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

12 In the Matter of the Accusation and Petition to
Revoke Probation Against:

Case No. 3306

13 DONALD STEVEN MERKEL
14 1330 Reed Street #2
San Diego, CA 92109

**ACCUSATION AND PETITION TO
REVOKE PROBATION**

15 Pharmacist License No. RPH 43281

16 Respondent.
17

18 Complainant alleges:

19 PARTIES

20 1. Virginia Herold (Complainant) brings this Accusation and Petition to
21 Revoke Probation solely in her official capacity as the Executive Officer of the Board of
22 Pharmacy, Department of Consumer Affairs.

23 2. On or about March 15, 1990, the Board of Pharmacy issued Pharmacist
24 License Number RPH 43281 to Donald Steven Merkel (Respondent). Respondent's Pharmacist
25 License has been on probation since October 31, 2001. His Pharmacist License will expire on
26 November 30, 2009, unless renewed.

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1 PRIOR DISCIPLINE

2 3. In a disciplinary action entitled "In the Matter of the Accusation Against
3 Donald Steven Merkel," Case No. 2339, the Board of Pharmacy issued a decision effective
4 October 13, 2001, in which Respondent's Original Pharmacist License was revoked for self-
5 administering controlled substances in a dangerous or injurious manner, moral turpitude or
6 dishonesty, unprofessional conduct, and violation of various controlled substances laws.
7 However, the revocation was stayed and Respondent's Original Pharmacist License was
8 suspended and then placed on probation for a period of five (5) years with certain terms and
9 conditions. A copy of that decision is attached as Exhibit A and is incorporated by reference.

10 4. The Board's disciplinary order effective on October 31, 2001, contained
11 Probation Condition 2, Rehabilitation Program - Pharmacist Recovery Program (PRP), which
12 provides that Respondent shall successfully participate in and complete his current contract and
13 any subsequent addendums to the PRP. This term also provides that probation shall be extended
14 until respondent successfully completes his treatment contract. Because respondent remains in
15 the PRP, his probation has continued to this date.

16 JURISDICTION AND STATUTORY PROVISIONS FOR THE ACCUSATION

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

20 6. Section 4022 of the Code states:

21 "Dangerous drug" or "dangerous device" means any drug or device unsafe for
22 self-use, except veterinary drugs that are labeled as such, and includes the following:

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

25 "(b) Any device that bears the statement: "Caution: federal law restricts this
26 device to sale by or on the order of a _____," "Rx only," or words of similar import, the
27 blank to be filled in with the designation of the practitioner licensed to use or order use of the
28 device.

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

3 7. Section 4059 of the Code states:

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

6 8. Section 4060 of the Code states:

7 No person shall possess any controlled substance, except that furnished to
8 a person upon the prescription of a physician, dentist, podiatrist, optometrist,
veterinarian, or naturopathic doctor pursuant to Section 3640.7, or furnished
9 pursuant to a drug order issued by a certified nurse-midwife pursuant to Section
2746.51, a nurse practitioner pursuant to Section 2836.1, or a physician assistant
10 pursuant to Section 3502.1, or naturopathic doctor pursuant to Section 3640.5, or
a pharmacist pursuant to either subparagraph (D) of paragraph (4) of, or clause
11 (iv) of subparagraph (A) of paragraph (5) of, subdivision (a) of Section 4052.
This section shall not apply to the possession of any controlled substance by a
12 manufacturer, wholesaler, pharmacy, pharmacist, physician, podiatrist, dentist,
optometrist, veterinarian, naturopathic doctor, certified nurse-midwife, nurse
13 practitioner, or physician assistant, when in stock in containers correctly labeled
with the name and address of the supplier or producer.

14 Nothing in this section authorizes a certified nurse-midwife, a nurse
15 practitioner, a physician assistant, or a naturopathic doctor, to order his or her own
stock of dangerous drugs and devices.

16 9. Section 4300 of the Code states:

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

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19 10. Section 4301 of the Code states:

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

23

24 (h) The administering to oneself, of any controlled substance, or the use of
25 any dangerous drug or of alcoholic beverages to the extent or in a manner as to be
dangerous or injurious to oneself, to a person holding a license under this chapter,
26 or to any other person or to the public, or to the extent that the use impairs the
ability of the person to conduct with safety to the public the practice authorized by
the license.

