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

In the Matter of the Accusation Against:	Case No. 2956
RIO LINDA DRUG **RALPH W. LARSSEN**, and **STUART SARGISSON**, Respondents.	OAH Case No. N2006050086

DECISION AFTER RECONSIDERATION

This matter was originally heard before Marilyn A. Woollard, Administrative Law Judge for the Office of Administrative Hearings (OAH), State of California, on January 29, 30, 31, February 1, 2, and March 5, 6, and 13, 2007, in Sacramento, California.

At the time of the hearing, Deputy Attorney General Jessica M. Amgwerd represented complainant Patricia F. Harris in her official capacity as the Executive Officer of the Board of Pharmacy (Complainant), Department of Consumer Affairs.[1]

Gerhard O. Winkler, Attorney at Law, represented respondents Rio Linda Drug and its owner, Ralph W. Larssen, who was present throughout the hearing.

Armond Marcarian, Attorney at Law, represented respondent Dr. Stuart Sargisson, who was present throughout the hearing.

Oral and documentary evidence was received. On March 11, 2007, Dr. Sargisson filed his supplemental brief in support of respondents' renewed motion to dismiss the Accusation pursuant to Business and Professions Code section 4104, subdivision (d), marked as Exhibit M for identification. On March 13, 2007, the parties presented oral closing arguments. The record remained open for receipt of additional briefs regarding the motions to dismiss. On March 23, 2007, Complainant's opposition to Dr. Sargissons's supplemental brief on motion to dismiss was received and marked as Exhibit 75 for identification. On March 27, 2007, Dr. Sargisson's reply brief was received and marked at Exhibit N for identification. On March 30, 2007, Dr. Sargisson's letter brief was received and marked as Exhibit O for identification. The record was then closed and the matter was submitted for Decision.

On August 6, 2007, the Board adopted the Proposed Decision as its decision in this matter with the exception of Probation Conditions III.7 and III.8. III.7 was amended to permit

[1] Virginia Herold is now the Executive Officer of the Board of Pharmacy.

Dr. Sargisson to supervise intern pharmacists, perform the duties of a preceptor during the period of probation, and to serve in the capacity of a Pharmacist-in-Charge after serving 180 days on probation. III.8 was amended by requiring Dr. Sargisson to pay to the Board a portion of its costs of investigation and prosecution in the amount of $5,000.00 rather than $10,490.75.

On August 21, 2007, Complainant filed an application to correct a mistake or error in the Board's decision pursuant to Government Code section 11518.5. The application asserts $8,645.00 for the inspector's 133 hours of labor related to this matter was mistakenly omitted from the total cost of investigation and prosecution. Before the Board could consider the application, on August 29, 2007, Complainant petitioned the Board for reconsideration of its Decision.

On September 4, 2007, the Board stayed the execution of the Decision pending the issuance of this Decision After Reconsideration.

Written argument having been received, and the entire record, including the transcript of said hearing having been read and considered, the Board, pursuant to Section 11517 of the Government Code, hereby makes the following decision:

FACTUAL FINDINGS

1. On April 28, 1974, the Board issued Pharmacist License RPH No. 28795 to respondent Ralph W. Larssen. This license will expire on March 31, 2008, unless renewed, revoked or suspended.

2. On May 13, 1997, the Board issued Original Pharmacy Permit No. PHY 42886 to Ralph W. Larssen, to do business as Rio Linda Drug (hereafter, RLD), at 402 M Street in Rio Linda, California. This permit has been in full force and effect since its issuance and will expire on May 1, 2008, unless renewed, revoked or suspended.

3. On March 1, 1990, the Board issued Pharmacist License No. 43083 to respondent Stuart Sargisson. This license has been continuously in effect since its issuance and will expire on December 31, 2007, unless renewed, revoked or suspended.

4. *Accusation:* On March 9, 2006, Complainant filed an Accusation against respondents, seeking suspension or revocation of their permit and/or licenses and ordering them to pay the Board's reasonable costs of investigation and enforcement. The primary focus of the Accusation is on the time period extending from January 2, 2004 through February 10, 2005, during which there were substantial diversions of controlled substances from RLD pharmacy. Unless otherwise indicated, Factual Findings refer to this "relevant time period."

Each of the respondents was alleged to have committed unprofessional conduct under section 4301, subdivisions (j) and (o), by violating sections 4105(a), 4081(a), 4059.5, as well as Health and Safety Code section 11209, subdivision (a), and California Code of Regulations (hereafter, C.C.R.), title 16, section 1718. Complainant later withdrew its allegation that Mr. Larssen violated section 4059.5. In addition, respondents Larssen and Sargisson were alleged to have violated section 4081, subdivision (b). All respondents also allegedly violated C.C.R.,

title 16, section 1714, subdivision (b); however, at hearing, Complainant amended the Accusation by deleting this allegation against respondent Sargisson, and by substituting C.C.R., title 16, section 1714, subdivision (d) in its stead.

5. *Notices of Defense and Affirmative Defenses*: On March 17, 2006, respondent Sargisson submitted his notice of defense and request for hearing. On March 27, 2006, respondents RLD and Mr. Larssen filed their notice of defense and request for hearing, denying the alleged violations and asserting specific affirmative defenses. On January 22, 2007, Dr. Sargisson filed identical affirmative defenses.

6. *Parties' Contentions*: Complainant contends that respondents engaged in unprofessional conduct beginning in 2002 but, particularly, from January 2, 2004 through February 10, 2005, by failing to maintain records of the acquisition and disposition of dangerous drugs at RLD's pharmacy for three years; by allowing dangerous drugs, including controlled substances, to be delivered to and signed for by personnel other than the pharmacist-in-charge or other pharmacist; by failing to ensure that dangerous drugs were safely and properly maintained, secured and distributed; and/or by failing to account for RLD's current dangerous drug inventories in violation of statutes and regulations of the Business and Professions and Health and Safety Codes. In Complainant's view, respondents' lax security and record-keeping practices created an environment at RLD that allowed the unlawful diversion of 463,988 doses of hydrocodone with acetaminophen (hereafter, HC/AP), a dangerous drug and a controlled substance. For these violations, Complainant requests appropriate discipline for respondents RLD and Mr. Larssen, and revocation for Dr. Sargisson.

Respondents contend that they were the trusting victims of a rogue employee, former pharmacy technician Nikki McKeon. Respondents assert Ms. McKeon ordered HC/AP drugs without their knowledge or consent, and then intercepted the delivery of these drugs outside of the pharmacy, by signing proofs of delivery for the wholesalers' delivery couriers and destroying the invoices. Respondents assert that because they reported the diversion of these drugs to the authorities as soon as they became aware of it, they are immune from liability in this administrative action under subdivision (d) of section 4104. Respondents further assert that the drugs were never legally "delivered" to RLD because drug wholesalers, whose licenses the Board has not attempted to revoke, failed to provide legally sufficient proofs of delivery or to ensure that the drugs were received by RLD's pharmacist. Respondents contend that they are the victims of discriminatory enforcement of the pharmacy laws by the Board, because manufactures, wholesalers, and a former pharmacist-in-charge received only minor sanctions for their conduct that contributed to the loss of these controlled substances. Respondents request that the Accusation be dismissed or, in the alternative, that no discipline of their permit and licenses be imposed.

7. *Motion to Dismiss:* On December 18, 2006, respondents RLD and Mr. Larssen filed a motion to dismiss the Accusation, joined in by respondent Sargisson, based upon their claim of immunity under section 4104, subdivision (d).

On January 22, 2007, the motion to dismiss was denied, pending the development of a full evidentiary record. The parties were also placed on notice that the statute at issue had been signed into law approximately 8 months after the date of the events in this case and was

not effective until January 1, 2006. (See: January 22, 2007 Order on Motion to Dismiss, incorporated by reference.) At the conclusion of the evidentiary hearing, respondents renewed their motion to dismiss on this basis, and thereafter filed supplemental briefs regarding whether section 4104, subdivision (d), should apply retroactively.

RLD Staff

8. Over the years, Mr. Larssen has owned seven pharmacies. During the relevant time, Mr. Larssen owned Middletown Pharmacy, a small community pharmacy north of Napa Valley that he purchased in 1995, and RLD, that he purchased in 1997. During the relevant period, Mr. Larssen worked as the pharmacist-in-charge (hereafter, PIC) at his Middletown Pharmacy. During the relevant period, Mr. Larssen did not work as a pharmacist at RLD.

9. RLD is a small community pharmacy that has been in operation for at least 25 years. As a small pharmacy, RLD fills approximately 100 to 150 prescriptions a day, using one pharmacist. RLD is open five days a week, Monday through Friday, from 9:00 a.m. to 6:00 p.m. Drug deliveries occur only during normal business hours.

During the relevant time period, RLD employed two PICs. Collette Newman was RLD's PIC from September 2003 until she was terminated by Mr. Larssen in late February 2004. Dr. Sargisson was RLD's PIC from February 24, 2004, until approximately October 2005. He generally worked three days a week as the sole pharmacist. A temporary pharmacist from Asereth relief agency would work at RLD on the other two days. For a one-month period that ended February 24, 2005, Dr. Sargisson was on medical leave.

RLD employed two pharmacy technicians: Lucinda Morgan and Nikki Lynn McKeon (also known as Nikki DeWeese). Ms. Morgan has been employed by RLD in various capacities for 25 years. In 1993, Ms. Morgan became a licensed pharmacy technician. Ms. McKeon was licensed as a pharmacy technician by the Board on June 20, 2003. She was a pharmacy technician with RLD for approximately two years, and left RLD on February 10, 2005, shortly after the discovery of the missing drugs.

RLD's also employed two clerks: Sandra Ritchie, a long time employee who paid routine bills, and Rich Moen who began working at RLD in the summer of 2004.

Respondents Larssen and Sargisson testified that they trusted the integrity of RLD's staff. There was no evidence that any of RLD's staff had any apparent drug dependency or substance abuse issues.

RLD's drug suppliers and ordering practices for HC/AP Products

10. During the relevant time period, RLD purchased dangerous drugs from three suppliers: Qualitest, an out-of- state drug manufacturer, and two drug wholesalers, Cardinal Health (Cardinal), and Valley Wholesale Drugs (Valley).

11. *Qualitest* was RLD's primary supplier of hydrocodone products. Qualitest offered special price promotions on HC/AP products twice each year, in the spring and fall. During these promotions, Mr. Larssen placed an order with Qualitest for the amount of HC/AP

products he anticipated would be used at both RLD and Middletown pharmacies, based upon each pharmacy's records of usage during the previous six months. To avoid diversion of HC/AP products, Mr. Larssen instructed Qualitest's account representative to only accept orders from him and not from any pharmacy staff.

If the HC/AP order was low and RLD needed additional products, Mr. Larssen instructed RLD staff to order generic HC/AP products from Valley. Mr. Larssen never authorized any RLD staff to purchase HC/AP products from Cardinal.

12. *Cardinal* is a large drug wholesaler that sells over-the-counter (OTC) products and personal goods typically carried at community pharmacies, as well as controlled substances.

