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

In the Matter of the Accusation Against: DOMINADOR S GERALES Pharmacy Technician Registration No. TCH 10407 Respondent.	Case No. 2923 OAH No. N2006090258

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 May 19, 2007.

It is so ORDERED on April 19, 2007.

BOARD OF PHARMACY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

By William Powers
WILLIAM POWERS
Board President

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

In the Matter of the Accusation Against:	Case No. 2923
DOMINADOR S. GERALES	OAH No. N2006090258
Pharmacy Technician Registration No. TCH 10407	
Respondent.	

PROPOSED DECISION

This matter was heard on February 14, 16 and 27, 2007, before Ann Elizabeth Sarli, Administrative Law Judge, State of California, Office of Administrative Hearings (OAH), in Sacramento, California.

Complainant, Patricia F. Harris, Executive Officer of the Board of Pharmacy, was represented by Sterling Smith, Deputy Attorney General.

Dominador S. Gerales was represented by Jeffrey S. Kravitz, Attorney at Law.

Oral and documentary evidence was submitted. The record was closed and the matter submitted for decision on February 27, 2007.

FACTUAL FINDINGS

1. On November 3, 1993, the Board of Pharmacy (Board) issued Pharmacist License Number TCH 10407 (pharmacy technician registration) to Dominador S. Gerales (respondent). The pharmacy technician registration was in full force and effect at all times relevant to this proceeding.

2. On May 3, 2006, Patricia F. Harris made the Accusation against respondent in her official capacity as Executive Officer of the Board. The Accusation was filed with OAH on September 13, 2006.

3. Respondent timely filed a Notice of Defense to the Accusation, pursuant to Government Code sections 11505 and 11509. The matter was set for an evidentiary hearing before an Administrative Law Judge of the Office of Administrative Hearings, an independent adjudicative agency of the State of California, pursuant to Government Code section 11500 et seq.

4. Respondent is thirty-nine years old. In 1988 he joined the United States Air Force and trained as a pharmacy technician. In 1993 he was licensed and began working at the Kaiser Permanente Hospital in Roseville (Kaiser) in the inpatient pharmacy. The Kaiser inpatient pharmacy provides supplies and medications to the hospital wards, so that physicians and nurses can administer medications to patients. The Kaiser pharmacy also has a small section, known as the discharge pharmacy, which dispenses medications to patients who are being discharged from the hospital. Both the inpatient and discharge sections have "picking areas" or storage areas where the drugs are stored in bins. Pharmacists and pharmacy technicians access the bins to obtain bulk supplies and unit doses of medications.

5. In October and November 2003, respondent was scheduled to work 6:00 p.m. to 2:30 a.m. at Kaiser. During the evening shift there were two technicians on duty until 11 p.m., and two pharmacists. From 11:00 p.m. to 6:30 a.m. there was one technician on duty and one pharmacist. Respondent's duties on the evening shift consisted filling drug dispensing machines in the hospital, compouning medication solutions, making unit doses of medications from bulk supplies, and determining if supplies were low and additional medications should be ordered.

6. Fioricet is a compound consisting of Butalbital, a Schedule III controlled substance as designated by Health and Safety Code section 11056, subdivision (c)(3).

7. In the summer of 2003, Nancy Lorge (Lorge) was the Kaiser pharmacy technician responsible for ordering the inventory of medications. She ordered medications when supplies were low, so that there would always be medications on hand for the hospital. She noticed that she was ordering more Fioricet than usual. She compared the Fioricet ordering history to the pharmacy utilization and determined that the quantity ordered exceeded the quantity dispensed. Lorge brought her concerns to the attention of the pharmacy manager, Anthony Angulo (Angulo). Angulo reviewed pharmacy and hospital records, and confirmed that more Fioricet had been ordered and received than was utilized. According to pharmacy and hospital records, there was missing Fioricet inventory and no explanation for the missing inventory.

8. Alan Yee, Kaiser pharmacy compliance unit conducted "data mining" of the previous 20 months and determined that 49 bottles of Fioricet had been ordered by the Roseville facility and 41 bottles were unaccounted for. In September 2003, Angulo instituted a "counting system" to determine what was occurring with the Fioricet stores. He and another pharmacist, Donna Chun (Chun), inventoried and monitored the Fioricet storage bins in both the inpatient and discharge storage areas of the pharmacy. Three times

a day on weekdays Angulo or Chun counted the bottles and tablets of Fioricet in both storage areas of the pharmacy. On Monday, September 15, at 8:00 a.m., 37 tablets of Fioricet were missing from a bulk bottle of 100 tablets in the inpatient storage section. The timing of the counting system meant that the Fioricet disappeared over the weekend of September 12 through September 15. No Fioricet had been sent to the hospital floor and no patient had been discharged with a Fioricet prescription.