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

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

....

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

11. Section 482 of the Code states:

Each board under the provisions of this code shall develop criteria to evaluate the rehabilitation of a person when:

....

(b) Considering suspension or revocation of a license under Section 490.

Each board shall take into account all competent evidence of rehabilitation furnished by the applicant or licensee.

12. Section 490 of the Code states:

(a) In addition to any other action that a board is permitted to take against a licensee, a board may suspend or revoke a license on the ground that the licensee has been convicted of a crime, if the crime is substantially related to the qualifications, functions, or duties of the business or profession for which the license was issued.

(b) Notwithstanding any other provision of law, a board may exercise any authority to discipline a licensee for conviction of a crime that is independent of the authority granted under subdivision (a) only if the crime is substantially related to the qualifications, functions, or duties of the business or profession for which the licensee's license was issued.

1 (c) A conviction within the meaning of this section means a plea or verdict
2 of guilty or a conviction following a plea of nolo contendere. Any action that a
3 board is permitted to take following the establishment of a conviction may be
4 taken when the time for appeal has elapsed, or the judgment of conviction has
5 been affirmed on appeal, or when an order granting probation is made suspending
6 the imposition of sentence, irrespective of a subsequent order under the provisions
7 of Section 1203.4 of the Penal Code.

8 (d) The Legislature hereby finds and declares that the application of this
9 section has been made unclear by the holding in *Petropoulos v. Department of*
10 *Real Estate* (2006) 142 Cal.App.4th 554, and that the holding in that case has
11 placed a significant number of statutes and regulations in question, resulting in
12 potential harm to the consumers of California from licensees who have been
13 convicted of crimes. Therefore, the Legislature finds and declares that this section
14 establishes an independent basis for a board to impose discipline upon a licensee,
15 and that the amendments to this section made by Senate Bill 797 of the 2007 -08
16 Regular Session do not constitute a change to, but rather are declaratory of,
17 existing law.

18 13. Section 493 of the Code states:

19 Notwithstanding any other provision of law, in a proceeding conducted by
20 a board within the department pursuant to law to deny an application for a license
21 or to suspend or revoke a license or otherwise take disciplinary action against a
22 person who holds a license, upon the ground that the applicant or the licensee has
23 been convicted of a crime substantially related to the qualifications, functions, and
24 duties of the licensee in question, the record of conviction of the crime shall be
25 conclusive evidence of the fact that the conviction occurred, but only of that fact,
26 and the board may inquire into the circumstances surrounding the commission of
27 the crime in order to fix the degree of discipline or to determine if the conviction
28 is substantially related to the qualifications, functions, and duties of the licensee in
question.

As used in this section, 'license' includes 'certificate,' 'permit,'
'authority,' and 'registration.'

14. Health and Safety Code section 11170 provides that "No person shall
prescribe, administer, or furnish a controlled substance for himself."

15. Health and Safety Code section 11350 provides:

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

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1 REGULATORY PROVISIONS FOR THE ACCUSATION

2 16. California Code of Regulations, title 16, section 1769 states:

3 (b) When considering the suspension or revocation of a facility or a
4 personal license on the ground that the licensee or the registrant has been
5 convicted of a crime, the board, in evaluating the rehabilitation of such person and
6 his present eligibility for a license will consider the following criteria:

- 7 (1) Nature and severity of the act(s) or offense(s).
8 (2) Total criminal record.
9 (3) The time that has elapsed since commission of the act(s) or
10 offense(s).
11 (4) Whether the licensee has complied with all terms of parole,
12 probation, restitution or any other sanctions lawfully imposed
13 against the licensee.
14 (5) Evidence, if any, of rehabilitation submitted by the licensee.

15 17. California Code of Regulations, title 16, section 1770, states:

16 For the purpose of denial, suspension, or revocation of a personal or
17 facility license pursuant to Division 1.5 (commencing with Section 475) of the
18 Business and Professions Code, a crime or act shall be considered substantially
19 related to the qualifications, functions or duties of a licensee or registrant if to a
20 substantial degree it evidences present or potential unfitness of a licensee or
21 registrant to perform the functions authorized by his license or registration in a
22 manner consistent with the public health, safety, or welfare.

