

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

In the Matter of the Accusation Against:

Andrew Mark Sternberg
6840 Sunset Ridge Court
West Hills, CA 91307

Pharmacist License No. RPH 32370

Respondent.

Case No. 3377

OAH No. 2010080067

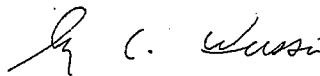
**ORDER DENYING
RECONSIDERATION**

ORDER DENYING RECONSIDERATION

The effective date of the decision in the above-entitled matter having heretofore been stayed until June 25, 2012 for the purpose of permitting respondent to file a petition for reconsideration of said decision, and no action having been taken by the Board before the stay dissolved and the Decision and Order took effect, pursuant to Government Code Section 11521, the Petition for Reconsideration is hereby deemed denied by operation of law.

The Decision and Order with an effective date of June 25, 2012, is the Board of Pharmacy's final decision in this matter.

BOARD OF PHARMACY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA



By

STANLEY C. WEISSER
Board President

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

In the Matter of the Accusation Against:

ANDREW MARK STERNBERG
6840 Sunset Ridge Court
West Hills, CA 91307

Respondent.

Case No. 3377

OAH No. 2010080067

**ORDER GRANTING 10-DAY
STAY OF EFFECTIVE DATE
OF DECISION AND ORDER**

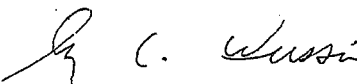
The Board of Pharmacy's Decision in the above-entitled matter was issued on May 16, 2012, to become effective on June 15, 2012. On June 13, 2012, the Board received Respondent's Second Petition for Reconsideration, also dated June 13, 2012.

In accordance with the provisions of Section 11521 of the Government Code, and for the sole purpose of considering the Petition for Reconsideration, the effective date of the Decision and Order in the above-entitled matter is hereby stayed until midnight on June 25, 2012.

IT IS SO ORDERED this 14th day of June, 2012.

BOARD OF PHARMACY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

By



STANLEY WEISSER
Board President

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

In the Matter of the Accusation Against:

ANDREW MARK STERNBERG

Pharmacist License No. RPH 32370

Respondent.

Case No. 3377

OAH No. 2010080067

DECISION AFTER RECONSIDERATION

Administrative Law Judge Ralph B. Dash heard this matter on March 7 and 8, 2011, at Los Angeles, California.

Susan Melton Wilson, Deputy Attorney General, represented Complainant.

Herbert L. Weinberg and Noah E. Jussim, Attorneys at Law, represented Andrew Mark Sternberg, (Respondent).

The record was left open until May 13, 2011, for the submission of closing and reply briefs. Complainant's briefs were timely submitted and marked as Exhibits 17 and 18 for identification. Respondent's closing and reply briefs were timely submitted and marked as Exhibits K and L for identification. The matter was deemed submitted on May 16, 2011, the date the last of the briefs was actually delivered to the Administrative Law Judge.

The proposed decision of the Administrative Law Judge was submitted to the Board of Pharmacy on June 14, 2011. After due consideration thereof, the Board of Pharmacy declined to adopt said proposed decision and thereafter on July 27, 2011 issued an Order of Non-adoption. Subsequently, on September 21, 2011, the Board issued an Order Fixing Date for Submission of Oral Arguments. After receiving a request dated October 10th from Respondent's counsel to continue the date set for arguments, the Board cancelled its scheduled oral arguments set for its meeting on October 18, 2011 and notified all parties of the intent to provide new opportunity for arguments and dates. On October 28, 2011, the Board issued a new order setting a

new date (November 28, 2011) for receiving arguments from the parties, but instead requested that written arguments be provided in lieu of oral arguments. Pursuant to Government Code section 11517, the Board extended time for rendering a decision in this case for another 30 days on November 29, 2011 to allow the Board to consider the transcript of the hearing, the written arguments of the parties, and to give the Board the opportunity to meet and deliberate on the decision. After consideration of written arguments and review and consideration of the entire record, including the transcript of the hearing, the Board of Pharmacy issued its "Decision After NonAdoption" ("Decision") and Order on December 23, 2011 to become effective on January 23, 2012.

A Petition for Reconsideration ("Petition") from Respondent was received by the Board on January 19, 2012. On January 20, 2012, in accordance with the provisions of Section 11521 of the Government Code, and for the sole purpose of considering the Petition for Reconsideration, the effective date of the Board's Decision was stayed until February 2, 2012. On February 1, 2012, the Board granted the petition for reconsideration, but solely as to the issue of whether the minimum hours of employment in the "Tolling of Probation" condition portion of the Decision should be modified.

Having considered all of the pertinent parts of the record, and the Petition and arguments submitted by Respondent, the Board of Pharmacy now makes and enters its Decision After Reconsideration as follows:

FINDINGS OF FACT

1. Virginia Herold made the Accusation in her official capacity as the Executive Officer of the Board of Pharmacy (Board).

2. The Board issued Registered Pharmacist License Number 32370 to Respondent on August 18, 1978. At all times pertinent hereto, said license has been and is now in full force and effect. Since July 21, 2001, Respondent has been and is now the pharmacist-in-charge (PIC) of Target Store Number T-228 Pharmacy, located in West Hills, California (pharmacy), permit number PHY 44113. By its Decision and Order effective March 28, 2011, the Board revoked the pharmacy permit, stayed the revocation, and placed the pharmacy on probation for a period of five years.¹

¹ The pharmacy had been a party to this proceeding, but settled the Accusation against it pursuant to stipulation. Under the terms of the disciplinary order, the pharmacy, in addition to being placed on probation under standard terms and conditions, was required to pay the Board an administrative penalty of \$100,000, provide a free health-care related community service program for at least 100 hours, and pay the Board's cost of investigation and prosecution in the sum of \$4,775.

3. This matter involves the theft of at least 216,630 tablets of Norco² 10mg from the pharmacy by Imelda Hurtado (Hurtado), a pharmacy technician, over an 18-month period.³ These tablets had a wholesale value of approximately \$1 per tablet and a retail value of between \$1.25 and \$1.50 per tablet. The street value ranged from \$1 to \$5 per tablet. Because Respondent is the PIC, it is his statutory responsibility to maintain the security of all pharmacy drugs. As more fully discussed below, he was the person who discovered the theft and reported it to Target management. While the Board believes that Target should have known that the theft was ongoing, as discussed below, Respondent also should have suspected some wrongdoing with Hurtado's illicit drug orders and thefts.

4. Hurtado accomplished the theft in the following manner: She would place an order with McKesson for up to 3000 tablets (500 tablets per bottle) to be delivered to the pharmacy on a day she was scheduled to work. She did this approximately 85 times, as often as three times per week, during the 18-month period (see Exhibit 9). The ordering system in place at the pharmacy allowed the orders to be placed by telephone by anyone who had access to the pharmacy code number. Respondent allowed Ms. Hurtado to have unrestricted access to the pharmacy's account code numbers. The orders did not have to be placed through a pharmacy telephone; any telephone would do. Hurtado apparently made the orders from her home. There were no audits of these orders by Respondent. When asked whether Respondent felt it was one of his duties to check invoices against the orders that were placed, Respondent answered "No. It was not one of my duties. It did not have to be." (RT 133:21-25.)

5. At the hearing, Respondent testified regarding the typical delivery process and procedure for receipt of dangerous drugs in the pharmacy. The wholesaler ("supplier") typically delivered the drug orders to the pharmacy between 12:30 p.m. and 1:00 p.m. (RT 85:3-8.) Section 4059.5 of the Pharmacy Law requires that a pharmacist sign for and receive all dangerous drugs or devices delivered to a pharmacy. Respondent testified that his policy was that "everybody that works in the pharmacy knows that the law prevents anybody from signing for deliveries, except a pharmacist." (RT 83:5-11.) Respondent did not explain how he would enforce that policy, nor was there any evidence presented as to how that would be implemented. With respect to receipt of drug deliveries, when Respondent signed for the delivery of dangerous drugs he would sign a "delivery log that is supplied by the supplier"; however, that log only disclosed how many containers were being delivered, not what was in the actual containers (RT 83:21-25; 84:1-5). He would then count the number of bottles, and give the tote to a pharmacy technician who he assigned to take care of

² Norco is the brand name for hydrocodone bitartrate/acetaminophen 10 mg/325 mg, a Schedule III opioid analgesic and has the highest single tablet dose of hydrocodone bitartrate with the lowest level of acetaminophen of all 10 mg hydrocodone combination products. It is indicated for the relief of moderate to moderately severe pain.

³ The theft took place over a two-year period, September 1, 2006 through August 31, 2008; however Hurtado, who was solely responsible for all stolen drugs, was not employed by the pharmacy for a six-month period during this time-frame.

unpacking the drugs, placing appropriate shelf labels on the bottles, and checking the invoice/packing slip inside the box to assure that the supplier delivered what was ordered.⁴ After Respondent signed for the drugs, he "never" looked at the invoices being taken out of the delivery container and did not check the invoices against the drugs he received (RT 133:6-11; 3-7). Respondent admitted that as the Pharmacist-in-Charge he had the "discretion" to examine the invoices, but chose not to do so. (RT 135:18-23.) The invoices he received were given to a pharmacy technician, who then placed them in a box under a counter. After the box was filled, it was then transferred to a "little storage area" in the pharmacy. (RT 156:10-14.) The box was not checked regularly by any pharmacists, but "occasionally" respondent or another pharmacist would look at those invoices, but only "for a specific drug that we had to order for somebody to see if it came in or if it didn't come in." (RT 156:15-21.) As a result, the missing inventory and invoices were only discovered by chance, and not for at least 18 months, as explained further below.

6. Hurtado's theft was first uncovered when Respondent went into the store room one day and while looking through a box of syringes found a bottle of 500 Norco tablets. He was surprised and suspicious. He decided to leave the bottle where it was then check again when he came back from lunch. When he came back from lunch, he found the bottle missing. Respondent talked to the other two pharmacists about what he had found and neither of them had any knowledge of it. Accordingly, Respondent notified his supervisor of what he had discovered. The supervisor told Respondent to maintain business as usual while the matter was investigated.

7. Target began its own investigation which included in-store surveillance. However, it was not until they installed hidden cameras in the ceiling of the pharmacy that they were able to get direct evidence of Hurtado's theft. When Hurtado was present during a McKesson delivery of one of her orders, she would take, and was allowed to take, the tote from the pharmacist to a work station at the side of the pharmacy furthest away from the pharmacist's station.⁵ She would take the six bottles, hide them in the store room and destroy the packing invoice. These acts insured that neither a current accounting of the pharmacy's inventory would be made nor the losses discovered. When the pharmacist on duty took a lunch break, she would go to the storage room, put three bottles in her purse and take them out to her car. There appeared to be no requirement that the pharmacy be closed while the pharmacist went to lunch or other security measures taken to ensure adequate supervision. Later in the day, when the pharmacist was on a break, she would take the other three bottles to her car in the same manner. Hurtado was arrested in the Target parking lot while in possession of 3000 stolen Norco tablets. A subsequent search of her home turned up

⁴ On two occasions during the 18-month period, Hurtado was not working when a 3000-tablet Norco delivery was made. On both occasions, the pharmacy (presumably another pharmacy technician) simply returned the order to McKesson.

⁵ There were three pharmacists working at the pharmacy, but only one at a time. They typically used the same work station, although much of their time was spent at the front counter, with the work-stations behind them, for customer counseling.

only one additional tablet, the remainder of the stolen tablets apparently having been taken by her boyfriend for street-sale.⁶

8. The amount of Norco tablets involved in this matter is staggering, particularly in light of the theft involving only one pharmacy which ordinarily did not sell Norco tablets at all. In fact, during the six-month period Hurtado was not employed at the pharmacy, it sold no Norco tablets at all. As the Pharmacist-in-charge, Respondent is the supervisor and manager responsible for ensuring the pharmacy's compliance with the Pharmacy Law. However, Hurtado's actions were not audited by Respondent and his oversight was so lacking that Hurtado was able to secret over 216,000 tablets of a dangerous drug away from the pharmacy over an 18-month period without Respondent's knowledge. If Respondent had properly supervised staff and conducted random checks of the containers that Respondent was signing for, the thefts may have been discovered much sooner. Respondent's failure to do random checks of the invoices or orders coming in allowed Hurtado the opportunity to destroy any paper evidence that might have alerted Respondent to her thefts. Further, there was no evidence that loss prevention practices were in place, such as secured equipment for the storage of such drugs. The delivery of 3000 tablets to the pharmacy at one time and the disappearance of such drugs from a "secured" location would have been discovered by Respondent if proper management and supervision, as described above, had occurred.

9. Similarly, the Target parent company, based in Minnesota, should have realized something was wrong. McKesson sent its invoices to the parent company for payment. The first time the parent company saw the first invoice for 3000 Norco tablets, suspicion should have been aroused.⁷ It had to pay for this order. In fact, it paid for 85 similar orders. Yet not once did it question the validity of any invoice. Nor did it question why its expenditure of over \$200,000 for delivery of a single drug to a single pharmacy over an 18-month period was never recouped by sales from that single pharmacy.

10. A total of three pharmacists worked at the pharmacy during the relevant time period, only one being on duty at a time. Records show that Respondent signed the McKesson manifest for approximately 25% of the Hurtado orders, the other two pharmacists signing for the remainder of the deliveries.⁸ While it is true that Hurtado acted with intent and purpose to deceive all three pharmacists, it does not change the

⁶ Not long after her arrest, Hurtado's pharmacy technician license was cancelled.

⁷ According to Exhibit 11, McKesson's bill to Target for each drug delivery was dated the same as the delivery of the drug to the pharmacy.

