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

In the Matter of the Accusation Against:
GERARDO SAMANIEGO
P.O. Box 434
Seeley, CA 92273

**Pharmacy Technician Registration No. TCH
58994**

Respondent.

Case No. 4363
DEFAULT DECISION AND ORDER

[Gov. Code, §11520]

FINDINGS OF FACT

1. On or about December 14, 2012, Complainant Virginia K. Herold, in her official capacity as the Executive Officer of the Board of Pharmacy, Department of Consumer Affairs, filed Accusation No. 4363 against Gerardo Samaniego (Respondent) before the Board of Pharmacy. (Accusation attached as Exhibit A.)

2. On or about October 21, 2004, the Board of Pharmacy (Board) issued Pharmacy Technician Registration No. TCH 58994 to Respondent. The Pharmacy Technician Registration was in full force and effect at all times relevant to the charges brought in Accusation No. 4363 and will expire on September 30, 2014, unless renewed.

1 3. On or about December 26, 2012, Respondent was served by Certified and First Class
2 Mail copies of the Accusation No. 4363, Statement to Respondent, Notice of Defense, Request
3 for Discovery, and Discovery Statutes (Government Code sections 11507.5, 11507.6, and
4 11507.7) at Respondent's address of record which, pursuant to Business and Professions Code
5 section 4100 and California Code of Regulations, title 16, section 1704, is required to be reported
6 and maintained with the Board. Respondent's address of record was and is:

7 P.O. Box 434
8 Seeley, CA 92273.

9 4. Service of the Accusation was effective as a matter of law under the provisions of
10 Government Code section 11505, subdivision (c) and/or Business & Professions Code section
11 124.

12 5. Government Code section 11506 states, in pertinent part:

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

18 6. Respondent failed to file a Notice of Defense within 15 days after service upon him
19 of the Accusation, and therefore waived his right to a hearing on the merits of Accusation No.
20 4363.

21 7. California Government Code section 11520 states, in pertinent part:

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

26 8. Pursuant to its authority under Government Code section 11520, the Board finds
27 Respondent is in default. The Board will take action without further hearing and, based on the
28 relevant evidence contained in the Default Decision Evidence Packet in this matter, as well as
taking official notice of all the investigatory reports, exhibits and statements contained therein on
file at the Board's offices regarding the allegations contained in Accusation No. 4363, finds that

1 the charges and allegations in Accusation No. 4363, are separately and severally, found to be true
2 and correct by clear and convincing evidence.

3 9. Taking official notice of its own internal records, pursuant to Business and
4 Professions Code section 125.3, it is hereby determined that the reasonable costs for Investigation
5 and Enforcement is \$995.00 as of January 16, 2013.

6 DETERMINATION OF ISSUES

7 1. Based on the foregoing findings of fact, Respondent Gerardo Samaniego has
8 subjected his Pharmacy Technician Registration No. TCH 58994 to discipline.

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

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

13 a. Respondent is subject to disciplinary action under sections 490 and 4301, subdivision
14 (l) of the Code in that he was convicted of a crime substantially related to the qualifications,
15 functions, and duties of a licensee. The circumstances are that on or about November 17, 2011, in
16 a criminal proceeding entitled *People v. Gerardo Samaniego*, in Imperial County Superior Court,
17 case number JCF27733, Respondent was convicted on his plea of guilty of violating Health and
18 Safety Code section 11351, possession for sale of the controlled substance hydrocodone, a felony.

19 b. Respondent is subject to disciplinary action under Code section 4301, subdivision (j)
20 in that Respondent possessed the controlled substance hydrocodone/APAP in violation of Code
21 section 4060.

22 c. Respondent is subject to disciplinary action under Code section 4301, subdivision (f)
23 in that Respondent possessed for sale a controlled substance, an act of moral turpitude.

24 d. Respondent is subject to disciplinary action under Code section 4301, subdivision (h)
25 in that Respondent used a controlled substance to an extent or in a manner dangerous or injurious
26 to herself and the public when he consumed the controlled substance hydrocodone/APAP to
27 satisfy his drug addiction, wherein he would consume ten to fifteen pills a day.

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ORDER

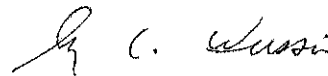
IT IS SO ORDERED that Pharmacy Technician Registration No. TCH 58994, heretofore issued to Respondent Gerardo Samaniego, is revoked.

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 April 17, 2013.

It is so ORDERED ON March 18, 2013.

