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

11 In the Matter of the Accusation Against:

Case No. 3747

12 **ARTHUR HOWARD BERGER**  
13 **11220 Cashmere Street**  
**Los Angeles, CA 90049**

**A C C U S A T I O N**

14 **Pharmacist License No. RPH 30997**

15 Respondent.

16  
17 Complainant alleges:

18 **PARTIES**

- 19 1. Virginia Herold (Complainant) brings this Accusation solely in her official capacity  
20 as the Executive Officer of the Board of Pharmacy, Department of Consumer Affairs.  
21 2. On or about July 29, 1977, the Board of Pharmacy (Board) issued Pharmacist License  
22 No. RPH 30997 to Arthur Howard Berger (Respondent). The Pharmacist License was in full  
23 force and effect at all times relevant to the charges brought herein and will expire on April 30,  
24 2012, unless renewed.

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1 **JURISDICTION**

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

5 **STATUTORY PROVISIONS**

6 4. Section 118, subdivision (b), of the Code provides that the suspension, expiration,  
7 surrender or cancellation of a license shall not deprive the Board of jurisdiction to proceed with a  
8 disciplinary action during the period within which the license may be renewed, restored, reissued  
9 or reinstated.

10 5. Section 490 of the Code states:

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

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

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

25 6. Section 4300 permits the Board to take disciplinary action to suspend or revoke a  
26 license issued by the Board.

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1           7.    Section 4301 states:

2           "The board shall take action against any holder of a license who is guilty of unprofessional  
3 conduct or whose license has been procured by fraud or misrepresentation or issued by mistake.

4 Unprofessional conduct shall include, but is not limited to, any of the following:

5           . . . .

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

11          . . . .

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

14          "(k) The conviction of more than one misdemeanor or any felony involving the use,  
15 consumption, or self-administration of any dangerous drug or alcoholic beverage, or any  
16 combination of those substances.

17          "(l) The conviction of a crime substantially related to the qualifications, functions, and  
18 duties of a licensee under this chapter. The record of conviction of a violation of Chapter 13  
19 (commencing with Section 801) of Title 21 of the United States Code regulating controlled  
20 substances or of a violation of the statutes of this state regulating controlled substances or  
21 dangerous drugs shall be conclusive evidence of unprofessional conduct. In all other cases, the  
22 record of conviction shall be conclusive evidence only of the fact that the conviction occurred.  
23 The board may inquire into the circumstances surrounding the commission of the crime, in order  
24 to fix the degree of discipline or, in the case of a conviction not involving controlled substances  
25 or dangerous drugs, to determine if the conviction is of an offense substantially related to the  
26 qualifications, functions, and duties of a licensee under this chapter. A plea or verdict of guilty or  
27 a conviction following a plea of nolo contendere is deemed to be a conviction within the meaning  
28 of this provision. The board may take action when the time for appeal has elapsed, or the

1 judgment of conviction has been affirmed on appeal or when an order granting probation is made  
2 suspending the imposition of sentence, irrespective of a subsequent order under Section 1203.4 of  
3 the Penal Code allowing the person to withdraw his or her plea of guilty and to enter a plea of not  
4 guilty, or setting aside the verdict of guilty, or dismissing the accusation, information, or  
5 indictment.

6 . . . .

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

11 8. Section 11055(d)(1) of the Health and Safety Code states, in pertinent part,  
12 "Unless specifically excepted or unless listed in another schedule, any material, compound,  
13 mixture, or preparation which contains any quantity of the following substances having a  
14 stimulant effect on the central nervous system:

15 (1) Amphetamine, its salts, optical isomers, and salts of its optical isomers"

16 9. Section 11057 (d)(32) of the Health and Safety Code states, in pertinent part,

17 (a) The controlled substances listed in this section are included in Schedule IV:

18 (32) Zolpidem

19 **REGULATORY PROVISIONS**

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

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

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1 **COST RECOVERY**

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

6 12. **CONTROLLED SUBSTANCES/DANGEROUS DRUGS**

7 a. Amphetamine is a Scheduled II controlled substance as defined in Health and Safety  
8 Code section 11055(d)(1) and is categorized as a dangerous drug pursuant to Business and  
9 Professions Code section 4022.

10 b. Ambien is a generic name for zolpidem tartrate, a nonbarbiturate hypnotic, is a  
11 Scheduled IV controlled substance as designated by Health and Safety Code section 11057,  
12 subdivision (d)(32), and is categorized as a dangerous drug pursuant to Business and Professions  
13 Code section 4022.