⁸ The records show that Hurtado herself signed for three deliveries, even though she was not permitted by law to do so. The evidence established Respondent was not working on the days two of the deliveries were made, meaning other pharmacists also allowed Hurtado to sign. In fact, they "allowed" Hurtado to spirit away bottles of Norco on numerous occasions, just as Respondent had done. Respondent worked on the day of the third Hurtado-signed delivery.

fact that she was assigned the task of ordering drugs and unpacking them with little or no accountability to or review by Respondent. Respondent's view that she appeared "trustworthy" and that informing staff that only a pharmacist could sign for drug deliveries was sufficient to fulfill his duty as pharmacist-in-charge was obviously not sufficient in this case. Hurtado was more easily able to steal from the pharmacy because no audits or direct review of Hurtado's work occurred. Also, Respondent failed to articulate any loss prevention procedures in place at the pharmacy. While Respondent's pharmacist expert testified that it is not the custom and practice, nor the standard of care in the community, for a pharmacist to watch the technician open a drug delivery tote and label the bottles and that the pharmacist is ordinarily occupied with either checking the prescriptions filled by other personnel, or consulting with clients about their medications, that opinion is neither an accurate nor complete assessment of what is required under the law. The Board's Inspector White, who is also a pharmacist and has specialized knowledge and experience in this area, correctly testified regarding a pharmacist-in-charge's duties under the Pharmacy Law. (15:10-23; 16:1-10.) These responsibilities include overseeing the daily operations of the pharmacy and being the "person responsible for their compliance with pharmacy law." (15:10-23.) Based upon these responsibilities, it is expected that the pharmacist-in-charge would perform some random audits of drug deliveries that he signed for, conduct checks of his staff's work, and actively participate in checking inventory as well as the drugs delivered to the pharmacy. These acts did not occur in this case.

11. Respondent has developed a corrective action plan to help prevent similar thefts in the future (Exhibit "I"). The plan includes admonishing pharmacy employees regarding policies for ordering controlled substances, requiring that a written record of all Schedule II and III drug orders be maintained, and making sure all Schedule II drugs and hydrocodone containing drugs are kept in a locked cabinet or drawer. He also suggested that all Schedule II and III drugs be opened and checked in by a pharmacist or under the direct line of sight of the pharmacists and that employees not be permitted to place large purses or backpacks in the pharmacy storeroom. These along with systemic changes, including limiting telephone access to drug orders or creating a system that would safeguard the pharmacy's drug account codes, would assist in the prevention of such thefts.

12. Respondent has been a licensed pharmacist in California for almost 33 years. He has no prior disciplinary history nor a record of there having been complaints to the Board filed against him. In addition to his own testimony, he offered several reference letters attesting to his honesty, integrity and dedication. The following, taken from a letter written to the Board by Michael Sternberg, Pharm. D, is representative:

For the last several years [Respondent] has been working at my local Target store as the Pharmacist-In-Charge. I have visited [him] at work frequently during that period while shopping in the store and there was always a crowd of patients willing to wait and discuss with him their medical conditions and ask him for his

advice. It was, and still is, apparent to me that [Respondent] is a big asset to Target and a resource in the community to get honest, accurate pharmaceutical information.

In conclusion, I am well aware of the Accusation and it in no way alters my high regard for the man. [He] has the personal integrity and honesty that all pharmacists should aspire to.

13. The Board incurred costs, including fees of the Attorney General, in the sum of \$18,477 in connection with the investigation and prosecution of this matter.

CONCLUSIONS OF LAW

1. Administrative proceedings to discipline a professional license are intended to protect the public, not punish the licensee. (*Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763.) It is well established that the purpose of discipline is not to punish, but to protect the public by eliminating practitioners who are dishonest, immoral, disreputable or incompetent. (*Fahmy v. Medical Board of California* (1995) 38 Cal.App.4th 810, 817.)

2. The standard of proof which must be met to establish the charging allegations herein is "clear and convincing evidence." (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853.) This means the burden rests with Complainant to offer proof that is clear, explicit and unequivocal--so clear as to leave no substantial doubt and sufficiently strong to command the unhesitating assent of every reasonable mind. (*Katie V. v. Superior Court* (2005) 130 Cal.App.4th 586, 594.)

Witkin explains the difference of this standard from the normal preponderance of the evidence and gives the following rationale:

In a few situations, for reasons of policy of the substantive law, the ordinary 'preponderance of the evidence' is not considered sufficient to establish the fact in issue, and instead the party must prove it by 'clear and convincing evidence.' In such cases, of course, the jury or trial judge should not be satisfied with a slight preponderance in favor of the plaintiff. [citations.] [¶]

The phrase has been defined as 'clear, explicit and unequivocal,' 'so clear as to leave no substantial doubt,' and 'sufficiently strong to command the unhesitating assent of every reasonable mind.'

[Citation.] Otherwise stated, a preponderance calls for probability, while clear and convincing proof demands a *high probability*.

[Citations.]

(1 Witkin, Cal. Evidence (4th ed., 2000) Burden of Proof and Presumptions, §38, p. 187.)

Legal Responsibility

3. Business and Professions Code section 4113 states in pertinent part:

[¶] . . . [¶]

(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.

4. Pharmacy Law makes any "Pharmacist-in-charge" (PIC) "the supervisor or manager responsible for ensuring the pharmacy's compliance with all state and federal laws and regulations pertaining to the practice of pharmacy." (Bus.&Prof.Code, § 4036.5.)

5. Business and Professions Code section 4081 states, in pertinent part:

[¶] . . . [¶]

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

(c) The pharmacist-in-charge or designated representative-in-charge shall not be criminally responsible for acts of the owner, officer, partner, or employee that violate this section and of which the pharmacist-in-charge or designated representative-in-charge had no knowledge, or in which he or she did not knowingly participate.

6. As a result of the foregoing statutory mandates, a PIC can be held responsible for the pharmacy's violations by the Board, regardless of whether he or she had actual knowledge of the violations or authorized the violations.

7. Based on the facts set forth in the above Findings, the Board makes the following determinations with respect to the six separate causes for discipline alleged in the Accusation. Taken seriatim:

a. The first charge is that Respondent failed to maintain complete and accurate records in violation of Business and Professions Code sections 4300, 4301, subdivisions (j) and (o), in conjunction with Sections 4005, 4081 and 4105, and California Code of Regulations, title 16, section 1718. This allegation is established. As pharmacist-in-charge, Respondent was responsible for ensuring that the pharmacy kept a complete and accurate record for all dangerous drugs received, sold or otherwise disposed of by the pharmacy. Respondent's failure to adequately supervise Hurtado contributed to the pharmacy's resulting failure to maintain accurate records of

the Norco tablets Hurtado ordered, even if those drugs were stolen out of his presence and without his knowledge or approval.

b. The second charge is that Respondent failed to maintain the above-referenced records as well as a current inventory, for three years in violation of the above code sections, but in particular Business and Professions Code section 4081, subdivision (a). As with the first charge, this charge is also true. Respondent's failure to adequately supervise Hurtado contributed to the pharmacy's resulting failure to maintain records and a current inventory as required of the Norco tablets Hurtado ordered, even if those drugs were stolen out of his presence and without his knowledge or approval.

c. The third charge is that Respondent allowed a non-pharmacist, Hurtado, to order and sign for the Norco tablets in violation of Business and Professions Code section 4095.5, subdivision (a). This code section does not prohibit Hurtado from ordering drugs. It allows a pharmacy (person unspecified) to order drugs, but limits the signing of the receipt for drugs to "a pharmacist." As noted above, Hurtado signed for Norco tablets on three occasions. On two of those occasions, Respondent was not at the pharmacy. On the third occasion, Respondent was working at the time Hurtado signed for the drugs, although it was not established if he was physically present in the pharmacy at the time the drugs were received. Regardless, Respondent was aware of the time frames that drugs were delivered. The law does not permit Respondent to not be "on duty" or to abdicate his supervisory responsibilities when drugs are delivered to the pharmacy. Consequently, it was established that Respondent did violate this code section.

d. The fourth charge is that Respondent violated the provisions of Business and Professions Code section 4115, subdivision (h), which makes the "pharmacist on duty" "directly responsible for the conduct of a pharmacy technician supervised by that pharmacist." Hurtado was supervised by one of three pharmacists, including Respondent. All three pharmacists were responsible for her conduct while they were on duty. However, because he did supervise Hurtado, at least part of the time, her violations of the pharmacy law become his responsibility. This charge was established.

e. The fifth charge alleges that Respondent failed to maintain the pharmacy facility, space, fixtures, and equipment so that drugs are "safely and properly prepared, maintained and secured," in violation of California Code of Regulations, title 16, section 1714, subdivision (b). As pharmacist-in-charge, Respondent was responsible for ensuring that the pharmacy maintained and secured its drugs from diversion and theft. Based on the facts of this case, it is clear that Respondent failed to secure the drugs that were being delivered to the pharmacy. There was no evidence that the pharmacy's facility, space, fixtures, or equipment were maintained in any way to prevent the thefts in this case, such as the use of locked cabinets or drawers for Schedule II or III drugs. This charge was proven as to Respondent.

f. The sixth charge is that Respondent failed "to secure the prescription department and provide effective controls" to prevent Hurtado's theft of Norco, in violation of California Code of Regulations, title 16, Section 1714 subdivision (d). This regulation applies not just to Respondent as PIC but to all "pharmacist[s] while on duty." Clearly, Hurtado stole Norco at times when Respondent was on duty, just as she did when the other two pharmacists were on duty. There were no effective controls in place to prevent her theft. Respondent could easily have provided such controls, as noted in Findings 4, 5, 7, 8, and 10. Although Respondent alleged that it is not the custom and practice of pharmacists in the area to take such steps, the custom and practice does not negate Respondent's statutory duty to prevent the theft. Respondent, by his actions and inactions, effectively gave the pharmacy's "key" to security away to Hurtado. This charge was established.

Factors Considered for the Appropriate Level of Discipline

8. The board has issued a Manual of Disciplinary Guidelines and Model Disciplinary Orders incorporated by reference at Title 16, California Code of Regulations section 1760. The Guidelines reflect the board's primary responsibility as public protection, but they also reflect an appropriate concern for the rehabilitation of licensees. The Guidelines set forth a number of factors to be considered in determining whether a minimum, maximum, or intermediate penalty is to be imposed in a given case. The Guidelines also set forth examples of mitigating evidence that may be presented by the respondent. The Guidelines set forth a number of standard conditions of probation, which are generally to be applied in every case, and a number of optional conditions, to be applied as appropriate in a particular case. According to the Board's Disciplinary Guidelines, violations of the Pharmacy Law involving security of dangerous drugs (Sections 4081, 4059.5 of the Business and Professions Code), the minimum recommended penalty for such "Category III" violations is: Revocation stayed, 90 days actual suspension and 3-5 years of probation.

9. In order to determine the appropriate measure of discipline, it is necessary to weigh and balance Respondents' violations of law as well as factors in justification, aggravation, or mitigation. Protection of the public is the Board's highest priority. The Board fulfills its public mandate by, among other things, imposing discipline. It is very important that the Board's licensees are aware of and abide by the standards of pharmacy practice and applicable pharmacy laws. In particular, it is very important that a Pharmacist-in-charge be aware of his responsibilities and the fact that he is legally responsible for a pharmacy's compliance with the law. The six causes for discipline proven demonstrate that Respondent Sternberg fails to understand his responsibilities or take responsibility for the lack of supervision at the pharmacy. Shockingly large quantities of Norco were diverted from Respondent's pharmacy under his watch over a long period of time. His admissions that he never checked invoices and that he did not consider it his "duty" was of particular concern to the Board. As the record establishes, the wide-spread and serious nature of these violations indicates that Respondent had no systems in place to prevent drug losses.

10. Nevertheless, the Board considered the following mitigating factors in setting the penalty in this case. Respondent has been licensed for almost 33 years with no disciplinary record. It was Respondent who first discovered the theft and immediately brought it to Target's attention. The theft was the result of a deliberate and calculated act by his subordinate employee to earn Respondent's trust and then violate it by stealing drugs from their mutual employer. Target's actions also contributed to the failure to discover the losses as described in Factual Finding 9. Finally, Respondent has developed corrective action plans to help prevent such losses in the future.

11. Business and Professions Code section 125.3 permits the Board to recover from Respondent its reasonable costs of investigation and prosecution of this disciplinary matter. As set forth in Finding 14, those costs total \$18,477. Of that amount, Target has already paid \$4,775. In *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, the Supreme Court rejected a constitutional challenge to a cost recovery provision similar to Business and Professions Code section 125.3. In so doing, however, the Court directed the administrative law judge and the agency to evaluate several factors to ensure that the cost recovery provision did not deter individuals from exercising their right to a hearing. Thus, the Board must not assess the full costs where it would unfairly penalize a Respondent who has committed some misconduct, but who has used the hearing process to obtain the dismissal of some charges or a reduction in the severity of the penalty. The Board must consider a Respondent's subjective good faith belief in the merits of his or her position and whether that Respondent has raised a colorable challenge. And the Board must consider a Respondent's ability to pay. (*Zuckerman*, supra at page 45.) The Administrative Law Judge found that in light of these factors, it would be unduly punitive to require Respondent to pay the remaining balance of the Board's costs. Based on Target's culpability, it was required to pay approximately 25 percent of the Board's costs, and it was placed on five years' probation. The Administrative Law Judge found that Respondent should be required to pay no more than \$1,847, which is 10 percent of the Board's costs. Pursuant to Business and Professions Code section 125.3(d), this finding is not reviewable by the Board to increase the cost award.

