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8	BEFORE THE BOARD OF PHARMACY	
9	DEPARTMENT OF CONSUMER AFFAIRS STATE OF CALIFORNIA	
10	STATE OF CA	ALIFORNIA 1
11	In the Matter of the Accusation Against:	Case No. 3439
12	MARY K. SMITH	·
13	921 Drake Avenue Marin City, CA 94965	ACCUSATION
14	Pharmacy Technician License No. TCH 60321	
15	Respondent.	
16	Complainant alleges:	
17	<u>PART</u>	TIES .
18	Virginia Herold (Complainant) brings	this Accusation solely in her official capacity
19	as the Executive Officer of the Board of Pharmacy, Department of Consumer Affairs.	
20	2. On or about January 11, 2005, the Board of Pharmacy issued Pharmacy Technician	
21	License Number TCH 60321 to Mary K. Smith (Respondent). The Pharmacy Technician License	
22	was in full force and effect at all times relevant to the charges brought herein and will expire on	
23	September 30, 2010, unless renewed.	
24	JURISDI	CTION
25	3. This Accusation is brought before the	Board of Pharmacy (Board), Department of
26	Consumer Affairs, under the authority of the following laws. All section references are to the	
27	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:
- (f) The commission of any act involving moral turpitude, dishonesty, fraud, deceit, or corruption, whether the act is committed in the course of relations as a licensee or otherwise, and whether the act is a felony or misdemeanor or not.
- (h) The administering to oneself, of any controlled substance, or the use of 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, 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.
- (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.

- (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.
 - 8. 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."

- 9. 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.
- 10. 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.
- 11. Health and Safety Code section 11170 provides that no person shall prescribe, administer, or furnish a controlled substance for himself or herself.
- 12. Health and Safety Code section 11173, subdivision (a), provides that no person shall obtain or attempt to obtain controlled substances, or procure or attempt to procure the administration of or prescription for controlled substances, (1) by fraud, deceit, misrepresentation, or subterfuge; or (2) by the concealment of a material fact.
- 13. Health and Safety Code section 11350, in pertinent part, makes it unlawful to possess any controlled substance listed in Schedule II (Health and Safety Code section 11055), subdivision (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 sale any controlled substance classified in Schedule III, IV, or V (Health and Safety Code sections 11056, 11057, or 11058) which is a narcotic drug.

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COST RECOVERY

15. 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

16. 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."

17. 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."
- 18. Norco, Vicodin, Vicodin ES, Lortab, and Lorcet are among the brand names for compounds of varying dosages of acetaminophen (aka APAP) and hydrocodone, a Schedule III controlled substance as designated by Health and Safety Code section 11056(e)(4) and dangerous drug as designated by Business and Professions Code section 4022. The varying compounds are also known generically as Hydrocodone with APAP. These are all narcotic drugs.
- 19. **Phenergan with Codeine** is a brand name for a compound consisting of the antihistamine **promethazine**, a dangerous drug as designated by Business and Professions Code section 4022, and **codeine**, a Schedule V controlled substance as designated by Health and Safety Code section 11058 and a dangerous drug as designated by Business and Professions Code section 4022. This drug is also known generically as **Promethazine with Codeine**. It is an antihistamine/antitussive, narcotic analgesic, and sleep aid.

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20. **Viagra** is a brand name for **sildenafil**, a dangerous drug as designated by Business and Professions Code section 4022, intended as a treatment for erectile dysfunction.

