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

In the Matter of the Accusation Against: **ORANGE PHARMACY** Original Pharmacy Permit No. PHY 35565 **TUE NGOC HOANG** Pharmacist License No. RPH 41779 Respondents.	Case No. 3122 OAH No. 2010031018 **NOTICE OF DECISION AND DENIAL OF RECONSIDERATION**

NOTICE REGARDING DENIAL OF RECONSIDERATION

The effective date of the decision in the above-entitled matter having heretofore been stayed until June 17, 2013 for the purpose of permitting respondents to file a petition for reconsideration of said decision, and no action having been taken by the Board on the petition 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 17, 2013, is the Board of Pharmacy's final decision in this matter.

BOARD OF PHARMACY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

By

STAN C. WEISSER
Board President

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

In the Matter of the Accusation Against: **ORANGE PHARMACY** Owner/Partner Tue Ngoc Hoang Owner/Partner Vinh N. Hoang 9972 Bolsa Avenue, Suite 103 Westminster, CA 92683 Original Pharmacy Permit No. PHY 35565 and **TUE NGOC HOANG** 112 Timerline Lane Santa Ana, CA 92705 Pharmacist License No. RPH 41779, Respondents.	Case No. 3122 OAH No. 201031018

STAY OF EFFECTIVE DATE

Respondents filed a Petition for Reconsideration in the above-entitled matter on June 3, 2013. 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 June 17, 2013.

IT IS SO ORDERED this 6th day of June, 2013.

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: **ORANGE PHARMACY** Original Pharmacy Permit No. PHY 35565 and **TUE NGOC HOANG** Pharmacist License No. RPH 41779, Respondents.	Case No. 3122 OAH No. 2010031018

DECISION AFTER NONADOPTION

Robert Walker, Administrative Law Judge, State of California, Office of Administrative Hearings, heard this matter on June 11, 12, and 13, 2012, in San Diego, California.

Marichelle S. Tahimic, Deputy Attorney General, represented the complainant, Virginia Herold, Executive Officer, Board of Pharmacy.

Ismail Amin, Attorney at Law, represented the respondents, Tue Ngoc Hoang and Orange Pharmacy. Tue Hoang did not appear personally. He appeared only through his counsel.

The record was closed on June 13, 2012.

The proposed decision of the Administrative Law Judge was submitted to the Board of Pharmacy on August 14, 2012. After due consideration thereof, the Board of Pharmacy declined to adopt said proposed decision and thereafter on October 19, 2012 issued an Order of Non-adoption. Subsequently, on December 10, 2012, the

Board issued an Order Fixing Date for Submission of Argument. After receiving a request from Complainant's counsel for additional time to submit arguments, the Board extended time to allow arguments to be filed on January 22, 2013. The Board was subsequently notified on or about January 22, 2013 that an incomplete set of transcripts had been produced. The Board received a complete set of transcripts on January 31, 2013 and issued an Amended Order Fixing Date for Argument on February 26, 2013. Written argument having been received from Complainant and Respondents, the time for filing written argument in this matter having expired, and the entire record, including the transcripts 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:

SUMMARY

In Orange County, pharmacies that fill prescriptions for Medi-Cal patients obtain payment through CalOptima. Because of Orange Pharmacy's refusal to agree to new contract terms, it was terminated from participating in the CalOptima program. Orange Pharmacy, nevertheless, continued to fill prescriptions for Medi-Cal patients. Orange Pharmacy obtained payment by having Pacific Pharmacy pretend it had filled the prescriptions.

Complainant alleges that the respondents engaged in dishonesty and fraud. Complainant also alleges that the respondents engaged in a number of acts of misconduct in connection with transferring dangerous drugs between pharmacies.

Complainant seeks suspension or revocation of Tue Hong's pharmacist license and Orange Pharmacy's permit.

Complainant also seeks cost recovery, and there are issues concerning cost recovery.

In this decision, it is determined that the respondents engaged in dishonesty and fraud but that there were no transfers of dangerous drugs between pharmacies.

FACTUAL FINDINGS

Background

1. On May 12, 1988, the Board of Pharmacy issued Pharmacist License Number RPH 41779 to respondent Tue Hoang; the license is current and set to expire on August 31, 2013. On May 15, 1989, the board issued Original Pharmacy Permit Number PHY 35565 to respondent Orange Pharmacy (Orange); the license is current and is set to expire on May 01, 2014. Tue Hoang owns Orange and, since May 15, 1989, has been the pharmacist- in- charge.

2. By an accusation dated November 7, 2007, the complainant, Virginia Herold, Executive Officer of the Board of Pharmacy, sought the revocation or suspension of Tue Hoang's license and Orange's permit. Complainant alleges that the respondents engaged in dishonesty and fraud. Complainant also alleges that the respondents engaged in a number of acts of misconduct in connection with transferring dangerous drugs between pharmacies.

3. Le Thuy Truong owned Pacific Pharmacy (Pacific). Ms. Truong's husband, Que Buu, was the pharmacist- in- charge of Pacific.

4. "CalOptima" is an integrated health care system that administers health insurance programs for children, low income families, and persons with disabilities. It is a public agency organized through Orange County for the purpose of administering the Medi-Cal benefit in that area.

5. When a medical provider has provided a benefit that is covered by the Medi-Cal program – including prescription drugs – the provider applies for reimbursement.[1] In Orange County, with minor exceptions that are not relevant here, claims for Medi-Cal reimbursement for pharmaceuticals must be made through CalOptima. CalOptima contracts with a privately owned pharmacy benefits manager (PBM) to accept and process claims in Orange County for Medi-Cal reimbursements for pharmaceuticals.

6. In order to be qualified to submit a claim to CalOptima's PBM, a pharmacy must be a party to a contract with the PBM. The pharmacies that have entered into contracts with the PBM are referred to as CalOptima's pharmacy network. In 2004 and for some time before that, Orange and Pacific were part of the CalOptima network.

7. In 2005, CalOptima added a new condition to the contract that pharmacies were required to enter into with the PBM. Pharmacies would be required to participate in the Fraud Prevention Institute – a private, nonprofit corporation. Under the terms of the new contract provision, a pharmacy would be required to permit the Fraud Prevention Institute to complete an on-site review of the pharmacy's operation.

8. A number of pharmacies objected to the new provision and refused to sign the new contract. The deadline for executing the new contract was January 1, 2005, but CalOptima extended the deadline twice. The second extension was to April 18, 2005. On that date, CalOptima sent Orange and other pharmacies a letter that provided, in part, "[You have] elected not to register or otherwise participate with the

[1] The term *reimbursement* is odd here. A pharmacy supplies a drug to a patient and applies to CalOptima for payment. There is no repayment or reimbursement. Nevertheless, the term commonly used is *reimbursement*.

Fraud Prevention Institute. . . . [Your] online billing for CalOptima members will be terminated. Termination will be effective April 19, 2005."

9. Twenty-seven pharmacies that were owned by Vietnamese-Americans filed a suit in the Superior Court of California for the County of Orange. The suit was against the Orange County Health Authority, the Fraud Prevention Institute, the County of Orange, and others. Orange was one of the plaintiffs. The plaintiffs alleged that all of the plaintiffs were pharmaceutical providers that sought to be able to apply for reimbursement from Medi-Cal without having to agree to CalOptima's new contract provision requiring participation in the Fraud Prevention Institute. The plaintiffs alleged as follows: The defendants had discriminated against the plaintiffs based on race and other impermissible grounds. The Fraud Prevention Institute functions as an auditor and private investigator but is not licensed to act in either of those capacities. The new contract provision involves a requirement that pharmacies waive patient privacy rights, which would be a violation of the California Constitution. The new contract provision involves an impermissible delegation of authority to set fraud prevention standards.

10. There were other allegations. The plaintiffs sought monetary damages and an injunction ordering the defendants not to require the new contract provision. The plaintiffs sought other remedies. The plaintiffs filed a second amended complaint on July 12, 2005. There was no evidence as to the date of the original filing.

11. While a number of pharmacies, including Orange, continued to refuse to enter into the new contract, other pharmacies, including Pacific,[2] did enter into it.

Orange Engaged Pacific To Obtain Payment From The PBM For Prescriptions Orange Filled

12. On April 19, 2005, Orange was no longer able to submit claims and receive reimbursement from CalOptima (AR June 12, 2012 at 30:8-14). Regardless, sometime after April 19, 2005, Orange entered into an arrangement with Pacific as follows: Orange would continue to fill prescriptions for CalOptima's patients. Pacific would pretend it had filled those prescriptions, would apply to CalOptima's PBM for reimbursements, and would share the reimbursements with Orange.

13. What did these pharmacies hope to gain by this subterfuge? Orange expected to be able to enter into a contract with CalOptima's PBM in the future. It was possible the plaintiffs would prevail in their legal action or that CalOptima would relent and drop the requirement concerning the Fraud Prevention Institute. With that in mind, it was important to Orange to maintain its Medi-Cal patients. If Orange had told its CalOptima patients that it could not serve them, those patients would have gone to other pharmacies. It was likely that, after Orange entered into a contract with the PBM, many of those patients would stay with their new pharmacies rather than return to Orange.