12. By reason of Factual Findings 1 through 13 and Legal Conclusions 1 through 12, cause exists to revoke respondent's pharmacist license, and to stay that revocation on appropriate conditions of probation for a period of three years. Public protection would be served by this period of probation to ensure that Respondent pays close attention to the pharmacy's operations and practices in the future. Additional terms will also include the requirements that Respondent maintain a separate file of all records pertaining to the acquisition or disposition of all controlled substances and submit quarterly reports to the Board detailing the total acquisition and disposition of controlled substances. It is believed that the inclusion of these additional conditions of probation will assist in addressing issues that led to the present proceeding and provide for the protection of the public while permitting respondent to continue his practice as a pharmacist-in-charge.

ORDER

WHEREFORE, THE FOLLOWING ORDER is hereby made:

License No. RPH 32370, issued to respondent ANDREW MARK STERNBERG is REVOKED; however, the revocation is STAYED and respondent is placed on PROBATION for three years upon the following terms and conditions:

1. Obey All Laws

Respondent shall obey all state and federal laws and regulations. Respondent shall report any of the following occurrences to the board, in writing, within seventy-two (72) hours of such occurrence:

- 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;
- a plea of guilty or nolo contendere in any state or federal criminal proceeding to any criminal complaint, information or indictment;
- a conviction of any crime; and,
- discipline, citation, or other administrative action filed by any state or federal agency which involves respondent's pharmacist license or which is related to the practice of pharmacy or the manufacturing, obtaining, handling, distributing, billing, or charging for any drug, device or controlled substance.

Failure to timely report such occurrence shall be considered a violation of probation.

2. Report to the Board

Respondent shall report to the board quarterly, on a schedule as directed by the board or its designee. The report shall be made either in person or in writing, as directed. Among other requirements, respondent shall state in each report under penalty of perjury whether there has been compliance with all the terms and conditions of probation. Failure to submit timely reports in a form as directed shall be considered a violation of probation. Any period(s) of delinquency in submission of reports as directed may be added to the total period of probation. Moreover, if the final probation report is not made as directed, probation shall be automatically extended until such time as the final report is made and accepted by the board.

3. Interview with the Board

Upon receipt of reasonable prior notice, respondent shall appear in person for interviews with the board or its designee, at such intervals and locations as are determined by the board or its designee. Failure to appear for any scheduled interview

without prior notification to board staff, or failure to appear for two (2) or more scheduled interviews with the board or its designee during the period of probation, shall be considered a violation of probation.

4. Cooperate with Board Staff

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

5. Continuing Education

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

6. Notice to Employers

During the period of probation, respondent shall notify all present and prospective employers of the decision in case number 3377 and the terms, conditions and restrictions imposed on respondent by the decision, as follows:

Within thirty (30) days of the effective date of this decision, and within fifteen (15) days of respondent undertaking any new employment, respondent shall cause his direct supervisor, pharmacist-in-charge (including each new pharmacist-in-charge employed during respondent's tenure of employment) and owner to report to the board in writing acknowledging that the listed individual(s) has/have read the decision in case number 3377, and terms and conditions imposed thereby. It shall be respondent's responsibility to ensure that his employer(s) and/or supervisor(s) submit timely acknowledgment(s) to the board.

If respondent works for or is employed by or through a pharmacy employment service, respondent must notify his direct supervisor, pharmacist-in-charge, and owner at every entity licensed by the board of the terms and conditions of the decision in case number 3377 in advance of the respondent commencing work at each licensed entity. A record of this notification must be provided to the board upon request.

Furthermore, within thirty (30) days of the effective date of this decision, and within fifteen (15) days of respondent undertaking any new employment by or through a pharmacy employment service, respondent shall cause his direct supervisor with the pharmacy employment service to report to the board in writing acknowledging that he or she has read the decision in case number Case No. 3377 and the terms and conditions imposed thereby. It shall be respondent's responsibility to ensure that his employer(s) and/or supervisor(s) submit timely acknowledgment(s) to the board.

Failure to timely notify present or prospective employer(s) or to cause that/those employer(s) to submit timely acknowledgments to the board shall be considered a violation of probation.

"Employment" within the meaning of this provision shall include any full-time, part-time, temporary, relief or pharmacy management service as a pharmacist or any position for which a pharmacist license is a requirement or criterion for employment, whether the respondent is an employee, independent contractor or volunteer.

7. Reimbursement of Board Costs

As a condition precedent to successful completion of probation, respondent shall pay to the board its costs of investigation and prosecution in the amount of \$1,847. Respondent shall make said payment at such time and in such manner as the Board's designee, in his or her discretion, may direct.

There shall be no deviation from the schedule set by the board's designee absent prior written approval by the board or its designee. Failure to pay costs by the deadline(s) as directed shall be considered a violation of probation.

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

8. Probation Monitoring Costs

Respondent shall pay any costs associated with probation monitoring as determined by the board each and every year of probation. Such costs shall be payable to the board on a schedule as directed by the board or its designee. Failure to pay such costs by the deadline(s) as directed shall be considered a violation of probation.

9. 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. Failure to maintain an active, current license shall be considered a violation of probation.

If respondent's license expires or is cancelled by operation of law or otherwise at any time during the period of probation, including any extensions thereof due to tolling or otherwise, upon renewal or reapplication respondent's license shall be subject to all terms and conditions of this probation not previously satisfied.

10. License Surrender While on Probation/Suspension

Following the effective date of this decision, should respondent cease practice due to retirement or health, or be otherwise unable to satisfy the terms and conditions of

probation, respondent may tender his license to the board for surrender. The board or its designee 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. This surrender constitutes a record of discipline and shall become a part of the respondent's license history with the board.

Upon acceptance of the surrender, respondent shall relinquish his pocket and wall license to the board within ten (10) days of notification by the board that the surrender is accepted. Respondent may not reapply for any license from the board for three (3) 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, including any outstanding costs.

11. Notification of a Change in Name, Residence Address, Mailing Address or Employment

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

Failure to timely notify the board of any change in employer(s), name(s), address(es), or phone number(s) shall be considered a violation of probation.

12. Tolling of Probation

Except during periods of suspension, respondent shall, at all times while on probation, be employed as a pharmacist in California for a minimum of forty (40) hours per month. Any month during which this minimum is not met shall toll the period of probation, i.e., the period of probation shall be extended by one month for each month during which this minimum is not met. During any such period of tolling of probation, respondent must nonetheless comply with all terms and conditions of probation. Should respondent, regardless of residency, for any reason (including vacation) cease practicing as a pharmacist for a minimum of forty (40) hours per month in California, respondent must notify the board in writing within ten (10) days of the cessation of practice, and must further notify the board in writing within ten (10) days of the resumption of practice. Any failure to provide such notification(s) shall be considered a violation of probation.

It is a violation of probation for respondent's probation to remain tolled pursuant to the provisions of this condition for a total period, counting consecutive and non-consecutive months, exceeding thirty-six (36) months.

"Cessation of practice" means any calendar month during which respondent is not practicing as a pharmacist for at least forty (40) hours per month, as defined by Business and Professions Code section 4000 et seq . "Resumption of practice" means any calendar month during which respondent is practicing for at least 40 hours per month as a pharmacist as defined by Business and Professions Code section 4000 et seq.

13. Violation of Probation

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 that was stayed. 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 that was stayed. Notice and opportunity to be heard are not required for those provisions stating that a violation thereof may lead to automatic termination of the stay and/or revocation of the license. 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 automatically extended until the petition to revoke probation or accusation is heard and decided.

14. Separate File of Records

Respondent shall maintain and make available for inspection a separate file of all records pertaining to the acquisition or disposition of all controlled substances. Failure to maintain such file or make it available for inspection shall be considered a violation of probation.

15. Report of Controlled Substances

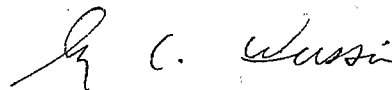
Respondent shall submit quarterly reports to the board detailing the total acquisition and disposition of such controlled substances as the board may direct. Respondent shall specify the manner of disposition (e.g., by prescription, due to burglary, etc.) or acquisition (e.g., from a manufacturer, from another retailer, etc.) of such controlled substances. Respondent shall report on a quarterly basis or as directed by the board. The report shall be delivered or mailed to the board no later than ten (10) days following the end of the reporting period. Failure to timely prepare or submit such reports shall be considered a violation of probation.

16. Completion of Probation

Upon written notice by the board or its designee indicating successful completion of probation, respondent's license will be fully restored.

This Decision shall become effective on June 15, 2012.

IT IS SO ORDERED this 16th day of May 2012.



STAN C. WEISSER
Board President

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

In the Matter of the Accusation Against:

ANDREW MARK STERNBERG
6840 Sunset Ridge Court
West Hills, CA 91307

Respondent.

Case No. 3377

OAH No. 2010080067

**ORDER GRANTING
PETITION FOR
RECONSIDERATION AND
STAY OF EXECUTION OF
THE EFFECTIVE DATE OF
DECISION AND ORDER**

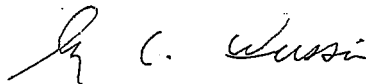
Respondent having requested reconsideration of the decision in the above-entitled matter, and good cause appearing, IT IS HEREBY ORDERED:

- (1) That reconsideration be, and is, hereby granted, said reconsideration to be solely on the issue of whether the minimum hours of employment in the "Tolling of Probation" condition should be modified;
- (2) The board hereby sets the date for submission of written arguments to be no later than March 5, 2012;
- (3) The Decision of the Board in this matter issued on December 23, 2011, and stayed for purposes of reconsideration until February 2, 2012, is hereby further stayed until the Board renders its decision on reconsideration.

The board itself will decide the case upon the record, including the exhibits and written argument of the parties, without taking additional evidence.

IT IS SO ORDERED this 1st day of February 2012.

BOARD OF PHARMACY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA



By

STANLEY WEISSER
Board President

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

In the Matter of the Accusation Against:

ANDREW MARK STERNBERG

6840 Sunset Ridge Court
West Hills, CA 91307

Pharmacist License No. RPH 32370,

Respondent.

Case No. 3377

OAH No. 2010080067

STAY OF EFFECTIVE DATE

Respondent filed a Petition for Reconsideration in the above-entitled matter on January 19, 2012. In accordance with the provisions of Section 11521 of the Government Code, and for the sole purpose of considering the Petition for Reconsideration, the effective date of the Decision is hereby stayed until February 2, 2012.

IT IS SO ORDERED this 20th day of January, 2012.

BOARD OF PHARMACY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

By


VIRGINIA K. HEROLD
Executive Officer

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

In the Matter of the Accusation Against:

ANDREW MARK STERNBERG

Pharmacist License No. RPH 32370

Respondent.

Case No. 3377

OAH No. 2010080067

DECISION AFTER NONADOPTION

Administrative Law Judge Ralph B. Dash heard this matter on March 7 and 8, 2011, at Los Angeles, California.

Susan Melton Wilson, Deputy Attorney General, represented Complainant.

Herbert L. Weinberg and Noah E. Jussim, Attorneys at Law, represented Andrew Mark Sternberg, (Respondent).

The record was left open until May 13, 2011, for the submission of closing and reply briefs. Complainant's briefs were timely submitted and marked as Exhibits 17 and 18 for identification. Respondent's closing and reply briefs were timely submitted and marked as Exhibits K and L for identification. The matter was deemed submitted on May 16, 2011, the date the last of the briefs was actually delivered to the Administrative Law Judge.

The proposed decision of the Administrative Law Judge was submitted to the Board of Pharmacy on June 14, 2011. After due consideration thereof, the Board of Pharmacy declined to adopt said proposed decision and thereafter on July 27, 2011 issued an Order of Non-adoption. Subsequently, on September 21, 2011, the Board issued an Order Fixing Date for Submission of Oral Arguments. After receiving a request dated October 10th from Respondent's counsel to continue the date set for arguments, the Board cancelled its scheduled oral arguments set for its meeting on October 18, 2011 and notified all parties of the intent to provide new opportunity for arguments and dates. On October 28, 2011, the Board issued a new order setting a

new date (November 28, 2011) for receiving arguments from the parties, but instead requested that written arguments be provided in lieu of oral arguments. The Board extended time for rendering a decision in this case for another 30 days on November 29, 2011 to allow the Board to consider the transcript of the hearing, the written arguments of the parties, and to give the Board the opportunity to meet and deliberate on the decision. Written argument having been received from Complainant and Respondent, the time for filing written argument in this matter having expired, and the entire record, including the transcript of said hearing having been read and considered, the Board of Pharmacy pursuant to Section 11517 of the Government Code hereby makes the following decision:

FINDINGS OF FACT

1. Virginia Herold made the Accusation in her official capacity as the Executive Officer of the Board of Pharmacy (Board).

2. The Board issued Registered Pharmacist License Number 32370 to Respondent on August 18, 1978. At all times pertinent hereto, said license has been and is now in full force and effect. Since July 21, 2001, Respondent has been and is now the pharmacist-in-charge (PIC) of Target Store Number T-228 Pharmacy, located in West Hills, California (pharmacy), permit number PHY 44113. By its Decision and Order effective March 28, 2011, the Board revoked the pharmacy permit, stayed the revocation, and placed the pharmacy on probation for a period of five years.¹

3. This matter involves the theft of at least 216,630 tablets of Norco² 10mg from the pharmacy by Imelda Hurtado (Hurtado), a pharmacy technician, over an 18-month period.³ These tablets had a wholesale value of approximately \$1 per tablet and a retail value of between \$1.25 and \$1.50 per tablet. The street value ranged from \$1 to \$5 per tablet. Because Respondent is the PIC, it is his statutory responsibility to maintain the security of all pharmacy drugs. As more fully discussed below, he was the person who discovered the theft and reported it to Target management. While the Board believes that Target should have known that the theft was ongoing, as

¹ The pharmacy had been a party to this proceeding, but settled the Accusation against it pursuant to stipulation. Under the terms of the disciplinary order, the pharmacy, in addition to being placed on probation under standard terms and conditions, was required to pay the Board an administrative penalty of \$100,000, provide a free health-care related community service program for at least 100 hours, and pay the Board's cost of investigation and prosecution in the sum of \$4,775.

