-picked representatives
 4 misses the point of this prosecution, the FDA's oversight responsibility, and
 5 Dr. Marschall's significant history of regulatory non-compliance with DOH. Congress
 6 has determined that there is a health risk when a certain class of drugs are prescribed to
 7 patients by unlicensed individuals. It is well within the scope of the FDA to make that
 8 determination, and Congress has legislated that prohibition by statute. In this case, the
 9 government does not come to the Court with examples of physical patient harm resulting
 10 from Dr. Marschall's criminal conduct, though this outcome is not far-fetched. The
 11 defendant was an unlicensed provider, instructing patients to mix and then self-inject a
 12 hormone into their bodies, for a non-FDA approved purpose, without so much as a
 13 face-to-face meeting.

14 The greater harm in this case is to patients' trust that their health care provider will
 15 be licensed with the State, and if such license is suspended, that the provider will disclose
 16 that suspension and abide by the law's requirements resulting from the suspension.
 17 Dr. Marschall blatantly failed to do this and thereby abused his patients' trust. *See, e.g.*,
 18 Exhibit D (Interview Report of W.B.), at 1 ("SA Zigler asked [W.B.] if he/she would
 19 have gone to Marschall if he/she knew that Marschall was an unlicensed physician, and
 20 [W.B.] replied 'hell no.' [W.B.] stated that he/she was embarrassed that he/she went to
 21 an unlicensed physician and he/she felt 'duped.'"); Exhibit E (Interview Report of S.M.),
 22 at 2 ("[S.M.] said he/she would never see anyone for her/his health care needs who was
 23 not licensed.").²

24 The medical (and in Washington state, naturopathic) licensing and pharmacy
 25 systems in this country are set up to ensure that the FDCA requirements for obtaining and
 26 distributing prescription drugs are followed. Because of this, the defendant *necessarily*
 27

28 ² Exhibits D and E are filed under seal as they contain confidential health information of witnesses.

1 | deceived his patients and the pharmacies in order to obtain and prescribe HCG. The
 2 | deception of the patients was quite simple: the defendant never notified his patients that
 3 | he was unlicensed and could not legally provide the drugs he was prescribing.

4 | The deception of the pharmacies to obtain prescription drugs in the first place was
 5 | a bit more involved. Evidence obtained from various compounding pharmacies around
 6 | the country established that Dr. Marschall ordered prescription drugs, including but not
 7 | limited to HCG, following his November 2013 license suspension through February
 8 | 2017. In some cases these drugs were shipped to Dr. Marschall's clinic in Port Angeles,
 9 | and in other cases they were shipped directly to out-of-state patients. Dr. Marschall
 10 | affirmatively misled the compounding pharmacies to believe that he was a licensed
 11 | naturopath possessing an active DEA license when he was not and did not.³ Evidence of
 12 | this deception is includes the following:

- 13 | • Marschall provided KRS Pharmacy licensure documentation in October 2013
 14 | showing his ND license as active (despite the fact that *almost two months*
 15 | *earlier* Marschall had signed an agreed order with DOH suspending his
 16 | license). *Compare* Exhibit F (Account Opening Documents provided by
 17 | Richard Marschall to KRS Pharmacy), at 4 *with* Exhibit B, at 8. He then failed
 18 | to notify the pharmacy that his license was officially suspended in November
 19 | 2013.
- 20 | • In October 2013, Marschall provided KRS Pharmacy a voided prescription pad
 21 | listing his DEA number and ND license number, despite the fact that his DEA
 22 | registration had been surrendered in October 2012 and he had agreed to
 23 | surrender his ND license. Exhibit F, at 1.
- 24 | • On October 10, 2013, the defendant provided KRS Pharmacy a signed
 25 | document entitled "Physician Statement: Doctor/Patient Relationship," which
 26 | contained Dr. Marschall's agreement that all prescriptions sent to KRS met
 27 | certain criteria, including that "a physical examination has been performed."

28 | ³ Dr. Marschall voluntarily surrendered his DEA registration in October 2012 after twice being admonished for
 failing to disclose administrative actions taken by DOH against his license on the DEA registration renewal form.

Exhibit F, at 2. Of course, in this case, his prior federal conviction, and in DOH proceedings, Dr. Marschall has admitted that he regularly prescribed prescription drugs without a physical examination.

- Marschall confirmed to Falls Compounding Pharmacy that he had an active license when he did not. *See* Exhibit G (Interview of Britney Enemark), at 1.

The deception inherent in the instant offense conduct is not new or isolated conduct for Dr. Marschall. Rather, it has been a consistent aspect of his professional life for at least the last eight years. In the events leading to his 2011 federal conviction, Dr. Marschall lied to FDA investigators about his intended use of HCG. Exhibit A ¶ 7. Between November 2013 and the present, he continued to solicit patients, practice naturopathy and prescribe drugs on a suspended license, deceiving the DOH and his own patients. He also failed to disclose his state license issues to the DEA on two occasions.

Finally, even today, Dr. Marschall's practice website lists his credentials, "N.D." *See* Exhibit K (Homepage for *Natural Healing Clinic*, at www.drmarschall.com) (last accessed October 12, 2017). These credentials are, at best, misleading, in light of his indefinitely suspended license, and may be a violation of law. Washington State law prohibits a person from practicing naturopathy or representing himself or herself as a naturopath without first applying for and receiving a license. RCW 18.36A.030. A person represents himself as a naturopath when, among other things, that person adopts or uses a title "ND." *Id.* An individual is involved in the unlicensed practice of a profession (including naturopathy) when he does so without "a valid . . . and *unsuspended license* to do so." RCW 18.130.020(12) (emphasis added). Read together these provisions suggest that a valid, unsuspended license is required to operate a business using the title N.D., which is exactly what Dr. Marschall continues to do. This will ultimately be an issue for the Department of Health; however, the government

1 suggests the defendant's website is misleading, and that his bond should be modified to
 2 require removal of the term "N.D." from his online and physical business locations.⁴

3 **2. Defendant's Personal Characteristics.**

4 Defendant's history and characteristics, on balance, do not weigh in favor of a
 5 lesser sentence than that recommended by the government. Without question,
 6 Dr. Marschall is long-time practitioner in the health care field with devoted patient base.
 7 Many of these patients accept, and even celebrate, that Dr. Marschall's "passion for
 8 helping patients became more important than understanding federal regulations and
 9 following the law as it has been interpreted." *See* Character Letter of B.G., at 1. While
 10 this characteristic has endeared Dr. Marschall to certain of his friends and patients, it is
 11 not a viable option in a society where doctors (medical or naturopathic) are governed by
 12 state licensure requirements and federal restrictions related to prescription drugs.

13 Until November of 2013, the defendant had been licensed as a naturopath in
 14 Washington State since 1986. For most of that time he has owned and operated the
 15 Natural Healing Clinic, located in Port Angeles, Washington. During that time, the
 16 defendant's professional relationship with the Department of Health's Board of
 17 Naturopathy – the body responsible for professional oversight and licensure of
 18 naturopaths – has been rocky.

19 In 1998 DOH suspended the defendant's license for thirty months and fined him
 20 \$3,000 for treating patients online and by phone. The conduct at issue in this order
 21 occurred between 1994 and 1998. The period of suspension was stayed based on
 22 Dr. Marschall's agreement not to treat out-of-state patients without regular physical
 23 examinations. *See* Exhibit H (Stipulated Findings of Fact, Conclusions of Law, and
 24 Agreed Order, Case No. M1997-109749) ¶ 4.1.

25
 26
 27
 28 ⁴ The defendant has complied with the bond condition that his website inform patients he is not licensed and that he cannot prescribe prescription drugs. *See* Release Status Report.

1 In November 2013, the defendant's license was suspended indefinitely and he was
 2 fined \$10,000, based on the facts underlying his criminal conviction in this Court, in
 3 addition to the fact that he prescribed HCG to patients whom he had never met in person.
 4 *See* Exhibit B (Case No. M2010-1493) ¶¶ 2.6-.7.

5 Following the November 2013 DOH Order, Marschall sought reinstatement of his
 6 license. In September 2014, the Department of Health received a complaint that the
 7 defendant was holding himself out as a practicing naturopath, soliciting patients and
 8 prescribing drugs. *See* Exhibit C ¶ 2.3. The DOH investigation established that
 9 Marschall was continuing to prescribe drugs during his suspension. *Id.* at ¶ 2.7.
 10 Marschall admitted he had engaged in the unlicensed practice of naturopathy. In an
 11 agreed order, his license was suspended for an additional 18 months on September 23,
 12 2015. He was fined \$5,000. *Id.* at ¶ 4.2.

13 This criminal case followed. Dr. Marschall's history as a healthcare provider,
 14 while touted by certain patients, is not complete without a sober view of his
 15 non-compliance with state and federal regulations.