FACTUAL BACKGROUND

- 21. From an unknown start date until on or about February 20, 2009, Respondent was employed as a pharmacy technician at a Kaiser Foundation Health Plan Pharmacy in San Rafael, CA (# 396; PHY 44385), where she had access to controlled substances and dangerous drugs.
- 22. Between in or about March 2008 and in or about February 2009, Respondent used her access to divert/steal controlled substances and dangerous drugs, including Norco, Vicodin ES, or other Hydrocodone products, Phenergan/Promethazine with Codeine, and/or Viagra.
- The exact number of instances of diversion/theft by Respondent, and the full quantity of controlled substances or dangerous drugs diverted/stolen by Respondent, are not known, but in the course of an internal investigation conducted by Kaiser, Respondent admitted to a course of conduct of diverting/stealing controlled substances and dangerous drugs from the pharmacy that included at least two instances of taking six (6) one pint bottles of Promethazine with Codeine syrup from the pharmacy, and at least one instance (on February 5, 2009) of taking up to eight (8) bottles (of 100 tablets) of Vicodin ES. Respondent further admitted to taking the Promethazine with Codeine from the pharmacy for purposes of self-use and for furnishing to her boyfriend for self-use, in the absence of valid prescriptions. Respondent further admitted to actually using the **Promethazine with Codeine** without a valid prescription. Respondent further admitted to taking the Vicodin ES for purposes of street sale/resale for monetary gain. Lastly, Respondent admitted to engaging another Kaiser pharmacy technician (A.M.)¹ as an accomplice for her diversion/theft, and that on at least one occasion (February 5, 2009) accomplice A.M. assisted her by ordering the stolen drugs into the stock of the pharmacy. A.M. admitted to procuring on Respondent's behalf, and/or assisting Respondent in taking, significant quantities (whole bottles and/or containers) of the controlled substances Norco (or its generic equivalent), Vicodin ES (or its generic equivalent), and Phenergan/Promethazine with Codeine, and the dangerous drug Viagra.

¹ The full name of the accomplice will be revealed during the discovery process.

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24. A subsequent verification audit of the controlled substances stock of the pharmacy by which Respondent was employed (Kaiser Foundation Health Plan Pharmacy in San Rafael, CA [# 396; PHY 44385]), for the period from March 2008 to February 2009 could not account for the controlled substance losses of approximately 35,155 dosage units (tablets) of **Hydrocodone with APAP 10/325** (generic **Norco**), approximately 2,690 dosage units (tablets) of **Vicodin ES**, and 40,591 mls (86 one-pint bottles) of **Promethazine with Codeine** syrup.

FIRST CAUSE FOR DISCIPLINE

(Acts Involving Moral Turpitude, Dishonesty, Fraud, Deceit or Corruption)

25. Respondent is subject to discipline under section 4301(f) of the Code, in that Respondent, as described in paragraphs 21 to 24 above, committed numerous acts involving moral turpitude, dishonesty, fraud, deceit, or corruption.

SECOND CAUSE FOR DISCIPLINE

(Self-Administration of Controlled Substance(s))

26. Respondent is subject to discipline under section 4301(h) of the Code, in that Respondent, as described in paragraphs 21 to 24 above, administered one or more controlled substances to herself, including **Promethazine with Codeine** products.

THIRD CAUSE FOR DISCIPLINE

(Furnishing of Controlled Substance(s))

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 21 to 24 above, furnished to herself or another without a valid prescription, and/or conspired to furnish, and/or assisted or abetted furnishing of, a controlled substance.

FOURTH CAUSE FOR DISCIPLINE

(Possession of Controlled Substance(s))

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 11350, in that Respondent, as described in paragraphs 21 to 24 above, possessed, conspired to possess, and/or assisted in or abetted possession of, a controlled substance, without a prescription.

FIFTH CAUSE FOR DISCIPLINE

(Obtaining Controlled Substance by Fraud, Deceit or Subterfuge)

29. Respondent is subject to discipline under section 4301(j) and/or (o) of the Code, and/or Health and Safety Code section 11173(a), in that Respondent, as described in paragraphs 21 to 24 above, obtained, conspired to obtain, and/or assisted in or abetted the obtaining of a controlled substance, by fraud, deceit, subterfuge, or concealment of material fact.

SIXTH CAUSE FOR DISCIPLINE

(Possession or Purchase of Controlled Substance(s) for Sale)

30. Respondent is subject to discipline under section 4301(j) and/or (o) of the Code, and/or Health and Safety Code section 11351, in that Respondent, as described in paragraphs 21 to 24 above, possessed or purchased for sale, conspired to possess or purchase for sale, and/or assisted in or abetted the possession or purchase for sale, of a controlled substance.

SEVENTH CAUSE FOR DISCIPLINE

(Unprofessional Conduct)

31. Respondent is subject to discipline under section 4301 of the Code in that Respondent, as described in paragraphs 21 to 30 above, engaged in unprofessional conduct.

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: Revoking or suspending Pharmacy Technician License Number TCH 60321, issued 1. to Mary K. Smith (Respondent); 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; Taking such other and further action as is deemed necessary and proper. VIRGINIA Executive Officer Board of Pharmacy Department of Consumer Affairs State of California Complainant SF2009405347 40432124.doc