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[2] It is noted that Pacific was also a Plaintiff in the lawsuit referred to herein.

14. Orange and Pacific acted on their agreement. Orange filled Medi-Cal prescriptions and then billed Pacific for the prescriptions that Orange itself had filled. (AR June 11, 2012 at 157:1-5; 164:1-5.) Pacific applied to CalOptima's PBM for reimbursement. The PBM for CalOptima, acting on Pacific's representations that it had filled the prescriptions, reimbursed Pacific. When Pacific received a payment from CalOptima, it would write a check to Orange for the invoiced amount (AR June 11, 2012 at 157:22-161:11; Complainant's Exs. 16 and 24). The director of CalOptima's pharmacy management testified that from July 2005 through December 2005, the amount that Pacific was billing CalOptima for medications increased substantially; she provided a table setting forth those monthly payment amounts. (AR June 12, 2012 AR 32-33:6-8; Complainant's Ex. 26.) In July 2005, the amount paid to Pacific was $43,332.30 and by December 2005, the payment amount had increased to $73,319.06. (Complainant's Ex. 26.) At hearing, the Board's inspector estimated that of the total Pacific was paid from August 4, 2005 through November 21, 2006, Orange invoiced Pacific for about 38% of the total or approximately $195,000. (AR June 12, 2012 at 80:5-81:13; Complainant's Ex. 20.)

15. Mr. Tue Hoang, as the owner and pharmacist- in- charge of Orange, is personally responsible for ensuring Orange's compliance with all state and federal laws pertaining to the practice of pharmacy. (Bus. & Prof. Code, § 4036.5.) Consequently, he is responsible for Orange's dishonest conduct.

The Mechanics

16. Each pharmacy had prescription labels with its name, address, and phone number preprinted on the labels. Orange would create a set of Orange labels for a prescription and fill the prescription. Orange would send Pacific a record of having filled the prescription. Mr. Buu then would create a duplicate set of Pacific labels for that prescription. Based on the strip label from the duplicate set, Mr. Buu would apply to the PBM for reimbursement. The Pacific strip label and the application for reimbursement constituted Pacific's representation to the PBM that Pacific had filled the prescription. CalOptima would assume from these representations that Pacific, and not Orange, had actually dispensed those prescriptions to Medi-Cal patients. (AR June 12, 2012 at 33:22-25.)

17. The pharmacies maintained records of the prescriptions Orange sent to Pacific for collection, records of the reimbursements Pacific received from the PBM, and records of payments Pacific made to Orange.

18. The pharmacies also misused certain documents in what appears to have been a feeble attempt to lend an appearance of legitimacy to their arrangement – documents such as a "Refill Pharmacies Contract," purchased and borrowed logs, returned to stock memos (RTS), and labels that incorrectly stated that prescriptions

had been transferred. These documents have legitimate uses, but Orange and Pacific misused them as part of their illicit arrangement.

Mr. Buu Admitted What He Was Doing

19. On September 13, 2006, Robert Kazabee, an inspector for the board, conducted a routine inspection of Pacific. He noticed a copy of Orange's prescription log, and asked why Pacific had it. Mr. Buu said Orange no longer was able to bill CalOptima, so he admitted that Pacific billed on Orange's behalf. In a written statement dated September 26, 2006, Mr. Buu elaborated. In the written statement he explained why the pharmacies engaged in this practice and explained something about the mechanics of how they accomplished it.

20. On January 23, 2007, Robert M. Venegas, an inspector for the board, conducted an inspection of Orange. Mr. Kazabee accompanied Mr. Venegas. They spoke with Paul Hoang, who is Tue Hoang's son and the business manager of Orange. Mr. Kazabee and Mr. Venegas told Paul Hoang they wanted documents concerning Orange's billings to CalOptima. Paul Hoang knew about Mr. Buu's disclosure and his written statement. Paul Hoang said Orange had been suspended from CalOptima and was having Pacific bill CalOptima for the Medi-Cal patients Orange served.

Rehabilitation and Other Evidence

21. Tue Hoang did not appear personally. He appeared only through his counsel. He has a right to do that, but he has left unanswered a number of questions concerning rehabilitation.

22. There was no evidence that Tue Hoang recognizes that what he did was wrong. There was no evidence that he is remorseful for participating in the subterfuge. There was no evidence that he is determined not to be dishonest in the future. There was no evidence that he has made any effort to rehabilitate himself.

23. Respondent Orange Pharmacy's business manager, Paul Hoang, testified that "we never believed that what we did was wrong or dishonest." (AR June 13, 2012 at 23:12-23.) In furtherance of respondents' defense, Paul Hoang claimed that Orange was actually acting as a "refill" pharmacy for Pacific to help Pacific's patients. As he explained it, Orange was acting as a refill pharmacy to "insure that the patients would get the medications on time, because Pacific was behind.." (AR June 12, 2012 at 188:1-11.) However, such representations are contradicted by other evidence in the record. Mr. Buu testified that Orange did not act as a refill pharmacy for Pacific during 2005-2006. (AR June 11, 2012 at 165:5-7.) The record reflects that respondents, with the help of Pacific, engaged in a deliberate scheme to mislead CalOptima by using manufactured prescription labels that represented that Pacific provided the pharmacy service when in fact those prescriptions were filled by Orange. As part of that scheme, Orange would "fax" prescription information to Pacific under

the guise of "transferring" prescriptions to Pacific when, in truth, those prescriptions had already been filled by Orange. (AR June 11, 2012 at 41:3-43:2; 151:22-154:8; Complainant's Ex. 5.) There was no credible evidence that respondents acted either as a refill pharmacy or transferred any of the prescriptions at issue in this case to Pacific for processing prior to the filling of those prescriptions.

24. In terms of mitigation, the Board considered that there was no evidence of respondents having engaged in other misconduct. . Respondent has operated Orange for over 23 years, and there was no evidence of any discipline having been imposed against his license. There was no evidence of any prior warnings and no evidence of prior misconduct. In December of 2006, Orange signed a new contract with the PBM, a contract that had no provision concerning the Fraud Prevention Institute. Orange cooperated with the board's inspectors.

25. However, these mitigating matters do not excuse Tue Hoang for participating in the dishonest arrangement whereby Pacific obtained payment for prescriptions Orange filled.

There Were No Drug Transfers

26. As noted above, the pharmacies misused certain documents in what appears to have been a feeble attempt to lend an appearance of legitimacy to their arrangement – documents such as purchased and borrowed logs. Some of the documents the pharmacies improperly used suggested there had been drug transfers. The record reflects that this was in fact part of the scheme to help facilitate what was truly occurring: the billing of CalOptima for services by a non-contracted provider (Orange). Complainant's alleged causes for discipline numbers two through five concern drug transfers between Orange and Pacific. There, however, was no evidence of any such drug transfers between these two pharmacies.

Cost Recovery

27. Complainant submitted two certifications of costs. One certification was for inspector's costs and interpreter's fees. The certification says:

> Inspector's costs through 9/20/2010,
> 66.25 hours at $102 per hour $6,757.50.
>
> Inspector's costs from 9/20/2010 through May 14, 2012,
> 35.50 hours at $102 per hour $3,621.00.
>
> Interpreter fees from September 30, 2010, $975.00.

28. The total is $11,353.50.

29. Business and Professions Code section 125.3, subdivision (a), provides, in part:

> [T]he administrative law judge may 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.

30. California Code of Regulations, title 1, section 1042, subdivision (b), provides, in part:

> Except as otherwise provided by law, proof of costs at the Hearing may be made by Declarations that contain specific and sufficient facts to support findings regarding actual costs incurred and the reasonableness of the costs, which shall be presented as follows:
>
> (1) For services provided by a regular agency employee, the Declaration may be executed by the agency or its designee and shall describe the general tasks performed, the time spent on each task and the method of calculating the cost. For other costs, the bill, invoice or similar supporting document shall be attached to the Declaration.
>
> (2) For services provided by persons who are not agency employees, the Declaration shall be executed by the person providing the service and describe the general tasks performed, the time spent on each task and the hourly rate or other compensation for the service. In lieu of this Declaration, the agency may attach to its Declaration copies of the time and billing records submitted by the service provider.

31. In an award for costs, an essential finding is that the costs incurred were reasonable. Business and Professions Code section 125.3, subdivision (d), specifies "reasonable costs." California Code of Regulations, title 1, section 1042, subdivision (b), provides that declarations are to contain facts to support findings regarding actual costs and "the reasonableness of the costs." Subdivision (b)(1) requires a description of "the time spent on each task." This is required so that the judge can make some assessment as to whether the time spent on various tasks was reasonable.

32. The Administrative Law Judge in this matter found that the certification concerning inspector's costs and interpreter's fees fails to satisfy the requirements of section 1042, subdivision (b), and fails to provide evidence that can support a finding

as to the amount of reasonable costs. Thus, the request for $11,353.50 in cost recovery must be denied.

33. Complainant also submitted a certification of costs for work performed by the Office of the Attorney General. The certification concerns work performed in 2007 through 2012 at a cost of $36,384.50. Attached to that certification is a form entitled "Matter Time Activity By Professional Type." The attachment contains a general description of the tasks performed, the time spent on the tasks, and the hourly rate of compensation. The Administrative Law Judge in this matter found that the certification satisfies the requirements of section 1042, subdivision (b) and the certification supports a finding that those costs are reasonable.

