

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

In the Matter of the Accusation Against:

D & R PHARMACY, INC.
dba PICO UNION PHARMACY,
Pharmacy Permit No. PHY 45340

and

DANA MADIEVSKY,
Pharmacist License No. RPH 48684

Respondents.

Case No. 5059

OAH No. 2015050797

**DECISION AFTER
RECONSIDERATION
AS TO RESPONDENT
MADIEVSKY, ONLY**

The California State Board of Pharmacy (Board) issued its Decision after Rejection in the above matter on March 18, 2016, to be effective April 18, 2016. Respondent Dana Madievsky, only, requested reconsideration of the decision prior to the effective date. Respondent Madievsky's request for reconsideration asked only that one, specific condition be modified. Specifically, respondent Madievsky requested that condition 13 of probation ("Tolling of Probation") be modified to reduce the number of hours that respondent must practice as a pharmacist per month to avoid tolling of her probation. A stay of the Decision after Rejection as against Respondent Madievsky only, was issued¹ for 10 days, until 5 p.m. on April 28, 2016, to allow time for the Board to consider the Petition for Reconsideration.

Good cause appearing, the Board granted reconsideration on April 28, 2016, and further stayed the decision against respondent Madievsky, only, until the board issued its decision after reconsideration.

On reconsideration, the Board upholds its Decision after Rejection, except that it modifies probationary condition 13 to read,

13. Tolling of Probation

Except during periods of suspension, respondent Madievsky shall, at all times while on probation, be employed as a pharmacist in California for a minimum of 40 hours per calendar month. Any month during which this minimum is not met 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.

¹ The portion of the decision against D& R Pharmacy, Inc., doing business as Pico Union Pharmacy, was not stayed and became effective at 5 p.m. on April 18, 2016.

Should respondent, regardless of residency, for any reason (including vacation) cease practicing as a pharmacist for a minimum of 40 hours per calendar month in California, respondent must notify the board in writing within ten (10) days of the cessation of practice, and must further notify the board in writing within ten (10) days of the resumption of practice. Any failure to provide such notification(s) 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 thirty-six (36) months.

"Cessation of practice" means any calendar month during which respondent is not practicing as a pharmacist for at least 40 hours, as defined by Business and Professions Code section 4000 et seq. "Resumption of practice" means any calendar month during which respondent is practicing as a pharmacist for at least 40 hours as a pharmacist as defined by Business and Professions Code section 4000 et seq.

The remainder of the Decision After Rejection dated March 18, 2016, is adopted unchanged as to Respondent Madievsky, and is incorporated herein by reference.

IT IS SO ORDERED this 5th day of May, 2016.

This Decision and Order will be effective at 5 p.m. on May 12, 2016.

BOARD OF PHARMACY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA



By _____

Amy Gutierrez, Pharm.D.
Board President

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

In the Matter of the Accusation Against:

D & R PHARMACY, INC.
dba PICO UNION PHARMACY,
Pharmacy Permit No. PHY 45340

and

DANA MADIEVSKY,
Pharmacist License No. RPH 48684

Respondents.

Case No. 5059

OAH No. 2015050797

**ORDER GRANTING
PETITION FOR
RECONSIDERATION AS TO
RESPONDENT DANA
MADIEVSKY ONLY**

Respondent Dana Madievsky having requested reconsideration of the decision in the above-entitled matter, and good cause appearing, the reconsideration is hereby granted and the Decision and Order is further stayed until the Board renders its final decision.

IT IS SO ORDERED this 28th day of April 2016.

BOARD OF PHARMACY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA



By

Deborah Veale, RPh.
Board Vice President

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

In the Matter of the Accusation Against:

D & R PHARMACY, INC.
dba PICO UNION PHARMACY,
Pharmacy Permit No. PHY 45340

and

DANA MADIEVSKY,
Pharmacist License No. RPH 48684

Respondents.

Case No. 5059

OAH No. 2015050797

10-DAY STAY ORDER OF EFFECTIVE
DATE OF DECISION AND ORDER AS
TO RESPONDENT DANA
MADIEVSKY ONLY

ORDER STAYING EFFECTIVE DATE, IN PART

Respondent Dana Madievsky timely petitioned for reconsideration of the decision in the above-entitled matter pursuant to section 11521 of the Government Code. In order to allow the board additional time to consider the petition, in accordance with the provisions of section 11521 of the Government Code,

IT IS HEREBY ORDERED that the effective date of the Decision and Order, as to Dana Madievsky in the above-entitled matter is stayed until 5 p.m. on April 28, 2016.

There having been no request for reconsideration as to the part of the decision pertaining to respondent Pico Union Pharmacy (PHY 45340), that portion of the decision will become effective at 5 p.m. on April 18, 2016, as previously ordered.

IT IS SO ORDERED this 18th day of April 18, 2016.

BOARD OF PHARMACY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA



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

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

In the Matter of the Accusation Against:

D & R PHARMACY INC.,
d.b.a. PICO UNION PHARMACY,
Pharmacy Permit No. PHY 45340

And

DANA MADIEVSKY
Pharmacist License No. RPH 48684,

Respondents.

Case No. 5059

OAH No. 2015050797

DECISION
AFTER REJECTION OF PROPOSED DECISION

John E. DeCure, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California, heard this matter on September 9 and 10, 2015, in Los Angeles. Christina Felix, Deputy Attorney General, represented Virginia K. Herold (complainant), Executive Officer of the Board of Pharmacy, Department of Consumer Affairs. Respondent D & R Pharmacy, doing business as Pico Union Pharmacy (respondent Pharmacy), and Respondent's president and pharmacist-in-charge (PIC) Dana Madievsky (respondent Madievsky), were represented by Herbert Weinberg, Attorney at Law. Respondent Madievsky was present during the hearing. Evidence was taken and argument was heard. The parties addressed an evidentiary issue relating to redacting certain records and submitted closing arguments. The record was closed on October 2, 2015. The ALJ issued a Proposed Decision on October 14, 2015.

Pursuant to section 11517 of the Government Code, on November 4, 2015, the members of the California State Board of Pharmacy ("Board") issued an Order rejecting the October 14, 2015, Proposed Decision of the Administrative Law Judge in the above-entitled matter. On December 18, 2015, the parties were notified that the transcript had been received and the deadline for the parties to submit written argument was set for January 18, 2016. Written argument was timely received from both parties.

The Board, having reviewed and considered the entire record, including the transcript, exhibits and written arguments, now issues this decision.

FACTUAL FINDINGS

Jurisdiction

1. Complainant filed the Accusation in her official capacity. Respondent Madievsky timely filed a notice of defense.

2. The board issued Original Pharmacy Permit Number PHY 45340 to respondent Pharmacy on August 28, 2001. The license will expire on August 1, 2016, unless renewed.

3. The board issued Original Pharmacist License Number RPH 48684 to respondent Madievsky on April 23, 1996. The license will expire on July 31, 2017, unless renewed.

General Overview

4. Respondent Madievsky has been the sole owner of respondent Pharmacy for 14 years. She employs two pharmacy technicians, Berta Echeverry and Connie Dea, both of whom have worked at respondent Pharmacy the entire time since respondent Madievsky became its owner.

5. About three miles away from respondent Pharmacy, Derrick Butler, M.D., a board-certified family practitioner, practices medicine at the T.H.E. (i.e., "To Help Everyone") Clinic, treating mostly underserved, poor inner-city patients. The vast majority of these patients rely upon Medi-Cal benefits or free county-funded medical programs for the poor, and they very seldom pay cash for medical services or prescriptions. During 2010, Dr. Butler wrote prescriptions on paper pads, but in December 2010, the T.H.E. Clinic switched to using electronic prescriptions, which could be sent to pharmacies either by facsimile or e-mail.

6. In August 2010, Dr. Butler reported to police the theft of prescription pads from T.H.E. Clinic by an unknown person. Dr. Butler had received a telephone call from Vernon Main Pharmacy (Vernon) asking him to verify a prescription for a large dosage of narcotics. Dr. Burgess inquired further with Vernon and discovered that multiple prescriptions for narcotics had been filled in Dr. Butler's name, but without his knowledge or authorization. In December, 2010, Dr. Butler mailed a "To Whom It May Concern" letter to area pharmacies alerting them of the theft of prescription forms and that the forms were being used to create "fake" prescriptions in his name. In November, 2011, Dr. Butler made a second report to police that an unknown person stole his prescription pads, forged his name on prescriptions, and exchanged the prescriptions for narcotics.

7. In April, 2011, Dr. Butler complained to the board that respondent Pharmacy had dispensed numerous fraudulent prescriptions in his name from August 2010 to February 2011.

Dr. Butler believed this was true because the California Department of Justice (DOJ) had sent him a CURES¹ report.

8. At all relevant items in 2010 and 2011, no one named “Keisha” (or Akeisha) or “Michelle” was an employee at the T.H.E. Clinic. When Dr. Butler talked with respondent Madievsky, he told her this, and asked her to immediately stop filling prescriptions in his name because they were false. Respondent Madievsky agreed, and respondent Pharmacy filled no further prescriptions in Dr. Butler’s name.

The Prescriptions

9. a. Sarah Bayley, a board Inspector of 15 years and licensed pharmacist since 1994, was assigned to investigate Dr. Butler’s complaint. At the hearing she testified regarding the results of her inspection and also provided expert testimony regarding the standard of practice for California pharmacists and pharmacies.

b. Ms. Bayley found that from August 1, 2010, to June 10, 2011, respondent Pharmacy dispensed 596 prescriptions allegedly written by Dr. Butler but which were false for various reasons. Some of the false prescriptions bore forged signatures of Dr. Butler, and some were approved by “Keisha” (or Akeisha) or “Michelle,” whereas those persons were unknown to the T.H.E. Clinic and therefore, Dr. Butler was unaware the prescriptions even existed. Other false prescriptions were in the name of supposed patients that Dr. Butler had never heard of or treated. Many of the prescriptions, when taken together, revealed prescribing patterns that should have alerted any knowledgeable, responsible pharmacist that the prescriptions may not have been legitimate as follows.

c. Ms. Bayley noted that 290 of the prescriptions were for Phenergan with Codeine, a Schedule V controlled substance. All of these prescriptions came with the exact same physician directions to take one teaspoon every six to eight hours, all were for a quantity of one pint, and all were accompanied by prescriptions for antibiotics in a quantity of 10 capsules. This is a prescription for a serious cough, with a 20-day supply of Phenergan with Codeine coupled with an only five-day supply of antibiotics. There is no variance as to any of the patients’ age, needs, or conditions. On August 5, 2010, respondent Pharmacy filled 10 such identical prescriptions in a single day, which is an unusually high level of repetition. Insurance plans were billed, but many patients paid \$110 to \$120 in cash for these prescriptions, which is also suspicious.