16 **3. The Court's Sentence should Promote Respect for the Law, Afford**
 17 **Adequate Deterrence, and Protect the Public from Further Crimes**
 18 **of the Defendant.**

19 At Dr. Marschall's sentencing hearing slightly more than six years ago, he told
 20 Judge Settle: "I felt, knowing that it was at least a misdemeanor to do so [order HCG
 21 from foreign sources], that in my belief system, according to the philosophy I was trained
 22 under at the University of Santa Clara, you can break a civil law in pursuit of a higher
 23 moral law." *See* Exhibit I (*Marschall I*, Sentencing Transcript, dated
 24 September 26, 2011), at 25:19-22. Judge Settle recognized the dangerous road suggested
 25 by the defendant's comments: "[I]t concerned me that you might think that in the interest
 26 of serving your patients, that if regulations were to interfere with your ability to do that,
 27 you'd just simply do it [T]hat gives the Court some concern about where you are
 28

going to head from here.” *Id.* at 28:16-25. As the next six years have shown, Judge Settle’s concern about the defendant’s respect for the law was well founded.

Under the government’s recommended sentence, the defendant will serve six months in prison to be followed by one year of supervised release. This recommended disposition, if imposed by the Court, will provide a short respite from defendant’s unlawful conduct, which he appears intent on continuing. After at least two license suspension proceedings and one cease and desist proceeding with DOH, and a prior criminal conviction, the defendant has shown he is not easily deterred. Beyond the Court’s sentence, the DOH must closely monitor the defendant. The government will work with DOH, so that agency imposes the strictest oversight of defendant at its disposal following his term of supervision.⁵ As the past five years have shown, a criminal conviction does not assure that the defendant will not continue to solicit and treat patients in violation of Board of Naturopathy standards, hold himself out as a naturopath, and prescribe drugs. The Court’s sentence should be sufficient to deter him from violating federal law when he does so.

4. The Need to Avoid Unwarranted Sentencing Disparity.

The most apt comparative case in this District is Dr. Marschall’s own prior conviction. The facts of that case were slightly different; however, the gist of the offense, the misbranded drug at issue, and the role of deception in the offense were the same. He received a sentence of two years’ probation in that case, and the punishment for a repeat offense should unquestionably be more severe. A second reference point comes from the Eastern District of Washington. In 2015, Donna Kay Whitney was charged with introduction of misbranded drugs in interstate commerce, under 21 U.S.C. §§ 331(a) and 333(a)(2), among other crimes. *See United States v. Whitney*, CR14-133LRS (E.D.

⁵ Government counsel has reviewed this case with Susan Gragg, the program manager of the Board of Naturopathy. The Board will review defendant’s conviction when final to determine whether to initiate proceedings to permanently revoke his license, which remains in suspended status. The Board may also consider whether Dr. Marschall’s continued use of “N.D.” on his website violates Washington law related to the unlicensed practice of naturopathy.

1 Wash), Dkt. 1 (Indictment). According to the plea agreement in that case, Ms. Whitney
 2 sold injectable HCG over the internet for purposes of weight loss. She had no medical
 3 license. The HCG bore false labeling indicating it had come from “FDA certified”
 4 facilities. *See* Exhibit J (*United States v. Whitney* Plea Agreement), at 5-13. Whitney
 5 was sentenced to six months’ imprisonment. *Whitney*, Dkt. No. 85.

6 **V. RESTITUTION AND CRIMINAL FINE**

7 The government is not seeking restitution in this matter for the patients who paid
 8 for prescriptions of HCG, despite the fact that Dr. Marschall was unlicensed. The
 9 government provided impact statements to the last known address of all patients to whom
 10 the defendant prescribed HCG following his license suspension. No requests for
 11 restitution were returned. Although restitution may be available under the statute, the
 12 process of determining to whom restitution is owed and how much would overly burden
 13 and prolong the sentencing process. Complexities exist in identifying the specific
 14 patients to whom restitution would be owed, amounts paid, and whether each drug was
 15 introduced into interstate commerce. The government believes that “complex issues of
 16 fact related to the cause or amount of the victims’ losses would complicate or prolong the
 17 sentencing process,” and does not seek restitution. *See* 18 U.S.C §§ 3663(a)(1)(B)(3);
 18 3663A(c)(3)(B).

19 A fine is appropriate however. Dr. Marschall’s previous criminal fine was \$2,000.
 20 The Department of Health has imposed fines of \$3,000, \$10,000, and \$5,000 for the
 21 various agreed license suspension and cease and desist orders. The government proposes
 22 a fine of \$4,000 in this case. This is the low-end of the fine guidelines for this offense.
 23 *See* USSG § 5E1.2(c)(3). Dr. Marschall reports to receive \$4,000 in monthly income
 24 from his practice. PSR ¶ 45. Although Dr. Marschall has significant consumer and
 25 educational debt, he does have the income to pay a small fine. In fact, he is paying his
 26 wife (from whom he is legally separated) \$3,000 per month in alimony, despite the fact
 27 the two still live on the same property, which they own outright. *See* PSR ¶¶ 30, 40, 47.
 28 A small fine is appropriate in this case.

VI. CONCLUSION

Based on all the factors outlined above, the government recommends a sentence of six months of imprisonment, followed by one year of supervised release with the conditions recommended by the United States Probation Office, and a criminal fine in the amount of \$4,000.

DATED this 13th day of October, 2017.

Respectfully submitted,

ANNETTE L. HAYES
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/s/ Matthew D. Diggs
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CERTIFICATE OF SERVICE

I hereby certify that on October 13, 2017, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the attorney(s) of record for the defendant(s).

s/Anna Chang

ANNA CHANG

Paralegal

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Exhibit B

STATE OF WASHINGTON
DEPARTMENT OF HEALTH
BOARD OF NATUROPATHY

Case -
2011-160977
2009-133433

In the Matter of

RICHARD A. MARSCHALL
Credential No. NATU NT 00000532

No. M2010-1493

STIPULATED FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
AGREED ORDER

Respondent:

The Board of Naturopathy (Board), through Judy L. Young, Department of Health Staff Attorney, and Respondent represented by counsel, Seth A. Rosenberg, stipulate and agree to the following

1. PROCEDURAL STIPULATIONS

1.1 On September 17, 2012, the Board issued a Statement of Charges against Respondent:

1.2 Respondent understands that the Board is prepared to proceed to a hearing on the allegations in the Statement of Charges

1.3 Respondent understands that if the allegations are proven at a hearing, the Board has the authority to impose sanctions pursuant to RCW 18.130.160

1.4 Respondent has the right to defend against the allegations in the Statement of Charges by presenting evidence at a hearing

1.5 Respondent waives the opportunity for a hearing on the Statement of Charges provided that the Board accepts this Stipulated Findings of Fact, Conclusions of Law and Agreed Order (Agreed Order)

1.6 The parties agree to resolve this matter by means of this Agreed Order

1.7 Respondent understands that this Agreed Order is not binding unless and until it is signed and accepted by the Board

1.8 If the Board accepts this Agreed Order, it will be reported to the National Practitioner Databank (45 CFR Part 60) and elsewhere as required by law. It is a public document and will be placed on the Department of Health's website and otherwise disseminated as required by the Public Records Act (Chap. 42.56 RCW) and the Uniform Disciplinary Act RCW 18.130.110

STIPULATED FINDINGS OF FACT,
CONCLUSIONS OF LAW AND AGREED ORDER
NO. M2010-1493

PAGE 1 OF 9

ORIGINAL

10-12-17 9:01

19 If the Board rejects this Agreed Order, Respondent waives any objection to the participation at hearing of any Board members who heard the Agreed Order presentation

2 FINDINGS OF FACT

Respondent and the Board stipulate to the following facts

21 On August 26, 1986, the state of Washington issued Respondent a credential to practice as a naturopathic physician. Respondent's credential is currently active

22 On or about September 26, 2011, Respondent was convicted of Causing the Introduction of a Misbranded Drug, in the Federal District Court for the Western District of Washington, Case Number 3:11-cr-00001-BHS-0001, USM Number 41188-086. The charge resulted from the introduction of Human Chorionic Gonadotropin (hCG), manufactured in China and distributed by a company in India, and Respondent's use of it as a weight loss drug, a use for which the drug is not approved by the Food and Drug Administration (FDA)

23 In an email dated February 17, 2009, to the FDA, Respondent stated "I am an endocrinologist, a hormone expert. I use Human Chorionic Gonadotropin to treat infertile patients."

24 On his web site, Respondent has referred to himself as a "bariatric endocrinologist." He has voluntarily removed those references.

25 Doctors of naturopathic medicine may not be board certified in bariatric endocrinology. There is no certification in bariatric endocrinology.

26 In 2008, Respondent prescribed hCG for Patient A for weight loss. At no time did Respondent meet Patient A in his office or elsewhere. Respondent's contact with Patient A was by telephone. Respondent had given Patient A the option of coming to his clinic or having a telephone consultation. Patient A chose the telephone consultation. On the telephone, Respondent asked Patient A questions about her medical history and asked her what medications she was currently taking.

27 In 2008, 2009, and 2010, Respondent prescribed hCG for weight loss for approximately one hundred seventy (170) patients who reside outside of Washington State and whom Respondent did not see in person, before or after prescribing hCG.

2.8 Respondent sent to patients hCG that was manufactured in India or China, not approved for use in the United States for any purpose, and potentially dangerous to patients. Patient B asked Respondent where the hCG was from. Respondent replied that he had an American supplier. Respondent made no mention of the hCG coming from an unapproved source overseas. Respondent's statement was untrue or misleading. On or about March 3, 2010, Respondent told an agent of the FDA that when asked, he told patients that the hCG came from India.