14 **FIRST CAUSE FOR DISCIPLINE**

15 **(Criminal Conviction)**

16 13. Respondent is subject to disciplinary action under sections 4301, subdivision (k) and  
17 (l), and 490 of the Code, as defined in California Code of Regulations, title 16, section 1770, in  
18 that Respondent was convicted of crimes, which are substantially related to the qualifications,  
19 functions, or duties of a pharmacist, as follows:

20 a. On or about February 25, 2010, after pleading nolo contendere, Respondent was  
21 convicted of one misdemeanor count of violating Vehicle Code section 23152(a) [driving under  
22 the influence of an alcoholic beverage or drug], in the criminal proceeding entitled *The People of*  
23 *the State of California v. Arthur Howard Berger* (Super. Ct. County of Los Angeles, 2010,  
24 No. 8NW03668). Respondent was ordered by the court to enroll and complete a 3-Month First  
25 Offender Alcohol Counseling Program, perform thirteen days of community service and was  
26 sentenced to three years probation with certain terms and conditions, and ordered to pay  
27 restitution. The circumstances surrounding the conviction are that on or about August 9, 2008,  
28 California Highway Patrol officers responded to a traffic collision. After speaking with

1 Respondent, officers noticed signs and symptoms of intoxication. Respondent performed several  
2 field sobriety tests (FSTs) unsuccessfully. Consequently, he was arrested for driving a motor  
3 vehicle while under the influence of an alcoholic beverage and/or controlled substance resulting  
4 in a traffic collision. Respondent submitted a urine sample that tested positive for  
5 Amphetamines.

6 **SECOND CAUSE FOR DISCIPLINE**

7 **(Use of Alcohol Beverages/Controlled Substance to the Extent to be Dangerous to Oneself)**

8 14. Respondent is subject to disciplinary action under section 4301, subdivision (h), of  
9 the Code, on the grounds of unprofessional conduct, in that on or about August 9, 2008,  
10 Respondent used and consumed alcoholic beverages and or controlled substances to the extent or  
11 in a manner as to be dangerous or injurious to himself or to others. Complainant refers to, and by  
12 this reference incorporates, the allegations set forth above in paragraph 13, subparagraph (a),  
13 inclusive, as though set fully.

14 **THIRD CAUSE FOR DISCIPLINE**

15 **(Unprofessional Conduct)**

16 15. Respondent is subject to disciplinary action under section 4301 of the Code, on the  
17 grounds of unprofessional conduct, in that on or about August 9, 2008, when he was arrested for  
18 causing a traffic collision while driving a motor vehicle under the influence of an alcoholic  
19 beverage and or controlled substance. Complainant refers to, and by this reference incorporates,  
20 the allegations set forth in paragraph 13, subparagraph (a), inclusive, as though set forth fully.

21 **DISCIPLINE CONSIDERATIONS**

22 16. To determine the degree of discipline, if any, to be imposed on Respondent Arthur  
23 Howard Berger, Complainant alleges that on or about May 14, 2005, in a prior disciplinary action  
24 entitled, "In the Matter of the Accusation Against R&W Pharmacy Services, Inc., Patti Jo Reed  
25 and Arthur Howard Berger," before the Board of Pharmacy, Case No. 2279, Respondent's  
26 Pharmacist license was suspended for a period of 60 days and placed on probation for a period of  
27 three (3) years with certain terms and conditions.

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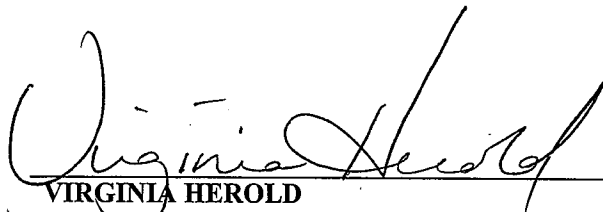
**PRAYER**

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

1. Revoking or suspending Pharmacist License No. RPH 30997, issued to Respondent Arthur Howard Berger;
2. Ordering Arthur Howard Berger to pay the Board the reasonable costs of the investigation and enforcement of this case, pursuant to Business and Professions Code section 125.3; and
3. Taking such other and further action as deemed necessary and proper.

DATED: \_\_\_\_\_

*5/9/11*



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

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