¹ CURES refers to California’s Controlled Substance Utilization Review and Evaluation System, a database of prescription-drug history information that includes information about the drug dispensed, drug quantity and strength, patient name, address, prescriber name, and authorization number including DEA number or prescription number. California doctors and pharmacies are required to report to DOJ, within seven days, every schedule II, III and IV drug prescription that is written.

d. Ms. Bayley found several other abnormal prescriptions. Sixteen of the prescriptions were for hydrocodone, a highly addictive Schedule II² controlled substance, in the form of either Lortab 10/500 mg or Norco 10/325 mg. All came with the exact same directions to take one tablet every six to eight hours, and all were prescribed in the same quantity of 100 tablets. The identical dosages and directions should have raised a question for any pharmacist as to whether the prescriptions are legitimate, because most legitimate prescriptions are varied due to multiple factors and conditions relevant to each individual patient. Similarly, five identical Lortab prescriptions were filled on September 30, 2010, which is highly unusual in terms of both the prescriptions' sameness and their issuance in such close succession. Five identical Norco prescriptions were filled on August 12, 2010, and five more identical prescriptions were filled on September 25, 2010. Such a high degree of repetition is suspicious for the same reasons.

e. Ms. Bayley stated that a competent pharmacist must exercise his or her professional judgment when faced with odd, suspicious, or apparently illegitimate prescriptions such as these. The exercise of such professional judgment cannot be delegated to pharmacy technicians. It was respondent Madievsky's duty to contact Dr. Butler directly to ask questions about the prescriptions and verify their legitimacy. If respondent Madievsky was not satisfied that a prescription was legitimate, she was not obligated to fill it.

f. Ms. Bayley's testimony established that pharmacy technicians may verify any kind of prescriptions on the pharmacy's behalf, but their duties do not include the exercise of a pharmacist's professional judgment. Therefore, if a prescription is of questionable legitimacy, the pharmacist cannot delegate the responsibility to contact the prescribing physician to the pharmacy technician but must contact the physician herself.

The Prescription Verifications

10. Complainant alleges in the Accusation that respondent Pharmacy and respondent Madievsky "never contacted Dr. [Butler] or the [T.H.E. Clinic] to verify the fraudulent prescriptions prior to dispensing the drugs to patients." The evidence presented on this issue was contradictory as follows.

11. Respondent Pharmacy made attempts to verify many of the prescriptions with the T.H.E. Clinic. Respondent Pharmacy's two pharmacy technicians, Berta Echeverry and Connie

² At the time the prescriptions were filled, hydrocodone containing products were classified as Schedule III substances. The federal Drug Enforcement Administration (DEA) reclassified hydrocodone combined products (HCPs) from Schedule III to Schedule II of the Controlled Substances Act effective October 6, 2014. (Title 21, C.F.R. Part 1308.) With that reclassification, additional requirements apply to prescriptions for such products. In its rulemaking, DEA found that HCPs were "widely diverted and abused" and that "[t]here have been large numbers of deaths and emergency department visits associated with abuse of HCPs." (Schedules of Controlled Substances: Rescheduling of Hydrocodone Combination Products From Schedule III to Schedule II, 79 FR 49661-01.)

Dea, both testified credibly, and adamantly, regarding their calls to either "Keisha" (or Akeisha) or "Michelle" for verification of some of the prescriptions, and a number of the prescriptions bear electronic or handwritten notes attesting to such verifications being made. According to the pharmacy technicians, their calls were always routed to either of these people, both of whom were calm and knowledgeable when providing verification information. However, the evidence also established, by a stipulation of the parties (see Exhibit 19), that no one named "Keisha" (or Akeisha) or "Michelle" worked at the T.H.E. Clinic.

12. When Dr. Butler twice reported to police that prescription pads were stolen, he did not, on either occasion, allege that the theft was part of a burglary or break-in. When prescription pads were stolen, Dr. Butler and the T.H.E. Clinic staff physicians considered whether a staff employee may have taken them. As a result, the clinic had to develop new internal protocols for securing and storing prescriptions pads. The sum of the evidence indicates that dishonest acts regarding prescribing were likely committed by a person or persons working at the T.H.E. Clinic.

13. Fraudulent prescriptions would be of no value to their purveyors unless they were filled. A staff person willing to steal prescription pads likely would also be willing to arrange for the false prescriptions to be verified as they were called in. This would account for respondent Pharmacy's two pharmacy technicians' claims that they received phone verifications from two clinic employees who were using names otherwise unknown to the clinic's staff. Because the technicians' testimony was credible while at the same time, the evidence established that the verifications issuing from the T.H.E. Clinic were false, it may be inferred from the totality of circumstances that two persons within the T.H.E. Clinic were providing verifications using assumed names.

14. Respondent Pharmacy's prescription records contained no notations that verifications were obtained for approximately 42 of the questionable prescriptions. Respondent Madievsky's testimony that all of the questionable prescription would have been verified was unpersuasive. Respondent Madievsky had no direct recollection of verifying any particular prescriptions, but had to rely on pharmacy records. If the records of these prescriptions contained no information about verifications, respondent was speculating that verifications had been secured.

Failure to Produce Six Original Prescriptions

15. During her investigation, Ms. Bayley requested that respondent Pharmacy produce numerous original prescriptions. Respondent Pharmacy and respondent Madievsky cooperated with the board's investigation. They produced 303 prescriptions as requested, but failed to produce six requested prescriptions as follows: prescription (Rx) no. 1559731; Rx no. 1559732; Rx no. 1566999; Rx no. 1567000; Rx no. 1555690; and Rx no. 1555691. Ms. Bayley

noted the missing prescriptions and sent a letter to respondent Madievsky requesting that they be forwarded to her. (Exhibit 14.) Respondent Madievsky does not recall ever seeing the letter and assumes that it was not delivered through the mail. When she read the allegations in the Accusation, she searched for and readily located the missing prescriptions, which were stored in the correct places but had “stuck” (i.e., clung) to the backs of other prescriptions. Respondent Madievsky credibly attributed the pharmacy’s failure to produce these six prescriptions to an honest mistake.

Mitigation, Rehabilitation, and Findings Pertinent to Discipline

16. a. Respondent Madievsky was a candid witness. She conceded the many irregularities that the board’s investigator noted in the prescriptions and agreed with Ms. Bayley’s expert opinion that a pharmacist must, in the exercise of her professional judgment, verify any such questionable or suspect prescriptions. She admitted that she, not her pharmacy technicians, should have been the one to contact Dr. Butler, but she had failed to do so. She cooperated with the board’s investigation. As a result of this case, she has changed the way she scrutinized prescriptions. For example, she did not know before that Phenergan with Codeine was an abused “street drug,” so she is more skeptical of such prescriptions, particularly if they appear irregular. The CURES system was not available until June 2011, which is after the fraudulent prescriptions in Dr. Butler’s name were filled, but since June 2011 she has used the CURES system daily. She inputs patient names to determine whether a patient is drug-seeking or “doctor-shopping,” or when a patient without a serious condition has a prescription for addictive drugs. If a prescribing physician is new to the pharmacy, she calls the physician herself to verify the prescription. If a patient is new and the prescription contains any irregularities, she calls the prescribing physician herself to verify the prescription. If a regular patient has a new prescription with irregularities, she calls the physician herself to verify the prescription.

b. In closing argument, Complainant claimed respondent Madievsky as a “not a credible witness” and “not truthful in her testimony.” As an example of this alleged lack of veracity, complainant noted that when respondent Madievsky was asked if she or respondent Pharmacy had been disciplined before, respondent Madievsky said they had not. According to Complainant, this testimony was false because, in 2008, the board issued citations to both respondents.

c. Complainant’s claim that respondent Madievsky was not credible or truthful regarding a prior disciplinary history is misinformed. Official notice is taken that Business and Professions Code³ section 125.9, which authorizes the board to establish a system for issuing citations and fines to licensees, and California Code of Regulations, title 16, section 1775, which provides a basic framework for such citations, do not treat citations and fines as disciplinable offenses. In fact, Code section 125.9, subdivision (b)(4), provides that upon a citation or fine’s

³ Hereafter, all references to Code refer to the Business and Professions Code.

assessment and issuance, "payment of any fine shall not constitute an admission of the violation charged." Furthermore, page 1 of Complainant's own Investigation Report sets forth a substantial list of vital information regarding both respondents. In that list, the Citations issued to respondent Pharmacy and respondent Madievsky on March 27, 2008, are described. Also listed for both respondents is the notation: "Prior history of discipline: None." (Exhibit 4.) The evidence showed that when respondent Madievsky stated she had no prior history of discipline, she was testifying truthfully.

d. Each respondent was previously issued a citation. On March 27, 2008, respondent Pharmacy was issued citation number CI 2006 32919, with a fine of \$2,500, for a violation of Business and Professions Code sections 4301, subdivisions (o)⁴ and (q)⁵, 4081⁶, 4332⁷ and 4061⁸. Respondent Madievsky was issued citation number CI 2007 35451, with a fine of \$3,500, for the same violations. No further detail was placed in the record.

17. Respondent Madievsky has had problems before contacting physicians by telephone to verify prescriptions and admitted that sometimes, when she was deterred from speaking with the physician, she would settle for talking with a medical staff person. Respondent now insists on speaking with the prescribing physician if the situation requires the physician's input and verifications.

18. Respondent Madievsky had repeated opportunities to place the onus on her two pharmacy technicians for not correctly verifying the fraudulent prescriptions, yet she refused to deflect the blame onto others. Instead, she took responsibility for failing to properly verify the prescriptions herself, estimating that she saw 90 percent of the prescriptions as they came in to be filled.

19. a. Irina Gelman, a friend and customer of respondent Madievsky's for 20 years, submitted a character reference letter in which she described respondent Madievsky as an honest, caring and dedicated pharmacist. Roger Salah, R.Ph., a registered pharmacist in California since 1964, submitted a character reference letter which described respondent Madievsky as ethical, honest, caring, knowledgeable and devoted to the practice of pharmacy. Elaine Bleiden, R.Ph., a registered pharmacist who has known and worked with respondent

⁴ Code section 4301, subdivision (o), provides that unprofessional conduct includes "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."

⁵ Code section 4301, subdivision (o), provides that unprofessional conduct includes "Engaging in any conduct that subverts or attempts to subvert an investigation of the board."

⁶ Code section 4081 relates to the making and keeping of pharmacy related records, including inventory, and making them available to authorized officers of the law. Amendments to the section since the citation issued did not change the provisions relative to pharmacies or pharmacists-in-charge.

⁷ Code section 4332 makes it a misdemeanor to violate section 4081.

⁸ Code section 4061 relates to requirements for distributing samples of dangerous drugs.

Madievsky since 1996, submitted a character reference letter describing her as a hardworking, knowledgeable pharmacist who is also a dedicated “patient advocate” when it comes to ensuring their good health. Thang Nguyen, M.D., a physician who has worked with respondent Madievsky for 13 years, complimented her professional expertise, knowledge and excellent service to his patients.

b. Each of the letter writers identified above stated that they were aware of the allegations brought against respondent Madievsky in the pending Accusation.

Costs

20. The board incurred enforcement costs, in the form of Attorney General fees, in the amount of \$9,420. The board incurred its own costs for investigation in the amount of \$12,822. The administrative law judge found that a portion of these costs were not reasonably incurred as follows.

a. The Attorney General’s Matter Time Activity report, which details its costs in increments of one-quarter hour and describes each corresponding task performed, reflects that 19.25 hours of Deputy Attorney General time was billed at a rate of \$170 per hour for “witness-related preparation.” The total cost of this activity is \$3,272.50. Ms. Bayley’s declaration for the board reflects 22 hours spent on hearing preparation, “which included case file review and witness preparation with the Attorney General’s Office.” Ms. Bayley’s billing rate for these costs appears to be \$120 per hour, which would make the total cost of this activity \$2,640. In sum, the combined Attorney General and board billable hours spent on these activities was 41.25 hours, for a total of \$5,912.50 in costs incurred.

b. The complainant called on two witnesses at hearing. Its first witness, Dr. Butler, testified for approximately two hours. Its second witness, Ms. Bayley, testified for approximately two and one-half hours. Both witnesses’ testimony was straightforward, mostly uncontroversial, and hewed to the allegation set for in the Accusation. There was no indication that either witness would have required lengthy or elaborate preparation to testify.

c. As a result, the Attorney General’s 19.25 hours of witness preparation is disproportionate to the actual four and one-half hours of total witness testimony rendered. A more reasonable amount of preparation would be four hours per witness. Therefore a reasonable total for Attorney General witness preparation costs is eight hours, or \$1,360.20. In the same vein, Ms. Bayley’s total of 22 hours of hearing and witness preparation is disproportionate to the two and one-half hours of testimony she provided at the hearing. Her billings included case file review, which in this case could be reasonably estimated at three hours. A more reasonable amount of witness preparation for her actual testimony would be four hours. Therefore, a reasonable total for Ms. Bayley’s hearing preparation, including file review and witness preparation, would be seven hours, or \$840.

d. All other Attorney General enforcement costs are reasonable. Pursuant to these Factual Findings, the Attorney General’s reasonable costs are reduced to \$7,508.

e. All other board investigation costs are reasonable. Pursuant to these Factual Findings, the board staff's reasonable costs are reduced to \$11,022.

f. These combined costs of investigation by board staff and Attorney General reasonable costs total \$18,530.