3. CONCLUSIONS OF LAW

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

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

3.2 Respondent has committed unprofessional conduct in violation of RCW 18.130.180(1) (4), (13), and (17).

3.3 The above violations provide grounds for imposing sanctions under RCW 18.130.160.

4. COMPLIANCE WITH SANCTION RULES

4.1 The disciplining authority applies WAC 246-16-800, *et seq.*, to determine appropriate sanctions. WAC 246-16-800(2)(c) requires the disciplining authority to impose terms based on a specific sanction schedule unless "the schedule does not adequately address the facts in a case."

4.2 The sanction schedules stated in rule do not address the conduct in this case. RCW 18.130.390 and WAC 246-16-800(2)(d) require the disciplining authority to use its judgment to determine appropriate sanctions when the sanction schedules do not address the conduct in question. The disciplining authority determined that a period of suspension and conditions to be imposed should Respondent return to practice are necessary to protect the public.

4.3 The disciplining authority considered that:

- A. Respondent has a history of previous discipline.
- B. The misconduct was grave.
- C. The misconduct had a potential to injure patients.
- D. Respondent has responsibility for the outcome of the misconduct.

- E Respondent's act was intentional
- F Respondent's motivation was dishonest and for personal gain
- G Respondent's conduct brings ill repute upon the profession

5 AGREED ORDER

Based on the Findings of Fact and Conclusions of Law, the Board and Respondent agree to entry of the following Agreed Order:

5.1 Respondent's credential to practice as a naturopathic physician in the state of Washington is **SUSPENDED** for at least one (1) year from the effective date of this Agreed Order and until Respondent fulfills the requirement of Paragraph 5.2 E below.

5.2 When Respondent returns to practice, following the **SUSPENSION**, Respondent must comply with the following conditions:

A Respondent's credential to practice as a naturopathic physician in the state of Washington is placed on **PROBATION** for seven (7) years from the date of reinstatement. During the **PROBATIONARY PERIOD**, Respondent shall comply with the following conditions:

B Respondent shall pay a fine to the Board in the amount of ten thousand dollars (\$10,000.00), which must be received by the Board within one (1) year of the date of reinstatement. The fine shall be paid by certified or cashier's check or money order, made payable to the Department of Health and mailed to the Department of Health, Board of Naturopathy, at PO Box 1099, Olympia, WA 98507-1099. Credit or Debit cards can also be used for payment at the front counter of the Department of Health building at 111 Israel Road SE, Tumwater, WA 98501, during regular business hours.

C In addition to mandatory continuing education, within one (1) year of the date of reinstatement, Respondent shall complete twenty four (24) hours of continuing education, pre-approved by the Board or its designee, as follows:

- 1 Twelve (12) hours of continuing education in the area of Ethics

2 Six (6) hours of continuing education in the area of
Endocrinology

3 Six (6) hours of continuing education in the area of Obesity
Management

Respondent shall provide the Board with proof of completion of such continuing education within thirty (30) days of such completion. Failure to complete the required minimum hours of pre-approved continuing education in the specified areas within the specified time(s) shall constitute a violation of this Agreed Order.

D Respondent acknowledges that the standard of care for naturopathic physicians in the state of Washington is that the physician must evaluate each patient in person before prescribing, authorizing, or recommending any treatment or use of any substance. Respondent further acknowledges that such an evaluation includes an in-person physical examination and that the physician must see each patient at least once per year.

E Before Respondent is released from suspension and admitted back into practice, Respondent shall write and submit to the Board a paper on the importance of physical examinations and in-person examination of patients. The paper shall be five thousand (5,000) words and shall be typed in no smaller than ten (10) point font.

F Within thirty (30) days of the date of reinstatement Respondent shall update his web site as follows:

1 The web site shall include no reference to Respondent as a "bariatric endocrinologist."

2 The web site shall include no reference to hCG for weight loss.

3 The web site shall not include offers to treat out of state patients.

4 The web site shall include a statement that all new patients will receive an in person physical examination on their first visit to Respondent.

G Respondent shall not prescribe, authorize, or recommend any treatment or the use of any substance for any patient whom Respondent has not first evaluated in person. Such an evaluation must include an in person physical examination. Respondent must see each patient in person at least once per year.

H For new patients at the initial visit, Respondent shall show each patient a copy of this Agreed Order or a summary of this Agreed Order, which has been approved in advance by the Board. For existing patients, at the first visit after the date of reinstatement, Respondent shall show the patient a copy of this Agreed Order or a summary of this Agreed Order approved in advance by the Board.

I For the first year of the PROBATIONARY PERIOD Respondent shall cooperate with quarterly audits of patient records conducted by a Department of Health investigator. The investigator shall collect and copy fifteen (15) random files. The Board or its designee shall review the files. Patient records shall include documentation that Respondent has shown the patient a copy of this Agreed Order or a summary of this Agreed Order as approved by the Board.

1 If Respondent successfully completes all quarterly audits conducted by within one (1) year of the date of reinstatement, Respondent shall then cooperate with semi-annual audits of patient records conducted by a Department of Health investigator for the next two (2) years and annual audits for the next four (4) years. The investigator shall collect and copy fifteen (15) random files. The Board or its designee shall review the files. Patient records shall include documentation that Respondent has shown the patient a copy of this Agreed Order or a summary of this Agreed Order as approved by the Board.

J Respondent shall neither prescribe for patients nor treat patients in states where he is not licensed to practice as a health care provider.

K Respondent shall comply with the terms and conditions of the judgment and sentence entered in federal court

L For the duration of the probationary period, Respondent shall submit monthly to the Board or its designee his office telephone record of the calls made and received from patients

5.3 Any documents required by this Agreed Order shall be sent to Department of Health Compliance at PO Box 47873, Olympia, WA 98504-7873

5.4 Respondent is responsible for all costs of complying with this Agreed Order

5.5 Respondent shall inform the Department of Health Office of Customer Service, in writing, of changes in Respondent's residential and/or business address within thirty (30) days of the change. The mailing address for the Office of Customer Service is PO Box 47865 Olympia, WA 98504-7865

5.6 The effective date of this Agreed Order is the date the Adjudicative Clerk Office places the signed Agreed Order into the U.S. mail. If required, Respondent shall not submit any fees or compliance documents until after the effective date of this Agreed Order

6 FAILURE TO COMPLY

Protection of the public requires practice under the terms and conditions imposed in this order. Failure to comply with the terms and conditions of this order may result in suspension of the credential after a show cause hearing. If Respondent fails to comply with the terms and conditions of this order, the Board may hold a hearing to require Respondent to show cause why the credential should not be suspended. Alternatively, the Board may bring additional charges of unprofessional conduct under RCW 18.130.130(9). In either case, Respondent will be afforded notice and an opportunity for a hearing on the issue of non-compliance.

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STIPULATED FINDINGS OF FACT,
CONCLUSIONS OF LAW AND AGREED ORDER
NO. M2010-1493

PAGE 7 OF 9

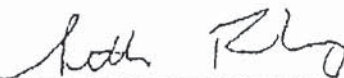
AO - REV. 2/01

7 ACCEPTANCE

I, RICHARD A. MARSCHALL, have read, understand and agree to this Agreed Order. This Agreed Order may be presented to the Board without my appearance. I understand that I will receive a signed copy if the Board accepts this Agreed Order.


RICHARD A. MARSCHALL
RESPONDENT

8-26-13
DATE


SETH A. ROSENBERG, WSBA #11660
ATTORNEY FOR RESPONDENT

9/3/2013
DATE

8 ORDER

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


DATED November 15, 2013

STATE OF WASHINGTON
DEPARTMENT OF HEALTH
BOARD OF NATUROPATHY



PANEL CHAIR

PRESENTED BY



JUDY L. YOUNG, WSPA #3797
DEPARTMENT OF HEALTH STAFF ATTORNEY

November 15, 2013
DATE

STIPULATED FINDINGS OF FACT,
CONCLUSIONS OF LAW AND AGREED ORDER
NO M2010-1493

PAGE 9 OF 9

AP-227-001

Exhibit F

Washington State Department of Health

By the authority of RCW 18.36A this person

Richard A Marschall

is granted a

Naturopathic Physician License

Washington State Department of

Authorized for DEA Registration 10/16/2008

Status

ACTIVE

Effective Date

05/28/2013

Initial Issuance

08/26/1986

Credential Number

NT 00000532

Expiration Date

06/22/2014

Secretary

Phone: 360-457-1515
Fax: 360-452-7460

Rick Marshall, N.D.

161 South Barr Road, Port Angeles, W.A. 98362

NPI# 1003962309
Lic# NT00000532
DEA# MM199.9462

Name: _____

Date: _____

Address:

Fox

Ref: 0-1-2-3-4-PRN



Physician Statement: Doctor/Patient Relationship

Dear Doctor:

KRS-GBT understands that in some cases, the patient and the prescribing physician may reside in different states. In order to ensure that all prescriptions receive by KRS-GBT are pursuant to a valid doctor/patient relationship, we require that our prescribing physicians agree that the following elements are satisfied prior to sending us a prescription. For purposes of state law, many state authorities, with the endorsement of medical societies, consider the existence of the following four elements as an indication that a legitimate doctor/patient relationship has been established:

- A patient has a medical complaint:
- A medical history has been taken:
- A physical examination has been performed:
- Some logical connection exists between the medical complaint, the medical history, the physical examination, and the drug prescribed.