23 COST RECOVERY

24 18. Section 125.3 of the Code states, in pertinent part, that the Board may
25 request the administrative law judge to direct a licentiate found to have committed a violation or
26 violations of the licensing act to pay a sum not to exceed the reasonable costs of the investigation
27 and enforcement of the case.

28 DRUGS

19. Ativan, the brand name for Lorazepam, is a Schedule IV controlled
substance as designated by Health and Safety Code section 11057(d)(16), and is a dangerous
drug pursuant to Code section 4022. Ativan is used to treat anxiety.

20. Darvocet N, a brand name for Propoxyphene and Acetaminophen, is a
Schedule IV controlled substance as designated by Health and Safety Code section 11057(c)(2),
and is a dangerous drug pursuant to Code section 4022. Darvocet N is used to treat pain.

21. Lorcet, Norco, Vicodin, the brand name for Hydrocodone and
acetaminophen, is a Schedule III controlled substance as designated by Health and Safety Code

1 section 11056(e)(4), and is a dangerous drug pursuant to Code section 4022. Lorcet is used to
2 treat pain.

3 22. MS Contin, the brand name for Morphine Sulfate, is a Schedule II
4 controlled substance as designated by Health and Safety Code section 11055(b)(1)(M), and is a
5 dangerous drug pursuant to Code section 4022. MS Contin is used to treat pain.

6 23. Oxycodone, also sold under the brand name OxyContin, is a Schedule II
7 controlled substance as designated by Health and Safety Code section 11055(b)(1)(N), and is a
8 dangerous drug pursuant to Code section 4022. Oxycodone is used to treat pain.

9 24. Soma, the brand name for Carisoprodol, is a dangerous drug pursuant to
10 Business and Professions Code section 4022. Soma is used as a muscle relaxant.

11 25. Suboxone/Subutex, the brand name for Buprenorphine and Naloxone, is a
12 Schedule III controlled substance as designated by 21 Code of Federal Regulations section
13 1308.13(e)(2)(i), and a dangerous drug pursuant to Code section 4022. Suboxone/Subutex is
14 used in the treatment of opiate addiction.

15 26. Xanax, a brand name for Alprazolam, is a Schedule IV controlled
16 substance as designated by Health and Safety Code section 11057(d)(1), and is a dangerous drug
17 pursuant to Code section 4022. Alprazolam is used to treat anxiety.

18 27. Morphine is a Schedule II controlled substance as designated by Health
19 and Safety Code section 11055(b)(1)(M), and is a dangerous drug pursuant to Code section 4022.

20 CAUSES FOR DISCIPLINE

21 FIRST CAUSE FOR DISCIPLINE

22 (October 24, 2008 Criminal Conviction - 23 Driving Under the Influence of Controlled Substances on February 1, 2008)

24 28. Grounds exist to revoke Respondent's license under sections 490, 493, and
25 4301, subdivisions (l), (j), and (o), for a criminal conviction that is substantially related to the
26 qualifications, functions, and duties of a Pharmacist. The circumstances are as follows:

27 29. On or about February 1, 2008, at 12:17 am, Respondent was detained by
28 the police in the parking lot when he was observed trying to drive over a raised curb several

1 times. His car was half way in the street and half way in the parking lot. He kept trying to start
2 the car, although it was already on. When asked, Respondent could not locate his driver's
3 license. The Officer located it in a small wallet in Respondent's shirt pocket. Upon the Officer's
4 request, Respondent stepped out of the car and almost fell down. Four different pills were laying
5 on the seat where Respondent was seated. Respondent had a small bottle of Subutex pills (8 mg)
6 and numerous loose pills in his pocket.

7 30. When asked if he had consumed any alcohol or drugs, he denied drinking
8 alcohol and reported to the police that he had taken Coumadin that was prescribed to him. When
9 asked, Respondent admitted to the Police that he knew that he should maintain pills in their
10 individual prescription bottles, but that he had put them in a smaller bottle. He told the police
11 that he had prescriptions for all of them, "at one time or another."

12 31. After the field sobriety test, Respondent was taken to the police
13 department and given a blood test. He was then arrested for driving under the influence of
14 drugs/alcohol and possession of controlled substances without a prescription.

