

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

In the Matter of the Accusation Against:

Case No. 2944

COMMUNITY MEDICAL PHARMACY

and

RALPH MICHAEL DEFAY, R.P.H.

Respondents.

DECISION AND ORDER

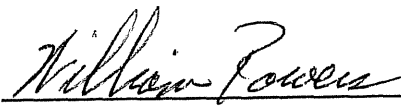
The attached Stipulated Settlement and Disciplinary Order is hereby adopted by the Board of Pharmacy, Department of Consumer Affairs, as its Decision in this matter.

This Decision shall become effective on August 8, 2007.

It is so ORDERED July 9, 2007.

BOARD OF PHARMACY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

By



WILLIAM POWERS
Board President

SEP 11 11 30 AM '07

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of the State of California
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10 **BEFORE THE**
11 **BOARD OF PHARMACY**
12 **DEPARTMENT OF CONSUMER AFFAIRS**
STATE OF CALIFORNIA

13 In the Matter of the Accusation Against:

Case No. 2944

14 COMMUNITY MEDICAL PHARMACY

15 and

16 RALPH MICHAEL DEFAY, R.P.H.

**STIPULATED SETTLEMENT AND
DISCIPLINARY ORDER**

17 Respondents.

18
19 IT IS HEREBY STIPULATED AND AGREED by and between the parties to the
20 above-entitled proceedings that the following matters are true:

21 PARTIES

22 1. Patricia F. Harris was the Executive Officer of the Board of Pharmacy.
23 She brought this action solely in her official capacity. Virginia Herold is the Acting Executive
24 Officer of the Board of Pharmacy and is represented in this matter by Bill Lockyer, Attorney
25 General of the State of California, by Ronald A. Casino, Deputy Attorney General.

26 2. Respondent is represented in this proceeding by attorney Herbert L.
27 Weinberg, Esq., whose address is McGuire Woods LLP, 1800 Century Park East, 8th Floor, Los
28 Angeles, CA 90067.

1 reconsideration and court review of an adverse decision; and all other rights accorded by the
2 California Administrative Procedure Act and other applicable laws.

3 9. Respondents voluntarily, knowingly, and intelligently waive and give up
4 each and every right set forth above.

5 CULPABILITY

6 10. Respondents admit the truth of each and every charge and allegation in
7 Accusation No. 2944.

8 11. Respondents agree that Pharmacy Permit Number PHY44260 and
9 Pharmacist License Number RPH 31725 are subject to discipline and they agree to be bound by
10 the Board's imposition of discipline as set forth in the Disciplinary Order below.

11 RESERVATION

12 12. The admissions made by Respondents herein are only for the purposes of
13 this proceeding, or any other proceedings in which the Board or other professional licensing
14 agency is involved, and shall not be admissible in any other criminal or civil proceeding.

15 CONTINGENCY

16 13. This stipulation shall be subject to approval by the Board of Pharmacy.
17 Respondents understand and agree that counsel for Complainant and the staff of the Board of
18 Pharmacy may communicate directly with the Board regarding this stipulation and settlement,
19 without notice to or participation by Respondents or their counsel. By signing the stipulation,
20 Respondents understand and agree that they may not withdraw their agreement or seek to rescind
21 the stipulation prior to the time the Board considers and acts upon it. If the Board fails to adopt
22 this stipulation as its Decision and Order, the Stipulated Settlement and Disciplinary Order shall
23 be of no force or effect. Except for this paragraph, it shall be inadmissible in any legal action
24 between the parties, and the Board shall not be disqualified from further action by having
25 considered this matter.

26 14. The parties understand and agree that facsimile copies of this Stipulated
27 Settlement and Disciplinary Order, including facsimile signatures thereto, shall have the same
28 force and effect as the originals.

