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

10 In the Matter of the Accusation Against:

Case No. 3942

11 **JOSE ERNESTO GARCIA**
12 **1258 La Canada Way**
13 **Salinas, CA 93901**

DEFAULT DECISION AND ORDER

Pharmacy Technician License No. TCH 73658

[Gov. Code, §11520]

Respondent.

14 FINDINGS OF FACT

15 1. On or about May 27, 2011, Complainant Virginia Herold, in her official capacity as
16 the Executive Officer of the Board of Pharmacy, Department of Consumer Affairs, filed
17 Accusation No. 3942 against Jose Ernesto Garcia (Respondent) before the Board of Pharmacy.
18 (A copy of the Accusation is attached as Exhibit A.)

19 2. On or about December 21, 2006, the Board of Pharmacy issued Pharmacy Technician
20 License No. TCH 73658 to Respondent. The License was in effect at all times relevant to the
21 charges brought in Accusation No. 3942 and will expire on February 29, 2012, unless renewed.

22 3. On or about June 6, 2011, Respondent was served by Certified and First Class Mail
23 with copies of: Accusation No. 3879; a Statement to Respondent, a Notice of Defense (2 copies);
24 a Request for Discovery; and Discovery Statutes (Gov.Code, §§ 11507.5, 11507.6, 11507.7) at
25 Respondent's address of record, which was and is: 1258 La Canada Way, Salinas, CA 93901.

26 4. Pursuant to Business and Professions Code section 136 and/or 4100, and/or California
27 Code of Regulations, title 16, section 1704, Respondent's address of record, and any changes
28 thereto, are required to be reported and maintained with the Board of Pharmacy (Board).

1 5. Service of the Accusation was effective as a matter of law under Government Code
2 section 11505, subdivision (c) and/or Business & Professions Code section 124.

3 6. Government Code section 11506 states, in pertinent part:

4 (c) The respondent shall be entitled to a hearing on the merits if the respondent
5 files a notice of defense, and the notice shall be deemed a specific denial of all parts
6 of the accusation not expressly admitted. Failure to file a notice of defense shall
constitute a waiver of respondent's right to a hearing, but the agency in its discretion
may nevertheless grant a hearing.

7 7. Respondent failed to file a Notice of Defense within 15 days after service of the
8 Accusation, and therefore waived his right to a hearing on the merits of Accusation No. 3942.

9 8. California Government Code section 11520 states, in pertinent part:

10 (a) If the respondent either fails to file a notice of defense or to appear at the
11 hearing, the agency may take action based upon the respondent's express admissions
or upon other evidence and affidavits may be used as evidence without any notice to
12 respondent.

13 9. Pursuant to its authority under Government Code section 11520, the Board finds
14 Respondent is in default. The Board will take action without further hearing and, based on the
15 relevant evidence contained in the Default Decision Evidence Packet in this matter, as well as
16 taking official notice of all the investigatory reports, exhibits and statements contained therein on
17 file at the Board's offices regarding the allegations contained in Accusation No. 3942, finds that
18 the charges and allegations in Accusation No. 3942, are separately and severally, found to be true
19 and correct by clear and convincing evidence.

20 10. Taking official notice of its own internal records, pursuant to Business and
21 Professions Code section 125.3, it is hereby determined that the reasonable costs for Investigation
22 and Enforcement is \$3,338.50 as of September 13, 2011.

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DETERMINATION OF ISSUES

25 1. Based on the foregoing findings of fact, Respondent Jose Ernesto Garcia has
26 subjected his Pharmacy Technician License No. TCH 73658 to discipline.

27 2. The agency has jurisdiction to adjudicate this case by default.