34. The Attorney General's costs certification says, also, that it is estimated in good faith that an additional $1,020 in costs were or will be billed to the board for further preparation. The Administrative Law Judge found that an estimate of costs expected to be incurred in the future fails to satisfy the requirements of Business and Professions Code section 125.3 or California Code of Regulations, title 1, section 1042. He further determined that an estimate of costs that were incurred in the past can support an award only if, as is required by California Code of Regulations, title 1, section 1042, subdivision (b)(3), the agency explains "the reason actual cost information is not available." Here there is no such explanation. Therefore, the Administrative Law Judge determined that the estimated costs are not allowed.

35. Pursuant to Business and Professions Code section 125.3(d), these findings are not reviewable by the Board to increase the cost award. It is found that, within the terms of Business and Professions Code section 125.3, subdivision (a), the reasonable costs are $36,384.50.

LEGAL CONCLUSIONS

The Standard of Proof

1. Complainant must prove her case by clear and convincing evidence to a reasonable certainty. Clear and convincing evidence means the evidence is "so clear as to leave no substantial doubt" and is "sufficiently strong to command the unhesitating assent of every reasonable mind." (*Mathieu v. Norrell Corporation* (2004) 115 Cal.App.4th 1174, 1190 [citing *Mock v. Michigan Millers Mutual Ins. Co.* (1992) 4 Cal.App.4th 306, 332-333].)

2. 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.)

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.

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.)

4. "The licensee, if he elects to operate his business through employees must be responsible to the licensing authority for their conduct in the exercise of his license...By virtue of the ownership of a ...license such owner has a responsibility to see to it that the license is not used in violation of the law." *Banks v. Board of Pharmacy* (1984) 161 Cal.App.3d 708, 713, citing *Ford Dealers Assn. v. Department of Motor Vehicles* (1982) 32 Cal.3d 347.

Grounds to Suspend or Revoke Respondent Orange's Permit and Respondent Hoang's License

5. By reason of the matters set forth in Findings 4 through 20 and 23, it is established by clear and convincing evidence that respondents committed acts of dishonesty and fraud. Orange and Pacific worked together to mislead CalOptima into paying pharmacy claims for services provided by Orange when CalOptima would not have otherwise paid those claims. Under this scheme, Orange, who was not a contracted and authorized CalOptima provider, would submit its pharmacy claims and copies of its pharmacy labels to Pacific, who was a contracted CalOptima provider. (See Factual Finding 16.) Pacific, using Orange's pharmacy labels, then created new labels that falsely represented to the PBM of CalOptima that it had filled the prescriptions that, in fact, Orange had filled. In reliance on Pacific's representations, the PBM made payments for pharmacy services to Pacific. Payments were then funneled to Orange from Pacific. The respondents, by intentionally participating in this scheme and subterfuge, engaged in dishonesty and fraud. Business and Professions Code section 4301, subdivision (f), provides that the commission of any act involving dishonesty or fraud is an act of unprofessional conduct. As both the owner of Orange and the pharmacist-in-charge of Orange, Respondent Hoang is legally responsible for all dishonest and fraudulent acts attributable to Orange. Further, section 4301 provides that the board shall take action against a licensee who is guilty of

unprofessional conduct. Thus, there are grounds to discipline Tue Hoang's pharmacist license and Orange's original pharmacy permit.

6. In causes for discipline numbers two through five, complainant alleges grounds for discipline that relate to transfers of drugs between Orange and Pacific. By reason of the matters set forth in Findings 18 and 26, it is determined that there were no transfers of drugs. Thus, those alleged grounds for imposing discipline are not sustained.

What Discipline Is Appropriate?

7. The board has published disciplinary guidelines. The guidelines promote uniformity and fairness in the determination of the level of discipline imposed on licensees or licensed premises when there has been a violation of the pharmacy law or pharmacy regulations. In the guidelines, the board created four categories of violations and recommended appropriate levels of disciplinary penalties. The categories are not exclusive, and the recommended disciplines for premises are slightly different from the recommended disciplines for individuals.

8. With regard to an individual license, the recommended minimum discipline for a category III violation is a stayed revocation with three to five years of probation and 90 days of actual suspension. The recommended maximum discipline is outright revocation.

9. With regard to a premises permit, the recommended minimum discipline for a category III violation is a stayed revocation with three to five years of probation and a minimum of 14 to 28 days of actual suspension. The recommended maximum discipline is outright revocation. However, the board in its "sole discretion" may deviate from these guidelines. (Title 16, California Code of Regulations section 1760.)

10. 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 in the public interest for the Board's licensees to conduct themselves in an honest and forthright manner. The public is protected when its licensees are honest in their practice and in their business dealings. Honest practitioners help prevent fraud and financial abuse of the public, including fraud that contributes to the increased cost of prescription drugs. Violations involving dishonesty, fraud or deceit, impact the credibility of the profession and affect the public trust.

11. Respondent Hoang, as the owner and pharmacist-in-charge of Orange Pharmacy, is responsible for the dishonest and fraudulent acts attributable to both licenses. The cause for discipline proven is serious and demonstrates respondent's willingness to commit dishonest acts for his own financial gain. In aggravation, these

acts were also not isolated incidents, but rather occurred several times over many months and involved deliberate acts to deceive a public benefits program. These acts also demonstrate that respondent refused to abide by standards set by a county-organized integrated health care system in deliberate disregard of the public policy set by an agency acting on behalf of the public. Although respondents have, so far, had an unblemished history with the Board, these violations call into question respondent Hoang's judgment and trustworthiness. His failure to acknowledge the violations and submit evidence that he accepts responsibility is troubling. The Board is also concerned about the lack of any evidence of remorse or the submission of any evidence that respondent had undergone any sort of rehabilitation with respect to his conduct. Without such evidence, the Board cannot offer assurances that such conduct might not repeat and that respondents are safe to practice with or without restriction.

12. Based on the foregoing, the public cannot be adequately protected unless both licenses are revoked outright. This finding is based upon Factual Findings 1-26 and Legal Conclusions 1-11.

Cost Recovery

13. By reason of the matters set forth in Findings 27 through 35, it is determined that the board's costs in this matter were $36,384.50 and that, within the terms of Business and Professions Code section 125.3, those costs were reasonable.

14. In *Zuckerman v. State Board of Chiropractic Examiners*,[3] a case in which the State Board of Chiropractic Examiners had disciplined a license, the Supreme Court of California dealt with the issue of cost recovery. The court held that "the Board must exercise its discretion to reduce or eliminate cost awards in a manner that will ensure that ... [cost recovery] does not deter chiropractors with potentially meritorious claims or defenses from exercising their right to a hearing." The court established five rules that an agency must observe in assessing the amount to be charged. To some extent, these rules are similar to matters one would consider in determining whether costs are reasonable. The court's rules, however, go beyond considerations of whether the costs are reasonable. The court said:

> [T]he Board must not assess the full costs of investigation and prosecution when to do so will unfairly penalize a chiropractor who has committed some misconduct but who has used the hearing process to obtain dismissal of other charges or a reduction in the severity of the discipline imposed. The Board must consider the chiropractor's "subjective good faith belief in the merits of his or her position" [citation] and whether the chiropractor has raised a "colorable challenge" to the proposed discipline [citation]. Furthermore, as in cost recoupment schemes in which the

[3] *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32.

> government seeks to recover from criminal defendants the cost of their state-provided legal representation [citation] the Board must determine that the chiropractor will be financially able to make later payments. Finally the Board may not assess the full costs of investigation and prosecution when it has conducted a disproportionately large investigation and prosecution to prove that a chiropractor engaged in relatively innocuous misconduct.[4]

15. In this case, respondents did engage in the conduct that is the primary focus of the accusation. Respondents, however, had a legitimate interest in pursuing a hearing. Respondent, however, offered no evidence that assessing the full costs of investigation and prosecution would constitute an unfair penalty.

16. It is determined by the Administrative Law Judge that this was not a case in which the agency conducted a disproportionately large investigation and prosecution to prove relatively innocuous misconduct.

17. Will respondent be financially able to make payments to reimburse the agency for its costs? Respondents did not present evidence that would support a finding of inability to pay the cost recovery.

18. *Zuckerman* requires that, in assessing costs, an agency must consider a licensee's "subjective good faith belief in the merits of his or her position" and must consider whether the licensee has raised a "colorable challenge" to the proposed discipline. It is determined that the respondents did not raise a colorable challenge to the allegations of wrongful conduct or to the allegation that discipline should be imposed.

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[4] Id. at p. 45.

ORDER REGARDING TUE HOANG

License Number RPH 41779 issued to Tue Hoang is revoked. Respondent Tue Hoang and Respondent Orange Pharmacy are ordered to pay the Board of Pharmacy $36,384.50.

ORDER REGARDING ORANGE PHARMACY

Original Pharmacy Permit Number PHY 35565 issued to Orange Pharmacy is revoked. Respondent Tue Hoang and Respondent Orange Pharmacy are ordered to pay the Board of Pharmacy $36,384.50.

This Decision shall become effective on June 7, 2013.

