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10 **BEFORE THE**
BOARD OF PHARMACY
11 **DEPARTMENT OF CONSUMER AFFAIRS**
STATE OF CALIFORNIA
12

13 In the Matter of the Accusation Against:

Case No. 4660

14 **MICHAEL JAMES HART**
15 **3805 Boundary Street, Apt. E**
San Diego, CA 92104

A C C U S A T I O N

16 **Pharmacy Technician Registration**
17 **No. TCH 86374**

18 Respondent.

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20 Complainant alleges:

21 **PARTIES**

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

24 2. On or about September 5, 2008, the Board of Pharmacy issued Pharmacy Technician
25 Registration Number TCH 86374 to Michael James Hart (Respondent). The Pharmacy
26 Technician Registration was in full force and effect at all times relevant to the charges brought
27 herein and will expire on October 31, 2013, unless renewed.

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1 **JURISDICTION**

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

5 4. Section 4300, subdivision (a) of the Code states "Every license issued may be
6 suspended or revoked."

7 5. Section 4300.1 of the Code states:

8 The expiration, cancellation, forfeiture, or suspension of a board-issued license
9 by operation of law or by order or decision of the board or a court of law, the
10 placement of a license on a retired status, or the voluntary surrender of a license by a
11 licensee shall not deprive the board of jurisdiction to commence or proceed with any
12 investigation of, or action or disciplinary proceeding against, the licensee or to render
13 a decision suspending or revoking the license.

12 **STATUTORY PROVISIONS**

13 6. Section 482 of the Code states:

14 Each board under the provisions of this code shall develop criteria to evaluate
15 the rehabilitation of a person when:

16 (a) Considering the denial of a license by the board under Section 480; or

17 (b) Considering suspension or revocation of a license under Section 490.

18 Each board shall take into account all competent evidence of rehabilitation
19 furnished by the applicant or licensee.

20 7. Section 490 of the Code provides, in pertinent part, that a board may suspend or
21 revoke a license on the ground that the licensee has been convicted of a crime substantially
22 related to the qualifications, functions, or duties of the business or profession for which the
23 license was issued.

24 8. Section 493 of the Code states:

25 Notwithstanding any other provision of law, in a proceeding conducted by a
26 board within the department pursuant to law to deny an application for a license or to
27 suspend or revoke a license or otherwise take disciplinary action against a person who
28 holds a license, upon the ground that the applicant or the licensee has been convicted
of a crime substantially related to the qualifications, functions, and duties of the
licensee in question, the record of conviction of the crime shall be conclusive
evidence of the fact that the conviction occurred, but only of that fact, and the board
may inquire into the circumstances surrounding the commission of the crime in order

1 to fix the degree of discipline or to determine if the conviction is substantially related
2 to the qualifications, functions, and duties of the licensee in question.

3 As used in this section, "license" includes "certificate," "permit," "authority,"
4 and "registration."

5 9. Section 4301 of the Code states:

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

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

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

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18 (l) The conviction of a crime substantially related to the qualifications,
19 functions, and duties of a licensee under this chapter. The record of conviction of a
20 violation of Chapter 13 (commencing with Section 801) of Title 21 of the United
21 States Code regulating controlled substances or of a violation of the statutes of this
22 state regulating controlled substances or dangerous drugs shall be conclusive
23 evidence of unprofessional conduct. In all other cases, the record of conviction shall
24 be conclusive evidence only of the fact that the conviction occurred. The board may
25 inquire into the circumstances surrounding the commission of the crime, in order to
26 fix the degree of discipline or, in the case of a conviction not involving controlled
27 substances or dangerous drugs, to determine if the conviction is of an offense
28 substantially related to the qualifications, functions, and duties of a licensee under this
chapter. A plea or verdict of guilty or a conviction following a plea of nolo
contendere is deemed to be a conviction within the meaning of this provision. The
board may take action when the time for appeal has elapsed, or the judgment of
conviction has been affirmed on appeal or when an order granting probation is made
suspending the imposition of sentence, irrespective of a subsequent order under
Section 1203.4 of the Penal Code allowing the person to withdraw his or her plea of
guilty and to enter a plea of not guilty, or setting aside the verdict of guilty, or
dismissing the accusation, information, or indictment.

