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7
8 **BEFORE THE**
BOARD OF PHARMACY
9 **DEPARTMENT OF CONSUMER AFFAIRS**
STATE OF CALIFORNIA

10 In the Matter of the Accusation Against:

Case No. 3440

11 **CALI PHARMACY**
12 **702 E. Santa Clara Street No. 1**
13 **San Jose, CA 95112**

A C C U S A T I O N

14 **Pharmacy License No. PHY 43882**

15 **and**

16 **HUNG PHI PHAN**
17 **2196 Wellington Drive**
Milpitas, CA 95035

18 **Pharmacist License No. RPH 45283**

19 Respondents.

20 Complainant alleges:

21
22 PARTIES

23 1. Virginia Herold (Complainant) brings this Accusation solely in her official capacity
24 as the Executive Officer of the Board of Pharmacy, Department of Consumer Affairs.

25 2. On or about January 11, 1999, the Board of Pharmacy issued Pharmacy License
26 Number PHY 43882 to Hung Phi Phan dba Cali Pharmacy (Respondent Cali). The Pharmacy
27 License was in full force and effect at all times relevant to the charges brought herein and will
28 expire on January 1, 2011, unless renewed.

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

4 (j) The violation of any of the statutes of this state, of any other state, or of the United
5 States regulating controlled substances and dangerous drugs.

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

10 9. Section 4059.5, subdivision (a) of the Code provides, in pertinent part, that dangerous
11 drugs and dangerous devices may only be ordered by an entity licensed by the Board and may
12 only be delivered to the licensed premises and signed for and received by a licensed pharmacist.

13 10. Section 4076, subdivision (a)(11)(A) of the Code requires, in pertinent part, that a
14 pharmacist shall not dispense a prescription except in a container that meets the requirements of
15 state and federal law and is correctly labeled with a physical description of the dispensed drug,
16 including its color, shape, and any identification code that appears on the tablets or capsules.

17 11. Section 4081, subdivision (a) of the Code provides, in pertinent part, that all records
18 of manufacture and of sale, acquisition, or disposition of dangerous drugs or dangerous devices
19 shall be at all times during business hours open to inspection by authorized officers of the law,
20 and shall be preserved for at least three years from the date of making. A current inventory shall
21 be kept by every licensed pharmacy that maintains a stock of dangerous drugs or devices.

22 12. Section 4332 of the Code makes it unlawful for any person to fail, neglect, or refuse
23 to maintain the records required by section 4081 or, when called upon by an authorized officer or
24 a member of the board, to refuse to produce or provide the records within a reasonable time, or to
25 willfully produce or furnish records that are false.

26 13. Section 4113, subdivision (b) of the Code states:

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

1 14. Health and Safety Code section 11153 provides that a prescription for a controlled
2 substance shall only be issued for a legitimate medical purpose by an individual practitioner
3 acting in the usual course of his or her professional practice; responsibility for proper prescribing
4 and dispensing of controlled substances is upon the prescribing practitioner, but a corresponding
5 responsibility rests with the pharmacist who fills the prescription.

6 15. Health and Safety Code section 11162.1 sets forth mandatory requirements for secure
7 prescription forms to be used for prescribing controlled substances, including security features.

8 16. Health and Safety Code section 11164 provides, in pertinent part, that except in the
9 emergency circumstances described in section 11167, no person shall prescribe, fill, compound,
10 or dispense a prescription for a controlled substance, unless:

11 (a) Each prescription for a controlled substance classified in Schedule II, III, IV, or V,
12 except as authorized by subdivision (b), is made on a controlled substance prescription form as
13 specified in Section 11162.1, (1) the prescription is signed and dated by the prescriber in ink and
14 contains: the prescriber's address and telephone number; the name of the ultimate user or research
15 subject, or contact information as determined by the Secretary of the United States Department of
16 Health and Human Services; refill information, such as the number of refills ordered and whether
17 the prescription is a first-time request or a refill; and the name, quantity, strength, and directions
18 for use of the controlled substance prescribed, and (2) the prescription also contains the address of
19 the person for whom the controlled substance is prescribed. If the prescriber does not specify this
20 address on the prescription, the pharmacist filling the prescription or an employee acting under
21 the direction of the pharmacist shall write or type the address on the prescription or maintain this
22 information in a readily retrievable form in the pharmacy.