LEGAL CONCLUSIONS

1. a. The individual practice of pharmacy, like the practice of medicine, is a profession. The standard of proof in an administrative disciplinary action seeking the suspension or revocation of a professional license is "clear and convincing evidence." *Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 856. The key element of "clear and convincing evidence is that it must establish a high probability of the existence of the disputed fact, greater than proof by a preponderance of the evidence. Evidence of a charge is clear and convincing so long as there is a "high probability" that the charge is true. *People v Mabini* (2001) 92 Cal.App.4th 654, 662. To take discipline against the pharmacist's license, complainant must establish cause for discipline exists by clear and convincing evidence.

b. The standard of proof against the pharmacy's license is different, because there are not extensive education, training and testing requirements to obtain such licensure. As such, complainant must establish cause for discipline against a pharmacy license by demonstrating cause for discipline by a preponderance of the evidence. (*Imports Performance v Dept. of Consumer Affairs, Bur. Of Automotive Repair* (2011) 201 Cal.App.4th 911, 916-917; *San Benito Foods v Veneman* (1996) 50 Cal.App.4th 1889.)

c. Such distinction is unnecessary in this matter, however, because the same allegations are made against both the pharmacist and pharmacy's licenses. The complainant met her burden of proving her case by clear and convincing evidence.

2. The Board of Pharmacy is guided by principles and statutes that mandate that whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public must be paramount. (Code, §§ 4001.1 and 4313.)

3. Cause exists to discipline respondent Pharmacy's permit number PHY 45340 and respondent Madievsky's pharmacist license number RPH 48684 under Code section 4301, subdivision (o), for committing unprofessional conduct by violating or assisting in or abetting the violation of state law governing pharmacy, to wit, California Code of Regulations, title 16, section 1761, subdivision (a), by dispensing prescriptions which contained significant errors, omissions, irregularity, uncertainty, or alteration, while failing to contact the prescriber to obtain the information needed to validate the prescriptions. (Factual Findings 4 through 14.)

4. Cause exists to discipline respondent Pharmacy's permit number PHY 45340 and respondent Madievsky's pharmacist license number RPH 48684 under Code section 4301, subdivision (o), for committing unprofessional conduct by violating or assisting in or abetting the violation of state law governing pharmacy, to wit, Code section 4333, by failing to maintain

prescription records available for inspection by authorized officers of the law in a board-licensed facility for a period of three years. (Factual Findings 4 through 15.)

Analysis to Determine Penalty

5. Section 4300 of the Code provides that the board may discipline the holder of, and suspend or revoke, any certificate, license or permit issued by the board. The Board's Disciplinary Guidelines state that, in determining whether the minimum, maximum, or an intermediate penalty is to be imposed in a given case, certain factors should be considered. (Title 16, C.C.R., § 1760.) Each factor is considered in turn below.

1. Actual or potential harm to the public. No actual harm to the public was alleged. The potential harm to the public is, however, significant. False or fraudulent prescriptions, by their nature, promote the misuse of abuse of dangerous drugs. Abuse and overdose can result in death.
2. Actual or potential harm to any consumer. No actual harm to a consumer was alleged, however, as noted above, the potential harm was life threatening.
3. Prior disciplinary record, including level of compliance with disciplinary order(s). Neither respondent has a prior record of discipline.
4. Prior warning(s), including but not limited to citation(s) and fine(s), letter(s) of admonishment, and/or correction notice(s). On March 27, 2008, respondent Pharmacy was issued a citation and fine, as was respondent Madievsky, as noted in Factual Finding 16.d.
5. Number and/or variety of current violations. The failure to verify false or fraudulent prescriptions was repeated misconduct that occurred over a 10-month period. The number of prescriptions was 596; 290 of those (for, cumulatively, 290 pints of cough medicine) involve a Schedule V controlled drug containing codeine and 16 prescriptions (for, cumulatively, 1,600 tablets) were for highly addictive, controlled drugs containing hydrocodone. The other violation was for failure to produce six original prescriptions in conjunction with the board staff's investigation.
6. Nature and severity of the act(s), offense(s) or crime(s) under consideration. By her failure to recognize the irregularities in the many false prescriptions presented to respondent Pharmacy, respondent Madievsky neglected a critically important function of a pharmacist, which is to exercise her professional judgment when necessary. Due to the high volume of false prescriptions that resulted, the offense is serious. By contrast, the failure to produce six original prescriptions for inspection

at the board's request appears to have been inadvertent. Considering over 300 requested prescriptions were produced as part of the inspection, that offense is minor.

7. Aggravating evidence. The evidence did not give rise to aggravating evidence except as otherwise noted herein.

8. Mitigating evidence. Four people, including two pharmacists and a physician, submitted letters attesting to respondent's good character.

9. Rehabilitation evidence. Respondent Madievsky ceased issuing any more false prescriptions in Dr. Butler's name after Dr. Butler made her aware of the problem. Respondent Madievsky cooperated with the board's investigation. Respondent Madievsky's failure to supply the board with six original prescriptions was a violation, but a minor one. Respondent Madievsky took responsibility for her misconduct and described the steps she has taken to heighten her vigilance in scrutinizing potentially false prescriptions and possible drug-seeking patients. Those steps include her frequent utilization of a prescribing histories within the CURES system as a reference point in assessing the validity of prescriptions, and her commitment to speak directly with prescribing physicians to obtain verifications.

[Factors 10 through 12 apply only where criminal proceedings were involved.]

13. Time passed since the act(s) or offense(s). The misconduct occurred between four and five years ago.

14. Whether the conduct was intentional or negligent, demonstrated incompetence, or, if the respondent is being held to account for conduct committed by another, the respondent had knowledge of or knowingly participated in such conduct. Respondent Madievsky's conduct was negligent in that she was responsible for ensuring the legitimacy and correctness of the prescriptions her pharmacy was filling, yet she repeatedly failed to fulfill her responsibilities.

15. Financial benefit to the respondent from the misconduct. No evidence was presented regarding the potential or actual financial benefit to the respondent Pharmacy or respondent Madievsky (as its owner) for filling the prescriptions in question, but due to the high volume of prescriptions, some financial benefit to respondent Pharmacy and respondent Madievsky was likely realized.

5. Considering all of these factors, respondent Pharmacy and respondent Madievsky committed serious misconduct due to the volume of false prescriptions that were wrongly verified and issued. Respondent Madievsky's culpability was attenuated, however, by her insight into her misconduct, her willingness to take responsibility, her cooperation with the board staff, and her efforts to rehabilitate herself and her pharmacy's practices. In sum, she appears to be a good candidate for probation, which extends to her pharmacy's license. A lengthy probation and terms that make it possible for the board to thoroughly monitor respondents' ongoing rehabilitative efforts over time, however, are necessary to best protect the public.

ORDER

Respondent Pico Union's Pharmacy License

A. Pharmacy Permit Number PHY 45340, issued to D & R Pharmacy, Inc., doing business as Pico Union Pharmacy, is revoked; the revocation is, however, stayed and respondent is placed on probation for five years upon the following terms and conditions:

1. **Obey All Laws**

Respondent owner shall obey all state and federal laws and regulations. Respondent owner shall report any of the following occurrences to the board, in writing, within seventy-two (72) hours of such occurrence: a) an arrest or issuance of a criminal complaint for violation of any provision of the Pharmacy Law, state and federal food and drug laws, or state and federal controlled substances laws; b) a plea of guilty or nolo contendere in any state or federal criminal proceeding to any criminal complaint, information or indictment; c) a conviction of any crime; d) discipline, citation, or other administrative action filed by any state or federal agency which involves respondent's license or which is related to the practice of pharmacy or the manufacturing, obtaining, handling or distributing, billing, or charging for any drug, device or controlled substance. Failure to timely report any such occurrence shall be considered a violation of probation.

2. **Report to the Board**

Respondent owner shall report to the board quarterly, on a schedule as directed by the board or its designee. The report shall be made either in person or in writing, as directed. Among other requirements, respondent owner shall state in each report under penalty of perjury whether there has been compliance with all the terms and conditions of probation. Failure to submit timely reports in a form as directed shall be considered a violation of probation. Any period(s) of delinquency in submission of reports as directed may be added to the total period of probation. Moreover, if the final probation report is not made as directed, probation shall be automatically extended until such time as the final report is made and accepted by the board.

3. **Interview with the Board**

Upon receipt of reasonable prior notice, respondent owner shall appear in person for interviews with the board or its designee, at such intervals and locations as are 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 (2) or more scheduled interviews with the board or its designee during the period of probation, shall be considered a violation of probation.

4. Cooperate with Board Staff

Respondent owner shall cooperate with the board's inspection program and with the board's monitoring and investigation of respondent's compliance with the terms and conditions of her probation. Failure to cooperate shall be considered a violation of probation.

5. Reimbursement of Board Costs

As a condition precedent to successful completion of probation, respondent owner and respondent Madievsky shall pay to the board its costs of investigation and prosecution in the amount of \$18,530. Respondent owner shall make said payments on a payment plan as approved by the board. There shall be no deviation from this schedule absent prior written approval by the board or its designee. Failure to pay costs by the deadline(s) as directed shall be considered a violation of probation.

6. Probation Monitoring Costs

Respondent owner shall pay any costs associated with probation monitoring as determined by the board each and every 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 deadline(s) as directed shall be considered a violation of probation.

7. Status of License

Respondent owner shall, at all times while on probation, maintain current licensure with the board. If respondent owner submits an application to the board, and the application is approved, for a change of location, change of permit or change of ownership, 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 at any time during the period of probation, including any extensions thereof due to tolling or otherwise, upon renewal or reapplication respondent's license shall be subject to all terms and conditions of this probation not previously satisfied.

8. License Surrender While on Probation/Suspension

Following the effective date of this decision, should respondent owner discontinue business, respondent owner may tender the premises license to the board for surrender. The board or its designee shall have the discretion whether to grant the request for surrender or take any other action it deems appropriate and reasonable. Upon formal acceptance of the surrender of the license, respondent will no longer be subject to the terms and conditions of probation.

Upon acceptance of the surrender, respondent owner shall relinquish the premises wall and renewal license to the board within ten (10) days of notification by the board that the surrender is accepted. 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 its provision to the pharmacy's ongoing patients, Respondent owner shall provide a copy of the written notice to the board. For the purposes 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 sixty (60) days.

Respondent owner may not apply for any new licensure from the board for three (3) years from the effective date of the surrender. 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. Respondent owner further stipulates that she shall reimburse the board for its costs of investigation and prosecution prior to the acceptance of the surrender.

9. Notice to Employees

Respondent owner shall, upon or before the effective date of this decision, ensure that all employees involved in permit operations are made aware of all 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, respondent owner shall submit written notification to the board, within fifteen (15) days of the effective date of this decision, 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.

10. Owners and Officers: Knowledge of the Law

Respondent shall provide, within thirty (30) days after the effective date of this decision, signed and dated statements from its owners, including any owner or holder of ten percent (10%) 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.