. . . .

(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.

. . . .

1 10. Section 4022 of the Code states

2 "Dangerous drug" or "dangerous device" means any drug or device unsafe for
3 self-use in humans or animals, and includes the following:

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

6 (b) Any device that bears the statement: "Caution: federal law restricts this
7 device to sale by or on the order of a _____," "Rx only," or words of similar
8 import, the blank to be filled in with the designation of the practitioner licensed to use
9 or order use of the device.

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

12 11. Section 4059 of the Code states, in pertinent part, that a person may not furnish any
13 dangerous drug except upon the prescription of a physician, dentist, podiatrist, optometrist,
14 veterinarian, or naturopathic doctor pursuant to Section 3640.7.

15 12. Section 4060 of the Code provides, in pertinent part, that no person shall possess any
16 controlled substance, except that furnished to a person upon the prescription of a physician,
17 dentist, podiatrist, optometrist, veterinarian, or naturopathic doctor.

18 13. Health and Safety Code section 11350, subdivision (a) states:

19 Except as otherwise provided in this division, every person who possesses (1)
20 any controlled substance specified in subdivision (b) or (c), or paragraph (1) of
21 subdivision (f) of Section 11054, specified in paragraph (14), (15), or (20)
22 of subdivision (d) of Section 11054, or specified in subdivision (b) or (c) of Section
23 11055, or specified in subdivision (h) of Section 11056, or (2) any controlled
24 substance classified in Schedule III, IV, or V which is a narcotic drug, unless upon
25 the written prescription of a physician, dentist, podiatrist, or veterinarian licensed to
26 practice in this state, shall be punished by imprisonment pursuant to subdivision (h)
27 of Section 1170 of the Penal Code.

28 14. Health and Safety Code section 11351 states:

 Except as otherwise provided in this division, every person who possesses for
sale or purchases for purposes of sale (1) any controlled substance specified in
subdivision (b), (c), or (e) of Section 11054, specified in paragraph (14), (15), or (20)
of subdivision (d) of Section 11054, or specified in subdivision (b) or (c) of Section
11055, or specified in subdivision (h) of Section 11056, or (2) any controlled
substance classified in Schedule III, IV, or V which is a narcotic drug, shall be
punished by imprisonment pursuant to subdivision (h) of Section 1170 of the Penal
Code for two, three, or four years.

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1 15. Health and Safety Code section 11377, subdivision (a) states:

2 Except as authorized by law and as otherwise provided in subdivision (b) or
3 Section 11375, or in Article 7 (commencing with Section 4211) of Chapter 9 of
4 Division 2 of the Business and Professions Code, every person who possesses any
5 controlled substance which is (1) classified in Schedule III, IV, or V, and which is not
6 a narcotic drug, (2) specified in subdivision (d) of Section 11054, except paragraphs
7 (13), (14), (15), and (20) of subdivision (d), (3) specified in paragraph (11) of
8 subdivision (c) of Section 11056, (4) specified in paragraph (2) or (3) of subdivision
9 (f) of Section 11054, or (5) specified in subdivision (d), (e), or (f) of Section 11055,
10 unless upon the prescription of a physician, dentist, podiatrist, or veterinarian,
11 licensed to practice in this state, shall be punished by imprisonment in a county jail
12 for a period of not more than one year or pursuant to subdivision (h) of Section 1170
13 of the Penal Code.