General - In accordance with Federal Guidelines (Guidance for FDA Staff and Industry, Compliance Policy Guides Manual, Sec. 460.200 Pharmacy Compounding, May 2002), and Florida Law (Rule 64B16-27.700), compounded prescriptions cannot be resold.

Missouri Specific - In compliance with Missouri Law (MO 20 CSR 2220-2.400), compounded prescriptions labeled for "Office Use" is strictly prohibited. Therefore, all compounded prescriptions must be issued with patient specific information including name, address and date of birth.

Ohio Specific: - In compliance with the Ohio State Board of Pharmacy Rule (4729-9-21), compounded prescriptions labeled for "office use" is strictly prohibited. Therefore, all compounded prescriptions must be issued with patient specific information including name, address, date of birth, and shipped directly to the patient only.

I, (Print) Rick Marschall, agree that all prescriptions sent to KRS-GBT will meet the criteria above. I agree that there is no other agreement written, oral or otherwise that negates this one.

Physician Signature: Rick Marschall

Date: 10-10-13

****Domestic - Please attach copy of physician state license and DEA Permit ****

****International - Please attach copy of physician Country/Providence license****

**Fax completed package to
Domestic 866.480.3322 • International 561.989.1595**

Please contact Montay at: montayrutledge@gbtbio.com • 888.242.7996 Ext. 367

791 Park of Commerce Boulevard, Suite 600 • Boca Raton, FL 33487 • T: 888.242.7995 • F: 866.480.3322



Domestic (USA) Account Setup Form

This form confirms your request for payment by credit card, by submitting this form, you agree to pay any and all amounts charged by KRS-GBT to your credit card account specified below, and authorize KRS-GBT to obtain credit approval from said credit card company.

I hereby authorize KRS-GBT to charge my credit card account specified below. I affirm that I am at least 18 years old and that I am legally authorized to use the credit card account number specified below. Furthermore, I understand and agree that any charges made to the account specified below are non refundable, and I agree to pay pursuant to my agreement with said credit card company, any such amounts charged by me both in the past and henceforth. Additionally, I agree to hold KRS-GBT completely and fully harmless from and against all claims of any type or nature whatsoever resulting from any charges made to said credit card account payment and will be billed to the credit card shown below.

Name: (print) <u>Rick Marschall</u>		Signature: <u>Rick Marschall</u>	
DEA # <u>NPI 1003962309</u>		State License #: <u>25205NTS32</u>	
Street: <u>162 S. Barr Rd</u>		City: <u>Port Angeles</u>	State: <u>WA</u> Zip: <u>98362</u>
Phone: <u>[REDACTED]</u>	Cell: <u>[REDACTED]</u>	Fax: <u>[REDACTED]</u>	
Email: <u>nhcom@g.com</u>		Website: <u>drmarschall.com</u>	

Card Type: <input checked="" type="checkbox"/> Visa <input type="checkbox"/> MasterCard <input type="checkbox"/> Amex <input type="checkbox"/> Discover			
Card Holders Name: <u>Rick Marschall</u>			
Card Number: <u>[REDACTED]</u>	<u>9128</u>	Exp. Date: <u>[REDACTED]</u>	CCV#: <u>[REDACTED]</u>
Billing Info: (if different from above) <u>N/A</u>			
Street: <u>[REDACTED]</u>	City: <u>[REDACTED]</u>	State: <u>[REDACTED]</u>	Zip: <u>[REDACTED]</u>
Billing Phone: <u>[REDACTED]</u>		Signature: <u>[REDACTED]</u>	

Rick Marschall
(Signature)

7431

Please contact Montay at: montayruffledge@gbtbio.com • 888.242.7996 Ext. 367

791 Park of Commerce Boulevard, Suite 500 • Boca Raton, FL 33487 • T: 888.242.7996 • F: 866.480.3322

MedProID - State License Detail

Report Date : 10/11/2013 3:44:27 PM (EST)
WebID User : GBTRX01

SLN Information

Name : Richard A Marschall
Address :
City/State/Zip : WA,
License State : WA - Washington
License # : NT00000532
License Expires : 06/22/2014
Status : Active
Prof Designation : Naturopathic
- Certification Code : NMD
- Description : NATUROPATHIC PHYSICIAN
- Specialty : Naturopathic Physician
Disciplinary Action : Yes

DEA Information

No DEA Data Found

CDS Information

No CDS Data Found

NPI Information

No NPI Data Found

State Specific

No State Specific Detail Found

My Detail

No My Detail Data Found

Sampleability Components

Sampleability : Unknown

Component	Value	Sampleability
License Status	ACTIVE	Y
- Status Sampleability (State)	Y	
License Expiration:		Y
- State Expiration Date	06/22/2014	
- State Grace Period	None	
- Customer Grace Period	None	
Professional Designation	Naturopathic	Unknown
- Sampling Authority (State)	Unknown	
- Sampling Authority (Customer)	Unknown	
- Collaborative Agreement	Not Applicable	
Sanctions		Y
- State	SanctionID Not Enabled	
Received in Last 12 months	09/27/2013	Y

Additional Information

Data Source : Washington State Department of Health
Deputy Secretary of Health

Exhibit G



**Food and Drug Administration
OFFICE OF CRIMINAL INVESTIGATIONS
MEMORANDUM OF INTERVIEW**

CASE NUMBER: 2016-SEW-715-0569
CASE TITLE: RICK MARSCHALL
DOCUMENT NUMBER: 254760
PERSON INTERVIEWED: Britney Enemark
PLACE OF INTERVIEW: Via Telephone
DATE OF INTERVIEW: 04/20/2017
TIME OF INTERVIEW: 8:50 a.m.
INTERVIEWED BY: SA Angela Zigler

OTHER PERSONS PRESENT: N/A

On April 20, 2017, BRITNEY ENEMARK, President of NYBERG HEALTH ENTERPRISES d/b/a THE FALLS COMPOUNDING PHARMACY, was interviewed by SA Angela Zigler, U.S. Food and Drug Administration, Office of Criminal Investigations (FDA/OCI) via telephone number [REDACTED]. ENEMARK was advised that the purpose of the interview was to discuss RICK MARSCHALL's contacts with THE FALLS COMPOUNDING PHARMACY (FCP), Snoqualmie, WA. ENEMARK agreed to answer questions and provided the following information in substance:

MARSCHALL "worked with" FCP for "years and years." FCP would not have questioned MARSCHALL's license, but ENEMARK believed a comment was made by MARSCHALL or one of MARSCHALL's patients that made FCP check to see if there was an "action" taken against MARSCHALL. FCP checked the Washington State Board website, under the provider credential search, and it stated that MARSCHALL's license was "not active." FCP questioned MARSCHALL about this and MARSCHALL told FCP that his license was active.

ENEMARK stated that MARSCHALL's fax number had to be removed from their system due to MARSCHALL's inactive license status as well. FCP prescription refill requests were automatically generated and sent to the physician to be signed and returned to FCP. When MARSCHALL continued to receive patient refill requests from FCP, MARSCHALL continued to sign them and return them to FCP.

Therefore on January 27, 2014, FCP wrote a note in MARSCHALL's profile that stated "Removed fax number from spot [REDACTED] lost license. Cannot fill anything for him until license is reupped."

ENEMARK stated that MARSCHALL continued to fax prescriptions to FCP that FCP did not fill due to MARSCHALL's inactive license. ENEMARK believed MARSCHALL told his patients that his license was active because MARSCHALL's patients then contacted FCP expecting their prescription. FCP told MARSCHALL's patients that MARSCHALL was not licensed and that their prescriptions were not going to be filled. The patients then "got mad" at FCP. ENEMARK stated that the patients were under the impression that MARSCHALL was a licensed naturopath. ENEMARK stated that this happened with approximately five or so of MARSCHALL's patients. ENEMARK stated that FCP eventually called the Board of Naturopathic Medicine for verification about MARSCHALL's license because of the statements made by MARSCHALL and MARSCHALL's patients.

On August 25, 2014, a note was placed on MARSCHALL's profile with FCP. The note stated, "Board of Naturopathic Medicine Rep says earliest reinstatement is November 15, 2014 assuming he has met all the conditions stipulated by the Board."

ENEMARK was under the impression that MARSCHALL used another pharmacy after FCP stopped filling prescriptions written/signed by MARSCHALL.

SUBMITTED: Electronically submitted by ANGELA ZIGLER

ANGELA ZIGLER, SPECIAL AGENT

DATE: 04/20/2017

APPROVED: Electronically approved by STEPHEN JACKSON

STEPHEN JACKSON, RESIDENT AGENT IN CHARGE

DATE: 04/20/2017

DISTRIBUTION: Orig: SFRO
CC: SEW

ATTACHMENTS: None.

