

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

In the Matter of the Accusation Against:

**ALPHA MEDICAL PHARMACY, INC., dba ALPHA
MEDICAL PHARMACY III, VICTOR FAI LAW, President,**

Pharmacy Permit No. PHY 54632

and

JENNY TZUNING LO, Pharmacist-in-Charge

Pharmacist License No. RPH 70581

Respondents

Agency Case No. 6747; OAH No. 2019100471

NOTICE OF DECISION AND ORDER

Pursuant to Government Code section 11517(c)(2), the attached Proposed Decision of the Administrative Law Judge is hereby deemed adopted by operation of law by the Board of Pharmacy, Department of Consumer Affairs, as its Decision in this matter.

This Decision shall become effective at 5:00 p.m. on April 14, 2021.

It is so ORDERED on March 15, 2021.

BOARD OF PHARMACY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

A handwritten signature in black ink, appearing to read "Greg M. Lippe".

By

Greg Lippe
Board President

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PROPOSED DECISION

Howard W. Cohen, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California, heard this matter by video and teleconference on October 12, 2020.

Heather Vo, Deputy Attorney General, represented complainant Anne Sodergren, Interim Executive Officer of the Board of Pharmacy (Board), Department of Consumer Affairs.

Tony J. Park and Luis Andre P. Vizcocho, Attorneys at Law, represented respondents Alpha Medical Pharmacy, doing business as Alpha Medical Pharmacy III, Victor Fai Law, President (Alpha Pharmacy), and Jenny Tzuning Lo, Pharmacist-in-Charge. Mr. Law and Ms. Lo were present.

Oral and documentary evidence was received.

During the hearing, complainant moved for leave to file an amendment to the Accusation by adding a section titled "Discipline Considerations" with the following language:

14. To determine the degree of discipline, if any, to be imposed on Respondent Alpha Medical Pharmacy, Victor Fai Law as President, Complainant alleges as follows:

a. On or about November 28, 2017, in a prior action, the Board of Pharmacy issued Citation Number CI 2017 77801 to Victor Fai Law based on violations of Business and Professions Code section 4306.5 The violation arose when Victor Fai Law made an offer for pharmacy services to a patient in exchange for the patient to not file a complaint with the Board. Respondent was ordered to pay \$5,000.00. That Citation is now final and is incorporated by reference as if fully set forth.

Respondent made no objection to the amendment, and the motion was granted.

The record was held open to allow complainant to file and serve the proposed amendment by close of business on October 12, 2020, and to allow respondent to file and serve a reply by October 14, 2020. Complainant timely filed the proposed language, which was marked as exhibit 11. Complainant filed no reply.

The record closed and the matter was submitted on October 14, 2017.

SUMMARY

Complainant alleges that Alpha Pharmacy, which owns three pharmacies, and Jenny Tzuning Lo, the pharmacist-in-charge (PIC) at one of the three pharmacies, knowingly allowed unlicensed pharmacy employees to repackage prescription medications, acts for which a pharmacy technician or pharmacist license is required. Complainant seeks to revoke or suspend PIC Lo's pharmacist license and Alpha Pharmacy's pharmacy license, and to prohibit Alpha Pharmacy and Mr. Law from serving as officers, owners, or partners of a licensee for five years.

Respondent Lo admitted and apologized for her actions and offered evidence of mitigation and rehabilitation. Victor Fai Law, testifying for Alpha Pharmacy, claimed ignorance of the prepackaging process at the pharmacy in question.

As discussed below, the evidence established cause for discipline, warranting public reprovals of both Alpha Pharmacy and PIC Lo.

FACTUAL FINDINGS

Jurisdiction

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

2. The Board issued Pharmacy Permit number PHY 54632 to respondent Alpha Pharmacy on August 1, 2016.¹ The license was scheduled to expire on August 1, 2020. Victor Fai Law, Pharmacist License number RPH 30791, has been the sole owner and Chief Executive Officer (CEO) of Alpha Pharmacy since August 1, 2016.

3. The Board issued Pharmacist License number RPH 70581 to respondent Lo on April 4, 2014. The license was scheduled to expire on January 31, 2020. From August 1, 2016, to the present, respondent Lo has been the PIC at Alpha Pharmacy III in Monterey Park. She was PIC at that pharmacy at all times relevant to the charging allegations.

Board Investigation

4. On November 2, 2018, Board Inspector Anna Yamada, accompanied by another inspector, Emerald Foster, conducted a routine inspection of Alpha Pharmacy in Monterey Park. In her Inspection Report, Inspector Yamada described Alpha Pharmacy as a traditional retail pharmacy on the first floor of a medical office building, typically staffed with one pharmacist and two clerks. Ms. Yamada wrote in her report,

¹ Alpha Medical Pharmacy Inc. operates pharmacies at three locations; the pharmacy at issue in this matter is Alpha Medical Pharmacy III.

and testified, that she discovered the pharmacy prepackaged numerous fast-moving drugs, transferring them from the manufacturers' stock bottles into unit-of-use vials, and that the prepackaging was performed by unlicensed clerks Jasmine Jin, May Yip, and Queenie Chiu.