23 (b)(1) Alternatively, any controlled substance classified in Schedule III, IV, or V may be
24 dispensed upon an oral or electronically transmitted prescription, which shall be produced in hard
25 copy form and signed and dated by the pharmacist filling the prescription or by any other person
26 expressly authorized by provisions of the Business and Professions Code. Any person who
27 transmits, maintains, or receives any electronically transmitted prescription shall ensure the
28 security, integrity, authority, and confidentiality of the prescription.

1 (2) The date of issue of the prescription and all the information required for a written
2 prescription by subdivision (a) shall be included in the written record of the prescription; the
3 pharmacist need not include the address, telephone number, license classification, or federal
4 registry number of the prescriber or the address of the patient on the hard copy, if that information
5 is readily retrievable in the pharmacy.

6 (3) Pursuant to an authorization of the prescriber, any agent of the prescriber on behalf of
7 the prescriber may orally or electronically transmit a prescription for a controlled substance
8 classified in Schedule III, IV, or V, if in these cases the written record of the prescription required
9 by this subdivision specifies the name of the agent of the prescriber transmitting the prescription.”

10 17. Health and Safety Code section 11172 provides that no person shall antedate [back-
11 date] or postdate [put a future date on] a prescription.

12 18. California Code of Regulations, title 16, section 1714, subdivision (b) provides that
13 each pharmacy licensed by the board shall maintain its facilities, space, fixtures, and equipment
14 so that drugs are safely and properly prepared, maintained, secured and distributed.

15 19. California Code of Regulations, title 16, section 1718, defines “current inventory” as
16 used in sections 4081 and 4332 to include complete accountability for all dangerous drugs
17 handled by every licensee enumerated in sections 4081 and 4332. It further requires that the
18 controlled substances inventories required by the Title 21, Code of Federal Regulations, section
19 1304, shall be available for inspection upon request for at least 3 years.

20 20. Title 21, Code of Federal Regulations, section 1304.11, subdivision (c) requires that
21 any registrant of the DEA take a new inventory of all stocks of controlled substances on hand at
22 least every two years, on any date within two years of the previous biennial inventory date.

23 21. California Code of Regulations, title 16, section 1761, states:

24 “(a) No pharmacist shall compound or dispense any prescription which contains any
25 significant error, omission, irregularity, uncertainty, ambiguity or alteration. Upon receipt of any
26 such prescription, the pharmacist shall contact the prescriber to obtain the information needed to
27 validate the prescription.

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1 (b) Even after conferring with the prescriber, a pharmacist shall not compound or dispense
2 a controlled substance prescription where the pharmacist knows or has objective reason to know
3 that said prescription was not issued for a legitimate medical purpose.”

4 22. Section 125.3 of the Code provides, in pertinent part, that the Board may request the
5 administrative law judge to direct a licentiate found to have committed a violation of the licensing
6 act to pay a sum not to exceed its reasonable costs of investigation and enforcement.

7 CONTROLLED SUBSTANCES / DANGEROUS DRUGS

8 23. Section 4021 of the Code states:

9 “‘Controlled substance’ means any substance listed in Chapter 2 (commencing with Section
10 11053) of Division 10 of the Health and Safety Code.”

11 24. Section 4022 of the Code states, in pertinent part:

12 “‘Dangerous drug’ or ‘dangerous device’ means any drug or device unsafe for self use,
13 except veterinary drugs that are labeled as such, and includes the following:

14 “(a) Any drug that bears the legend: ‘Caution: federal law prohibits dispensing without
15 prescription,’ ‘Rx only,’ or words of similar import. . . .

16 “(c) Any other drug or device that by federal or state law can be lawfully dispensed only on
17 prescription or furnished pursuant to Section 4006.”

18 25. **Norco, Vicodin, Vicodin ES, Lortab, and Lorcet** are among the brand names for
19 compounds of varying dosages of acetaminophen (aka APAP) and **hydrocodone**, a Schedule III
20 controlled substance as designated by Health and Safety Code section 11056(e)(4) and dangerous
21 drug as designated by Business and Professions Code section 4022. The varying compounds are
22 also known generically as **Hydrocodone with APAP**. These are all narcotic drugs.

23 26. **Valium** is a brand name for **diazepam**, which is a Schedule IV controlled substance
24 as designated by Health and Safety Code section 11057(d)(9) and a dangerous drug as designated
25 by Business and Professions Code section 4022. It is a depressant drug.

26 27. **Ultram** is a brand name for **tramadol**, a dangerous drug as designated by Business
27 and Professions Code section 4022. It is a centrally-acting narcotic-like pain reliever.