Mr. Larssen purchased prescription and nonprescription items from Cardinal at special prices negotiated by the Leader Pharmacy Group (LPG), a Sacramento-based group of independent pharmacists of which he is a member. LPG's purpose is to obtain competitive prices so small pharmacies can compete with chain pharmacies. To obtain the LGP-negotiated prices from Cardinal, Mr. Larssen was required to purchase a minimum amount of inventory each month ($100,000) and to authorize Cardinal to make an electronic debit from his checking account every Thursday. In addition, a dedicated Cardinal computer was placed in RLD's pharmacy and was used to place orders for prescription and non-prescription products.

Cardinal offered lower prices on brand name drugs than RLD's other local supplier, Valley. Mr. Larssen instructed RLD staff to order any brand name drugs from Cardinal. This instruction did not include ordering HC/AP products. According to Mr. Larssen, from 1999 through 2004, RLD had no history of ordering HC/AP products from Cardinal, and no one at RLD was authorized to purchase HC/AP products from Cardinal.

13. *Valley* is a drug wholesaler with which RLD regularly did business. Valley carried some OTC products and specialized in generic drugs, which were less expensive than Cardinal's. Mr. Larssen instructed RLD staff to purchase its generic drugs, including generic HC/AP products as necessary, from Valley.

RLD employees placed orders for drugs with Valley by telephone. Ms. McKeon frequently placed these orders.

Computers at RLD

14. During the relevant time, RLD had two computers used for pharmacy operations.

RLD's own computer maintained records of the prescription drugs it dispensed to customers. These records of disposition of controlled substances were available in computer-generated drug utilization reports (DURs). It was this data that Mr. Larssen relied on to determine RLD's typical usage of HC/AP products over a 6-month period for ordering purposes.

The dedicated Cardinal computer was available for RLD staff to order products throughout the day. The Cardinal computer randomly printed out confirmation sheets listing products ordered. Such order confirmation sheets could be printed out on demand; however,

RLD staff did not print out confirmation sheets to verify what products were ordered from Cardinal.

Respondents and Ms. Morgan testified that Ms. McKeon was the most computer literate of RLD's staff.

Delivery and Acceptance of Dangerous Drugs at RLD:

15. Dangerous drugs, including HC/AP Schedule III controlled substances, were delivered to RLD's premises by the delivery services used by Cardinal and Valley. Nikki McKeon's father owned Valley Health Courier Service, a company that delivered drugs from Valley to RLD. Ms. McKeon had experience working as a delivery driver for her father and continued to deliver blood products to the Sacramento Airport for his service.

Each individual order that was placed through RLD with Cardinal or Valley was delivered in its own "tote" or container, with an invoice documenting the acquisition and a proof of delivery (POD) form (often a duplicate of the invoice), for the driver to bring back to the wholesaler. If multiple orders were placed during a day, multiple totes with individual invoices would be delivered the following day.

Delivery drivers drove their trucks into RLD's parking lot, near its back door. There was no buzzer on this door. Drivers knocked on the door, which opened into the pharmacy's storage room. Any available RLD employee, including clerks, pharmacy technicians and, occasionally, a pharmacist, answered the door. The employee accepted the tote/s from the driver, and signed the POD for the driver to bring back to the wholesaler.

To ensure that products ordered had been delivered, RLD employees checked invoices with the contents of the tote by removing reorder stickers attached to the invoice and placing a sticker onto each item received. An unmatched sticker indicated an ordered item that had not been received. This was the primary mechanism for ensuring that ordered items had been received by RLD. The invoices would then be placed into a box next to the Cardinal computer. Invoices for controlled substances were place in a separate box. None of the employees at RLD ever compared the invoices from Cardinal to the order confirmation sheets available in the Cardinal computer. Valley orders were jotted down in a spiral notebook kept by the telephone that was later destroyed. There were no internal ordering records maintained for products ordered by telephone from Valley against which to compare the invoices.

Discovery of Missing Controlled Substances

16. On February 2, 2005, while working on the Cardinal computer, Ms. Morgan found a confirmation sheet indicating that 6 bottles of 1,000 tablets each of HC/AP had been ordered by RLD. Ms. Morgan believed this was an error, because RLD did not need these drugs and no employee indicated that they had placed the order. When Cardinal billed RLD for these 6 bottles the next day and the controlled substances could not be located, Ms. Morgan investigated further. Ms. Morgan discovered that HC/AP products had been ordered many times before, that Nikki McKeon generally signed the PODs and that Ms. McKeon signed the POD for the order in question on February 3, 2005. Ms. Morgan reported the matter to Mr. Larssen.

17. On February 7, 2005, Mr. Larssen called Board inspector Linton Hokana to report the missing drugs and was referred to California Department of Justice, Bureau of Narcotics Enforcement (BNE) Agent Jin Tanaka.

Agent Tanaka interviewed Ms. McKeon on February 10, 2005. During her audio-taped interview, Ms. McKeon agreed that the signatures on the PODs she viewed appeared similar to her own, but she denied that they were in fact her signatures. Ms. McKeon also denied that she ever signed for deliveries of items that were not in fact brought into the pharmacy.

On February 15, 2005, Ralph Larssen completed and submitted a "Report of Theft or Loss of Controlled Substances" to the federal Drug Enforcement Agency (DEA) on its Form DEA-106. In this report, Mr. Larssen indicated that a total of 408,500 doses of brand named HC/AP products [Vicodin ES, Lortab 7.5, Vicodin, Lortab 10, Lorcet 10, and Norco], were lost from RLD, with a purchase value of $70,000. Mr. Larssen provided the Board with a copy of the DEA 106 form and a letter explaining the circumstances of the discovery of missing drugs.

18. There has been no criminal prosecution resulting from the diversion of controlled substances from RLD. All parties agree that Ms. McKeon is the probable suspect, based upon a comparison of her work schedule and time cards with the times HC/AP products were ordered, her apparent signature on the vast majority of POD forms obtained from the drug wholesalers and manufacture, and her prior experience as a delivery driver for her father's drug delivery service. While Agent Tanaka testified that "anyone" at RLD could have diverted the HC/AP products, he indicated in his investigative report that Ms. McKeon was the likely suspect. According to Agent Tanaka, the street value of these drugs was approximately twice that amount. Inspector Hokana testified that, based upon his training and experience as part of the Board's drug diversion fraud team, the missing HC/AP tablets were worth $5.00 each, or a total street value of approximately $ 2,300,000.00

19. In October 2006, the Board revoked Ms. McKeon's pharmacy technician license number TCH 49265, after she failed to appear at the administrative hearing involving her actions while employed at Rio Linda Drug.6 The Board's Accusation alleged that Ms. McKeon "dishonestly, fraudulently and deceitfully obtained 463,000 doses of hydrocodeine with acetaminophen" by "diverting Rio Linda Drug's inventory," "failing to maintain the records of acquisition and/or the invoices," and subverting the investigation by not appearing at scheduled appointments with Inspector Hokana in June 2005.

Board Investigation and Audit

20. Inspector Hokana investigated the loss of controlled substances at RLD pharmacy. On February 24, 2005, Mr. Hokana inspected RLD and obtained initial records available from RLD staff; he returned to RLD on March 3, and May 18, 2005, to obtain further documents from RLD staff.

Many documents that should have been readily available to Mr. Hokana during the February 24, 2005, inspection of RLD were not available, including complete records of acquisition (invoices) and of disposition (drug utilization reports) of controlled substances. RLD could not produce the policies and procedures and a job description for its pharmacy

technicians. Inspector Hokana was provided with RLD's January 19, 2004, controlled drug inventory of Schedule 2 through 5 controlled substances prepared by former PIC Newman; a list of missing HC/AP drugs prepared by Ms. Morgan, with a note to Mr. Larssen that these "are what we can find in a hurry that are missing;" and a list of 79 missing Cardinal invoices by number.

At the conclusion of this inspection, Mr. Hokana asked respondents to locate and provide certain documents to him on March 1, 2005. In addition, because RLD was not in possession of all invoices, Inspector Hokana and/or Agent Tanaka obtained the original acquisition reports, invoices for HC/AP products provided to RLD, and PODs from Cardinal, Valley (JT), and Qualitest.

21. After Inspector Hokana's first inspection, Mr. Larssen personally called Valley to obtain copies of invoices that were not found at RLD. He did this in an effort to help gather the documents Mr. Hokana requested.

On March 3, 2005, RLD provided Mr. Hokana with numerous documents, including 120 invoices from Valley, 4 invoices from Qualitest, and 18 Cardinal invoices. Power of attorney forms appointing respondent Sargisson and revoking existing powers of attorney to former PICs Ms. Newman and Ms. Whyte were also provided.

22. On May 18, 2005, RLD provided Mr. Hokana with 15 drug utilization reports for HC/AP products dispensed; an independent controlled substances inventory conducted at 2 p. m. on February 23, 2005, and Ms. McKeon's time sheets.

23. *Missing Controlled Substances*: As indicated in his October 17, 2005, Investigation Report, Inspector Hokana used documents from all sources to conduct an "open ended audit" in which he compared records of RLD's acquisitions to its records of dispositions. The discrepancies between the numbers of HC/AP products acquired and the number dispensed determined from these records established the approximate amount of HC/AP products missing from RLD.

From January 4, 2004, through February 23, 2004, while Ms. Newman was RLD's PIC, a total of 10,000 doses of HC/AP were missing from RLD.8

From February 24, 2004, through February 10, 2005, while Dr. Sargisson was RLD's PIC, a total of 449,000 doses of HC/AP were missing from RLD.9
From January 1, 2004 through February 10, 2005, RLD could not account for 463,988 doses of HC/AP, or 74 percent of its total acquisitions of HC/AP products. This figure was determined by comparing the total of 622,100 doses of all strengths of HC/AP that had been acquired by RLD from its three suppliers, with its records of disposition of a total of 158,112 doses. The variance in acquisition and disposition figures yielded the number of diverted or "missing" doses of HC/AP. This was the largest amount of diverted controlled substances Mr. Hokana had seen in his 8 years as a Board inspector.

24. *Records of acquisition and disposition*: Each pharmacy order for the purchase of dangerous drugs, including controlled substances, generates a record of acquisition, typically an invoice, which must be retained by a pharmacy and be available to the Board for a period

of three years. Similarly, a pharmacy must maintain records of its disposition of controlled substances. During the relevant time, RLD did not have complete records of the acquisition and disposition of these unaccounted for controlled substances in its pharmacy records.

Acquisition Records: From January 2, 2004, through February 10, 2005, 226 orders for the purchase of HC/AP products were placed by RLD employees with Cardinal, Valley, and Qualitest. Respondents RLD and its owner Mr. Larssen did not have 95 of the 226 invoices for the purchase of HC/AP products that should have been retained in RLD's records. Of these 226 orders, RLD employees ordered controlled substances 92 times from Cardinal, 129 times from Valley, and 5 times from Qualitest. RLD staff could not locate 76 Cardinal invoices, 18 Valley invoices, and 1 Qualitest invoice that should have been retained and available in its pharmacy records.