11. Posted Notice of Probation

Respondent owner shall prominently post a probation notice provided by the board in a place conspicuous and readable 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 which is intended to mislead or is likely to have the effect of misleading any patient, customer, member of the public, or other person(s) 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.

12. Separate File of Records

Respondent owner shall maintain and make available for inspection a separate file of all records pertaining to the acquisition or disposition of all controlled substances. Failure to maintain such file or make it available for inspection shall be considered a violation of probation.

13. Report of Controlled Substances

Respondent owner shall submit quarterly reports to the board detailing the total acquisition and disposition of such controlled substances as the board may direct. Respondent owner shall specify the manner of disposition (e.g., by prescription, due to burglary, etc.) or acquisition (e.g., from a manufacturer, from another retailer, etc.) of such controlled substances. Respondent owner shall report on a quarterly basis or as directed by the board. The report shall be delivered or mailed to the board no later than ten (10) days following the end of the reporting period. Failure to timely prepare or submit such reports shall be considered a violation of probation.

14. Violation of Probation

If a respondent owner has not complied with any term or condition of probation, the board shall have continuing jurisdiction over respondent license, and probation shall be automatically 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.

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 and/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 accusation is heard and decided.

15. Completion of Probation

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

Respondent Dana Madievsky's License

B. Pharmacist License No. RPH 48684, issued to respondent Dana Madievsky, is revoked; the revocation is, however, stayed and respondent is placed on probation for five years upon the following terms and conditions:

1. Obey All Laws

Respondent Madievsky shall obey all state and federal laws and regulations. Respondent shall report any of the following occurrences to the board, in writing, within seventy-two (72) hours of such occurrence: a) an arrest or issuance of a criminal complaint for violation of any provision of the Pharmacy Law, state and federal food and drug laws, or state and federal controlled substances laws; b) a plea of guilty or nolo contendere in any state or federal criminal proceeding to any criminal complaint, information or indictment; c) a conviction of any crime; or d) discipline, citation, or other administrative action filed by any state or federal agency which involves respondent's pharmacist license or which is related to the practice of pharmacy or the manufacturing, obtaining, handling, distributing, billing, or charging for any drug, device or controlled substance.

Failure to timely report any such occurrence shall be considered a violation of probation.

2. Report to the Board

Respondent Madievsky shall report to the board quarterly, on a schedule as directed by the board or its designee. The report shall be made either in person or in writing, as directed. Among other requirements, respondent shall state in each report under penalty of perjury whether there has been compliance with all the terms and conditions of probation. Failure to submit timely reports in a form as directed shall be considered a violation of probation. Any period(s) of delinquency in submission of reports as directed may be added to the total period of probation. Moreover, if the final probation report is not made as directed, probation shall be automatically extended until such time as the final report is made and accepted by the board.

3. Interview with the Board

Upon receipt of reasonable prior notice, respondent Madievsky shall appear in person for interviews with the board or its designee, at such intervals and locations as are determined by the board or its designee. Failure to appear for any scheduled interview without prior notification to board staff, or failure to appear at two (2) or more scheduled interviews with the board or its designee during the period of probation, shall be considered a violation of probation.

4. Cooperate with Board Staff

Respondent Madievsky shall cooperate with the board's inspection program and with the board's monitoring and investigation of respondent's compliance with the terms and conditions of her probation. Failure to cooperate shall be considered a violation of probation.

5. Continuing Education

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

6. Notice to Employers

During the period of probation, respondent Madievsky shall notify all present and prospective employers of the decision in case number 5059 and the terms, conditions and restrictions imposed on respondent by the decision, as follows:

Within thirty (30) days of the effective date of this decision, and within fifteen (15) days of respondent undertaking any new employment, respondent shall cause her direct supervisor, pharmacist-in-charge (including each new pharmacist-in-charge employed during respondent's tenure of employment) and owner to report to the board in writing acknowledging that the listed individual(s) has/have read the decision in case number 5059, and terms and conditions imposed thereby. It shall be respondent's responsibility to ensure that her employer(s) and/or supervisor(s) submit timely acknowledgment(s) to the board.

If respondent works for or is employed by or through a pharmacy employment service, respondent must notify her direct supervisor, pharmacist-in-charge, and owner at every entity licensed by the board of the terms and conditions of the decision in case number 5059 in advance of the respondent commencing work at each licensed entity. A record of this notification must be provided to the board upon request.

Furthermore, within thirty (30) days of the effective date of this decision, and within fifteen (15) days of respondent undertaking any new employment by or through a pharmacy employment service, respondent shall cause her direct supervisor with the pharmacy employment service to report to the board in writing acknowledging that she has read the decision in case number 5059 and the terms and conditions imposed thereby. It shall be respondent's responsibility to ensure that her employer(s) and/or supervisor(s) submit timely acknowledgment(s) to the board.

Failure to timely notify present or prospective employer(s) or to cause that/those employer(s) 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.

7. No Supervision of Interns, Serving as Pharmacist-In-Charge (PIC), or Serving as Consultant, Except as Otherwise Specified

During the period of probation, respondent Madievsky shall not supervise any intern pharmacist, be the pharmacist-in-charge or designated representative-in-charge of any entity licensed by the board nor serve as a consultant except as otherwise specified this order. Assumption of any such unauthorized supervision responsibilities shall be considered a violation of probation.

8. Reimbursement of Board Costs

As a condition precedent to successful completion of probation, respondent Madievsky and respondent Pharmacy shall pay to the board its costs of investigation and prosecution in the amount of \$18,530. It is within the board's discretion to establish a reasonable monthly or quarterly repayment plan with respondents. There shall be no deviation from this schedule absent prior written approval by the board or its designee. Failure to pay costs by the deadline(s) as directed shall be considered a violation of probation.

9. Probation Monitoring Costs

Respondent Madievsky shall pay any costs associated with probation monitoring as determined by the board each and every 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 deadline(s) as directed shall be considered a violation of probation.

10. Status of License

Respondent Madievsky shall, at all times while on probation, maintain an active, current license with the board, including any period during which suspension or probation is tolled. Failure to maintain an active, current license shall be considered a violation of probation. If respondent's license expires or is cancelled by operation of law or otherwise at any time during the period of probation, including any extensions thereof due to tolling or otherwise, upon renewal or reapplication respondent's license shall be subject to all terms and conditions of this probation not previously satisfied.

11. License Surrender While on Probation/Suspension

Following the effective date of this decision, should respondent Madievsky cease practice due to retirement or health, or be otherwise unable to satisfy the terms and conditions of probation, respondent may tender her license to the board for surrender. The board or its designee shall have the discretion whether to grant the request for surrender or take any other action it deems appropriate and reasonable. Upon formal acceptance of the surrender of the license, respondent will no longer be subject to the terms and conditions of probation. This surrender constitutes a record of discipline and shall become a part of the respondent's license history with the board.

Upon acceptance of the surrender, respondent shall relinquish her pocket and wall license to the board within ten (10) days of notification by the board that the surrender is accepted. Respondent may not reapply for any license from the board for three (3) years from the effective date of the surrender. Respondent shall meet all requirements applicable to the license sought as of the date the application for that license is submitted to the board, including any outstanding costs.

12. Notification of a Change in Name, Residence Address, Mailing Address or Employment

Respondent Madievsky shall notify the board in writing within ten (10) days of any change of employment. Said notification shall include the reasons for leaving, the address of the new employer, the name of the supervisor and owner, and the work schedule if known. Respondent shall further notify the board in writing within ten (10) days of a change in name, residence address, mailing address, or phone number.

Failure to timely notify the board of any change in employer(s), name(s), address(es), or phone number(s) shall be considered a violation of probation.

13. Tolling of Probation

Except during periods of suspension, respondent Madievsky shall, at all times while on probation, be employed as a pharmacist in California for a minimum of 120 hours per calendar month. Any month during which this minimum is not met 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.

Should respondent, regardless of residency, for any reason (including vacation) cease practicing as a pharmacist for a minimum of 120 hours per calendar month in California, respondent must notify the board in writing within ten (10) days of the cessation of practice, and must further notify the board in writing within ten (10) days of the resumption of practice. Any failure to provide such notification(s) 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 thirty-six (36) months.

"Cessation of practice" means any calendar month during which respondent is not practicing as a pharmacist for at least 120 hours, as defined by Business and Professions Code section 4000 et seq. "Resumption of practice" means any calendar month during which respondent is practicing as a pharmacist for at least 120 hours as a pharmacist as defined by Business and Professions Code section 4000 et seq.

14. No New Ownership of Licensed Premises

Respondent Madievsky shall not acquire any new ownership, legal or beneficial interest nor serve as a manager, administrator, member, officer, director, trustee, associate, or partner of any additional business, firm, partnership, or corporation licensed by the board. If respondent currently owns or has any legal or beneficial interest in, or serves as a manager, administrator, member, officer, director, trustee, associate, or partner of any business, firm, partnership, or corporation currently or hereinafter licensed by the board, respondent may continue to serve in such capacity or hold that interest, but only to the extent of that position or interest as of the effective date of this decision. Violation of this restriction shall be considered a violation of probation.

15. Separate File of Records

Respondent Madievsky shall maintain and make available for inspection a separate file of all records pertaining to the acquisition or disposition of all controlled substances. Failure to maintain such file or make it available for inspection shall be considered a violation of probation.

16. Report of Controlled Substances

Respondent Madievsky shall submit quarterly reports to the board detailing the total acquisition and disposition of such controlled substances as the board may direct. Respondent shall specify the manner of disposition (e.g., by prescription, due to burglary, etc.) or acquisition (e.g., from a manufacturer, from another retailer, etc.) of such controlled substances. Respondent shall report on a quarterly basis or as directed by the board. The report shall be delivered or mailed to the board no later than ten (10) days following the end of the reporting period. Failure to timely prepare or submit such reports shall be considered a violation of probation.

17. Consultant for Owner or Pharmacist-In-Charge

During the period of probation, respondent Madievsky shall not supervise any intern pharmacist or serve as a consultant to any entity licensed by the board. Respondent may, however, be a pharmacist-in-charge if she complies with all the provisions of this probation term. Respondent shall not be a pharmacist-in-charge at more than one pharmacy or at any pharmacy of which she is not the sole owner. During the period of probation when respondent serves as a pharmacist-in-charge, respondent shall retain an independent consultant at her own expense who shall be responsible for reviewing pharmacy operations on a quarterly basis for compliance by respondent with state and federal laws and regulations governing the practice of pharmacy and for compliance by respondent with the obligations of a pharmacist-in-charge. The consultant shall be a pharmacist licensed by and not on probation with the board and whose name shall be submitted to the board or its designee, for prior approval, within thirty (30) days of the effective date of this decision. Failure to timely retain, seek approval of, or ensure timely reporting by the consultant shall be considered a violation of probation.

18. Ethics Course

Within sixty (60) calendar days of the effective date of this decision, respondent Madievsky shall enroll in a course in ethics, at respondent's expense, approved in advance by the board or its designee. Failure to initiate the course during the first year of probation, and 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.

19. Violation of Probation

If respondent Madievsky 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.

If respondent Madievsky 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 and/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 accusation is heard and decided.

20. Completion of Probation

Upon written notice by the board indicating successful completion of probation, respondent Madievsky's pharmacist license will be fully restored.

This Decision shall become effective at 5:00 p.m. on April 18, 2016.

IT IS SO ORDERED on this 18th day of March, 2016.

BOARD OF PHARMACY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA



By

Amarylis "Amy" Gutierrez, Pharm.D.
Board President

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

In the Matter of the Accusation Against:

D & R PHARMACY, INC.
Db a PICO UNION PHARMACY,
Pharmacy Permit No. PHY 45340

and

DANA MADIEVSKY,
Pharmacist License No. RPH 48684

Respondents.