BOARD OF PHARMACY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA



By

STANLEY C. WEISSER
Board President

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DOJ Matter ID:SD2012703794

Attachment:
Exhibit A: Accusation

Exhibit A

Accusation

1 KAMALA D. HARRIS
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2 LINDA K. SCHNEIDER
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3 ADRIAN R. CONTRERAS
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E-mail: Adrian.Contreras@doj.ca.gov
8 *Attorneys for Complainant*

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

12 In the Matter of the Accusation Against:

Case No. 4363

13 **GERARDO SAMANIEGO**
14 **P.O. Box 434**
Seeley, CA 92273

A C C U S A T I O N

15 **Pharmacy Technician Registration No. TCH**
16 **58994**

17 Respondent.

18 Complainant alleges:

19 **PARTIES**

20 1. Virginia Herold (Complainant) brings this Accusation solely in her official capacity
21 as the Executive Officer of the Board of Pharmacy, Department of Consumer Affairs.

22 2. On or about October 21, 2004, the Board of Pharmacy issued Pharmacy Technician
23 Registration Number TCH 58994 to Gerardo Samaniego (Respondent). The Pharmacy
24 Technician Registration was in full force and effect at all times relevant to the charges brought
25 herein and will expire on September 30, 2014, unless renewed.

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1 **JURISDICTION**

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

5 4. Section 118, subdivision (b), of the Code provides that the suspension, expiration,
6 surrender, or cancellation of a license shall not deprive the Board of jurisdiction to proceed with a
7 disciplinary action during the period within which the license may be renewed, restored, reissued
8 or reinstated.

9 5. Section 4300 of the Code states:

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

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

14 "(1) Suspending judgment.

15 "(2) Placing him or her upon probation.

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

17 "(4) Revoking his or her license.

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

20 "..."

21 **STATUTORY PROVISIONS**

22 6. Section 477 of the Code states:

23 As used in this division:

24 "(a) 'Board' includes 'bureau,' 'commission,' 'committee,' 'department,' 'division,'
25 'examining committee,' 'program,' and 'agency.'

26 "(b) 'License' includes certificate, registration or other means to engage in a
27 business or profession regulated by this code."

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1 7. Section 482 of the Code states:

2 "Each board under the provisions of this code shall develop criteria to evaluate the
3 rehabilitation of a person when:

4 "(a) Considering the denial of a license by the board under Section 480; or

5 "(b) Considering suspension or revocation of a license under Section 490.

6 "Each board shall take into account all competent evidence of rehabilitation furnished by
7 the applicant or licensee."

8 8. Section 490 of the Code states:

9 "(a) In addition to any other action that a board is permitted to take against a licensee, a
10 board may suspend or revoke a license on the ground that the licensee has been convicted of a
11 crime, if the crime is substantially related to the qualifications, functions, or duties of the business
12 or profession for which the license was issued.

13 "(b) Notwithstanding any other provision of law, a board may exercise any authority to
14 discipline a licensee for conviction of a crime that is independent of the authority granted under
15 subdivision (a) only if the crime is substantially related to the qualifications, functions, or duties
16 of the business or profession for which the licensee's license was issued.

17 "(c) A conviction within the meaning of this section means a plea or verdict of guilty or a
18 conviction following a plea of nolo contendere. Any action that a board is permitted to take
19 following the establishment of a conviction may be taken when the time for appeal has elapsed, or
20 the judgment of conviction has been affirmed on appeal, or when an order granting probation is
21 made suspending the imposition of sentence, irrespective of a subsequent order under the
22 provisions of Section 1203.4 of the Penal Code.

23 "(d) The Legislature hereby finds and declares that the application of this section has been
24 made unclear by the holding in *Petropoulos v. Department of Real Estate* (2006) 142 Cal.App.4th
25 554, and that the holding in that case has placed a significant number of statutes and regulations
26 in question, resulting in potential harm to the consumers of California from licensees who have
27 been convicted of crimes. Therefore, the Legislature finds and declares that this section
28 establishes an independent basis for a board to impose discipline upon a licensee, and that the

1 amendments to this section made by Senate Bill 797 of the 2007 -08 Regular Session do not
2 constitute a change to, but rather are declaratory of, existing law."

3 9. Section 493 of the Code states:

4 "Notwithstanding any other provision of law, in a proceeding conducted by a board within
5 the department pursuant to law to deny an application for a license or to suspend or revoke a
6 license or otherwise take disciplinary action against a person who holds a license, upon the
7 ground that the applicant or the licensee has been convicted of a crime substantially related to the
8 qualifications, functions, and duties of the licensee in question, the record of conviction of the
9 crime shall be conclusive evidence of the fact that the conviction occurred, but only of that fact,
10 and the board may inquire into the circumstances surrounding the commission of the crime in
11 order to fix the degree of discipline or to determine if the conviction is substantially related to the
12 qualifications, functions, and duties of the licensee in question.