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1 3. The Board of Pharmacy is authorized to revoke Respondent's Pharmacy Technician
2 License based upon the following violations alleged in the Accusation which are supported by the
3 evidence contained in the Default Decision Evidence Packet in this case.:

4 a. In violation of Business and Professions Code section 4301(f), Respondent did the
5 following acts involving moral turpitude, dishonesty, fraud, deceit, or corruption: In or between
6 September 2009 and May 2010, Respondent stole/diverted an unknown quantity of **Hydrocodone**
7 **with APAP** and **Xanax/alprazolam**, both controlled substances, from his employer (a Walgreens
8 pharmacy). At least some of the amount stolen/diverted was for Respondent's self-use. The total
9 quantity stolen/diverted is not known, but Walgreens reported amounts of 3,041 tablets of varying
10 strengths of **Hydrocodone with APAP**, and 2,510 tablets of varying strengths of **alprazolam**,
11 lost due to employee pilferage. In and/or during this period, Respondent also drank an unknown
12 quantity of **Cheratussin with codeine** cough syrup, a controlled substance, without prescription.

13 b. In violation of Business and Professions Code section 4301(h), Respondent, as
14 described above, administered one or more controlled substances to himself;

15 c. In violation of Business and Professions Code section(s) 4301(j), (o), and/or 4059 ,
16 and/or Health and Safety Code section 11170, Respondent, as described above, furnished to
17 himself or another without a valid prescription, and/or conspired, assisted or abetted furnishing
18 of, a controlled substance, without a valid prescription;

19 d. In violation of Business and Professions Code section(s) 4301(j), (o), and/or 4060,
20 and/or Health and Safety Code section 11350, Respondent, as described above, possessed,
21 conspired to possess and/or assisted in or abetted possession of, a controlled substance, without a
22 valid prescription;

23 e. In violation of Business and Professions Code section(s) 4301(j) and/or (o), and/or
24 Health and Safety Code section 11173(a), Respondent, as described above, obtained, conspired t
25 obtain and/or assisted in or abetted obtaining of, a controlled substance by fraud, deceit,
26 subterfuge, or concealment of a material fact;

27 f. In violation of Business and Professions Code section 4301, Respondent, as described
28 above, engaged in unprofessional conduct.

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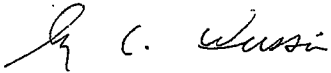
ORDER

IT IS SO ORDERED that Pharmacy Technician License No. TCH 73658, heretofore issued to Respondent Jose Ernesto Garcia, is revoked.

Pursuant to Government Code section 11520, subdivision (c), Respondent may serve a written motion requesting that the Decision be vacated and stating the grounds relied on within seven (7) days after service of the Decision on Respondent. The agency in its discretion may vacate the Decision and grant a hearing on a showing of good cause, as defined in the statute.

This Decision shall become effective on March 22, 2012.

It is so ORDERED February 21, 2012.



STANLEY C. WEISSER, BOARD PRESIDENT
FOR THE BOARD OF PHARMACY
DEPARTMENT OF CONSUMER AFFAIRS

20523024.DOC
DOJ Matter ID:SF2011200009

Attachment:
Exhibit A: Accusation

Exhibit A

Accusation

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2 FRANK H. PACOE
Supervising Deputy Attorney General
3 JOSHUA A. ROOM
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Attorneys for Complainant

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

10 In the Matter of the Accusation Against:

Case No. 3942

11 **JOSE ERNESTO GARCIA**
12 **1258 La Canada Way**
13 **Salinas, CA 93901**

A C C U S A T I O N

14 **Pharmacy Technician License No. TCH 73658**

15 Respondent.

16 Complainant alleges:

17 PARTIES

- 18 1. Virginia Herold (Complainant) brings this Accusation solely in her official capacity
19 as the Executive Officer of the Board of Pharmacy, Department of Consumer Affairs.
- 20 2. On or about December 21, 2006, the Board of Pharmacy issued Pharmacy Technician
21 License Number TCH 73658 to Jose Ernesto Garcia (Respondent). The Pharmacy Technician
22 License was in full force and effect at all times relevant to the charges brought herein and will
23 expire on February 29, 2012, unless renewed.

