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

In the Matter of the Accusation Against: **BRIAN D. HIGHSMITH** **2808 Garvin Street** **Richmond, California 94801** **Pharmacy Technician License No. TCH 64644** Respondent.	Case No. 3351 **ACCUSATION**

Complainant alleges:

PARTIES

1. Virginia Herold (Complainant) brings this Accusation solely in her official capacity as the Executive Officer of the Board of Pharmacy, Department of Consumer Affairs.

2. On or about August 22, 2005, the Board of Pharmacy issued Pharmacy Technician License Number TCH 64644 to Brian D. Highsmith (Respondent). The Pharmacy Technician License was in full force and effect at all times relevant to the charges brought herein and will expire on September 30, 2011, unless renewed.

JURISDICTION

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

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

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

6. Section 118(b) of the Code provides, in pertinent part, that the suspension, expiration, surrender, or cancellation of a license shall not deprive the Board of jurisdiction to proceed with a disciplinary action during the period within which the license may be renewed, restored, reissued or reinstated. Section 4402(a) of the Code provides that any pharmacist license that is not renewed within three years following its expiration may not be renewed, restored, or reinstated and shall be canceled by operation of law at the end of the three-year period. Section 4402(e) of the Code provides that any other license issued by the Board may be canceled by the Board if not renewed within 60 days after its expiration, and any license canceled in this fashion may not be reissued but will instead require a new application to seek reissuance.

STATUTORY AND REGULATORY PROVISIONS

7. Section 4301 of the Code provides, in pertinent part, that the Board shall take action against any holder of a license who is guilty of "unprofessional conduct," defined to include, but not be limited to, any of the following:

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

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

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

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8. Section 490 of the Code provides, in pertinent part, that the Board may suspend or revoke a license when it finds that the licensee has been convicted of a crime substantially related to the qualifications, functions or duties of the license.

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

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

10. Section 4059 of the Code, in pertinent part, prohibits furnishing of any dangerous drug or dangerous device except upon the prescription of an authorized prescriber.

11. Section 4060 of the Code provides, in pertinent part, that no person shall possess any controlled substance, except that furnished upon a valid prescription/drug order.

12. Health and Safety Code section 11170 provides that no person shall prescribe, administer, or furnish a controlled substance for himself or herself.

13. Health and Safety Code section 11350, in pertinent part, makes it unlawful to possess a controlled substance in Schedule I, subdivision(s) (b), (c), or (f)(1), Schedule II, subdivision(s) (b) or (c), or any narcotic drug in Schedules III-V, absent a valid prescription.

14. Health and Safety Code section 11351, in pertinent part, makes it unlawful to possess for sale or purchase for purposes of sale, a controlled substance in Schedule I, subdivision(s) (b), (c) or (e), or any narcotic drug in Schedules III-V.

15. Health and Safety Code section 11351.5, in pertinent part, makes it unlawful to possess for sale, or purchase for purposes of sale, **cocaine** base.

16. Health and Safety Code section 11357, in pertinent part, makes it unlawful for any person to possess **marijuana** or concentrated cannabis.

17. Health and Safety Code section 11359, in pertinent part, makes it unlawful for any person to possess **marijuana** for sale.

18. Section 125.3 of the Code provides, in pertinent part, that the Board may request the administrative law judge to direct a licentiate found to have committed a violation of the licensing act to pay a sum not to exceed its reasonable costs of investigation and enforcement.

CONTROLLED SUBSTANCES / DANGEROUS DRUGS

19. Section 4021 of the Code states:

"'Controlled substance' means any substance listed in Chapter 2 (commencing with Section 11053) of Division 10 of the Health and Safety Code."

20. Section 4022 of the Code states, in pertinent part:

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

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

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

21. **Marijuana** is a Schedule I controlled substance as designated by Health and Safety Code section 11054(d)(13), and a dangerous drug as designated by Business and Professions Code section 4022. It is a hallucinogenic drug.

22. **Cocaine** is a Schedule I (in base form) or Schedule II controlled substance as designated by Health and Safety Code sections 11054(f)(1) and 11055(b)(6) and a dangerous drug as designated by Business and Professions Code section 4022. It is a narcotic drug.

23. **Heroin** is a Schedule I controlled substance as designated by Health and Safety Code section 11054(c)(11) and a dangerous drug as designated by Business and Professions Code section 4022. It is an opiate drug.

FACTUAL BACKGROUND

24. On or about September 5, 2004, Oakland Police discovered Respondent sitting in the driver's seat of a parked car with thirty-one (31) small bags of suspected rock (base) **cocaine** in his lap, a plastic bag with approximately ½ ounce of suspected **marijuana** on the floorboard at his feet, and other plastic bags containing smaller amounts of **marijuana** in the driver's seat.

25. On or about January 21, 2007, Oakland Police responded to a report of three men in possession of a firearm, and found Respondent sitting in a parked car with two other men. After Respondent and the two other men were ordered out of the vehicle, and upon detection by the officer(s) of the smell of **marijuana**, a search of the car turned up, *inter alia*, three (3) small plastic bags containing suspected **heroin**, and a plastic sandwich bag containing suspected **marijuana**. Respondent stated that the car belonged to his mother.