13 "As used in this section, 'license' includes 'certificate,' 'permit,' 'authority,' and
14 'registration.'"

15 10. Section 4060 of the Code states:

16 "No person shall possess any controlled substance, except that furnished to a person upon
17 the prescription of a physician, dentist, podiatrist, optometrist, veterinarian, or naturopathic doctor
18 pursuant to Section 3640.7, or furnished pursuant to a drug order issued by a certified
19 nurse-midwife pursuant to Section 2746.51, a nurse practitioner pursuant to Section 2836.1, or a
20 physician assistant pursuant to Section 3502.1, or naturopathic doctor pursuant to Section 3640.5,
21 or a pharmacist pursuant to either subparagraph (D) of paragraph (4) of, or clause (iv) of
22 subparagraph (A) of paragraph (5) of, subdivision (a) of Section 4052. This section shall not
23 apply to the possession of any controlled substance by a manufacturer, wholesaler, pharmacy,
24 pharmacist, physician, podiatrist, dentist, optometrist, veterinarian, naturopathic doctor, certified
25 nurse-midwife, nurse practitioner, or physician assistant, when in stock in containers correctly
26 labeled with the name and address of the supplier or producer."

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1 "Nothing in this section authorizes a certified nurse-midwife, a nurse practitioner, a
2 physician assistant, or a naturopathic doctor, to order his or her own stock of dangerous drugs and
3 devices."

4 11. Section 4301 of the Code states:

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

8 "...

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

12 "...

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

18 "...

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

21 "(l) The conviction of a crime substantially related to the qualifications, functions, and
22 duties of a licensee under this chapter. The record of conviction of a violation of Chapter 13
23 (commencing with Section 801) of Title 21 of the United States Code regulating controlled
24 substances or of a violation of the statutes of this state regulating controlled substances or
25 dangerous drugs shall be conclusive evidence of unprofessional conduct. In all other cases, the
26 record of conviction shall be conclusive evidence only of the fact that the conviction occurred.
27 The board may inquire into the circumstances surrounding the commission of the crime, in order
28 to fix the degree of discipline or, in the case of a conviction not involving controlled substances

1 or dangerous drugs, to determine if the conviction is of an offense substantially related to the
2 qualifications, functions, and duties of a licensee under this chapter. A plea or verdict of guilty or
3 a conviction following a plea of nolo contendere is deemed to be a conviction within the meaning
4 of this provision. The board may take action when the time for appeal has elapsed, or the
5 judgment of conviction has been affirmed on appeal or when an order granting probation is made
6 suspending the imposition of sentence, irrespective of a subsequent order under Section 1203.4 of
7 the Penal Code allowing the person to withdraw his or her plea of guilty and to enter a plea of not
8 guilty, or setting aside the verdict of guilty, or dismissing the accusation, information, or
9 indictment.

10 ". . . ."

11 12. Section 4022 of the Code states

12 "Dangerous drug" or "dangerous device" means any drug or device unsafe for self-use in
13 humans or animals, and includes the following:

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

16 "(b) Any device that bears the statement: "Caution: federal law restricts this device to sale
17 by or on the order of a _____," "Rx only," or words of similar import, the blank to be filled
18 in with the designation of the practitioner licensed to use or order use of the device.

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

21 REGULATORY PROVISIONS

22 13. California Code of Regulations, title 16, section 1769, states:

23 "...

24 "(b) When considering the suspension or revocation of a facility or a personal license on the
25 ground that the licensee or the registrant has been convicted of a crime, the board, in evaluating
26 the rehabilitation of such person and his present eligibility for a license will consider the
27 following criteria:

28 "(1) Nature and severity of the act(s) or offense(s).

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“(2) Total criminal record.

“(3) The time that has elapsed since commission of the act(s) or offense(s).

“(4) Whether the licensee has complied with all terms of parole, probation, restitution or any other sanctions lawfully imposed against the licensee.

“(5) Evidence, if any, of rehabilitation submitted by the licensee.

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

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

COSTS

15. Section 125.3 of the Code provides, in pertinent part, that the Board may request the administrative law judge to direct a licentiate found to have committed a violation or violations of the licensing act to pay a sum not to exceed the reasonable costs of the investigation and enforcement of the case.