On Tuesday, September 22, a noon count showed one bottle of Fioricet (100 tablets) was missing from the storage bin in the inpatient section and was unaccounted for. By September 26, 2003, a total of 237 tablets was missing (two bulk bottles of 100 tablets each and 37 individual tablets). Angulo contacted Kaiser's loss prevention department, and on September 26, 2003, hidden cameras were placed in the inpatient and discharge pharmacies, directly above the Fioricet bins. The hidden cameras were connected to a videotape recorder concealed in the pharmacist's office.

9. On October 1, 2003, at 8:00 a.m., one bottle of 100 tablets was missing and unaccounted for from the Fioricet bin in the inpatient section of the pharmacy. Again, on October 6, 2003, there was one bottle of 100 tablets and 30 individual tablets of Fioricet missing from the inpatient section of the pharmacy. On October 13, 2003, a 100 tablet bottle of Fioricet was missing from the discharge pharmacy and unaccounted for. Angulo removed the video tapes from the hidden camera after each of these discrepancies was discovered and had them delivered to Kaiser loss prevention, where they were stored in a safe until reviewed by Kaiser security personnel.[1]

10. Grace Mizuhara, Kaiser a pharmacy compliance manger, reviewed the videotapes and noted two occasions of suspicious activity. The videotapes of September 30 at 20:26 hours (8:26 p.m.) and October 4 at 00:15 hours (12:15 a.m.) showed a male wearing a white laboratory coat entering the inpatient storage area. He looked around him, paced for a few seconds, quickly grabbed a bottle of Fioricet, lifted his lab coat and concealed the bottle in his waistband in the back of the lab coat. He then left the storage area. According to the audits Angulo and Chun were conducting, a bottle of Fioricet had disappeared the evening/early morning of September 30, and over the October 4-5 weekend. Mizuhara copied the videotapes and made still photos of the man in the lab coat. She sent these to Angulo and Chun who instantly recognized respondent. Both had no doubts that the images were of respondent.

[1] Videotapes were removed and sent to Kaiser security personnel on a regular basis.

11. Even though respondent was recognizable in the photographs and videotape, Kaiser personnel checked respondent's time cards and determined that he was on duty during the times the audits showed missing Fioricet. Time cards and scheduling records showed he was the only employee who was on duty all of the dates the Fioricet disappeared. Finally, Kaiser personnel checked the physical characteristics of all employees on duty the dates and times of the captured images and none of these employees could be mistaken for respondent.

12. On October 17, 2003, Kaiser personnel interviewed respondent about the thefts. Respondent was shown the videotapes and was asked whether he was stealing Fioricet from Kaiser. He responded no. He was asked why, if he was not stealing drugs, he was placing bottles of Fioricet into the back of his pants. He replied that he did not know. He was asked if it was common practice for him to place bottles of "meds" into the back of his pants and he replied "yes." He said he was taking the medications to the pharmacy counter for the pharmacist. He did not admit that he was the person on the videotapes. Nor, did he state that he was not the person on the videotapes.

Board investigator Richard Iknoian (Iknoian) interviewed respondent on April 13, 2005, and showed him the still photographs derived from the videotapes. Respondent denied that he was the person in the photographs. He signed a declaration stating that he did not know who the person in the photographs is.

13. At the hearing of this matter, respondent was asked on direct examination if the person on the videotape is him. He first replied that he was "not sure" and that "it has been awhile and I'm not sure…I usually change face or hair." He testified that at the October 2003 meeting with Kaiser personnel, when he first saw the videotapes, he was "in shock" and he could not clearly distinguish who was on the videotapes. On cross examination he stated that he did not know if the person on the videotapes is him. He testified that it cannot be determined from the videotape whether the person taking the Fioricet is him. He emphasized that the person in the videotapes could have been holding the Fioricet bottle in his left hand out of camera view and that "all you see is the lab coat lifting." He testified that the person in the videotapes could have been taking the Fioricet to the counter for the pharmacist. He admitted that he told Kaiser interviewers that it was his common practice to place bottles of medications under his lab coat, in the back of his pants, but testified that he was not telling the truth when he made that statement.

