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

In the Matter of the Accusation Against: MARLON ORELLANA 4236 Nelsonback Avenue Lakewood, California 90712 Pharmacy Technician Registration Number TCH 32624 Respondent.	Case No. 2895 OAH No. L2006030290

PROPOSED DECISION

The hearing in the above-captioned matter took place on May 25, 2006, in Los Angeles, California. Joseph D. Montoya, Administrative Law Judge (ALJ), Office of Administrative Hearings, presided. Complainant was represented by Barry G. Thorpe, Deputy Attorney General. Respondent appeared in propria persona.

Evidence was received, the case argued, and the matter submitted for decision on the hearing date. The Administrative Law Judge hereby makes his factual findings, legal conclusions, and order, as follows.

FACTUAL FINDINGS

1. Complainant Patricia F. Harris filed the Accusation in this matter while acting solely in her official capacity as the Executive Officer of the Board of Pharmacy (Board), Department of Consumer Affairs, State of California.

2. Respondent Marlon E. Orellana is licensed by the Board as a Pharmacy Technician, and has been so licensed since March 17, 2000. He holds Pharmacy Technician Registration number TCH 32624. However, the registration was delinquent as of April 21, 2006, and it had an expiration date of March 31, 2006. There is no evidence that Respondent had renewed his registration as of the hearing date.

3. Respondent was employed as a pharmacy technician at Whittier Pharmacy in Whittier, California, from approximately August 2003 until on or about August 17, 2004.

4. On August 12, 2004, Respondent was on duty with a pharmacist, Magdy "Mike" Zouen. On that date the pharmacy received a shipment of drugs from the firm's wholesaler. Among the drugs received were Phentermine, 30 mg., the generic name for Fastin and Ionamin. Phentermine is a Class IV controlled substance under section 11057, subdivision (a)(4) of the Health and Safety Code, and Phentermine is categorized as a dangerous drug pursuant to section 4022 of that Code.

5. After the shipment of drugs was received, Mr. Zouen priced the items received, and placed them on the pharmacy's shelves. This included a sealed package containing 100 capsules of 30 mg. Phentermine. In the late afternoon, Mr. Zouen checked the pharmacy's stock and discovered that 40 capsules of the newly-received Phentermine were missing. He ran a daily report, but it did not account for the missing drugs. He spoke to Respondent about it, and Respondent produced documentation showing the 40 capsules of Phentermine as having been sold. Mr. Zouen found that puzzling, as he had no recollection at the time of having dispensed such a prescription.

6. Computer-generated reports from the pharmacy's record-keeping system showed that such a prescription had been filled, that prescription purportedly being from a Dr. Arturo Lopez. The initials given for the person filling the prescription were "DK", which were not Mr. Zouen's initials, nor the initials of the owner of the pharmacy, Odette Khalil. The last three numbers of the prescription are "810." (See Ex. 4, p. 1.)

7. Mr. Zouen notified the owner of the pharmacy of the shortage. She and her husband spoke to Respondent about the matter, and obtained a written statement from him on August 17, 2006. The statement is as follows:

> I, Marlon Orellana, admit to helping Maria Rodriguez to take out prescription medications out of the shelf without a prescription without notifying the pharmacist on duty. In addition, I admit to have seen (sic) Maria taking out the medications herself out of the pharmacy. Maria has been taking phenteramine 15 mg and 30 mg out of the pharmacy for about one year. On 8/16/2004, I filled a prescription RX#23810 and I changed the date for 8/12/2004 without a valid prescription by using someone elses (sic) user name and cod then I deleted it from the computer. (Ex. 6.)

8. Maria Rodriguez, the person referred to in Respondent's statement, was a clerk in the store where the pharmacy was housed. She and Respondent were terminated by Whittier Pharmacy on or about August 17, 2004. It should be noted that the number of the false prescription record acknowledged in Respondent's written statement coincides with the record noted in Factual Finding 6, above.