From February 24, 2004, through February 20, 2005, during Dr. Sargisson's tenure as PIC, 69 Cardinal invoices, 15 Valley invoices, and 1 Qualitest invoice were not retained and available in the pharmacy. Unusually large quantities of 6,000 to 10,000 tablets were ordered multiple times from Cardinal on an increasingly frequent basis.

Disposition Records: From January 2, 2004, through February 10, 2005, respondents RLD and owner Ralph Larssen had no records of disposition for 463,988 "missing" doses of HC/AP ordered through RLD. During respondent Dr. Sargisson's tenure as PIC from February 24, 2004, through February 20, 2005, there were no disposition records for approximately 450,000 doses of HC/AP.

25. *Proofs of Delivery*: From January 2, 2004, through February 10, 2005, RLD pharmacists failed to sign 133 of the 150 PODs of all acquisitions from Cardinal, 207 out of 223 PODs from Valley, and five of the PODs from Qualitest.[11]

From February 24, 2004, through February 10, 2005, under the supervision of PIC Dr. Sargisson, 123 Cardinal PODs, 171 Valley PODs and 5 Qualitest PODs were signed by an RLD employee who was not a pharmacist. Dr. Sargisson signed 3 of the 150 Cardinal PODs, 9 of the 223 Valley PODs and none of the Qualitest PODs. Ms. McKeon signed 104 of the Cardinal PODs, 149 of the Valley PODs, and 2 of the Qualitest PODs.

RLD's Policies and Procedures and Pharmacy Security

26. During the relevant time, RLD had a security alarm system in place.

27. Pharmacy technician Lucinda Morgan and clerk Sandra Ritchie, both of whom had worked at RLD for many years, were RLD's defacto managers. Ms. Ritchie took care of the cash register, paid routine bills, and supervised the clerical staff. Ms. Morgan, as RLD's employee with most seniority, supervised the pharmacy technicians, and arranged staff schedules, including for temporary pharmacists.

28. None of Mr. Larssen's ordering instructions to staff were available in written form.

29. Unlike HC/AP and other Schedule III controlled substances, Schedule II controlled substances were maintained in a locked cabinet at all times, under the sole control of the

pharmacist. RLD kept a "perpetual inventory" of its Schedule 2 drugs, by which it tracked each order and each prescription dispensed.

30. All dangerous drugs, including Schedule III drugs, were behind a locked accordion door, to which only the pharmacist had a key. As PIC, Dr. Sargisson had a key to the pharmacy and to the Schedule II drug cabinet. Dr. Sargisson unlocked the accordion door in the morning; both he and pharmacy technicians worked in this area. A duplicate key was kept in a sealed envelope for use by temporary pharmacists.

During Dr. Sargisson's days off or during his medical leave, Ms. Morgan was responsible for providing the key to the pharmacy and to the locked Schedule II controlled substances cabinet to temporary pharmacists and retrieving it from them before they left the job.

31. When Inspector Hokana first inspected RLD, Ms. Morgan could not locate a policy and procedure manual for RLD. Ms. Morgan was not aware of the existence of RLD's policies and procedures for pharmacy technicians until 2005, after the discovery of the missing drugs. Ms. Morgan had never read the manual or any policies and procedures. Clerk Rich Moen was also unfamiliar with any policies and procedures at RLD.

On May 8, 2005, RLD faxed its policy and procedure manual, entitled "*Pharmacy Operations During the Temporary Absence of a Pharmacist*," to Mr. Hokana. This 8-paged manual had initially been faxed to RLD from Middletown Pharmacy that morning. In the manual, pharmacy technicians are advised that, while the pharmacist is absent, they may "check[..] drugs received from the manufacturer vs. invoice, and plac[e] drug products into inventory. (Note: Only pharmacists can accept orders from wholesalers per B&P Code section 4059.5.)."

32. Due to Ms. Morgan's lengthy tenure at RLD, Dr. Sargisson did not question some of the routine pharmacy practices after he became the PIC. In Dr. Sargisson's prior experience as a pharmacist at over 40 pharmacies, pharmacies typically cumulated their orders throughout the day and sent one computer order to the wholesaler at day's end. By contrast, RLD pharmacy technicians sent multiple orders on the Cardinal computer throughout the day. Dr. Sargisson thought this was an unusual practice that was more cumbersome because it resulted in multiple totes, but he did not question this ordering practice or establish a different ordering policy.

33. The unwritten policy at RLD during the relevant period was that only pharmacists could order and sign for Schedule 2 drugs, but that both pharmacists and pharmacist technicians could order Schedule III drugs with Valley by telephone or with Cardinal by computer. There was no procedure to ensure that employees did not order drugs improperly, either during their working day or after working hours. For example, Dr. Sargisson heard Ms. McKeon say that she had sent orders to Cardinal on the Cardinal Computer, but he had no control over what she ordered. Mr. Larssen testified that orders for drugs from Cardinal could be made by computer from home by anyone who had a computer, the wholesaler's website, the account number, and his password. Mr. Larssen's password is the same for each of his pharmacies; however, each store has a different account number. Nikki McKeon was authorized to place orders with Cardinal and knew the password.

The unwritten policy and practice of RLD during the relevant time was that anyone, including clerks, could accept and sign for delivery of controlled substances to the pharmacy. Respondent Larssen was not aware of RLD's practice of allowing non-pharmacists to sign for deliveries.

Ms. Morgan testified that, before Mr. Larssen purchased RLD, some pharmacists were stricter and only allowed pharmacists to sign for dangerous drugs. These prior pharmacists also did their own ordering of Schedule III drugs.

34. During the relevant period, Dr. Sargisson noticed that, in addition to her regular breaks, Ms. McKeon took from 6 to 8 cigarette breaks during the course of a day. Dr. Sargisson also noticed that these breaks were not long enough to actually smoke a cigarette. In retrospect, Dr. Sargisson thought this behavior was odd. He also noted that "scuzzy" boyfriends would visit Ms. McKeon at RLD.

35. There was no procedure for what action an employee should undertake, or what chain of command should be followed to report an unusual activity in the pharmacy. For example, RLD clerk Rick Moen told Inspector Hokana that, in the summer of 2004, shortly after he began working at RLD, he found a box with 6 to 8 large plastic jugs of pills in a drug delivery tote outside of RLD's back door near the dumpster, close to where Ms. McKeon routinely parked her car. Mr. Moen gave the drugs to Ms. McKeon who had a strange look on her face and said she "would take care of it." Mr. Moen did not tell any other, more senior RLD staff or the PIC about this episode until after the discovery of the missing drugs.

36. Dr. Sargisson did not personally observe the work of pharmacy technicians. Ms. McKeon was known to be in the back storage room without supervision, where the invoices were stored, and she was also known to come into the pharmacy on her days off on several occasions to pick something up. Ms. McKeon was in the back room doing unknown activity, particularly on her last days of work at RLD. Both Ms. McKeon and Ms. Morgan ordered drugs on the Cardinal Computer and by telephone to Valley without any oversight by or, accountability to, Dr. Sargisson.

37. *Alleged Inequality of Treatment:* Both respondents Sargisson and Larssen were shocked that their licenses were being pursued by the Board when, in their opinions, other licensees who had committed similar or related statutory violations did not have Accusations filed against them. Both Mr. Larssen and Dr. Sargission believed the Board's action against them to be unfair, and each testified that Inspector Hokana acted inappropriately by pursing actions against their licenses and ignoring violations by large wholesalers. Dr. Sargisson actively sought an attorney who would fight the Accusation, due to this perceived miscarriage of justice. Dr. Sargisson testified that Mr. Hokana was a "mean-spirited and hateful" individual who had a specific agenda to "write us up."

PIC Newman: Former RLD PIC Ms. Newman, on whose watch 10,000 doses of HC/AP products went missing, was issued a letter of admonishment by the Board for failing to sign PODs for the delivery of dangerous drugs, and for failing to maintain security. No fines were imposed. An Accusation was not filed against her.

Valley: On February 16, 2006, the Board issued Citation Number CI 2005 30776 to Valley, which it fined $2,000 for its violation of section 4059.5, subdivision (a)/Health and Safety Code section 11209, subdivision (a). Valley was also cited but not fined for its failure to maintain POD forms in violation of Health and Safety Code section 11209, subdivision (b). This Citation was based upon Inspector Hokana's June 28, 2005, Order of Correction report, in which he determined that Valley and its exemptee-in-charge, Roger Peters, had allowed non-pharmacists to sign for 192 of the 223 POD forms for deliveries of Valley dangerous drugs made to RLD. Of these unsigned PODs, 142 were for deliveries of hydrocodone-containing controlled substances and 50 were for dangerous drugs.

Cardinal: On March 9, 2006, the Board issued Citation Number CI 2005 30544 to Cardinal, which it fined $2,000 for violating section 4059.5, subdivision (a) and Health and Safety Code section 11209, subdivision (a). This citation was based upon Inspector Hokana's June 28, 2005, Order of Correction report, in which he determined that Cardinal and its exemptees-in-charge, Bruce Behnke (1-2-04 through 5-8-04) and Paul Scheuer (5-24-04 through 2-10-05), did not require a pharmacist to sign a total of 133 out of 150 PODs forms for deliveries of hydrocodone-containing controlled substances to RLD. The Citation noted that the dispositions to RLD that were either not signed or signed by non-pharmacists "lead to the unlawful diversion
of a large quantity of controlled substances." Cardinal was also cited but not fined for its failure to maintain PODs in violation of Health and Safety Code section 11209, subdivision (b).

38. *Inspector Hokana:* There was no credible evidence that Inspector Hokana had a vendetta against respondents or that he intentionally singled them out for administrative action for any inappropriate reason. Rather, Mr. Hokana's investigation focused on understanding and accounting for an extremely large quantity of controlled substances that were diverted from a licensed pharmacy and, presumably, placed in to the unregulated public stream. Mr. Hokana's training and his years of experience as a Board investigator and as member of the Board's drug diversion fraud team were apparent in his audit. Mr. Hokana's demeanor while testifying was professional; his explanation of the manner in which he conducted the audit was precise and detailed and without animosity or apparent dislike of respondents. Mr. Hokana was willing to admit and correct the few errors respondents pointed out in his thorough investigation audit. Overall, Mr. Hokana's testimony was that of a dedicated and trained civil servant attempting to comply with the serious responsibilities placed upon the Board to ensure that controlled substances are not diverted. It was highly credible.

Evidence of Mitigation and Aggravation, Rehabilitation

39. *Respondent Larssen* is currently 56 years old, married with four adult children. He has been a California licensed pharmacist since 1974, during an eight- year period of which his license was not active. Due to his inactive license status, Mr. Larssen was required to retake the Board's test to activate his pharmacist license in approximately 1989. He is familiar with pharmacy laws through this examination, his continuing education courses, and through daily use.

Over the years, Mr. Larssen has owned seven pharmacies and has had a total of 60 "store years" experience as a pharmacy owner. As a pharmacy owner, Mr. Larson has

discovered several problems with his pharmacists in charge and pharmacist technicians that he has reported to the Board, without receiving any penalty or action against his license.