14. Respondent was not credible. While the videotapes do not contain a clear frontal photograph of respondent, the videotape images and still photographs match the photograph of respondent that appears on his employee badge in 2003. He has changed his appearance considerably since then by removing facial hair and changing his hairstyle. Moreover, respondent's supervisor and the supervising pharmacist, both of whom worked with respondent for years, readily identified him from the videotapes and still photographs. Both these witnesses were extremely credible. Circumstantial evidence also points to respondent as the thief. He was working the evenings the videotapes were made and was

the only person on the two to four person staffs the evenings the videotapes were made, who matched the description (others were female and an older male with white hair). The person on the videotapes is wearing the same watch as respondent and wearing a white lab coat, a practice respondent began in 2003 after years of wearing "street clothes" at work.

Respondent's defense is incredible as well. He maintains that it "might or might not" be him appearing on the videotapes, but if it is him, there is nothing incriminating about the videotapes; he is probably taking the Fioricet to the counter for the pharmacist in his left hand. The evidence was that there were no orders for Fioricet on September 30 and October 4, and no unit dosages were made up and returned to the Fioricet bins on those days. Respondent thus could not have been bringing Fioricet to a pharmacist at the pharmacist's request. Respondent also implied that he may have taken the Fioricet bottles from the storage bins to the counter for unit dosing and someone else may have stolen the bottles from the unit dosing location. He was not credible.

15. Respondent did not have a valid prescription for Fioricet at the times of his thefts.

Rehabilitation and Mitigation

16. Respondent was terminated from Kaiser and began working as a pharmacy technician at Marshall Hospital in Placerville in October 2003. He began by working with a registry and was hired in October 2004. Due to delays on Kaiser's part and the length of the investigation of this matter, the Accusation was not filed until May 2006. Respondent has had at least two and a half years to work on demonstrating honesty and sobriety. He has done neither, perhaps in a misguided attempt to support his defense, perhaps in denial that he has a problem.

17. Respondent introduced no evidence of mitigation or rehabilitation, instead claiming that he did not have a drug problem and was not dishonest. The evidence that he committed theft of Fioricet on two occasions was overwhelming. The evidence that he had a drug problem in 2003 was also clear and convincing. Not only are the thefts circumstantial evidence of a drug problem, but respondent was observed several times appearing to be under the influence while on duty. On September 19, 2003, a Kaiser pharmacist, Elizabeth Pasion, reported to the pharmacist in charge, Chun, that she had asked respondent to go home at about 8:00 p.m. She had worked with respondent many years, knew him well, and considered him a friend. That evening he was pale and extremely talkative. He continued to talk incessantly and she could not understand the words he was saying. He had been behaving like this frequently on the late shift, and it was uncharacteristic for him. Pasion documented her observations that day.

18. On September 25, 2003, at about 4:00 p.m., pharmacy technician Lorge was working with respondent. She, too, had known him for many years. He was talking and she was having trouble understanding him. He was trying to tell a story and she could not understand the flow of his words. Many of his words "did not make sense." He made up some words and some of his words were not in the proper sequence. Some of the sounds he was making were noises, and not words. She saw him attempt to mix an IV solution (Atavin drip) and he seemed to be having trouble. It was a solution which was needed immediately on the hospital floor. It was taking him too long to make up the solution. He was slow moving and seemed unsure of what he was doing. He seemed dazed and confused. She reported this event to Chun verbally and in writing that day.

19. On October 6, 2003, Chun was supervising respondent and another pharmacy technician. Chun asked the other pharmacy technician to compound two batches of syringes of Dilaudid. She noticed later that respondent was compounding the Dilaudid. He was taking a long time to compound it and she watched him. She thought she saw him sway. She asked him why it was taking so long and he explained he could not finish because he was "short," there was not enough Dilaudid for the twelve syringes. She felt there was something wrong with his technique because normally there is an "overfill" or more than enough Dilaudid to compound the syringes. She told him someone else would do the compounding and he yelled "Ok we'll have Jim do it!" She was concerned because there was no one named Jim working in the pharmacy and because of the shortage of Dilaudid, a narcotic. She was also concerned because at this time she knew Fioricet was missing and she had two reports about respondent's bizarre behavior. Chun tried to arrange a drug test for respondent. But, after he talked with a union representative, respondent would submit to a drug test only if the test screened specifically for Dilaudid, and no other drug. The drug panel could not be narrowed to produce results specific for only Dilaudid, so no test was taken.

20. There is additional evidence that respondent had a drug problem in 2003, which he has not acknowledged or addressed. Iknoian is a registered pharmacist and testified as an expert witness in this matter. He testified persuasively that Fioricet has an unusual withdrawal period, and that the person in withdrawal becomes agitated and displays extreme talkativeness, similar to the behavior Kaiser employees observed in respondent.