² Norco is the brand name for hydrocodone bitartrate/acetaminophen 10 mg/325 mg, a Schedule III opioid analgesic and has the highest single tablet dose of hydrocodone bitartrate with the lowest level of acetaminophen of all 10 mg hydrocodone combination products. It is indicated for the relief of moderate to moderately severe pain.

³ The theft took place over a two-year period, September 1, 2006 through August 31, 2008; however Hurtado, who was solely responsible for all stolen drugs, was not employed by the pharmacy for a six-month period during this time-frame.

discussed below, Respondent also should have suspected some wrongdoing with Hurtado's illicit drug orders and thefts.

4. Hurtado accomplished the theft in the following manner: She would place an order with McKesson for up to 3000 tablets (500 tablets per bottle) to be delivered to the pharmacy on a day she was scheduled to work. She did this approximately 85 times, as often as three times per week, during the 18-month period (see Exhibit 9). The ordering system in place at the pharmacy allowed the orders to be placed by telephone by anyone who had access to the pharmacy code number. Respondent allowed Ms. Hurtado to have unrestricted access to the pharmacy's account code numbers. The orders did not have to be placed through a pharmacy telephone; any telephone would do. Hurtado apparently made the orders from her home. There were no audits of these orders by Respondent. When asked whether Respondent felt it was one of his duties to check invoices against the orders that were placed, Respondent answered "No. It was not one of my duties. It did not have to be." (RT 133:21-25.)

5. At the hearing, Respondent testified regarding the typical delivery process and procedure for receipt of dangerous drugs in the pharmacy. The wholesaler ("supplier") typically delivered the drug orders to the pharmacy between 12:30 p.m. and 1:00 p.m. (RT 85:3-8.) Section 4059.5 of the Pharmacy Law requires that a pharmacist sign for and receive all dangerous drugs or devices delivered to a pharmacy. Respondent testified that his policy was that "everybody that works in the pharmacy knows that the law prevents anybody from signing for deliveries, except a pharmacist." (RT 83:5-11.) Respondent did not explain how he would enforce that policy, nor was there any evidence presented as to how that would be implemented. With respect to receipt of drug deliveries, when Respondent signed for the delivery of dangerous drugs he would sign a "delivery log that is supplied by the supplier"; however, that log only disclosed how many containers were being delivered, not what was in the actual containers (RT 83:21-25; 84:1-5). He would then count the number of bottles, and give the tote to a pharmacy technician who he assigned to take care of unpacking the drugs, placing appropriate shelf labels on the bottles, and checking the invoice/packing slip inside the box to assure that the supplier delivered what was ordered.⁴ After Respondent signed for the drugs, he "never" looked at the invoices being taken out of the delivery container and did not check the invoices against the drugs he received (RT 133:6-11; 3-7). Respondent admitted that as the Pharmacist-in-Charge he had the "discretion" to examine the invoices, but chose not to do so. (RT 135:18-23.) The invoices he received were given to a pharmacy technician, who then placed them in a box under a counter. After the box was filled, it was then transferred to a "little storage area" in the pharmacy. (RT 156:10-14.) The box was not checked regularly by any pharmacists, but "occasionally" respondent or another pharmacist would look at those invoices, but only "for a specific drug that we had to order for somebody to see if it came in or if it didn't come in." (RT 156:15-21.) As a result, the

⁴ On two occasions during the 18-month period, Hurtado was not working when a 3000-tablet Norco delivery was made. On both occasions, the pharmacy (presumably another pharmacy technician) simply returned the order to McKesson.

missing inventory and invoices were only discovered by chance, and not for at least 18 months, as explained further below.

6. Hurtado's theft was first uncovered when Respondent went into the store room one day and while looking through a box of syringes found a bottle of 500 Norco tablets. He was surprised and suspicious. He decided to leave the bottle where it was then check again when he came back from lunch. When he came back from lunch, he found the bottle missing. Respondent talked to the other two pharmacists about what he had found and neither of them had any knowledge of it. Accordingly, Respondent notified his supervisor of what he had discovered. The supervisor told Respondent to maintain business as usual while the matter was investigated.

7. Target began its own investigation which included in-store surveillance. However, it was not until they installed hidden cameras in the ceiling of the pharmacy that they were able to get direct evidence of Hurtado's theft. When Hurtado was present during a McKesson delivery of one of her orders, she would take, and was allowed to take, the tote from the pharmacist to a work station at the side of the pharmacy furthest away from the pharmacist's station.⁵ She would take the six bottles, hide them in the store room and destroy the packing invoice. These acts insured that neither a current accounting of the pharmacy's inventory would be made nor the losses discovered. When the pharmacist on duty took a lunch break, she would go to the storage room, put three bottles in her purse and take them out to her car. There appeared to be no requirement that the pharmacy be closed while the pharmacist went to lunch or other security measures taken to ensure adequate supervision. Later in the day, when the pharmacist was on a break, she would take the other three bottles to her car in the same manner. Hurtado was arrested in the Target parking lot while in possession of 3000 stolen Norco tablets. A subsequent search of her home turned up only one additional tablet, the remainder of the stolen tablets apparently having been taken by her boyfriend for street-sale.⁶

8. The amount of Norco tablets involved in this matter is staggering, particularly in light of the theft involving only one pharmacy which ordinarily did not sell Norco tablets at all. In fact, during the six-month period Hurtado was not employed at the pharmacy, it sold no Norco tablets at all. As the Pharmacist-in-charge, Respondent is the supervisor and manager responsible for ensuring the pharmacy's compliance with the Pharmacy Law. However, Hurtado's actions were not audited by Respondent and his oversight was so lacking that Hurtado was able to secret over 216,000 tablets of a dangerous drug away from the pharmacy over an 18-month period without Respondent's knowledge. If Respondent had properly supervised staff and conducted random checks of the containers that Respondent was signing for, the

⁵ There were three pharmacists working at the pharmacy, but only one at a time. They typically used the same work station, although much of their time was spent at the front counter, with the work-stations behind them, for customer counseling.

⁶ Not long after her arrest, Hurtado's pharmacy technician license was cancelled.

thefts may have been discovered much sooner. Respondent's failure to do random checks of the invoices or orders coming in allowed Hurtado the opportunity to destroy any paper evidence that might have alerted Respondent to her thefts. Further, there was no evidence that loss prevention practices were in place, such as secured equipment for the storage of such drugs. The delivery of 3000 tablets to the pharmacy at one time and the disappearance of such drugs from a "secured" location would have been discovered by Respondent if proper management and supervision, as described above, had occurred.

9. Similarly, the Target parent company, based in Minnesota, should have realized something was wrong. McKesson sent its invoices to the parent company for payment. The first time the parent company saw the first invoice for 3000 Norco tablets, suspicion should have been aroused.⁷ It had to pay for this order. In fact, it paid for 85 similar orders. Yet not once did it question the validity of any invoice. Nor did it question why its expenditure of over \$200,000 for delivery of a single drug to a single pharmacy over an 18-month period was never recouped by sales from that single pharmacy.

10. A total of three pharmacists worked at the pharmacy during the relevant time period, only one being on duty at a time. Records show that Respondent signed the McKesson manifest for approximately 25% of the Hurtado orders, the other two pharmacists signing for the remainder of the deliveries.⁸ While it is true that Hurtado acted with intent and purpose to deceive all three pharmacists, it does not change the fact that she was assigned the task of ordering drugs and unpacking them with little or no accountability to or review by Respondent. Respondent's view that she appeared "trustworthy" and that informing staff that only a pharmacist could sign for drug deliveries was sufficient to fulfill his duty as pharmacist-in-charge was obviously not sufficient in this case. Hurtado was more easily able to steal from the pharmacy because no audits or direct review of Hurtado's work occurred. Also, Respondent failed to articulate any loss prevention procedures in place at the pharmacy. While Respondent's pharmacist expert testified that it is not the custom and practice, nor the standard of care in the community, for a pharmacist to watch the technician open a drug delivery tote and label the bottles and that the pharmacist is ordinarily occupied with either checking the prescriptions filled by other personnel, or consulting with clients about their medications, that opinion is neither an accurate nor complete assessment of what is required under the law. The Board's Inspector White, who is also a pharmacist and has specialized knowledge and experience in this area, correctly testified regarding a pharmacist-in-charge's duties under the Pharmacy Law.

⁷ According to Exhibit 11, McKesson's bill to Target for each drug delivery was dated the same as the delivery of the drug to the pharmacy.

⁸ The records show that Hurtado herself signed for three deliveries, even though she was not permitted by law to do so. The evidence established Respondent was not working on the days two of the deliveries were made, meaning other pharmacists also allowed Hurtado to sign. In fact, they "allowed" Hurtado to spirit away bottles of Norco on numerous occasions, just as Respondent had done. Respondent worked on the day of the third Hurtado-signed delivery.

(15:10-23; 16:1-10.) These responsibilities include overseeing the daily operations of the pharmacy and being the "person responsible for their compliance with pharmacy law." (15:10-23.) Based upon these responsibilities, it is expected that the pharmacist-in-charge would perform some random audits of drug deliveries that he signed for, conduct checks of his staff's work, and actively participate in checking inventory as well as the drugs delivered to the pharmacy. These acts did not occur in this case.

11. Respondent has developed a corrective action plan to help prevent similar thefts in the future (Exhibit "I"). The plan includes admonishing pharmacy employees regarding policies for ordering controlled substances, requiring that a written record of all Schedule II and III drug orders be maintained, and making sure all Schedule II drugs and hydrocodone containing drugs are kept in a locked cabinet or drawer. He also suggested that all Schedule II and III drugs be opened and checked in by a pharmacist or under the direct line of sight of the pharmacists and that employees not be permitted to place large purses or backpacks in the pharmacy storeroom. These along with systemic changes, including limiting telephone access to drug orders or creating a system that would safeguard the pharmacy's drug account codes, would assist in the prevention of such thefts.

12. Respondent has been a licensed pharmacist in California for almost 33 years. He has no prior disciplinary history nor a record of there having been complaints to the Board filed against him. In addition to his own testimony, he offered several reference letters attesting to his honesty, integrity and dedication. The following, taken from a letter written to the Board by Michael Sternberg, Pharm. D, is representative:

For the last several years [Respondent] has been working at my local Target store as the Pharmacist-In-Charge. I have visited [him] at work frequently during that period while shopping in the store and there was always a crowd of patients willing to wait and discuss with him their medical conditions and ask him for his advice. It was, and still is, apparent to me that [Respondent] is a big asset to Target and a resource in the community to get honest, accurate pharmaceutical information.

In conclusion, I am well aware of the Accusation and it in no way alters my high regard for the man. [He] has the personal integrity and honesty that all pharmacists should aspire to.

13. The Board incurred costs, including fees of the Attorney General, in the sum of \$18,477 in connection with the investigation and prosecution of this matter.

CONCLUSIONS OF LAW

1. Administrative proceedings to discipline a professional license are intended to protect the public, not punish the licensee. (*Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763.) It is well established that the purpose of discipline is not to punish, but to protect the public by eliminating practitioners who are dishonest, immoral, disreputable or incompetent. (*Fahmy v. Medical Board of California* (1995) 38 Cal.App.4th 810, 817.)

2. The standard of proof which must be met to establish the charging allegations herein is "clear and convincing evidence." (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853.) This means the burden rests with Complainant to offer proof that is clear, explicit and unequivocal--so clear as to leave no substantial doubt and sufficiently strong to command the unhesitating assent of every reasonable mind. (*Katie V. v. Superior Court* (2005) 130 Cal.App.4th 586, 594.)

Witkin explains the difference of this standard from the normal preponderance of the evidence and gives the following rationale:

In a few situations, for reasons of policy of the substantive law, the ordinary 'preponderance of the evidence' is not considered sufficient to establish the fact in issue, and instead the party must prove it by 'clear and convincing evidence.' In such cases, of course, the jury or trial judge should not be satisfied with a slight preponderance in favor of the plaintiff. [citations.] [¶]

The phrase has been defined as 'clear, explicit and unequivocal,' 'so clear as to leave no substantial doubt,' and 'sufficiently strong to command the unhesitating assent of every reasonable mind.'

[Citation.] Otherwise stated, a preponderance calls for probability, while clear and convincing proof demands a *high probability*.

[Citations.]

(1 Witkin, Cal. Evidence (4th ed., 2000) Burden of Proof and Presumptions, §38, p. 187.)

Legal Responsibility

3. Business and Professions Code section 4113 states in pertinent part:

[¶] . . . [¶]

(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.

4. Pharmacy Law makes any "Pharmacist-in-charge" (PIC) "the supervisor or manager responsible for ensuring the pharmacy's compliance with all state and federal laws and regulations pertaining to the practice of pharmacy." (Bus.&Prof.Code, § 4036.5.)