9. The owners of the pharmacy reported this matter to the Board, and the Board in turn assigned one of it's inspectors, Valerie L. Knight, to investigate the matter. She

interviewed Mr. Zouen, the owners of the pharmacy, and Respondent. She learned that more than just 40 capsules of Phentermine was missing from the pharmacy inventory. Not only had a substantial amount of Phentermine been taken, but there was an unexplained shortage of Viagra and Hydrocodone. (Hydrocodone is a controlled substance also known as Vicodin ES.) In total, nearly 600 capsules were missing from the pharmacy inventory.

10. As part of her investigation, Ms. Knight contacted Respondent so as to obtain his side of the story. She obtained the following statement from Respondent, which bears repeating, verbatim[1]:

> My name is Marlon Orellana. I was a pharmacy technician at whiter drug's. I worked for this pharmacy for about 1 year. I never had no incident's with this pharmacy. I am a honest person. I never acknowl-
> edge me falsely in putting a fake prescription all I said I did was I got #10 phentermine capsules put them in a vial and an another employee Maria Rodriquez took the 10 capsules. I knew she had taken the capsules. But I didn't say anything. So pretty much its my fault. She was on a diet and wanted those pills. Her husband was a heroin addict.
> That day I admitted leaving the pills there 4 Maria to take.
> I never took any pills for personal gain or personal use. I am not obeist. I do not need that medication. I never took anything else. I know I did something wrong but please take into consideration I am a single parent. I have a lot of responsibility. I wouldnt do anything to mess up my career especially for my son. I admit knowing Maria Rodriguez took the pills. That's as far as my involvement. In another words I pretty much handed her the pills. I left them 4 her to take.
> If anything whitter drugs should get audited for being so crooked. They would bill the insurance companys for a certain amount of medications and dispense a different amount. The pharmacist Mike would get a certain medication approved, and would ship out a cheaper medication. This was through workers comp. I didn't take any medication Maria did.

Respondent handwrote and signed this statement for Ms. Knight in approximately April 2005.[2]

11. During the hearing in this matter, Respondent testified that he facilitated Ms. Rodriguez's theft of 10 capsules of Phentermine on one occassion; he denied having a hand in any other thefts. He claimed he had not done anything like his participation in her theft

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[1] The numerous spelling and grammatical errors are found in the original. The convention of italicizing such has been departed from given the volume of the errors.

[2] Ms. Knight had sent him the Board's standard form for such statements on or about April 15, 2005, requesting a response in 14 days. According to her report, she received it back on May 2, 2005.

before that one incident. He denied that Ms.Rodriguez was to pay him for his help, or that she was his girlfriend. Further, he attested that he had left the 10 capsules for Mr. Rodriguez in approximately mid-July 2004, and not on August 12 of that year. He admitted to creating a false prescription to hide the theft of the 10 capsules, and that he later deleted that false prescription, at some time before August 12, 2004. He denied ever making other false prescriptions.

12. It was established, in part through Mr. Zouen's testimony, that persons other than Respondent, other pharmacy technicians, and pharmacists could gain access to the pharmacy with relative ease. For example, all of those who worked in the store that housed the pharmacy had to walk through the pharmacy area to get to the restroom. Mr. Zouen admitted that if he were distracted, or needed to use the restroom, people could gain access. Further, non-licensees who worked for the pharmacy performed tasks nearby the pharmacy, and could potentially access drugs without the knowledge of the pharmacist on duty.

13. In the course of denying any other thefts of drugs on his own part, and in denying any involvement with any other thefts perpetrated by Ms. Rodriguez, Respondent testified that he had "suspected" she was stealing Phentermine from the pharmacy. He stated he had not shared his suspicions with the pharmacist-in-charge. His explanation for his failure to come forward was that Ms. Rodriguez had several children and a husband who was not working, and he did not want her to lose her job.

14. Although some of Respondent's testimony was accepted, not all of his statements during the hearing were credible. For example, he testified to having a suspicion that Ms. Rodriguez was stealing Phentermine, but in the written statement given to his employer, he said he had seen her take the drugs. He claimed during the hearing that he created a false prescription record on one occasion, in approximately July 2004, but his August 17, 2004 written statement identifies one that he created on August 16, 2004. He was on duty on August 12, 2004, when a substantial amount of Phentermine went missing, and gave his pharmacist an explanation that did not comport with the circumstances; this was before he admittedly made a false prescription record.