Exhibit I

1 UNITED STATES DISTRICT COURT
2 WESTERN DISTRICT OF WASHINGTON
3 AT TACOMA

4 UNITED STATES OF AMERICA,) Docket No. CR11-5222BHS
5 Plaintiff,) Tacoma, Washington
6 vs.) September 26, 2011
7 RICHARD MARSCHALL,)
8 Defendant.)
9

10
11 TRANSCRIPT OF SENTENCING HEARING
12 BEFORE THE HONORABLE BENJAMIN H. SETTLE
UNITED STATES DISTRICT COURT JUDGE

13 APPEARANCES:

14 For the Plaintiff: NICHOLAS W. BROWN
Assistant United States Attorney
700 Stewart Street, Suite 5220
15 Seattle, Washington 98101-1271

16 For the Defendant: KENNETH S. KAGAN
Carney Badley Spellman
17 701 Fifth Avenue, Ste 3600
Seattle, Washington 98104-7010
18

19 Probation Officer: BECKY MILLER

20 Court Reporter: Teri Hendrix
Union Station Courthouse, Rm 3130
21 1717 Pacific Avenue
Tacoma, Washington 98402
22 (253) 882-3831
23

24 Proceedings recorded by mechanical stenography, transcript
25 produced by Reporter on computer.

1 MONDAY, SEPTEMBER 26th, 2011 - 1:30 P.M.

2 * * *

3 THE COURT: Please be seated. Good afternoon.

4 THE CLERK: This is in the matter of the United
5 States of America versus Richard Marschall, Cause No.
6 CR11-5222BHS.

7 Counsel, please make an appearance for the record.

8 MR. BROWN: Good afternoon, Your Honor, Nicholas
9 Brown for the United States.

10 THE COURT: Good afternoon.

11 MR. KAGAN: Good afternoon, Your Honor. Kenneth
12 Kagan for Richard Marschall. Dr. Marschall is here as you can
13 see on my right. He got injured last night, so he's in
14 considerable pain, but he's able to participate.

15 THE COURT: Very well. Good afternoon.

16 That being the case, Dr. Marschall will not have to stand,
17 if he should choose to address the Court for sentencing.

18 This matter has been set on for sentencing this afternoon,
19 and the first thing I want to do is inquire, are you satisfied
20 with the services you received from your attorney here?

21 THE DEFENDANT: Very much.

22 THE COURT: Do you believe you've had sufficient
23 opportunity then to prepare for this hearing with him by going
24 over the government's sentencing memorandum, your own
25 sentencing memorandum and, of course, the presentence report

1 that was developed on your behalf?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: I have also gone through and reviewed all
4 of those documents. In addition, I have read your statement
5 in the presentence report. There were a number of statements
6 solicited, what we refer to as victim impact statements, and
7 then some letters that were written on your behalf by various
8 patients.

9 Are there any other documents the Court needs to review?

10 MR. BROWN: Not from the government, Your Honor.

11 MR. KAGAN: I brought with me, Your Honor, a letter
12 that was written by a patient, that I received this morning
13 and I gave it to the courtroom deputy to give it to you. I
14 hope you had a chance to read that.

15 THE COURT: I did review that as well.

16 Now, I want to go over --

17 MR. KAGAN: Your Honor, excuse me, one more thing,
18 and that is on Dr. Marschall's behalf, I transmitted to you a
19 few weeks ago a letter accepting responsibility.

20 THE COURT: Yes, that is what I mentioned was a
21 letter from him. I have read that.

22 Now, I want to go over the sentencing parameters here.
23 This is the offense to which he pled guilty, is causing
24 introduction of misbranded drugs. Now, this is a Class E
25 felony. It carries a maximum of three years imprisonment.

1 The base offense level, the parties are in agreement, is 6.
2 There also is an agreement that there should be a reduction of
3 two for acceptance of responsibility. There is, I believe, a
4 dispute about the abuse of trust, whether or not two levels
5 should be added to that.

6 I can hear argument on this, Mr. Kagan, but my review of
7 the notes under 3B1.3, indicate that this is the type of case
8 that would entail the application of an abuse of trust
9 adjustment, so I will be happy to hear from you.

10 MR. KAGAN: Your Honor, do you prefer for me to go to
11 the podium?

12 THE COURT: Please.

13 MR. KAGAN: I agree with the Court that this is the
14 type of case that would normally lend itself to a two-point
15 adjustment upward for violation of a public trust, in the
16 sense that he is a medical professional who treats patients
17 and who is governed by certain rules that apply to the
18 practice of his profession.

19 The reason that I believe this is not a violation or an
20 abuse of a position of trust, first of all, I think that we
21 need to establish clearly that there is nothing unlawful about
22 his use of HCG in his practice, and that is not what has been
23 alleged here.

24 What was alleged here was that he caused the introduction
25 into commerce of HCG that came from overseas rather than being

1 produced or obtained domestically. It came from a Canadian
2 pharmaceutical supplier and it was made in either India or
3 China. That is the gravamen of the offense, not the use of
4 HCG.

5 So it is our position that he did not use his position to
6 get patients to take something that he did not have the
7 authority to offer them or to prescribe for them. He does
8 have that authority. The difference is the use of something
9 coming from overseas.

10 Dr. Marschall reasonably believed that the drug was safe
11 and effective, and there has never been a single allegation
12 that anyone was harmed because they took HCG that was produced
13 overseas or that any of the HCG from overseas was defective or
14 harmful in any way.

15 So when I look at the case and the notes in that section
16 as well, I believe that this would apply in a case where he,
17 or a physician or a health care provider, was prescribing
18 something and not telling the patients what it was, giving
19 them something that was harmful, profiting in some way that
20 was inappropriate.

21 This is just simply a matter of bringing something into
22 commerce that violated regulation. But he's entitled to use
23 HCG. So if it was a banned substance, for example, or
24 something that was a contraband of some kind, like it was
25 exceeding his authority to prescribe a narcotic or something

1 like that, I would agree. But here, I think it is not an
2 abuse of trust because if he could give his patient HCG that
3 was manufactured in Tennessee, then if he believes that he can
4 get HCG from another source and it is the same HCG that's the
5 same substance, I don't believe that to be an abuse of trust.

6 THE COURT: Mr. Brown.

7 MR. BROWN: Thank you, Your Honor. Obviously, we
8 would concur in the Court's initial reading that the conduct
9 for which Dr. Marschall pled guilty does in fact constitute an
10 abuse of a position of trust.

11 Clearly, there's probably no other greater position than
12 being a doctor, physician or naturopathic doctor. That
13 carries with it the burden and the duty to be ethical and
14 honest in your vehemence.

15 What the defendant has pled guilty to, if you look at
16 specifically the elements of the offense, is he knowingly
17 imported a misbranded drug and did so with the intent to
18 deceive.

19 Now, the statute contemplates two different types of
20 deception. One can be to the FDA or the people regulating the
21 drug, the other can be to the patients who are then prescribed
22 the drug. In either case, the underlying offense was done so
23 with the intent to deceive.

24 Any time you have someone licensed by the State of
25 Washington to provide medical care, who has pled to an offense

1 that includes an element of deception, you have an abuse of
2 that position of trust.

3 I also think that if you look at the conduct itself and
4 what followed, what followed was lies by Dr. Marschall to the
5 FDA compliance officer about what he was doing and the
6 purposes for importing that drug. The combination of that, to
7 the government, is clearly one that constitutes an abuse of a
8 position of trust. So I think for all those reasons, that
9 should apply. It doesn't ultimately affect what the
10 government's recommendation is in this case, but it does apply
11 for purpose of a sentencing recommendation.

12 THE COURT: Thank you, Mr. Brown. I agree, and that
13 was my initial impression when I go over and look at the
14 statement of facts in the plea agreement, and the very charge
15 involves a deception here and a knowing deception, of course.
16 That is something that he was enabled to do.

17 He was in a professional capacity, and I think also the
18 patients have every right to expect that when procuring this,
19 that he would procure it lawfully. He acknowledged that he
20 deceived through this misbranding.

21 So I believe that it does apply, and I find that it does,
22 and that then puts the basic offense level at 6. Now,
23 Dr. Marschall has no criminal history, therefore no criminal
24 history points. This puts him in a criminal history category
25 of I, and the guidelines suggest here as punishment, zero to

1 six months.

2 Of course, we know this is advisory and not binding upon
3 the Court. The Court has the discretion to impose any
4 sentence in this case up to the maximum, of course, which is
5 three years.

6 Are there any other matters before I proceed to hear
7 argument?

8 MR. BROWN: Not from the government.

9 MR. KAGAN: No.

10 THE COURT: Then I will hear from the government on
11 its recommendation.

12 MR. BROWN: Thank you, Your Honor. As we noted in
13 our sentencing memorandum, we are recommending a sentence of
14 24 months in prison -- excuse me, probation, a \$5,000 fine,
15 200 hours of community service in this case.

16 I think it is important to start off by reminding
17 Dr. Marschall, as well as highlighting to the Court, a couple
18 things in the plea agreement in this case because as I read
19 his letter to the Court and I read the defendant's sentencing
20 memorandum, I was a little bit troubled.

21 As we just highlighted, the elements of this offense are
22 very clear. Dr. Marschall imported a misbranded drug, that he
23 did so knowingly, and that he did so with the intent to
24 deceive. And then when you turn to the statement of facts in
25 this case, Your Honor, there are a couple things I want to

1 again highlight today.