IT IS SO ORDERED this 7th day of May, 2013.

STAN C. WEISSER, R.Ph.
Board President

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

In the Matter of the Accusation Against: **ORANGE PHARMACY** Original Pharmacy Permit No. PHY 35565 and **TUE NGOC HOANG** Pharmacist License No. RPH 41779 Respondent.	Case No. 3122 OAH No. 2010031018

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 Statement of Issues case No. 4049. A copy of the proposed decision is attached hereto.

The board will decide the case itself upon the record, including the transcript, exhibits and written 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 submission of written argument.

IT IS SO ORDERD this 19th day of October 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: ORANGE PHARMACY Original Pharmacy Permit No. PHY 35565 and TUE NGOC HOANG Pharmacist License No. RPH 41779 Respondents.	Case No. 3122 OAH No. 2010031018

PROPOSED DECISION

Robert Walker, Administrative Law Judge, State of California, Office of Administrative Hearings, heard this matter on June 11, 12, and 13, 2012, in San Diego, California.

Marichelle S. Tahimic, Deputy Attorney General, represented the complainant, Virginia Herold, Executive Officer, Board of Pharmacy.

Iamail Amin, Attorney at Law, represented the respondents, Tue Ngoc Hoang and Orange Pharmacy. Tue Hoang did not appear personally. He appeared only through his counsel.

The record was closed on June 13, 2012.

SUMMARY

In Orange County, pharmacies that fill prescriptions for Medi-Cal patients obtain payment through CalOptima. Because of Orange Pharmacy's refusal to agree to new contract terms, it was terminated from participating in the CalOptima program. Orange Pharmacy, nevertheless, continued to fill prescriptions for Medi-Cal patients. Orange Pharmacy obtained payment by having Pacific Pharmacy pretend it had filled the prescriptions.

Complainant alleges that the respondents engaged in dishonesty and fraud. Complainant also alleges that the respondents engaged in a number of acts of misconduct in connection with transferring dangerous drugs between pharmacies.

Complainant seeks suspension or revocation of Tue Hong's pharmacist license and Orange Pharmacy's permit.

Complainant also seeks cost recovery, and there are issues concerning cost recovery.

In this decision, it is determined that the respondents engaged in dishonesty and fraud but that there were no transfers of dangerous drugs between pharmacies. It is determined that Tue Hong's pharmacist license and Orange Pharmacy's permit should be placed on probation. It is further determined that Tue Hong's pharmacist license should be suspended for 90 days.

FACTUAL FINDINGS

Background

1. On May 12, 1988, the Board of Pharmacy issued Pharmacist License Number RPH 41779 to respondent Tue Hoang. On May 15, 1989, the board issued Original Pharmacy Permit Number PHY 35565 to respondent Orange Pharmacy (Orange). Tue Hoang owns Orange and, since May 15, 1989, has been the pharmacist in charge.

2. By an accusation dated November 7, 2007, the complainant, Virginia Herold, Executive Officer of the Board of Pharmacy, sought the revocation or suspension of Tue Hoang's license and Orange's permit. Complainant alleges that the respondents engaged in dishonesty and fraud. Complainant also alleges that the respondents engaged in a number of acts of misconduct in connection with transferring dangerous drugs between pharmacies.

3. Le Thuy Truong owned Pacific Pharmacy (Pacific). Ms. Truong's husband, Que Buu, was the pharmacist in charge.

4. Orange Prevention and Treatment Integrated Medial Assistance, which is known as "CalOptima" is an integrated health care system that administers health insurance programs for children, low income families, and persons with disabilities. It is a special commission, organized through Orange County.

5. When a medical provider has provided a benefit that is covered by the Medi-Cal program – including prescription drugs – the provider applies for reimbursement.[1] In Orange County, with minor exceptions that are not relevant here, claims for Medi-Cal reimbursement for pharmaceuticals must be made through CalOptima. CalOptima contracts with a privately owned pharmacy benefits manager (PBM) to accept and process claims in Orange County for Medi-Cal reimbursements for pharmaceuticals.

6. In order to be qualified to submit a claim to CalOptima's PBM, a pharmacy must be a party to a contract with the PBM. The pharmacies that have entered into contracts with the PBM are referred to as CalOptima's pharmacy network. In 2004 and for some time before that, Orange and Pacific were part of the CalOptima network.

7. In 2005, CalOptima added a new condition to the contract that pharmacies were required to enter into with the PBM. Pharmacies would be required to participate in the Fraud Prevention Institute – a private, nonprofit corporation. Under the terms of the new contract provision, a pharmacy would be required to permit the Fraud Prevention Institute to complete an on-site review of the pharmacy's operation.

8. A number of pharmacies objected to the new provision and refused to sign the new contract. The deadline for executing the new contract was January 1, 2005, but CalOptima extended the deadline twice. The second extension was to April 18, 2005. On that date, CalOptima sent Orange and other pharmacies a letter that provided, in part, "[You have] elected not to register or otherwise participate with the Fraud Prevention Institute. . . . [Your] online billing for CalOptima members will be terminated. Termination will be effective April 19, 2005."

9. Twenty-seven pharmacies that were owned by Vietnamese-Americans filed a suit in the Superior Court of California for the County of Orange. The suit was against the Orange County Health Authority, the Fraud Prevention Institute, the County of Orange, and others. Orange was one of the plaintiffs. The plaintiffs alleged that all of the plaintiffs were pharmaceutical providers that sought to be able to apply for reimbursement from Medi-Cal without having to agree to CalOptima's new contract provision requiring participation in the Fraud Prevention Institute. The plaintiffs alleged as follows: The defendants had discriminated against the plaintiffs based on race and other impermissible grounds. The Fraud Prevention Institute functions as an auditor and private investigator but is not licensed to act in either of those capacities. The new contract provision involves a requirement that pharmacies waive patient privacy rights, which would be a violation of the California Constitution. The new contract provision involves an impermissible delegation of authority to set fraud prevention standards.

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[1] The term *reimbursement* is odd here. A pharmacy supplies a drug to a patient and applies to CalOptima for payment. There is no *re*payment or *re*imbursement. Nevertheless, the term commonly used is *reimbursement*.

10. There were other allegations. The plaintiffs sought monetary damages and an injunction ordering the defendants not to require the new contract provision. The plaintiffs sought other remedies. The plaintiffs filed a second amended complaint on July 12, 2005. There was no evidence as to the date of the original filing.

11. While a number of pharmacies, including Orange, continued to refuse to enter into the new contract, other pharmacies, including Pacific, did enter into it.

Orange Engaged Pacific To Obtain Payment From The PBM For Prescriptions Orange Filled

12. Some time after April 19, 2005, Orange entered into an arrangement with Pacific as follows: Orange would continue to fill prescriptions for Medi-Cal patients. Pacific would pretend it had filled those prescriptions, would apply to the PBM for reimbursements, and would share the reimbursements with Orange.

13. What did these pharmacies hope to gain by this subterfuge? Orange expected to be able to enter into a contract with the PBM in the future. It was possible the plaintiffs would prevail in their legal action or that CalOptima would relent and drop the requirement concerning the Fraud Prevention Institute. With that in mind, it was important to Orange to maintain its Medi-Cal patients. If Orange had told its Medi-Cal patients that it could not serve them, those patients would have gone to other pharmacies. It was likely that, after Orange entered into a contract with the PBM, many of those patients would stay with their new pharmacies rather than return to Orange.

14. It is not entirely clear what else the two pharmacies expected to gain by this subterfuge. One or both of them would benefit financially. It is not clear from the evidence, however, whether it was one or both. Also, if it was only one, it is not clear which one. It is possible that Ms. Truong and her husband, Mr. Buu, did this simply to help their friend, Tue Hoang. It is also possible that Ms. Truong and Mr. Buu obtained some financial benefit from the arrangement. It is not necessary, however, to sort out the parties' motivations for engaging in the subterfuge.

15. Orange and Pacific acted on their agreement. Orange filled prescriptions. Pacific applied to the PBM for reimbursement. The PBM, acting on Pacific's implicit representations that it had filled the prescriptions, reimbursed Pacific.

16. Mr. Tue Hoang, as the owner and pharmacist in charge of Orange, is personally responsible for Orange's dishonest conduct.

The Mechanics

17. Each pharmacy had prescription labels with its name, address, and phone number preprinted on the labels. Orange would create a set of Orange labels for a prescription and fill the prescription. Orange would send Pacific a record of having filled the

prescription. Mr. Buu then would create a duplicate set of Pacific labels for that prescription. Based on the strip label from the duplicate set, Mr. Buu would apply to the PBM for reimbursement. The Pacific strip label and the application for reimbursement constituted Pacific's implicit representation to the PBM that Pacific had filled the prescription.

18. The pharmacies maintained records of the prescriptions Orange sent to Pacific for collection, records of the reimbursements Pacific received from the PBM, and records of payments Pacific made to Orange.

19. The pharmacies also misused certain documents in what appears to have been a feeble attempt to lend an appearance of legitimacy to their arrangement – documents such as a "Refill Pharmacies Contract," purchased and borrowed logs, returned to stock memos (RTS), and labels that incorrectly stated that prescriptions had been transferred. These documents have legitimate uses, but Orange and Pacific misused them as part of their illicit arrangement.