15. It was not established that Respondent was responsible for the theft of all the drugs that were ultimately found missing after August 12, 2004, and as alleged in the Second Cause for Discipline. However, it was established that Respondent stole controlled substances from the pharmacy, that he assisted Ms. Rodriguez in the theft of controlled substances, and that he created and then deleted false prescription records. By his own admission he failed to inform the pharmacist-in-charge that he had seen Ms. Rodriguez take controlled substances.

16. Respondent expressed remorse for helping Ms. Rodriguez take the small amount of Phentermine capsules. However, he continued to deny any involvement in the shortage that was established on August 12, 2004, even though he was involved with creation of a false record on or about that date. While he recognized that he was responsible for his

wrongdoing, he appeared to have no idea that if he saw another employee stealing from the pharmacy, he should speak up and thereby prevent further theft. While he claims to have matured since these incidents, he has much to learn about his obligations as a licensee.

17. The Board has incurred costs of investigation and prosecution in the amount of $6,544.75. Approximately $5,200 of that amount are attributable to attorneys' fees, including paralegal's charges, and the balance is attributed to the investigation.

18. Respondent has not worked as a pharmacy technician since the early part of 2006, as he is now a sales representative. He is married and has a child to support. While the costs claimed are reasonable when determining the sum total, they are not reasonable unless made payable in installments.

LEGAL CONCLUSIONS

1. Jurisdiction exists to proceed in this matter, pursuant to Business and Professions Code sections 118, subdivision (b), and 4300[3], based on Factual Findings 1 and 2.

2. Cause exists to suspend or revoke Respondent's registration as a pharmacy technician pursuant to sections 4300 and 4301, subdivision (g), for his unprofessional conduct in making false prescription and pharmacy records, based on Factual Findings 3 through 8, 11, 14, and 15.

3. (A) Respondent's admitted furnishing of Phentermine to his co-worker constituted a violation of section 4051, subdivision (a), which bars the furnishing of prescription drugs by any person but a pharmacist. This Conclusion is based on Factual Findings 3 through 11, and 14 through 16.

(B) As a result of his violation of section 4051, subdivision (a), cause exists to suspend or revoke Respondent's registration as a pharmacy technician pursuant to sections 4300 and 4301, subdivision (j), for his unprofessional conduct in violating a statute that regulates controlled substances and dangerous drugs.

4. Cause exists to suspend or revoke Respondent's registration as a pharmacy technician pursuant to sections 4300 and 4301, subdivision (j), for his unprofessional conduct in committing dishonest, fraudulent, and corrupt acts by making false prescription and pharmacy records, by assisting another to steal controlled substances, and by stealing controlled substances. This Conclusion is based on Factual Findings 3 through 11, and 13 through 15.

[3] All statutory references shall be to the Business and Professions Code unless otherwise noted.

5. The Board is entitled to recover its costs pursuant to section 125.3, based on Legal Conclusions 2 through 4, and each of them. The reasonable amount of costs is $6,544.75, based on Factual Finding 17 and 18, so long as he is allowed to pay the costs in reasonable installments. (See *Zuckerman v. State Board of Chiropractic Examiners*, (2002) 29 Cal.4th 32, 45 [When imposing costs, "The Board must consider the licensee's ability to make payment."].) Monthly payments of $125.00 appear reasonable in all the circumstances.

6. (A) There were no mitigating facts presented in this matter and little evidence of rehabilitation. Even if all of Respondent's statements were given full weight, it would be established that he falsified prescription records on two occasions, that he helped a co-worker steal a small amount of a dangerous controlled substance, and that he had turned a blind eye to her constant theft for a period of months. Respondent demonstrated a lack of insight into the nature of his wrongdoing.

(B) It is well-settled that the purpose of proceedings of this type is to protect the public, and not to punish the errant licensee. (*E.g., Camacho v. Youde* (1979) 95 Cal.App.3d 161, 164.) The Board's paramount duty is public protection. (See §4001.1.) It is clear that the public can best be protected by the revocation of the Respondent's Pharmacy Technician registration.