5. When Inspectors Yamada and Foster arrived to conduct the inspection, Theresa Tran was the pharmacist on duty; also working there were clerks Queenie Chiu and Quyen Lau. Inspector Yamada inspected the medication shelves and found numerous pre-packaged prescription vials throughout the pharmacy. The vials, containing 30 or 60 units of medication, were placed upside down next to the corresponding manufacturers' stock bottles, which usually contain 100 or 1,000 units. The vials were individually labeled with stickers on which the drug name, strength, quantity, manufacturer, lot number and expiration dates were handwritten. Some of the labels included handwritten initials. The vials contained various types of medication, including antibiotics, vitamins, oral liquids, blood pressure medications, and cholesterol medications. Inspector Yamada photographed many of the vials and bottles; the photographs in evidence are consistent with her report and testimony, including her conclusion that, in view of the large number of vials, the prepackaging was not an isolated incident but was performed routinely by the unlicensed personnel whose initials appeared on the labels.

6. Inspector Yamada explained that prepackaging medications is legal when properly labeled and performed by licensed pharmacists or pharmacy technicians. Prepackaging is useful when a pharmacy is busy and is usually done for commonly used medications. When the pharmacy receives a prescription, the pharmacist can fill the prescription by dispensing the vial, which contains the pre-counted number of units.

7. Inspector Yamada asked Ms. Tran to identify who filled the vials; Ms. Tran said she only worked at Alpha Pharmacy occasionally and did not know. Inspector Yamada asked Ms. Chiu, whose initials, "QC," appeared on numerous vial labels, if she had filled those vials. Ms. Chiu denied doing so, saying that the pharmacist counted pills and filled the vials; she admitted only that she wrote the labels.

8. Respondent Lo, the PIC, then arrived and assisted with the inspection. Inspector Yamada showed her the pre-packaged prescription vials and asked her to explain the process.

9. Respondent Lo readily admitted to Yamada during the inspection, and at hearing, that the pharmacy's unlicensed clerks routinely counted, poured, and labeled the medications in the prescription vials during periods when the pharmacy was not busy. Respondent Lo told Inspector Yamada she verified the contents and labels of the pre-packaged prescription vials.

10. When Inspector Yamada told respondent Lo that Ms. Chiu had denied counting and pouring medications into the vials, respondent Lo disputed Ms. Chiu's version and again confirmed that the unlicensed clerks filled the vials, which PIC Lo would then verify. When Inspector Yamada confronted Ms. Chiu with this information and showed her vials with the initials "QC. Ms. Chiu admitted she had pre-packaged the medications.

11. Inspector Yamada asked PIC Lo why she allowed the pharmacy clerks, rather than a licensed technician, to pre-package the prescription vials. PIC Lo, who acknowledged knowing the clerks were unlicensed, replied that the pharmacy did not employ any licensed technicians.

12. While still at the pharmacy, Inspector Yamada issued a Written Notice that the pharmacy appeared to have failed to comply with Business and Professions Code section 4115, subdivision (e), which provides that only licensed pharmacy technicians may perform work for which a pharmacy technician license is required. The Written Notice stated that pharmacy clerks Jasmine Jin, May Yip, and Queenie Chiu, who were not licensed pharmacy technicians, had prepackaged medication vials. Evidence presented at hearing confirms the clerks were not licensed by the Board.

13. Inspector Yamada explained at hearing that pharmacies are highly regulated to protect public safety, and that allowing unlicensed persons, who lack the appropriate level of knowledge, education, and experience, to prepackage vials increases the risk of error and consequent harm to the public. She explained that compliance with pharmacy law is the responsibility of both the pharmacist on duty at any given time and the PIC, whether present or not.

14. The two inspectors signed the Written Notice, as did PIC Lo. In her Inspection Report, also signed by both inspectors and by PIC Lo, Inspector Yamada wrote that PIC Lo was to submit to her, within 14 days, a written statement addressing the Notice in order to complete the investigation.

15. On November 10, 2018, PIC Lo timely emailed a written statement to Inspector Yamada. She wrote that she had taken corrective action in light of the inspection. A licensed pharmacy technician, Helena Moc, was now working full-time at the pharmacy in place of one of the unlicensed clerks and was responsible for pre-packaging all medication vials. PIC Lo sent Inspector Yamada a copy of Ms. Moc's pharmacy technician license.

16. According to Inspector Yamada and PIC Lo's testimony at hearing, Mr. Law regularly did paperwork at the pharmacy for a few hours every other week; on occasion, he filled in as the pharmacist on duty and dispensed prepackaged medications. Inspector Yamada does not know whether Mr. Law was involved in or knew of the decision to have unlicensed employees prepackage medications. She believes he must have noticed the large number of prepackaged vials with labels bearing the initials of unlicensed employees working with him whenever he served as the pharmacist on duty.

17. PIC Lo does not know whether Mr. Law knew the clerks were prepackaging medications or whether he supervised any prepackaging activities when he filled in as the pharmacist on duty. She knows that dispensing medications requires the pharmacist to look at the label on the vials and believes Mr. Law must have seen the clerks' initials on the vial labels when he dispensed medications.

18. Mr. Law is the sole shareholder and the chief executive officer of Alpha Medical Pharmacy Inc., which wholly owns three pharmacy locations, Alpha Pharmacy I, II, and III. Alpha Pharmacy has a PIC at each location to run each pharmacy's operations; Mr. Law did not at any relevant time serve as the PIC at Alpha Pharmacy III, the location Ms. Yamada inspected.