2 If you look at paragraph E on page five of the plea
3 agreement, it says some very clear things that the parties
4 have agreed on in support of Dr. Marschall's plea agreement.
5 He acknowledges he was prescribing HCG for weight loss
6 purposes; he purchased the drug from a Canadian website in the
7 past. He further admitted that he knew the drugs came from
8 India. He then admitted that he had lied in his February 2009
9 email to the FDA which he claimed that he needed the HCG to
10 treat infertile patients. He further acknowledged he had
11 never treated any patients for infertility with HCG.

12 We then turn to paragraph G which is at the bottom of page
13 5 and continuing to page 6, the last sentence of that
14 paragraph says, "he further admitted to lying to the inspector
15 in 2009 to try to convince her to release the package stating
16 that I was distracting her, I was diverting her."

17 And then in the last sentence of paragraph H, defendant
18 acknowledges that he caused the introduction of these
19 misbranded drugs with the intent to deceive.

20 The reason I think it is important to highlight those
21 again today, Your Honor, is because as I read his letter and I
22 read the defendant's sentencing memorandum, it seems to the
23 government at least that he's somewhat equivocating about what
24 happened here.

25 First of all, as I read the defendant's sentencing

1 memorandum, he hesitates to acknowledge the fact that he
2 admitted to lying to the FDA inspector. The plea agreement
3 states explicitly that he acknowledged that he did, in fact,
4 lie to the inspector. So I don't think he can have it both
5 ways.

6 His letter to the Court also says that he came to realize
7 that the drugs he was buying from this Canadian website were
8 done so illegally. The question the government has is when
9 did he come to realize that, because as he agreed in the plea
10 agreement, he did so knowingly with the intent to deceive. So
11 it wasn't something that he came to realize after the fact.
12 Pursuant to the plea agreement, he did this knowing that he
13 shouldn't be doing it, and he did it repeatedly over a course
14 of months. So I have trouble with the way he's set forth what
15 he did right and what he did wrong as laid out in his letter
16 to the Court as well as in his sentencing memorandum.

17 There are also a number of letters the Court has read from
18 patients who claim they have suffered side effects from the
19 drugs they were administered by Dr. Marschall, and also a
20 number of them claim that they were never advised of the
21 potential side effects.

22 Dr. Marschall again takes issue with this in his
23 sentencing memorandum saying again unequivocally that there
24 were no side effects, or for those people who had particular
25 health problems, he did advise them. That is not the

1 perception the government has in the letters that were
2 provided to the Court. A number of the patients -- former
3 patients -- of Dr. Marschall said very clearly that they were
4 never advised of the side effects, no matter if they had low
5 side effects or if they had health problems that would make
6 them aggravated.

7 THE COURT: Is there a dispute as to whether or not
8 there were prescriptions filled over the telephone without a
9 physical exam and, if that is so, what, if any, violation is
10 that of the standard of practice or ethics?

11 MR. BROWN: I think if you look at the plea
12 agreement, Your Honor, again the statement of facts in
13 paragraph 7G, Dr. Marschall in fact acknowledged that he was
14 still treating many patients over the telephone.

15 Now, the government's view of that is that that is
16 probably not consistent with the Department of Health
17 guidelines that they had imposed on him following his 1994
18 suspension of that. I don't think that that alone constitutes
19 a separate criminal act. The Department of Health may have
20 their own sanctions that may follow this.

21 THE COURT: I didn't take it at all to be a criminal
22 act. I was curious as to whether it constituted a violation
23 of the standard of practice and ethics. It wasn't clear to me
24 in reviewing the file what the effect of that is.

25 MR. BROWN: I don't want to say definitively it is,

1 Your Honor. Obviously, the Department of Health has their own
2 standards about what it might be. It certainly seems to the
3 government inconsistent with the protocols they set forth in
4 their sanctions to him, but I don't know definitively that
5 that's the case. I am sure the Department of Health will
6 weigh in on it.

7 However, when the government looks at that fact, the fact
8 that he acknowledged that he was still prescribing patients
9 over the phone, and when questioned by the FDA inspector about
10 this, he again sort of equivocated about whether this was
11 wrongful or not.

12 When he was questioned at trial about continuing the
13 practice and again reminded of the fact that he had been
14 sanctioned in part for doing this sort of thing in the past,
15 he said well, then my Hippocratic oath kicks in and I have to
16 treat them. It seems to me to be a consistent pattern by
17 Dr. Marschall of always trying to find excuses or ways around
18 the FDA laws.

19 It doesn't bother the government at all if Dr. Marschall
20 does not agree with the FDA regulations, does not agree with
21 the fact that he was not able to get this stuff from the
22 overseas sources. The problem the government has is really
23 how he's treated it. This is one of those rare cases where in
24 many ways what happened after the underlying offense is more
25 serious or is equally as serious as the underlying offense,

1 because over and over and over he has demonstrated a tendency
2 to lie, to cut corners, to equivocate about whether what he
3 was doing was wrongful or not.

4 And what the government should expect, and what the State
5 of Washington should expect, is that people who are licensed
6 by them should be honest and forthcoming in their dealings.
7 If they don't agree with the law, that is fine. If they don't
8 like the law, they don't like the government regulation of
9 this, that is also fine, but no matter what, they should be
10 honest and ethical in their dealings with it.

11 I don't think Dr. Marschall has done that, and I have
12 trouble with how he's presented it in not only his memorandum
13 to the Court, but in his letter to the Court. The very basic
14 statement that I came to realize what I was doing was illegal,
15 rather than say I knowingly did it, I apologize to the Court,
16 I should haven't done it. There's two different ways to look
17 at that.

18 We do, however, recommend that Dr. Marschall get the
19 sentence as outlined in our sentencing memorandum. The
20 government's problems with his conduct in this case and the
21 conduct that followed the underlying offense is somewhat
22 mitigated by the fact that obviously Dr. Marschall has never
23 been in trouble with the law before, he has no criminal
24 history points.

25 By all accounts, many people are very pleased with the

1 medical service that he has provided over the last 20 plus
2 years, and the government would in no way dispute the fact
3 that he has been a good doctor for a good number of people, so
4 that mitigates the sentence for us somewhat.

5 I also recognize that in all likelihood pleading guilty to
6 a felony offense like this and being sanctioned by this Court
7 is probably going to have some other serious consequences on
8 his ability to practice medicine in the future, I think
9 rightly so, but I think that mitigates the type of punishment
10 this Court should issue.

11 There is an additional discussion in both the presentence
12 report and the defendant's sentencing memorandum about whether
13 restitution was appropriate in this case. The government has
14 not asked for restitution, but we had asked for a \$5,000 fine
15 be imposed.

16 The reason we did that is that a number of his patients
17 have asked that they get their money back for various reasons,
18 whether they suffered side effects or simply because they
19 thought -- or they think they should have been informed of
20 where the drug was coming from. The way the government reads
21 the restitution requirement that this Court would have to
22 find, the Court would have to find that they are harmed --
23 first of all, that there was harm and that his conduct was the
24 proximate cause of that.

25 I don't think we have enough information to say that that

1 was the case, and that is why we have not asked for
2 restitution for the group of patients that were prescribed
3 this drug, or for only the individuals who are specifically
4 requesting it. So that is why we did not ask for restitution
5 in the case, but we are asking for a \$5,000 fine for
6 Dr. Marschall because that is authorized under the statute.

7 Otherwise, I agree with the recommendations by pretrial
8 services in terms of the special conditions they are
9 recommending be imposed. The one that I would disagree with,
10 they recommend that drug testing be imposed on Dr. Marschall.
11 I don't see enough in the record to find an adequate basis for
12 that. There's no allegation that Dr. Marschall himself has
13 been abusing drugs or anything of that note. While he may
14 have been improperly importing certain drugs, I don't think
15 that the drug testing requirement on him should be applied,
16 but otherwise we agree with the requirements.

17 THE COURT: Your recommendation is for a \$5,000 fine?
18 I think that your memorandum suggested \$10,000, at least at
19 one place.

20 MR. BROWN: I apologize if it did, Your Honor; the
21 statute maximum is \$5,000. That's what the government is
22 recommending.

23 THE COURT: Thank you for the clarification.

24 Mr. Kagan.

25 MR. KAGAN: Thank you, Your Honor.

1 Taking the matters maybe in somewhat reverse order, with
2 regard to the question of restitution, I wanted to say that I
3 agree with Mr. Brown. With regard to the letters or the forms
4 that the various patients have returned to the government
5 asking about restitution or asking about their experience of
6 Dr. Marschall, it is true that none of them would be able to
7 say that, to the extent they had any side effects, that it was
8 related to HCG that came from overseas, which was the issue in
9 this case.

10 THE COURT: I think I agree with that overall
11 assessment. I suppose the question I have, and perhaps I
12 should have asked Mr. Brown this, is that if they obtain some
13 substance here under essentially false pretenses, wouldn't
14 that void the implied contract -- it's certainly not a written
15 contract -- but they come to him as a patient, and he
16 prescribes and provides, and isn't there some sort of issue
17 there?

18 MR. KAGAN: That, in other words, if they agree to
19 pay a sum of money for a prescription that he has recommended
20 for them, if he's not authorized to offer that particular
21 prescription, then they should -- I think the Court's question
22 implies that they should then receive a rebate for what they
23 paid for something he was not authorized to prescribe.