24
25 JURISDICTION

- 26 3. This Accusation is brought before the Board of Pharmacy (Board), Department of
27 Consumer Affairs, under the authority of the following laws. All section references are to the
28 Business and Professions Code (Code) unless otherwise indicated.

1 4. Section 4011 of the Code provides that the Board shall administer and enforce both
2 the Pharmacy Law [Bus. & Prof. Code, § 4000 et seq.] and the Uniform Controlled Substances
3 Act [Health & Safety Code, § 11000 et seq.].

4 5. Section 4300(a) of the Code provides that every license issued by the Board may be
5 suspended or revoked.

6 6. Section 118(b) of the Code provides, in pertinent part, that the suspension, expiration,
7 surrender, or cancellation of a license shall not deprive the Board of jurisdiction to proceed with a
8 disciplinary action during the period within which the license may be renewed, restored, reissued
9 or reinstated. Section 4402(a) of the Code provides that any pharmacist license that is not
10 renewed within three years following its expiration may not be renewed, restored, or reinstated
11 and shall be canceled by operation of law at the end of the three-year period. Section 4402(e) of
12 the Code provides that any other license issued by the Board may be canceled by the Board if not
13 renewed within 60 days after its expiration, and will require a new application.

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STATUTORY AND REGULATORY PROVISIONS

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7. Section 4301 of the Code provides, in pertinent part, that the Board shall take action
against any holder of a license who is guilty of "unprofessional conduct," defined to include, but
not be limited to, any of the following:

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(f) The commission of any act involving moral turpitude, dishonesty, fraud, deceit, or
corruption, whether the act is committed in the course of relations as a licensee or otherwise, and
whether the act is a felony or misdemeanor or not.

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(h) The administering to oneself, of any controlled substance, or the use of any dangerous
drug or of alcoholic beverages to the extent or in a manner as to be dangerous or injurious to
oneself, to a person holding a license under this chapter, or to any other person or to the public, or
to the extent that the use impairs the ability of the person to conduct with safety to the public the
practice authorized by the license.

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

1 (o) Violating or attempting to violate, directly or indirectly, or assisting in or abetting the
2 violation of or conspiring to violate any provision or term of this chapter or of the applicable
3 federal and state laws and regulations governing pharmacy, including regulations established by
4 the board or by any other state or federal regulatory agency.

5 8. California Code of Regulations, title 16, section 1770, states:

6 "For the purpose of denial, suspension, or revocation of a personal or facility license
7 pursuant to Division 1.5 (commencing with Section 475) of the Business and Professions Code, a
8 crime or act shall be considered substantially related to the qualifications, functions or duties of a
9 licensee or registrant if to a substantial degree it evidences present or potential unfitness of a
10 licensee or registrant to perform the functions authorized by her license or registration in a
11 manner consistent with the public health, safety, or welfare."

12 9. Section 4059 of the Code, in pertinent part, prohibits furnishing of any dangerous
13 drug or dangerous device except upon the prescription of an authorized prescriber.

14 10. Section 4060 of the Code provides, in pertinent part, that no person shall possess any
15 controlled substance, except that furnished upon a valid prescription/drug order.

16 11. Health and Safety Code section 11170 provides that no person shall prescribe,
17 administer, or furnish a controlled substance for himself or herself.

18 12. Health and Safety Code section 11173, subdivision (a), provides that no person shall
19 obtain or attempt to obtain controlled substances, or procure or attempt to procure the
20 administration of or prescription for controlled substances, (1) by fraud, deceit, misrepresentation,
21 or subterfuge; or (2) by the concealment of a material fact.

22 13. Health and Safety Code section 11350, in pertinent part, makes it unlawful to possess
23 any controlled substance listed in Schedule II (Health and Safety Code section 11055),
24 subdivision (b) or (c), or any narcotic drug in Schedules III-V, absent a valid prescription.