DRUGS

16. Hydrocodone is marketed under numerous trade names, including Vicodin and Norco. Hydrocodone/APAP is a Schedule III controlled substance pursuant to Health and Safety Code section 11056, subdivision (e)(1), and is a dangerous drug pursuant to Code section 4022.

FIRST CAUSE FOR DISCIPLINE

(November 17, 2011, Criminal Conviction for Possession for Sale of a Controlled Substance on August 22, 2011)

17. Respondent is subject to disciplinary action under sections 490 and 4301, subdivision (l) of the Code in that he was convicted of a crime substantially related to the qualifications, functions, and duties of a licensee. The circumstances are as follows:

1 18. On or about November 17, 2011, in a criminal proceeding entitled *People v. Gerardo*
2 *Samaniego*, in Imperial County Superior Court, case number JCF27733, Respondent was
3 convicted on his plea of guilty of violating Health and Safety Code section 11351, possession for
4 sale of the controlled substance hydrocodone, a felony. As a result of a plea agreement, one
5 count of violating Penal Code section 504, embezzlement, a felony, was dismissed.

6 19. As a result of the conviction, Respondent was sentenced to three years formal
7 probation, ordered to register as a drug offender pursuant to Health and Safety Code section
8 11590, and pay fines and fees.

9 20. The facts that led to the conviction are that on or about August 22, 2011, officers with
10 the El Centro Police Department responded to a local Target store because there had been a report
11 that Respondent, a pharmacy technician working at the pharmacy inside of the Target, had stolen
12 hydrocodone/APAP pills while working. In-house investigators of Target detained Respondent at
13 the store before the police arrived. The in-house investigators gave the officers a baggie that
14 Respondent had in his pocket when he was detained. The baggie had about 200 white pills
15 marked with "M367." The officers were also given an empty pill container that the in-house
16 investigators saw on a surveillance video Respondent throwing away in a trash can. After the
17 officers read Respondent his Miranda warnings, he admitted that he had become "addicted" to
18 hydrocodone/APAP three years previously, wherein he would take as many as ten to fifteen pills
19 a day. The officers showed him the baggie, and he admitted that it was the same baggie of the
20 stolen hydrocodone/APAP he had in his pocket. They showed him the pill container, and he
21 admitted that it was the same container that he threw away after he emptied the pills into the
22 baggie. The officers asked Respondent if he ever sold these pills to others previously, and he
23 answered that he sold pills previously to others at twenty dollars a baggie for "chump change"
24 and gas money.

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SECOND CAUSE FOR DISCIPLINE

**(Unprofessional Conduct-Violation of Laws Regulating Controlled Substances
and Dangerous Drugs)**

21. Respondent is subject to disciplinary action under Code sections 4301, subdivision (j) in that Respondent possessed the controlled substance hydrocodone/APAP in violation of Code section 4060. The circumstances are described in paragraphs 17-20, above, and are hereby incorporated as if fully set forth herein.

THIRD CAUSE FOR DISCIPLINE

(Unprofessional Conduct-Act of Moral Turpitude)

22. Respondent is subject to disciplinary action under Code sections 4301, subdivision (f) in that Respondent committed possession for sale of a controlled substance, an act of moral turpitude. The circumstances are described in paragraphs 17-20, above, and are hereby incorporated as if fully set forth herein.

FOURTH CAUSE FOR DISCIPLINE

**(Unprofessional Conduct-Use of a Controlled Substance to an Extent or in a
Manner Dangerous or Injurious to Oneself or to Others)**

23. Respondent is subject to disciplinary action under Code 4301, subdivision (h) in that as described in paragraph 20 above, Respondent used a controlled substance to an extent or in a manner dangerous or injurious to herself and the public when he consumed the controlled substance hydrocodone/APAP to satisfy his drug addiction, wherein he would consume ten to fifteen pills a day.

PRAYER

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

1. Revoking or suspending Pharmacy Technician Registration Number 58994, issued to Gerardo Samaniego;

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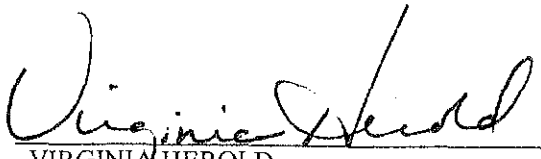
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2. Ordering Gerardo Samaniego to pay the Board of Pharmacy the reasonable costs of the investigation and enforcement of this case, pursuant to Business and Professions Code section 125.3; and

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

DATED: 12/14/12



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

SD2012703794
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