19. Mr. Law spends much of his time working on Board matters; he visits Alpha Pharmacy III once or twice per week, primarily to collect checks and billing statements. He also occasionally relieves the pharmacist on duty there when there are scheduling problems, up to three or four hours per month. When serving as the relief pharmacist on duty, Mr. Law has dispensed medications, including those in the prepackaged vials. He would verify that the medications in the vials were correct as to

name, strength, and expiration date, and would open the vials to check for number and color.

20. Mr. Law did not pay attention to the clerks' initials on the vials and did not know the clerks had performed the prepackaging. He hired the three unlicensed clerks at Alpha Pharmacy III but was not involved in assigning them their duties. Nor did he instruct them to repackage medications, relying on the PIC to delegate their daily tasks and supervise them. He understands it is a violation of pharmacy law for unlicensed clerks to prepackage medicine. Mr. Law acknowledged that Alpha Pharmacy did not employ a licensed pharmacy technician until after the inspector found the violation at issue in this case.

21. Mr. Law was president of the Board of Pharmacy at the time of the Alpha Pharmacy III inspection. He was appointed to the Board in 2012 and was vice-president of the Board when he received a citation on November 28, 2017, for violating Business and Professions Code section 4306.5 (misuse of education). The Citation (Citation number CI 2017 77801) recited that an investigation "determined Pharmacist Law made an offer for pharmacy services to [a client] in exchange for [the client] to not file a complaint with the Board of Pharmacy. This was a violation of pharmacy law." (Ex. 10.) Mr. Law disputed the truth of the basis for the citation on cross-examination; his testimony on this subject was discounted, as the citation was final. After the citation issued, the Board elected Mr. Law president.

22. In an Investigation Report dated February 4, 2019, Inspector Yamada wrote, in summary, "This was an unlicensed technician activity case. On 11/2/18, an inspection of Alpha Pharmacy revealed unlicensed staff members pre-packaged medication prescription vials at the pharmacy." (Ex. 4, p. 47.)

23. The Investigation Report contained two separate identical findings, one against Alpha Pharmacy and one against PIC Lo. Inspector Yamada found that, on November 2, 2018, an inspection of Alpha Medical Pharmacy III revealed that unlicensed clerks Jasmine Jin, May Yip, and Queenie Chiu pre-packaged medication prescription vials for the pharmacy. Ms. Yamada reported that prepackaging medication vials without a technician license is a violation of Business and Profession Code section 4115, subdivision (e). (Ex. 4, p. 48.)

Mitigation and Rehabilitation

RESPONDENT LO

24. At hearing, respondent Lo readily admitted, as she had during the inspection, that she knew unlicensed clerks were regularly engaged in prepackaging medications, transferring medications from manufacturers' stock bottles to vials and labeling the vials. She explained, however, how she had justified the practice to herself before the inspection.

25. The clerks stood right next to PIC Lo at the pharmacy counter when they prepackaged the medications. PIC Lo would take a manufacturer's bottle, place it in front of a clerk, and tell the clerk how many units to place in a vial, so the clerks could not have made any mistake about which medication they were prepackaging. PIC Lo would then check that the medications in the vial were correct and properly counted, and would herself place the vial and the manufacturer's bottle back on the appropriate shelf. When a prescription order arrived, PIC Lo would check the accuracy of the contents of each vial a second time before dispensing it. No controlled substances were ever prepackaged.

26. PIC Lo processed an average of 150 to 200 prescriptions each day, a fairly busy schedule. That is why she decided to prepackage during slow periods; it allowed her to increase the accuracy of the counting and save time during busy periods.

27. PIC Lo testified that, because of how she had structured the prepackaging process, the clerks were essentially “counting machines.” She performed all tasks requiring judgment, such as selecting the bottle from which medications were to be prepackaged, and she double- and triple-checked the medications before dispensing them. She felt very confident about the accuracy of the medication labels, as she checked each one personally. She believed she had ensured against any error, but admitted she violated the pharmacy laws, nevertheless. She admitted she was solely responsible for the decision to have the unlicensed clerks perform the prepackaging.

28. She now uses only licensed personnel to do prepackaging. “I’ve learned my lesson,” she testified.

29. Respondent Lo is respected and trusted by her professional peers and by her friends, as reflected in several character reference letters, all signed under penalty of perjury.

a. Hoichi Cheung, a pharmacist licensed since 2004, wrote in a letter dated July 26, 2020 that he works per diem at Alpha Pharmacy on weekends and full-time doing research for Amphastar Pharmaceuticals, Inc. He was PIC Lo’s mentor when she started working at Alpha Pharmacy in 2014. He considers her to be an excellent pharmacist, honest, hardworking, knowledgeable, and caring. He wrote she works well under stress and dispenses medications with utmost caution, understanding that her

first priority is patient safety. About this matter, Mr. Cheung believes it was an oversight of PIC Lo's, who had no intention of harming any patients.

b. John Yang, in a letter dated September 29, 2020, wrote that he is an elder in PIC Lo's church, where she serves in many roles, is entrusted with many duties, and is widely seen as a caring, compassionate, and trustworthy person. He attributes her violation of pharmacy law to a lapse in judgment. He wrote that his "knowledge of her as a person and of her reputations leads me to have 100 percent confidence in her ability to rectify any of her mistakes and to from here on out serve patients with the utmost professionalism and integrity." (Ex. C, p. 2.)

