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9	BEFORE THE
10	BOARD OF PHARMACY DEPARTMENT OF CONSUMER AFFAIRS
` 11	STATE OF CALIFORNIA
12	In the Matter of the Accusation Against: Case No. 3735
13	JOSE PERUCHO SAENZ A C C U S A T I O N
14	1890 Fargo Lane #01 Chula Vista, CA 91913
15	Pharmacy Technician Registration
16	Number TCH 49120  Respondent.
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18	Complainant alleges:
19	PARTIES
20	1. Complainant Virginia Herold brings this Accusation solely in her official capacity as
21	the Executive Officer of the Board of Pharmacy, Department of Consumer Affairs.
22	2. On May 16, 2003, the Board issued Pharmacy Technician Registration Number TCH
23	49120 to Respondent Jose Perucho Saenz. The registration was in full force and effect at all
24	times relevant to the charges brought herein and will expire on May 31, 2011, unless renewed.
25	JURISDICTION
26	3. This Accusation is brought before the Board, Department of Consumer Affairs, under
27	the authority of the following laws. All section references are to the Business and Professions
28 ·	Code unless otherwise indicated.
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- 4. Section 4300, subdivision (a) of the Business and Professions Code (Code) provides, in pertinent part, that every license issued may be suspended or revoked.
- 5. Section 118, subdivision (b), of the Code provides that the suspension, expiration, surrender, or cancellation of a license shall not deprive the Board of jurisdiction to proceed with a disciplinary action during the period within which the license may be renewed, restored, reissued or reinstated.

### STATUTORY PROVISIONS

6. Section 4059, subsection (a), of the Code states:

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

7. Section 4060 of the Code states:

No person shall possess any controlled substance, except that furnished to a person upon the prescription of a physician, dentist, podiatrist, optometrist, veterinarian, or naturopathic doctor pursuant to Section 3640.7, or furnished pursuant to a drug order issued by a certified nurse-midwife pursuant to Section 2746.51, a nurse practitioner pursuant to Section 2836.1, a physician assistant pursuant to Section 3502.1, a naturopathic doctor pursuant to Section 3640.5, or a pharmacist pursuant to either Section 4052.1 or 4052.2. This section shall not apply to the possession of any controlled substance by a manufacturer, wholesaler, pharmacy, pharmacist, physician, podiatrist, dentist, optometrist, veterinarian, naturopathic doctor, certified nurse-midwife, nurse practitioner, or physician assistant, when in stock in containers correctly labeled with the name and address of the supplier or producer.

8. 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.

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(l) The conviction of a crime substantially related to the qualifications. functions, and duties of a licensee under this chapter. The record of conviction of a violation of Chapter 13 (commencing with Section 801) of Title 21 of the United States Code regulating controlled substances or of a violation of the statutes of this state regulating controlled substances or dangerous drugs shall be conclusive evidence of unprofessional conduct. In all other cases, the record of conviction shall be conclusive evidence only of the fact that the conviction occurred. The board may inquire into the circumstances surrounding the commission of the crime, in order to fix the degree of discipline or, in the case of a conviction not involving controlled substances or dangerous drugs, to determine if the conviction is of an offense substantially related to the qualifications, functions, and duties of a licensee under this chapter. A plea or verdict of guilty or a conviction following a plea of nolo contendere is deemed to be a conviction within the meaning of this provision. The board may take action when the time for appeal has elapsed, or the judgment of conviction has been affirmed on appeal or when an order granting probation is made suspending the imposition of sentence, irrespective of a subsequent order under Section 1203.4 of the Penal Code allowing the person to withdraw his or her plea of guilty and to enter a plea of not guilty, or setting aside the verdict of guilty, or dismissing the accusation, information, or indictment.

(o) Violating or attempting to violate, directly or indirectly, of 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.

## Section 11350 of the Health & Safety (H&S) Code states in pertinent part:

(a) Except as otherwise provided in this division, every person who possesses (1) any controlled substance specified in subdivision (b) or (c), or paragraph (1) of subdivision (f) of Section 11054, specified in paragraph (14), (15), or (20) of subdivision (d) of Section 11054, or specified in subdivision (b) or (c) of Section 11055, or specified in subdivision (h) of Section 11056, or (2) any controlled substance classified in Schedule III, IV, or V which is a narcotic drug, unless upon the written prescription of a physician, dentist, podiatrist, or veterinarian licensed to practice in this state, shall be punished by imprisonment in the state prison.

#### 10. Section 11352 of the H&S Code states:

(a) Except as otherwise provided in this division, every person who transports, imports into this state, sells, furnishes, administers, or gives away, or offers to transport, import into this state, sell, furnish, administer, or give away, or attempts to import into this state or transport (1) any controlled substance specified in subdivision (b), (c), or (e), or paragraph (1) of subdivision (f) of Section 11054, specified in

paragraph (14), (15), or (20) of subdivision (d) of Section 11054, or specified in subdivision (b) or (c) of Section 11055, or specified in subdivision (h) of Section 11056, or (2) any controlled substance classified in Schedule III, IV, or V which is a narcotic drug, unless upon the written prescription of a physician, dentist, podiatrist, or veterinarian licensed to practice in this state, shall be punished by imprisonment in the state prison for three, four, or five years.

(b) Notwithstanding the penalty provisions of subdivision (a), any person who transports for sale any controlled substances specified in subdivision (a) within this state from one county to another noncontiguous county shall be punished by imprisonment in the state prison for three, six, or nine years.

#### COST RECOVERY

11. 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.

