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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. 2701

11 MARCELLA L. BERK
5329 Wesley Road
12 Rocklin, CA 95765

**STIPULATED SURRENDER OF
LICENSE AND ORDER**

13 Pharmacy Technician Registration No. TCH
14 35695

Respondent.

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16
17 IT IS HEREBY STIPULATED AND AGREED by and between the parties in this
18 proceeding that the following matters are true:

19 PARTIES

20 1. Patricia F. Harris (Complainant) is the Executive Officer of the Board of
21 Pharmacy. She brought this action solely in her official capacity and is represented in this matter
22 by Bill Lockyer, Attorney General of the State of California, by Jana L. Tuton, Deputy Attorney
23 General.

24 2. Marcella L. Berk (Respondent) is representing herself in this proceeding
25 and has chosen not to exercise her right to be represented by counsel.

26 3. On or about January 5, 2001, the Board of Pharmacy issued Pharmacy
27 Technician Registration No. TCH 35695 to Marcella L. Berk. The Registration was in full force

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1 and effect at all times relevant to the charges brought in Accusation No. 2004-144 and will expire
2 on May 31, 2006, unless renewed.

3 JURISDICTION

4 4. Accusation No. 2004-144 was filed before the Board of Pharmacy (Board),
5 Department of Consumer Affairs, and is currently pending against Respondent. The Accusation
6 and all other statutorily required documents were properly served on Respondent on January 6,
7 2005. Respondent timely filed her Notice of Defense contesting the Accusation. A copy of
8 Accusation No. 2004-144 is attached as exhibit A and incorporated herein by reference.

9 ADVISEMENT AND WAIVERS

10 5. Respondent has carefully read, and understands the charges and allegations
11 in Accusation No. 2004-144. Respondent also has carefully read, and understands the effects of
12 this Stipulated Surrender of License and Order.

13 6. Respondent is fully aware of her legal rights in this matter, including the
14 right to a hearing on the charges and allegations in the Accusation; the right to be represented by
15 counsel, at her own expense; the right to confront and cross-examine the witnesses against her;
16 the right to present evidence and to testify on her own behalf; the right to the issuance of
17 subpoenas to compel the attendance of witnesses and the production of documents; the right to
18 reconsideration and court review of an adverse decision; and all other rights accorded by the
19 California Administrative Procedure Act and other applicable laws.

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

22 CULPABILITY

23 8. Respondent understands that the charges and allegations in Accusation
24 No. 2004-144, if proven at a hearing, constitute cause for imposing discipline upon her Pharmacy
25 Technician Registration.

26 9. For the purpose of resolving the Accusation without the expense and
27 uncertainty of further proceedings, Respondent agrees that, at a hearing, Complainant could
28 establish a factual basis for the charges in the Accusation and that those charges constitute cause

1 for discipline. Respondent hereby gives up her right to contest that cause for discipline exists
2 based on those charges.

3 10. Respondent understands that by signing this stipulation she enables the
4 Board to issue an order accepting the surrender of her Pharmacy Technician Registration without
5 further process.

6 RESERVATION

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

11 CONTINGENCY

12 12. This stipulation shall be subject to approval by the Board of Pharmacy.
13 Respondent understands and agrees that counsel for Complainant and the staff of the Board of
14 Pharmacy may communicate directly with the Board regarding this stipulation and settlement,
15 without notice to or participation by Respondent. By signing the stipulation, Respondent
16 understands and agrees that she may not withdraw her agreement or seek to rescind the
17 stipulation prior to the time the Board considers and acts upon it. If the Board fails to adopt this
18 stipulation as its Decision and Order, the Stipulated Surrender and Disciplinary Order shall be of
19 no force or effect, except for this paragraph, it shall be inadmissible in any legal action between
20 the parties, and the Board shall not be disqualified from further action by having considered this
21 matter.

22 13. The parties understand and agree that facsimile copies of this Stipulated
23 Surrender of License and Order, including facsimile signatures thereto, shall have the same force
24 and effect as the originals.

25 14. In consideration of the foregoing admissions and stipulations, the parties
26 agree that the (Board) may, without further notice or formal proceeding, issue and enter the
27 following Order:

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ORDER

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2 IT IS HEREBY ORDERED that Pharmacy Technician Registration No. TCH
3 35695, issued to Respondent Marcella L. Berk is surrendered and accepted by the Board of
4 Pharmacy.

5 15. Respondent shall lose all rights and privileges as a pharmacy technician in
6 California as of the effective date of the Board's Decision and Order.