c. Theresa Tran, the licensed pharmacist who was present when Inspector Yamada visited the pharmacy, wrote that respondent Lo is a fair and approachable PIC, and a serious, loyal, and dedicated person. She wrote that PIC Lo goes out of her way to help patients, even after her shift is over, and that she cares deeply about her patients and her work. Though Ms. Tran knows that fault was found with PIC Lo's management, she believes PIC Lo would not do anything to jeopardize her patients' well-being. "[S]he is one of the most caring and reliable pharmacist[s] I know." (Ex. C, p. 3.)

d. Quyen Liu, in a letter dated August 29, 2020, wrote that she has worked full-time under PIC Lo's supervision since 2016. According to Ms. Liu, PIC Lo is knowledgeable, detail-oriented, kind, and careful. She takes her time explaining medications to patients and answering their concerns. PIC Lo "would never do anything to jeopardize [a] patient's safety [The] patient's wellbeing is her highest priority," and she has earned her patients' respect and appreciation. (Ex. C, p. 5.)

e. In a letter dated August 20, 2020, Annie Keh, an attorney, wrote that she has known PIC Lo since 2007. They work together to serve their community through their church. She is impressed with PIC Lo's "integrity, work ethics and compassion toward others." Ms. Keh wrote that the actions underlying this matter are out of character and that PIC Lo would do nothing to jeopardize the safety and wellbeing of her patients. (Ex. C, p. 6.)

RESPONDENT ALPHA PHARMACY

30. Mr. Law acknowledged at hearing that he hired the three unlicensed clerks working at Alpha Pharmacy III but denied that he was involved in their daily work assignments and or that he instructed them to prepackage medications. He did not know they were prepackaging medications and did not know which employees at the pharmacy performed which tasks. The clerks' duties were determined by PIC Lo, on whom he relied to delegate tasks to all pharmacy employees.

31. Mr. Law worked as the pharmacist on duty at Alpha Pharmacy III only for a few hours per month at most. He knew no licensed pharmacy technicians were employed at Alpha Pharmacy III, and he saw clerks' initials on prepackaged vials. But he did not instruct PIC Lo to use the clerks to prepackage medications. No evidence was introduced to show that he saw any clerks engaged in prepackaging while he was present. Inspector Yamada only surmised Mr. Law must have known the initials on the labels meant the clerks had filled the vials.

32. The evidence did not establish that Alpha Pharmacy, through its CEO, Mr. Law, ordered or condoned any unprofessional conduct. As Board president and as CEO of Alpha Pharmacy III's corporate parent, Mr. Law's attention to Board matters and the financial responsibilities of ownership of three pharmacies occupied most of his

professional time and attention. Nonetheless, because Mr. Law occasionally filled in as pharmacist on duty at Alpha Pharmacy III and dispensed prepackaged vials bearing labels having unlicensed employees' initials on them, he should have but neglected to question his PIC about her prepackaging process. That failure supports a conclusion that respondent Alpha Pharmacy's oversight of PIC Lo with respect to prepackaging activities was insufficient to ensure PIC Lo's compliance with pharmacy law, which she violated.

Costs of Enforcement

33. The Board incurred investigative costs for inspectors and a supervising inspector in the amount of \$1,482.25, and enforcement costs, in the form of Attorney General fees and costs, in the amount of \$21,205, for a total of \$22,687.25.

LEGAL CONCLUSIONS

Applicable Authority

1. The Board may suspend or revoke a license for unprofessional conduct. (Bus. & Prof. Code, §§ 4300, 4301.)² Unprofessional conduct includes violating any laws governing pharmacy. (§ 4301, subd. (o).) The Board retains jurisdiction to discipline an expired license. (§§ 118, subd. (b), 4300.1.)

² All further statutory references are to the Business and Professions Code, unless otherwise stated.

2. "Protection of the public shall be the highest priority for the California State Board of Pharmacy in exercising its licensing, regulatory, and disciplinary functions." (§ 4001.1.)

3. Any person whose license is revoked or placed on probation "shall be prohibited from serving as a manager, administrator, owner, member, officer, director, associate, partner, or in any other position with management or control of a licensee." The prohibition shall remain in effect for up to five years if the license has been placed on probation, or until the license is reinstated if the license has been revoked. (§ 4307, subd. (a).)

4. "The pharmacist-in-charge shall be responsible for a pharmacy's compliance with all state and federal laws and regulations pertaining to the practice of pharmacy." (§ 4113, subd. (c).) "'Pharmacist-in-charge' means a pharmacist proposed by a pharmacy and approved by the Board as the supervisor or manager responsible for ensuring the pharmacy's compliance with all state and federal laws and regulations pertaining to the practice of pharmacy." (§ 4036.5.)

5. "A pharmacy corporation shall not do, or fail to do, any act where doing or failing to do the act would constitute unprofessional conduct under any statute or regulation. In the conduct of its practice, a pharmacy corporation shall observe and be bound by the laws and regulations that apply to a person licensed under this chapter." (§ 4156.)