1 15. In consideration of the foregoing admissions and stipulations, the parties
2 agree that the Board may, without further notice or formal proceeding, issue and enter the
3 following Disciplinary Order:

4 **DISCIPLINARY ORDER**

5 A. IT IS HEREBY ORDERED that Pharmacy Permit Number PHY 44260
6 issued to In House Pharmacist, Inc., doing business as COMMUNITY MEDICAL PHARMACY
7 and Pharmacist License Number RPH 31725 issued to RALPH MICHAEL DEFAY are revoked.
8 However, the above revocations are stayed and Respondents are placed on probation for three (3)
9 years on the following terms and conditions:

10 Severability Clause. Each condition of probation contained herein is a separate
11 and distinct condition. If any condition of this Order, or any application thereof, is declared
12 unenforceable in whole, or in part, or to any extent, the remainder of this Order, and all other
13 applications thereof, shall not be affected. Each condition of this Order shall separately be valid
14 and enforceable to the fullest extent permitted by law.

15 **As To Both PHY 44260 and RPH 31725**

16 **1. Obey All Laws**

17 Respondent shall obey all state and federal laws and regulations substantially
18 related to or governing the practice of pharmacy.

19 Respondent shall report any of the following occurrences to the board, in writing,
20 within 72 hours of such occurrence:

- 21 • an arrest or issuance of a criminal complaint for violation of any provision
22 of the Pharmacy Law, state and federal food and drug laws, or state and
23 federal controlled substances laws
24 • a plea of guilty or nolo contendere in any state or federal criminal
25 proceeding to any criminal complaint, information or indictment
26 • a conviction of any crime
27 • discipline, citation, or other administrative action filed by any state and
28 federal agency which involves respondent's Pharmacy Permit or

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Pharmacist license or which is related to the practice of pharmacy or the manufacturing, obtaining, handling or distribution or billing or charging for of any drug, device or controlled substance.

2. Reporting to the Board

Respondent shall report to the board quarterly. The report shall be made either in person or in writing, as directed. Respondent shall state under penalty of perjury whether there has been compliance with all the terms and conditions of probation. If the final probation report is not made as directed, probation shall be extended automatically until such time as the final report is made and accepted by the board.

3. Interview with the Board

Upon receipt of reasonable notice, respondent shall appear in person for interviews with the board upon request at various intervals at a location to be determined by the board. Failure to appear for scheduled interview without prior notification to board staff shall be considered a violation of probation.

4. Cooperation with Board Staff

Respondent shall cooperate with the board's inspectional program and in the board's monitoring and investigation of respondent's compliance with the terms and conditions of his or her probation. Failure to comply shall be considered a violation of probation.

5. Continuing Education

Respondent shall provide evidence of efforts to maintain skill and knowledge as a pharmacist as directed by the board.

6. Notice to Employers

Respondent shall notify all present and prospective employers of the decision in case number 2944 and the terms, conditions and restrictions imposed on respondent by the decision. Within 30 days of the effective

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date of this decision, and within 15 days of respondent undertaking new employment, respondent shall cause his or her direct supervisor, pharmacist-in-charge and/or owner to report to the board in writing acknowledging the employer has read the decision in case number 2944. If respondent works for or is employed by or through a pharmacy employment service, respondent must notify the direct supervisor, pharmacist-in-charge, and/or owner at every pharmacy of the terms and conditions of the decision in case number 2944 in advance of the respondent commencing work at each pharmacy.

"Employment" within the meaning of this provision shall include any full-time, part-time, temporary, relief or pharmacy management service as a pharmacist, whether the respondent is considered an employee or independent contractor.

7. Reimbursement of Board Costs

Respondent shall pay to the board its costs of investigation and prosecution in the amount of \$12,000.00. Respondent shall make said payments as follows: Respondent shall make quarterly payments of \$1,090.90 during the first thirty three (33) months of probation. The first payment shall be made on or before the effective date of this decision.

The filing of bankruptcy by respondent shall not relieve respondent of his or her responsibility to reimburse the board its costs of investigation and prosecution.

8. Probation Monitoring Costs

Respondent shall pay the costs associated with probation monitoring as determined by the board each and every year of probation. Such costs shall be payable to the board at the end of each year of probation. Failure to pay such costs shall be considered a violation of probation.