Case No. 5059

OAH No. 2015050797

TO ALL PARTIES AND THEIR ATTORNEY OF RECORD:

ORDER SETTING DATE FOR SUBMISSION OF WRITTEN ARGUMENT

The administrative record of the hearing in the above-entitled matter having now become available, the parties are hereby notified of the opportunity to submit written argument in accordance with the Order Rejecting the Proposed Decision dated November 4, 2015. In addition to any arguments the parties may wish to submit, the board is interested in argument directed at the following issue: If cause for discipline exists, what penalty, if any, should be applied in this case.

Pursuant to said Order written argument shall be filed with the Board of Pharmacy, 1625 N. Market Blvd, Suite N-219, Sacramento, California, on or before January 18, 2016. **No new evidence may be submitted.**

IT IS SO ORDERED this 18th day of December 2015.



By

Amy Gutierrez, Pharm.D.
Board President

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

In the Matter of the Accusation Against:

D & R PHARMACY, INC.
DbA PICO UNION PHARMACY,
Pharmacy Permit No. 45340

and

DANA MADIEVSKY,
Pharmacist License No. RPH 48684

Respondents.

Case No. 5059

OAH No. 2015050797

ORDER REJECTING PROPOSED DECISION

Pursuant to section 11517 of the Government Code, the Proposed Decision of the Administrative Law Judge in the above-entitled matter is rejected. The California State Board of Pharmacy (hereinafter "board") will decide the case upon the record, including the transcript(s) of the hearing, and upon such written argument as the parties may wish to submit.

The board is particularly interested in arguments directed to the question whether the discipline should be increased. The parties will be notified of the date for submission of such argument when the transcript of the above-mentioned hearing becomes available.

It is so ORDERED on November 4, 2015.

BOARD OF PHARMACY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA



By

Amy Gutierrez, Pharm.D.
Board President

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

In the Matter of the Accusation Against:

D & R PHARMACY, INC.
Dba PICO UNION PHARMACY,
Pharmacy Permit No. 45340

and

DANA MADIEVSKY,
Pharmacist License No. RPH 48684

Respondents.

Case No. 5059

OAH No. 2015050797

PROPOSED DECISION

John E. DeCure, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on September 9 and 10, 2015, in Los Angeles.

Christina Felix, Deputy Attorney General, represented Virginia K. Herold (Complainant), Executive Officer of the Board of Pharmacy (Board), Department of Consumer Affairs.

Respondent D & R Pharmacy, doing business as Pico Union Pharmacy (Respondent Pharmacy), and Respondent's president and pharmacist-in-charge (PIC), Dana Madievsky (Respondent Madievsky), were represented by Herbert Weinberg, Attorney at Law. Respondent Madievsky was present during the hearing.

Evidence was taken and argument was heard.

Complainant made a request for a protective order sealing confidential records contained in Complainant's Exhibits 6, 8, 12 and 20. The records contained medical and/or personal information primarily in the form of pharmacy records obtained from Respondent during Complainant's investigation. Complainant's stated reasons to protect these documents from disclosure were as follows: "The documents are so voluminous as to make redaction unduly burdensome. Moreover, some of the personal information is necessary to prove elements of the charges against Respondents." In *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178, the California Supreme Court set forth the findings that both the trial and appellate courts must expressly make to seal a record. Courts must

find that (1) there is an overriding interest supporting sealing records; (2) there is a substantial probability that the interest will be prejudiced absent sealing; (3) the proposed sealing is narrowly tailored to serve the overriding interest; and (4) there is no less restrictive means of achieving the overriding interest. (*Ibid* at 1217-1218.) Complainant failed to meet her burden to demonstrate that there was no less restrictive means of achieving the interest supporting sealing the records, which in this case is patient privacy. The documents are not so voluminous that appropriate redactions to preserve patient privacy could not be made within a reasonable time, nor would redactions so deface the materials that they would lose their probative value. Complainant's request to seal the record was thereby denied. Exhibits 6, 8, 12 and 20 were returned to Complainant with an order for the required redactions to be made, and these exhibits to be re-submitted, by no later than September 25, 2015. Complainant timely complied with this order.

Both parties chose to make written closing arguments. Complainant chose not to make an initial closing argument due to a scheduling issue. Respondent was given until September 14, 2015, to submit a written closing argument. Complainant was given until October 2, 2015, to submit a closing argument, which would include rebuttal. The record was closed and the matter was submitted on October 2, 2015.

FACTUAL FINDINGS

Jurisdiction

1. Complainant filed the Accusation in her official capacity. Respondent Madievsky timely filed a notice of defense.
2. The Board issued Original Pharmacy Permit Number PHY 45340 to Respondent Pharmacy on August 28, 2001. The license will expire on August 1, 2016, unless renewed.
3. The Board issued Original Pharmacist License Number RPH 48684 to Respondent Madievsky on August 28, 2001. The license will expire on July 31, 2017, unless renewed.

General Overview

4. Respondent Madievsky has been the sole owner of Respondent Pharmacy for 14 years. She employs two pharmacy technicians, Berta Echeverry and Connie Dea, both of whom have worked at Respondent Pharmacy the entire time since Respondent Madievsky became its owner.
5. About three miles away from Respondent Pharmacy, Derrick Butler, M.D., a board-certified family practitioner, practices medicine at the T.H.E. (i.e., "To Help Everyone") Clinic, treating mostly underserved, poor inner-city patients. The vast majority of these patients rely upon Medi-Cal benefits or free county-funded medical

programs for the poor, and they very seldom pay cash for medical services or prescriptions. During 2010, Dr. Butler wrote prescriptions on paper pads, but in December 2010, the T.H.E. Clinic switched to using electronic prescriptions, which could be sent to pharmacies either by facsimile or e-mail.

6. In August 2010, Dr. Butler reported to police the theft of prescription pads from T.H.E. Clinic by an unknown person. Dr. Butler had received a telephone call from Vernon Main Pharmacy (Vernon) asking him to verify a prescription for a large dosage of narcotics. Dr. Burgess inquired further with Vernon and discovered that multiple prescriptions for narcotics had been filled in Dr. Butler's name, but without his knowledge or authorization. In December 2010 Dr. Butler mailed a "To Whom it May Concern" letter to area pharmacies alerting them of the theft of prescription forms and that the forms were being used to create "fake" prescriptions in his name. In November 2011 Dr. Butler made a second report to police that an unknown person stole his prescription pads, forged his name on prescriptions, and exchanged the prescriptions for narcotics.

7. In April 2011 Dr. Butler complained to the Board that Respondent Pharmacy had dispensed numerous fraudulent prescriptions in his name from August 2010 to February 2011. Dr. Butler believed this was true because the California Department of Justice (DOJ) had sent him a CURES¹ report which revealed these prescriptions as being filled at Respondent Pharmacy. When Dr. Butler saw this information in the CURES report, he called Respondent Pharmacy and spoke with Respondent Madievsky about the false prescriptions. She reviewed at least some of the prescriptions and she told Dr. Butler that her records indicated that many of the prescriptions had been called in to the T.H.E. Clinic for verification. According to Respondent Pharmacy's records, when they called in, typically their calls would go to either a person named "Keisha" (or Akeisha), or a person named "Michelle," both of whom verified that the prescriptions were valid.

8. At all relevant times in 2010 and 2011, no one named "Keisha" (or Akeisha) or "Michelle" was an employee at the T.H.E. Clinic. When Dr. Butler talked with Respondent Madievsky, he told her this, and asked her to immediately stop filling prescriptions in his name because they were false. Respondent Madievsky agreed, and Respondent Pharmacy filled no further prescriptions in Dr. Butler's name.

//

¹ CURES refers to the California's Controlled Substance Utilization Review and Evaluation System, a database of prescription-drug history information which includes information about the drug dispensed, drug quantity and strength, patient name, address, prescriber name, and authorization number including DEA number or prescription number. California doctors and pharmacies are required to report to DOJ, within seven days, every schedule II, III and IV drug prescription that is written.

The Prescriptions

9(a). Sarah Bayley, a Board Inspector of 15 years and licensed pharmacist since 1994, was assigned to investigate Dr. Butler's complaint. At the hearing she testified regarding the results of her inspection and also provided expert testimony regarding the standard of practice for California pharmacists and pharmacies.

9(b). Ms. Bayley found that from August 1, 2010, to June 10, 2011, Respondent Pharmacy dispensed 596 prescriptions allegedly written by Dr. Butler but which were false for various reasons. Some of the false prescriptions bore forged signatures of Dr. Butler, and some were approved by "Keisha" (or Akeisha) or "Michelle," whereas those persons were unknown to the T.H.E. Clinic and therefore, Dr. Butler was unaware the prescriptions even existed. Other false prescriptions were in the name of supposed patients that Dr. Butler had never heard of or treated. Many of the prescriptions, when taken together, revealed prescribing patterns that should have alerted any knowledgeable, responsible pharmacist that the prescriptions may not have been legitimate as follows.

9(c). Ms. Bayley noted that 290 of the prescriptions were for Phenergan with Codeine, a Schedule V controlled substance. All of these prescriptions came with the exact same physician directions to take one teaspoon every six to eight hours, all were for a quantity of one pint, and all were accompanied by prescriptions for antibiotics in a quantity of 10 capsules. This is a prescription for a serious cough, with a 20-day supply of Phenergan with Codeine coupled with an only five-day supply of antibiotics. There is no variance as to any of the patients' age, needs, or conditions. On August 5, 2010, Respondent Pharmacy filled 10 such identical prescriptions in a single day, which is an unusually high level of repetition. Insurance plans were billed, but many patients paid from \$110 to \$120 in cash for these prescriptions, which is also suspicious.

9(d). Ms. Bayley found several other abnormal prescriptions. 16 of the prescriptions were for hydrocodone, a highly addictive Schedule II controlled substance, in the form of either Lortab 10/500 mg or Norco 10/325 mg. All came with the exact same directions to take one tablet every six to eight hours, and all were prescribed in the same quantity of 100 tablets. The identical dosages and directions should have raised a question for any pharmacist as to whether the prescriptions are legitimate, because most legitimate prescriptions are varied due to multiple factors and conditions relevant to each individual patient. Similarly, five identical Lortab prescriptions were filled on September 30, 2010, which is highly unusual in terms of both the prescriptions' sameness and their issuance in such close succession. Five identical Norco prescriptions were filled on August 12, 2010, and five more identical prescriptions were filled on September 25, 2010. Such a high degree of repetition is suspicious for the same reasons.

9(e). Ms. Bayley stated that a competent pharmacist must exercise his or her professional judgment when faced with odd, suspicious, or apparently illegitimate prescriptions such as these. The exercise of such professional judgment cannot be

delegated to pharmacy technicians. It was Respondent Madievsky's duty to contact Dr. Butler directly to ask questions about the prescriptions and verify their legitimacy. If Respondent Madievsky was not satisfied that a prescription was legitimate, she was not obligated to fill it.

9(f). Ms. Bayley's testimony established that pharmacy technicians may verify any kind of prescriptions on the pharmacy's behalf, but their duties do not include the exercise of a pharmacist's professional judgment. Therefore, if a prescription is of questionable legitimacy, the pharmacist cannot delegate the responsibility to contact the prescribing physician to the pharmacy technician but must contact the physician herself.

The Prescription Verifications

10. Complainant alleges in the Accusation that Respondent Pharmacy and Respondent Madievsky "never contacted Dr. [Butler] or the [T.H.E. Clinic] to verify the fraudulent prescriptions prior to dispensing the drugs to patients." The evidence presented on this issue was contradictory as follows.