5. Business and Professions Code section 4081 states, in pertinent part:

[¶] . . . [¶]

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

(c) The pharmacist-in-charge or designated representative-in-charge shall not be criminally responsible for acts of the owner, officer, partner, or employee that violate this section and of which the pharmacist-in-charge or designated representative-in-charge had no knowledge, or in which he or she did not knowingly participate.

6. As a result of the foregoing statutory mandates, a PIC can be held responsible for the pharmacy's violations by the Board, regardless of whether he or she had actual knowledge of the violations or authorized the violations.

7. Based on the facts set forth in the above Findings, the Board makes the following determinations with respect to the six separate causes for discipline alleged in the Accusation. Taken seriatim:

a. The first charge is that Respondent failed to maintain complete and accurate records in violation of Business and Professions Code sections 4300, 4301, subdivisions (j) and (o), in conjunction with Sections 4005, 4081 and 4105, and California Code of Regulations, title 16, section 1718. This allegation is established. As pharmacist-in-charge, Respondent was responsible for ensuring that the pharmacy kept a complete and accurate record for all dangerous drugs received, sold or otherwise disposed of by the pharmacy. Respondent's failure to adequately supervise Hurtado contributed to the pharmacy's resulting failure to maintain accurate records of the Norco tablets Hurtado ordered, even if those drugs were stolen out of his presence and without his knowledge or approval.

b. The second charge is that Respondent failed to maintain the above-referenced records as well as a current inventory, for three years in violation of the above code sections, but in particular Business and Professions Code section 4081, subdivision (a). As with the first charge, this charge is also true. Respondent's failure to adequately supervise Hurtado contributed to the pharmacy's resulting failure to maintain records and a current inventory as required of the Norco tablets Hurtado ordered, even if those drugs were stolen out of his presence and without his knowledge or approval.

c. The third charge is that Respondent allowed a non-pharmacist, Hurtado, to order and sign for the Norco tablets in violation of Business and Professions Code section 4095.5, subdivision (a). This code section does not prohibit Hurtado from ordering drugs. It allows a pharmacy (person unspecified) to order drugs, but limits the signing of the receipt for drugs to "a pharmacist." As noted above, Hurtado signed for Norco tablets on three occasions. On two of those occasions, Respondent was not at the pharmacy. On the third occasion, Respondent was working at the time Hurtado signed for the drugs, although it was not established if he was physically present in the pharmacy at the time the drugs were received. Regardless, Respondent was aware of the time frames that drugs were delivered. The law does not permit Respondent to not be "on duty" or to abdicate his supervisory responsibilities when drugs are delivered to the pharmacy. Consequently, it was established that Respondent did violate this code section.

d. The fourth charge is that Respondent violated the provisions of Business and Professions Code section 4115, subdivision (h), which makes the "pharmacist on duty" "directly responsible for the conduct of a pharmacy technician supervised by that pharmacist." Hurtado was supervised by one of three pharmacists, including Respondent. All three pharmacists were responsible for her conduct while they were on duty. However, because he did supervise Hurtado, at least part of the time, her violations of the pharmacy law become his responsibility. This charge was established.

e. The fifth charge alleges that Respondent failed to maintain the pharmacy facility, space, fixtures, and equipment so that drugs are "safely and properly prepared, maintained and secured," in violation of California Code of Regulations, title 16, section 1714, subdivision (b). As pharmacist-in-charge, Respondent was responsible for ensuring that the pharmacy maintained and secured its drugs from diversion and theft. Based on the facts of this case, it is clear that Respondent failed to secure the drugs that were being delivered to the pharmacy. There was no evidence that the pharmacy's facility, space, fixtures, or equipment were maintained in any way to prevent the thefts in this case, such as the use of locked cabinets or drawers for Schedule II or III drugs. This charge was proven as to Respondent.

f. The sixth charge is that Respondent failed "to secure the prescription department and provide effective controls" to prevent Hurtado's theft of Norco, in violation of California Code of Regulations, title 16, Section 1714 subdivision (d). This regulation applies not just to Respondent as PIC but to all "pharmacist[s] while on duty." Clearly, Hurtado stole Norco at times when Respondent was on duty, just as she did when the other two pharmacists were on duty. There were no effective controls in place to prevent her theft. Respondent could easily have provided such controls, as noted in Findings 4, 5, 7, 8, and 10. Although Respondent alleged that it is not the custom and practice of pharmacists in the area to take such steps, the custom and practice does not negate Respondent's statutory duty to prevent the theft. Respondent,

by his actions and inactions, effectively gave the pharmacy's "key" to security away to Hurtado. This charge was established.

Factors Considered for the Appropriate Level of Discipline

8. The board has issued a Manual of Disciplinary Guidelines and Model Disciplinary Orders incorporated by reference at Title 16, California Code of Regulations section 1760. The Guidelines reflect the board's primary responsibility as public protection, but they also reflect an appropriate concern for the rehabilitation of licensees. The Guidelines set forth a number of factors to be considered in determining whether a minimum, maximum, or intermediate penalty is to be imposed in a given case. The Guidelines also set forth examples of mitigating evidence that may be presented by the respondent. The Guidelines set forth a number of standard conditions of probation, which are generally to be applied in every case, and a number of optional conditions, to be applied as appropriate in a particular case. According to the Board's Disciplinary Guidelines, violations of the Pharmacy Law involving security of dangerous drugs (Sections 4081, 4059.5 of the Business and Professions Code), the minimum recommended penalty for such "Category III" violations is: Revocation stayed, 90 days actual suspension and 3-5 years of probation.

9. In order to determine the appropriate measure of discipline, it is necessary to weigh and balance Respondents' violations of law as well as factors in justification, aggravation, or mitigation. Protection of the public is the Board's highest priority. The Board fulfills its public mandate by, among other things, imposing discipline. It is very important that the Board's licensees are aware of and abide by the standards of pharmacy practice and applicable pharmacy laws. In particular, it is very important that a Pharmacist-in-charge be aware of his responsibilities and the fact that he is legally responsible for a pharmacy's compliance with the law. The six causes for discipline proven demonstrate that Respondent Sternberg fails to understand his responsibilities or take responsibility for the lack of supervision at the pharmacy. Shockingly large quantities of Norco were diverted from Respondent's pharmacy under his watch over a long period of time. His admissions that he never checked invoices and that he did not consider it his "duty" was of particular concern to the Board. As the record establishes, the wide-spread and serious nature of these violations indicates that Respondent had no systems in place to prevent drug losses.

10. Nevertheless, the Board considered the following mitigating factors in setting the penalty in this case. Respondent has been licensed for almost 33 years with no disciplinary record. It was Respondent who first discovered the theft and immediately brought it to Target's attention. The theft was the result of a deliberate and calculated act by his subordinate employee to earn Respondent's trust and then violate it by stealing drugs from their mutual employer. Target's actions also contributed to the failure to discover the losses as described in Factual Finding 9. Finally, Respondent has developed corrective action plans to help prevent such losses in the future.

11. Business and Professions Code section 125.3 permits the Board to recover from Respondent its reasonable costs of investigation and prosecution of this disciplinary matter. As set forth in Finding 14, those costs total \$18,477. Of that amount, Target has already paid \$4,775. In *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, the Supreme Court rejected a constitutional challenge to a cost recovery provision similar to Business and Professions Code section 125.3. In so doing, however, the Court directed the administrative law judge and the agency to evaluate several factors to ensure that the cost recovery provision did not deter individuals from exercising their right to a hearing. Thus, the Board must not assess the full costs where it would unfairly penalize a Respondent who has committed some misconduct, but who has used the hearing process to obtain the dismissal of some charges or a reduction in the severity of the penalty. The Board must consider a Respondent's subjective good faith belief in the merits of his or her position and whether that Respondent has raised a colorable challenge. And the Board must consider a Respondent's ability to pay. (*Zuckerman*, supra at page 45.) The Administrative Law Judge found that in light of these factors, it would be unduly punitive to require Respondent to pay the remaining balance of the Board's costs. Based on Target's culpability, it was required to pay approximately 25 percent of the Board's costs, and it was placed on five years' probation. The Administrative Law Judge found that Respondent should be required to pay no more than \$1,847, which is 10 percent of the Board's costs. Pursuant to Business and Professions Code section 125.3(d), this finding is not reviewable by the Board to increase the cost award.

12. By reason of Factual Findings 1 through 13 and Legal Conclusions 1 through 12, cause exists to revoke respondent's pharmacist license, and to stay that revocation on appropriate conditions of probation for a period of three years. Public protection would be served by this period of probation to ensure that Respondent pays close attention to the pharmacy's operations and practices in the future. Additional terms will also include the requirements that Respondent maintain a separate file of all records pertaining to the acquisition or disposition of all controlled substances and submit quarterly reports to the Board detailing the total acquisition and disposition of controlled substances. It is believed that the inclusion of these additional conditions of probation will assist in addressing issues that led to the present proceeding and provide for the protection of the public while permitting respondent to continue his practice as a pharmacist-in-charge.

ORDER

WHEREFORE, THE FOLLOWING ORDER is hereby made:

License No. RPH 32370, issued to respondent ANDREW MARK STERNBERG is REVOKED; however, the revocation is STAYED and respondent is placed on PROBATION for three years upon the following terms and conditions:

1. Obey All Laws

Respondent shall obey all state and federal laws and regulations. Respondent shall report any of the following occurrences to the board, in writing, within seventy-two (72) hours of such occurrence:

- 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;
- a plea of guilty or nolo contendere in any state or federal criminal proceeding to any criminal complaint, information or indictment;
- a conviction of any crime; and,
- discipline, citation, or other administrative action filed by any state or federal agency which involves respondent's pharmacist license or which is related to the practice of pharmacy or the manufacturing, obtaining, handling, distributing, billing, or charging for any drug, device or controlled substance.

Failure to timely report such occurrence shall be considered a violation of probation.

2. Report to the Board

Respondent shall report to the board quarterly, on a schedule as directed by the board or its designee. The report shall be made either in person or in writing, as directed. Among other requirements, respondent shall state in each report under penalty of perjury whether there has been compliance with all the terms and conditions of probation. Failure to submit timely reports in a form as directed shall be considered a violation of probation. Any period(s) of delinquency in submission of reports as directed may be added to the total period of probation. Moreover, if the final probation report is not made as directed, probation shall be automatically extended until such time as the final report is made and accepted by the board.

3. Interview with the Board

Upon receipt of reasonable prior notice, respondent shall appear in person for interviews with the board or its designee, at such intervals and locations as are determined by the board or its designee. Failure to appear for any scheduled interview without prior notification to board staff, or failure to appear for two (2) or more

scheduled interviews with the board or its designee during the period of probation, shall be considered a violation of probation.

4. Cooperate with Board Staff

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

5. Continuing Education

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

6. Notice to Employers

During the period of probation, respondent shall notify all present and prospective employers of the decision in case number 3377 and the terms, conditions and restrictions imposed on respondent by the decision, as follows:

Within thirty (30) days of the effective date of this decision, and within fifteen (15) days of respondent undertaking any new employment, respondent shall cause his direct supervisor, pharmacist-in-charge (including each new pharmacist-in-charge employed during respondent's tenure of employment) and owner to report to the board in writing acknowledging that the listed individual(s) has/have read the decision in case number 3377, and terms and conditions imposed thereby. It shall be respondent's responsibility to ensure that his employer(s) and/or supervisor(s) submit timely acknowledgment(s) to the board.

If respondent works for or is employed by or through a pharmacy employment service, respondent must notify his direct supervisor, pharmacist-in-charge, and owner at every entity licensed by the board of the terms and conditions of the decision in case number 3377 in advance of the respondent commencing work at each licensed entity. A record of this notification must be provided to the board upon request.

Furthermore, within thirty (30) days of the effective date of this decision, and within fifteen (15) days of respondent undertaking any new employment by or through a pharmacy employment service, respondent shall cause his direct supervisor with the pharmacy employment service to report to the board in writing acknowledging that he or she has read the decision in case number Case No. 3377 and the terms and conditions imposed thereby. It shall be respondent's responsibility to ensure that his employer(s) and/or supervisor(s) submit timely acknowledgment(s) to the board.

Failure to timely notify present or prospective employer(s) or to cause that/those employer(s) to submit timely acknowledgments to the board shall be considered a violation of probation.

"Employment" within the meaning of this provision shall include any full-time, part-time, temporary, relief or pharmacy management service as a pharmacist or any position for which a pharmacist license is a requirement or criterion for employment, whether the respondent is an employee, independent contractor or volunteer.

7. Reimbursement of Board Costs

As a condition precedent to successful completion of probation, respondent shall pay to the board its costs of investigation and prosecution in the amount of \$1,847. Respondent shall make said payment at such time and in such manner as the Board's designee, in his or her discretion, may direct.

There shall be no deviation from the schedule set by the board's designee absent prior written approval by the board or its designee. Failure to pay costs by the deadline(s) as directed shall be considered a violation of probation.

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

8. Probation Monitoring Costs

Respondent shall pay any costs associated with probation monitoring as determined by the board each and every year of probation. Such costs shall be payable to the board on a schedule as directed by the board or its designee. Failure to pay such costs by the deadline(s) as directed shall be considered a violation of probation.

9. 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. Failure to maintain an active, current license shall be considered a violation of probation.

If respondent's license expires or is cancelled by operation of law or otherwise at any time during the period of probation, including any extensions thereof due to tolling or otherwise, upon renewal or reapplication respondent's license shall be subject to all terms and conditions of this probation not previously satisfied.

10. License Surrender While on Probation/Suspension

Following the effective date of this decision, should respondent cease practice due to retirement or health, or be otherwise unable to satisfy the terms and conditions of probation, respondent may tender his license to the board for surrender. The board or its designee 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. This surrender constitutes a record of discipline and shall become a part of the respondent's license history with the board.