9. Status of License

Respondent shall, at all times while on probation, maintain an active current

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license with the board, including any period during which suspension or probation is tolled.

If respondent's license expires or is canceled by operation of law or otherwise, upon renewal or reapplication, respondent's license shall be subject to all terms and conditions of this probation not previously satisfied.

10. License Surrender while on Probation/Suspension

Following the effective date of this decision, should respondent cease practice due to retirement or health, or be otherwise unable to satisfy the terms and conditions of probation, respondent may tender his or her license to the board for surrender. The board shall have the discretion whether to grant the request for surrender or take any other action it deems appropriate and reasonable. Upon formal acceptance of the surrender of the license, respondent will no longer be subject to the terms and conditions of probation.

Upon acceptance of the surrender, respondent shall relinquish his or her pocket license to the board within 10 days of notification by the board that the surrender is accepted. Respondent may not reapply for any license from the board for three years from the effective date of the surrender. Respondent shall meet all requirements applicable to the license sought as of the date the application for that license is submitted to the board.

11. Notice to Employees

Respondent shall, upon or before the effective date of this decision, ensure that all employees involved in permit operations are made aware of all the terms and conditions of probation, either by posting a notice of the terms and conditions, circulating such notice, or both. If the notice required by this provision is posted, it shall be posted in a prominent place and shall remain posted throughout the probation period. Respondent shall ensure that any employees hired or used after the effective date of this decision are made aware of the terms and conditions by

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posting a notice, circulating a notice, or both.

"Employees" as used in this provision includes all full-time, part-time, temporary and relief employees and independent contractors employed or hired at any time during probation.

12. Owners and Officers: Knowledge of the Law

Respondent shall provide, within 30 days after the effective date of this decision, signed and dated statements from its owners, including any owner or holder of 10% or more of the interest in respondent or respondent's stock, and any officer, stating said individuals have read and are familiar with state and federal laws and regulations governing the practice of pharmacy.

13. Notification of Employment/Mailing Address Change

Respondent shall notify the board in writing within 10 days of any change of employment. Said notification shall include the reasons for leaving and/or the address of the new employer, supervisor or owner and work schedule if known. Respondent shall notify the board in writing within 10 days of a change in name, mailing address or phone number.

14. Tolling of Probation

Should respondent, regardless of residency, for any reason cease practicing pharmacy for a minimum of 40 hours per calendar month in California, respondent must notify the board in writing within 10 days of cessation of the practice of pharmacy or the resumption of the practice of pharmacy. Such periods of time shall not apply to the reduction of the probation period. It is a violation of probation for respondent's probation to remain tolled pursuant to the provisions of this condition for a period exceeding three years.

"Cessation of practice" means any period of time exceeding 30 days in which respondent is not engaged in the practice of pharmacy

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as defined in Section 4052 of the Business and Professions Code.

15. Violation of Probation

If respondent violates probation in any respect, the board, after giving respondent notice and an opportunity to be heard, may revoke probation and carry out the disciplinary order which was stayed. If a petition to revoke probation or an accusation is filed against respondent during probation, the board shall have continuing jurisdiction and the period of probation shall be extended, until the petition to revoke probation or accusation is heard and decided.

If respondent has not complied with any term or condition of probation, the board shall have continuing jurisdiction over respondent, and probation shall automatically be extended until all terms and conditions have been satisfied or the board has taken other action as deemed appropriate to treat the failure to comply as a violation of probation, to terminate probation, and to impose the penalty which was stayed.

16. Completion of Probation

Upon successful completion of probation, respondent's license will be fully restored.

As to RPH 31725 Only

17. No Preceptorships, Serving as Consultant, or Supervision of Interns

Respondent shall not supervise any intern pharmacist, perform any of the duties of preceptor or serve as a consultant to any entity licensed by the board.