11. Respondent Pharmacy made attempts to verify many of the prescriptions with the T.H.E. Clinic. Respondent Pharmacy's two pharmacy technicians, Berta Echeverry and Connie Dea, both testified credibly, and adamantly, regarding their calls to either "Keisha" (or Akeisha) or "Michelle," for verification of some of the prescriptions, and a number of the prescriptions bear electronic or handwritten notes attesting to such verifications being made. According to the pharmacy technicians, their calls were always routed to either of these people, both of whom were calm and knowledgeable when providing verification information. However, the evidence also established, by a stipulation of the parties (see Exhibit 19), that no one named "Keisha" (or Akeisha) or "Michelle" worked at the T.H.E. Clinic.

12. When Dr. Butler twice reported to police that prescription pads were stolen, he did not, on either occasion, allege that the theft was part of a burglary or break-in. When prescription pads were stolen, Dr. Butler and the T.H.E. Clinic staff physicians considered whether a staff employee may have taken them. As a result, the clinic had to develop new internal protocols for securing and storing prescription pads. The sum of the evidence indicates that dishonest acts regarding prescribing were likely committed by a person or persons working at the T.H.E. Clinic.

13. Fraudulent prescriptions would be of no value to their purveyors unless they were filled. A staff person willing to steal prescription pads likely would also be willing to arrange for the false prescriptions to be verified as they were called in. This would account for Respondent Pharmacy's two pharmacy technicians' claims that they received repeated phone verifications from two clinic employees who were using names otherwise unknown to the clinic's staff. Because the technicians' testimony was credible while at the same time, the evidence established that the verifications issuing from the T.H.E. Clinic were false, it may be inferred from the totality of circumstances

that two persons within the T.H.E. Clinic were providing verifications using assumed names.

14. Respondent Pharmacy's prescription records contained no notations that verifications were obtained for approximately 42 of the questionable prescriptions. Respondent Madievsky's testimony that all of the questionable prescriptions would have been verified was unpersuasive. Respondent Madievsky had no direct recollection of verifying any particular prescriptions, but had to rely on pharmacy records. If the records of these prescriptions contained no information about verifications, Respondent was speculating that verifications had been secured.

Failure to Produce Six Original Prescriptions

15. During her investigation, Ms. Bayley requested that Respondent Pharmacy produce numerous original prescriptions. Respondent Pharmacy and Respondent Madievsky cooperated with the Board's investigation. They produced 303 prescriptions as requested, but failed to produce six requested prescriptions as follows: prescription (Rx) no. 1559731; Rx no. 1559732; Rx no. 1566999; Rx no. 1567000; Rx no. 1555690; and Rx no. 1555691. Ms. Bayley noted the missing prescriptions and sent a letter to Respondent Madievsky requesting that they be forwarded to her. (Exhibit 14.) Respondent Madievsky does not recall ever seeing the letter and assumes that it was not delivered through the mail. When she read the allegations in the Accusation, she searched for and readily located the six missing prescriptions, which were stored in the correct places but had "stuck" (i.e., clung) to the backs of other prescriptions. Respondent Madievsky credibly attributed the pharmacy's failure to produce these six prescriptions to an honest mistake.

Mitigation, Rehabilitation, and Findings Pertinent to Discipline

16(a). Respondent Madievsky was a candid witness. She conceded the many irregularities that the Board's investigator noted in the prescriptions and agreed with Ms. Bayley's expert opinion that a pharmacist must, in the exercise of her professional judgment, verify any such questionable or suspect prescriptions. She admitted that she, not her pharmacy technicians, should have been the one to contact Dr. Butler, but she had failed to do so. She cooperated with the Board's investigation. As a result of this case, she has changed the way she scrutinizes prescriptions. For example, she did not know before that Phenergan with Codeine was an abused "street drug," so she is more skeptical of such prescriptions, particularly if they appear irregular. The CURES system was not available until June 2011, which is after the fraudulent prescriptions in Dr. Butler's name were filled, but since June 2011 she has used the CURES system daily. She inputs patient names to determine whether a patient is drug-seeking or "doctor shopping," or when a patient without a serious condition has a prescription for addictive drugs. If a prescribing physician is new to the pharmacy, she calls the physician herself to verify the prescription. If a patient is new and the prescription contains any irregularities, she calls the prescribing physician herself to verify the prescription. If a

regular patient has a new prescription with irregularities, she calls the physician herself to verify the prescription.

16(b). In closing argument, Complainant cast Respondent Madievsky as "not a credible witness" and "not truthful in her testimony." As a prime example of this alleged lack of veracity, Complainant noted that when Respondent Madievsky was asked if she or Respondent Pharmacy had been disciplined before, Respondent Madievsky said they had not. According to Complainant, this testimony was false because in 2008, the Board issued citations to both respondents.

16(c). Complainant's claim that Respondent Madievsky was not credible or truthful regarding a prior disciplinary history is misinformed. Official notice is taken that Business and Professions Code section 125.9, which authorizes the Board to establish a system for issuing citations and fines to licensees, and California Code of Regulations, title 16, section 1775, which provides a basic framework for such citations, do not treat citations and fines as disciplinable offenses. In fact, Business and Professions Code section 125.9, subdivision (b)(4), provides that upon a citation or fine's assessment and issuance, "payment of any fine shall not constitute an admission of the violation charged." Furthermore, page 1 of Complainant's own Investigation Report sets forth a substantial list of vital information regarding both respondents. In that list, the Citations issued to Respondent Pharmacy and Respondent Madievsky on March 27, 2008 are described. Also listed for both respondents is the notation: "Prior Discipline: None." (Exhibit 4.) The evidence showed that when Respondent Madievsky stated she had no prior discipline, she was testifying truthfully.

17. Respondent Madievsky has had problems before contacting physicians by telephone to verify prescriptions and admitted that sometimes, when she was deterred from speaking with the physician, she would settle for talking with a medical staff person. Respondent now insists on speaking with the prescribing physician if the situation requires the physician's input and verification.

18. Respondent Madievsky had repeated opportunities to place the onus on her two pharmacy technicians for not correctly verifying the fraudulent prescriptions, yet she refused to deflect the blame onto others. Instead, she took responsibility for failing to properly verify the prescriptions herself, estimating that she saw 90 percent of the prescriptions as they came in to be filled.

19(a). Irina Gelman, a friend and customer of Respondent Madievsky's for 20 years, submitted a character reference letter in which she described Respondent Madievsky as an honest, caring and dedicated pharmacist. Roger Salah, R.Ph., a registered pharmacist in California since 1964, submitted a character reference letter which described Respondent Madievsky as ethical, honest, caring, knowledgeable and devoted to the practice of pharmacy. Elaine Bleiden, R.Ph., a registered pharmacist who has known and worked with Respondent Madievsky since 1996, submitted a character reference letter describing her as a hardworking, knowledgeable pharmacist who is also

a dedicated "patient advocate" when it comes to ensuring their good health. Thang Nguyen, M.D., a physician who has worked with Respondent Madievsky for 13 years, complimented her professional expertise, knowledge and excellent service to his patients.

19(b). All of these letter writers stated that they were aware of the allegations brought against Respondent Madievsky in the pending Accusation.

Costs

20. The Board incurred enforcement costs, in the form of Attorney General fees, in the amount of \$9,420. The Board incurred its own costs for investigation in the amount of \$12,822. A portion of these costs were not reasonably incurred as follows.

21. The Attorney General's Matter Time Activity report, which details its costs in increments of one-quarter hour and describes each corresponding task performed, reflects that 19.25 hours of Deputy Attorney General time was billed at a rate of \$170 per hour for "witness-related preparation." The total cost of this activity is \$3,272.50. Ms. Bayley's declaration for the Board reflects 22 hours spent on hearing preparation "which included case file review and witness preparation with the Attorney General's Office." Ms. Bayley's billing rate for these costs appears to be \$120 per hour, which would make the total cost of this activity \$2,640. In sum, the combined Attorney General and Board billable hours spent on these activities was 41.25 hours, for a total of \$5,912.50 in costs incurred.

22. The Board called only two witnesses at the hearing. Its first witness, Dr. Butler, testified for approximately two hours. Its second witness, Ms. Bayley, testified for approximately two and one-half hours. Both witnesses' testimony was straightforward, mostly uncontroversial, and hewed to the allegations set forth in the Accusation. There was no indication that either witness would have required lengthy or elaborate preparation to testify.

23. As a result, the Attorney General's 19.25 hours of witness preparation is disproportionate to the actual four and one-half hours of total witness testimony rendered. A more reasonable amount of preparation would be four hours per witness. Therefore, a reasonable total for Attorney General witness preparation costs is eight hours, or \$1,360.20. In the same vein, Ms. Bayley's total of 22 hours of hearing and witness preparation is disproportionate to the two and one-half hours of testimony she provided at the hearing. Her billings included case file review, which in this case, could be reasonably estimated at three hours. A more reasonable amount of witness preparation for her actual testimony would be four hours. Therefore, a reasonable total for Ms. Bayley's hearing preparation, including file review and witness preparation, would be seven hours, or \$840.

24. All other Attorney General enforcement costs are reasonable. Pursuant to Factual Findings 20 through 23, the Attorney General's reasonable costs are reduced to \$7,508.

25. All other Board investigation costs are reasonable. Pursuant to Factual Findings 20 through 23, the Board's reasonable costs are reduced to \$11,022. (These costs, when combined with the Attorney Generals reasonable costs, total \$18,530.)

LEGAL CONCLUSIONS

1. The practice of pharmacy, like the practice of medicine, is a profession. *Vermont & 110th Medical Arts Pharmacy v. Board of Pharmacy* (1981) 125 Cal.App.3d 19, 25. The standard of proof in an administrative disciplinary action seeking the suspension or revocation of a professional license is "clear and convincing evidence." *Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 856. The key element of "clear and convincing evidence" is that it must establish a high probability of the existence of the disputed fact, greater than proof by a preponderance of the evidence. Evidence of a charge is clear and convincing so long as there is a "high probability" that the charge is true. *People v. Mabini* (2001) 92 Cal.App.4th 654, 662. The Board met its burden of proving its case by clear and convincing evidence.

2. Cause exists to discipline Respondent Pharmacy's Permit Number PHY 45340 and Respondent Madievsky's pharmacist license number RPH 48684 under Business and Professions Code section 4301, subdivision (o), for committing unprofessional conduct by violating or assisting in or abetting the violation of state law governing pharmacy, to wit, California Code of Regulations, title 16, section 1761, subdivision (a), by dispensing prescriptions which contained significant errors, omissions, irregularity, uncertainty, or alteration, while failing to contact the prescriber to obtain the information needed to validate the prescriptions. (Factual Findings 4 through 13.)

3. Cause exists to discipline Respondent Pharmacy's Permit Number PHY 45340 and Respondent Madievsky's pharmacist license number RPH 48684 under Business and Professions Code section 4301, subdivision (o), for committing unprofessional conduct by violating or assisting in or abetting the violation of state law governing pharmacy, to wit, Business and Professions Code section 4333, by failing to maintain prescription records available for inspection by authorized officers of the law in a board-licensed facility for a period of three years. (Factual Findings 4 through 9, and 14.)

