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7

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

11 In the Matter of the Second Amended
Accusation Against:

Case No. 1H 2011 606

12 **GARY C. MAGALAD**
13 **903 New Depot Street, Apt. 9**
14 **Los Angeles, California 90012**

SECOND AMENDED ACCUSATION

15 **Respiratory Care Practitioner License No.**
16 **24124**

17 Respondent.

18
19 Complainant alleges:

20 **PARTIES**

21 1. Stephanie Nunez (Complainant) brings this Second Amended Accusation solely in
22 her official capacity as the Executive Officer of the Respiratory Care Board of California,
23 Department of Consumer Affairs.

24 2. On or about January 14, 2005, the Respiratory Care Board issued Respiratory Care
25 Practitioner License Number 24124 to Gary C. Magalad (Respondent). Respiratory Care
26 Practitioner License No. 24124 expired on June 30, 2013, and has not been renewed. Respiratory
27 Care Practitioner License No. 24124 was suspended on December 28, 2012, pursuant to the
28 Interim Suspension of Order issued.

JURISDICTION

1
2 3. This Second Amended Accusation is brought before the Board under the authority of
3 the following laws. All section references are to the Business and Professions Code (Code)
4 unless otherwise indicated.

5 4. Section 3710 of the Code states: "The Respiratory Care Board of California, hereafter
6 referred to as the board, shall enforce and administer this chapter [Chapter 8.3, the Respiratory
7 Care Practice Act]."

8 5. Section 3718 of the Code states: "The board shall issue, deny, suspend, and revoke
9 licenses to practice respiratory care as provided in this chapter."

10 6. Section 3750 of the Code states:
11 "The board may order the denial, suspension or revocation of, or the imposition of
12 probationary conditions upon, a license issued under this chapter, for any of the following causes:

13 ". . .

14 "(d) Conviction of a crime that substantially relates to the qualifications,
15 functions, or duties of a respiratory care practitioner. The record of conviction or a
16 certified copy thereof shall be conclusive evidence of the conviction.

17 ". . .

18 "(j) The commission of any fraudulent, dishonest, or corrupt act which is
19 substantially related to the qualifications, functions, or duties of a respiratory care
20 practitioner.

21 ". . . ."

22 7. Section 3750.5, Subdivision (a) states:

23 " In addition to any other grounds specified in this chapter, the board may deny,
24 suspend, place on probation, or revoke the license of any applicant or license-holder who has
25 done any of the following:

26 " (a) Obtained, possessed, used, or administered to himself or herself in violation of
27 law, or furnished or administered to another, any controlled substances as defined in Division 10
28 (commencing with Section 11000) of the Health and Safety Code, or any dangerous drug as

1 defined in Article 2 (commencing with Section 4015 of chapter 9, except as directed by a licensed
2 physician and surgeon, dentist, podiatrist, or other health care provider, or illegally possessed any
3 associated paraphernalia.”

4 8. Section 3752 of the Code states:

5 "A plea or verdict of guilty or a conviction following a plea of nolo contendere made to a
6 charge of any offense which substantially relates to the qualifications, functions, or duties of a
7 respiratory care practitioner is deemed to be a conviction within the meaning of this article. The
8 board shall order the license suspended or revoked, or may decline to issue a license, when the
9 time for appeal has elapsed, or the judgment of conviction has been affirmed on appeal or when
10 an order granting probation is made suspending the imposition of sentence, irrespective of a
11 subsequent order under Section 1203.4 of the Penal Code allowing the person to withdraw his or
12 her plea of guilty and to enter a plea of not guilty, or setting aside the verdict of guilty, or
13 dismissing the accusation, information, or indictment."

14 9. California Code of Regulations, title 16, section 1399.370, states:

15 "For the purposes of denial, suspension, or revocation of a license, a crime or act shall be
16 considered to be substantially related to the qualifications, functions or duties of a respiratory care
17 practitioner, if it evidences present or potential unfitness of a licensee to perform the functions
18 authorized by his or her license or in a manner inconsistent with the public health, safety, or
19 welfare. Such crimes or acts shall include but not be limited to those involving the following:

20 "(a) Violating or attempting to violate, directly or indirectly, or assisting or abetting
21 the violation of or conspiring to violate any provision or term of the Business and Professions
22 Code.

23 "(b) Commission of an act or conviction of a crime involving fiscal dishonesty theft,
24 or larceny.

25 ". . . ."