6. A person shall not perform the duties of a pharmacy technician without first being licensed by the Board as a pharmacy technician. (§ 4115, subd. (e).)

7. "A pharmacy technician may perform packaging . . . or other nondiscretionary tasks only while assisting, and while under the direct supervision and

control of, a pharmacist. The pharmacist shall be responsible for the duties performed under his or her supervision by a technician.” (§ 4115, subd. (a).) The Board has adopted regulations “to specify tasks pursuant to subdivision (a) that a pharmacy technician may perform under the supervision of a pharmacist.” (§ 4115, subd. (d).) Among other things, the regulations provide that the duties of a pharmacy technician for which a license is required include removing drugs from stock; counting, pouring, or mixing pharmaceuticals; placing the product into a container; affixing a label to the container; and packaging and prepackaging. (Cal. Code Regs., tit. 16, § 1793.2.) A pharmacy technician may perform those tasks only when there is a pharmacist on duty (§ 4115, subd. (b).)

Standard and Burden of Proof

8. Respondent Lo’s pharmacist license is a professional license. (§ 4050; *Murphy v. E. R. Squibb & Sons, Inc.* (1985) 40 Cal.3d 672, 678-679.) To impose discipline on a professional license, complainant must prove cause for discipline by clear and convincing evidence to a reasonable certainty. (*Sternberg v. California State Board of Pharmacy* (2015) 239 Cal.App.4th 1159, 1171; *Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 856.) Clear and convincing evidence requires a finding of “high probability,” and has been described as requiring proof that is so clear as to leave no substantial doubt and that is sufficiently strong to command the unhesitating assent of every reasonable mind. (*In re Marriage of Weaver* (1990) 224 Cal.App.3d 478, 487; *In re Angelia P.* (1981) 28 Cal.3d 908, 919.)

9. Alpha Pharmacy’s pharmacy permit, however, is a nonprofessional license because it does not have extensive educational, training, or testing requirements

similar to a professional license. (See *Mann v. Dept. of Motor Vehicles* (1999) 76 Cal.App.4th 312, 319; *San Benito Foods v. Veneman* (1996) 50 Cal.App.4th 1889, 1894.) An applicant for a pharmacy permit need not be a pharmacist; instead, the applicant must designate a pharmacist-in-charge with the requisite education, training, and licensure. (§§ 4110, subd. (a), 4113, subd. (a).) To impose discipline on Alpha Pharmacy's nonprofessional pharmacy permit, complainant must prove cause for discipline by a preponderance of the evidence, which is a lower standard of proof than clear and convincing evidence. (*Imports Performance v. Dept. of Consumer Affairs, Bureau of Automotive Repair* (2011) 201 Cal.App.4th 911, 916-917 (*Imports Performance*); Evid. Code, §115.) A preponderance of the evidence means "'evidence that has more convincing force than that opposed to it.' [Citation.]" (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.)

10. Therefore, complainant must prove by clear and convincing evidence that disciplining respondent Lo's license is warranted (*Sternberg, supra*, 239 Cal.App.4th at p. 1171), and by a preponderance of the evidence that disciplining Alpha Pharmacy's license is warranted (*Imports Performance, supra*, 201 Cal.App.4th 916-917).

Cause for Discipline

11. Cause exists to discipline respondent Lo's pharmacist license for unprofessional conduct under Business and Professions Code sections 4301, subdivision (o), and 4315, subdivision (e), and California Code of Regulations, title 16, section 1793.2, in that, as PIC, she knowingly allowed unlicensed pharmacy employees under her supervision to perform acts for which a pharmacy technician license is required, as set forth in Factual Findings 4 through 23, and Legal Conclusions 1 through 10.

12. Cause exists to discipline respondent Alpha Pharmacy's pharmacy permit license for unprofessional conduct under Business and Professions Code section 4301, subdivision (o), 4315, subdivision (e), and 4156, and California Code of Regulations, title 16, section 1793.2, in that Alpha Pharmacy failed in its duty to ensure that its PIC was not engaged in unprofessional conduct, as set forth in Factual Findings 4 through 23 and 30 through 32.

13. Cause does not exist to discipline respondent Alpha Pharmacy's pharmacy permit under Business and Professions Code section 4301, subdivision (o), 4315, subdivision (e), and 4156, and California Code of Regulations, title 16, section 1793.2, in that it was not sufficiently established that the pharmacy, through its president and pharmacist on duty, Victor Fai Law, knowingly allowed unlicensed pharmacy employees under Mr. Law's supervision as the pharmacist on duty, to perform acts for which a pharmacy technician license is required, as set forth in Factual Findings 4 through 23 and 30 through 32.

Appropriate Discipline

14. The Board shall consider its Disciplinary Guidelines (rev. 2/2017) (Guidelines) when determining whether and how to discipline a license. (CCR, § 1774.) The Disciplinary Guidelines establish four categories for evaluating violations and determining discipline.

15. Category I violations, which include "violation(s) of packaging requirements," are "potentially harmful," the least serious types of violations. (Guidelines at p. 9.) Category II violations are those that exhibit a "*serious* potential for harm." (*Ibid.*, italics added.) Categories III and IV violations are progressively more serious, with a progressively greater potential for harm.