Analysis to Determine Penalty

4. The Board's Disciplinary Guidelines state that in determining whether the minimum, maximum, or an intermediate penalty is to be imposed in a given case, the

following applicable factors should be considered (each factor is accompanied by a corresponding analysis):

1. Actual or potential harm to the public. No actual harm to the public was alleged. The potential harm to the public is that false or fraudulent prescriptions, by their nature, promote the misuse or abuse of drugs.
2. Actual or potential harm to any consumer. No actual harm to a consumer was alleged. The potential harm to the public is that false or fraudulent prescriptions, by their nature, promote the misuse or abuse of drugs.
3. Prior disciplinary record, including level of compliance with disciplinary order(s). Neither respondent has a prior disciplinary record.
4. Prior warning(s), including but not limited to citation(s) and fine(s), letter(s) of admonishment, and/or correction notice(s). On March 27, 2008, Respondent Pharmacy was issued Citation and Fine no. CI 2006 32919, and Respondent Madievsy was issued Citation and Fine no. CI 2007 35451. Both citations and fines were in the amount of \$2,500, and were issued pursuant to Business and Professions Code sections 4301, subdivision (o), 4301, subdivision (q), 4801, 4332, and 4061.
5. Number and/or variety of current violations. The failure to verify false or fraudulent prescriptions was repeated misconduct that occurred over a 10-month period. The only other violation, for failure to produce six original prescriptions, was unrelated to the prescribing violations, as it concerned compliance with the Board's investigation.
6. Nature and severity of the act(s), offense(s) or crime(s) under consideration. By her failure to recognize the irregularities in the many false prescriptions presented to Respondent Pharmacy, Respondent Madievsy neglected a critically important function of a pharmacist, which is to exercise her professional judgment when necessary. Due to the high volume of false prescriptions that resulted, the offense is serious. By contrast, the failure to produce six original prescriptions for inspection at the Board's request appears to have been inadvertent. Considering that over 300 requested prescriptions were produced as part of the inspection, that offense is de minimis.

7. Aggravating evidence. The evidence did not give rise to aggravating circumstances.

8. Mitigating evidence. Four people, including two pharmacists and a physician, submitted letters attesting to Respondent's good character.

9. Rehabilitation evidence. Respondent Madievsky ceased issuing any more false prescriptions in Dr. Butler's name after Dr. Butler made her aware of the problem. Respondent Madievsky cooperated with the Board's investigation. Respondent Madievsky's failure to supply the Board with six original prescriptions was a de minimus violation. Respondent Madievsky took responsibility for her misconduct and described the steps she has taken to heighten her vigilance in scrutinizing potentially false prescriptions and possible drug-seeking patients. Those steps include her frequent utilization of prescribing histories within the CURES system as a reference point in assessing the validity of prescriptions, and her commitment to speak directly with prescribing physicians to obtain verifications.

....

13. Time passed since the act(s) or offense(s). The misconduct occurred between four and five years ago.

14. Whether the conduct was intentional or negligent demonstrated incompetence, or, if the respondent is being held to account for conduct committed by another, the respondent had knowledge of or knowingly participated in such conduct.

Respondent Madievsky's conduct was negligent in that she was responsible for ensuring the legitimacy and correctness of the prescriptions her pharmacy was filling, yet she repeatedly failed to fulfill her responsibilities.

15. Financial benefit to the respondent from the misconduct. No evidence was presented regarding the potential or actual financial benefit to the Respondent Pharmacy for filling the prescriptions in question, but due to the high volume of prescriptions, at least some financial benefit to Respondent Pharmacy was likely realized.

5. Considering all of these factors, Respondent Pharmacy and Respondent Madievsky committed serious misconduct due to the volume of false prescriptions that were wrongly verified and issued. Respondent Madievsky's culpability was attenuated, however, by her insight into her misconduct, her

willingness to take responsibility, her cooperation with the Board, and her efforts to rehabilitate herself and her pharmacy's practices. In sum, she appears to be a good candidate for probation. The following order will best achieve the purpose of public protection.

ORDER

Pharmacy Permit Number PHY 45340, issued to D & R Pharmacy, Inc., doing business as Pico Union Pharmacy, and Pharmacist License Number RPH 48684, issued to Respondent Dana Madievsky, are hereby revoked. However, the revocation is stayed and Respondents are placed on probation for four years upon the following terms and conditions:

1. Obey All Laws

Respondents shall obey all state and federal laws and regulations. Respondent Madievsky shall report any of the following occurrences to the board, in writing, within 72 hours of such occurrence: an arrest or issuance of a criminal complaint for violation of any provision of the Pharmacy Law, state and federal food and drug laws, or state and 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; a conviction of any crime; discipline, citation, or other administrative action filed by any state or federal agency which involves respondent's registered pharmacist license or which is related to the practice of pharmacy or the manufacturing, obtaining, handling, distributing, billing, or charging for any drug, device or controlled substance. Failure to timely report such occurrence shall be considered a violation of probation.

2. Report to the Board

Respondent Madievsky shall report to the board quarterly, on a schedule as directed by the board or its designee. The report shall be made either in person or in writing, as directed. Among other requirements, Respondent Madievsky shall state in each report under penalty of perjury whether there has been compliance with all the terms and conditions of probation. Failure to submit timely reports in a form as directed shall be considered a violation of probation. Any period(s) of delinquency in submission of reports as directed may be added to the total period of probation. Moreover, if the final probation report is not made as directed, probation shall be automatically extended until such time as the final report is made and accepted by the board.

3. Interview with the Board

Upon receipt of reasonable prior notice, Respondent Madievsky shall appear in person for interviews with the board or its designee, at such intervals and locations as are 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 (2) or more scheduled

interviews with the board or its designee during the period of probation, shall be considered a violation of probation.

4. Cooperate with Board Staff

Respondents shall cooperate with the board's inspection program and with the board's monitoring and investigation of Respondent Madievsky's compliance with the terms and conditions of her probation. Failure to cooperate shall be considered a violation of probation.

5. Continuing Education

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

6. Notice to Employers

During the period of probation, only where applicable, Respondent Madievsky shall notify all present and prospective employers of the decision in case number 5059 and the terms, conditions and restrictions imposed on Respondents by the decision, as follows:

Within 30 days of the effective date of this decision, and within 15 days of Respondent Madievsky undertaking any new employment, in that event only Respondent Madievsky shall cause her direct supervisor, pharmacist-in-charge (including each new pharmacist-in-charge employed during Respondent Madievsky's tenure of employment) and owner to report to the board in writing acknowledging that the listed individual(s) has/have read the decision in case number 5059, and terms and conditions imposed thereby. It shall be Respondent Madievsky's responsibility to ensure that her employer(s) and/or supervisor(s) submit timely acknowledgment(s) to the board.

If Respondent Madievsky should work for or become employed by or through a pharmacy employment service, she must notify her direct supervisor, pharmacist-in-charge, and owner at every entity licensed by the board of the terms and conditions of the decision in case number 5059 in advance of Respondent commencing work at each licensed entity. A record of this notification must be provided to the board upon request.

Furthermore, within 30 days of the effective date of this decision, and within 15 days of Respondent Madievsky undertaking any new employment by or through a pharmacy employment service, in that event Respondent Madievsky shall cause her direct supervisor with the pharmacy employment service to report to the board in writing acknowledging that he or she has read the decision in case number 5059 and the terms and conditions imposed thereby. It shall be Respondent Madievsky's responsibility to ensure that her employer(s) and/or supervisor(s) submit timely acknowledgment(s) to the board.

Failure to timely notify present or prospective employer(s) or to cause that/those employer(s) 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.

7. No Supervision of Interns

During the period of probation, Respondent Madievsky shall not supervise any intern pharmacist. Assumption of any such unauthorized supervision responsibilities shall be considered a violation of probation.

8. Reimbursement of Board Costs

As a condition precedent to successful completion of probation, Respondents shall pay to the board its costs of investigation and prosecution in the amount of \$18,530. It is within the board's discretion to establish a reasonable monthly or quarterly repayment plan with Respondents.

There shall be no deviation from the repayment schedule the board establishes absent prior written approval by the board or its designee. Failure to pay costs by the deadline(s) as directed shall be considered a violation of probation.

The filing of bankruptcy by either Respondents shall not relieve them of their responsibility to reimburse the board its costs of investigation and prosecution.

9. Probation Monitoring Costs

Respondents shall pay any costs associated with probation monitoring as determined by the board each and every 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 deadline(s) as directed shall be considered a violation of probation.

10. Status of Licenses

Respondents shall, at all times while on probation, maintain active, current licenses with the board, including any period during which suspension or probation is tolled. Failure to maintain an active, current license shall be considered a violation of probation.

If Respondents' licenses expire or are cancelled by operation of law or otherwise at any time during the period of probation, including any extensions thereof due to tolling or otherwise, upon renewal or reapplication respondents' licenses shall be subject to all terms and conditions of this probation not previously satisfied.

11. License Surrender While on Probation/Suspension

Following the effective date of this decision, should Respondent Madievsky cease practice due to retirement or health, or be otherwise unable to satisfy the terms and

conditions of probation, Respondent Madievsky may tender her license to the board for surrender. The board or its designee shall have the discretion whether to grant the request for surrender or take any other action it deems appropriate and reasonable. Upon formal acceptance of the surrender of the license, Respondent Madievsky will no longer be subject to the terms and conditions of probation. This surrender constitutes a record of discipline and shall become a part of the Respondent Madievsky's license history with the board.

Upon acceptance of the surrender, Respondent Madievsky shall relinquish her pocket and wall license to the board within 10 days of notification by the board that the surrender is accepted. Respondent Madievsky may not reapply for any license from the board for 3 years from the effective date of the surrender. Respondent Madievsky shall meet all requirements applicable to the license sought as of the date the application for that license is submitted to the board, including any outstanding costs.

12. Notification of a Change in Name, Residence Address, Mailing Address or Employment

Respondent Madievsky shall notify the board in writing within 10 days of any change of employment. Said notification shall include the reasons for leaving, the address of the new employer, the name of the supervisor and owner, and the work schedule if known. Respondent Madievsky shall further notify the board in writing within 10 days of a change in name, residence address, mailing address, or phone number.

Failure to timely notify the board of any change in employer(s), name(s), address(es), or phone number(s) shall be considered a violation of probation.

13. Tolling of Probation

Except during periods of suspension, Respondent Madievsky shall, at all times while on probation, be employed as a pharmacist in California for a minimum of 120 hours per calendar month. Any month during which this minimum is not met 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 Madievsky must nonetheless comply with all terms and conditions of probation.

Should Respondent Madievsky, regardless of residency, for any reason (including vacation) cease practicing as a pharmacist for a minimum of 120 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(s) shall be considered a violation of probation.

It is a violation of probation for Respondent Madievsky's probation to remain tolled pursuant to the provisions of this condition for a total period, counting consecutive and non-consecutive months, exceeding 48 months.

"Cessation of practice" means any calendar month during which respondent is not practicing as a pharmacist for at least 120 hours, as defined by Business and Professions Code section 4000 et seq. "Resumption of practice" means any calendar month during which Respondent Madievsky is practicing as a pharmacist for at least 120 hours as a pharmacist as defined by Business and Professions Code section 4000 et seq.

14. Violation of Probation

If a Respondents have not complied with any term or condition of probation, the board shall have continuing jurisdiction over Respondents, 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.

If Respondents violate 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 and/or revocation of the license. If a petition to revoke probation or an accusation is filed against either 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 accusation is heard and decided.

15. Pharmacy Self-Assessment Mechanism

Within the first year of probation, Respondent Madievsky shall complete the Pharmacist Self-Assessment Mechanism (PSAM) examination provided by the National Association of Boards of Pharmacy (NABP). Respondent Madievsky shall submit a record of completion to the board demonstrating she has completed this examination. Respondent Madievsky shall bear all costs for the examination. Continuing education hours received for this examination shall not be used as part of the required continuing education hours for renewal purposes.

Failure to timely complete the PSAM or submit documentation thereof shall be considered a violation of probation.

Respondent Madievsky shall waive any rights to confidentiality and provide examination results to the board or its designee.

