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

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| In the Matter of the Accusation Against:<br><br>**AMADO MERCHAN**<br>**180 Flora Avenue**<br>**Walnut Creek, CA 94595**<br><br>**Pharmacy Technician License No. TCH 69567**<br><br>Respondent. | Case No. 4562<br><br>**ACCUSATION** |

Complainant alleges:

PARTIES

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

2. On or about September 11, 2006, the Board of Pharmacy issued Pharmacy Technician License Number TCH 69567 to Amado Merchan (Respondent). The Pharmacy Technician License expired on or about September 30, 2012, and has not been renewed. The License was cancelled based on delinquency on or about January 6, 2013.

JURISDICTION

3. This Accusation is brought before the Board of Pharmacy (Board), Department of Consumer Affairs, under the authority of the following laws. All section references are to the Business and Professions Code (Code) unless otherwise indicated.

4. Section 4011 of the Code provides that the Board shall administer and enforce both the Pharmacy Law [Bus. & Prof. Code, § 4000 et seq.] and the Uniform Controlled Substances Act [Health & Safety Code, § 11000 et seq.].

5. Section 4300(a) of the Code provides that every license issued by the Board may be suspended or revoked.

6. Section 4300.1 of the Code provides that the expiration, cancellation, forfeiture, or suspension of a Board-issued license, the placement of a license on a retired status, or the voluntary surrender of a license by a licensee, shall not deprive the Board of jurisdiction to commence or proceed with any investigation of, or action or disciplinary proceeding against, the licensee or to render a decision suspending or revoking the license.

## STATUTORY AND REGULATORY PROVISIONS

7. Section 4301 of the Code provides, in pertinent part, that the Board shall take action against any holder of a license who is guilty of "unprofessional conduct," defined to include, but not be limited to, any of the following:

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

(h) The administering to oneself, of any controlled substance, or the use of any dangerous drug or of alcoholic beverages to the extent or in a manner as to be dangerous or injurious to oneself, to a person holding a license under this chapter, or to any other person or to the public, or to the extent that the use impairs the ability of the person to conduct with safety to the public the practice authorized by the license.

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

(l) The conviction of a crime substantially related to the qualifications, functions, and duties of a licensee under this chapter.

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

8. Section 490 of the Code provides, in pertinent part, that the Board may suspend or revoke a license when it finds that the licensee has been convicted of a crime substantially related to the qualifications, functions or duties of the license.

9. California Code of Regulations, title 16, section 1770, states:

"For the purpose of denial, suspension, or revocation of a personal or facility license pursuant to Division 1.5 (commencing with Section 475) of the Business and Professions Code, a crime or act shall be considered substantially related to the qualifications, functions or duties of a licensee or registrant if to a substantial degree it evidences present or potential unfitness of a licensee or registrant to perform the functions authorized by her license or registration in a manner consistent with the public health, safety, or welfare."

10. Section 4059 of the Code, in pertinent part, prohibits furnishing of any dangerous drug or dangerous device except upon the prescription of an authorized prescriber.

11. Section 4060 of the Code provides, in pertinent part, that no person shall possess any controlled substance, except that furnished upon a valid prescription/drug order.

12. Health and Safety Code section 11170 provides that no person shall prescribe, administer, or furnish a controlled substance for himself or herself.

13. Health and Safety Code section 11173, subdivision (a), provides that no person shall obtain or attempt to obtain controlled substances, or procure or attempt to procure the administration of or prescription for controlled substances, (1) by fraud, deceit, misrepresentation, or subterfuge; or (2) by the concealment of a material fact.

14. Health and Safety Code section 11350, in pertinent part, makes it unlawful to possess any controlled substance listed in Schedule II (Health and Safety Code section 11055), subdivision (b) or (c), or any narcotic drug in Schedules III-V, absent a valid prescription.

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15. Health and Safety Code section 11377, in pertinent part, makes it unlawful to possess certain Schedule I-III controlled substances, or any controlled substance in Schedules III-V which is not a narcotic drug, unless upon written prescription of an authorized prescriber.