18. Pharmacist-in-Charge Restrictions

Respondent may be a pharmacist-in-charge. However, during the first two (2) years of probation, respondent shall retain an independent consultant at his or her own expense who shall be responsible for reviewing pharmacy operations on a quarterly basis for compliance by respondent with state and federal laws and regulations governing the practice of pharmacy and

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for compliance by respondent with the obligations of a pharmacist-in-charge. The consultant shall be a pharmacist licensed by and not on probation with the board and whose name shall be submitted to the board, for its prior approval within 30 days of the effective date of this decision. Respondent shall not be a pharmacist-in-charge at any pharmacy of which he is not currently the PIC. The board may, in case of any employment change by respondent or for other reasons as deemed appropriate by the board, preclude the respondent from acting as a pharmacist-in-charge.

19. No New Ownership of Premises

Respondent shall not acquire any new ownership, legal or beneficial interest nor serve as a manager, administrator, member, officer, director, trustee, associate, or partner of any additional business, firm, partnership, or corporation licensed by the board. If respondent currently owns or has any legal or beneficial interest in, or serves as a manager, administrator, member, officer, director, associate, or partner of any business, firm partnership, or corporation currently or hereinafter licensed by the board, respondent may continue to serve in such capacity or hold that interest, but only to the extent of that position or interest as of the effective date of this decision.

B. The allegations of Accusation No. 2944 are deemed admitted.


ACCEPTANCE

We have carefully read the above Stipulated Settlement and Disciplinary Order and have fully discussed it with our attorney, Herbert L. Weinberg. We fully understand the terms and conditions and other matters contained therein. Further, we understand the effect this stipulation will have on our Pharmacist Permit and Pharmacist License. We enter into this Stipulated Settlement voluntarily, knowingly, and intelligently, and agree to be bound by the Disciplinary Order and Decision of the Board of Pharmacy. We further agree that a facsimile

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1 copy of this Stipulated Settlement and Disciplinary Order, including facsimile copies of
2 signatures, may be used with the same force and effect as the originals.

3 DATED: 4-2-07

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5 
6 RALPH MICHAEL DEFAY
7 For Respondents
8 Community Medical Pharmacy
9 and Ralph Michael Defay

8 I have read and fully discussed with Respondents the terms and conditions and
9 other matters contained in the above Stipulated Settlement and Disciplinary Order. I approve its
10 form and content.

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12 DATED: 4-8-07

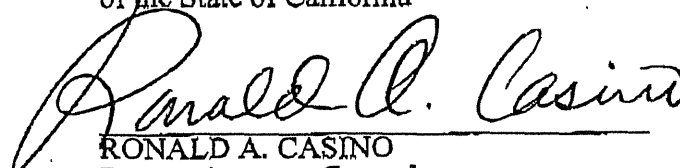
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14 
15 HERBERT L. WEINBERG
16 Attorney for Respondents

17 ENDORSEMENT

18
19 The foregoing Stipulated Settlement and Disciplinary Order is hereby respectfully
20 submitted for consideration by the Board of Pharmacy of the Department of Consumer Affairs.