16. No New Ownership of Licensed Premises

Respondent Madievsky shall not acquire any new ownership, legal or beneficial interest nor serve as a manager, administrator, member, officer, director, trustee, associate, or partner of any business, firm, partnership, or corporation licensed by the board in addition to, or other than, Respondent Pharmacy. If Respondent Madievsky currently owns or has any legal or beneficial interest in, or serves as a manager, administrator, member, officer,

director, trustee, associate, or partner of any business, firm, partnership, or corporation currently or hereinafter licensed by the board, respondent may continue to serve in such capacity or hold that interest, but only to the extent of that position or interest as of the effective date of this decision. Violation of this restriction shall be considered a violation of probation.

17. Separate File of Records (For pharmacist owners and pharmacists-in-charge)

Respondents shall maintain and make available for inspection a separate file of all records pertaining to the acquisition or disposition of all controlled substances. Failure to maintain such file or make it available for inspection shall be considered a violation of probation.

18. Report of Controlled Substances (For pharmacist owners and pharmacists-in-charge)

Respondent Madievsky shall submit quarterly reports to the board detailing the total acquisition and disposition of such controlled substances as the board may direct. Respondent Madievsky shall specify the manner of disposition (e.g., by prescription, due to burglary, etc.) or acquisition (e.g., from a manufacturer, from another retailer, etc.) of such controlled substances. Respondent Madievsky shall report on a quarterly basis or as directed by the board. The report shall be delivered or mailed to the board no later than 10 days following the end of the reporting period. Failure to timely prepare or submit such reports shall be considered a violation of probation.

19. Ethics Course

Within 60 calendar days of the effective date of this decision, Respondent Madievsky shall enroll in a course in ethics, at Respondent Madievsky's expense, approved in advance by the board or its designee. Failure to initiate the course during the first year of probation, and complete it within the second year of probation, is a violation of probation.

Respondent Madievsky shall submit a certificate of completion to the board or its designee within five days after completing the course.

//

//

//

//

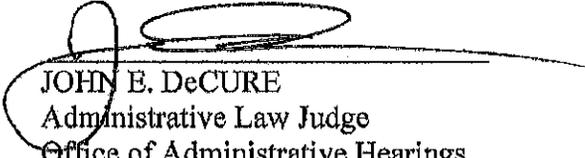
//

//

20. Completion of Probation

Upon written notice by the board or its designee indicating successful completion of probation, respondents' licenses will be fully restored.

DATED: October 14, 2015



JOHN E. DeCURE
Administrative Law Judge
Office of Administrative Hearings

1 KAMALA D. HARRIS
Attorney General of California
2 JAMES M. LEDAKIS
Supervising Deputy Attorney General
3 NICOLE R. TRAMA
Deputy Attorney General
4 State Bar No. 263607
110 West "A" Street, Suite 1100
5 San Diego, CA 92101
P.O. Box 85266
6 San Diego, CA 92186-5266
Telephone: (619) 645-2143
7 Facsimile: (619) 645-2061
Attorneys for Complainant

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

11
12 In the Matter of the Accusation Against:
13 **D & R PHARMACY, INC.,**
DBA PICO UNION PHARMACY
14 **1273 S. Union Ave**
Los Angeles, CA 90015
15 **Pharmacy Permit No. PHY 45340**
16 **and**
17 **DANA MADIEVSKY**
18 **11357 Dona Lisa Drive**
Studio City, CA 91604
19 **Pharmacist License No. RPH 48684**
20
21 Respondents.

Case No. 5059

ACCUSATION

22
23 Complainant alleges:

24 **PARTIES**

- 25 1. Virginia Herold (Complainant) brings this Accusation solely in her official capacity
26 as the Executive Officer of the Board of Pharmacy, Department of Consumer Affairs.
27 2. On or about August 28, 2001, the Board of Pharmacy issued Permit Number 45340 to
28 D & R Pharmacy, Inc., dba Pico Union Pharmacy (Respondents). The Permit was in full force

1 and effect at all times relevant to the charges brought herein and will expire on August 1, 2014,
2 unless renewed.

3 3. On or about April 23, 1996, the Board of Pharmacy issued Pharmacist License No.
4 RPH 48684 to Dana Madievsky (Respondent). The Pharmacist License was in full force and
5 effect at all times relevant to the charges brought herein and will expire on July 31, 2015, unless
6 renewed.

7 JURISDICTION

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

11 5. Section 4011 of the Code provides that the Board shall administer and enforce both
12 the Pharmacy Law [Bus. & Prof. Code, § 4000 et seq.] and the Uniform Controlled Substances
13 Act [Health & Safety Code, § 11000 et seq.].

14 6. Section 4300(a) of the Code provides that every license issued by the Board may be
15 suspended or revoked.

16 7. Section 4300.1 of the Code states:

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

21 STATUTORY PROVISIONS

22 8. Section 4022 of the Code states:

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

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

26 (b) Any device that bears the statement: "Caution: federal law restricts this
27 device to sale by or on the order of a _____," "Rx only," or words of similar import,
28

1 the blank to be filled in with the designation of the practitioner licensed to use or
2 order use of the device.

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

5 9. Section 4113, subdivision (c) of the Code states: "The pharmacist-in-charge shall be
6 responsible for a pharmacy's compliance with all state and federal laws and regulations
7 pertaining to the practice of pharmacy."

8 10. Section 4301 of the Code states:

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

13

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

19

20 11. Section 4333 of the Code states, in pertinent part, that all prescriptions filled by a
21 pharmacy and all other records required by Section 4081 shall be maintained on the premises and
22 available for inspection by authorized officers of the law for a period of at least three years. In
23 cases where the pharmacy discontinues business, these records shall be maintained in a
24 board-licensed facility for at least three years.

25 REGULATORY PROVISIONS

26 12. California Code of Regulations, title 16, section 1761 states:

27 (a) No pharmacist shall compound or dispense any prescription which
28 contains any significant error, omission, irregularity, uncertainty, ambiguity or
alteration. Upon receipt of any such prescription, the pharmacist shall contact the
prescriber to obtain the information needed to validate the prescription.

1 **COST RECOVERY**

2 13. Section 125.3 of the Code provides, in pertinent part, that the Board may request the
3 administrative law judge to direct a licentiate found to have committed a violation or violations of
4 the licensing act to pay a sum not to exceed the reasonable costs of the investigation and
5 enforcement of the case, with failure of the licentiate to comply subjecting the license to not
6 being renewed or reinstated. If a case settles, recovery of investigation and enforcement costs
7 may be included in a stipulated settlement.

8 **DRUGS**

9 14. Amoxicillin, is a dangerous drug pursuant to Business and Professions Code section
10 4022.

11 15. Bactrim DS, a brand name for trimethoprim/sulfam ethoxazole, is a dangerous drug
12 pursuant to Business and Professions Code section 4022.

13 16. Keflex, a brand name for cephalexin, is a dangerous drug pursuant to Business and
14 Professions Code section 4022.

15 17. Lortab, a brand name for hydrocodone, is a Schedule III controlled substance
16 pursuant to Health and Safety Code section 11056, subdivision (e), and a dangerous drug
17 pursuant to Business and Professions Code section 4022.

18 18. Norco, a brand name for acetaminophen and hydrocodone bitartrate, is a Schedule III
19 controlled substance pursuant to Health and Safety Code section 11056, subdivision (e), and a
20 dangerous drug pursuant to Business and Professions Code section 4022.

21 19. Phenergan/Codeine, the brand name for Promethazine with Codeine Syrup is a
22 Schedule V controlled substance under Health and Safety Code section 11058 and is a dangerous
23 drug pursuant to Business and Professions Code section 4022.

24 **FACTUAL ALLEGATIONS**

25 20. At all times mentioned herein and since August 28, 2001, Dana Madievsky
26 (Respondent) has been the President and Pharmacist-in-Charge (PIC) of D & R Pharmacy, Inc.,
27 dba Pico Union Pharmacy (Respondent) located in Los Angeles, California.

1 21. From August 1, 2010 to June 10, 2011, Respondents dispensed 596 fraudulent
2 prescriptions to patients allegedly written by Dr. D.B. Of the 596 fraudulent prescriptions, 16
3 prescriptions were for hydrocodone products, 290 prescriptions were for Phenergan with
4 Codeine, and 290 prescriptions were for antibiotics (Keflex 500 mg, Bactrim DS, and
5 Amoxicillin 500 mg). All of the hydrocodone prescriptions (Lortab 10/500 mg and Norco 10/325
6 mg) were dispensed with the same directions to take one tablet every six to eight hours and in the
7 same total quantity of one hundred tablets. All of the 290 prescriptions for Phenergan with
8 Codeine showed the same directions (take 1 teaspoon every six to eight hours) and the same total
9 quantity (1 pint) and were prescribed on the same prescription document as the antibiotic. All of
10 the prescriptions for antibiotics showed the same total quantity (10 capsules).

11 22. Dr. D.B. did not write or authorize any of the fraudulent prescriptions. None of the
12 patients who were dispensed fraudulent prescriptions were patients of Dr. D.B. or were patients at
13 the clinic where Dr. D.B. worked. Respondents never contacted Dr. D.B. or the clinic to verify
14 the fraudulent prescriptions prior to dispensing the drugs to patients.

15 23. During the Board of Pharmacy's investigation, copies of the original fraudulent
16 prescriptions were obtained from Respondents. The majority of the prescriptions were noted by
17 Respondents as "verified with Michelle and Akisha" on the back of the prescription documents.
18 However, nobody by the name "Michelle" or "Akisha" were employed by Dr. D.B. or the clinic
19 where Dr. D.B. worked. Dr. D.B. confirmed that the clinic would not verify these prescriptions
20 because the clinic never saw those patients.

21 24. Respondents were also unable to produce the original prescriptions for the following
22 six prescriptions that were dispensed: RX No. 1559731 for Bactrim dispensed to D.J.; RX No.
23 1559732 for Phenergan with Codeine dispensed to D.J.; RX No. 1566999 for Phenergan with
24 Codeine dispensed to B.A.; RX No. 1567000 for Bactrim dispensed to B.A.; RX No. 1555690 for
25 Phenergan with Codeine dispensed to S.M.; and RX No. 1555691 for Bactrim dispensed to S.M.

1 **FIRST CAUSE FOR DISCIPLINE**

2 **(Dispensing Erroneous, Irregular, Uncertain, or Altered Prescriptions)**

3 25. Respondents are subject to disciplinary action for unprofessional conduct under Code
4 section 4301, subdivision (o), for violation of California Code of Regulations section 1761(a) for
5 dispensing prescriptions which contained significant errors, omissions, irregularities,
6 uncertainties, ambiguities or alterations, and failing to verify the prescriptions with the prescriber,
7 as set forth in paragraphs 20 through 24, which are incorporated herein by reference.

8 **SECOND CAUSE FOR DISCIPLINE**

9 **(Failure to Maintain Prescription Records)**

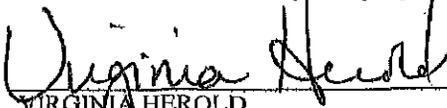
10 26. Respondents are subject to disciplinary action for unprofessional conduct under Code
11 section 4301, subdivision (o), for violation of Code section 4333 failing to maintain prescription
12 records, as set forth in paragraphs 20 through 24, which are incorporated herein by reference.

13 **PRAYER**

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

- 16 1. Revoking or suspending Permit Number 45340, issued to D & R Pharmacy, Inc., dba
17 Pico Union Pharmacy;
- 18 2. Revoking or suspending Pharmacist License Number RPH 48684, issued to Dana
19 Madievsky;
- 20 3. Ordering Respondents to pay the Board of Pharmacy the reasonable costs of the
21 investigation and enforcement of this case, pursuant to Business and Professions Code section
22 125.3;
- 23 4. Taking such other and further action as deemed necessary and proper.

24 DATED: 8/16/14


25 VIRGINIA HEROLD
26 Executive Officer
27 Board of Pharmacy
28 Department of Consumer Affairs
State of California
Complainant

LA2014511025/70874826.doc