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

12 In the Matter of the Accusation Against:

Case No. 4918

13 **HARVEY AYALA ALVAREZ**
5433 48th Ave
14 Sacramento, CA 95823

A C C U S A T I O N

15 **Pharmacy Technician Registration No. TCH**
16 **103851**

17 Respondent.

18
19 Virginia Herold ("Complainant") alleges:

20 **PARTIES**

21 1. Complainant brings this Accusation solely in her official capacity as the Executive
22 Officer of the Board of Pharmacy, Department of Consumer Affairs.

23 2. On or about June 29, 2010, the Board of Pharmacy issued Pharmacy Technician
24 Registration Number TCH 103851 to Harvey Ayala Alvarez ("Respondent"). The Pharmacy
25 Technician Registration was in full force and effect at all times relevant to the charges brought
26 herein and will expire on February 28, 2014, unless renewed.

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1 **JURISDICTION**

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

5 4. Code section 4011 provides, in pertinent part, that the Board shall administer and
6 enforce both the Pharmacy Law [Bus. & Prof. Code, § 4000 et seq.] and the Uniform Controlled
7 Substances Act [Health & Safety Code, § 11000 et seq.].

8 5. Code section 4300 provides, in pertinent part, that every license issued may be
9 suspended or revoked.

10 6. Code Section 4300.1 states:

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

16 **STATUTORY PROVISIONS**

17 **Business and Professions Code**

18 7. Code Section 4021 states:

19 "‘Controlled Substance’ means any substance listed in Chapter 2 (commencing with section
20 11053) of Division 10 of the Health and Safety Code."

21 8. Code Section 4022 states, in pertinent part:

22 "‘Dangerous drug’ means any drug unsafe for self-use in humans or animals, and includes the
23 following:

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

26 ...

27 (c) Any drug that by federal or state law can be lawfully dispensed only on prescription
28 or furnished pursuant to section 4006.

1 9. Code Section 4059 provides, in pertinent part:

2 “No person shall furnish any dangerous drug, except upon the prescription of a physician,
3 dentist, podiatrist, optometrist, or veterinarian...”

4 10. Code Section 4060 provides, in pertinent part:

5 No person shall possess any controlled substance, except that furnished to a person upon the
6 prescription of a physician, dentist, podiatrist, optometrist, veterinarian, or naturopathic doctor
7 pursuant to Section 3640.7, or furnished pursuant to a drug order issued by a certified nurse-
8 midwife pursuant to Section 2746.51, a nurse practitioner pursuant to Section 2836.1, or a
9 physician assistant pursuant to Section 3502.1, or naturopathic doctor pursuant to Section 3640.5,
10 or a pharmacist pursuant to either subparagraph (D) of paragraph (4) of, or clause (iv) of
11 subparagraph (A) of paragraph (5) of, subdivision (a) of Section 4052

12 11. Code section 4301 states, in pertinent part:

13 The board shall take action against any holder of a license who is guilty of unprofessional
14 conduct. Unprofessional conduct shall include, but is not limited to, any of the following:

15 ...

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

19 ...

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

22 ...

23 “(l) The conviction of a crime substantially related to the qualifications, functions, and duties
24 of a licensee under this chapter.

25 ...

26 “(o) Violating or attempting to violate, directly or indirectly, or assisting in or abetting the
27 violation of or conspiring to violate any provision or term of this chapter or of the applicable
28

1 federal and state laws and regulations governing pharmacy, including regulations established by the
2 board or by any other state or federal regulatory agency.”

3 ...

4 **Health and Safety Code**

5 12. Health and Safety Code section 11170 states:

6 “No person shall prescribe, administer, or furnish a controlled substance for himself.”

7 13. Health and Safety Code section 11173 states, in pertinent part:

8 “(a) No person shall obtain or attempt to obtain controlled substances, or procure or attempt
9 to procure the administration of controlled substances, (1) by fraud, deceit, misrepresentation, or
10 subterfuge; or (2) by the concealment of a material fact.”

11 ...

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

16 **COST RECOVERY**

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

21 **DRUGS**

22 16. “Promethazine with Codeine” is a generic name for Phenergan with Codeine, and is a
23 controlled substance under Health and Safety Code section 11058, subdivision (c)(1) and a
24 dangerous drug within the meaning of Business and Professions Code section 4022 in that it
25 requires a prescription under federal law.

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1 **FIRST CAUSE FOR DISCIPLINE**

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

3 17. Respondent is subject to discipline under Code section 4301, subdivision (f), for
4 unprofessional conduct, in that between approximately May 31, 2012 and June 22, 2012,
5 Respondent committed numerous acts involving moral turpitude, dishonesty, fraud, deceit or
6 corruption. The circumstances are as follows:

7 a. On or about March 26, 2012, the Kaiser Permanente ("Kaiser") Call Center
8 received an anonymous telephone call reporting theft of a cough syrup with codeine by
9 Respondent. Kaiser conducted an investigation and found that an audit of promethazine with
10 codeine conducted at the Elk Grove Kaiser location from April 14, 2011 to June 22, 2012 resulted
11 in a negative variance of 33.6%. Covert cameras were installed in the pharmacy and a daily count
12 of the drug was initiated by pharmacist-in-charge Dong. Upon review of the daily count of the
13 drug and the video footage from the pharmacy, it was confirmed that Respondent was responsible
14 for four incidents of loss of promethazine with codeine on May 31, 2012, June 8, 2012, June 18,
15 2012, and June 22, 2012. Respondent stole the drug by reaching into the promethazine with
16 codeine stock bin, removing bottles, and walking off with the bottles of promethazine with
17 codeine. No prescriptions for promethazine with codeine cough syrup were sold or filled by the
18 pharmacy during the dates in question. On July 2, 2012, the investigator interviewed Respondent
19 in the presence of local pharmacy management, Kaiser Human Resource personnel and a union
20 representative. The union representative privately advised the Kaiser Human Resources
21 representative that Respondent had admitted to diverting the promethazine with codeine cough
22 syrup on four or five occasions, and was willing to resign in lieu of termination for theft. Although
23 Respondent would not personally admit the diversion to the Kaiser representatives out of fear of
24 criminal prosecution, he confirmed his written resignation in lieu of termination.

25 18. On April 15, 2013, a criminal complaint in the case of *People v. Harvey Ayala Alvarez*
26 (Super. Ct. Sacramento County Case No. 13M02794) was filed against Respondent on charges of
27 violation of Business and Professions Code section 4060 (Possession of Controlled Substance
28 without a valid prescription) and Penal Code section 503 (Embezzlement), for the conduct set

1 forth above in paragraphs 17 through 21, and their subparts. This matter is currently pending in
2 Sacramento County Superior Court.

3 **SECOND CAUSE FOR DISCIPLINE**

4 **(Unlawful Possession of Controlled Substance)**

5 19. Respondent is subject to discipline under Code section 4060 and Health and Safety
6 Code section 11350, in that Respondent had possession of a controlled substance, to wit:
7 Promethazine with Codeine, without authorization or a valid prescription therefore, as more fully
8 set forth above in paragraph 17 and its subpart.

9 **THIRD CAUSE FOR DISCIPLINE**

10 **(Furnishing of Dangerous Drug)**

11 20. Respondent is subject to discipline under Code section 4059 and Health and Safety
12 Code section 11170, in that on multiple instances Respondent furnished to himself a dangerous
13 drug, to wit: promethazine with codeine, without a valid prescription, as more fully set forth above
14 in paragraph 17 and its subpart.

15 **FOURTH CAUSE FOR DISCIPLINE**

16 **(Violation of Statutes Regulating Controlled Substances and Dangerous Drugs)**

17 21. Respondent is subject to discipline under Code section 4301, subdivision (j), on the
18 grounds of unprofessional conduct, in that between approximately May 31, 2012 and June 22,
19 2012, Respondent violated statutes regulating controlled substances and dangerous drugs, including
20 Business and Professions Code section 4060 and Health and Safety Code section 11350, as set
21 forth above in paragraph 18, Business and Professions Code section 4059 and Health and Safety
22 Code section 11170, as set forth above in paragraph 19, and Health and Safety Code section
23 11173, as set forth above in paragraph 20.

24 **FIFTH CAUSE FOR DISCIPLINE**

25 **(Conviction of Crime)**

26 22. Respondent is subject to discipline under Code section 4301, subdivision (l), in that he
27 was convicted of the following crime which is substantially related to the qualifications, functions,
28 or duties of a licensed pharmacy technician: On or about November 6, 2012, in the case of *People*

1 v. *Harvey Ayala Alvarez* (Super. Ct. Sacramento County, Case No. 12M01740), Respondent was
2 convicted on his plea of nolo contendere of violating Penal Code section 25400, subdivision
3 (a)(1)(Carrying concealed weapon in a vehicle), a misdemeanor. The circumstances are as
4 follows:

5 a. On or about March 2, 2012, Officer M. conducted a vehicle stop for operating a
6 radio or similar device in a vehicle on a street in a manner which results in sound from the device
7 being audible to a person of normal hearing sensitivity more than twenty-five feet from the vehicle.
8 Respondent was the driver and only occupant in the vehicle. Upon investigation, the Officer
9 determined that Respondent was driving on a suspended license. During the tow inventory of the
10 vehicle, the Officer located a loaded .380 semi-automatic handgun underneath the driver's seat.
11 The handgun was registered to Respondent, who admitted to placing the gun beneath the seat.

12 **SIXTH CAUSE FOR DISCIPLINE**

13 **(Violating Laws Governing Pharmacy)**

14 23. Respondent is subject to discipline under Code section 4301, subdivision (o), in that
15 Respondent violated the laws governing pharmacy, as more fully set forth above in paragraphs 17
16 through 23, and their subparts.

17 **PRAYER**

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

20 1. Revoking or suspending Pharmacy Technician Registration Number TCH 103851,
21 issued to Harvey Ayala Alvarez;

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23 2. Ordering Harvey Ayala Alvarez to pay the Board of Pharmacy the reasonable costs of
24 the investigation and enforcement of this case, pursuant to Business and Professions Code section
25 125.3;

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

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DATED: 11/4/13

Virginia Herold

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

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