21 DATED: 10-4-06

22 BILL LOCKYER, Attorney General
23 of the State of California

24 
25 RONALD A. CASINO
26 Deputy Attorney General

27 Attorneys for Complainant

28 DOJ Matter ID: SD2005800259
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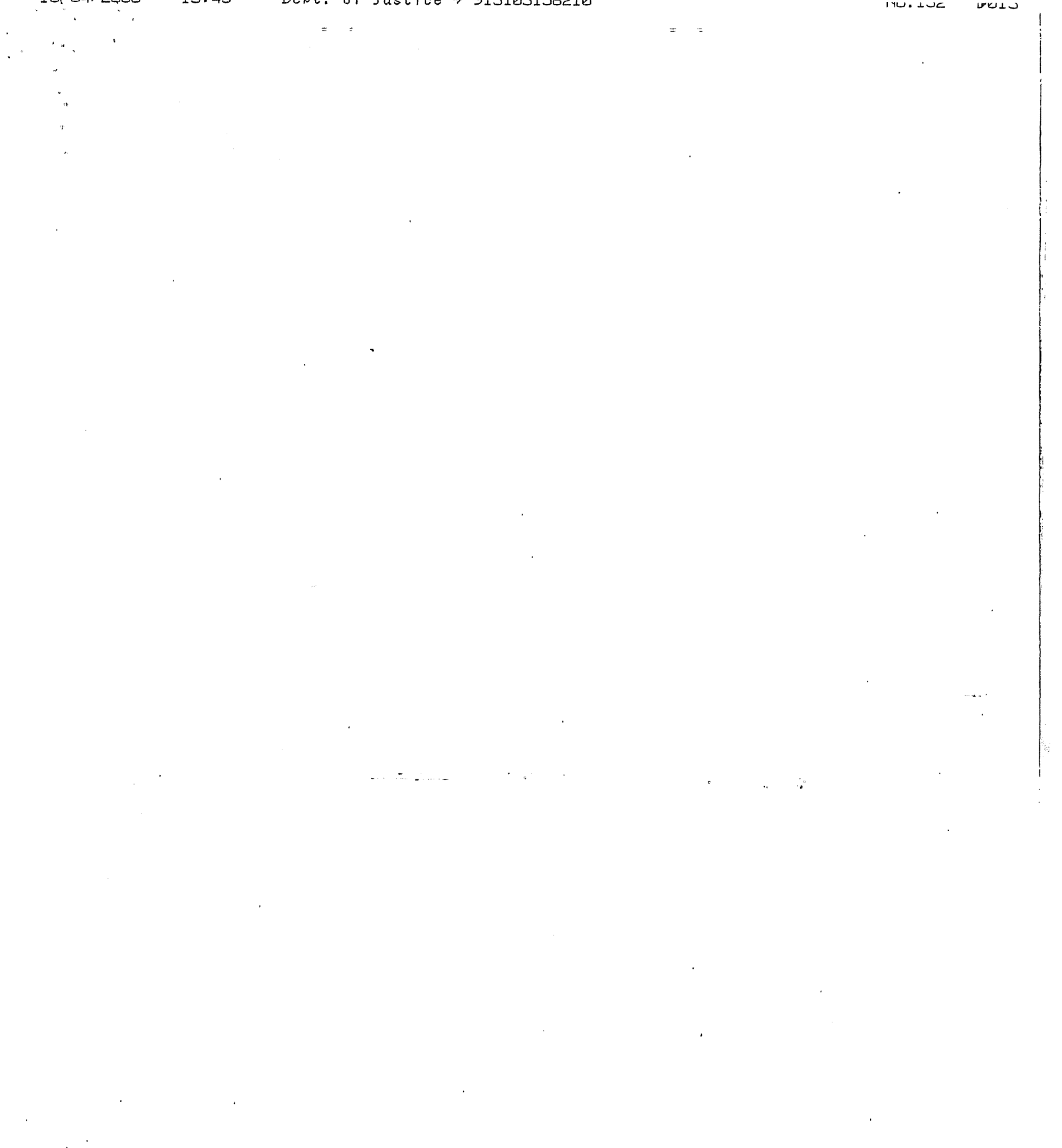


Exhibit A
Accusation No. 2944

1 BILL LOCKYER, Attorney General
of the State of California
2 JENNIFER L. WECK, State Bar No. 173486
Deputy Attorney General
3 California Department of Justice
110 West "A" Street, Suite 1100
4 San Diego, CA 92101
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6 Telephone: (619) 645-2653
Facsimile: (619) 645-2061
7 Attorneys for Complainant

8
9 **BEFORE THE**
10 **CALIFORNIA STATE BOARD OF PHARMACY**
11 **DEPARTMENT OF CONSUMER AFFAIRS**
STATE OF CALIFORNIA

12 In the Matter of the Accusation Against:
13 **COMMUNITY MEDICAL PHARMACY**
610 Gateway Center Way, Suite C, D & E
14 San Diego, CA 92102
15 Pharmacy Permit No. PHY 44260
16 and
17 **RALPH MICHAEL DEFAY, R.P.H.**
15216 Crestview Court
18 Poway, CA 92064
19 Pharmacist License No. RPH 31725
20 Respondents.