15 32. Respondent's blood sample was found to contain the following dangerous
16 drugs or controlled substances: Opiates, Hydrocodone, Oxycodone, Benzodiazepines, Diazepam,
17 Nordiazepam, Alprazolam, and Lorazepam.

18 33. The pills in Respondent's possession were seized and later identified as:

- 19 a. The Subutex (8 mg) bottle contained 2 Darvocet N 100 pills, 3
20 Suboxone 8N pills, 22 Vicodin pills, 12 Xanax pills, 2 Soma pills,
21 33 Lorazepam pills, 6 unidentified pills.
22 b. The following pills were loose in Respondent's pockets or found
23 on the driver's seat: 9 unidentified pills, 1 Vicodin pill, 1 Morphine
24 pill, 22 Xanax pills, and 28 Lorazepam pills.

25 34. On October 28, 2008, in the matter of the *People v. Donald Merkel*, San
26 Diego Superior Court Case Number SCD213377, Respondent pled guilty to a violation of
27 Vehicle Code section 23152(a) (driving under the influence), a misdemeanor. Respondent was
28 sentenced to 5 years probation with certain conditions including a 3 month first conviction

1 program and a MADD impact panel, 90 days license suspension, one day of jail (with credit for
2 time served of one day), and an \$3,620.00 fine.

3 **SECOND CAUSE FOR DISCIPLINE**

4 **(Consumption of Controlled Substances or Dangerous Drugs in Injurious Manner)**

5 35. Grounds exist to revoke Respondent's license under sections 4301,
6 subdivision (h), for administering to himself and using a dangerous drug to the extent or in a
7 manner as to be dangerous or injurious to himself and to the public. The facts supporting this
8 cause for discipline are described in paragraphs 29 to 34 above and are herein incorporated by
9 reference.

10 **THIRD CAUSE FOR DISCIPLINE**

11 **(Violation of Laws Regarding Controlled Substances)**

12 36. Respondent is subject to disciplinary action under section 4301,
13 subdivisions (j) and (o), for violations of laws regarding controlled substances and pharmacy, as
14 follows:

- 15 a. Respondent furnished dangerous drugs to himself without a prescription in
16 violation of Section 4059.
- 17 b. Respondent possessed controlled substances without a prescription and not
18 in stock containers in violation of Code section 4060.
- 19 c. Respondent administered controlled substances to himself in violation of
20 Health and Safety Code section 11170.
- 21 d. Respondent possessed controlled substances without a valid prescription
22 in violation of Health and Safety Code section 11350.

23 37. The facts supporting this cause for discipline are described in paragraphs
24 29 to 34 above and are herein incorporated by reference.

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1 **JURISDICTION FOR THE PETITION TO REVOKE PROBATION**

2 38. Section 4300(d) of the Code states:

3 The board may initiate disciplinary proceedings to revoke or suspend any
4 probationary certificate of licensure for any violation of the terms and conditions
5 of probation. Upon satisfactory completion of probation, the board shall convert
6 the probationary certificate to a regular certificate, free of conditions.

7 39. Grounds exist for revoking the probation and reimposing the order of
8 revocation of Pharmacy License Number RPH 43281 issued to Respondent. The Board's
9 disciplinary order effective on October 31, 2001, contained Probation Condition 24, Violation of
10 Probation, which provides as follows:

11 If respondent violates probation in any respect, the board, after giving
12 respondent notice and an opportunity to be heard, may revoke probation and carry
13 out the disciplinary order which was stayed. If a petition to revoke probation or an
14 accusation is filed against respondent during probation, the board shall have
15 continuing jurisdiction and the period of probation shall be extended, until the
16 petition to revoke probation or accusation is heard and decided.

17 If respondent has not complied with any term or condition of probation,
18 the board shall have continuing jurisdiction over respondent, and probation shall
19 automatically be extended until all terms and conditions have been satisfied or the
20 board has taken other action as deemed appropriate to treat the failure to comply
21 as a violation of probation, to terminate probation, and to impose the penalty
22 which was stayed.

23 40. Respondent has violated the conditions of his probation as set forth in the
24 following paragraphs.

25 **FIRST CAUSE TO REVOKE PROBATION**

26 **(Failure to Obey All Laws)**

27 41. The Board's disciplinary order effective on October 31, 2001, contained
28 Probation Condition 9, Obey All Laws, which required Respondent to do the following:

Respondent shall obey all federal and state laws and regulations
substantially related or governing the practice of pharmacy.