26 10. California Code of Regulations, title 16, section 1399.380, states:

27 "The executive officer of the board or his or her designee is authorized to issue a
28 citation to any person or employer for a violation of any provision of division 1.5 and chapter 1 of

1 division 2 of the Business and Professions Code, as permitted, the Act, or any regulation adopted
2 by the board:

3 “(h) The sanctions authorized under this section shall be separate from and in addition to
4 any other administrative discipline, civil penalties, or criminal penalties.”

5 11. Business and Professions Code section 492 states:

6 “Notwithstanding any other provision of law, successful completion of any diversion
7 program under the Penal Code, or successful completion of an alcohol and drug problem
8 assessment program under article 5 (commencing with Section 23249.50) of chapter 12 of
9 Division 11 of the Vehicle Code, shall not prohibit any agency established under Division 2
10 (commencing with Section 500) of the code, or any initiative act referred to in that division, from
11 taking disciplinary action against a licensee or from denying a license for professional
12 misconduct, notwithstanding that evidence of that misconduct may be recorded in a record
13 pertaining to an arrest.”

14 “This section shall not be construed to apply to any drug diversion program operated by any
15 agency established under Division 2 (commencing with Section 500) of this code, or any
16 initiative act referred to in that division.”

17 12. Health and Safety Code section 11364, subdivision (a), states:

18 “It is unlawful to possess an opium pipe or any device, contrivance, instrument, or
19 paraphernalia used for injecting or smoking (1) a controlled substance specified in subdivision (b)
20 (c), or (e), or paragraph (1) of subdivision (f) of Section 11054, specified in paragraph (14), (15),
21 or (20) of subdivision (d) of section 11054, specified in subdivision (b) or (c) of Section 11055, or
22 (2) a controlled substance which is a narcotic drug classified in Schedule III, IV, or V.”

23 COST RECOVERY

24 13. Section 3753.5, subdivision (a) of the Code states:

25 "In any order issued in resolution of a disciplinary proceeding before the board, the board or
26 the administrative law judge may direct any practitioner or applicant found to have committed a
27 violation or violations of law or any term and condition of board probation to pay to the board a
28 sum not to exceed the costs of the investigation and prosecution of the case. A certified copy of

1 the actual costs, or a good faith estimate of costs where actual costs are not available, signed by
2 the official custodian of the record or his or her designated representative shall be prima facie
3 evidence of the actual costs of the investigation and prosecution of the case."

4 14. Section 3753.7 of the Code states:

5 "For purposes of the Respiratory Care Practice Act, costs of prosecution shall include
6 attorney general or other prosecuting attorney fees, expert witness fees, and other administrative,
7 filing, and service fees."

8 15. Section 3753.1 of the Code states:

9 "(a) An administrative disciplinary decision imposing terms of probation may include,
10 among other things, a requirement that the licensee-probationer pay the monetary costs associated
11 with monitoring the probation. "

12 **FIRST CAUSE FOR DISCIPLINE**

13 (Convictions of Crimes Substantially Related)

14 16. Respondent's license is subject to disciplinary action under Code section 3750,
15 subdivision (d), 3752 and California Code of Regulations, title 16, section 1399.370, subdivision
16 (a), in that he was convicted of a crimes substantially related to the qualifications, functions and
17 duties of a respiratory care practitioner. The circumstances are as follows:

18 **November 16, 2011 Conviction (Theft):**

19 17. On or about August 31, 2011, an Alhambra Police Department Officer responded to a
20 report of a theft at a Kohl's store. The undercover loss prevention officer at Kohl's observed via
21 video surveillance a female place children's clothing items in a shopping cart. Respondent went
22 up to the shopping cart, removed a Kohl's plastic shopping bag, and placed some of the items
23 inside of the shopping bag. Respondent then walked to the customer service station and
24 attempted to return the un-purchased items for a refund using a sales receipt from the previous
25 day. He was unable to obtain the refund because he did not have proper identification.
26 Respondent asked the clerk if his wife could make the return and went to look for her.
27 Respondent's wife walked to the customer service department, completed the fraudulent refund,
28 and received \$90.25. She then purchased additional items using the fraudulent refund.