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1 32. During the inspection on or about January 6, 2009, the Board Inspector(s) reviewed
2 prescription documents for controlled substance prescriptions, and discovered:

3 a. Multiple prescriptions for **Hydrocodone with APAP** (generic **Vicodin** or **Lortab**),
4 typically in a quantity of 300 tablets, typewritten on plain paper rather than on secure prescription
5 forms required to be used for controlled substances by Health and Safety Code section 11158 et
6 seq. The prescriptions were on paper bearing the name and address for O'Conner Hospital [sic],²
7 called for "Vicodin: Tablet 10.5 mg" (which the pharmacy filled with **Hydrocodone with APAP**
8 **10/500**), transposed the prescriber's purported license and DEA registrant number(s), and were
9 purportedly signed by Amy Whithal, MD. Respondent Phan reported to the Inspectors: that the
10 prescriptions were dropped off and picked up by an individual purporting to be a nurse acting on
11 behalf of the prescriber; that the nurse paid with cash and transported all of the medications to an
12 assisted living facility; and that he had not contacted the prescriber to verify the prescriptions.

13 b. Multiple prescriptions written on the pharmacy's telephone prescription pad for 28
14 tablets of **Penicillin** and 30 tablets of **Lortab** (10/500). When asked if the prescriptions were in
15 his handwriting, Respondent Phan said they were written by a dentist (J.H.)³ whose office was
16 located down the street. Respondent Phan reported that the dentist came to the pharmacy almost
17 every day and asked Respondent Phan to provide him with the (telephonic) prescription pads to
18 write on, so eventually Respondent Phan just provided him with a supply of these documents. In
19 addition, several of the prescriptions written in December 2008 were back-dated to June 2008 and
20 when asked Respondent Phan could provide no explanation for the back-dated prescriptions. He
21 further reported that the dentist always picked up the prescriptions and paid for them with cash.

22 33. Subsequent follow-up investigation by Board Inspector(s) conducted between January
23 and November 2009 revealed the following additional facts regarding Respondents' conduct:

24 a. That there was no record of Amy Whithal being licensed by the Medical Board of
25 California under that name or under the license number used on the prescription documents;

26 _____
27 ² The correct spelling of the area hospital in question is actually O'Connor Hospital.

28 ³ The full name will be revealed to Respondent during discovery

- 1 b. That there was no physician named Amy Whithal employed by O'Connor Hospital;
- 2 c. That the telephone number printed on the prescription documents in the possession of
3 Respondent(s) Cali/Phan did not belong to O'Connor Hospital;
- 4 d. That the name given by the nurse purporting to be a representative of one or more of
5 the prescribers at the hospital was not a name appearing in that hospital's personnel records;
- 6 e. That the hospital had no affiliation with any assisted living facilities;
- 7 f. That in and/or between 2006 and 2008 Respondent(s) Cali/Phan had received and
8 dispensed pursuant to legitimate prescriptions issued on O'Connor Hospital letterhead/forms,
9 including on secure prescription forms conforming with the Health and Safety Code;
- 10 g. That in and/or between 2006 and 2008 Respondent(s) Cali/Phan dispensed pursuant
11 to approximately 263 prescriptions purportedly issued on O'Conner Hospital [sic] letterhead and
12 purportedly signed by various prescribers therein, many or all of which were false, fraudulent, or
13 forged prescriptions – over this period Respondents dispensed approximately 31,870 dosage units
14 (tablets) of varying strengths and varieties of **Hydrocodone with APAP** products (e.g., **Vicodin**,
15 **Lortab**, or generics), as well as 210 dosage units (tablets) of **diazepam** (and/or **Valium**);
- 16 h. That the above-described prescriptions were not written on secure prescription forms;
- 17 i. That Respondent Phan failed to contact the prescribers to verify the prescriptions;
- 18 j. That the dentist license issued to J.H. was delinquent (expired without renewal) from
19 September 30, 2008 until January 27, 2009, rendering him unable to practice during that time;
- 20 k. That in and/or between March 2007 and August 2008, Respondent(s) Cali/Phan had
21 dispensed approximately 1,000 additional prescriptions written by dentist J.H. on the pharmacy's
22 telephonic prescription form(s), 500 of **Penicillin** and 500 of **Hydrocodone with APAP 10/500**
23 (and/or **Lortab 10/500**) – all of these prescriptions were back-dated (antedated) by the dentist;
- 24 l. That between on or about September 30, 2008 and on or about January 27, 2009 (the
25 dates during which dentist J.H.'s license was delinquent), Respondent(s) Cali/Phan dispensed
26 approximately 364 prescriptions for **Penicillin** and **Hydrocodone with APAP 10/500 (Lortab)**
27 that had been back-dated (antedated) to a date prior to the date of the license expiration; and
- 28 m. That Respondents had failed to maintain a current inventory of dangerous drugs.