14 16. Health and Safety Code section 11378 states:

15 Except as otherwise provided in Article 7 (commencing with Section 4211) of
16 Chapter 9 of Division 2 of the Business and Professions Code, every person who
17 possesses for sale any controlled substance which is (1) classified in Schedule III, IV,
18 or V and which is not a narcotic drug, except subdivision (g) of Section 11056, (2)
19 specified in subdivision (d) of Section 11054, except paragraphs (13), (14), (15), (20),
20 (21), (22), and (23) of subdivision (d), (3) specified in paragraph (11) of subdivision
21 (c) of Section 11056, (4) specified in paragraph (2) or (3) of subdivision (f) of Section
22 11054, or (5) specified in subdivision (d), (e), or (f), except paragraph (3) of
23 subdivision (e) and subparagraphs (A) and (B) of paragraph (2) of subdivision (f), of
24 Section 11055, shall be punished by imprisonment pursuant to subdivision (h) of
25 Section 1170 of the Penal Code.

26 17. United States Code, title 21, section 843 states, in pertinent part:

27 (a) It shall be unlawful for any person knowingly or intentionally –

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(3) to acquire or obtain possession of a controlled substance by
misrepresentation, fraud, forgery, deception, or subterfuge;

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REGULATORY PROVISIONS

18. California Code of Regulations, title 16, section 1769, states:

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(b) When considering the suspension or revocation of a facility or a personal
License on the ground that the licensee or the registrant has been convicted of a
crime, the board, in evaluating the rehabilitation of such person and his present
eligibility for a license will consider the following criteria:

(1) Nature and severity of the act(s) or offense(s).

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(2) Total criminal record.

(3) The time that has elapsed since commission of the act(s) or offense(s).

(4) Whether the licensee has complied with all terms of parole, probation, restitution or any other sanctions lawfully imposed against the licensee.

(5) Evidence, if any, of rehabilitation submitted by the licensee.

19. 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 his license or registration in a manner consistent with the public health, safety, or welfare.

COSTS

20. 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 or violations of the licensing act to pay a sum not to exceed the reasonable costs of the investigation and enforcement of the case, with failure of the licentiate to comply subjecting the license to not being renewed or reinstated. If a case settles, recovery of investigation and enforcement costs may be included in a stipulated settlement.

DRUGS

21. Alprazolam, sold commercially as Xanax, is a Schedule IV controlled substance under California Health and Safety Code section 11057, subdivision (d)(1), and is classified as a dangerous drug pursuant to Business and Professions Code section 4022.

22. Hydrocodone bitartate/acetaminophen, sold commercially as Norco, is a Schedule III controlled substance as designated by Health and Safety Code section 11056, subdivision (e)(4), and is a dangerous drug pursuant to Business and Professions Code section 4022.

23. Tramadol, sold commercially as Ultram, is a dangerous drug pursuant to Business and Professions Code section 4022.

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1 FIRST CAUSE FOR DISCIPLINE

2 **(February 23, 2012 Criminal Conviction for Grand Theft on January 1, 2012)**

3 24. Respondent has subjected his registration to discipline under sections 490 and 4301,
4 subdivision (l) of the Code in that he was convicted of a crime that is substantially related to the
5 qualifications, duties, and functions of a pharmacy technician. The circumstances are as follows:

6 a. On or about February 23, 2012, in a criminal proceeding entitled *People of the*
7 *State of California v. Michael James Hart*, in San Diego County Superior Court, case number
8 CD238395, Respondent was convicted on his plea of guilty to violating Penal Code section 487,
9 subdivision (a), grand theft of personal property, a felony reduced to a misdemeanor at sentencing
10 after Respondent paid restitution to the victim in the amount of \$1,089.22. Pursuant to
11 Respondent's plea agreement, the court dismissed additional counts of burglary (Pen. Code, §
12 459), and possession of a controlled substance, to wit, hydrocodone (Health & Saf. Code, §
13 11350(a)).