On May 4, 2004, however, Inspector Hokana issued Citation Number CI 2003 26164 to Mr. Larssen's Laytonville Pharmacy (LP), and fined him $250 for each of the following violations: (1) failure to have sufficient security to prevent the unlawful diversion of controlled substances by the PIC in violation of C.C.R., title 16, section 1714, subdivision (b); and (2) failure to report the discovery of lost controlled substances to the Board within 30 days of discovery, in violation of C.C.R., title 16, section 1715.6. Mr. Larssen did not contest this citation because he believed Inspector Hokana disregarded his input and would not change his mind, and because he concluded contesting a $500 citation was not cost-beneficial. Mr. Larssen testified that Mr. Hokana's finding that he did not timely report the discovery of a controlled substance loss to the Board was not accurate.

Because RLD's bills from its drug suppliers were electronically debited from Mr. Larssen's checking accounts, Mr. Larssen did not employ a bookkeeper during the relevant period. Mr. Larssen testified that Cardinal had a computer interface that allowed him to obtain a monthly printout regarding what was purchased from each store by category. This capability allowed him to monitor each of his pharmacy's use of prescription and non-prescription items, and it was more cost-effective than hiring a bookkeeper for each pharmacy.

Weekly electronic debits from Mr. Larssen's RLD checking account by Cardinal ranged from $25,000 to $35,000 per week. Mr. Larssen generally purchased close to $150,000 worth of inventory a month from Cardinal for each of his pharmacies, for a total annual inventory of $1,800,000. Before the missing drugs were discovered, Mr. Larssen was aware that there was a discrepancy of approximately $70,000 in his RLD checking account. Mr. Larssen did not know the reason for this discrepancy, and believed it might have been attributable to a change in reimbursement rates.

As the owner of small pharmacies, Mr. Larssen has made business decisions designed to keep him competitive with large retail pharmacies. At the same time, he is aware of the potential for drug diversions from his stores. Mr. Larssen made conscious efforts in his ordering practices with Qualitest to ensure that all bulk orders of HC/AP products were only made through him. There was no evidence, however, of any efforts on Mr. Larssen's part to review or oversee the management and security practices at RLD.

Remedial Measures: On discovery of the missing drugs, Mr. Larssen acted promptly to notify the Board and DEA, and worked cooperatively in this process. While both Mr. Hokana and Agent Tanaka expressed some concerns about information provided shortly after the discovery, the evidence as a whole supports a finding that Mr. Larssen and RLD staff were working diligently to discover what had occurred. Consequently, information was provided as it was discovered.

Rick Moen testified that, after the discovery of the drug diversions, RLD non-pharmacist staff agreed as a group that they would not sign for any drug deliveries. Mr. Larssen also instructed RLD's PIC to sign for all deliveries to the pharmacy. Mr. Larssen stopped ordering from Cardinal and Qualitest to find a different way to monitor controlled substances likely to be diverted.

40. *Dr. Sargisson* is 67 years old and has been a licensed pharmacist, with no prior disciplinary history, for the past 18 years. Prior to becoming a pharmacist, Dr. Sargisson had a full military career and was honorably discharged. He has two adult adopted children.

Dr. Sargisson's priority as RLD's PIC and sole pharmacist was to ensure that its customers received their prescriptions. This work included assisting in problems with prescription refills, insurance coverage issues and counseling. There was no evidence that Dr. Sargisson's work as a pharmacist dispensing prescriptions and counseling pharmacy customers was unprofessional.

During the relevant period, Dr. Sargisson trusted RLD employees and believed he had authority to designate non-pharmacist RLD employees to sign for drug deliveries under Health and Safety Code section 11209, subdivision (a). Dr. Sargisson is currently aware of his obligation to sign for the delivery of all dangerous drugs and he stops whatever he is doing anytime a delivery comes into the pharmacy. This means frequent interruptions of his work as a pharmacist, but he understands the Board's emphasis on this requirement.

Dr. Sargisson is remorseful for the loss of controlled substances while he was RLD's PIC. He frequently thinks about how these events could have happened. At the same time, Dr. Sargisson strongly believes that the Board is pursuing his license unfairly, when few consequences were taken against other individuals and entities with similar violations. Dr. Sargisson wishes to continue as a practicing pharmacist as long as he is able. He believes he has lost employment opportunities, after a pharmacy owner sees that his license is subject to a pending Accusation.

For the past two years, Dr. Sargisson has worked as a temporary pharmacist, without incident.

41. *Costs*: Complainant submitted certifications of costs showing $8,645.00 incurred for investigative services and $20,981.50 incurred for legal services provided by the Office of the Attorney General, for a total of $29,626.50. Those costs are deemed just and reasonable.

LEGAL CONCLUSIONS

1. The Pharmacy Law is set forth in Business and Professions Code Section 4300, et seq. Section 4301 authorizes the Board to take disciplinary action against any licensee "who is guilty of unprofessional conduct." Respondents are alleged to have committed unprofessional conduct under subdivisions (j) and (o) by, respectively, (1) "the violation of any of the statutes of this state, of any other state, or of the United States regulating controlled substances and dangerous drugs" and/or (2) "violating or attempting to violate, directly or indirectly, or assisting in or abetting the violation of or conspiring to violate any provision or term of this chapter or of the applicable federal and state laws and regulations governing pharmacy, including regulations established by the board or by any other state or federal regulatory agency."

2. *Burden of Proof:* In this matter, Complainant bears the burden to prove by clear and convincing evidence that the allegations contained in its Accusation are true, and that the

relief it seeks should be granted. (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal. App. 3d 853, 856.) Respondents bear the burden of establishing their affirmative defenses by a preponderance of the evidence.

3. *Motion to Dismiss:* During the relevant time period, Business and Professions Code section 4104 required all pharmacies to have procedures in place to protect the public when a licensed individual employed "by or with the pharmacy is known to be chemically, mentally, or physically impaired to the extent it affects his or her ability to practice the profession or occupation authorized by his or her license," as well as when such individual "is known to have engaged in the theft, diversion, or self-use of prescription drugs belonging to the pharmacy." Under California Code of Regulations, title 16, section 1715.6, a pharmacy owner must report any drug loss to the Board within 30 days of the discovery of any loss of controlled substances.

Effective January 1, 2006, section 4104 was amended in various ways. A thirty-day requirement to report information to the Board that indicates a licensed employee's impairment, use or diversion of drugs was added to the statute, as was a list of types of information that must be reported. (Bus. & Prof. Code § 4104, subds. (a), (c).) In addition, subdivision (d) was added and provides:

> d) Anyone making a report authorized or required by this section shall have immunity from any liability, civil or criminal, that might otherwise arise from the making of the report. Any participant shall have the same immunity with respect to participation in any administrative or judicial proceeding resulting from the report.

As set forth in Factual Finding 7, respondents renewed their motion to dismiss the Accusation pursuant to section 4104, subdivision (d). Because the discovery and reporting of the diverted drugs occurred in February 2005, and the statute was not effective until January 1, 2006, the parties submitted briefs to support or oppose the retroactive application of this law.

In determining whether a statute applies retroactively, the courts have repeatedly reiterated the well-established cannon of interpretation that statutes "'are not to be given a retrospective operation unless it is clearly made to appear that such was the legislative intent.' *Aetna Cas. & Surety Co. v. Ind. Acc. Com.* (1947) 30 Cal. 2d 388... The courts will, rather, presume that prospective rather than retrospective operation was intended, unless express language or clear and unavoidable implication negatives the presumption." *Glavinich, Jr. v. Commonwealth Land Title Insurance Company* (1984) 163 Cal. App. 3d 263, 272. Further, "legislative intent in favor of the retrospective operation of a statute cannot be implied from the mere fact that the statute is remedial and subject to the rule of liberal construction." *Aetna Cas. & Surety Co.*, supra, 30 Cal. 2d at p. 395.

Respondents argue that, under the reasoning in *Borden v. Division of Medical Quality* (1994) 30 Cal. App. 4th 874, subdivision (d)'s immunity provision should apply to them. The Court in *Borden* relied on "a well-established exception to the general rule that statutes are not construed to apply retroactively, i.e., when the legislation merely clarifies existing law." Id. at 882.

There is nothing in the language of section 4104 that indicates a Legislative intent that it should apply retroactively. In fact, the statutory amendment was signed into law in October 2005, but was not characterized as an urgency measure, and consequently did not become effective until January 1, 2006. Subdivision (d) does not merely clarify existing law. Although pharmacy owners were required to report losses of controlled substances to the Board prior to the 2005 amendments to section 4104, the amendments added new reporting requirements. Subdivision (d)'s immunity provision provides substantive protections that did not previously exist to "anyone making a report" authorized or required by section 4104.

Even assuming, *arguendo*, that section 4101, subdivision (d) applies retroactively, there is no merit to respondents' contention that it relieves them from their ongoing statutory duties as licensees. The Accusation focuses on respondents' failure to comply with their independent statutory duties under the Pharmacy Law over a time period that extends as far back as 2002. An interpretation in support of such blanket immunity would be contrary to public policy and the primacy the Board must place on protecting the public from unsafe pharmacy practices. In exercising its licensing, regulatory, and disciplinary functions, the Board's "highest priority" is the "protection of the public." The Legislature has expressly indicated that, whenever an inconsistent interest is sought to be promoted, the "protection of the public shall be paramount." (Bus. & Prof. Code § 4001.1.) Accordingly, respondents' motion to dismiss the Accusation is denied.

4. In keeping with its primary emphasis on public protection, one of the goals of the Pharmacy Law and its implementing regulations is to maintain pharmacy security. Each pharmacy licensed by the board "shall maintain its facilities, space, fixtures, and equipment so that drugs are safely and properly prepared, maintained, secured and distributed...." (Cal. Code of Regs., title 16, § 1714, subdiv. (b).) "Each pharmacist while on duty shall be responsible for the security of the prescription department, including provisions for effective control against theft or diversion of dangerous drugs and devices, and records for such drugs and devices. Possession of a key to the pharmacy where dangerous drugs and controlled substances are stored shall be restricted to a pharmacist." (Cal. Code of Regs., title 16, § 1714, subdiv. (d).)

5. The pharmacist-in-charge is the "gatekeeper" for ensuring pharmacy compliance with the laws. Every pharmacy must designate a pharmacist-in-charge and notify the Board of its designation within 30 days. (Bus. & Prof. Code § 4113, subd. (a).) Under the Pharmacy Law, the pharmacist-in-charge assumes significant responsibility:

> The pharmacist-in-charge shall be responsible for a pharmacy's compliance with all state and federal laws and regulations pertaining to the practice of pharmacy. (Bus. & Prof. Code § 4113, subd. (b).)

The pharmacist-in-charge of a pharmacy "shall have responsibility for the daily operation of the pharmacy." (Cal. Code of Regs., title 16, § 1709.1, subdiv. (a).) To fulfill this responsibility, the "pharmacy owner shall vest the pharmacist-in-charge with adequate authority to assure compliance with the laws governing the operation of a pharmacy." (Cal. Code of Regs., title 16, § 1709.1, subdiv. (b).)