Mr. Buu Acknowledged What He Was Doing

20. On September 13, 2006, Robert Kazabee, an inspector for the board, conducted a routine inspection of Pacific. He noticed a copy of Orange's prescription log, and asked why Pacific had it. Mr. Buu said Orange no longer was able to bill CalOptima, so Pacific billed on Orange's behalf. (Under the circumstances, this seems like surprising candidness!) In a written statement dated September 26, 2006, Mr. Buu elaborated. In the written statement he explained why the pharmacies engaged in this practice and explained something about the mechanics of how they accomplished it.

21. On January 23, 2007, Robert M. Venegas, an inspector for the board, conducted an inspection of Orange. Mr. Kazabee accompanied Mr. Venegas. They spoke with Paul Hoang, who is Tue Hoang's son and the business manager of Orange. Mr. Kazabee and Mr. Venegas told Paul Hoang they wanted documents concerning Orange's billings to CalOptima. Paul Hoang knew about Mr. Buu's disclosure and his written statement. Paul Hoang said Orange had been suspended from CalOptima and was having Pacific bill CalOptima for the Medi-Cal patients Orange served.

Rehabilitation

22. Tue Hoang did not appear personally. He appeared only through his counsel. He has a right to do that, but he has left unanswered a number of questions concerning rehabilitation.

23. There was no evidence that Tue Hoang recognizes that what he did was wrong. There was no evidence that he is remorseful for participating in the subterfuge. There was no evidence that he is determined not to be dishonest in the future. There was no evidence that he has made any effort to rehabilitate himself.

Absence Of Evidence Of Other Misconduct And Matters In Mitigation And Extenuation

24. There was no evidence of respondent's having engaged in other misconduct. Moreover, there are a number of mitigating and extenuating circumstances. There was no evidence that respondent made errors in filling prescriptions. Respondent's conduct did not involve incompetence. No patients filed complaints concerning respondent's conduct. Respondent's conduct resulted in no harm to patients. There was no evidence that respondents placed the public safety in jeopardy. The arrangement did not involve billing for a service that had not been provided; the requests for reimbursement were for prescriptions that, in fact, had been filled. The dispute regarding the added requirement in the contract ultimately was resolved by CalOptima's relenting, which suggests that at least some of the allegations in the plaintiffs' suit had merit. In December of 2006, Orange signed a new contract with the PBM, a contract that had no provision concerning the Fraud Prevention Institute. Orange cooperated with the board's inspectors. While respondent did benefit from his wrongful conduct by maintaining his client base, he did not obtain payment for any service he did not provide. Thus, he did not receive any unearned financial benefit.

25. Respondent has operated Orange for over 23 years, and there was no evidence of any discipline having been imposed against his license. There was no evidence of any prior warnings and no evidence of prior misconduct. It has been five and one-half years since respondent engaged in the conduct that constitutes the cause for discipline, and there was no evidence of misconduct during that time.

26. These matters do not excuse Tue Hoang for participating in the dishonest arrangement whereby Pacific obtained payment for prescriptions Orange filled. These maters do, however, suggest a limit to Tue Hoang's level of culpability.

There Were No Drug Transfers

27. As noted above, the pharmacies misused certain documents in what appears to have been a feeble attempt to lend an appearance of legitimacy to their arrangement – documents such as purchased and borrowed logs. Some of the documents the pharmacies improperly used suggested there had been drug transfers. Complainant's alleged causes for discipline numbers two through five concern drug transfers between Orange and Pacific. There, however, were no drug transfers.

Cost Recovery

28. Complainant submitted two certifications of costs. One certification was for inspector's costs and interpreter's fees. The certification says:

> Inspector's costs through 9/20/2010, 66.25 hours at $102 per hour $6.757.50.

Inspector's costs from 9/20/2010 through May 14, 2012, 35.50 hours at $102 per hour $3,621.

Interpreter fees from September 30, 2010, $975.

29. The total is $11,353.50.

30. Business and Professions Code section 125.3, subdivision (a), provides, in part:

> [T]he administrative law judge may 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.

31. California Code of Regulations, title 1, section 1042, subdivision (b), provides, in part:

> Except as otherwise provided by law, proof of costs at the Hearing may be made by Declarations that contain specific and sufficient facts to support findings regarding actual costs incurred and the reasonableness of the costs, which shall be presented as follows:
>
> (1) For services provided by a regular agency employee, the Declaration may be executed by the agency or its designee and shall describe the general tasks performed, the time spent on each task and the method of calculating the cost. For other costs, the bill, invoice or similar supporting document shall be attached to the Declaration.
>
> (2) For services provided by persons who are not agency employees, the Declaration shall be executed by the person providing the service and describe the general tasks performed, the time spent on each task and the hourly rate or other compensation for the service. In lieu of this Declaration, the agency may attach to its Declaration copies of the time and billing records submitted by the service provider.

32. In an award for costs, an essential finding is that the costs incurred were reasonable. Business and Professions Code section 125.3, subdivision (d), specifies "reasonable costs." California Code of Regulations, title 1, section 1042, subdivision (b), provides that declarations are to contain facts to support findings regarding actual costs and "the reasonableness of the costs." Subdivision (b)(1) requires a description of "the time

spent on each task." This is required so that the judge can make some assessment as to whether the time spent on various tasks was reasonable.

33. The certification concerning inspector's costs and interpreter's fees fails to satisfy the requirements of section 1042, subdivision (b), and fails to provide evidence that can support a finding as to the amount of reasonable costs. Thus, the request for $11,353.50 in cost recovery must be denied.

34. Complainant also submitted a certification of costs for work performed by the Office of the Attorney General. The certification concerns work performed in 2007 through 2012 at a cost of $36,384.50. Attached to that certification is a form entitled "Matter Time Activity By Professional Type." The attachment contains a general description of the tasks performed, the time spent on the tasks, and the hourly rate of compensation. The certification satisfies the requirements of section 1042, subdivision (b). And the certification supports a finding that those costs are reasonable.

35. The Attorney General's costs certification says, also, that it is estimated in good faith that an additional $1,020 in costs were or will be billed to the board for further preparation. An estimate of costs expected to be incurred in the future fails to satisfy the requirements of Business and Professions Code section 125.3 or California Code of Regulations, title 1, section 1042. An estimate of costs that were incurred in the past can support an award only if, as is required by California Code of Regulations, title 1, section 1042, subdivision (b)(3), the agency explains "the reason actual cost information is not available." Here there is no such explanation. The estimated costs are not allowed.

36. It is found that, within the terms of Business and Professions Code section 125.3, subdivision (a), the reasonable costs are $36,384.50.

LEGAL CONCLUSIONS

Grounds to Suspend or Revoke Respondent Orange's Permit and Respondent Hoang's License

1. By reason of the matters set forth in Findings 6 through 21, it is found as follows: Pacific falsely represented to the PBM that it had filled prescriptions that, in fact, Orange had filled. The respondents, by participating in the subterfuge, engaged in dishonesty and assisted Pacific in violating the pharmacy laws. Business and Professions Code section 4301, subdivision (f), provides that dishonesty is an act of unprofessional conduct, and section 4301, subdivision (o), provides that assisting in the violation of regulations governing pharmacy is an act of unprofessional conduct. Further, section 4301 provides that the board shall take action against a licensee who is guilty of unprofessional conduct. Thus, there are grounds to discipline Tue Hoang's pharmacist license and Orange's original pharmacy permit.

2. In causes for discipline numbers two through five, complainant alleges grounds for discipline that relate to transfers of drugs between Orange and Pacific. By reason of the matters set forth in Findings 19 and 27, it is determined that there were no transfers of drugs. Thus, those alleged grounds for imposing discipline are not sustained.

What Discipline Is Appropriate?

3. The board has published disciplinary guidelines. The guidelines promote uniformity and fairness in the determination of the level of discipline imposed on licensees or licensed premises when there has been a violation of the pharmacy law or pharmacy regulations. In the guidelines, the board created four categories of violations and recommended appropriate levels of disciplinary penalties. The categories are not exclusive, and the recommended disciplines for premises are slightly different from the recommended disciplines for individuals. Orange Pharmacy's arrangement to have Pacific obtain payment for prescriptions Orange filled involved dishonesty, was a violation of the pharmacy law, and calls into question Tue Hoang's ethics. This could be classified as a category II violation. But Tue Hoang's involvement included collusion with Pacific to defraud the PBM. Tue Hoang committed a fraudulent act in connection with his practice as a pharmacist. Thus, the violation should be classified as a category III violation.

4. With regard to an individual license, the recommended minimum discipline for a category III violation is a stayed revocation with three to five years of probation and 90 days of actual suspension. The recommended maximum discipline is outright revocation.

5. With regard to a premises permit, the recommended minimum discipline for a category III violation is a stayed revocation with three to five years of probation and a minimum of 14 to 28 days of actual suspension. The recommended maximum discipline is outright revocation.