There was substantial circumstantial evidence that respondent had a drug problem. Between January 2002 and October 2003, there were 4,140 tablets of Fioricet unaccounted for at Kaiser pharmacy, and during the audit period, respondent was the only employee who was on duty every time Fioricet disappeared. Additionally, Iknoian contacted the pharmacy manager at Marshall Hospital, Robert DiPonte (DiPonte). DiPonte confirmed in April 2005, in telephone conference and later by electronic mail, that he conducted an audit of Fioricet at Iknoian's request. DiPonte determined that between approximately October 2003 and October 2004, 100 tablets of Fioricet were unaccounted for. He also confirmed

that respondent had been working at the pharmacy beginning in December 2003. However, at hearing, DiPonte minimized the loss. He testified that 100 tablets may be unaccounted for due to billing or charging practices, was an insubstantial amount, and it would not be beyond normal business practices to have this amount of the drug unaccounted for.

21. Respondent's supervisor, DiPonte, and two pharmacy technicians who work with him at Marshall Hospital testified that they have never seen him appear intoxicated or exhibit bizarre behavior.

Costs

22. At hearing, the parties were advised that the Administrative Law Judge would take evidence relating to the factors set forth in *Zuckerman v. Board of Chiropractic Examiners* (2002) 29 Cal. 4th 32. The parties were advised that *Zuckerman* factors would be considered in determining the reasonableness of costs. These factors include: whether the licensee has been successful at hearing in getting charges dismissed or reduced, the licensee's subjective good faith belief in the merits of his position, whether the licensee has raised a colorable challenge to the proposed discipline, the financial ability of the licensee to pay, and whether the scope of the investigation was appropriate to the alleged misconduct. Respondent introduced no evidence regarding these factors.

Complainant established that the reasonable costs of investigation and prosecution of this matter were $35,449.75. Complainant established that the scope of the investigation was appropriate to the alleged misconduct. Complainant prevailed on all of the charges.

LEGAL CONCLUSIONS

1. Business and Professions Code section 4300, provides that the Board may suspend or revoke any certificate, license, permit, registration, or exemption, and may suspend the right to practice or place the licensee on probation.

2. The standard of proof in an administrative disciplinary action seeking the suspension or revocation of a professional license is "clear and convincing evidence." (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 583.) "Clear and convincing evidence" means evidence of such convincing force that it demonstrates, in contrast to the opposing evidence, a high probability of the truth of the facts for which it is offered as proof. "Clear and convincing evidence" is a higher standard of proof than proof by a "preponderance of the evidence." (*BAJI* 2.62.) "Clear and convincing evidence" requires a finding of high probability. It must be sufficiently strong to command the unhesitating assent of every reasonable mind. (*In re David C.* (1984) 152 Cal.App.3d 1189.)

3. Pursuant to Health and Safety Code section 11056, subdivision (c)(3), Butalbital is a Schedule III controlled substance. As set forth in Factual Finding 6, Fioricet is a compound consisting of Butalbital, a Schedule III controlled substance.

Dishonest Acts

4. Business and Professions Code section 4301, subdivision (f), provides that the Board shall take action against any holder of a license, who is guilty of unprofessional conduct, including:

> 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.

It was established by clear and convincing evidence that respondent is subject to discipline under Business and Professions Code section 4301, subdivisions (f), due to his theft of approximately 200 tablets of Fioricet on September 30, 2003, and October 4, 2003, as set forth in Factual Findings 4 through 15. Respondent's thefts constitute unprofessional conduct. His acts involved moral turpitude, dishonesty, deceit, and corruption, and were committed in the course of his profession.

Violation of Drug Laws

5. Business and Professions Code section 4301, subdivision (j), provides that the board shall take action against any holder of a license who is guilty of unprofessional conduct, including:

> The violation of any of the statutes of this state or of the United States regulating controlled substances and dangerous drugs.

Business and Professions Code section 4060, provides in pertinent part:

> No person shall possess any controlled substance, except that furnished to a person upon the prescription of a physician, dentist, podiatrist, optometrist, veterinarian, or naturopathic doctor pursuant to Section 3640.7, or furnished pursuant to a drug order issued by a certified nurse-midwife pursuant to Section 2746.51, a nurse practitioner pursuant to Section 2836.1, a physician assistant pursuant to Section 3502.1, a naturopathic doctor pursuant to Section 3640.5, or a pharmacist pursuant to either subparagraph (D) of paragraph (4) of, or clause (iv) of subparagraph (A) of paragraph (5) of, subdivision (a) of Section 4052 … .

6. It was established by clear and convincing evidence that respondent violated Business and Professions Code section 4060, as set forth in Factual Findings 4 through 15.