ORDER

The Pharmacy Technician Registration issued to Respondent Marlon E. Orellana, number TCH 32624, is hereby revoked. Respondent shall pay to the Board its costs of $6,544.75 in installments of $125.00 per month beginning 30 days after the effective date of this decision.

June 26, 2006

Joseph D. Montoya
Administrative Law Judge
Office of Administrative Hearings

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

In the Matter of the Accusation Against: MARLON ORELLANA 4236 Nelsonback Avenue Lakewood, California 90712 Pharmacy Technician Registration Number TCH 32624, Respondent.	Case No.: 2895 OAH No.: L2006030290

DECISION

The attached Proposed Decision of the Administrative Law Judge is hereby adopted by the Board of Pharmacy as its Decision in the above-entitled matter.

This Decision shall become effective on August 30, 2006

IT IS SO ORDERED July 31, 2006.

BOARD OF PHARMACY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

By William Powers
WILLIAM POWERS
Board President

rfm

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Attorneys for Complainant

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

In the Matter of the Accusation Against: MARLON E. ORELLANA 4236 Nelsonbark Avenue Lakewood, CA 90712 Pharmacy Technician Registration No. TCH 32624 Respondent.	Case No. 2895 **FIRST AMENDED ACCUSATION**

Complainant alleges:

PARTIES

1. Patricia F. Harris (Complainant) makes and files this First Amended Accusation solely in her official capacity as the Executive Officer of the Board of Pharmacy, Department of Consumer Affairs. This First Amended Accusation supersedes and replaces nunc pro tunc the Accusation previously filed.

2. On or about March 17, 2000, the Board of Pharmacy issued Original Pharmacy Technician Registration No. TCH 32624 to Marlon E. Orellana (Respondent). The Original Pharmacy Technician Registration was in full force and effect at all times relevant to the charges brought herein and will expire on March 31, 2006, unless renewed.

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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 unless otherwise indicated.

4. Section 4300 of the Code provides, in pertinent part, that every license issued by the Board is subject to discipline, including suspension or revocation.

5. Section 118, subdivision (b) states:

"The suspension, expiration, or forfeiture by operation of law of a license issued by a board in the department, or its suspension, forfeiture, or cancellation by order of the board or by order of a court of law, or its surrender without the written consent of the board, shall not, during any period in which it may be renewed, restored, reissued, or reinstated, deprive the board of its authority to institute or continue a disciplinary proceeding against the licensee upon any ground provided by law or to enter an order suspending ore revoking the license or otherwise taking disciplinary action against the licensee on any such ground."

6. Section 4301 of the Code states:

"The board shall take action against any holder of a license who is guilty of unprofessional conduct or whose license has been procured by fraud or misrepresentation or issued by mistake. Unprofessional conduct shall include, but is not 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.

"(g) Knowingly making or signing any certificate or other document that falsely represents the existence or nonexistence of a state of facts.

. . . .

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

. . . .

"(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.

"(p) Actions or conduct that would have warranted denial of a license."

7. Section 4051 of the Code states:

"(a) Except as otherwise provided in this chapter, it is unlawful for any person to manufacture, compound, furnish, sell, or dispense any dangerous drug or dangerous device, or to dispense or compound any prescription pursuant to Section 4040 of a prescriber unless he or she is a pharmacist under this chapter."

8. Health and Safety Code section 11173, subdivision (a), provides: "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."

9. 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.

10. CONTROLLED SUBSTANCE

A. Phentermine, generic for Fastin and Ionamin, a class of drugs called anorectics, is a Schedule IV controlled substances as designated by Health and Safety Code section 11057(f)(4) and is categorized as a dangerous drug pursuant to section 4022 of the Code.

FIRST CAUSE FOR DISCIPLINE

(Knowingly Making a False Document)

11. Respondent is subject to disciplinary action under sections 4300 and 4301, subdivisions (g) and (o) of the Code, on the grounds of unprofessional conduct in that Respondent knowingly made a false prescription. The circumstances are as follows:

a. On or about August 16, 2004, Respondent, while employed as a pharmacy technician at Whittier Drug, entered a false prescription for Phentermine 15 mg. #60 in the pharmacy computer for a patient. Respondent used the initials of a pharmacist no longer working at the pharmacy and the name of a doctor who had not seen the patient. Respondent admitted that he changed the date from August 16, 2004 to August 12, 2005 and then deleted the entry from the computer.