7 16. Respondent shall cause to be delivered to the Board both her wall and
8 pocket certificates on or before the effective date of the Decision and Order.

9 17. Respondent fully understands and agrees that if she ever files an
10 application for licensure or a petition for reinstatement in the State of California, the Board shall
11 treat it as a petition for reinstatement. Respondent must comply with all the laws, regulations
12 and procedures for reinstatement of a revoked license in effect at the time the petition is filed,
13 and all of the charges and allegations contained in Accusation No. 2004-144 shall be deemed to
14 be true, correct, and admitted by Respondent when the Board determines whether to grant or
15 deny the petition.

16 18. Respondent shall pay the Board its costs of investigation and enforcement
17 in the amount of \$2,500.00 prior to issuance of a new or reinstated license.

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ACCEPTANCE

I have carefully read the Stipulated Surrender of License and Order. I understand the stipulation and the effect it will have on my Pharmacy Technician Registration. I enter into this Stipulated Surrender of License and Order voluntarily, knowingly, and intelligently, and agree to be bound by the Decision and Order of the Board of Pharmacy.

DATED: 2/21/05.




MARCELLA L. BERK
Respondent

ENDORSEMENT

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

DATED: 3-10-05.

BILL LOCKYER, Attorney General
of the State of California



JANA L. TUTON
Deputy Attorney General

Attorneys for Complainant

DOJ Docket Number/Matter ID: sa2004102946
stipulation 1-28-05.wpd

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

In the Matter of the Accusation Against:

MARCELLA L. BERK
5329 Wesley Road
Rocklin, CA 95765

Pharmacy Technician Registration No. TCH
35695

Respondent:

Case No 2701

OAH No. ***

DECISION AND ORDER

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

This Decision shall become effective on May 27, 2005.

It is so ORDERED April 27, 2005.

BOARD OF PHARMACY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

By


STANLEY W. GOLDENBERG
Board President

Exhibit A
Accusation No. 2004-144

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of the State of California
2 JANA L. TUTON, State Bar No. 78206
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3 California Department of Justice
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8 **BEFORE THE**
9 **BOARD OF PHARMACY**
10 **DEPARTMENT OF CONSUMER AFFAIRS**
11 **STATE OF CALIFORNIA**

12 In the Matter of the Accusation Against:

Case No. 2701

13 **MARCELLA L. BERK,**
5329 Wesley Road
14 Rocklin, CA 95765

ACCUSATION

15 **Original Pharmacy Technician Registration**
16 **No. TCH 35695**

Respondent.

17 Complainant alleges:

18 **PARTIES**

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

22 2. On or about January 5, 2001, the Board of Pharmacy ("Board") issued
23 Original Pharmacy Technician Registration Number TCH 35695 to Marcella L. Berk
24 (Respondent). The registration will expire on May 31, 2006, unless renewed.

25 **STATUTORY PROVISIONS**

26 3. Section 477 of the Code provides that the term "board" includes "bureau,"
27 "commission," "committee," "department," "division," "examining committee," "program," and

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1 "agency." The term "license" includes certificate, registration or other means to engage in a
2 business or profession regulated by the Code.

3 3 Section 4038 of the Code provides:

4 "Pharmacy technician" means an individual who assists a pharmacist in a
5 pharmacy in the performance of his or her pharmacy related duties, as specified in Section 4115."

6 4. Section 4300 of the Code provides, in pertinent part:

7 "(a) Every license issued may be suspended or revoked.

8 (b) The board shall discipline the holder of any license issued by the
9 board, whose default has been entered or whose case has been heard by the board and found
10 guilty, by any of the following methods:

11 (1) Suspending judgment.

12 (2) Placing him or her upon probation.

13 (3) Suspending his or her right to practice for a period not exceeding one
14 year.

15 (4) Revoking his or her license.

16 (5) Taking any other action in relation to disciplining him or her as the
17 board in its discretion may deem proper."

18 5. Section 4301 of the Code provides, in pertinent part:

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

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

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

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1 6. Health and Safety Code section 11173, subdivision (a) provides:

2 "(a) No person shall obtain or attempt to obtain controlled substances, or
3 procure or attempt to procure the administration of or prescription for controlled substances, (1)
4 by fraud, deceit, misrepresentation, or subterfuge; or (2) by the concealment of a material fact."

