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

12 In the Matter of the Accusation Against:

Case No. 5368

13 **FERNANDO LUIS CLAUSTRO**
14 **139 Stillman Way #3**
15 **Upland, CA 91786**
16 **Pharmacy Technician Registration License**
17 **No. TCH 109536**

DEFAULT DECISION AND ORDER

[Gov. Code, §11520]

18 Respondent.

19
20 **FINDINGS OF FACT**

21 1. On or about May 4, 2015, Complainant Virginia K. Herold, in her official capacity as
22 the Executive Officer of the Board of Pharmacy, Department of Consumer Affairs, filed
23 Accusation No. 5368 against Fernando Luis Claustro (Respondent) before the Board of
24 Pharmacy. (Accusation attached as Exhibit A.)

25 2. On or about December 27, 2010, the Board of Pharmacy (Board) issued Pharmacy
26 Technician Registration License No. TCH 109536 to Respondent. The Pharmacy Technician
27 Registration License was in full force and effect at all times relevant to the charges brought in
28 Accusation No. 5368 and will expire on July 31, 2014, unless renewed.

1 3. On or about May 29, 2015, Respondent was served by Certified and First Class Mail
2 copies of the Accusation No. 5368, Statement to Respondent, Notice of Defense, Request for
3 Discovery, and Discovery Statutes (Government Code sections 11507.5, 11507.6, and 11507.7) at
4 Respondent's address of record which, pursuant to Business and Professions Code section 4100,
5 is required to be reported and maintained with the Board. Respondent's address of record was
6 and is:

7 139 Stillman Way #3
8 Upland, CA 91786.

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
11 section 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 5368.

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. 5368, finds that

1 the charges and allegations in Accusation No. 5368, 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 \$1,272.50 as of September 28, 2015.

6 DETERMINATION OF ISSUES

7 1. Based on the foregoing findings of fact, Respondent Fernando Luis Claustro has
8 subjected his Pharmacy Technician Registration License No. TCH 109536 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 License based upon the following violations alleged in the Accusation which are
12 supported by the evidence contained in the Default Decision Evidence Packet in this case.:

13 a. Business and Professions Code sections 4300 and 4301, subdivision (h) for dangerous
14 use of controlled substances, unprofessional conduct.

15 b. Business and Professions Code sections 4300 and 4301, subdivision (j), and Health
16 and Safety Code section 11173, for drug statute violations, unprofessional conduct.

17 c. Business and Professions Code sections 4300 and 4301, subdivisions (o), for
18 violating Business and Professions Code sections 4059 and 4060, for Pharmacy Law violations,
19 unprofessional conduct.

20 d. Business and Professions Code sections 4300 and 4301, subdivision (o), for violating
21 Business and Professions Code section 4314, for failure to comply with Board issued citation,
22 unprofessional conduct.

23 e. Business and Professions Code sections 4300 and 4301, subdivision (f), for acts
24 involving moral turpitude, dishonesty, fraud, deceit or corruption, unprofessional conduct.

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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.

It is so ORDERED November 18, 2015.

Azhar Cortiz

Amy Gutierrez, Pharm.D.
Board President

Attachment:
Exhibit A: Accusation

Exhibit A

Accusation

(FERNANDO LUIS CLAUSTRO)

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

11 In the Matter of the Accusation Against:

Case No. 5368

12 **FERNANDO LUIS CLAUSTRO**
13 139 Stillman Way #3
Upland, CA 91786

A C C U S A T I O N

14 Pharmacy Technician Registration License
15 No. TCH 109536

16 Respondent.

17
18 Complainant alleges:

19 **PARTIES**

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

22 2. On or about December 27, 2010, the Board issued Pharmacy Technician Registration
23 License No. TCH 109536 to Fernando Luis Claustro (Respondent). The Pharmacy Technician
24 Registration License was in full force and effect at all times relevant to the charges brought herein
25 and will expire on July 31, 2014, unless renewed.

26 **JURISDICTION**

27 3. This Accusation is brought before the Board, under the authority of the following
28 laws. All section references are to the Business and Professions Code unless otherwise indicated.

1 4. Section 4300, subdivision (a), states that "[e]very license issued may be suspended or
2 revoked."

3 5. Section 4300.1 states:

4 "The expiration, cancellation, forfeiture, or suspension of a board-issued license by operation
5 of law or by order or decision of the board or a court of law, the placement of a license on a
6 retired status, or the voluntary surrender of a license by a licensee shall not deprive the board of
7 jurisdiction to commence or proceed with any investigation of, or action or disciplinary proceeding
8 against, the licensee or to render a decision suspending or revoking the license."