16. The following factors are also relevant when determining what discipline to impose on the licensees in this matter: actual or potential harm to the public, actual or potential harm to any consumer, prior disciplinary record, prior warnings (including citations, letters of admonishment, and correction notices), number and variety of current violations, nature and severity of the acts, aggravating evidence, mitigating evidence, rehabilitation evidence, time passed since the acts or offenses, whether the conduct was intentional or negligent or demonstrated incompetence, and financial benefit to the respondent from the misconduct. (Guidelines (p. 4); § 4300.)

17. All of respondent Lo's violations are Category I violations. Respondent Lo knew the clerks were unlicensed, and she committed multiple violations. She was also responsible for the clerks' acts, both as the pharmacist on duty when they committed the acts, and as the PIC. For Category I violations, the Guidelines recommend revocation or stayed revocation with two years of probation.

18. Uncontroverted evidence, however, established respondent Lo virtually eliminated any risk to patients or public safety by closely overseeing the prepackaging activities of the unlicensed clerks. In every instance, she would place the manufacturer's bottle in front of the clerk, eliminating the possibility of the clerk selecting the wrong medication for prepackaging. She stood next to the clerk during prepackaging. She counted and verified the medications in each vial after prepackaging. She herself re-shelved the bottles and vials in the correct shelf location. She counted and verified the medications again when she dispensed them to fill a prescription. The Board met its burden in establishing respondent Lo's statutory and regulatory violations but did not clearly and convincingly establish more than a minimal risk to patients or public safety. (Factual Findings 4-27.)

19. Applying all the relevant factors and considering that respondent Lo was not shown to have acted out of any improper motive, has never before been disciplined, readily admitted the violation to the inspector and at hearing, has taken steps to prevent any further violations, and offered numerous persuasive character references (see Factual Findings 4 through 29), the record in this case supports the conclusion that a public reproof, which constitutes license discipline, will suffice to protect the public and the pharmacy's patients. The statutes relating to the licensing of professions generally are not designed to punish, but to protect the public from dishonest, untruthful, and disreputable licensees. (*Arneson v. Fox* (1980) 28 Cal.3d 440, 451.)

20. As for respondent Alpha Pharmacy, sufficient evidence that the corporation knew of the unprofessional conduct is lacking, though there is sufficient evidence that the corporate owner had reason to question PIC Lo about whether unlicensed clerks were repackaging medication.

21. Respondent Alpha Pharmacy delegated to PIC Lo the running of the pharmacy, as permitted and contemplated by statute. There was insufficient evidence to show that unlicensed clerks engaged in prepackaging on the occasions when Mr. Law was present and serving as the pharmacist on duty, or that Mr. Law knew what activity the initials on the vial labels represented. Mr. Law denied knowing that unlicensed personnel repackaged the medications. The evidence is sufficient to establish that Alpha Pharmacy knew enough, through Mr. Law, that it should have inquired of PIC Lo about her prepackaging practices and the initials on the vials. This neglect warrants a public reproof of the pharmacy. The evidence did not establish any ethical violation by the pharmacy.

22. Cause does not exist to prohibit Alpha Medical Pharmacy from serving as a manager, administrator, owner, member, officer, director, associate, or partner of a licensee for five years, as set forth in Factual Findings 4 through 23 and 30 through 32.

23. Cause does not exist to prohibit Victor Fai Law from serving as a manager, administrator, owner, member, officer, director, associate, or partner of a licensee for five years, as set forth in Factual Findings 4 through 23 and 30 through 32.

Cost Recovery

24. Complainant requests an award of investigative and enforcement costs. "Except as otherwise provided by law, in any order issued in resolution of a disciplinary proceeding before any board within the [Department of Consumer Affairs] . . . , upon request of the entity bringing the proceeding, the administrative law judge may direct a licensee found to have committed a violation or violations of the licensing act to pay a sum not to exceed the reasonable costs of the investigation and enforcement of the case." (§ 125.3, subd. (a).)

25. Complainant requests \$22,687.25 in investigation and enforcement costs under section 125.3 and presented prima facie evidence those costs are reasonable. (Factual Finding 33; see § 125.3, subds. (a), (c).) Respondents presented no evidence to the contrary.

26. The Board must not assess its full costs, however, if doing so would unfairly penalize a licensee "who has committed some misconduct but used the hearing process to obtain dismissal of other charges or a reduction in the severity of the discipline imposed." (*Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, 45.) The Board must also consider respondents' "'subjective good faith belief in the merits of [their] position;'" and whether [they] raised a "'colorable

challenge''' to the proposed discipline. (*Ibid.* [quoting *California Teachers Assn. v. State of California* (1999) 20 Cal.4th 327, 342, 345].) Furthermore, the Board must determine respondents "will be financially able to make later payments," and "may not assess the full costs . . . when it has conducted a disproportionately large investigation to prove that [a licensee] engaged in relatively innocuous misconduct." (*Ibid.*)

27. Neither respondent presented evidence of financial inability to pay the Board's costs. Both Alpha Pharmacy and PIC Lo are responsible for all of the violations established in this case. Both respondents used the hearing process to obtain a reduction in the severity of the discipline imposed. The Board, therefore, should not assess its full costs against them. Under the circumstances, an award of \$4,500, or about 20 percent of the Boards' total costs, is reasonable. Respondents are jointly and severally responsible to pay those awarded costs.