24 Am I taking the Court's meaning correctly?

25 THE COURT: Essentially. Because there's a

1 deception, I have already talked about that.

2 MR. KAGAN: In this case -- I think that in theory I
3 see the logic of that position. In this particular case,
4 however, it would be nearly impossible to break it out because
5 it is impossible to tell which patient received which
6 particular shipment of drugs, because some of them were
7 getting it over a period of time, and there's a mix of the
8 very same patient would be getting some that was domestic and
9 some that was foreign, and it would be very difficult to tell
10 which patient got which from which lot that he received. So I
11 don't know that it is even possible to determine that.

12 THE COURT: The government has certainly concurred
13 with you in its recommendation of that, so I will indicate
14 here that the Court will not be imposing restitution based on
15 that.

16 MR. KAGAN: Thank you, Your Honor.

17 The government places a lot of emphasis on dishonesty, and
18 in not only the probation department's presentence report but
19 also in the government's sentencing memorandum, there are
20 phrases that are repeated over and over again. It doesn't
21 matter what information we've provided to refute any of it.
22 There's a mantra that gets repeated, and I wanted to address a
23 couple of these things.

24 Dr. Marschall has made clear that, in regard to the
25 fertility, he assisted women in getting pregnant when weight

1 was a factor in their inability to get pregnant. So there
2 were a number of instances where he was able to understand
3 where a woman tried to get pregnant over and over and over and
4 was grossly overweight and was having trouble conceiving, so
5 with some weight loss he was able to assist some women in
6 getting pregnant. So it is not completely fair to say that he
7 never used HCG to treat infertility.

8 Infertility per se would be difficulty in conceiving, and
9 there were a number of successes, and that part has never been
10 acknowledged.

11 Another issue is the mantra of he represented himself to
12 be an endocrinologist, and he is not a quote, licensed
13 endocrinologist, unquote. There is no such thing as a
14 licensed endocrinologist. Endocrinology is the study of
15 hormones, and he has devoted himself not only in study but
16 also over the years of practice to the treatment of diseases
17 that are hormone related such as diabetes and others.

18 THE COURT: Well, let me ask you this in connection
19 with that. Isn't endocrinology a subspecialty of internal
20 medicine?

21 MR. KAGAN: It is a subspecialty, but there's no such
22 thing as being a licensed endocrinologist.

23 THE COURT: But you can get board certified, can you
24 not?

25 MR. KAGAN: You can get board certified; however, I

1 did confer with the head of the legal department for the
2 Department of Health who advised me, and that is why I put
3 into my memorandum and my letter to the probation department,
4 that one need not be an M.D. or a D.O., a medical doctor, to
5 self-refer as an endocrinologist.

6 The only thing that is a restriction on the use of the
7 term endocrinology or endocrinologist is if you attempt to
8 deceive the public into believing that you are an M.D. or a
9 D.O., which was never the case here. Dr. Marschall has always
10 made it clear that he was a naturopathic physician.

11 THE COURT: Well, do you think the average patient
12 knows the distinction --

13 MR. KAGAN: Definitely, because --

14 THE COURT: -- between those three when it comes to
15 subspecialties?

16 MR. KAGAN: Yes, I do, Your Honor. And the reason is
17 that many -- or most -- of his patients or patients who go to
18 naturopaths do so specifically because they reject
19 conventional medicine as practiced by M.D.'s and D.O.'s. So
20 by virtue of the choice that they make to go to the Natural
21 Healing Clinic, which is run by Dr. Rick Marschall, N.D., they
22 know very well that they are rejecting -- it is a conscious
23 decision to reject the option of going to an M.D.

24 So there's no question in my mind that he has never
25 attempted to deceive the public into believing that he's an

1 M.D. or a D.O. and per the State of Washington, which
2 regulates the practice of medicine in this case, it is not
3 considered deceptive or a violation of anything to refer to
4 himself as an endocrinologist if that is what he does in his
5 practice is endocrinology, without reference to the fact that
6 he is not board certified through the M.D. realm, and not
7 needing a license to be one.

8 So I can't seem to persuade the government that this is
9 not an issue of dishonesty, but it is not. I satisfied myself
10 through my contacts with the legal department of DOH that it
11 is not an issue. They don't care about that because it has
12 not been done deceptively to create the impression that he's a
13 medical doctor.

14 So those are a couple examples where the government has
15 sort of harped on dishonesty by repeating the same phrases
16 over and over, but in both of those instances, it is not true.

17 Your Honor, I have been involved in this case now for
18 about a year. I have come to know Dr. Marschall as well as a
19 lawyer can know a client, and I know that his intentions are
20 sincere. I think that the letters that you've received from
21 some of his patients make it clear that, in their view anyway,
22 he is a very kind and compassionate physician, naturopathic
23 physician.

24 A lot of them don't care about the fact that he got
25 involved in a violation of the law. They still wish to

1 continue receiving medical services from him. They feel as
2 though they were well-served. They feel as though he had an
3 understanding of conditions that other types of practitioners
4 never were able to uncover, and they want him to continue
5 practicing and they want to continue being his patient. I
6 think that speaks volumes for the regard with which he's held
7 in the community, including a number of his patients.

8 He has been law abiding his whole life. He has not a
9 blemish on his record, other than what brought him into this
10 court. So I think that the probation department's
11 recommendation for confinement by home detention is
12 unwarranted in this case. I don't believe that Dr. Marshall
13 needs to be confined. I think that the government's
14 recommendation of probation is appropriate.

15 I would urge the Court to impose probation for one year
16 rather than two. I also agree that drug testing is not
17 appropriate in this case because he counsels and he does
18 everything he can to have people lead the cleanest possible
19 lives with their diets and everything that they put in their
20 bodies. There's no implication here whatsoever that drugs are
21 an issue.

22 One of the biggest things I want to bring to the Court's
23 attention is the issue of travel restrictions. I would urge
24 the Court to not impose what is normally a standard condition
25 that Dr. Marshall not be able to leave the judicial district

1 without permission from either the Court or the probation
2 department.

3 He does travel, both overseas and domestically, and his
4 travel is important. He does go to unserved areas of the
5 country, particularly the state of Mississippi, where
6 naturopathy is not licensed by the state of Mississippi. He
7 does go and he does provide services to people who can't
8 otherwise see a naturopath. That does not violate the law of
9 Mississippi and it does not violate the law in the State of
10 Washington. There are a lot of people that count on him to
11 provide some of those naturopathic services in a state which
12 is among many that do not have naturopathy as a recognized
13 profession.

14 THE COURT: How much travel is anticipated next year?

15 MR. KAGAN: I would say that there are --

16 THE DEFENDANT: Seven trips a year.

17 MR. KAGAN: Now, he did surrender his passport. The
18 family did have a planned trip overseas to Italy. That would
19 be important, but mainly it is to be able to treat patients in
20 a place where they can't otherwise receive the services. I
21 would urge the Court to relax that condition. He is not a
22 flight risk; I don't think that's the issue. And I think it
23 is pretty fair to say at this point that he would not be using
24 travel for the purpose of engaging in any kind of criminal
25 activity.

1 With regard to the fine, Your Honor, as you know, the
2 minimum level at this stage with where we are in the
3 proceedings is \$250, and \$5,000 is the maximum. Based on the
4 financial statement that Ms. Miller was able to put together,
5 Dr. Marschall has so little available discretionary funds. He
6 just breaks even every month by virtue of the fact that his
7 clinic is not especially profitable. It is not a big money
8 making operation. He lives on-site, and with all the various
9 expenses that he has, including legal fees that he's had to
10 pay in the last year, he really is not in a position to pay a
11 fine such as the government is suggesting. There isn't that
12 kind of room.

13 THE COURT: Did you just earlier indicate that he was
14 planning a trip to Italy with his family?

15 MR. KAGAN: That is true.

16 THE DEFENDANT: May I respond to that? My parents
17 died -- my father died this March and my mother died a couple
18 years ago, and my siblings want us to travel to Italy to see
19 some relatives and to bring them some things from my parents'
20 home. They are helping me get there, and he's right. For
21 these HCG programs, I charged what most people would say in
22 the field is very reasonable. I am not out to in any way
23 gouge patients, never have. And I do -- when I travel --

24 THE COURT: I am going to interrupt you there. I
25 will give you a chance to address the Court on issues that you

1 want to, but I will turn it back over to Mr. Kagan.

2 MR. KAGAN: I was going to say, Your Honor, that
3 Dr. Marschall didn't anticipate paying his own way, and his
4 wife's way to Italy; there was going to be family support for
5 that. That was going to be the point.

6 In addition to the letters that were provided by me to the
7 Court, I know also that there were a handful in the
8 restitution inquiries that were sent out by the government,
9 that a number of people who also took the position that he was
10 a very fine naturopathic physician and wished to continue
11 being served by him. These are people from various parts of
12 the country who took that trouble.

13 So, Your Honor, my request is that Dr. Marschall serve no
14 confinement, whether that be behind bars or at home; that he
15 not have the travel restrictions the Court would normally
16 impose; and that his sentence of probation last for one year
17 and that the drug testing and the DNA not be imposed on him.
18 He's not a threat of continual criminal conduct.