7. Health and Safety Code section 11377, subdivision (a), provides in pertinent part:

Except as authorized by law and as otherwise provided ... every person who possesses any controlled substance which is (1) classified in Schedule III, IV, or V, and which is not a narcotic drug ...unless upon the prescription of a physician, dentist, podiatrist, or veterinarian, licensed to practice in this state, shall be punished by imprisonment in a county jail for a period of not more than one year or in the state prison.

8. It was established by clear and convincing evidence that respondent violated Health and Safety Code section 11377, subdivision (a), as set forth in Factual Findings 4 through 15.

9. It was established by clear and convincing evidence that respondent is subject to discipline under Business and Professions Code section 4301, subdivision (j), Business and Professions Code section 4060, and Health and Safety Code sections 11170 and 11377, subdivision (a), due to his possession of a Schedule III controlled substance, without a prescription, as set forth in Factual Findings 4 through 15.

Rehabilitation and Mitigation

10. As set forth in Factual Findings 16 through 21, respondent has shown no mitigation and no rehabilitation, and does not admit his thefts. Because of the absence of these factors and the severity of his conduct, he continues to pose a risk to the public and is not a candidate for a probationary license.

Costs

11. Business and Professions Code section 125.3, provides that the Board may request the administrative law judge to direct a licentiate found to have committed violations of the licensing act to pay a sum not to exceed the reasonable costs of the investigation and enforcement of the case. As set forth in Factual Finding 22 the reasonable costs of investigation and prosecution of this mater were established as $35,449.75.

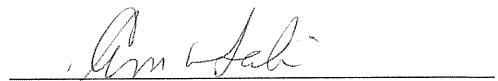
ORDER

Technician registration number TCH 10407, issued to respondent Dominador S. Geralis, is revoked pursuant to Legal Conclusions 1 through 9, separately and together, and legal Conclusion 10. Respondent shall relinquish his pocket technician registration to the Board within ten days of the effective date of this decision. Respondent may not petition the Board for reinstatement of his revoked license for three years from the effective date of this

decision. A condition of reinstatement shall be that respondent is certified by the Pharmacy Technician Certification Board and provides satisfactory proof of certification to the Board.

Upon reinstatement, respondent shall pay to the Board its costs of investigation and prosecution in the amount of $35,449.75, or shall make arrangements, at the Board's discretion, for partial payments.

Dated: March 22, 2007



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

In the Matter of the Accusation Against: DOMINADOR S. GERALES 4800 Peale Drive Sacramento, CA 95842 Pharmacy License No. TCH 10407 Respondent.	Case No. 2923 OAH No. **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 November 3, 1993, the Board of Pharmacy issued Pharmacy License Number TCH 10407 to Dominador S. Gerales (Respondent). The license will expire on June 30, 2007, unless renewed.

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 states, in pertinent part:

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

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

"(1) Suspending judgment.

"(2) Placing him or her upon probation.

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

"(4) Revoking his or her license.

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

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

"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.

. . .

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

6. Section 4060 of the Code provides, in pertinent part, that no person shall possess any controlled substance, except that furnished to a person upon lawful prescription.

7. 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

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violations of the licensing act to pay a sum not to exceed the reasonable costs of the investigation and enforcement of the case.

8. Health and Safety Code section 11170 provides, in pertinent part, that no person shall furnish a controlled substance for himself..

DRUGS

9. Fioricet is a compound consisting of Butalbital, a Schedule III controlled substance as designated by Health and Safety Code section 11056(c)(3) and caffeine and acetaminophen.

FIRST CAUSE FOR DISCIPLINE

(Dishonest Acts)

10. Respondent is subject to disciplinary action under section 4301(f) in that respondent has committed acts of dishonesty and deceit. The circumstances are as follows:

11. On or about September 30, 2003 , and on or about October 4, 2003, while working as a pharmacy technician, respondent stole approximately 200 tablets of Fioricet from his employer, Kaiser Permanente of Roseville.

SECOND CAUSE FOR DISCIPLINE

(Violation of Drug Laws)

12. Respondent is subject to disciplinary action under section 4301(j), in conjunction with section 4060 and Health and Safety Code sections 11170 and 11350(a) in that the acts described in paragraphs 10 and 11, supra, are a violation of California statutes regulating controlled substances.

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:

A. Revoking or suspending Pharmacy License Number TCH 10407, issued to Dominador S. Gerales;

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B. Ordering Dominador Gerales 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;

C. Taking such other and further action as deemed necessary and proper.

DATED: 5/3/06

P. F. Harris

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

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