ORDER

Respondent Alpha Pharmacy

PUBLIC REPROVAL

The Board shall issue a public reproof to Alpha Medical Pharmacy Inc., doing business as Alpha Medical Pharmacy III, Victor Fai Law, President, Pharmacy license number 54632, based on its failure to adequately supervised its PIC to ensure compliance with pharmacy law. Respondent is required to report this reproof as a disciplinary action.

Respondent Lo

PUBLIC REPROVAL

The Board shall issue a public reproof to Jenny Tzuning Lo, Pharmacist license number RPH 70581, based on her unprofessional conduct as PIC in directing unlicensed clerks under her supervision to prepackage medication. Respondent is required to report this reproof as a disciplinary action.

Respondents Alpha Pharmacy and Lo

REIMBURSEMENT OF BOARD COSTS

Respondents shall jointly and severally pay to the Board its costs of investigation and prosecution in the amount of \$4,500. Respondents shall be permitted to pay these costs in a payment plan approved by the Board or its designee.

DATE: 12/01/2020


Howard W. Cohen (Dec 1, 2020 09:25 PST)

HOWARD W. COHEN

Administrative Law Judge

Office of Administrative Hearings

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7

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

11 In the Matter of the Accusation Against:

Case No. 6747

12 **ALPHA MEDICAL PHARMACY INC.,**
13 **dba ALPHA MEDICAL PHARMACY III,**
VICTOR FAI LAW, President
401 N. Garfield Ave., #101
14 Monterey Park, CA 91754

ACCUSATION

15 Permit No. PHY 54632

16 And

17 **JENNY TZUNING LO**
Pharmacist-in-Charge
18 1087 Canyon Spring Lane
Diamond Bar, CA 91765

19 Pharmacist License No. RPH 70581

20 Respondents.
21

22 **PARTIES**

23
24 1. Anne Sodergren (Complainant) brings this Accusation solely in her official capacity
25 as the Interim Executive Officer of the Board of Pharmacy, Department of Consumer Affairs.

26 Alpha Medical Pharmacy III

27 2. On or about August 1, 2016, the Board of Pharmacy issued Permit Number PHY
28 54632 to Alpha Medical Pharmacy Inc., dba Alpha Medical Pharmacy III, and Victor Fai Law,

1 RPH 30791, as President since August 1, 2016 (Respondent Alpha Pharmacy). The Pharmacy
2 Permit was in full force and effect at all times relevant to the charges brought herein and will
3 expire on August 1, 2020, unless renewed.

4 Jenny Tzuning Lo

5 3. On or about April 4, 2014, the Board of Pharmacy issued Pharmacist License Number
6 RPH 70581 to Jenny Tzuning Lo (Respondent Lo). Respondent Lo has been the Pharmacist-in-
7 Charge at Alpha Medical Pharmacy III since August 1, 2016. The Pharmacist License was in full
8 force and effect at all times relevant to the charges brought herein and will expire on January 31,
9 2020, unless renewed.

10 **JURISDICTION**

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

14 5. Section 118, subdivision (b) states:

15 “(b) The suspension, expiration, or forfeiture by operation of law of a license issued by a
16 board in the department, or its suspension, forfeiture, or cancellation by order of the board or by
17 order of a court of law, or its surrender without the written consent of the board, shall not, during
18 any period in which it may be renewed, restored, reissued, or reinstated, deprive the board of its
19 authority to institute or continue a disciplinary proceeding against the licensee upon any ground
20 provided by law or to enter an order suspending or revoking the license or otherwise taking
21 disciplinary action against the licensee on any such ground.”

22 6. Section 4300 states, in part:

23 “(a) Every license issued may be suspended or revoked.

24 “(b) The board shall discipline the holder of any license issued by the board, whose default
25 has been entered or whose case has been heard by the board and found guilty, by any of the
26 following methods:

27 “(1) Suspending judgment.

28 “(2) Placing him or her upon probation.

1 “(3) Suspending his or her right to practice for a period not exceeding one year.

2 “(4) Revoking his or her license.

3 “(5) Taking any other action in relation to disciplining him or her as the board in its
4 discretion may deem proper.

5 . . .

6 “(e) The proceedings under this article shall be conducted in accordance with Chapter 5
7 (commencing with Section 11500) of Part 1 of Division 3 of the Government Code, and the board
8 shall have all the powers granted therein. The action shall be final, except that the propriety of
9 the action is subject to review by the superior court pursuant to Section 1094.5 of the Code of
10 Civil Procedure.”

11 7. Section 4301 states, in part:

12 “The board shall take action against any holder of a license who is guilty of unprofessional
13 conduct or whose license has been issued by mistake. Unprofessional conduct includes, but is not
14 limited to, any of the following:

15

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

20

21 8. Section 4307 states, in part:

22 “(a) Any person who has been denied a license or whose license has been revoked or is
23 under suspension, or who has failed to renew his or her license while it was under suspension, or
24 who has been a manager, administrator, owner, member, officer, director, associate, partner, or
25 any other person with management or control of any partnership, corporation, trust, firm, or
26 association whose application for a license has been denied or revoked, is under suspension or has
27 been placed on probation, and while acting as the manager, administrator, owner, member,
28 officer, director, associate, partner, or any other person with management or control had

1 knowledge of or knowingly participated in any conduct for which the license was denied,
2 revoked, suspended, or placed on probation, shall be prohibited from serving as a manager,
3 administrator, owner, member, officer, director, associate, partner, or in any other position with
4 management or control of a licensee as follows:

5 “(1) Where a probationary license is issued or where an existing license is placed on
6 probation, this prohibition shall remain in effect for a period not to exceed five years.