5 7. Health and Safety Code section 11368 provides:

6 "Every person who forges or alters a prescription or who issues or utters
7 an altered prescription, or who issues or utters a prescription bearing a forged or fictitious
8 signature for any narcotic drug, or who obtains any narcotic drug by any forged, fictitious, or
9 altered prescription, or who has in possession any narcotic drug secured by a forged, fictitious, or
10 altered prescription, shall be punished by imprisonment in the county jail for not less than six
11 months nor more than one year, or in the state prison."

12 8. Section 125.3 of the Code provides that the Board may request the
13 administrative law judge to direct a licentiate found to have committed a violation or violations
14 of the licensing act to pay a sum not to exceed the reasonable costs of the investigation and
15 enforcement of the case.

16 **DRUGS**

17 9. Section 4022 of the Code provides that the term "dangerous drug" means
18 any drug unsafe for self-use in that under federal or state law the drug can be lawfully dispensed
19 only on prescription or furnished pursuant to section 4006 of the Code.

20 10. "Hydrocodone" with Acetaminophen (Lortab) is a Schedule III controlled
21 substance as designated by Health and Safety Code section 11056, subdivision (e)(4), and a
22 dangerous drug within the meaning of section 4022 of the Code, in that under federal or state
23 law Hydrocodone can be lawfully dispensed only on prescription or furnished pursuant to
24 section 4006 of the Code.

25 **FIRST CAUSE FOR DISCIPLINE**

26 (Dishonest and Fraudulent Acts)

27 11. Respondent's license is subject to discipline under section 4301,
28 subdivisions (f), and (j) of the Code, for obtaining controlled substances by fraud, deceit,

1 and misrepresentation and in violation of Health & Safety Code sec. 11173(a) and 11368,
2 as more particularly set forth below:

3 a. **Sav On Pharmacy, Sacramento, California:**

4 On or about November 20, 2002, Respondent knowingly presented
5 a fraudulent prescription written by Leonard Magnani, M.D., for 100-tablets of Hydrocodone/
6 APAP 7.5/500 (Lortab) to Sav On Pharmacy located in Sacramento, California. After the
7 prescription was filled, Respondent gave the drugs to Dr. Magnani.

8 b. **Bel Air Pharmacy, Sacramento, California:**

9 On or about October 19, 2001, November 15, 2001,
10 December 10, 2001, February 23, 2002, April 16, 2002, July 15, 2002, October 30, 2002,
11 and November 25, 2002, Respondent knowingly presented eight fraudulent prescriptions written
12 by Leonard Magnani, M.D., to Bel Air Pharmacy located in Sacramento, California, for
13 Hydrocodone/APAP 7.5/500 (Lortab). Each prescription was for 100 tablets. After the
14 prescriptions were filled, Respondent gave the drugs to Dr. Magnani.

15 c. **Safeway Pharmacy, Sacramento, California:**

16 On or about April 20, 2001, June 6, 2001, July 12, 2001,
17 December 7, 2001, March 14, 2002, September 3, 2002, October 2, 2002, and
18 November 7, 2002, Respondent knowingly presented nine fraudulent prescriptions written by
19 Leonard Magnani, M.D., to Safeway Pharmacy located in Sacramento, California, for
20 Hydrocodone/APAP 7.5/500 (Lortab) in a total dosage of 900-tablets. Each prescription was for
21 100 tablets. After the prescriptions were filled, Respondent gave the drugs to Dr. Magnani.

22 d. **Raley's Pharmacy, Sacramento, California:**

23 On or about December 27, 2001, February 12, 2002, April 2, 2002,
24 and October 23, 2002, Respondent knowingly presented four fraudulent prescriptions for
25 Hydrocodone/APAP 7.5/500 (Lortab) written by Leonard Magnani, M.D., to Raley's Pharmacy
26 located in Sacramento, California. Each prescription was for 100 tablets. After the prescriptions
27 were filled, Respondent gave the drugs to Dr. Magnani.

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1 PRAYER

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

4 1. Revoking or suspending Original Pharmacy Technician Registration
5 Number TCH 35695 issued to Marcella L. Berk;

6 2. Ordering Marcella L. Berk to pay the reasonable costs incurred by the
7 Board in the investigation and enforcement of this case pursuant to section 125.3 of the Code;
8 and,

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

10 DATED: 12/13/04

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12
13 *P. F. Harris*

14 PATRICIA F. HARRIS
15 Executive Officer
16 Board of Pharmacy
17 Department of Consumer Affairs
18 State of California
19 Complainant
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