5. The Pharmacy Law mandates strict record-keeping requirements for all dangerous drugs and devices. Pursuant to Business and Professions Code section 4081, subdivision (a):

> All records of manufacture and of sale, acquisition, or disposition of dangerous drugs or dangerous devices shall be at all times during business hours open to inspection by authorized officers of the law, and shall be preserved for at least three years from the date of making. A current inventory shall be kept by every ...pharmacy, ... holding a currently valid and unrevoked ... license who maintains a stock of dangerous drugs or dangerous devices.

The term "current inventory" used in this section "shall be considered to include complete accountability for all dangerous drugs handled by every licensee enumerated in Sections 4081 and 4332." (Cal. Code Regs., tit. 16, § 1718.) The pharmacy "owner, officer, and partner" is "jointly responsible, with the pharmacist-in-charge or exemptee-in-charge, for maintaining the records and inventory described in this section." (Bus. & Prof. Code § 4081, subd. (b).)

In addition, "all records or other documentation of the acquisition and disposition of dangerous drugs and dangerous devices by any entity licensed by the board shall be retained on the licensed premises in a readily retrievable form." (Bus. & Prof. Code § 4105, subd. (a).)

6. Equally strict laws apply to the manner in which dangerous drugs may be ordered, delivered to, and received by a pharmacy. Pursuant to Business and Professions Code section 4059.5, subdivision (a):

> Except as otherwise provided in this chapter, dangerous drugs or dangerous devices may only be ordered by an entity licensed by the board and must be delivered to the licensed premises and signed for and received by the pharmacist-in-charge or, in his or her absence, another pharmacist designated by the pharmacist-in-charge....

Health and Safety Code section 11209, subdivision (a), is part of the Controlled Substances Act and was enacted in 1986. It provides, in pertinent part, that:

> (a) No person shall deliver Schedule II, III, or IV controlled substances to a pharmacy or pharmacy receiving area, nor shall any person receive controlled substances on behalf of a pharmacy unless, at the time of delivery, a pharmacist or authorized receiving personnel signs a receipt showing the type and quantity of the controlled substances received. Any discrepancy between the receipt and the type or quantity of controlled substances actually received shall be reported

to the delivering wholesaler or manufacturer by the next business day after delivery to the pharmacy.

Respondents' contention that Section 11209, subdivision (a), prevails over section 4059.5, subdivision (a), and authorized them to designate pharmacy technicians and clerks as "authorized receiving personnel" is without merit. Section 4059.5 was enacted in 1997, and addresses "dangerous drugs," a more encompassing term that includes controlled substances. As pharmacy licensees, respondents are bound by mandates of the Pharmacy Law contained in the Business and Professions Code, unless otherwise specifically stated. Section 4059.5 expressly indicates that it is applicable "except as otherwise provided in this chapter" of the Business and Professions Code. Finally, the reference in Section 11209 to "authorized receiving personnel" refers to deliveries to large hospital "pharmacy receiving areas." (Health & Saf. Code § 11209.) As indicated in 4059.5, subdivision (c), "[n]otwithstanding subdivisions (a) and (b), deliveries to a hospital pharmacy may be made to a central receiving location within the hospital." Thereafter, these drugs must be delivered to the hospital pharmacy within one working day and immediately be inventoried by the pharmacist on duty. (Bus. & Prof. Code § 4059.5, subd. (c).) Thus, as applied to a non-hospital pharmacy, these sections are not inconsistent as both require the pharmacist's signature for any delivery of controlled substances. As set forth in Factual Finding 31, this requirement was recognized by respondent Larssen's policy manual; unfortunately, none of the staff at RLD had ever read this policy.

7. *Affirmative Defense of Non-Delivery:* Respondents argue that the missing controlled substances were never legally "delivered" to RLD because, under section 4166, a wholesaler who uses a common carrier "shall be liable for the security and integrity of any dangerous drugs or dangerous devices through that carrier until the drugs or devices are delivered to the transferee at its board licensed premises." In their view, Cardinal and Valley failed to ensure that their drug delivery services personnel obtained a signature from RLD's pharmacist, and consequently, liability for the missing controlled substances remains with the wholesalers. Respondents also assert that Ms. McKeon "may" have met the drivers in the parking lot and signed for them outside of the store, before they were legally "delivered" to the pharmacy.

Respondents' arguments are unpersuasive. Under the Controlled Substances Act, the term "deliver" or "delivery" means the actual, constructive, or attempted transfer from one person to another of a controlled substance, whether or not there is an agency relationship. (Health & Saf. Code § 11009.) In this case, wholesalers' delivery service personnel attempted to transfer controlled substances to RLD employees with apparent authority at the premises of a Board-licensed pharmacy.14 Furthermore, section 4166 does not relieve respondents of their independent duty under section 4059.5, subdivision (a), and under Health and Safety Code section 11209, subdivision (a), to ensure that a pharmacist signed the proofs of delivery. As set forth in Factual Findings 15, 25, and 33, respondents RLD and Dr. Sargisson allowed controlled substances to be delivered in a manner that was inconsistent with their statutory duties.

8. *Discriminatory Enforcement*: As set forth in Factual Finding 37, the Board did not file an Accusation to revoke the licenses of RLD's former PIC Ms. Coleman, or of wholesalers Cardinal and Valley. Nevertheless, these licensees were disciplined by the Board: Ms. Coleman received a letter of admonishment, and Cardinal and Valley each received

citations and minor fines.

Discriminatory prosecution is a denial of equal protection to persons who are deliberately singled out for prosecution based upon an unjustifiable standard, such as race, religion, or some other arbitrary classification unrelated to a legitimate law enforcement interest. (See *Baluyut v. Superior Court* (1996) 12 Cal. 4th 826, 831-833 (*Balayut*).) While the theory of discriminatory enforcement evolved in connection with criminal prosecutions, it is based on constitutional principles of equal protection and is applicable to the administrative enforcement of laws regulating professions. (See, e.g., *Overturf v. California Horse Racing Bd.* (1978) 86 Cal.App.3d 979, 984-986.) 15 The elements of discriminatory prosecution are (1) that the defendant has been deliberately singled out for prosecution on the basis of some invidious criterion, and (2) that the prosecution would not have been pursued but for the discriminatory purpose of the prosecuting authorities. (See id. at p. 832.) When a defendant establishes these elements, the action must be dismissed unless the authorities establish a compelling reason for selective enforcement. (Id. at pp. 831-832.) Laxity of enforcement against others does not demonstrate purposeful discrimination. *Ehrlich v. McConnell* (1963) 214 Cal.App.2d 280, 288.

As set forth in Factual Finding 38, respondents did not establish that Inspector Hokana singled them out for prosecution based upon any invidious criterion. The respondents' strongly felt belief that the Board's prosecution against them is unfair does not satisfy their burden. Respondents attempt to demonstrate some wrongful purpose by the Board via evidence of dissimilar penalties issued. There is no requirement, however, that the Board issue identical penalties to licensees in similar circumstances. In *Grannis v. Board of Medical Examiners* (1971) 19 Cal. App. 3d 551, the court held there was no abuse of discretion in granting the Board's motion to quash a physician's subpoena for records of Board penalties imposed against other doctors in similar circumstances. In doing so, the court noted that "there is no requirement that charges similar in nature must result in identical penalties (*Coleman v. Harris*, 218 Cal.App.2d 401...)." (See also: *Talmo v. Civil Service Commission of Los Angeles County* (*Talmo*) (1991) 231 Cal.App.3d 210, 230, rejecting sheriff deputy's claim that he was treated unfairly because other deputies committed similar acts of batteries, threats, and racial slurs against inmates and were not discharged. "When it comes to a public agency's imposition of punishment, 'there is no requirement that charges similar in nature must result in identical penalties.' (citing *Coleman v. Harris* 1963) 218 Cal.App.2d 401, 404....)." *Talmo,* 231 Cal.App.3d at 230; *Accord*: *Kolender v. County Civil Service Commission* (2005) 132 Cal. App. 4th 716, 723.)

Consequently, respondents have not established the essential elements of their defense; their claims of discriminatory enforcement are without merit.

9. *Affirmative Defense under Health and Safety Code section 11153.5*:
The Controlled Substances Act prohibits wholesalers or manufacturers, or their agents or employees, from "furnish[ing] controlled substances for other than legitimate medical purposes." (Health & Saf. Code § 11153.5, subdiv. (a).) Anyone who knowingly or with conscious disregard for the fact, furnishes controlled substances for other than a legitimate medical purpose can be punished by imprisonment for up to one year and/or a fine of up to $20,000. (Id. at subdiv. (b).) Factors to be used to determine whether a wholesaler or manufacturer, or their agent or employee, has "knowingly or with a conscious disregard"

furnished controlled substances for other than legitimate medical purposes include "the amount of controlled substances furnished" and *the previous ordering pattern of the customer (including size and frequency of orders).* (Id. at subdiv. (c).) [emphasis added.]

Respondents argue that Cardinal Wholesaler violated Health and Safety Code section 111153.5, by failing to notify them of the drastic increase in HC/AP ordering patterns. As set forth in Factual Findings 9 through 12, RLD is recognized as a small community pharmacy and RLD did not order HC/AP from Cardinal prior to the relevant period. Inspector Hokana candidly admitted that, in retrospect, he should have obtained records from Cardinal showing RLD's previous ordering practices. As set forth in Factual Finding 16 and 17, once Ms. Morgan realized that there were missing drugs, respondents acted quickly to report them. While RLD bears responsibility for monitoring its own acquisitions, if Cardinal had reviewed RLD's previous ordering pattern for HC/AP products, Cardinal would undoubtedly have determined that these excessive orders through RLD were being made for reasons "other than medical purposes" and alerted RLD. There is no reason to believe that respondents would not have acted in a similar prompt manner had Cardinal questioned RLD's radical change in ordering practices.

10. *Respondent Rio Linda Drug and Owner Ralph Larssen*: As set forth in the Factual Findings and Legal Conclusions as a whole, during the relevant period, respondent RLD violated sections 4081, subdivision (a), 4105, subdivision (a) 4059.5, subdivision (a), C.C.R., title 16, sections 1714, subdivision (b), and 1718, and Health and Safety Code section 11209, subdivision (a). Complainant has met the burden of proof that respondent RLD committed unprofessional conduct under section 4301, subdivisions (j) and (o).

As set forth in the Factual Findings and Legal Conclusions as a whole, during the relevant period, Ralph Larssen as owner and licensed permittee of RLD violated section 4081, subdivisions (a) and (b), section 4105, subdivision (a), C.C.R., title 16, sections 1714, subdivision (b), and 1718, and Health and Safety Code section 11209, subdivision (a). Complainant has met the burden of proof that respondent Ralph Larssen, as owner and permit licensee of RLD, committed unprofessional conduct under section 4301, subdivisions (j) and (o).