FIRST CAUSE FOR DISCIPLINE

(Conviction of Substantially Related Crime(s))

26. Respondent is subject to discipline under section 4301(l) and/or section 490 of the Code, by reference to California Code of Regulations, title 16, section 1770, for the conviction of substantially related crime(s), in that on or about February 26, 2007, in the criminal case *People v. Brian D. Highsmith*, Case No. 526479A in Alameda County Superior Court, Respondent was convicted of one (1) count of violating Health and Safety Code section 11357, subdivision (a) (Possession of concentrated cannabis), a misdemeanor, as follows:

a. On or about January 21, 2007, based on the conduct described in paragraph 25 above, Respondent was arrested and subsequently charged in *People v. Brian D. Highsmith*, Case No. 526479A in Alameda County Superior Court, in a three-count complaint with counts two and three alleged only against Respondent's co-defendant, with one (1) count of violating Health and Safety Code section 11357, subdivision (a) (Possession of concentrated cannabis), a felony.

b. On or about February 26, 2007, Respondent pleaded no contest and was found guilty of a lesser-included version of count one (Health and Safety Code section 11357(a) – the possession of concentrated cannabis), and was convicted of a misdemeanor. The imposition of sentence was suspended in favor of a conditional sentence (probation) of three (3) years, on terms and conditions including time served, fines and fees, search conditions, and an order that he stay away from his co-defendants and the block where the January 21, 2007 arrest took place. If he were able to successfully complete two (2) years of probation, Respondent was eligible to petition for an early termination of probation on or about February 26, 2009.

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SECOND CAUSE FOR DISCIPLINE

(Furnishing of Controlled Substance)

27. Respondent is subject to discipline under section 4301(j) and/or (o) and/or section 4059 of the Code, and/or Health and Safety Code section 11170 in that Respondent, as described in paragraphs 23 to 25 above, furnished to himself or another without a valid prescription, and/or conspired to furnish, and/or assisted or abetted furnishing of, a controlled substance.

THIRD CAUSE FOR DISCIPLINE

(Possession of Controlled Substance)

28. Respondent is subject to discipline under section 4301(j) and/or (o) and/or section 4060 of the Code, and/or Health and Safety Code section(s) 11350 and/or 11357, in that Respondent, as described in paragraphs 23 to 25 above, possessed, conspired to possess, and/or assisted in or abetted possession of, a controlled substance, without a prescription.

FOURTH CAUSE FOR DISCIPLINE

(Possession or Purchase of Controlled Substance for Sale)

29. Respondent is subject to discipline under section 4301(j) and/or (o) of the Code, and/or Health and Safety Code section(s) 11351, 11351.5 and/or 11359, in that Respondent, as described in paragraphs 23 to 25 above, possessed or purchased a controlled substance for sale, or conspired and/or assisted in or abetted such possession or purchase for sale.

FIFTH CAUSE FOR DISCIPLINE

(Unprofessional Conduct)

30. Respondent is subject to discipline under section 4301 of the Code in that Respondent, as described in paragraphs 23 to 29 above, engaged in unprofessional conduct.

DISCIPLINE CONSIDERATIONS

31. To determine the proper degree of discipline, if any, to be imposed on Respondent, Complainant alleges that on or about July 18, 2005, in a case titled *People v. Brian Douglas Highsmith*, Case No. HO2831343 in Santa Clara County Superior (Traffic) Court, Respondent was convicted of violating Vehicle Code section 21956 (Pedestrian on roadway), an infraction, and two counts of violating Vehicle Code section 40508, subdivision (a) (Willful failure to appear in court following a written promise to appear), also infractions, as follows:

a. On or about June 15, 2003, Respondent was issued Citation / Notice to Appear J2806754 for violating Vehicle Code section 21956 (Pedestrian on roadway), an infraction.

b. On or about July 16, 2003, August 1, 2003, September 27, 2003, May 16, 2004, and/or June 21, 2004, Respondent failed to appear in court as ordered, and bench warrant(s) were issued charging him with two (2) counts of violating Vehicle Code section 40508, subdivision (a) (Willful failure to appear in court following a written promise to appear), both misdemeanors.

c. On or about July 18, 2005, Respondent appeared and pleaded guilty to the one (1) count of violating Vehicle Code section 21956 (Pedestrian on roadway), an infraction and the two (2) counts of violating Vehicle Code section 40508, subdivision (a) (Willful failure to appear in court following a written promise to appear), that were both reduced to infractions. Sentencing on counts two and three was suspended, and Respondent was required to pay total fines and fees on count one of $62.50 by no later than October 17, 2005. When payment was not made by on or about November 26, 2005, a further bench warrant was issued for Respondent's arrest pursuant to Vehicle Code section 40508, subdivision (b) (Willful failure to pay bail or fine), a misdemeanor, requiring a bail/payment of $337.50 from Respondent.

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 or suspending Pharmacy Technician License Number TCH 64644, issued to Brian D. Highsmith (Respondent);

2. Ordering Respondent to pay the Board the reasonable costs of the investigation and enforcement of this case, pursuant to Business and Professions Code section 125.3;

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

DATED: 10/27/09

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

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