9 **STATUTORY PROVISIONS**

10 6. Section 492 states:

11 "Notwithstanding any other provision of law, successful completion of any diversion
12 program under the Penal Code, or successful completion of an alcohol and drug problem
13 assessment program under Article 5 (commencing with section 23249.50) of Chapter 12 of
14 Division 11 of the Vehicle Code, shall not prohibit any agency established under Division 2
15 ([Healing Arts] commencing with Section 500) of this code, or any initiative act referred to in that
16 division, from taking disciplinary action against a licensee or from denying a license for
17 professional misconduct, notwithstanding that evidence of that misconduct may be recorded in a
18 record pertaining to an arrest.

19 "This section shall not be construed to apply to any drug diversion program operated by any
20 agency established under Division 2 (commencing with Section 500) of this code, or any initiative
21 act referred to in that division."

22 7. Section 4301 states, in pertinent part:

23 "The board shall take action against any holder of a license who is guilty of unprofessional
24 conduct or whose license has been procured by fraud or misrepresentation or issued by mistake.

25 Unprofessional conduct shall include, but is not limited to, any of the following:

26

27 "(f) The commission of any act involving moral turpitude, dishonesty, fraud, deceit, or
28 corruption, whether the act is committed in the course of relations as a licensee or otherwise, and

1 whether the act is a felony or misdemeanor or not.

2

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

8

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

11

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

16 8. Section 4314 states:

17 "(a) The board may issue citations containing fines and orders of abatement for any
18 violation of Section 733, for any violation of this chapter or regulations adopted pursuant to this
19 chapter, or for any violation of Division 116 (commencing with Section 150200) of the Health and
20 Safety Code, in accordance with Sections 125.9, 148, and 4005 and the regulations adopted
21 pursuant to those sections.

22 "(b) Where appropriate, a citation issued by the board, as specified in this section, may
23 subject the person or entity to whom the citation is issued to an administrative fine.

24 "(c) Notwithstanding any other provision of law, where appropriate, a citation issued by
25 the board may contain an order of abatement. The order of abatement shall fix a reasonable time
26 for abatement of the violation. It may also require the person or entity to whom the citation is
27 issued to demonstrate how future compliance with the Pharmacy Law, and the regulations adopted
28 pursuant thereto, will be accomplished. A demonstration may include, but is not limited to,

submission of a corrective action plan, and requiring completion of up to six hours of continuing education courses in the subject matter specified in the order of abatement. Any continuing education courses required by the order of abatement shall be in addition to those required for license renewal.

“(d) Nothing in this section shall in any way limit the board from issuing a citation, fine, and order of abatement pursuant to Section 4067 or Section 56.36 of the Civil Code, and the regulations adopted pursuant to those sections.”

PHARMACY LAW

9. Section 4059 provides that a person may not furnish any dangerous drug except upon the prescription of a physician, dentist, podiatrist, optometrist, veterinarian, or naturopathic doctor pursuant to Section 3640.7. A person may not furnish any dangerous device, except upon the prescription of a physician, dentist, podiatrist, optometrist, veterinarian, or naturopathic doctor pursuant to Section 3640.7.

10. Section 4060 states:

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

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

CONTROLLED SUBSTANCES / DANGEROUS DRUGS

16. Cocaine is a Schedule II controlled substance as designated in Health and Safety Code section 11055(b)(6), and is categorized as a dangerous drug according to section 4022.

17. Marijuana is a hallucinogenic Schedule I controlled substance under State and federal law (Health & Saf. Code § 11054 subd. (d)(13); and 21 U.S.C. § 812.); and a dangerous drug pursuant to section 4022.

FIRST CAUSE FOR DISCIPLINE

(Dangerous Use of Controlled Substance(s))

18. Respondent is subject to disciplinary action under section 4300, and 4301, subdivision (h), on the grounds of unprofessional conduct, in that on or about July 4, 2014, Respondent used Cocaine and / or Marijuana, controlled substances and dangerous drugs, to the extent or in a manner as to be dangerous or injurious to himself or others, as follows:

a. On or about July 5, 2014, Respondent was stopped by a law enforcement officer for driving a vehicle that was playing extremely loud music, music that could be heard more than 50 feet away. Respondent informed the officer that he did not realize that he was playing music that loud and was unable to maintain his balance when standing. While the officer noticed a smell of marijuana emit from Respondent, Respondent admitted that he smoked marijuana earlier and directed the officer's gaze with his finger to small pieces of marijuana cigarettes in the vehicle's ashtray. During a consented search of Respondent and his vehicle, Respondent was found in possession of 0.8 grams of cocaine and 4.2 grams of marijuana, admittedly belonging to Respondent. Respondent informed the officer that the baggies and scale found in his vehicle's trunk were from over a month ago when he used to sell drugs, but he does not sell drugs anymore because he turned things around, and forgot to take the scale and baggies out of his trunk.