Upon acceptance of the surrender, respondent shall relinquish his pocket and wall license to the board within ten (10) days of notification by the board that the surrender is accepted. Respondent may not reapply for any license from the board for three (3) 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, including any outstanding costs.

11. Notification of a Change in Name, Residence Address, Mailing Address or Employment

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

Failure to timely notify the board of any change in employer(s), name(s), address(es), or phone number(s) shall be considered a violation of probation.

12. Tolling of Probation

Except during periods of suspension, respondent shall, at all times while on probation, be employed as a pharmacist in California for a minimum of twenty (20) hours per week. Any month during which this minimum is not met shall toll the period of probation, i.e., the period of probation shall be extended by one month for each month during which this minimum is not met. During any such period of tolling of probation, respondent must nonetheless comply with all terms and conditions of probation. Should respondent, regardless of residency, for any reason (including vacation) cease practicing as a pharmacist for a minimum of twenty (20) hours per week in California, respondent must notify the board in writing within ten (10) days of the cessation of practice, and must further notify the board in writing within ten (10) days of the resumption of practice. Any failure to provide such notification(s) shall be considered a violation of probation.

It is a violation of probation for respondent's probation to remain tolled pursuant to the provisions of this condition for a total period, counting consecutive and non-consecutive months, exceeding thirty-six (36) months.

"Cessation of practice" means any calendar month during which respondent is not practicing as a pharmacist for at least twenty (20) hours per week, as defined by Business and Professions Code section 4000 et seq. "Resumption of practice" means any calendar month during which respondent is practicing for at least 20 hours per week as a pharmacist as defined by Business and Professions Code section 4000 et seq.

13. Violation of Probation

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 that was stayed. 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 that was stayed. Notice and opportunity to be heard are not required for those provisions stating that a violation thereof may lead to automatic termination of the stay and/or revocation of the license. 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 automatically extended until the petition to revoke probation or accusation is heard and decided.

14. Separate File of Records

Respondent shall maintain and make available for inspection a separate file of all records pertaining to the acquisition or disposition of all controlled substances. Failure to maintain such file or make it available for inspection shall be considered a violation of probation.

15. Report of Controlled Substances

Respondent shall submit quarterly reports to the board detailing the total acquisition and disposition of such controlled substances as the board may direct. Respondent shall specify the manner of disposition (e.g., by prescription, due to burglary, etc.) or acquisition (e.g., from a manufacturer, from another retailer, etc.) of such controlled substances. Respondent shall report on a quarterly basis or as directed by the board. The report shall be delivered or mailed to the board no later than ten (10) days following the end of the reporting period. Failure to timely prepare or submit such reports shall be considered a violation of probation.

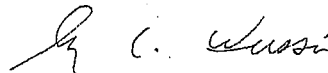
16. Completion of Probation

Upon written notice by the board or its designee indicating successful completion of probation, respondent's license will be fully restored.

This Decision shall become effective on January 23, 2012.

IT IS SO ORDERED this 23rd day of December, 2011.

BOARD OF PHARMACY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA



By

STANLEY C. WEISSER
Board President

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

In the Matter of the Accusation Against:

Andrew Mark Sternberg
6840 Sunset Ridge Court
West Hills, CA 91307

Pharmacist License No. RPH 32370

Respondent.

Case No. 3377

OAH No. 2010080067

TO ALL PARTIES AND THEIR ATTORNEY OF RECORD:

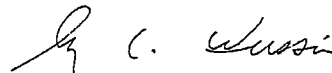
AMENDED ORDER OF NONADOPTION OF PROPOSED DECISION

YOU ARE HEREBY NOTIFIED pursuant to Section 11517 of the Government Code, the California State Board of Pharmacy hereby non-adopts the proposed decision in Administrative Case number 3377. A copy of the proposed decision is attached hereto.

The board will decide the case itself upon the record, including the transcript, exhibits and oral argument of the parties, without taking additional evidence. The Board has ordered a transcript and will notify the parties when the transcript has been prepared and of the date set for the parties to provide oral argument directly to the full Board at an open session meeting of the Board.

IT IS SO ORDERED THIS 22nd day of August 2011.

BOARD OF PHARMACY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA



By

STANLEY C. WEISSER
Board President

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

In the Matter of the Accusation Against:

Andrew Mark Sternberg
6840 Sunset Ridge Court
West Hills, CA 91307

Pharmacist License No. RPH 32370

Respondent.

Case No. 3377

OAH No. 2010080067

TO ALL PARTIES AND THEIR ATTORNEY OF RECORD:

ORDER OF NONADOPTION OF PROPOSED DECISION

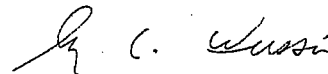
YOU ARE HEREBY NOTIFIED pursuant to Section 11517 of the Government Code, the California State Board of Pharmacy hereby non-adopts the proposed decision in Administrative Case number 3306. A copy of the proposed decision is attached hereto.

The board will decide the case itself upon the record, including the transcript, exhibits and oral argument of the parties, without taking additional evidence. The Board has ordered a transcript and will notify the parties when the transcript has been prepared and of the date set for the parties to provide oral argument directly to the full Board at an open session meeting of the Board.

IT IS SO ORDERED THIS 22nd day of August 2011.

BOARD OF PHARMACY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

By



STANLEY C. WEISSER
Board President

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

In the Matter of the Accusation Against:

ANDREW MARK STERNBERG,

Pharmacist License Number RPH 32370,

Respondent.

Case No. 3377

OAH No. 2010080067

PROPOSED DECISION

Administrative Law Judge Ralph B. Dash heard this matter on March 7 and 8, 2011, at Los Angeles, California.

Susan Melton Wilson, Deputy Attorney General, represented Complainant.

Herbert L. Weinberg and Noah E. Jussim, Attorneys at Law, represented Andrew Mark Sternberg, (Respondent).

The record was left open until May 13, 2011, for the submission of closing and reply briefs. Complainant's briefs were timely submitted and marked as Exhibits 17 and 18 for identification. Respondent's closing and reply briefs were timely submitted and marked as Exhibits K and L for identification. The matter was deemed submitted on May 16, 2011, the date the last of the briefs was actually delivered to Administrative Law Judge.

Oral and documentary evidence having been received and the matter having been submitted, the Administrative Law Judge makes the following Proposed Decision.

FINDINGS OF FACT

1. Virginia Herold made the Accusation in her official capacity as the Executive Officer of the Board of Pharmacy (Board).
2. The Board issued Registered Pharmacist License Number 32370 to Respondent on August 18, 1978. At all times pertinent hereto, said license has been and is now in full force and effect. Since July 21, 2001, Respondent has been and is now the pharmacist-in-charge (PIC) of Target Store Number T-228 Pharmacy, located in West Hills, California (pharmacy), permit number PHY 44113. By its Decision and Order effective

March 28, 2011, the Board revoked the pharmacy permit, stayed the revocation, and placed the pharmacy on probation for a period of five years.¹

3. This matter involves the theft of at least 216,630 tablets of Norco² 10mg from the pharmacy by Imelda Hurtado (Hurtado), a pharmacy technician, over an 18-month period.³ These tablets had a wholesale value of approximately \$1 per tablet and a retail value of between \$1.25 and \$1.50 per tablet. The street value ranged from \$1 to \$5 per tablet. Because Respondent is the PIC, it is his statutory responsibility to maintain the security of all pharmacy drugs. As more fully discussed below, he was the person who discovered the theft and reported it to Target management. However, because of the manner in which the pharmacy parent company (Target) and the wholesale supplier (McKesson) operated, the theft was easily accomplished without Respondent's actual knowledge. However, both Target and McKesson should have known that the theft was ongoing. In fact, as discussed below, they should have suspected some wrongdoing with Hurtado's first illicit drug order.

4. Hurtado accomplished the theft in the following manner: She would place an order with McKesson for up to 3000 tablets (500 tablets per bottle) to be delivered to the pharmacy on a day she was scheduled to work. She did this approximately 85 times, as often as three times per week, during the 18-month period (see Exhibit 9). Target's system of ordering drugs allowed the orders to be placed by telephone by anyone who had access to the pharmacy code number, such as the pharmacists and technicians who worked there. The orders did not have to be placed through a pharmacy telephone; any telephone would do. Hurtado apparently made the orders from her home.

5. McKesson typically delivered the drug orders to the pharmacy at approximately 12:30 p.m. The law requires that the on-duty pharmacist sign the McKesson manifest acknowledging receipt of the drugs. However, simply by looking at the manifest, the pharmacist has no idea for which drugs he or she is signing. The manifest only sets forth the order number and the number of containers that are contained in the delivery tote. The pharmacist typically verifies the number of bottles, then gives the tote to a pharmacy technician who takes care of unpacking the drugs, placing appropriate shelf labels on the bottles, and checking the invoice/packing slip inside the box to assure that McKesson

¹ The pharmacy had been a party to this proceeding, but settled the Accusation against it pursuant to stipulation. Under the terms of the disciplinary order, the pharmacy, in addition to being placed on probation under standard terms and conditions, was required to pay the Board an administrative penalty of \$100,000, provide a free health-care related community service program for at least 100 hours, and pay the Board's cost of investigation and prosecution in the sum of \$4,775.

² Norco is the brand name for hydrocodone bitartrate/acetaminophen 10 mg/325 mg, a Schedule III opioid analgesic and has the highest single tablet dose of hydrocodone bitartrate with the lowest level of acetaminophen of all 10 mg hydrocodone combination products. It is indicated for the relief of moderate to moderately severe pain.

³ The theft took place over a two-year period, September 1, 2006 through August 31, 2008; however Hurtado, who was solely responsible for all stolen drugs, was not employed by the pharmacy for a six-month period during this time-frame.

delivered what was ordered.⁴ The invoice is then placed in a box under a counter and, according to the testimony, is never looked at again, by anyone, not even Target.

6. When Hurtado was present during a McKesson delivery of one of her orders, she would take the tote from the pharmacist to a work station at the side of the pharmacy furthest away from the pharmacist's station.⁵ She would take the six bottles, hide them in the store room and destroy the packing invoice. When the pharmacist on duty took a lunch break, she would go to the storage room, put three bottles in her purse and take them out to her car. Later in the day, when the pharmacist was on a break, she would take the other three bottles to her car in the same manner. She left no trail, paper or otherwise, at the pharmacy by which Respondent could become aware of the theft.

7. Hurtado's theft was uncovered when Respondent went into the store room one day and while looking through a box of syringes found a bottle of 500 Norco tablets. He was surprised and suspicious. He decided to leave the bottle where it was then check again when he came back from lunch. When he came back from lunch, he found the bottle missing. Respondent talked to the other two pharmacists about what he had found and neither of them had any knowledge of it. Accordingly, Respondent notified his supervisor of what he had discovered. The supervisor told Respondent to maintain business as usual while the matter was investigated.

8. Target began its own investigation which included in-store surveillance. However, it was not until they installed hidden cameras in the ceiling of the pharmacy that they were able to get direct evidence of Hurtado's theft. Hurtado was arrested in the Target parking lot while in possession of 3000 stolen Norco tablets. A subsequent search of her home turned up only one additional tablet, the remainder of the stolen tablets apparently having been taken by her boyfriend for street-sale.⁶

9. The amount of Norco tablets involved in this matter is staggering, particularly in light of the theft involving only one pharmacy which ordinarily did not sell Norco tablets at all. In fact, during the six-month period Hurtado was not employed at the pharmacy, it sold no Norco tablets at all. A delivery of 3000 tablets to the pharmacy at one time should have aroused McKesson's suspicions. Certainly by the time it was delivering 9000 tablets per week, McKesson should have been put on notice that something was seriously amiss.

⁴ On two occasions during the 18-month period, Hurtado was not working when a 3000-tablet Norco delivery was made. On both occasions, the pharmacy (presumably another pharmacy technician) simply returned the order to McKesson.

⁵ There were three pharmacists working at the pharmacy, but only one at a time. They typically used the same work station, although much of their time was spent at the front counter, with the work-stations behind them, for customer counseling.

⁶ Not long after her arrest, Hurtado's pharmacy technician license was cancelled. She became a confidential police informant, helping them in a criminal case against her boyfriend who apparently had paid her \$1 per tablet and then arranged for the stolen tablets to be distributed and sold on the streets.

However, under the pharmacy law, McKesson apparently has no duty to notify anyone of these highly unusual purchases.

10. Similarly, the Target parent company, based in Minnesota, should have realized something was wrong. McKesson sent its invoices to the parent company for payment. The first time the parent company saw the first invoice for 3000 Norco tablets, suspicion should have been aroused.⁷ It had to pay for this order. In fact, it paid for 85 similar orders. Yet not once did it question the validity of any invoice. Nor did it question why its expenditure of over \$200,000 for delivery of a single drug to a single pharmacy over an 18-month period was never recouped by sales from that single pharmacy.

11. As noted above, a total of three pharmacists worked at the pharmacy during the relevant time period, only one being on duty at a time. Records show that Respondent signed the McKesson manifest for approximately 25% of the Hurtado orders, the other two pharmacists signing for the remainder of the deliveries.⁸ Hurtado deceived all three pharmacists and was able to do so because Target and McKesson made it so easy for her. There was simply no trail, paper or otherwise, that any of them could follow. The trail was all in the hands of McKesson and Target. In fact, the only way any of the pharmacists could have uncovered the thefts would have been for them to stand by Hurtado when she opened the McKesson drug tote and attempted to secrete the drugs. Unrebutted expert testimony offered by Respondent established that it is not the custom and practice, nor the standard of care in the community, for a pharmacist to watch the technician open a drug delivery tote and label the bottles. The pharmacist is ordinarily occupied with either checking the prescriptions filled by other personnel, or consulting with clients about their medications.