1 Respondent took the bag containing the purchased items and concealed inside the bag the two
2 pieces of jewelry which had not been purchased, that Respondent's wife had previously selected
3 from the jewelry department and put in the shopping cart. After they exited the store, the loss
4 prevention officer detained both subjects and placed them under private person's arrest. The
5 Alhambra Police Officer arrested Respondent for commercial burglary, a violation of Penal Code
6 section 459, and conspiring to commit burglary, a violation of Penal Code section 182,
7 subdivision (a)(1). He was transported to the Alhambra Police Department jail for booking.
8 Respondent admitted to the police officer that he planned to go to Kohl's and make a fraudulent
9 return by selecting items similar to the items purchased the previous day in order to receive a
10 fraudulent refund.

11 18. On or about September 15, 2011, in the matter entitled *The People of the State of*
12 *California vs. Gary Cruz Magalad*, in Los Angeles County Superior Court, Case No. 1AH03801,
13 Respondent was charged with commercial burglary, in violation of Penal Code section 459, a
14 misdemeanor (Count 1), and theft, in violation of Penal Code section 484, subdivision (a), a
15 misdemeanor (Count 2).

16 19. On or about November 16, 2011, Respondent pled nolo contendere to violating Penal
17 Code section 484, subdivision (a), a misdemeanor, as charged in Count 2. Respondent was
18 placed on probation for three years under the following terms and conditions:

- 19 a. Serve 2 days in county jail;
- 20 b. Pay fines in the amount of \$840.00;
- 21 c. Perform 10 days of community labor;
- 22 d. Stay away from Kohl's store; and
- 23 e. Obey all laws and orders of the Court.

24 The Court dismissed Count 1 of the complaint.

25 **August 9, 2012 Conviction (Possession of an Injection/Ingestion Device):**

26 20. On or about April 3, 2012, at 12:48 p.m., a Los Angeles County Sheriff Department
27 Officer responded to a report of possible vandalism to a wall in a restroom and drug use by one of
28 the community service workers at a park located at 120 E. Via Verde Drive, San Dimas,

1 California. The officer smelling the growing odor of marijuana and knowing the workers had
2 signed an agreement as part of the community service protocols, allowing routine searches, the
3 officer then searched several of the workers. Upon searching Respondent, the officer located and
4 recovered a glass pipe with a charred sphere at one end in the top pocket of Respondent's
5 backpack. Upon questioning, Respondent admitted to the officer that the pipe belonged to him
6 and that he last smoked methamphetamine at 5:00 a.m., that day. Respondent was cited for
7 possession of an injection/ingestion device in violation of Health and Safety Code 11364,
8 subdivision (a), a misdemeanor.

9 21. On or about August 9, 2012, in the matter entitled *The People of the State of*
10 *California vs. Gary Cruz Magalad*, in Los Angeles County Superior Court, Case No. 2PK02355,
11 Respondent pled guilty to possession of an injection/ingestion device in violation of Health and
12 Safety Code 11364, subdivision (a). Respondent was placed on probation for two years under the
13 following terms and conditions:

- 14 a. Pay fines in the amount of \$276.00;
- 15 b. Do not possess any narcotics, dangerous or restricted drugs or paraphernalia,
16 except with a valid prescription;
- 17 c. Enroll and successfully complete an approved controlled substance abuse
18 program;
- 19 d. Submit to periodic controlled substance testing when requested by the court,
20 treatment program or peace officer; and
- 21 e. Obey all laws and orders of the Court.

22 **January 30, 2013 Conviction (Possession of a Controlled Substance):**

23 22. On or about October 21, 2012, at 12:41 a.m., a City of Ontario Police Officer
24 observed Respondent asleep in the front passenger seat of a vehicle that was parked in the lot of
25 the Econo Inn. This hotel is known for being the locale of different types of crimes including
26 thefts, narcotics, prostitution, loitering, etc. The officer woke Respondent from his sleep and
27 observed on his chest and in plain view a clear zip-lock plastic baggie. Inside the baggie was an
28 off-white crystalline like substance and from the officer's training and experience led him to

1 believe that the substance was methamphetamine. As Respondent was exiting the vehicle,
2 pursuant to the officer's directions, the officer also observed a glass pipe in the arm tray of the
3 door that was also in plain view. At one end of the pipe was a long stem and on the other side is a
4 bulbous end. The inside of the pipe was coated with an off-white substance and burn marks at the
5 bulbous side. From the officer's training and experience the officer determined that the pipe was
6 a common tool used to ingest methamphetamine. The Respondent denied being the owner of the
7 pipe and the baggie of methamphetamine, despite the fact that the baggie of methamphetamine
8 was on his chest and there was nobody else around.