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COST RECOVERY

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

CONTROLLED SUBSTANCES / DANGEROUS DRUGS

17. Section 4021 of the Code states:

"'Controlled substance' means any substance listed in Chapter 2 (commencing with Section 11053) of Division 10 of the Health and Safety Code."

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

"'Dangerous drug' or 'dangerous device' means any drug or device unsafe for self use, except veterinary drugs that are labeled as such, and includes the following:

"(a) Any drug that bears the legend: 'Caution: federal law prohibits dispensing without prescription,' 'Rx only,' or words of similar import.

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

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

20. **Xanax** is a brand name for **alprazolam**, a Schedule IV controlled substance as designated by Health and Safety Code section 11057(d)(1) and dangerous drug as designated by Business and Professions Code section 4022. It is used to treat anxiety and panic disorders.

21. **Phenergan with Codeine** syrup is a brand name for a compound consisting of the antihistamine **promethazine**, a dangerous drug as designated by Business and Professions Code section 4022, and **codeine**, a Schedule V controlled substance as designated by Health and Safety Code section 11058(c)(1) and a dangerous drug as designated by Business and Professions Code section 4022. This drug is also known generically as **Promethazine with Codeine** syrup. It is an antihistamine/antitussive, narcotic analgesic, and sleep aid.

## FACTUAL BACKGROUND

22. For approximately six (6) years until on or about May 22, 2012, Respondent was employed as a pharmacy technician at a Rite Aid Pharmacy (PHY 42399) in Pleasanton, CA, where by virtue of his employment he had access to controlled substances and dangerous drugs.

23. During the tenure of his employment by the Rite Aid Pharmacy, Respondent used his access to divert/steal controlled substances and dangerous drugs, including **Hydrocodone** products, **alprazolam** (**Xanax**) products, and **Promethazine with Codeine** products, for self-use.

24. The exact number of instances of diversion/theft by Respondent, and the full quantity of controlled substances or dangerous drugs diverted/stolen by Respondent, are not known, but in the course of investigations conducted by the pharmacy, by police, and by the Board of Pharmacy, the following were among the observations, admissions, and revelations reported:

a. A review of controlled substance inventories conducted by pharmacy staff or supervisors in or about May 2012 identified a shortage of 1,965 tablets of **Hydrodocone with APAP** drug products from the pharmacy inventory. A subsequent review of footage from covert video surveillance of the pharmacy identified Respondent, on at least five (5) occasions between March 26, 2012 and May 11, 2012, appearing to take tablets from one or more bottle(s) of **Hydrocodone with APAP** and place them into his pocket(s).

b. Pharmacy staff and/or supervisors reviewed inventories of other controlled substances, and detected further losses of **Xanax / alprazolam** (100 tablets missing) products and **Promethazine with Codeine** (20 bottles of 480 mls each, total of 9,600 mls missing) products.

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c. On or about May 22, 2012, Respondent was interviewed by pharmacy staff or supervisors, and by the Pleasanton Police Department, and admitted to diverting/stealing around 500-1,000 tablets of **Hydrocodone with APAP 10/325** (generic **Norco**), approximately six (6) bottles (2,880 mls) of **Promethazine with Codeine**, and approximately 20 tablets of **Xanax**.

d. An audit of controlled substance inventories subsequently performed by Rite Aid for the period from May 1, 2011 to June 1, 2012 identified total losses of 2,176 tablets of **Hydrocodone with APAP 10/325** (generic **Norco**), 11,173 mls of **Promethazine with Codeine**, and 222 tablets of varying strengths of **alprazolam** (generic **Xanax**). There were also other shortages of controlled substances in the pharmacy inventory.

FIRST CAUSE FOR DISCIPLINE

(Acts Involving Moral Turpitude, Dishonesty, Fraud, Deceit or Corruption)

25. Respondent is subject to discipline under section 4301(f) of the Code, in that Respondent, as described in paragraphs 21 to 23 above, committed acts involving moral turpitude, dishonesty, fraud, deceit, or corruption.