6. Outright revocation is inappropriate. There was no evidence of respondent's having engaged in other misconduct. Moreover, there are a number of mitigating and extenuating circumstances. There was no evidence that respondent made errors in filling prescriptions. Respondent's conduct did not involve incompetence. No patients filed complaints concerning respondent's conduct. Respondent's conduct resulted in no harm to patients. There was no evidence that respondents placed the public safety in jeopardy. The arrangement did not involve billing for a service that had not been provided; the requests for reimbursement were for prescriptions that, in fact, had been filled. The dispute regarding the added requirement in the contract ultimately was resolved by CalOptima's relenting, which suggests that at least some of the allegations in the plaintiffs' suit had merit. In December of 2006, Orange signed a new contract with the PBM, a contract that had no provision concerning the Fraud Prevention Institute. Orange cooperated with the board's inspectors. While respondent did benefit from his wrongful conduct by maintaining his client base, he did not obtain payment for any service he did not provide. Thus, he did not receive any unearned financial benefit. Respondent has operated Orange for over 23 years, and there was no evidence of any discipline having been imposed against his license. There was no

evidence of any prior warnings and no evidence of prior misconduct. It has been five and one-half years since respondent engaged in the conduct that constitutes cause for discipline, and there was no evidence of misconduct during that time.

7. On the other hand, a willingness to be dishonest is a very serious matter for a pharmacist. Respondent's dishonesty coupled with his failure to offer any proof of remorse or attempts at rehabilitation indicate the need for the longer term of probation – five years rather than three.

8. Because the gravamen of the offense is Tue Hoang's dishonesty rather than the pharmacy's failure to serve its patients well, the suspension will be imposed only on Tue Hoang's pharmacist license.

9. A word is in order as to whether respondent engaged in a single violation or multiple violations. The pharmacies' illicit practice extended from approximately April 19, 2005, when CalOptima advised Orange that it was terminated from participation in the CalOptima program, to January 23, 2007, when the inspectors conducted an inspection of Orange, a period of approximately 20 months. During that period respondent sent records of numerous prescriptions to Pacific for collection of payment. Thus, one could find that respondent engaged in multiple violations. It is neither unfair nor unreasonable, however, to treat this as a single violation. It began with CalOptima's terminating Orange and ended with the board's inspection. It involved a single plan. It involved a single arrangement between two pharmacies. Orange had a single purpose – to maintain its client base.

Cost Recovery

10. By reason of the matters set forth in Findings 28 through 36, it is determined that the board's costs in this matter were $36,384.50 and that, within the terms of Business and Professions Code section 125.3, those costs were reasonable.

11. In *Zuckerman v. State Board of Chiropractic Examiners,*[2] a case in which the State Board of Chiropractic Examiners had disciplined a license, the Supreme Court of California dealt with the issue of cost recovery. The court held that "the Board must exercise its discretion to reduce or eliminate cost awards in a manner that will ensure that ... [cost recovery] does not deter chiropractors with potentially meritorious claims or defenses from exercising their right to a hearing." The court established five rules that an agency must observe in assessing the amount to be charged. To some extent, these rules are similar to matters one would consider in determining whether costs are reasonable. The court's rules, however, go beyond considerations of whether the costs are reasonable. The court said:

> [T]he Board must not assess the full costs of investigation and prosecution when to do so will unfairly penalize a chiropractor

[2] *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32.

> who has committed some misconduct but who has used the hearing process to obtain dismissal of other charges or a reduction in the severity of the discipline imposed. The Board must consider the chiropractor's "subjective good faith belief in the merits of his or her position" [citation] and whether the chiropractor has raised a "colorable challenge" to the proposed discipline [citation]. Furthermore, as in cost recoupment schemes in which the government seeks to recover from criminal defendants the cost of their state-provided legal representation [citation] the Board must determine that the chiropractor will be financially able to make later payments. Finally the Board may not assess the full costs of investigation and prosecution when it has conducted a disproportionately large investigation and prosecution to prove that a chiropractor engaged in relatively innocuous misconduct.[3]

12. In this case, respondent did engage in the conduct that is the primary focus of the accusation. Respondent, however, had a legitimate interest in pursuing a hearing. He established that outright revocation is not an appropriate discipline. Respondent, however, offered no evidence that assessing the full costs of investigation and prosecution would constitute an unfair penalty.

13. It is determined that this was not a case in which the agency conducted a disproportionately large investigation and prosecution to prove relatively innocuous misconduct.

14. Will respondent be financially able to make payments to reimburse the agency for its costs? Respondent did not present evidence that would support a finding of inability to pay the cost recovery.

15. *Zuckerman* requires that, in assessing costs, an agency must consider a licensee's "subjective good faith belief in the merits of his or her position" and must consider whether the licensee has raised a "colorable challenge" to the proposed discipline. It is determined that the respondents did not raise a colorable challenge to the allegations of wrongful conduct or to the allegation that discipline should be imposed.

16. The board, as is required by *Zuckerman,* must determine whether a payment schedule is necessary so that respondents will be financially able to pay the board's costs.

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[3] *Id.* at p. 45.

ORDER REGARDING TUE HOANG

License Number RPH 41779 issued to Tue Hoang is revoked. The revocation, however, is stayed for five years, and a probationary license shall be issued on the following conditions.

1. Beginning the effective date of this decision, respondent Tue Hoang is suspended from the practice of pharmacy for 90 days. During suspension, respondent shall not enter any pharmacy area or any portion of the licensed premises of a wholesaler, veterinary food-animal drug retailer, or any other distributor of drugs that is licensed by the board. He shall not enter any manufacturer or any place where dangerous drugs and devices or controlled substances are maintained. Respondent shall not practice pharmacy or do any act involving drug selection, selection of stock, manufacturing, compounding, dispensing, or patient consultation. Respondent shall not manage, administer, or be a consultant to any licensee of the board. Respondent shall not have access to or control the ordering, manufacturing, or dispensing of dangerous drugs and devices or controlled substances. Respondent shall not engage in any activity that requires the professional judgment of a pharmacist. Respondent shall not direct or control any aspect of the practice of pharmacy. Respondent shall not perform the duties of a pharmacy technician or an exemptee for any entity licensed by the board. Subject to the above restrictions, respondent may continue to own or hold an interest in any pharmacy in which he or she holds an interest at the time this decision becomes effective unless otherwise specified in this order.

2. Respondent shall obey all state and federal laws and regulations.

3. Respondent shall report any of the following occurrences to the board, in writing, within 72 hours of the occurrence: An arrest or issuance of a criminal complaint for violation of any provision of the pharmacy law, state or federal food and drug laws, or state or 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; conviction of any crime; discipline, citation, or other administrative action filed by any state or federal agency that involves respondent's pharmacy license; discipline, citation, or other administrative action filed by any state or federal agency that is related to the practice of pharmacy or to manufacturing, obtaining, handling, distributing, billing for, or charging for any drug, device, or controlled substance.

4. Respondent shall report to the board quarterly as directed by the board or its designee. The report shall be made either in person or in writing, as directed. Respondent shall state under penalty of perjury whether he has complied with all of the terms and conditions of probation. Periods of delinquency in the submission of reports may be added to the period of probation. If respondent fails to make the final probation report as directed, probation shall be extended automatically until such time as respondent make the final report and the board accepts it.

5. On receipt of reasonable notice, respondent shall appear in person for interviews with the board or its designee at intervals and in locations 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 or more scheduled interviews during the period of probation shall be considered a violation of probation.

6. Respondent shall cooperate with the board's inspection program and the board's monitoring and investigation of respondent's compliance with the conditions of probation.

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

8. Respondent shall notify all present and prospective employers of this decision and the conditions and restrictions imposed by this decision. If, on the date this decision becomes effective, respondent is working in any health care profession, respondent shall, within 30 days of that date, cause respondent's direct supervisor, pharmacist-in-charge, or owner to report to the board in writing acknowledging that he or she has read this decision. Before respondent undertakes new employment, he or she shall cause the prospective employer to report to the board in writing acknowledging that he or she has read this decision.

9. If respondent works for or is employed by or through a pharmacy employment service, respondent must notify the direct supervisor, pharmacist-in-charge, or owner at every pharmacy in which respondent plans to work of the conditions and restrictions imposed by this decision. Respondent shall provide that notice before commencing work at each pharmacy. "Employment" within the meaning of this provision shall include any full-time, part-time, temporary, relief or pharmacy management service as a pharmacist, whether the respondent is considered an employee or independent contractor. It shall be respondent's responsibility to ensure that his or her employers and supervisors submit timely writings to the board acknowledging that he or she has read this decision.

10. Furthermore, within 30 days of the effective date of this decision, and within 15 days of respondent's undertaking any new employment by or through a pharmacy employment service, respondent shall cause his or her direct supervisor with the pharmacy employment service to report to the board in writing acknowledging that he or she has read this decision. Failure to timely notify present or prospective employers or to cause them 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.

11. Respondent shall not supervise any intern pharmacist or serve as the pharmacist-in-charge or designated representative-in-charge of any entity licensed by the

board or serve as a consultant unless otherwise specified in writing by the board. Assumption of any such unauthorized supervision responsibilities without the board's written approval shall be considered a violation of probation.