9 Based upon all of the above, Respondent was arrested for violation of Health and Safety
10 Code 11377, subdivision (a). At the Ontario Police Department, the methamphetamine was
11 determined to weigh .09 grams and the contents of the baggie tested positive for amphetamines.

12 23. On or about December 6, 2012, in the matter entitled *The People of the State of*
13 *California vs. Gary Cruz Magalad*, in San Bernardino County Superior Court, Case No.
14 FWV1203077, Respondent was charged with possession of a controlled substance, in violation of
15 Health and Safety Code section 11377, subdivision (a), a felony (Count 1), and possession of
16 smoking device, in violation of Health and Safety Code section 11364.1, subdivision (a), a
17 misdemeanor (Count 2).

18 24. On or about January 30, 2013, Respondent pled guilty to violating Health and Safety
19 Code section 11377, subdivision (a), a felony, as charged in Count 1. Respondent was placed on
20 probation for three years that includes, but not limited to, the following terms and conditions:

- 21 a. Report to the probation officer in person immediately and thereafter once every
22 fourteen days or as directed;
- 23 b. Submit to a search and seizure of your person, residence and/or property under
24 your control at any time of the day or night by any law-enforcement officer,
25 with or without a search warrant, and with or without cause;
- 26 c. Neither use nor possess any controlled substance without medical prescription;
27 A physician's written notice is to be given to the probation officer;
- 28 d. Not possess any type of drug paraphernalia, as defined in H&S 11364.5(d);

- e. Neither possess nor consume any alcoholic beverages nor enter places where such beverages are the chief item of sale, and submit to tests at the direction of the probation officer;
- f. Participate in a counseling program as directed by the probation officer, submit monthly proof of attendance and/or successful completion to the probation officer as directed and abide by all rules and regulations of the counseling program;
- g. Not associate with persons known to defendant to be illegal users or sellers of controlled substances, except for those involved in your recovery;
- h. Pay a restitution fine of \$280.00;
- i. Enroll in and complete a PC1210 Drug Treatment program;
- j. Attend NA/AA three times per week;

The Court dismissed Count 2 of the complaint.

SECOND CAUSE FOR DISCIPLINE

(Obtained, Possessed, Used or Administered a Controlled Substance)

25. Respondent's license is further subject to disciplinary action under section 3750.5, as defined by section 3750.5, subdivision (a), of the Code, in that he admitted to obtaining, possessing, using, or administering to himself in violation of law, a controlled substance as defined in Division 10 (commencing with Section 11000) of the Health and Safety Code, or any dangerous drug as defined in Article 2 (commencing with Section 4015 of chapter 9, except as directed by a licensed physician and surgeon, dentist, podiatrist, or other health care provider, or illegally possessed any associated paraphernalia, as more particularly alleged in paragraphs 20 through 24, above, which is hereby incorporated by reference and realleged as if fully set forth herein.

26. Respondent's license is further subject to disciplinary action under Code section 3750.5, subdivision (a), in that he admitted to obtaining, possessing, using, or administering to himself in violation of law, a controlled substance as defined in Division 10 (commencing with Section 11000) of the Health and Safety Code, or any dangerous drug as defined in Article 2

1 (commencing with Section 4015 of chapter 9, except as directed by a licensed physician and
2 surgeon, dentist, podiatrist, or other health care provider, or illegally possessed any associated
3 paraphernalia. The circumstances are as follows:

4 On or about September 8, 2012, at 11:15 p.m., a City of Upland Police Officer observed
5 Respondent attempting to gain entry with his vehicle to a gated mobile home park. The officer
6 made contact with the Respondent and when asked if there was anything illegal in his vehicle,
7 Respondent indicated there might be a methamphetamine pipe near the front passenger seat.
8 While discussing this with the Respondent, the officer noticed objective symptoms of Respondent
9 indicating that Respondent was under the influence of a controlled substance. Upon further
10 investigation and a field evaluation, the officer observed Respondent to be fidgeting around and
11 being unable to control his jaw movements. Respondent's pulse was 66 beats over 30 seconds,
12 indicating a pulse rate of 132. The normal range being 60 to 90 beats per minute. The officer also
13 asked Respondent to perform the Romberg stand, and Respondent estimated 12 seconds as 30
14 seconds. This indicated to the officer that his internal clock was running extremely fast. During
15 this test, the officer observed Respondent's eyelids to be fluttering, and the officer could see the
16 pulse on the left side of Respondent's neck to be pulsating extremely quickly. The officer also
17 observed Respondent's tongue to be covered with a thick white coating, indicating dryness of the
18 mouth. The officer checked Respondent's pupils in direct light conditions, and observed them to
19 be approximately 3.0 mm, but began to rebound to about 3.5 mm. The officer checked
20 Respondent's pupils in dark light conditions and they went to approximately 4.0 mm.