Case No. 2944
ACCUSATION

21
22 The Complainant, Patricia F. Harris, Executive Officer, for cause of accusation
23 against COMMUNITY MEDICAL PHARMACY and RALPH MICHAEL DEFAY, alleges as
24 follows:

25 **PARTIES**

26 1. The Complainant, Patricia F. Harris, is the Executive Officer of the
27 California State Board of Pharmacy (hereinafter the "Board") and makes this Accusation solely
28 in her official capacity.

1 9. Title 16, California Code of Regulations, section 1718 defines "current
2 inventory" as used in Business and Professions Code section 4081 to include the complete
3 accountability for all dangerous drugs handled by every licensee listed in that code provision.

4 10. Business and Professions Code section 4022 describe dangerous drugs as
5 those which require a medical prescription.

6 11. Health and Safety Code section 11058(c)(1) describes Schedule V
7 Controlled Substances to include narcotic drugs which contain non-narcotic active medical
8 ingredients.

9 12. Health and Safety Code section 11208 states, in pertinent part, that in a
10 prosecution, proof that a defendant received or has had in his possession at any time an amount
11 of a controlled substance that is less than the amount that is accounted for by any record required
12 by law, is prima facie evidence of guilt.

13 13. Title 16, California Code of Regulations, section 1714(b) provides, in
14 pertinent part, that each licensed pharmacy is required to maintain its facilities, space, fixtures,
15 and equipment so that drugs are safely and properly prepared, maintained, secured and
16 distributed.

17 **FACTS**

18 14. In October, 2004, investigators from the United States Drug Enforcement
19 Agency (DEA) Diversion, in San Diego, California, determined that quantities of phenergan with
20 codeine cough syrup (PhenCod) were being shipped to a private Dallas, Texas residence from
21 respondent COMMUNITY MEDICAL PHARMACY, located in San Diego, California, via
22 Federal Express shipping. The investigation, with assistance from the Board of Pharmacy
23 inspector, concluded that a non-licensed employee of COMMUNITY MEDICAL PHARMACY
24 was diverting PhenCod and sending the drug to individuals in Texas for cash payments. The
25 employee admitted to receiving cash payments of approximately \$50,000 to \$60,000 for drug
26 shipments to Texas since November 2003. The employee stated that the only drug he took was
27 PhenCod, that he acted alone, and that no one from COMMUNITY MEDICAL PHARMACY
28 participated in these acts.

1 15. Phenergan with codeine is the brand name and is also know by its generic
2 name promethazine with codeine. PhenCod is a dangerous drug pursuant to Business and
3 Professions Code section 4022, and a Schedule V controlled substance, pursuant to Health and
4 Safety Code section 11058(c)(1).

5 16. In July and August, 2005, the Board requested drug inventory and drug
6 utilization records from respondent COMMUNITY MEDICAL PHARMACY for the time period
7 of February 9, 2004, through July 27, 2005. PhenCod sales records to COMMUNITY
8 MEDICAL PHARMACY from three pharmaceutical companies (Cardinal Health, Major
9 Pharmaceutical and Ritchie Pharmacal) were also requested for the same time frame.

10 17. On or about September 14, 2005, Board Inspector Robert Venegas utilized
11 the PhenCod inventory and sales records and prepared a "Selected Drug Audit Summary." This
12 summary revealed that respondent COMMUNITY MEDICAL PHARMACY was short
13 approximately 1,899,863 ml. or 4019 pints of PhenCod.

14 18. On or about September 16, 2005, David Schneider, General Manager of
15 COMMUNITY MEDICAL PHARMACY submitted to the Board the results of their own
16 inventory audit of all controlled substances from the time period of February 9, 2004, through
17 August 2, 2005. The results of their audit demonstrated shortages of Vicodin and Vicodin ES.