25 14. Section 125.3 of the Code provides, in pertinent part, that the Board may request the
26 administrative law judge to direct a licentiate found to have committed a violation of the licensing
27 act to pay a sum not to exceed its reasonable costs of investigation and enforcement.
28

CONTROLLED SUBSTANCES / DANGEROUS DRUGS

15. Section 4021 of the Code states:

“Controlled substance’ means any substance listed in Chapter 2 (commencing with Section 11053) of Division 10 of the Health and Safety Code.”

16. Section 4022 of the Code states, in pertinent part:

“Dangerous drug’ or ‘dangerous device’ means any drug or device unsafe for self use, except veterinary drugs that are labeled as such, and includes the following:

“(a) Any drug that bears the legend: ‘Caution: federal law prohibits dispensing without prescription,’ ‘Rx only,’ or words of similar import.

...

“(c) Any other drug or device that by federal or state law can be lawfully dispensed only on prescription or furnished pursuant to Section 4006.”

17. **Norco, Vicodin, Vicodin ES, Lortab, and Lorcet** are among the brand names for compounds of varying dosages of acetaminophen (aka APAP) and **hydrocodone**, a Schedule III controlled substance as designated by Health and Safety Code section 11056(e)(4) and dangerous drug as designated by Business and Professions Code section 4022. The varying compounds are also known generically as **Hydrocodone with APAP**. These are all narcotic drugs.

18. **Xanax** is a brand name for **alprazolam**, a Schedule IV controlled substance as designated by Health and Safety Code section 11057(d)(1) and a dangerous drug as designated by Business and Professions Code section 4022. It is a depressant drug.

19. **Cheratussin AC** and **Robitussin AC** are among the brand names for a compound of the expectorant guaifenesin and **codeine**, a Schedule V controlled substance as designated by Health and Safety Code section 11058(c)(1) and a dangerous drug as designated by Business and Professions Code section 4022. These are also known generically as **Guaifenesin with Codeine**. These combinations are an expectorant cough syrup, and a narcotic analgesic.

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1 FACTUAL BACKGROUND

2 20. From an unknown start date until on or about April 27, 2010, Respondent worked as a
3 pharmacy technician in at least three Walgreens Pharmacy stores, two stores (Walgreens #4170;
4 PHY 42140 and Walgreens #6419; PHY 45178) in Elk Grove, CA, and a third (Walgreens #2961;
5 PHY 39364) in Lodi, CA, where by virtue of his employment Respondent enjoyed access to
6 controlled substances and dangerous drugs.

7 21. During the tenure of his employment with Walgreens, Respondent used his access to
8 divert/steal controlled substances and dangerous drugs, including **Hydrocodone with APAP** drug
9 products, and **Xanax/alprazolam** drug products.

10 22. The exact number of instances of diversion/theft by Respondent, and the full quantity
11 of controlled substances or dangerous drugs diverted/stolen, are not known, but in the course of
12 investigations conducted by Walgreens and by the Board, the following were reported:

13 a. On or about April 19, 2010, while at work at Walgreens #4170, Respondent
14 participated in a random urine drug test. The test results were positive for **hydrocodone** and for
15 **alprazolam**. (Also for **hydromorphone**, though this is a potential metabolite from **hydrocodone**
16 and may not indicate that any **hydromorphone**-containing drugs were actually ingested.)

17 b. On or about April 27, 2010, Respondent admitted to Walgreens investigators
18 that he had been diverting/stealing controlled substances/dangerous drugs from Walgreens #4170,
19 Walgreens #6419, and Walgreens #2961. He said he began taking medications from Walgreens
20 during Summer 2009. He admitted to taking seventy-five (75) tablets of **Xanax/alprazolam** (65
21 - 2 mg tablets + 10 - 1 mg tablets) and twenty (20) **Hydrocodone with APAP 5/500** tablets.