Thus, by clear and convincing evidence, Complainant has established legally sufficient grounds for the revocation of RLD's/Ralph Larssen's Original Pharmacy Permit No. PHY 42886.

11. *Respondent Ralph W. Larssen*: As set forth in the Factual Findings and Legal Conclusions as a whole, during the relevant period, Ralph Larssen, as a licensed pharmacist and owner/licensed permittee of RLD, violated sections 4081, subdivision (a), 4105, subdivision (a), 4301, subdivision (o), C.C.R., title 16, sections 1714, subdivision (b), and 1718.

Although the law does not require a pharmacy owner to be a licensed pharmacist, that does not mean the license of the pharmacist-owner is shielded from discipline. In *Banks v. Board of Pharmacy* (1984) 161 Cal.App.3d 708, Charles J. Banks was a licensed pharmacist and the owner of Intra World Wide of America, a pharmacy. Due to shortages of controlled substances, Dr. Banks' pharmacist certificate and pharmacy license were disciplined. The

unprofessional conduct of Mr. Banks and his pharmacy were for failing "to maintain complete and accurate records" and "negligence in maintaining security and inventory control. (*Id.* at 713.) The superior court denied Mr. Banks' petition for a writ of mandate. On appeal, Mr. Banks argued that Business and Professions Code section 4232 did not apply to him personally, and that "disciplining his license violated the Equal Protection Clause of the Fourteenth Amendment, because a non-pharmacist in similar circumstances would not be held personally liable for record keeping infractions. (*Id.* at 838-839.) The Court of Appeal found it was immaterial that Business and Professions Code section 4232 did not apply to Mr. Banks personally, since some of the statutes "undoubtedly could be applied against him. (*Id.* at 838.)

The Equal Protection Clause argument also failed. The Court explained, "when . . . no suspect classification is drawn, such as one based on race or religion, the Equal Protection Clause merely demands a rational relationship between the distinction drawn and a legitimate state purpose. (*Id.* at 839.) "... the Legislature could reasonably believe that a pharmacist, because of his training, would be more capable of safeguarding the drug supply and thus could more justly be held fully responsible. (*Ibid.*)

Complainant has, therefore, met the burden of proof that respondent Ralph Larssen, as a pharmacist and owner/licensed permittee of RLD, committed unprofessional conduct under section 4301, subdivisions (j) and (o).

Thus, by clear and convincing evidence, Complainant has established legally sufficient grounds for the discipline of Ralph Larssen's pharmacist license, RPH No. 28795.

12. *Respondent Stuart Sargisson:* As set forth in the Factual Findings and the Legal Conclusions as a whole, as RLD's PIC, Dr. Sargisson did not ensure compliance with statutes and regulations designed to ensure the security of Schedule III controlled substances. Specifically, during the relevant period, respondent Sargisson violated sections 4081, subdivision (a), 4105, subdivision (a) 4059.5, subdivision (a), C.C.R., title 16, sections 1714, subdivision (d), and 1718, and Health and Safety Code section 11209, subdivision (a). The consequences of these violations, while wholly unintended by him, posed a serious risk of harm to the public.

Complainant has met its burden of proof, by clear and convincing evidence, that Dr. Sargisson committed unprofessional conduct under section 4301, subdivisions (j) and (o), and that this constitutes grounds for the revocation of his pharmacy license. However, as set forth in Factual Findings 9 and 40, it would not be contrary to the public interest to issue a restricted license to Dr. Sargisson. In this regard, the evidence does not support a finding that Dr. Sargisson's abilities as a practicing pharmacist are at issue. Rather, the evidence established that Dr. Sargisson did not fully comprehend the extent of his obligations as RLD's pharmacist in charge to ensure compliance with all laws and regulations. Dr. Sargisson failed to question existing policies and failed to develop policies and procedures to insure the integrity and the security of drugs, particularly in the context of ordering controlled substances and ensuring their proper acceptance on delivery. In mitigation, serious health issues occurring during a portion of the relevant time may have affected Dr. Sargisson's ability to attend to these matters.

13. *Costs and Attorneys Fees:* Under Business and Professions Code section 125.3, 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. As set forth in Finding 41, the costs of investigation and enforcement claimed by Complainant herein are in the amount of $29,626.50.

Pursuant to *Zuckerman v. Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, various factors must be considered in determining the amount of costs to be assessed. The Board must not assess the full costs of investigation and prosecution when to do so will unfairly penalize a licensee who has committed some misconduct, but who has used the hearing process to obtain dismissal of other charges or a reduction in the severity of the discipline imposed. The Board must consider the licensee's subjective good faith belief in the merits of his or her position, as well as whether the licensee has raised a colorable challenge to the proposed discipline. The Board must determine that the licensee will be financially able to make later payments. Finally, the Board may not assess the full costs of investigation and prosecution when it has conducted a disproportionately large investigation to prove that a licensee engaged in relatively innocuous misconduct.

Taking into account the above factors, the time spent appears to be reasonable and the activities were necessary to the development and presentation of the case. Under all of the facts and circumstances, and taking into consideration the Board's obligation to protect the public through licensing actions such as this one, assessment of costs in the amount of $29,626.50 against respondents is reasonable and appropriate. These costs shall be divided between respondents Larssen ($19,135.75) and Sargisson ($10,490.75).

ORDER

1. The stay imposed on September 4, 2007 is hereby terminated.

2. Ralph W. Larssen, Pharmacist License RPH No. 28795, shall be issued a public letter of reprimand, and he shall pay to the Board its costs of investigation and prosecution in the amount of $19,135.75, which shall be paid within 30 days of the effective date of this decision or pursuant to a payment plan agreed to by the Board. The filing of bankruptcy by respondent shall not relieve respondent of his responsibility to reimburse the Board its costs of investigation and prosecution.

3. Pharmacy Permit No. PHY 42886, issued to respondent Ralph W. Larssen to do business as respondent Rio Linda Drug, is hereby revoked.

4. Pharmacist License No. 43083, issued to respondent Stuart Sargisson, is hereby revoked; however, said revocation is stayed and respondent is placed on probation for two (2) years upon the following terms and conditions:

a. Obey All Laws

Respondent shall obey all state and federal laws and regulations substantially related to or governing the practice of pharmacy. Respondent shall report any of the following occurrences to the Board, in writing, within 72 hours of such occurrence:

1) an arrest or issuance of a criminal complaint for violation of any provision of the Pharmacy Law, state and federal food and drug laws, or state and federal controlled substances laws;

2) a plea of guilty or nolo contendre in any state or federal criminal proceeding to any criminal complaint, information or indictment;

3) a conviction of any crime;

4) discipline, citation, or other administrative action filed by any state and federal agency which involves respondent's 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.

b. 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.

c. 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 a scheduled interview without prior notification to Board staff shall be considered a violation of probation.

d.. 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.

e. Continuing Education

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

f. Notice to Employers

Respondent shall notify all present and prospective employers of the decision in case number N2006050086 and the terms, conditions and restrictions imposed on respondent by the decision. Within 30 days of the effective 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 N2006050086.

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 and terms and conditions of the decision in case

number N2006050086 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.

g. No Pharmacist-in-Charge (PIC)

Respondent shall not be the pharmacist-in-charge of any entity licensed by the Board.

h. Reimbursement of Board Costs

Respondent shall pay to the Board its costs of investigation and prosecution in the amount of $10,490.75, which shall be paid within 30 days of the effective date of this decision or pursuant to a payment plan agreed to by the Board. The filing of bankruptcy by respondent shall not relieve respondent of his responsibility to reimburse the Board its costs of investigation and prosecution.

i. 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.

j. Status of License

Respondent shall, at all times while on probation, maintain an active current license with the Board, including any period during which suspension or probation is tolled. If respondent's license expires or is cancelled 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.

k. 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.

l. 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.

m. Tolling of Probation

Respondent shall work at least 40 hours in each calendar month as a pharmacist and at least an average of 80 hours per month in any six consecutive months. Failure to do so will be a violation of probation. If respondent has not complied with this condition during the probationary term, and respondent has presented sufficient documentation of his or her good faith efforts to comply with this condition, and if no other conditions have been violated, the Board, in its discretion, may grant an extension of respondent's probation period up to one year without further hearing in order to comply with this condition.

n. 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.

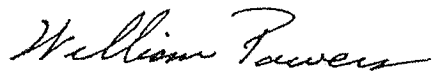
If a respondent has not complied with any term or condition of probation, the Board shall have continuing jurisdiction over respondent, and probation shall automatically be extended until all terms and conditions have been satisfied or the Board has taken other action as deemed appropriate to treat the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

o. Completion of Probation

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

IT IS SO ORDERED this 25th day of February 2008.

Effective Date: March 26, 2008



WILLIAM POWERS
President, Board of Pharmacy
Department of Consumer Affairs

BILL LOCKYER, Attorney General
of the State of California
JESSICA M. AMGWERD, State Bar No. 155757
Deputy Attorney General
California Department of Justice
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 445-7376
Facsimile: (916) 327-8643

Attorneys for Complainant

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

In the Matter of the Accusation Against: **RIO LINDA DRUG** 402 M. Street Rio Linda, CA 95673 Pharmacy Permit PHY 42886 **RALPH W. LARSSEN** 1260 Summit Lake Angwin, CA 94508 Pharmacy License RPH 28795 **STUART SARGISSON** 8800 Aquarius Ave Elk Grove, CA 95624 Pharmacy License RPH 43083 Respondents.	Case No. 2956 **ACCUSATION**

Complainant alleges:

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

I.

LICENSE HISTORY

2. On April 28, 1974, the Board issued Pharmacist License RPH No. 28795 to Respondent Ralph W. Larssen, to practice pharmacy in California. Mr. Larssen's pharmacy license was in full force and effect at all times relevant to the charges brought herein and will expire on March 31, 2006, unless renewed.[1]

3. On or about May 13, 1997, the Board issued Original Pharmacy Permit No. PHY 42886 to Ralph W. Larssen, to do business as Rio Linda Drug. Respondent Rio Linda Drug is located at 402 M. Street, Rio Linda, CA 95673. Rio Linda Drug's pharmacy permit was in full force and effect at all times relevant to the charges brought herein and will expire on May 1, 2006, unless renewed.

4. On March 1, 1990, the Board issued Pharmacist License No. RPH 43083 to Respondent Stuart Sargisson, to practice pharmacy in California. Mr. Sargisson has been the Pharmacist-in-Charge of Rio Linda Drug since February 24, 2004. Mr. Sargisson's pharmacy license was in full force and effect at all times relevant to the charges brought herein and will expire on December 31, 2007, unless renewed.

5. On June 20, 2003, the Board issued Original Pharmacy Technician Registration No. TCH 49265 to Nikki Lynn McKeon (aka Nikki deWeese), to act as a pharmacy technician in California. Ms. McKeon's pharmacy technician's registration was in full force and effect at all times relevant to the charges brought herein and will expire on November 30, 2006, unless renewed.