7 “(2) Where the license is denied or revoked, the prohibition shall continue until the license
8 is issued or reinstated.

9”

10 **STATUTORY AND REGULATORY PROVISIONS**

11 9. Section 4113, subdivision (c) states:

12 “(c) The pharmacist-in-charge shall be responsible for a pharmacy's compliance with all
13 state and federal laws and regulations pertaining to the practice of pharmacy.”

14 10. Section 4115, subdivision (e) states:

15

16 “(e) A person shall not act as a pharmacy technician without first being licensed by the
17 board as a pharmacy technician.

18”

19 11. Code of Regulations, title 16, section 1793.2 addresses the duties of a pharmacy
20 technician and states:

21 “ ‘Nondiscretionary tasks’ as used in Business and Professions Code section 4115, include:

22 “(a) removing the drug or drugs from stock;

23 “(b) counting, pouring, or mixing pharmaceuticals;

24 “(c) placing the product into a container;

25 “(d) affixing the label or labels to the container;

26 “(e) packaging and repackaging.”

27 ///

28 ///

1 **COST RECOVERY**

2 12. Section 125.3 provides, in part, that the Board may request the administrative law
3 judge to direct a licensee found to have committed a violation or violations of the licensing act to
4 pay a sum not to exceed the reasonable costs of the investigation and enforcement of the case.

5 **CAUSE FOR DISCIPLINE**

6 **(Aiding and Abetting Unlicensed Practice)**

7 13. Respondents ALPHA PHARMACY and LO have subjected their Pharmacy Permit
8 and Pharmacist License, respectively, to disciplinary action for permitting non-licensed
9 individuals to perform the duties of a registered pharmacy technician. (Bus. & Prof. Code §§
10 4301, subd. (o), 4115, subd. (e); and Cal. Code of Regs., title 16, § 1793.2). Specifically, during
11 a November 2, 2018 Board inspection of Alpha Medical Pharmacy III, it was determined that
12 Respondents Alpha Pharmacy and Lo routinely permitted unlicensed pharmacy employees,
13 Jasmine J., May Y., and Queenie C., to perform tasks including pre-packaging of medication
14 prescription vials for the pharmacy, which can only be performed by a duly registered pharmacy
15 technician.

16 **OTHER MATTERS**

17 14. Pursuant to Code section 4307, if discipline is imposed on Pharmacy Permit Number
18 PHY 54632 issued to Alpha Medical Pharmacy Inc., dba Alpha Medical Pharmacy III, Alpha
19 Medical Pharmacy III shall be prohibited from serving as a manager, administrator, owner,
20 member, officer, director, associate, or partner of a licensee for five years if Pharmacy Permit
21 Number PHY 54632 is placed on probation or until Pharmacy Permit Number PHY 54632 is
22 reinstated if it is revoked.

23 15. Pursuant to Code section 4307, if discipline is imposed on Pharmacy Permit Number
24 PHY 54632 issued to Alpha Medical Pharmacy Inc., dba Alpha Medical Pharmacy III while
25 Victor Fai Law has been an officer and owner and had knowledge of or knowingly participated in
26 any conduct for which the licensee was disciplined, Victor Fai Law shall be prohibited from
27 serving as a manager, administrator, owner, member, officer, director, associate, or partner of a
28

licensee for five years if Pharmacy Permit Number PHY 54632 is placed on probation or until Pharmacy Permit Number PHY 54632 is reinstated if it is revoked.

PRAYER

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

1. Revoking or suspending Pharmacy Permit Number PHY 54632, issued to Alpha Medical Pharmacy Inc., dba Alpha Medical Pharmacy III;
2. Revoking or suspending Pharmacist License No. RPH 70581 issued to Jenny Tzuning Lo;
3. Prohibiting Alpha Medical Pharmacy III from serving as a manager, administrator, owner, member, officer, director, associate, or partner of a licensee for five years if Pharmacy Permit Number PHY 54632 is placed on probation or until Pharmacy Permit Number PHY 54632 is reinstated if Pharmacy Permit Number 54632 issued to Alpha Medical Pharmacy III is revoked;
4. Prohibiting Victor Fai Law from serving as a manager, administrator, owner, member, officer, director, associate, or partner of a licensee for five years if Pharmacy Permit Number PHY 54632 is placed on probation or until Pharmacy Permit Number PHY 54632 is reinstated if Pharmacy Permit Number 54632 issued to Alpha Medical Pharmacy III is revoked;
5. Ordering Alpha Medical Pharmacy Inc., dba Alpha Medical Pharmacy III and Jenny Tzuning Lo to pay the reasonable costs of the investigation and enforcement of this case, pursuant to Business and Professions Code section 125.3; and
6. Taking such other and further action as deemed necessary and proper.

DATED: August 12, 2019



ANNE SODERGREN
Interim Executive Officer
Board of Pharmacy
Department of Consumer Affairs
State of California
Complainant