22 c. Subsequent audits of the controlled substances stocks of the three Walgreens
23 Pharmacy stores in which Respondent worked for the period from September 2009 to May 2010
24 revealed the following shortages: 461 tablets of varying strengths of **alprazolam**, and 1,107
25 tablets of varying strengths of **Hydrocodone with APAP**, short at Walgreens # 4170; 148 tablets
26 of varying strengths of **alprazolam**, and 981 tablets of varying strengths of **Hydrocodone with**
27 **APAP**, short at Walgreens # 6419; and 1,901 tablets of varying strengths of **alprazolam**, and 953
28 tablets of varying strengths of **Hydrocodone with APAP**, short at Walgreens # 2961.

1 23. During the course of his interviews with Walgreens investigator(s), Respondent also
2 admitted that he sometimes drank/ingested his grandmother's **Cheratussin** cough syrup (with
3 **codeine**), for which he did not have a prescription.

4
5 FIRST CAUSE FOR DISCIPLINE

6 (Acts Involving Moral Turpitude, Dishonesty, Fraud, Deceit or Corruption)

7 24. Respondent is subject to discipline under section 4301(f) of the Code, in that
8 Respondent, as described in paragraphs 20 to 23 above, committed numerous acts involving
9 moral turpitude, dishonesty, fraud, deceit, or corruption.

10 SECOND CAUSE FOR DISCIPLINE

11 (Self-Administration of Controlled Substances)

12 25. Respondent is subject to discipline under section 4301(h) of the Code, in that
13 Respondent, as described in paragraphs 20 to 23 above, administered one or more controlled
14 substances to himself, including **hydrocodone**, **alprazolam**, and **codeine** drug products.

15 THIRD CAUSE FOR DISCIPLINE

16 (Furnishing of Controlled Substance(s))

17 26. Respondent is subject to discipline under section 4301(j) and/or (o) and/or section
18 4059 of the Code, and/or Health and Safety Code section 11170, in that Respondent, as described
19 in paragraphs 20 to 23 above, furnished to himself or another, and/or conspired to furnish, and/or
20 assisted or abetted furnishing of, a controlled substance/dangerous drug, without a prescription.

21 FOURTH CAUSE FOR DISCIPLINE

22 (Possession of Controlled Substance(s))

23 27. Respondent is subject to discipline under section 4301(j) and/or (o) and/or section
24 4060 of the Code, and/or Health and Safety Code section 11350, in that Respondent, as described
25 in paragraphs 20 to 23 above, possessed, conspired to possess, and/or assisted in or abetted
26 possession of, a controlled substance, without a prescription.

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1 FIFTH CAUSE FOR DISCIPLINE

2 (Obtaining Controlled Substance by Fraud, Deceit or Subterfuge)

3 28. Respondent is subject to discipline under section 4301(j) and/or (o) of the Code,
4 and/or Health and Safety Code section 11173(a), in that Respondent, as described in paragraphs
5 20 to 23 above, obtained, conspired to obtain, and/or assisted in or abetted the obtaining of a
6 controlled substance, by fraud, deceit, subterfuge, or concealment of material fact.

7 SIXTH CAUSE FOR DISCIPLINE

8 (Unprofessional Conduct)

9 29. Respondent is subject to discipline under section 4301 of the Code in that
10 Respondent, as described in paragraphs 20 to 28 above, engaged in unprofessional conduct.

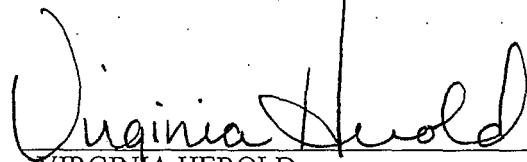
11 PRAYER

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

- 14 1. Revoking or suspending Pharmacy Technician License No. TCH 73658, issued to
- 15 Jose Ernesto Garcia (Respondent);
- 16 2. Ordering Respondent to pay the Board the reasonable costs of the investigation and
- 17 enforcement of this case, pursuant to Business and Professions Code section 125.3;
- 18 3. Taking such other and further action as is deemed necessary and proper.

19 DATED: _____

20 5/27/11

21 

22 VIRGINIA HEROLD
23 Executive Officer
24 Board of Pharmacy
25 Department of Consumer Affairs
26 State of California
27 Complainant

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