14 b. As a result of the conviction, on or about March 22, 2012, Respondent was
15 granted three years formal probation, and sentenced to serve one day in jail, with credit for one
16 day. Respondent was further ordered to complete 20 days of community service, pay fees and
17 fines in the amount of \$2,551.22, submit to a Fourth Amendment waiver, comply with drug and
18 alcohol terms, and to stay away from CVS Pharmacy.

19 c. The facts that led to the conviction are that on or about January 4, 2012, a CVS
20 Pharmacy Loss Prevention Manager contacted the Drug Enforcement Administration's San Diego
21 Field Division's Tactical Diversion Squad (TDS) to report that one of their pharmacy technicians
22 (Respondent) was seen on video surveillance stealing one bottle of Norco 10/325 from their
23 pharmacy during his scheduled shift on January 1, 2012. That afternoon, agents from the TDS
24 met with the Loss Prevention Manager to review the video surveillance footage, and
25 arrangements were made to allow the Loss Prevention Manager to obtain a statement from
26 Respondent. In Respondent's written statement, he admitted that from April 2010 to January 1,
27 2012, he stole approximately four bottles of Norco 7.5/325 mg., two bottles of Norco 10/325 mg.,
28 two bottles of Xanax 2 mg., and 40 bottles of Ultram 50 mg. Respondent stated he sold the drugs

1 to friends. The total cost of the stolen drugs was estimated at \$1,089.22. The TDS agents arrived
2 and placed Respondent under arrest. Respondent discussed his written statement with the TDS
3 agents and confirmed the thefts. In a subsequent interview with an investigator with the Board of
4 Pharmacy on June 29, 2012, Respondent prepared a written declaration stating that he stole the
5 drugs for resale and for personal use.

6 **SECOND CAUSE FOR DISCIPLINE**

7 **(Commission of Acts Involving Dishonesty, Fraud, Deceit & Corruption)**

8 25. Respondent has subjected his registration to discipline under section 4301,
9 subdivision (f) of the Code for unprofessional conduct in that on or between April 2010 and
10 January 2012, Respondent stole controlled substances and dangerous drugs from his
11 employer/pharmacy using fraud, deceit, and dishonesty, as described in paragraph 24, above.

12 **THIRD CAUSE FOR DISCIPLINE**

13 **(Violation of California Statutes Regulating Controlled Substances)**

14 26. Respondent is subject to disciplinary action under section 4301, subdivision (j) of the
15 Code for unprofessional conduct in that on or between April 2010 to January 2011, Respondent
16 knowingly violated Business and Professions Code sections 4022, 4059, and 4060; and Health
17 and Safety Code sections 11350, 11351, 11377, and 11378, as described in paragraph 24, above.

18 **FOURTH CAUSE FOR DISCIPLINE**

19 **(Violating Federal & State Laws & Regulations Governing Pharmacy)**

20 27. Respondent is subject to disciplinary action under section 4301, subdivision (o) of the
21 Code for unprofessional conduct in that on or between April 2010 to January 2012, Respondent
22 violated Title 21 U.S.C. section 843, subdivision (a)(3), Board of Pharmacy Regulations
23 (California Code of Regulations, Title 16, Section 1700, et seq.), and the California Uniform
24 Controlled Substances Act (Health and Safety Code 11000, et seq.), when he obtained controlled
25 substances using fraud and deceit, as described in paragraph 24, above.

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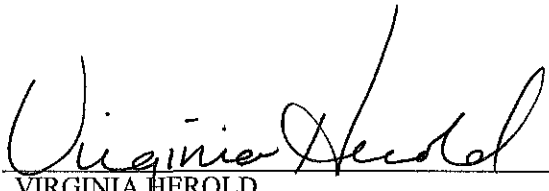
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PRAYER

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 Registration Number TCH 86374, issued to Michael James Hart;
2. Ordering Michael James Hart to pay the Board of Pharmacy the reasonable costs of the investigation and enforcement of this case, pursuant to Business and Professions Code section 125.3;
3. Taking such other and further action as deemed necessary and proper.

DATED: 9/27/13



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

SD2013805176