SECOND CAUSE FOR DISCIPLINE

(Self-Administration of Controlled Substance(s))

26. Respondent is subject to discipline under section 4301(h) of the Code, and/or Health and Safety Code section 11170, in that Respondent, as described in paragraphs 21 to 23 above, self-administered a controlled substance, and/or conspired and/or assisted or abetted this conduct.

THIRD CAUSE FOR DISCIPLINE

(Furnishing of Controlled Substance(s))

27. Respondent is subject to discipline under section 4301(j) and/or (o) and/or section 4059 of the Code, and/or Health and Safety Code section 11170, in that Respondent, as described in paragraphs 21 to 23 above, furnished to himself a controlled substance without a valid prescription, and/or conspired and/or assisted or abetted this conduct.

## FOURTH CAUSE FOR DISCIPLINE

(Possession of Controlled Substance(s))

28. Respondent is subject to discipline under section 4301(j) and/or (o) and/or section 4060 of the Code, and/or Health and Safety Code section 11350 and/or 11377, in that Respondent, as described in paragraphs 21 to 23 above, possessed, conspired to possess, and/or assisted in or abetted possession of, a controlled substance, without a prescription.

## FIFTH CAUSE FOR DISCIPLINE

(Obtaining Controlled Substance by Fraud, Deceit or Subterfuge)

29. Respondent is subject to discipline under section 4301(j) and/or (o) of the Code, and/or Health and Safety Code section 11173(a), in that Respondent, as described in paragraphs 21 to 23 above, obtained, conspired to obtain, and/or assisted in or abetted the obtaining of a controlled substance, by fraud, deceit, subterfuge, or concealment of material fact.

## SIXTH CAUSE FOR DISCIPLINE

(Conviction of Substantially Related Crime(s))

30. Respondent is subject to discipline under section 4301(l) and/or section 490 of the Code, by reference to California Code of Regulations, title 16, section 1770, in that on or about March 24, 2014, in the criminal case *People v. Amado Merchan*, Case No. H55047 in Alameda County Superior Court, Respondent was convicted of violating Penal Code section 487, subdivision (a) (Grand Theft of Personal Property > $950), a felony, as follows:

a. On or about May 22, 2012, based on the conduct described in paragraphs 21 to 23 above, Respondent was arrested on suspicion of violating Penal Code section 459 (Burglary) and Penal Code section 503 (Embezzlement), both felonies.

b. On or about June 18, 2012 and/or November 25, 2013, Respondent was charged in Case No. H55047 in Alameda County Superior Court with violating (1) Penal Code section 487, subdivision (a) (Grand Theft of Personal Property > $950.00), a felony, and (2) Penal Code section 503 (Embezzlement > $950.00), a felony.

c. On or about March 24, 2014, Respondent pleaded no contest to Count 1 and was convicted. Count 2 was dismissed pursuant to the plea. Imposition of sentence was suspended and Respondent was placed on formal probation for a period of five (5) years, on terms and conditions including time served of two (2) days, NA/AA attendance, and fines and fees.

## SEVENTH CAUSE FOR DISCIPLINE

(Unprofessional Conduct)

31. Respondent is subject to discipline under section 4301 of the Code in that Respondent, as described in paragraphs 21 to 30 above, engaged in unprofessional conduct.

## PRAYER

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

1. Revoking or suspending Pharmacy Technician License Number TCH 69567, issued to Amado Merchan (Respondent);

2. Ordering Respondent to pay the Board the reasonable costs of the investigation and enforcement of this case, pursuant to Business and Professions Code section 125.3;

3. Taking such other and further action as is deemed necessary and proper.

DATED: 6/9/14

Virginia Herold

VIRGINIA HEROLD
Executive Officer
Board of Pharmacy
Department of Consumer Affairs
State of California
*Complainant*

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