12. Respondent has developed a corrective action plan to help prevent similar thefts in the future. The plan includes admonishing pharmacy employees regarding policies for ordering controlled substances, requiring that a written record of all Schedule II and III drug orders be maintained, and making sure all Schedule II drugs and hydrocodone-containing drugs are kept in a locked cabinet or drawer. He also suggested that all Schedule II and III drugs be opened and checked in by a pharmacist or under the direct line of sight of the pharmacists and that employees not be permitted to place large purses or backpacks in the pharmacy storeroom. These are good ideas, but probably would have no impact whatsoever should another "Hurtado-type" theft be undertaken because there must be systemic changes, changes which can only be made by Target and McKesson, to prevent

⁷ According to Exhibit 11, McKesson's bill to Target for each drug delivery was dated the same as the delivery of the drug to the pharmacy.

⁸ Julia Krumer and Karen Fitzgerald were the two pharmacists who also worked at the pharmacy during the relevant time period. Neither of them has been charged by the Board with any wrongdoing. The records show that Hurtado herself signed for three deliveries, even though she was not permitted by law to do so. The evidence established Respondent was not working on the days two of the deliveries were made, meaning Krumer and/or Fitzgerald also allowed Hurtado to sign. In fact, they "allowed" Hurtado to spirit away bottles of Norco on numerous occasions, just as Respondent had done. While Respondent worked on the day of the third Hurtado-signed delivery, there was no evidence presented to show that he was actually present in the pharmacy when the third delivery was made.

such thefts. McKesson should place the names of the drugs being delivered on the manifest the pharmacist signs when receiving the drug tote. Otherwise, the pharmacist will still be signing for contents unknown.⁹ Next, Target must prevent and prohibit any telephonic ordering of drugs, especially from telephones outside the pharmacy. Drugs should all be ordered via a computer located in the pharmacy, with a print-out of all orders being given to the pharmacist on duty to review at the end of the day. Target should also review all invoices for drug orders on at least a weekly basis to ensure that any unusually large or otherwise suspicious orders can be found as soon as possible. Finally, Target should spend the money to hire additional pharmacists so there would never be a period when the pharmacy was open but no pharmacist present. With only one pharmacist on duty, and that pharmacist entitled to take lunch and restroom breaks, the opportunity for theft is great. Until such changes are made, any faithless employee could order and steal drugs, just as Hurtado did. Of course, Target could require that only pharmacists can unpack and label drug deliveries. However, that being the job of the technician, would severely limit the pharmacist's time to spend filling prescriptions and counseling customers.

13. Respondent has been a licensed pharmacist in California for almost 33 years. He has no prior disciplinary history nor a record of there having been complaints to the Board filed against him. In addition to his own testimony, he offered several reference letters attesting to his honesty, integrity and dedication. The following, taken from a letter written to the Board by Michael Sternberg, Pharm. D, is representative:

For the last several years [Respondent] has been working at my local Target store as the Pharmacist-In-Charge. I have visited [him] at work frequently during that period while shopping in the store and there was always a crowd of patients willing to wait and discuss with him their medical conditions and ask him for his advice. It was, and still is, apparent to me that [Respondent] is a big asset to Target and a resource in the community to get honest, accurate pharmaceutical information.

In conclusion, I am well aware of the Accusation and it in no way alters my high regard for the man. [He] has the personal integrity and honesty that all pharmacists should aspire to.

14. The Board incurred costs, including fees of the Attorney General, in the sum of \$18,477 in connection with the investigation and prosecution of this matter.

⁹ It is not clear whether McKesson's use of code numbers on the manifests are of its own internal generation, or its beginning compliance with the not yet operative "drug pedigree law," Business and Professions Code sections 4034 and 4163, et seq. It is recognized that the law does not require McKesson to put actual drug names on its manifest. Perhaps it is McKesson's way of keeping secret from its own delivery people the contents of the sealed tote in which the drugs are delivered to the pharmacy. However, since the totes are sealed, it would seem prudent to place the drug names on the manifest so the pharmacist will know which drugs he is signing for, and there would be an easily decipherable paper record showing that the drugs sent by McKesson were actually received by the pharmacy.

* * * * *

CONCLUSIONS OF LAW

1. Administrative proceedings to discipline a professional license are intended to protect the public, not punish the licensee. (*Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763.) It is well established that the purpose of discipline is not to punish, but to protect the public by eliminating practitioners who are dishonest, immoral, disreputable or incompetent. (*Fahmy v. Medical Board of California* (1995) 38 Cal.App.4th 810, 817.)

2. The standard of proof which must be met to establish the charging allegations herein is "clear and convincing evidence." (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853.) This means the burden rests with Complainant to offer proof that is clear, explicit and unequivocal--so clear as to leave no substantial doubt and sufficiently strong to command the unhesitating assent of every reasonable mind.. (*Katie V. v. Superior Court* (2005) 130 Cal.App.4th 586, 594.)

Witkin explains the difference of this standard from the normal preponderance of the evidence and gives the following rationale:

In a few situations, for reasons of policy of the substantive law, the ordinary 'preponderance of the evidence' is not considered sufficient to establish the fact in issue, and instead the party must prove it by 'clear and convincing evidence.' In such cases, of course, the jury or trial judge should not be satisfied with a slight preponderance in favor of the plaintiff. [citations.] [¶] The phrase has been defined as 'clear, explicit and unequivocal,' 'so clear as to leave no substantial doubt,' and 'sufficiently strong to command the unhesitating assent of every reasonable mind.' [Citation.] Otherwise stated, a preponderance calls for probability, while clear and convincing proof demands a *high probability*. [Citations.]

(1 Witkin, Cal. Evidence (4th ed., 2000) Burden of Proof and Presumptions, §38, p. 187.)

3. Business and Professions Code sections 4063.5 and 4113, subdivision (c), provide that a PIC is "responsible for a pharmacy's compliance with all state and federal regulations pertaining to the practice of pharmacy." Although these code sections were not referenced in the Accusation, testimony from Complainant's investigator and argument of Complainant's counsel made it clear that Respondent's apparent culpability for the pharmacy's violation of laws and regulations stem from his role as PIC.¹⁰ That explains why

¹⁰ See, *California Association of Health Facilities v. Department of Health Services* (1997) 16 Cal.4th 284, regarding the "non-delegable duties" of a professional licensee. The court held that even an unreasonable act of an employee of a licensee can form the basis for discipline against the licensee. But the case does not instruct that a professional license may be revoked due to the unforeseen conduct of its employee. In fact, in dictum the court suggests that an exception to the rule regarding the "non-delegable" duties of a licensee may be made where "under

the other two pharmacists working at the pharmacy, who signed for the majority of the Norco tablets that Hurtado stole, have not been charged by the Board in any disciplinary proceeding.

4. Based on the facts set forth in the above Findings, Complainant alleges six separate causes for discipline. Taken seriatim:

a. The first charge is that Respondent failed to maintain complete and accurate records in violation of Business and Professions Code sections 4300, 4301, subdivisions (j) and (o), 4005, 4081 and 4105, and California Code of Regulations, title 16, section 1718. This allegation is true. Respondent maintained no record of the Norco tablets Hurtado ordered and stole out of his presence and without his knowledge or approval.

b. The second charge is that Respondent failed to maintain the above-referenced records, of which he never had knowledge or possession, for three years in violation of the above code sections, but in particular Business and Professions Code section 4081, subdivision (a). As with the first charge, this charge is also true.

c. The third charge is that Respondent allowed a non-pharmacist, Hurtado, to order and sign for the Norco tablets in violation of Business and Professions Code section 4095.5, subdivision (a). This code section does not prohibit Hurtado from ordering drugs. It allows a pharmacy (person unspecified) to order drugs, but limits the signing of the receipt for drugs to "a pharmacist." As noted above, Hurtado signed for Norco tablets on three occasions. On two of those occasions, Respondent was not even at the pharmacy. On the third occasion, Respondent may have been present at the pharmacy, but it was not established that Respondent was on duty (i.e. not at lunch or on break) at the time Hurtado signed for the drugs. To the extent Respondent is ultimately the person responsible for acts committed by wayward employees out of his presence, he did violate this code section.

d. The fourth charge is that Respondent violated the provisions of Business and Professions Code section 4115, subdivision (h), which makes the "pharmacist on duty" "directly responsible for the conduct of a pharmacy technician supervised by that pharmacist." Hurtado was supervised by one of three pharmacists, including Respondent. All three pharmacists were responsible for her conduct while they were on duty. Only Respondent was charged under this code section. However, because he did supervise Hurtado, at least part of the time, her violations of the pharmacy law become his responsibility.

e. The fifth charge alleges that Respondent failed to maintain the pharmacy facility, space, fixtures, and equipment so that drugs are "safely and properly prepared, maintained and secured," in violation of California Code of Regulations, title 16, section 1714, subdivision (b). There was no evidence of any failure of Respondent to securely maintain the pharmacy facility. He did not leave drugs out in the open, leave doors unlocked

unusual circumstances" the employee commits an act outside her course of employment, an exception similar to the one available to employers' tort liability under the doctrine of *respondeat superior*. (Id. at 305.)

or fail to report broken computers or lights. The Norco came and left the premises through the theft of Hurtado. The ability of Hurtado to commit the theft was not caused by the mal-maintenance of any pharmacy facility. This charge was unproven as to Respondent.

f. The sixth charge is that Respondent failed "to secure the prescription department and provide effective controls" to prevent Hurtado's theft of Norco, in violation of California Code of Regulations, title 16, subdivision (d). This regulation applies not just to Respondent as PIC but to all "pharmacist[s] while on duty." Clearly, Hurtado stole Norco at times when Respondent was on duty, just as she did when the other two pharmacists were on duty. There were no effective controls in place to prevent her theft. Target could easily have provided such controls, as noted in Finding 12. However, had Respondent stopped his usual duties to stand over the pharmacy techs when they opened the drug delivery totes, and watch each one while the drugs were re-packaged and labeled for shelf use, he most likely would have caught the theft very early on and have prevented further thefts. Although it is not the custom and practice of pharmacists in the area to take such steps, the custom and practice does not negate Respondent's statutory duty to prevent the theft. (*California Association of Health Facilities v. Department of Health Services*, supra, at 295-297.)

5. Respondent is an excellent, caring pharmacist, licensed for almost 33 years with no disciplinary record. His integrity has never been challenged and is, indeed, above reproach. It was Respondent who first discovered the theft and immediately brought it to Target's attention. The theft was the result of many things, particularly Target's system of permitting drug orders to be made telephonically off-site, its failure to hire a sufficient number of pharmacists to secure the facility, and its apparent failure to even bother looking at drug invoices before paying them. Respondent's liability is statutory. Target's culpability is factual.

6. Business and Professions Code section 125.3 permits the Board to recover from Respondent its reasonable costs of investigation and prosecution of this disciplinary matter. As set forth in Finding 14, those costs total \$18,477. Of that amount, Target has already paid \$4,775. In *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, the Supreme Court rejected a constitutional challenge to a cost recovery provision similar to Business and Professions Code section 125.3. In so doing, however, the Court directed the administrative law judge and the agency to evaluate several factors to ensure that the cost recovery provision did not deter individuals from exercising their right to a hearing. Thus, the Board must not assess the full costs where it would unfairly penalize a Respondent who has committed some misconduct, but who has used the hearing process to obtain the dismissal of some charges or a reduction in the severity of the penalty. The Board must consider a Respondent's subjective good faith belief in the merits of his or her position and whether that Respondent has raised a colorable challenge. And the Board must consider a Respondent's ability to pay. (*Zuckerman*, supra at page 45.) In light of these factors, it would be unduly punitive to require Respondent to pay the remaining balance of the Board's costs. Based on Target's factual culpability, it was required it to pay approximately 25 percent of the Board's costs, and it was placed on five years' probation. The disciplinary order set forth below, which is based almost entirely on Respondent's statutory liability, is a

clear indication Respondent should be required to pay no more than \$1,847, which is 10 percent of the Board's costs.

7. In light of Respondent's lengthy unblemished license history, and his statutory, as opposed to factual, culpability, the public interest would be best served by permitting Respondent to retain unfettered licensure, but to publicly reprove Respondent under the provisions of Business and Professions Code Section 495.

* * * * *

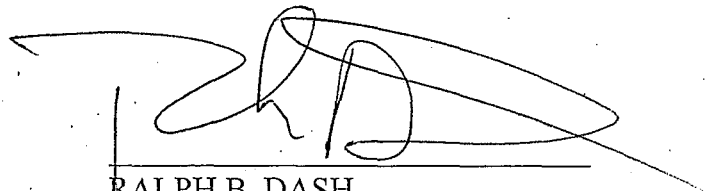
ORDER

WHEREFORE, THE FOLLOWING ORDER is hereby made:

1. Respondent Andrew Mark Sternberg is hereby reprovved for his conduct as set forth in the above Findings of Fact. Inclusion of this decision in the Board's public files shall constitute publication of this reprovval.

2. Respondent shall pay to the Board the sum of \$1,847; as and for its costs of investigation and prosecution of this matter, at such time and in such manner as the Board, in its discretion, may direct.