19 Thank you.

20 THE COURT: Thank you, Mr. Kagan. Ms. Miller, do you
21 have anything you wish to add here?

22 PROBATION OFFICER: Yes, Your Honor. I would like to
23 make an oath that the probation office did not recommend drug
24 treatment or a drug testing condition, so I am not sure what
25 was referred to today. It is not in my recommendation.

1 THE COURT: Thanks. Now, Dr. Marschall, again you
2 have the opportunity to address the Court before sentence is
3 determined and imposed here. Would you like to?

4 THE DEFENDANT: You can hear me all right?

5 THE COURT: Yes. As I indicated earlier, you need
6 not stand.

7 THE DEFENDANT: Well, it is clear to me that I made a
8 mistake by ordering HCG over the Internet. I will say in my
9 defense that HCG is something that has been used in the world
10 since the 1930s, and it has been used for heart disease and
11 rheumatoid problems, prostatic hypertrophy, for immune system
12 disregulation, as well as for weight loss. I have been using
13 it for all those different things.

14 So when my sources in America were unable to provide me --
15 and I contacted every possible compounding pharmacy from
16 California to the East Coast to try to get HCG through my
17 normal channels. I never ordered off of the Internet for any
18 other reason than this.

19 I felt, knowing that it was at least a misdemeanor to do
20 so, that in my belief system, according to the philosophy I
21 was trained under at the University of Santa Clara, you can
22 break a civil law in pursuit of a higher moral law. So in my
23 opinion, in my belief at the time, getting HCG for patients
24 who had benign prostatic hypertrophy, who were struggling with
25 cancer as well as weight problems and an inability to get

1 pregnant and heart disease and several of the conditions that
2 this amazing compound, this natural compound was providing
3 benefit for, if they couldn't supply -- if the three American
4 manufacturing suppliers couldn't provide it for me and the
5 Canadians had documented safety evidence for their HCG, which
6 is what they told me and what I was aware of from other
7 sources and other patients who were getting it from the same
8 place, then I did break the law and I did do that.

9 And as soon as -- I guess you might say some people would
10 have said to me that you are a victim of your own success,
11 meaning about the 13th clinic that I could ascertain by 2008
12 to provide HCG for any reason, other than undescended
13 testicles and infertility which the FDA has approved it for.
14 I was training other doctors around -- some of my fellow
15 naturopathic doctors who are endocrinology trained in our own
16 way.

17 They started ordering, and we couldn't get it
18 domestically, so in fact we got it this way, not just myself,
19 but as many Americans do, when they can't get their own
20 pharmaceutical drugs that they either can't get or afford,
21 they do it through that way. I was looking for another source
22 and within just several months, it came available in Florida.
23 And at the time the FDA actually took my HCG, they took
24 domestic HCG from my clinic, a thousand dollars worth which
25 they never returned, and it only has a shelf life of six

1 months, so that's the case.

2 I guess if I had to do it over again, I wouldn't have done
3 it. It was a mistake. Look what it has gotten me into here.
4 Even with the benefit of these patients, I broke the law. So
5 I don't intend to ever do that again, ever.

6 But that is what happened, and I really have nothing else
7 to say.

8 THE COURT: I am sure that Mr. Kagan has thoroughly
9 prepared you for what is involved in being before a federal
10 judge and sentencing. I am constrained by the law. I must
11 follow the law, and that law tells me that I must consider
12 several factors before arriving at a fair and just sentence.

13 The seriousness of the offense is one of them. I don't
14 think anyone here would be recommending the sentences that are
15 being recommended if this was regarded as a highly serious
16 offense. It carries a maximum of three years, which puts it
17 as a Class C felony at the lower end of felonies, in terms of
18 what punishment is authorized by Congress, which is not to say
19 that it is not a serious offense at all. It is a felony. It
20 is not a misdemeanor, and Congress has determined that these
21 laws are important in protecting the public.

22 I look at who you are as an individual and, apart from
23 this episode in your life, you have been a fine citizen. You
24 have very many appreciative clients or patients, rather, and
25 that certainly militates in favor of a sentence that fully

1 takes into consideration the contribution that you've made.

2 I look at protecting the public. At this point, I don't
3 think that I have to worry about protecting the public. I had
4 some concern when you were indicating that you had been
5 training in California to believe that a higher law supersedes
6 essentially man's law. While others subscribe to that, I
7 think that it is a slippery slope to advance that kind of
8 argument.

9 Sometimes you hear about the crime of necessity, the old
10 entering -- a trespasser entering a burning building to save a
11 life in there. I think it is an overstated proposition
12 because truly you are not a trespasser, you have implied
13 consent to go into that building. But there is certainly --
14 we could sit here and discuss what higher law it is that
15 should supersede, but I don't think we are talking about that
16 here, and it concerned me that you might think that in the
17 interest of serving your patients, that if regulations were to
18 interfere with your ability to do that, you'd just simply do
19 it.

20 You backed off of that some when you indicated later that
21 you wouldn't do this again, primarily because you don't like
22 the consequences, not because you think that -- it appeared to
23 me not because you thought whatever you did was wrong; it was
24 just a violation of the law. So that gives the Court some
25 concern about where you are going to head from here.

1 Certainly, the Court is interested in deterrence,
2 deterring you and deterring others from engaging in this type
3 of illegal conduct, and I think you've spoken to that yourself
4 when you said you don't want to do it again because of the
5 consequences. You now have a felony conviction. I think
6 given the nature of this, that is substantial deterrence to
7 you and to others. We don't know what the licensing
8 implications are here to you. Nobody seems to be able to
9 know, and we are not at that point, but that is another
10 process that apparently you'll have to go through, is whether
11 there's going to be administrative discipline from the
12 Department of Licensing or not.

13 So when I factor all of these things in, I think that a
14 recommendation for probation is a reasonable one and I will
15 adopt it, but the probation will be for two years. You will
16 have the standard conditions, including travel restrictions,
17 although the visa -- or rather passport, Mr. Brown, it seems
18 to me that the passport can be returned to him. The condition
19 remains that he has to secure permission from the probation
20 department to do any travel, including travel overseas.

21 The special conditions are going to apply here, and it is
22 to cooperate in the collection of DNA.

23 Your residence, any property you have is subject to a
24 search, which can be conducted at a reasonable time and a
25 reasonable manner where there's a suspicion that you have

1 violated conditions of your supervised release. Of course,
2 anyone with whom you live needs to know of this condition.

3 The restitution is not going to be paid. Based on the
4 government's administration of this and the representation to
5 the Court, it is not deemed required in this case or
6 appropriate.

7 Now, the fine that the Court is going to impose is a fine
8 of \$2,000. I recognize that \$5,000 is the maximum. I think a
9 fine is in order for this type of offense. You will be given
10 time, of course, to pay that, and interest on that fine will
11 be waived.

12 You have to provide the probation officer with access to
13 all your requested financial information, including
14 authorization to conduct credit checks and obtain copies of
15 your federal income tax returns. You are not to be
16 self-employed or employed by friends unless approved by the
17 probation officer.

18 I know that that has been the nature of your profession
19 and I am certainly expecting that Ms. Miller, as your current
20 probation officer, understands that, and I will leave it at
21 her discretion or any other probation officer to deal with
22 that and impose reasonable conditions there.

23 Now, you are to comply with the Washington State
24 Department of Health in your current practice and not
25 administer or prescribe any drug unless it is approved by the

1 FDA for the purposes intending it to be used for.

2 I am going to require you to perform 250 hours of
3 community service at the approval and direction of the
4 probation officer and in this connection, it is not very
5 common that it is performed out of state, but it seems that
6 you are already interested in some nature of community service
7 outside of the state, and the Court anticipates that that
8 could qualify, if the probation officer is satisfied with the
9 nature of that community service.

10 Finally, you will consent to the probation office
11 conducting and monitoring your computer hardware and software
12 and electronic devices.

13 Again, the fine has already been determined, and you have
14 a special assessment, I believe, that is in the amount and
15 will be in the amount of \$100, which is due immediately.

16 While Mr. Brown is preparing that judgment, I will
17 indicate to you, Dr. Marschall -- remind you, I guess, that
18 you have given up your right to appeal the sentence if that
19 sentence is within or below the sentencing guidelines, and of
20 course it has been. You have waived that right.

21 You have not given up your right to challenge a sentence
22 if you were to allege that you received the ineffective
23 assistance of legal counsel. You've indicated you are
24 satisfied with him, and I think you have every right to be.
25 Your attorney has represented you well in this case, but that

1 is not for me to decide. If you were to challenge the
2 sentence on that basis, you'd have to do it within one year of
3 today's date.

4 MR. BROWN: May I approach?

5 THE COURT: All right. I find the judgment conforms
6 to the Court's sentence imposed here, and I am signing it.

7 Dr. Marschall, I expect that you will be a good
8 probationer on probation, and I will have no opportunity to
9 see you again. I wish you well and trust that you will be
10 able to get beyond this and get back to serving your patients.

11 THE CLERK: All rise.

12 (Proceedings concluded at 2:24 p.m.)

13 * * * * *

14 C E R T I F I C A T E

15
16 I certify that the foregoing is a correct transcript from
17 the record of proceedings in the above-entitled matter.

18
19 /S/ Teri Hendrix

December 2, 2011

20 Teri Hendrix, Court Reporter

Date

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