b. Subsequently, on or about September 8, 2014, after Respondent plead guilty to violating Health and Safety Code section 11350(a) [possession of a controlled substance, to wit, cocaine] in the criminal proceeding entitled *The People of the State of California v. Fernando Luis Claustro* (Super. Ct. San Bernardino County, 2014, No. FWV1403375), the Court ordered him placed on supervised probation for 36 months in the Proposition 36 program. In addition, the

1 Court ordered Respondent to register as a controlled substance offender, pursuant to Health and
2 Safety Code section 11590/11594.

3 **SECOND CAUSE FOR DISCIPLINE**

4 **(Drug Statute Violation)**

5 19. Respondent is subject to disciplinary action under section 4300, 4301, subdivision (j),
6 for violating Health and Safety Code section 11173, subdivision (a), on the grounds of
7 unprofessional conduct, in that on or about July 4, 2014, Respondent was in possession of Cocaine
8 and Marijuana, controlled substances and dangerous drugs, without valid prescriptions.
9 Complainant refers to and by this reference incorporates the allegations set forth above in
10 paragraph 18, subparagraphs a and b, inclusive, as though set forth fully.

11 **THIRD CAUSE FOR DISCIPLINE**

12 **(Pharmacy Law Violations)**

13 20. Respondent is subject to disciplinary action under section 4300, 4301, subdivision (o),
14 for violating section 4059 and 4060, on the grounds of unprofessional conduct, in that on or about
15 July 4, 2014, Respondent was in possession of Cocaine and Marijuana, controlled substances and
16 dangerous drugs, without valid prescriptions. Complainant refers to and by this reference
17 incorporates the allegations set forth above in paragraph 18, subparagraphs a and b, inclusive, as
18 though set forth fully.

19 **FOURTH CAUSE FOR DISCIPLINE**

20 **Failure to Comply with Board Issued Citation)**

21 21. Respondent is subject to disciplinary action under section 4300, 4301, subdivision (o),
22 for violating section 4314, on the grounds of unprofessional conduct, in that Respondent failed to
23 comply with a Board issued citation with circumstances as follows:

24 a. On or about May 17, 2013, the Board issued administrative Citation No.
25 CI 2012 54644 with a \$400.00 fine, due on or about June 16, 2013. Citation No. CI-2012-54644
26 is final and unpaid. Citation No. CI 2012 54644 alleged violations of:

27 i. Section 4301, subdivision (h) [unprofessional conduct – administering to oneself, of
28 any controlled substance, or the use of any dangerous drug or of alcoholic beverages. . .]. On or

1 about August 4, 2012, Respondent was arrested for violating misdemeanor Vehicle Code Section
2 23152(a) – Driving Under the Influence of Alcohol or Drugs and misdemeanor Vehicle Code
3 Section 23152(b) – DUI/0.08 Percent.

4 ii. Section 4301, subdivision (I) [unprofessional conduct – conviction of a crime
5 substantially related to the practice of pharmacy]. On or about February 14, 2013, Respondent
6 was convicted of misdemeanor Vehicle Code Section 23152(a) – driving under the influence of
7 alcohol or drugs and misdemeanor Vehicle Code section 23152(b) – DUI/0.08 percent.

8 **FIFTH CAUSE FOR DISCIPLINE**

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

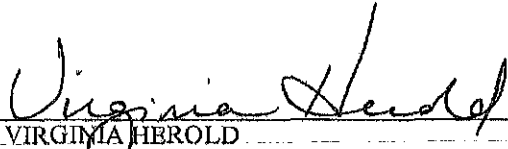
10 22. Respondent is subject to disciplinary action under sections 4300 and 4301, subdivision
11 (f), on the grounds of unprofessional conduct, in that Respondent committed acts involving moral
12 turpitude, dishonesty, fraud, deceit, or corruption. Complainant refers to and by this reference
13 incorporates the allegations set forth above in paragraphs 18 - 21, inclusive, as though set forth
14 fully.

15 **PRAYER**

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

- 18 1. Revoking or suspending Pharmacy Technician Registration License No. TCH 109536,
19 issued to Fernando Luis Claustro;
- 20 2. Ordering Fernando Luis Claustro to pay the Board the reasonable costs of the
21 investigation and enforcement of this case, pursuant to section 125.3; and
- 22 3. Taking such other and further action as deemed necessary and proper.

23
24 DATED: 5/4/15


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

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