21 The officer then asked Respondent when the last time he used methamphetamine was, and
22 Respondent indicated that he last smoked one-half gram two days prior. Respondent indicated he
23 has been on a binge for the last 5-6 months. Upon searching Respondent's vehicle, the officer
24 located and recovered a glass pipe in the center console. The pipe was approximately 4 inches
25 long, and had a bulb on one end. The bottom of the bulb was burnt and there was a white residue
26 in the shaft of the pipe. Based upon all of the above, Respondent was arrested for violation of
27 Health and Safety Code 11550, subdivision (a), and Health and Safety Code 11364, subdivision
28 (a).

1 On or about October 18, 2012, in the San Bernardino County Superior Court, a criminal
2 complaint was filed in Case No. MWV1204440, charging Respondent with having violated
3 Health and Safety Code 11550, subdivision (a), for use of, and being under the influence of a
4 controlled substance (Count 1), and Health and Safety Code 11364, subdivision (a), possession of
5 a controlled substance instrument/paraphernalia (Count 2).

6 On or about November 8, 2012, Respondent failed to appear for a scheduled arraignment
7 pertaining to the charges, and the Superior Court therefore issued a bench warrant for
8 Respondent's arrest, with the Court setting Respondent's bail at \$20,000.

9 **THIRD CAUSE FOR DISCIPLINE**

10 (Commission of Fraudulent, Dishonest, and/or Corrupt Act)

11 27. Respondent's license is subject to disciplinary action under Code section 3750,
12 subdivision (j), and California Code of Regulations, title 16, section 1399.370, subdivision (b), in
13 that he committed a fraudulent, dishonest, and/or corrupt act which is substantially related to the
14 qualifications, functions, or duties of a respiratory care practitioner. The facts and circumstances
15 alleged in the First and Second Causes for Discipline are incorporated as if fully set forth here.

16 **DISCIPLINE CONSIDERATIONS**

17 28. To determine the degree of discipline, if any, to be imposed on Respondent,
18 Complainant alleges that on or about January 31, 2011, the Respiratory Care Board of California
19 issued Citation Number C-11-0012 to Respondent, and ordered him to pay a fine in the amount of
20 \$500.00. The Citation was based upon Respondent being placed on diversion by the Court on
21 December 7, 2010, following his plea of nolo contendere to the charge of theft, in violation of
22 Penal Code section 484, subdivision (a), a misdemeanor. Respondent was arrested due to
23 selecting and concealing various pieces of children's clothing from the Kohl's department store,
24 and then taking the clothing to a store register where Respondent and his wife obtained a cash
25 refund. Respondent also did not pay for items of jewelry (earrings) that were removed from the
26 store. That Citation is incorporated by reference as if fully set forth.

27 29. To determine the degree of discipline, if any, to be imposed on Respondent,
28 Complainant alleges that on or about January 27, 2013, Respondent was arrested for removing

1 surveillance equipment from its packaging and attempting to leave a Rancho Cucamonga,
2 California Costco store with it concealed underneath his clothing. On or about March 1, 2013,
3 the San Bernardino County Superior Court, in Case No. MWV1301090, filed a charge against
4 Respondent for second degree commercial burglary, for violating Penal Code section 459, a
5 misdemeanor.

6 **PRAYER**

7 WHEREFORE, Complainant requests that a hearing be held on the matters herein alleged,
8 and that following the hearing, the Respiratory Care Board issue a decision:

- 9 1. Revoking or suspending Respiratory Care Practitioner License Number 24124 issued
10 to Gary C. Magalad;
- 11 2. Ordering Gary C. Magalad to pay the Respiratory Care Board the costs of the
12 investigation and enforcement of this case, and if placed on probation, the costs of probation
13 monitoring; and
- 14 3. Taking such other and further action as deemed necessary and proper.

15
16 DATED: November 1, 2013

Original Signed by Liane Freels for:

17 STEPHANIE NUNEZ
18 Executive Officer
19 Respiratory Care Board of California
20 Department of Consumer Affairs
21 State of California
22 *Complainant*

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