12. 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 $36,384.50. As is required by *Zuckerman*, the board shall determine whether a payment schedule is necessary to enable the respondent to pay the costs. If the board sets a payment schedule, respondent shall not deviate from that schedule absent prior written approval by the board or its designee. Failure to pay costs by the deadlines as directed shall be considered a violation of probation. The filing of bankruptcy shall not relieve respondent of the responsibility to reimburse the board for its costs of investigation and prosecution.

13. Respondent shall pay any costs associated with probation monitoring as determined by the board each 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 deadlines as directed shall be considered a violation of probation.

14. Respondent shall, at all times while on probation – including any period during which suspension or probation is tolled – maintain an active, current license with the board. If respondent's license expires or is cancelled by operation of law or otherwise, respondent's license, on renewal or reapplication, shall be subject to all of the conditions of this probation not previously satisfied.

15. If, following the effective date of this decision, respondent ceases to practice due to retirement or health, or if respondent is otherwise unable to satisfy the conditions of probation, respondent may tender his or her license to the board for surrender. The board shall have discretion regarding whether to grant the request for surrender or take any other action it deems appropriate and reasonable. If the board formally accepts a surrender of the license, respondent will no longer be subject to the conditions of probation. Such surrender constitutes a record of discipline and shall become a part of the respondent's license history with the board. Within 10 days of notification by the board that the surrender is accepted, respondent shall relinquish his or her pocket and wall licenses to the board. Respondent may not reapply for any license from the board for three years from the effective date of the surrender. If respondent reapplies, respondent shall meet all requirements applicable to the license sought as of the date the application for that license is submitted to the board, and the respondent shall have paid all outstanding costs.

16. Respondent shall notify the board in writing within 10 days of any change of employment. The notification shall include the reasons for leaving the prior employment. It shall also include the name and address of the new employer, supervisor, and owner and respondent's new work schedule if known. Respondent shall notify the board in writing within 10 days of a change in name, mailing address, or phone number. Failure to timely notify the board of any change in employer, name, address, or phone number shall be considered a violation of probation.

17. Except during periods of suspension, respondent shall, at all times while on probation, be employed as a pharmacist in California for a minimum of 20 hours per calendar month. Any failure to satisfy this condition 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.

18. Should respondent, regardless of residency, for any reason (including vacation) cease practicing as a pharmacist for a minimum of 20 hours per calendar month in California, respondent must notify the board in writing within 10 days of the cessation of practice and must further notify the board in writing within 10 days of the resumption of practice. Any failure to provide such notification 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 36 months. "Cessation of practice" means a failure to practice as a pharmacist, as defined by Business and Professions Code section 4000 et seq., for at least 20 hours in any calendar month. "Resumption of practice" means any calendar month during which respondent is practicing as a pharmacist for at least 20 hours as a pharmacist as defined by Business and Professions Code section 4000 et seq.

19. If 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.

20. 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 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 the accusation is heard and decided.

21. Within 60 days of the effective date of this decision, respondent shall submit to the board or its designee, for prior approval, a community service program in which respondent shall regularly provide free health-care related services to a community or charitable facility or agency for at least 20 hours per month for four months. Within 30 days of board approval thereof, respondent shall submit documentation to the board demonstrating commencement of the community service program. Respondent shall report on progress with the community service program in the quarterly reports. Failure to timely submit required documentation, commence the service, or comply with the program shall be considered a violation of probation.

22. Within 60 calendar days of the effective date of this decision, respondent shall enroll in a course in ethics at respondent's expense. The course will not satisfy this condition unless respondent obtained written approval of the course by the board or its designee before enrolling in it. Failure to initiate the course during the first year of probation or failure to complete it within the second year of probation is a violation of probation. Respondent shall submit a certificate of completion to the board or its designee within five days after completing the course.

23. A failure to satisfy any condition of probation is a violation of probation.

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

ORDER REGARDING ORANGE PHARMACY

Original Pharmacy Permit Number PHY 35565 issued to Orange Pharmacy is revoked. The revocation, however, is stayed for five years, and a probationary permit shall be issued on the following conditions.

1. Respondent owner shall obey all state and federal laws and regulations.

2. Respondent owner shall report any of the following occurrences to the board, in writing, within 72 hours of the occurrence: An arrest or issuance of a criminal complaint for violation of any provision of the pharmacy law, state or federal food and drug laws, or state or 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; conviction of any crime; discipline, citation, or other administrative action filed by any state or federal agency that involves respondent's premises permit; discipline, citation, or other administrative action filed by any state or federal agency that is related to the practice of pharmacy or to manufacturing, obtaining, handling, distributing, billing for, or charging for any drug, device, or controlled substance.

3. Respondent owner shall report to the board quarterly as directed by the board or its designee. The report shall be made either in person or in writing, as directed. Respondent owner shall state under penalty of perjury whether he has complied with all of the terms and conditions of probation. Periods of delinquency in the submission of reports may be added to the period of probation. If respondent owner fails to make the final probation report as directed, probation shall be extended automatically until such time as respondent owner make the final report and the board accepts it.

4. On receipt of reasonable notice, respondent owner shall appear in person for interviews with the board or its designee at intervals and in locations 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 or more scheduled interviews during the period of probation shall be considered a violation of probation.

5. Respondent owner shall cooperate with the board's inspection program and the board's monitoring and investigation of respondent's compliance with the conditions of probation.

6. As a condition precedent to successful completion of probation, respondent owner shall pay to the board its costs of investigation and prosecution in the amount of $36,384.50. As is required by *Zuckerman*, the board shall determine whether a payment schedule is necessary to enable respondent owner to pay the costs. If the board sets a payment schedule, respondent owner shall not deviate from that schedule absent prior written approval by the board or its designee. Failure to pay costs by the deadlines as directed shall be considered a violation of probation. The filing of bankruptcy shall not relieve respondent owner of the responsibility to reimburse the board for its costs of investigation and prosecution.

7. Respondent owner shall pay any costs associated with probation monitoring as determined by the board each 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 deadlines as directed shall be considered a violation of probation.

8. Respondent owner shall, at all times while on probation – including any period during which suspension or probation is tolled – maintain an active, current license with the board. If respondent owner submits an application to the board for a change of location, change of permit, or change of ownership and if the application is approved, the board shall retain continuing jurisdiction over the license, and the respondent shall remain on probation as determined by the board. Failure to maintain current licensure shall be considered a violation of probation. If respondent's license expires or is cancelled by operation of law or otherwise, respondent's license, on renewal or reapplication, shall be subject to all of the conditions of this probation not previously satisfied.

9. If, following the effective date of this decision, respondent owner discontinues business, respondent owner may tender the premises license to the board for surrender. The board shall have discretion regarding whether to grant the request for surrender or take any other action it deems appropriate and reasonable. If the board formally accepts a surrender of the license, respondent will no longer be subject to the conditions of probation. Within 10 days of notification by the board that the surrender is accepted, respondent owner shall relinquish the premises wall and renewal licenses to the board. Respondent owner shall further submit a completed Discontinuance of Business form according to board guidelines and shall notify the board of the records inventory transfer. Respondent owner shall also, by the effective date of this decision, arrange for the continuation of care for ongoing patients of the pharmacy by, at minimum, providing a written notice to ongoing patients that specifies the anticipated closing date of the pharmacy and that identifies one or more area pharmacies capable of taking up the patients' care, and by cooperating as may be necessary in the

transfer of records or prescriptions for ongoing patients. Within five days of providing the written notice to the pharmacy's ongoing patients, respondent owner shall provide a copy of the written notice to the board. For the purpose of this provision, "ongoing patients" means those patients for whom the pharmacy has on file a prescription with one or more refills outstanding or for whom the pharmacy has filled a prescription within the preceding 60 days. Respondent owner may not apply for any new licensure from the board for three years from the effective date of the surrender. If respondent owner applies for a new license, respondent owner shall meet all requirements applicable to the license sought as of the date the application for that license is submitted to the board, and respondent owner shall have paid all outstanding costs.

10. Respondent owner shall, on or before the effective date of this decision, ensure that all employees involved in permit operations are made aware of all of the terms and conditions of probation, either by posting a notice of the terms and conditions, circulating such notice, or both. If the notice required by this provision is posted, it shall be posted in a prominent place and shall remain posted throughout the probation period. Respondent owner shall ensure that any employees hired or used after the effective date of this decision are made aware of the terms and conditions of probation by posting a notice, circulating a notice, or both. Additionally, within 15 days of the effective date of this decision, respondent owner shall submit written notification to the board that this term has been satisfied. Failure to submit such notification to the board shall be considered a violation of probation. "Employees" as used in this provision includes all full-time, part-time, volunteer, temporary, and relief employees and independent contractors employed or hired at any time during probation.

11. Within 30 days after the effective date of this decision, respondent shall provide, signed and dated statements from its owners, including any owner or holder of ten percent or more of the interest in respondent or respondent's stock, and any officer, stating under penalty of perjury that said individuals have read and are familiar with state and federal laws and regulations governing the practice of pharmacy. The failure to timely provide said statements under penalty of perjury shall be considered a violation of probation.

12. Respondent owner shall prominently post a probation notice provided by the board in a conspicuous place accessible to the public. The probation notice shall remain posted during the entire period of probation. Respondent owner shall not, directly or indirectly, engage in any conduct or make any statement that is intended to mislead or is likely to have the effect of misleading any patient, customer, member of the public, or other person as to the nature of and reason for the probation of the licensed entity. Failure to post such notice shall be considered a violation of probation.