1 FOURTH CAUSE FOR DISCIPLINE

2 (Improper Delivery/Receipt of Dangerous Drugs/Controlled Substances)

3 37. Respondents Cali and Phan are each subject to discipline under section 4301(j) and/or
4 (o) and/or section 4113(b), in combination with section 4059.5, of the Code, in that, as described
5 in paragraphs 29-34, on one or more occasions it, he, and/or they violated statutes regulating
6 controlled substances or dangerous drugs, and/or directly or indirectly violated, attempted to
7 violate, and/or assisted in or abetted violation of, laws or regulations governing the practice of
8 pharmacy, by acts including but not limited to permitting a non-pharmacist to receive and sign for
9 deliveries of dangerous drugs and/or controlled substances to the pharmacy.

10
11 FIFTH CAUSE FOR DISCIPLINE

12 (Dispensing of Controlled Substances Pursuant to Improper Prescriptions)

13 38. Respondents Cali and Phan are each subject to discipline under section 4301(j) and/or
14 (o) and/or section 4113(b) of the Code, in combination with Health and Safety Code section(s)
15 11162.1 and 11164, in that, as described in paragraphs 29-34, on one or more occasions it, he,
16 and/or they violated statutes regulating controlled substances or dangerous drugs, and/or directly
17 or indirectly violated, attempted to violate, and/or assisted in or abetted violation of, laws or
18 regulations governing the practice of pharmacy, by acts including but not limited to dispensing of
19 controlled substances pursuant to prescriptions not written on secure prescription forms.

20
21 SIXTH CAUSE FOR DISCIPLINE

22 (Dispensing Pursuant to Erroneous or Uncertain Prescriptions)

23 39. Respondents Cali and Phan are each subject to discipline under section 4301(j) and/or
24 (o) and/or section 4113(b) of the Code, in combination with California Code of Regulations, title
25 16, section 1761, in that, as described in paragraphs 29-34, on one or more occasions it, he, and/or
26 they violated statutes regulating controlled substances or dangerous drugs, and/or directly or
27 indirectly violated, attempted to violate, and/or assisted in or abetted violation of, laws or
28 regulations governing the practice of pharmacy, by acts including but not limited to dispensing of

1 medications pursuant to prescription(s) containing a significant error, omission, irregularity,
2 uncertainty, ambiguity or alteration, without first contacting the prescriber to verify and/or when
3 they knew or should have known the prescription was not issued for a legitimate medical purpose.

4
5 SEVENTH CAUSE FOR DISCIPLINE

6 (Failure to Exercise Corresponding Responsibility)

7 40. Respondents Cali and Phan are each subject to discipline under section 4301(j) and/or
8 (o) and/or section 4113(b) of the Code, in combination with Health and Safety Code section(s)
9 11153, in that, as described in paragraphs 29-34, on one or more occasions it, he, and/or they
10 violated statutes regulating controlled substances or dangerous drugs, and/or directly or indirectly
11 violated, attempted to violate, and/or assisted in or abetted violation of, laws or regulations
12 governing the practice of pharmacy, by acts including but not limited to dispensing of controlled
13 substances pursuant to prescriptions where it was or should have been clear that the prescriptions
14 were not issued for a legitimate medical purpose and/or that they were otherwise not proper.

15
16 EIGHTH CAUSE FOR DISCIPLINE

17 (Dispensing Pursuant to Antedated Prescriptions)

18 41. Respondents Cali and Phan are each subject to discipline under section 4301(j) and/or
19 (o) and/or section 4113(b) of the Code, in combination with Health and Safety Code section(s)
20 11172, in that, as described in paragraphs 29-34, on one or more occasions it, he, and/or they
21 violated statutes regulating controlled substances or dangerous drugs, and/or directly or indirectly
22 violated, attempted to violate, and/or assisted in or abetted violation of, laws or regulations
23 governing the practice of pharmacy, by acts including but not limited to dispensing of controlled
24 substances pursuant to prescriptions that had been antedated (back-dated) by the prescriber.