### **FACTS**

- 12. On March 6, 2008, Drug Enforcement Administration (DEA) and Federal Bureau of Investigation (FBI) agents simultaneously served federal search warrants at White Cross Pharmacy, Park Blvd. Pharmacy, and Galloway Pharmacy in San Diego after a two-year investigation into controlled substance diversion from the three pharmacies. On March 6, 2008, while Respondent was employed as a Pharmacy Technician at Galloway Pharmacy, he was served with a federal arrest warrant as part of the above investigation.
  - 13. The search and warrants produced the following information:
- a. Galloway was using the building located at 2984 Newton Avenue, San Diego, in back of the pharmacy, as part of the pharmacy for storing prescription records, prescriptions filled with controlled substances and being packaged for delivery, and computer terminals containing confidential patient information, but the building was not licensed with the Board as a pharmacy.
- b. From July 21, 2005, to March 6, 2008, Galloway purchased 467,400 tablets of Hydrocodone 5/500; 2,111,400 tablets of Hydrocodone 10/325; and 154,900 tablets of Oxycodone 80mg.
- c. The DEA Biennial Inventory of July 21, 2005, for Galloway shows 730 tablets of Oxycodone 80; 31,200 tablets of Hydrocodone 5/500; and 22,5000 tablets of Hydrocodone

10/325; and a closing inventory (stock on hand) on March 6, 2008, of 956 tablets of Oxycodone 80; 5,396 tablets of Hydrocodone 5/500; and 2,378 tablets of Hydrocodone 10/325.

d. The DEA computation chart shows that from July 21, 2005, to March 6, 2008, Galloway dispensed 74,846 tablets of Oxycodone 80mg; 370,767 tablets of Hydrocodone 5/500; and 103,623 tablets of Hydrocodone 10/325.

Together, this information revealed that Galloway was short 79,828 (51%) tablets of Oxycodone 80mg; short 122,437 (25%) tablets of Hydrocodone 5/500 and short 2,028,899 (95%) of Hydrocodone 10/325.

- 14. On March 16, 2009, in a criminal proceeding entitled, *United States of America vs.*Jose Jesus Peruch Saenz, in the United States District Court, Southern District of California, Case No. 3:08-cr-0511-BEN, Respondent was convicted by a plea of guilty to charges contained in a Superseding Information of knowingly and intentionally conspiring to distribute approximately 90,000 Hydrocodone Bitartrate tablets, a Schedule III controlled substance, beginning in 2005 and continuing through July 2007, in violation of 21 United States Code sections 846 and 841, subdivision (a); and filing a false income tax return on April 15, 2007, in violation of 26 United States Code section 7206(a), both felonies.
- 15. Pursuant to the March 16, 2009 Plea Agreement between the United States and Respondent, Respondent agreed to forfeit \$23,801.92 seized from his bank account, \$1,031.00 in U.S. currency found in his residence, a ring with an estimated value of \$17,070 a Lexus GS 600 and a BMW 740i. Respondent also understood that the crimes to which he pled guilty carry the following penalties:

Count 1: Distribution of Oxycodone

- A. A maximum term of imprisonment of 5 years:
- B. A maximum fine of \$250,000;
- C. A mandatory special assessment of \$100: and
- D. A term of supervised release of 3 years.

Count 2: Filing False Income Tax Return

- A. A maximum term of imprisonment of 3 years:
- B. A maximum fine of \$100,000, together with costs of prosecution;
- C. A mandatory special assessment of \$100; and
- D. A term of supervised release of up to 1 year.

16. On April 5, 2010, Respondent was sentenced as follows: time served (18 days custodial credit) as to both counts of the Superseding Information; supervised release for a term of three years as to count 1, and 2 years as to count 2, to run concurrently; pay \$100 penalty for both counts; and waiver of fines.

## FIRST CAUSE FOR DISCIPLINE

# (March 16, 2009 Felony Conviction: Distributing Hydrocodone & Filing False Income Tax Return)

17. Respondent has subjected his license to disciplinary action under sections 490 and 4301, subdivision (I), of the Code, in that he was convicted of crimes substantially related to the qualifications, duties, and functions of a pharmacy technician, as detailed in paragraphs 12—16.

## SECOND CAUSE FOR DISCIPLINE

## (Unprofessional Conduct: Dishonesty, Deceit & Corruption)

18. Respondent has subjected his license to disciplinary action under Code sections 4301, subdivision (f), for engaging in acts involving moral turpitude, dishonesty, fraud, deceit, or corruption, as detailed in paragraphs 12—16.

## THIRD CAUSE FOR DISCIPLINE

## (Unlawful Possession of Controlled Substances)

19. Respondent has subjected his license to disciplinary action under sections 4301, subdivision (j) and (o), for violation of section 4060 of the Code, and section 11350, subdivision (a) of the H&S Code, in that he unlawfully possessed controlled substances, as detailed in paragraphs 12—16.

## FOURTH CAUSE FOR DISCIPLINE

## (Unprofessional Conduct: Unlawfully Furnishing Controlled Substances)

20. Respondent has subjected his license to disciplinary action under sections 4301, subdivision (j) and (o), for violation of section 4059, subdivision (a), of the Code, and section 11352, subdivision (a) of the H&S Code, in that he furnished controlled substances without a prescription therefor, and violated state and federal statutes and regulations governing the practice of pharmacy, as detailed in paragraphs 12—16.

## **PRAYER**

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

- 1. Revoking or suspending Pharmacy Technician Registration Number TCH 49120 issued to Jose Perucho Saenz;
- 2. Ordering Jose Perucho Saenz to pay the Board of Pharmacy the reasonable costs of the investigation and enforcement of this case, pursuant to Business and Professions Code section 125.3; and
  - 3. Taking such other and further action as deemed necessary and proper.

DATED: 7/16/10

VIRGINIA HEROLD Executive Officer

Board of Pharmacy

Department of Consumer Affairs

State of California Complainant