---

1. From February 1, 1993 until March 13, 2003, Mr. Larssen was the sole owner of Laytonville Pharmacy, PHY 38247. From August 2002, through March 2003, Laytonville Pharmacy did not have sufficient security in place to prevent theft of controlled substances by an employee, resulting in the unlawful diversion of controlled substances. On May 4, 2004, as owner of Laytonville Pharmacy, Mr. Larssen received a citation for a violation of California Code of Regulations, title 16, section 1714(b) and section 1715.6.

II.

STATUTORY PROVISIONS

6. Under Business and Professions Code ("Bus. & Prof. Code") section 4300 the Board may discipline any license, for any reason provided in the Pharmacy Law, (i.e., Bus. & Prof. Code section 4000 et. seq.)

7. Bus. & Prof. Code section 4301 states, in pertinent part:

§ 4301. Unprofessional conduct; licenses procured through misrepresentation, fraud, or mistake

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:

. . . .

(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.

. . .

8. Bus. & Prof. Code section 4059.5(a) states as follows:

§ 4059.5. Dangerous drugs and devices; license necessary to order; transfer, sale or delivery; deliveries to hospitals and pharmacies

(a) Except as otherwise provided in this chapter, dangerous drugs or dangerous devices may only be ordered by an entity licensed by the board and must be delivered to the licensed premises and signed for and received by a pharmacist-in-charge or, in his or her absence, another pharmacist designated by the pharmacist-in-charge. Where a licensee is permitted to operate through an exemptee, the exemptee may sign for and receive the delivery.

9. Bus. & Prof. Code section 4081, states, in pertinent part, the following:

§ 4081. Records; hours; preservation; violations

(a) All records of manufacture and of sale, acquisition, or disposition of dangerous drugs or dangerous devices shall be at all times during business hours open to inspection by authorized officers of the law, and shall be preserved for at least three years

from the date of making. A current inventory shall be kept by every manufacturer, wholesaler, pharmacy, . . . who maintains a stock of dangerous drugs or dangerous devices.

(b) The owner, officer, and partner of any pharmacy, . . . shall be jointly responsible, with the pharmacist-in-charge or exemptee, for maintaining the records and inventory described in this section.

. . .

10. Bus. & Prof. Code section 4105(a), states the following:

§ 4105. Records of acquisition and disposition of dangerous drugs and devices; location; availability; waivers

(a) All records or other documentation of the acquisition or disposition of dangerous drugs and dangerous devices by any entity licensed by the board shall be retained on the licensed premises in a readily retrievable form.

11. Bus. & Prof. Code section 4113, states, in pertinent part, the following:

§ 4113. Pharmacists-in-charge; designation; responsibilities; notifications

(a) Every pharmacy shall designate a pharmacist-in-charge and within 30 days thereof, shall notify the board in writing of the identity and license number of that pharmacists and the date he or she was designated.

(b) The pharmacist-in-charge shall be responsible for a pharmacy's compliance with all state and federal laws and regulations pertaining to the practice of pharmacy.

12. California Code of Regulations, title 16, section 1714(b) and (d) state the following:

§ 1714. Operational Standards and Security.

. . .

(b) Each pharmacy licensed by the board shall maintain its facilities, space, fixtures, and equipment so that drugs are safely and properly prepared, maintained, secured and distributed. The pharmacy shall be sufficient size and unobstructed area to accommodate the safe practice of pharmacy.

. . .

(d) Each pharmacist while on duty shall be responsible for the security of the prescription department, including provisions for effective control against theft or diversion of dangerous drugs and devices, and records for such drugs and devices. Possession of a key to the pharmacy where dangerous drugs and controlled substances are stored shall be restricted to a pharmacist.

13. California Code of Regulations, title 16, section 1718 states as follows:

§ 1718. Current Inventory Defined.

"Current Inventory" as used in Sections 4081 and 4332 of the Business and Professions Code shall be considered to include complete accountability for all dangerous drugs handled by every licensee enumerated in Sections 4081 and 4332.

The controlled substances inventories required by Title 21, CFR, Section 1304 shall be available for inspection upon request for at least 3 years after the date of the inventory.

14. Health and Safety Code section 11209(a), states as follows:

§ 11209. Delivery of Schedule II, III, or IV controlled substances; signing and retaining receipts; reports of discrepancies

(a) No person shall deliver Schedule II, III, or IV controlled substances to a pharmacy or pharmacy receiving area, nor shall any person receive controlled substances on behalf of a pharmacy unless, at the time of delivery, a pharmacist or authorized receiving personnel signs a receipt showing the type and quantity of the controlled substance received. Any discrepancy between the receipt and the type or quantity of controlled substances actually received shall be reported to the delivering wholesaler or manufacturer by the next business day after delivery to the pharmacy.

15. Bus. & Prof. Code 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 or revoking the license or otherwise taking disciplinary action against the licensee on any such ground

16. Bus. & Prof. Code section 125.3 states, 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.

///

///

III.

CONTROLLED SUBSTANCES AT ISSUE

17. "Lortab", a brand name for Hydrocodone, is an opiate and a Schedule III controlled substance as designated by Health & Saf. Code section 11056, subdivision (e)(4).

18. "Lorcet", a brand name for Hydrocodone, is an opiate and a Schedule III controlled substance as designated by Health & Saf. Code section 11056, subdivision (e)(4).

19. "Norco", a brand name for Hydrocodone, is an opiate and a Schedule III controlled substance as designated by Health & Saf. Code section 11056, subdivision (e)(4)

20. "Vicodin", a brand name for Hydrocodone, is an opiate and a Schedule III controlled substance as designated by Health & Saf. Code section 11056, subdivision (e)(4).

BRAND NAME	GENERIC NAME	DANGEROUS DRUG PER B&PC 4022	CONTROLLED SUBSTANCE PER H&S CODE	INDICATIONS FOR USE
Lortab	Hydrocodone/APAP 7.5 or 10mg /500mg	Yes	Yes-C3 HSC 11056 (e) (4)	Pain
Lorcet 10mg	Hydrocodone/APAP 10mg/650mg	Yes	Yes-C3 HSC 11056 (e) (4)	Pain
Norco	Hydrocodone/APAP 10mg/325mg	Yes	Yes-C3 HSC 11056 (e) (4)	Pain
Vicodin Vicodin ES	Hydrocodone/APAP 5/500 or 7.5/750mg	Yes	Yes-C3 HSC 11056 (e) (4)	Pain

IV.

GENERAL BACKGROUND

21. On February 2, 2005, Lucinda Morgan, while working as a pharmacy technician at Rio Linda Drug, found a confirmation order for 6 bottles of 1,000 tablets of hydrocodone with acetaminophen in a printer Rio Linda Drug used when ordering drugs from Cardinal Health. Rio Linda Drug did not need the drug, and no employee indicated they had placed the order. On the following day, Cardinal Health billed Rio Linda Drug for the 6 bottles of 1,000 tablets of hydrocodone with acetaminophen, however, the controlled substances could not be located. Ms. Morgan, checking on the status, discovered the drug was ordered many times before, and that pharmacy technician Nikki McKeon generally signed the proof of deliveries.

22. (*Drug ordering, receipts, and delivery signatures by non-pharmacists*) From 2002, through February 10, 2005, Rio Linda Drug allowed pharmacy technicians and clerks to order, receive, verify, and sign for the delivery of, controlled substances from wholesalers (e.g., Cardinal Health and Valley Wholesale Drug Company) and manufacturers (e.g., Qualitest Pharmaceuticals, Inc.).

23. Rio Linda Drug had an arrangement with Cardinal Health and/or other wholesalers/manufacturers for payments to be deducted automatically from Respondent Mr. Larssen's and/or Rio Linda Drug's checking account, without Mr. Larssen ever seeing the invoices. This allowed for employees to order and receive controlled substances at Rio Linda Drug's back door, and destroy the invoices without detection.

24. (*Rio Linda Drug's controlled substance shortages*) From January 2, 2004, through February 10, 2005, Rio Linda Drug had a theft/loss of circa 463,000 tablets of hydrocodone. The estimated losses of these Schedule III controlled substances were as follows:

a. 378,558 doses of hydrocodone with acetaminophen 10/325 tablets (Norco);

b. 49,634 doses of hydrocodone with acetaminophen 7.5/750 tablets (Vicodin ES);

c. 24,726 doses of hydrocodone with acetaminophen 5/500 tablets (Vicodin);

d. 6,470 doses of hydrocodone with acetaminophen 10/500 tablets (Lortab);

e. 3,600 doses of hydrocodone with acetaminophen 7.5/500 tablets (Lortab); and

f. 1,000 doses of hydrocodone with acetaminophen 10/650 tablets (Lorcet 10 mg).

The above losses/theft represented 74% of Rio Linda Drug's total purchase the six strengths combined.

25. (*Controlled substance shortages under PIC Sargisson*) Respondent Mr. Sargisson was Rio Linda Drug's pharmacist-in-charge beginning February 24, 2004. From February 24, 2004, through February 10, 2005, while Mr. Sargisson was the pharmacist-in-charge, Rio Linda Drug had a theft/loss of approximately 449,000 tablets of hydrocodone. The estimated losses were of the following Schedule III controlled substances:

a. 372,000 doses of hydrocodone with acetaminophen 10/325 tablets (Norco);

b. 44,000 doses of hydrocodone with acetaminophen 7.5/750 tablets (Vicodin ES);

c. 23,000 doses of hydrocodone with acetaminophen 5/500 tablets (Vicodin);

d. 6,000 doses of hydrocodone with acetaminophen 10/500 tablets (Lortab);

e. 3,000 doses of hydrocodone with acetaminophen 7.5/500 tablets (Lortab); and

f. 1,000 doses of hydrocodone with acetaminophen 10/650 tablets (Lorcet 10 mg).

26. (*Rio Linda Drug's missing invoices*) From January 2, 2004, through February 10, 2005, Rio Linda Drug failed to account for 95 dangerous drug invoices (i.e., 76 invoices from Cardinal Health, 18 invoices from Valley Wholesale Drug Company, and 1 invoice from Qualitest Pharmaceuticals, Inc.)

27. (*Rio Linda Drug's missing invoices under PIC Sargisson*) From February 24, 2004, through February 10, 2005, while Mr. Sargisson was the pharmacist-in-charge, Rio Linda Drug failed to account for 85 dangerous drug invoices (i.e., 69 invoices from Cardinal Health, 15 invoices from Valley Wholesale Drug Company, and 1 invoice from Qualitest Pharmaceuticals, Inc.)

28. (*Deliveries signed by non-pharmacist*) From January 2, 2004, through February 10, 2005, 345 proof of deliveries of dangerous drug delivered to Rio Linda Drug were signed by non-pharmacists (i.e., 133 proof of delivery forms from Cardinal Health, 207 proof of delivery forms from Valley Wholesale, and 5 proof of delivery forms from Qualitest.)

29. (*Deliveries signed by non-pharmacist under PIC Sargisson*) From February 24, 2004, through February 10, 2005, 299 proof of deliveries of dangerous drugs delivered to Rio Linda Drug were signed by non-pharmacists (i.e., 123 proof of delivery forms from Cardinal Health, 171 proof of delivery forms from Valley Wholesale, and 5 proof of delivery forms from Qualitest.)