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DISCIPLINE CONSIDERATIONS

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2 44. To determine the proper degree of discipline, if any, to be imposed on Respondent
3 Cali and/or on Respondent Phan, Complainant alleges that effective June 8, 2000, in a prior
4 disciplinary action titled *In the Matter of the Accusation Against Cali Pharmacy and Hung Phi*
5 *Phan*, Case Number 2167 before the Board of Pharmacy, Respondent Phan's license was subject
6 to disciplinary action imposed by the Board as follows:

7 a. On or about October 13, 1999, Accusation No. 2167 was filed before the Board, in
8 which it was alleged that Respondent Cali and Respondent Phan, as Pharmacist-in-Charge, had
9 subjected their licenses to disciplinary action pursuant to sections 4113(b) and 4301(d), (j) and/or
10 (o) of the Code, Health and Safety Code section 11153, and/or California Code of Regulations,
11 title 16, section 1761(b), by engaging in multiple instances of excessive furnishing of controlled
12 substances to a patient, and/or by furnishing controlled substance(s) without a legitimate medical
13 purpose on one or more occasion(s), and/or by filling prescriptions with a significant uncertainty
14 or ambiguity. Specifically, the Accusation alleged all of the following: during an 80-day period
15 in 1996, the pharmacy dispensed 560 tablets (7 tablets per day) of Tylenol #3 (Acetaminophen
16 with Codeine) to a single patient; during an overlapping 288-day period in 1995-96, the pharmacy
17 dispensed 4,620 tablets (16 tablets per day) of Carisoprodol 350mg to the same patient; during an
18 overlapping 68-day period in 1995-96, the pharmacy dispensed 400 tablets (6 tablets per day) of
19 Hydrocodone with APAP to the same patient; during an overlapping 210-day period in 1995-96,
20 the pharmacy dispensed 2,030 tablets (10 tablets per day) of Ultram 50mg to the same patient;
21 and during an overlapping 254-day period in 1996, the pharmacy dispensed 3,480 tablets (14
22 tablets per day) of Carisoprodol 350 mg to a second patient.. Also, all of these prescriptions were
23 conveyed to the pharmacy by telephone by a person identifying herself as a prescriber's assistant;
24 however, the prescriptions were actually phoned in by the first of these two patients.

25 b. On or about February 25, 2000, Respondent Phan signed a Stipulation in Settlement
26 agreeing to accept discipline under the Accusation. Though he contested the charges, he agreed
27 that if such charges were proven at hearing, they would constitute cause for discipline, and further
28 stipulated that in future no claim would be made that the charges had not been proven.

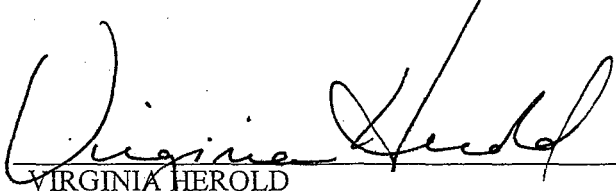
1 c. By Decision and Order of the Board effective June 8, 2000, the stipulation was made
2 the decision of the Board, and Respondent Phan's license was revoked, with the revocation stayed
3 and Respondent Phan's license placed on probation for three (3) years on terms and conditions
4 including a 45-day suspension, reimbursement of \$4,000.00 in Board costs, and all other standard
5 terms and conditions of probation. Pursuant to the agreement, this Decision and Order dismissed
6 the Accusation as to Respondent Cali, imposing no discipline against the premises license. That
7 decision is now final and is incorporated by reference as if fully set forth herein.

8
9 PRAYER

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

- 12 1. Revoking or suspending Pharmacy License Number PHY 43882, issued to Hung Phi
13 Phan dba Cali Pharmacy (Respondent Cali);
- 14 2. Revoking or suspending Pharmacist License Number RPH 45283, issued to Hung Phi
15 Phan (Respondent Phan);
- 16 3. Ordering Respondent Cali and Respondent Phan, jointly and severally, to pay to the
17 Board of Pharmacy reasonable costs of its investigation and enforcement of this case, pursuant to
18 Business and Professions Code section 125.3;
- 19 4. Taking such other and further action as is deemed necessary and proper.

20
21 DATED: 6/17/10


22 VIRGINIA HEROLD
23 Executive Officer
24 Board of Pharmacy
25 Department of Consumer Affairs
26 State of California
27 Complainant

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