18 19. Vicodin and Vicodin ES are dangerous drugs pursuant to Business and
19 Professions Code section 4022, and are Schedule III controlled substances, pursuant to Health
20 and Safety Code section 11056(e)(4).

21 20. In September, 2005, the Board requested drug inventory and drug
22 utilization records from respondent COMMUNITY MEDICAL PHARMACY for the time period
23 of February 9, 2004, through August 2, 2005. Vicodin and Vicodin ES sales records to
24 COMMUNITY MEDICAL PHARMACY from three pharmaceutical companies (Cardinal
25 Health, Major Pharmaceutical and Ritchie Pharmacal) were also requested for the same time
26 frame.

27 21. On or about October 21, 2005, Board Inspector Venegas utilized the
28 Vicodin and Vicodin ES inventory and sales records and prepared a "Selected Drug Audit

1 Summary." This summary revealed that respondent COMMUNITY MEDICAL PHARMACY
2 was short approximately 8,907 tablets of Vicodin and 92,718 tablets of Vicodin ES.

3 **FIRST CAUSE FOR DISCIPLINE**

4 **(Failure to Show Complete Accountability of Dangerous Drugs and
5 Controlled Substances and Failure to Maintain Pharmacy Records)**

6 22. Complainant incorporates herein by this reference the preamble and each
7 of the allegations set forth in paragraphs 1 through 21 hereinabove.

8 23. The pharmacy license held by respondent COMMUNITY MEDICAL
9 PHARMACY and the pharmacist license held by Pharmacist-in-Charge respondent DEFAY are
10 subject to discipline under Business and Professions Code section 4301(j) for unprofessional
11 conduct, in that, between February 9, 2004, and August 2, 2005, COMMUNITY MEDICAL
12 PHARMACY possessed a lesser amount of dangerous drugs and controlled substances than was
13 accounted for by records required by law, thereby violating Business and Professions Code
14 section 4081. Specifically, COMMUNITY MEDICAL PHARMACY'S inventory of PhenCod
15 was short approximately 1,899,863 ml. or 4019 pints, its inventory of Vicodin was short
16 approximately 8,907 tablets, and its inventory of Vicodin ES was short approximately 92,718
17 tablets.

18 **SECOND CAUSE FOR DISCIPLINE**

19 **(Non-Compliant Pharmacy Security)**

20 24. Complainant incorporates herein by this reference the preamble and each
21 of the allegations set forth in paragraphs 1 through 21 hereinabove.

22 25. The pharmacy license held by respondent COMMUNITY MEDICAL
23 PHARMACY is subject to discipline under Title 16, California Code of Regulations, section
24 1714(b), in that, between February 9, 2004, and July 27, 2005, approximately 1,899,863 ml. or
25 4019 pints of PhenCod and between February 9, 2004 and August 2, 2005, approximately 8,907
26 tablets of Vicodin and 92,718 tablets of Vicodin ES were diverted from the pharmacy
27 demonstrating failure to safely and properly maintain and secure drugs at its facility.

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1 2. Revoking or suspending Pharmacist License Number RPH 31725 issued to
2 respondent RALPH MICHAEL DEFAY.

3 3. Prohibiting respondent RALPH MICHAEL DEFAY from serving as a
4 manager, administrator, owner, member, officer, director, associate, or partner of a licensee,
5 pursuant to the provisions of Business and Professions Code section 4307(a).

6 4. Directing respondents COMMUNITY MEDICAL PHARMACY and
7 RALPH MICHAEL DEFAY to pay the California State Board of Pharmacy the reasonable costs
8 of the investigation and prosecution of this matter pursuant to Business and Professions Code
9 section 125.3, according to proof.

10 5. Taking such further action as is deemed necessary and proper.

11
12 DATED: 3/9/06

13
14 P. J. Harris
15 PATRICIA F. HARRIS
16 Executive Officer
17 California State Board of Pharmacy
18 Department of Consumer Affairs

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20 Attorneys for Complainant

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