13. If respondent owner 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.

14. If respondent owner violates probation in any respect, the board, after giving respondent owner 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 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 the accusation is heard and decided.

15. A failure to satisfy any condition of probation is a violation of probation.

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

DATED: August 13, 2012

Robert Walker

ROBERT WALKER
Administrative Law Judge
Office of Administrative Hearings

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

In the Matter of the Accusation Against: ORANGE PHARMACY Owner/Partner Tue Ngoc Hoang Owner/Partner Vinh N. Hoang 9972 Bolsa Avenue, Ste. 103 Westminster, CA 92683 Original Pharmacy Permit No. PHY 35565 and TUE NGOC HOANG 1162 Timberline Lane Santa Ana, CA 92705 Pharmacist License No. RPH 41779 Respondents.	Case No. 3122 **A C C U S A T I O N**

Complainant alleges:

PARTIES

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

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2. On or about May 15, 1989, the Board of Pharmacy issued Original Pharmacy Permit Number PHY 35565 to Orange Pharmacy, a partnership between Tue Ngoc Hoang and Vinh N. Hoang (Pharmacy Respondent). The original pharmacy permit was in full force and effect at all times relevant to the charges brought herein and will expire on May 1, 2008, unless renewed.

3. On or about May 12, 1988, the Board of Pharmacy issued Pharmacist License Number RPH 41779 to Tue Ngoc Hoang (Hoang). The pharmacist license was in full force and effect at all times relevant to the charges brought herein and will expire on August 31, 2009, unless renewed. At all times relevant herein, Hoang was the pharmacist-in-charge (PIC) for Orange Pharmacy.

JURISDICTION

4. This Accusation is brought before the Board of Pharmacy (Board), Department of Consumer Affairs, under the authority of the following laws:

A. Section 4300 of the Code provides that every license issued by the Board may be suspended or revoked.

B. Section 4301 of the Code states in pertinent part:

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

". . . .

"(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.

". . . .

"(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.

". . . ."

C. Section 4059 of the Code states in pertinent part:

"(a) A person may not furnish any dangerous drug, except upon prescription. . .

"(b) This section does not apply to the furnishing of any dangerous drug or dangerous device by a manufacturer, wholesaler, or pharmacy to each other or to a physician, dentist, podiatrist, optometrist, veterinarian, or naturopathic doctor pursuant to Section 3640.7., or to a laboratory under sales and purchase records that correctly give the date, the names and addresses of the supplier and the buyer, the drug or device, and its quantity. This section does not apply to the furnishing of any dangerous device by a manufacturer, wholesaler, or pharmacy to a physical therapist acting within the scope of his or her license under sales and purchase records that correctly provide the date the device is provided, the names and addresses of the supplier and the buyer, a description of the device, and the quantity supplied.

". . . ."

D. Section 4081 of the Code states in pertinent part:

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

". . . ."

E. Section 4113 of the Code 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.

". . . ."

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

5. This Accusation also refers to the following titles and sections of the California Code of Regulations (CCR):

A. Title 16, CCR 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."

B. Title 16, CCR section 1717 states in pertinent part:

". . . .

" (e) A pharmacist may transfer a prescription for Schedule III, IV or V controlled substances to another pharmacy for refill purposes in accordance with Title 21, Code of Federal Regulations, section 1306.26.

Prescriptions for other dangerous drugs which are not controlled substances may also be transferred by direct communication between pharmacists or by the receiving pharmacist's access to prescriptions or electronic files that have been created or verified by a pharmacist at the transferring pharmacy. The receiving pharmacist shall create a written prescription; identifying it as a transferred prescription; and record the date of transfer and the original prescription number. When a prescription transfer is accomplished via direct access by the receiving pharmacist, the

receiving pharmacist shall notify the transferring pharmacy of the transfer. A pharmacist at the transferring pharmacy shall then assure that there is a record of the prescription as having been transferred, and the date of transfer. Each pharmacy shall maintain inventory accountability and pharmacist accountability and dispense in accordance with the provisions of section 1716 of this Division. Information maintained by each pharmacy shall at least include:

(1) Identification of pharmacist(s) transferring information;

(2) Name and identification code or address of the pharmacy from which the prescription was received or to which the prescription was transferred, as appropriate;

(3) Original date and last dispensing date;

(4) Number of refills and date originally authorized;

(5) Number of refills remaining but not dispensed;

(6) Number of refills transferred.

"(f) The pharmacy must have written procedures that identify each individual pharmacist responsible for the filling of a prescription and a corresponding entry of information into an automated data processing system, or a manual record system, and the pharmacist shall create in his/her handwriting or through hand-initializing a record of such filling, not later than the beginning of the pharmacy's next operating day. Such record shall be maintained for at least three years."

C. Title 22, CCR section 51501 states in pertinent part:

". . . .

"(d) No provider shall submit claims to the Medi-Cal program using any provider number other than that issued to the provider by the Department.

". . . ."

D. Title 22, CCR section 51484 states:

" No provider shall bill or submit a claim for or on behalf of any provider who has been suspended from participation in the California Medical Assistance Program, for any services rendered in whole or in part by any such suspended provider during the term of such suspension."

CHARGES AND ALLEGATIONS

6. "CalOptima" is the name of an integrated health care system that administers health insurance programs for Orange County, California children, low income families, and persons with disabilities. It is a public/private partnership authorized by federal law to administer Medi-Cal benefits within a defined geographic area.

7. Only those issued provider numbers by the California Medi-Cal program may submit bills or claims to CalOptima for reimbursement.

8. Respondent Orange Pharmacy is a Board licensed pharmacy in Westminster, California. It was a registered provider for the CalOptima program but as of at least August 2005 was no longer a provider.

9. Pacific Pharmacy, a Board licensed pharmacy, is also located in Westminster, California. It was and is a registered provider for the CalOptima program.

10. Between approximately August 8, 2005 and October 31, 2006, Respondent Pharmacy and PIC Hoang and Pacific Pharmacy arranged for Pacific Pharmacy to bill CalOptima for $149,230.00 worth of prescription claims for Orange Pharmacy, which could no longer legally bill CalOptima. During the above period of time, 38% of Pacific Pharmacy's total billing to CalOptima was actually for Orange Pharmacy.

11. During the above period, Respondent Pharmacy and Pacific Pharmacy transferred dangerous drugs between each using a "Borrowed and Purchased" log that did not meet pharmacy law requirements.

12. During the above period, Orange Pharmacy failed to maintain complete accountability for dangerous drugs.

FIRST CAUSE FOR DISCIPLINE

(Unprofessional Conduct: Dishonesty, Fraud or Deceit)

13. Respondents Orange Pharmacy and PIC Hoang are each subject to disciplinary action under section 4301(f) for dishonesty and fraud in that they arranged to submit Orange Pharmacy claims to CalOptima using Pacific Pharmacy, knowing that these claims were

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unlawful because Orange Pharmacy was no longer a CalOptima provider at the times at issue, as more particularly alleged above and incorporated here by reference.

SECOND CAUSE FOR DISCIPLINE

(Unprofessional Conduct: Violation of Board Statutes)

14. Respondents Orange Pharmacy and PIC Hoang are each subject to disciplinary action under section 4301(j) in conjunction with 4059 in that the transfer of drugs between Respondent Pharmacy and Pacific Pharmacy did not identify, or adequately identify, the necessary information required by Code section 4059 for purchase and sales, as more particularly alleged above and incorporated here by reference.

THIRD CAUSE FOR DISCIPLINE

(Unprofessional Conduct: Violation of Board Statutes)

15. Respondents Orange Pharmacy and PIC Hoang are subject to disciplinary action under section 4301(j) in conjunction with section 4081 for failure to keep a current inventory due to their non-existent or inadequate record keeping with regard to the drug transfers with Pacific Pharmacy, as more particularly alleged above and incorporated here by reference.

FOURTH CAUSE FOR DISCIPLINE

(Unprofessional Conduct: Violation of Board Regulation)

16. Respondents Orange Pharmacy and PIC Hoang are subject to disciplinary action under section 4301(j) in conjunction with CCR section 1718 for failure to maintain complete accountability of dangerous drugs due to their non-existent or inadequate record keeping with regard to the drug transfers with Pacific Pharmacy, as more particularly alleged above and incorporated here by reference.

FIFTH CAUSE FOR DISCIPLINE

(Unprofessional Conduct: Violation of Board Regulation)

17. Respondents Orange Pharmacy and PIC Hoang are subject to disciplinary action under section 4301(j) in conjunction with CCR section 1717 for failure to comply with that regulation's requirements concerning the transfer between pharmacies of dangerous drugs, as more particularly alleged above and incorporated here by reference.

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 Original Pharmacy Permit Number PHY 35565, issued to Orange Pharmacy, partner/owners Tue Ngoc Hoang and Vinh N. Hoang;

2. Revoking or suspending Pharmacist License Number RPH 41779, issued to Tue Ngoc Hoang;

3. Ordering Orange Pharmacy and Tue Ngoc Hoang 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;

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

DATED: 11/7/07

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