SECOND CAUSE FOR DISCIPLINE

(Furnishing Controlled Substances Without a Prescription)

12. Respondent is subject to disciplinary action under sections 4300 and 4301, subdivisions (j) and (o) of the Code, on the grounds of unprofessional conduct for violating code section 4051 in Respondent dispensed a dangerous drug without a prescription. The circumstances are as follows:

a. On or about August 17, 2005, Respondent stated that for over a year he had been taking Phentermine from the pharmacy and giving the medications to a clerk/employee. Respondent stated that he had been helping her take the prescription medications without a prescription.

b. The pharmacist estimated that Respondent removed approximately 600 pills of Phentermine from the pharmacy, valued at approximately $500.

c. On or about August 12, 2004, Respondent took Phentermine 30 mg. from his employer, Whittier Drugs, without a prescription or authorization to do so.

THIRD CAUSE FOR DISCIPLINE

(Obtained Controlled Substances by Dishonesty, Fraud or Deceit)

13. Respondent is subject to disciplinary action under sections 4300 and 4301, subdivisions (f) and (o) of the Code, on the grounds of unprofessional conduct for violating Health and Safety Code section 11173, subdivision (a), in that Respondent obtained a controlled substances by dishonesty, fraud or deceit. The circumstances are as follows:

a. On or about August 12, 2004, Respondent removed approximately 40 capsules of Phentermine 30 mg. from the Whittier Drug Pharmacy. On or about August 12,

2005, at about 11:00 a.m., the pharmacist received an order of 100 capsules Phentermine 30mg. At approximately 4:30 p.m., the pharmacist discovered that 40 capsules were missing. Respondent was on duty on that day.

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 No. TCH 32624, issued to Marlon E. Orellana.

2. Ordering Marlon E. Orellana 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: 12/16/05

P. F. Harris

PATRICIA F. HARRIS
Executive Officer
Board of Pharmacy
Department of Consumer Affairs
State of California
Complainant

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

In the Matter of the Accusation Against:	Case No. 2895
MARLON E. ORELLANA 4236 Nelsonbark Avenue Lakewood, CA 90712 Pharmacy Technician Registration No. TCH 32624 Respondent.	**ACCUSATION**

Complainant alleges:

PARTIES

1. Patricia F. Harris (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 March 17, 2000, the Board of Pharmacy issued Original Pharmacy Technician Registration No. TCH 32624 to Marlon E. Orellana (Respondent). The Original Pharmacy Technician Registration was in full force and effect at all times relevant to the charges brought herein and will expire on March 31, 2006, unless renewed.

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"(g) Knowingly making or signing any certificate or other document that falsely represents the existence or nonexistence of a state of facts.

. . . .

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

. . . .

"(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.

"(p) Actions or conduct that would have warranted denial of a license."

7. Section 4051 of the Code states:

"(a) Except as otherwise provided in this chapter, it is unlawful for any person to manufacture, compound, furnish, sell, or dispense any dangerous drug or dangerous device, or to dispense or compound any prescription pursuant to Section 4040 of a prescriber unless he or she is a pharmacist under this chapter."

8. Health and Safety Code section 11173, subdivision (a), provides: "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."

9. 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.

10. CONTROLLED SUBSTANCE

A. Phentermine, generic for Fastin and Ionamin, a class of drugs called anorectics, is a Schedule IV controlled substances as designated by Health and Safety Code section 11057(f)(4) and is categorized as a dangerous drug pursuant to section 4022 of the Code.

FIRST CAUSE FOR DISCIPLINE

(Knowingly Making a False Document)

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PRAYER

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1. Revoking or suspending Pharmacy Technician Registration No. TCH 32624, issued to Marlon E. Orellana.

2. Ordering Marlon E. Orellana 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: 8/31/05

P. F. Harris

PATRICIA F. HARRIS
Executive Officer
Board of Pharmacy
Department of Consumer Affairs
State of California
Complainant

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