30. (*Deliveries not signed*) From January 2, 2004, through February 10, 2005, 7 proof of deliveries of dangerous drugs delivered to Rio Linda Drug were unsigned (i.e., 6

unsigned proof of delivery forms from Cardinal Health, 1 unsigned proof of delivery forms from Valley Wholesale.)

V.

VIOLATIONS

A. Violations Against Rio Linda Drug.

(B&P SECTION 4301(j)
(Violation of State/Federal Statutes)

31. Paragraphs 21 through 30 are incorporated herein by reference. Respondent Rio Linda Drug is subject to disciplinary action pursuant to Bus. & Prof. Code section 4301, subdivision (j), on the grounds of unprofessional conduct, for violating the following state statutes:

a. Bus. & Prof. Code, section 4081(a), which requires that the "records of manufacture, sale, acquisition, or disposition of dangerous drugs" be kept for three years. Rio Linda Drug failed to maintain records of acquisition *and* disposition of dangerous drugs as alleged in the previous paragraphs.

b. Bus. & Prof. Code, section 4105(a), which requires that "all records or other documentation of the acquisition or disposition of dangerous drugs" shall be retained at the pharmacy. Rio Linda Drug failed to maintain records of acquisition *and* disposition of dangerous drugs as alleged in the previous paragraphs.

c. Bus. & Prof. Code, section 4059.5(a), which requires that dangerous drugs may only be delivered to "and signed for and received by a pharmacist-in-charge or, in his or her absence, another pharmacist designated by the pharmacist-in-charge." From 2002, through February 10, 2005, Rio Linda Drug allowed non-pharmacists to sign for and/or receive deliveries of dangerous drugs as alleged in the previous paragraphs.

d. Health & Safety Code, section 11209(a), which prohibits delivery of Schedule II, III, or IV controlled substances from being delivered "unless, at the time of delivery, a pharmacist or authorized receiving personnel signs a receipt showing the type and quantity of the controlled substance received." Any discrepancies are "to be reported to the delivering wholesaler or manufacturer by the next business day after delivery to the pharmacy." From 2002, through February 10, 2005, controlled substances were delivered to Rio Linda Drug which were not received by, nor signed by, a pharmacist, as alleged in the previous paragraphs.

(B&P SECTION 4301(o)
(Violation of Laws and Regulations)

32. Paragraphs 21 through 31 are incorporated herein by reference. Respondent Rio Linda Drug is subject to disciplinary action pursuant to Bus. & Prof. Code section 4301, subdivision (o), on the grounds of unprofessional conduct, for violating directly and/or indirectly the laws as alleged in paragraph 31(a) through (d) above. Additional grounds for discipline under section 4301, subdivision (o), include violations of the following regulations:

a. California Code of Regulations, section 1714(b), which requires that "drugs are safely and properly prepared, maintained, secured and distributed." Rio Linda Drug failed to ensure that drugs were safely and properly maintained and secured, as a result Rio Linda Drug suffered significant thefts/losses of Schedule III controlled substances as alleged in the previous paragraphs.

b. California Code of Regulations, section 1718, which requires that the pharmacy account for current inventory for all dangerous drugs, and be available for inspection upon request for at least 3 years after the date of the inventory. Rio Linda Drug failed to account for current dangerous drug inventories as alleged in paragraphs 24 through 27.

B. Violations Against Stuart Sargisson.

(B&P SECTION 4301(j)
(Violation of State/Federal Statutes)

33. Paragraphs 21 through 30 are incorporated herein by reference. Respondent Stuart Sargisson, as the pharmacist-in-charge at Rio Linda Drug beginning February 24, 2004, was responsible under Bus. & Prof. Code section 4113, subdivision (b), to ensure Rio Linda Drug complied "with all state and federal laws and regulations pertaining to the practice of pharmacy." Respondent Stuart Sargisson is subject to disciplinary action pursuant to Bus. & Prof. Code section 4301, subdivision (j), on the grounds of unprofessional conduct, for violating the following state statutes:

a. Bus. & Prof. Code, section 4081(a), which requires that the "records of manufacture, sale, acquisition, or disposition of dangerous drugs" be kept for three years. (Under Bus. & Prof. Code, section 4081(b), a pharmacist-in-charge is also responsible for maintaining the records and inventory at the pharmacy.)

Mr. Sargisson violated Bus. & Prof. Code, section 4081 when, during the time he was the pharmacist-in-charge from February 24, 2004 through February 10, 2005, Rio Linda Drug did not keep

records of acquisition and disposition of dangerous drugs, and could not account for the shortage (acquisitions greater than dispositions) of these dangerous drugs.

b. Bus. & Prof. Code, section 4105(a), which requires that "all records or other documentation of the acquisition or disposition of dangerous drugs" shall be retained at the pharmacy. Mr. Sargisson violated Bus. & Prof. Code, section 4105(a) when Rio Linda Drug failed to maintain records of acquisition and/or disposition of dangerous drugs during the time he was the pharmacist-in-charge from February 24, 2004 through February 10, 2005, as alleged in paragraphs 25 and 27.

c. Bus. & Prof. Code, section 4059.5(a), which requires that dangerous drugs may only be delivered to "and signed for and received by a pharmacist-in-charge or, in his or her absence, another pharmacist designated by the pharmacist-in-charge. Mr. Sargisson violated Bus. & Prof. Code, section 4059.5(a) when during the time he was the pharmacist-in-charge from February 24, 2004 through February 10, 2005, Rio Linda Drug accepted unsigned deliveries of dangerous drugs and/or had non-pharmacists sign for delivery and receipt of dangerous drugs as alleged in paragraphs 25, 27, 29-30.

d. Health & Safety Code, section 11209(a), which prohibits delivery of Schedule II, III, or IV controlled substances from being delivered "unless, at the time of delivery, a pharmacist or authorized receiving personnel signs a receipt showing the type and quantity of the controlled substance received." Any discrepancies are "to be reported to the delivering wholesaler or manufacturer by the next business day after delivery to the pharmacy." When Mr. Sargisson was the pharmacist-in-charge, controlled substances were delivered to Rio Linda Drug which were not received by, nor signed by, a pharmacist, as alleged in paragraphs 29 and 30.

(B&P SECTION 4301(o)
(Violation of Laws and Regulations)

34. Paragraphs 21 through 33 are incorporated herein by reference.

Respondent Stuart Sargisson, as the pharmacist-in-charge at Rio Linda Drug beginning February 24, 2004, was responsible under Bus. & Prof. Code section 4113, subdivision (b), to ensure Rio Linda Drug complied "with all state and federal laws and regulations pertaining to the practice of pharmacy." Respondent Stuart Sargisson is subject to disciplinary action pursuant to Bus. & Prof. Code section 4301, subdivision (o), on the grounds of unprofessional conduct, for violating directly and/or indirectly the laws as alleged in paragraph 33(a) through (d). Additional grounds for discipline under section 4301, subdivision (o), include violations of the following regulations:

a. California Code of Regulations, section 1714(b), which requires that "drugs are safely and properly prepared, maintained, secured and distributed." When Mr. Sargisson was the pharmacist-in-charge, Rio Linda Drug failed to ensure that drugs were safely and properly maintained and secured, as a result it suffered

substantial thefts/losses of Schedule III controlled substances as alleged in paragraphs 22, 25, 27, 29-30.

b. California Code of Regulations, section 1718, which requires that the pharmacy account for current inventory for all dangerous drugs, and be available for inspection upon request for at least 3 years after the date of the inventory. When Mr. Sargisson was the pharmacist-in-charge, Rio Linda Pharmacy failed to account for current inventory from February 24, 2004 through February 10, 2005, as alleged in paragraphs 25 and 27.

C. Violations Against Ralph Larssen.

(B&P SECTION 4301(j)
(Violation of State/Federal Statutes)

35. Paragraphs 21 through 30 are incorporated herein by reference. Respondent Ralph Larssen, as the owner of Rio Linda Drug, is subject to disciplinary action pursuant to Bus. & Prof. Code section 4301, subdivision (j), on the grounds of unprofessional conduct, for violating the following state statutes:

a. Bus. & Prof. Code, section 4081(a), which requires that the "records of manufacture, sale, acquisition, or disposition of dangerous drugs" be kept for three years. (Under Bus. & Prof. Code, section 4081(b), the owner is also responsible for maintaining the records and inventory at the pharmacy.) Mr. Larssen violated Bus. & Prof. Code, section 4081 when Rio Linda Drug failed to maintain records of acquisition and/or disposition of dangerous drugs as alleged in paragraphs 21 through 30.

b. Bus. & Prof. Code, section 4105(a), which requires that "all records or other documentation of the acquisition or disposition of dangerous drugs" shall be retained at the pharmacy. Mr. Larssen violated Bus. & Prof. Code, section 4105(a) when Rio Linda Drug failed to maintain records of acquisition and/or disposition of dangerous drugs as alleged in paragraphs 24 through 27.

c. Bus. & Prof. Code, section 4059.5(a), which requires that dangerous drugs may only be delivered to "and signed for and received by a pharmacist-in-charge or, in his or her absence, another pharmacist designated by the pharmacist-in-charge." Mr. Larssen violated Bus. & Prof. Code, section 4059.5(a) when non-pharmacists signed for and received dangerous drugs at Rio Linda Drug as alleged in paragraphs 22, 26, and 27.

(B&P SECTION 4301(o)
(Violation of Laws and Regulations)

36. Paragraphs 21 through 35 are incorporated herein by reference. Respondent Ralph Larssen, as the owner of Rio Linda Drug, is subject to disciplinary action pursuant to pursuant to Bus. & Prof. Code section 4301, subdivision (o), on the grounds of

unprofessional conduct, for violating directly and/or indirectly the laws as alleged in paragraph 35(a) through (c). Additional grounds for discipline under section 4301, subdivision (o), include violations of the following regulations:

a. California Code of Regulations, section 1714(b), which requires that "drugs are safely and properly prepared, maintained, secured and distributed." Mr. Larssen violated this regulation when Rio Linda Drug failed to ensure that drugs were safely and properly maintained and secured, as a result it suffered significant thefts/losses of Schedule II controlled substances.

b. California Code of Regulations, section 1718, which requires that the pharmacy account for current inventory for all dangerous drugs, and be available for inspection upon request for at least 3 years after the date of the inventory. Mr. Larssen violated this regulation when Rio Linda Drug failed to account for Rio Linda Drug's current inventory from January 2, 2004 through February 10, 2005.

VI.

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 Pharmacist License Number RPH 28795, issued to Ralph W. Larssen;

2. Revoking or suspending Pharmacist License Number RPH 43083, issued to Stuart Sargisson;

3. Revoking or suspending Pharmacy Permit No. PHY 42886, issued to Rio Linda Drug;

4. Ordering Respondent Ralph W. Larssen 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;

5. Ordering Respondent Stuart Sargisson 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;

///

///

///

6. Ordering Respondent Rio Linda Drug 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;

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

DATED: 3/9/06

P. F. Harris

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

10219695