Date: 6-10-11



RALPH B. DASH
Administrative Law Judge
Office of Administrative Hearings

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Attorneys for Complainant

7
8 **BEFORE THE**
BOARD OF PHARMACY
9 **DEPARTMENT OF CONSUMER AFFAIRS**
STATE OF CALIFORNIA

10 In the Matter of the Accusation Against:

Case No. 3377

11 **TARGET STORE NO. T-228,**
12 **ANDREW MARK STERNBERG,**
Pharmacist-In-Charge
6635 Fallbrook Avenue
13 West Hills, CA 91307
Pharmacy Permit No. PHY 44113,

A C C U S A T I O N

14
15 **and**

16 **ANDREW MARK STERNBERG**
6840 Sunset Ridge Court
17 West Hills, CA 91307
Pharmacist License No. RPH 32370

18 Respondents.

19
20 Complainant alleges:

21 **PARTIES**

- 22 1. Virginia Herold (Complainant) brings this Accusation solely in her official capacity
23 as the Executive Officer of the Board of Pharmacy, Department of Consumer Affairs.
- 24 2. On or about February 17, 1999, the Board of Pharmacy (Board) issued Pharmacy
25 Permit No. PHY 44113 to Target Store No. T-228, Andrew Mark Sternberg, Pharmacist-In-
26 Charge (Respondent TARGET STORE NO. T-228). Andrew Mark Sternberg is and has been the
27 Pharmacist-In-Charge since July 21, 2001. The Pharmacy Permit was in full force and effect at
28 all times relevant to the charges brought herein and will expire on June 1, 2010, unless renewed.

1 the pharmacist has first interviewed the patient to determine the authenticity of the prescription.

2 “(c) The adoption, amendment, or repeal by the board of these or any other board rules or
3 regulations shall be in accordance with Chapter 3.5 (commencing with Section 11340) of Part 1
4 of Division 3 of Title 2 of the Government Code.”

5 7. Section 4059.5, subdivision (a), states:

6 “Except as otherwise provided in this chapter, dangerous drugs or dangerous devices may
7 only be ordered by an entity licensed by the board and shall be delivered to the licensed premises
8 and signed for and received by a pharmacist. Where a licensee is permitted to operate through a
9 designated representative, the designated representative may sign for and receive the delivery.”

10 8. Section 4081 states:

11 “(a) All records of manufacture and of sale, acquisition, or disposition of dangerous drugs
12 or dangerous devices shall be at all times during business hours open to inspection by authorized
13 officers of the law, and shall be preserved for at least three years from the date of making. A
14 current inventory shall be kept by every manufacturer, wholesaler, pharmacy, veterinary
15 food-animal drug retailer, physician, dentist, podiatrist, veterinarian, laboratory, clinic, hospital,
16 institution, or establishment holding a currently valid and unrevoked certificate, license, permit,
17 registration, or exemption under Division 2 (commencing with Section 1200) of the Health and
18 Safety Code or under Part 4 (commencing with Section 16000) of Division 9 of the Welfare and
19 Institutions Code who maintains a stock of dangerous drugs or dangerous devices.

20 “(b) The owner, officer, and partner of any pharmacy, wholesaler, or veterinary
21 food-animal drug retailer shall be jointly responsible, with the pharmacist-in-charge or
22 representative-in-charge, for maintaining the records and inventory described in this section.

23 “(c) The pharmacist-in-charge or representative-in-charge shall not be criminally
24 responsible for acts of the owner, officer, partner, or employee that violate this section and of
25 which the pharmacist-in-charge or representative-in-charge had no knowledge, or in which he or
26 she did not knowingly participate.”

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1 9. Section 4105 states:

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

5 "(b) The licensee may remove the original records or documentation from the licensed
6 premises on a temporary basis for license-related purposes. However, a duplicate set of those
7 records or other documentation shall be retained on the licensed premises.

8 "(c) The records required by this section shall be retained on the licensed premises for a
9 period of three years from the date of making.

10 "(d) Any records that are maintained electronically shall be maintained so that the
11 pharmacist-in-charge, the pharmacist on duty if the pharmacist-in-charge is not on duty, or, in the
12 case of a veterinary food-animal drug retailer or wholesaler, the designated representative on
13 duty, shall, at all times during which the licensed premises are open for business, be able to
14 produce a hard copy and electronic copy of all records of acquisition or disposition or other drug
15 or dispensing-related records maintained electronically.

16 "(e)(1) Notwithstanding subdivisions (a), (b), and (c), the board, may upon written request,
17 grant to a licensee a waiver of the requirements that the records described in subdivisions (a), (b),
18 and (c) be kept on the licensed premises.

19 (2) A waiver granted pursuant to this subdivision shall not affect the board's authority
20 under this section or any other provision of this chapter."

21 10. Section 4115, subdivision (h), states that "[t]he pharmacist on duty shall be directly
22 responsible for the conduct of a pharmacy technician supervised by that pharmacist.

23 11. Section 4300 states, in pertinent part, that "[e]very license issued may be suspended
24 or revoked."

25 12. Section 4301 states, in pertinent part:

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

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"(j) The violation of any of the statutes of this state, or any other 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 or by any other state or federal regulatory agency. . . ."

REGULATORY PROVISIONS

13. California Code of Regulations, title 16, section 1714 states, in pertinent part:

....

"(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 of 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."

14. California Code of Regulations, title 16, section 1718 states:

"'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."

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1 COST RECOVERY

2 15. Section 125.3 provides that the Board may request the administrative law judge to
3 direct a licensee found to have committed a violation or violations of the licensing act to pay a
4 sum not to exceed the reasonable costs of the investigation and enforcement of the case.

5 CONTROLLED SUBSTANCES / DANGEROUS DRUGS

6 16. Norco - is the brand name for a pain medication combining narcotic Hydrocodone
7 with non-narcotic acetaminophen¹ and is classified as a Schedule III narcotic substance pursuant
8 to Health and Safety Code section 115056 (e)(4) and a dangerous drug pursuant to Business and
9 Professions Code section 4022.

10 SUMMARY OF FACTS

11 17. The following facts are common to all charges of the Accusation:

12 a. On or about September 5, 2008, the Board received a "Report of Theft or Loss
13 of Controlled Substances" from Respondents in which they reported significant losses of the drug
14 Norco, attributed to theft by former employee Imelda Hurtado, a pharmacy technician (license no.
15 TCH 50509).

16 b. On or about August 13, 2008, Hurtado was detained while leaving Respondent
17 TARGET STORE NO. T-228 with 6 bottles of Norco concealed in her purse. At or about that
18 time, Hurtado admitted that on multiple occasions between September 2006 and August, 2008,
19 she made telephonic orders to Respondents' regular supplier/wholesaler (using the pharmacy's
20 account number) to order bottles of Norco², arranging for delivery of the unauthorized orders on
21 days when she was working.

22 c. On at least three instances (October 11, 2006; December 18, 2006, and
23 November 2, 2007) Hurtado personally signed for the delivery from the supplier. Apparently, she
24 more typically recovered the Norco post-delivery, while the shipment was being unpacked. A
25 Target investigator observing Hurtado on two separate instances in July 2008, watched her locate
26 then remove multiple bottles of Norco from a post-delivery shipment without interference from

27 ¹ Acetaminophen is an over-the-counter analgesic and is not a dangerous drug.

28 ² Bottles of Norco ordered by Hurtado contained 500 tablets (strength: 10mg/325mg)

1 other pharmacy staff.

2 d. During the subject time period, Norco was rarely dispensed by Respondent
3 TARGET STORE NO. T-228, and not generally kept in stock.

4 e. Hurtado destroyed or otherwise disposed of purchase invoices to conceal losses
5 of controlled substances through theft. That invoices were missing was not discovered for almost
6 two years.

7 f. Commencing on September 5, 2008, a selected drug audit was performed by
8 Board inspectors. The audit period was from September 1, 2006 and August 31, 2008. The audit
9 revealed that 216,630 tablets of Norco had been ordered and received but were not in stock and
10 unaccounted for:

11

12 DRUG	9/1/2006 INVENTORY AMOUNT	PURCHASED AMOUNT	DISPENSED AMOUNT	8/31/2008 INVENTORY AMOUNT	AMOUNT SHORT
13 Norco	130	216,500	0	0	216,630

14

15 **FIRST CAUSE FOR DISCIPLINE**

16 **(Failure to Maintain Complete and Accurate Records)**

17 18. Respondents TARGET STORE NO. T-228 and ANDREW MARK STERNBERG are
18 subject to disciplinary action under section 4300 for unprofessional conduct as defined in section
19 4301, subdivisions (j) and (o), in conjunction with sections 4005, 4081 and 4105, and California
20 Code of Regulations, title 16, section 1718 for failure to maintain a complete and accurate record
21 for all controlled substances/dangerous drugs received, sold, or otherwise disposed of by them.
22 As described in paragraph 17, above, Respondents were unable to account for 216,630 doses of
23 Norco, a controlled substance and dangerous drug, per a selected drug audit performed by Board
24 inspectors. The audit period was from September 1, 2006 to August 31, 2008. The audit revealed
25 that 216,630 tablets of Norco had been ordered and received but were not in stock and not
26 accounted for.

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1 SECOND CAUSE FOR DISCIPLINE

2 (Failure to Maintain Complete Acquisition/Disposition Records)

3 19. Respondents TARGET STORE NO. T-228 and ANDREW MARK STERNBERG
4 are subject to disciplinary action under section 4300 for unprofessional conduct as defined in
5 section 4301, subdivisions (j) and (o), in conjunction with sections 4081, subdivision (a), and
6 4105 for failure to maintain all records of acquisition and disposition for three (3) years from date
7 of making and to keep a current inventory of dangerous drugs. Respondents' employee stole
8 and/or destroyed purchase invoices to conceal losses of controlled substances through theft.
9 Neither the missing invoices, nor the large volume of controlled substances ordered without
10 authorization by Hurtado and delivered to the pharmacy, were discovered by Respondents for
11 almost two years, as described in paragraph 17, above.

12 THIRD CAUSE FOR DISCIPLINE

13 (Allowing a Non-Pharmacist to Order and Receive Controlled Substances)

14 20. Respondents TARGET STORE NO. T-228 and ANDREW MARK STERNBERG are
15 subject to disciplinary action under section 4300 for unprofessional conduct as defined in section
16 4301, subdivision (o), in conjunction with section 4059.5, subdivision (a), for allowing a non
17 pharmacist, pharmacy technician Imelda Hurtdo, to order and sign for the delivery (on October
18 11, 2006; December 18, 2006, and November 2, 2007) of controlled substances and dangerous
19 drugs, as described in paragraph 17 above.

20 FOURTH CAUSE FOR DISCIPLINE

21 (Failure to Properly Supervise Pharmacy Staff)

22 21. Respondents TARGET STORE NO. T-228 and ANDREW MARK STERNBERG are
23 subject to disciplinary action under section 4300 for unprofessional conduct as defined in section
24 4301, subdivision (o), in conjunction with section 4115, subdivision (h), for failing to properly
25 supervise pharmacy technician Imelda Hurtado's activities while working in the pharmacy,
26 allowing her to steal Norco, a controlled substance and dangerous drug. Complainant refers to
27 and by this reference incorporates allegations of paragraphs 17 – 20 above as though fully set
28 forth.

1 FIFTH CAUSE FOR DISCIPLINE

2 (Failure to Maintain Security of Pharmacy)

3 22. Respondents TARGET STORE NO. T-228 and ANDREW MARK STERNBERG are
4 subject to disciplinary action under section 4300 for unprofessional conduct as defined in section
5 4301, subdivision (o), in conjunction with section 4005 and California Code of Regulations, title
6 16, section 1714, subdivision (b), for failing to maintain its facilities, space, fixtures, and
7 equipment so that drugs are safely and properly prepared, maintained, secured. Respondents
8 failed to secure and maintain its facilities from diversion and theft. Complainant refers to and by
9 this reference incorporates allegations of paragraphs 17 – 21 above as though fully set forth.

10 SIXTH CAUSE FOR DISCIPLINE

11 (Failure to Maintain Security of Controlled Substances)

12 23. Respondent ANDREW MARK STERNBERG is subject to disciplinary action under
13 section 4300 for unprofessional conduct as defined in section 4301, subdivisions (o), in
14 conjunction with section 4005 and California Code of Regulations, title 16, section 1714,
15 subdivision (d), for failing to secure the prescription department and provide effective controls to
16 prevent theft or diversion of 216,630 doses of Norco, a controlled substance and dangerous drug,
17 between September 1, 2006 and August 31, 2008, and maintain records for such drugs.
18 Complainant refers to and by this reference incorporates allegations of paragraphs 17 – 22
19 above as though fully set forth.

20 PRAYER

21 WHEREFORE, Complainant requests that a hearing be held on the matters herein alleged,
22 and that following the hearing, the Board of Pharmacy issue a decision:

- 23 1. Revoking or suspending Pharmacy Permit No. PHY 44113, issued to Target Store
24 No. T-228;
- 25 2. Revoking or suspending Pharmacist License No. RPH 32370, issued to Andrew Mark
26 Sternberg;

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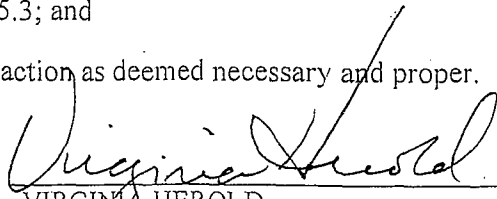
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3. Ordering Target Store No. T-228 and Andrew Mark Sternberg to pay the Board of Pharmacy the reasonable costs of the investigation and enforcement of this case, pursuant to Business and Professions Code section 125.3; and

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

DATED: 10/29/09



VIRGINIA HEROLD
Executive Officer
Board of Pharmacy
Department of Consumer Affairs
State of California
Complainant

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