42. Respondent's probation is subject to revocation because he failed to
comply with Probation Condition 9, referenced above in the following ways.

a. Respondent was convicted of driving under the influence of drugs
in the matter of the *People v. Donald Merkel*, San Diego Superior

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Court Case Number SCD213377. The circumstances supporting this cause to revoke probation are set forth in paragraphs 29 to 34 above and are herein incorporated by reference.

b. Respondent consumed controlled substances or dangerous drugs in an injurious manner in violation of sections 4301, subdivision (h). The circumstances supporting this cause to revoke probation are set forth in paragraphs 29 to 35 above and are herein incorporated by reference.

c. Respondent furnished dangerous drugs to himself without a prescription in violation of Section 4059. The circumstances supporting this cause to revoke probation are set forth in paragraphs 29 to 37 above and are herein incorporated by reference.

d. Respondent possessed controlled substances without a prescription and not in stock containers in violation of Code section 4060. The circumstances supporting this cause to revoke probation are set forth in paragraphs 29 to 37 above and are herein incorporated by reference.

e. Respondent administered controlled substances to himself in violation of Health and Safety Code section 11170. The circumstances supporting this cause to revoke probation are set forth in paragraphs 29 to 37 above and are herein incorporated by reference.

f. Respondent possessed controlled substances without a valid prescription in violation of Health and Safety Code section 11350. The circumstances supporting this cause to revoke probation are set forth in paragraphs 29 to 37 above and are herein incorporated by reference.

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SECOND CAUSE TO REVOKE PROBATION

(Failure to Abstain From Drug Use)

43. The Board's disciplinary order effective on October 31, 2001, contained Probation Condition 4, Abstain From Drug Use, which required Respondent to do the following:

Respondent shall abstain completely from the possession or use or possession of controlled substances and dangerous drugs. This order does not apply in instances where medications are lawfully prescribed to the respondent for a legitimate illness or condition by a physician, dentist or podiatrist and where respondent, upon request of the Board or its designee, provides documentation from the treating physician, dentist or podiatrist that the prescription was legitimately issued and is a necessary part of the treatment of the respondent.

If at any time during the period of probation respondent tests positive for controlled substances or dangerous drugs as a result of any biological fluid testing and if respondent does not have a legitimate prescription from a physician, dentist or podiatrist as set forth above for those controlled substances or dangerous drugs, the Board shall, without affording respondent notice and the opportunity to be heard, revoke probation and carry out the disciplinary order that was stayed.

44. Respondent's probation is subject to revocation because he failed to comply with Probation Condition 4, referenced above. Respondent consumed dangerous drugs or controlled substances without a prescription when he was arrested for driving under the influence of drugs. The circumstances supporting this cause to revoke probation are set forth in paragraphs 29 to 37 above and are herein incorporated by reference.

DISCIPLINE CONSIDERATIONS

45. To determine the degree of discipline, if any, to be imposed on Respondent's license, Complainant alleges that disciplinary action has been taken against Respondent previously in Case No. 2339, as is outlined above in paragraphs 3 to 4. Respondent's pharmacist license remains on probation and he has remained on the PRP since 2001.

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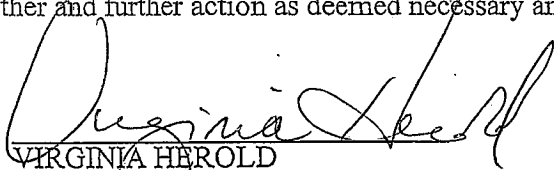
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PRAYER

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

1. Revoking the probation that was granted by the Board of Pharmacy in Case No. 2339 and imposing the disciplinary order that was stayed thereby revoking Original Pharmacist License No. RPH 43281 issued to Donald Steven Merkel;
2. Revoking or suspending Pharmacist License Number RPH 43281, issued to Donald Steven Merkel.
3. Ordering Donald Steven Merkel to pay the Board of Pharmacy the reasonable costs of the investigation and enforcement of this case, pursuant to Business and Professions Code section 125.3;
4. Taking such other and further action as deemed necessary and proper.

DATED: 6/23/09


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

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