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

10 In the Matter of the Petition to Revoke Probation  
11 Against:

Case No. 3871

12 **BRIAN HIGHSMITH**  
13 **76 Overlook Lane**  
**El Sobrante, CA 94803**

**FIRST AMENDED PETITION TO  
REVOKE PROBATION**

14 **Pharmacy Technician License No. TCH 64644**

15 Respondent.

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17 Complainant alleges:

18 PARTIES

- 19 1. Virginia Herold (Complainant) brings this Petition to Revoke Probation solely in her  
20 official capacity as Executive Officer, Board of Pharmacy, Department of Consumer Affairs.
- 21 2. On or about August 22, 2005, the Board of Pharmacy issued Pharmacy Technician  
22 License No. TCH 64644 to Brian Highsmith (Respondent). The License was in effect at all times  
23 relevant to the charges brought herein and will expire on September 30, 2011, unless renewed.
- 24 3. In a disciplinary action titled "In the Matter of Accusation against Brian Highsmith,"  
25 Case No. 3351, the Board of Pharmacy issued a Decision and Order, effective June 23, 2010, in  
26 which Respondent's Pharmacy Technician License was revoked. However, the revocation was  
27 stayed and Respondent was placed on probation for a period of five (5) years with certain terms  
28 and conditions. A copy of that decision is attached as Exhibit A and is incorporated by reference.



1 SECOND CAUSE TO REVOKE PROBATION

2 (Failure to Timely Submit Compliant Employer Acknowledgment(s))

3 9. At all times after the effective date (June 23, 2010) of the Decision and Order  
4 imposing probation on Respondent's License, Term and Condition 9 of that Order required that  
5 Respondent notify his employer(s) of the decision in Case No. 3351 and that within 30 days he  
6 cause such employer(s) to submit a written acknowledgment of the decision in which his direct  
7 supervisor, pharmacist-in-charge, and owner each report that they have read the decision in Case  
8 No. 3351 and the terms and conditions imposed thereby. Respondent failed to timely submit an  
9 acknowledgment in writing from the owner (or owner representative) of his employer(s). This  
10 failure to timely submit written acknowledgment(s) subjects Respondent's License to revocation.  
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12 THIRD CAUSE TO REVOKE PROBATION

13 (Failure to Abstain from Non-Prescribed Drug or Alcohol Use)

14 10. At all times after the effective date (June 23, 2010) of the Decision and Order  
15 imposing probation on Respondent's License, Term and Condition 10 of that Order required that  
16 Respondent completely abstain from the possession or use of alcohol, controlled substances,  
17 dangerous drugs and their associated paraphernalia except when the drugs are lawfully prescribed  
18 by a licensed practitioner as part of a documented medical treatment. Upon request of the Board  
19 or its designee, Respondent is required to timely provide proof from a licensed practitioner that a  
20 detected drug was legitimately prescribed and is a necessary part of Respondent's treatment. In  
21 addition, Respondent is required to ensure that he is not in the same physical location as anyone  
22 using illicit substances. On or about November 18, 2010, a drug test taken by Respondent had a  
23 positive result for the presence of **oxycodone**, a narcotic controlled substance. Board staff sent  
24 Respondent a letter requiring him to submit documentation of a legitimate prescription for this  
25 drug. Though Respondent received and responded to the letter, he failed to supply documentation  
26 of a prescription. This failure to abstain from use of a controlled substance for which Respondent  
27 did not have a lawful prescription, and/or Respondent's failure to timely supply proof of a valid  
28 prescription, subjects Respondent's License to revocation.

1 FOURTH CAUSE TO REVOKE PROBATION

2 (Failure to Timely Submit to/Cooperate With Random Drug Screening)

3 11. At all times after the effective date (June 23, 2010) of the Decision and Order  
4 imposing probation on Respondent's License, Term and Condition 11 of that Order required that  
5 Respondent participate at his own expense in random drug screening/testing, as directed by the  
6 Board or its designee, and that he fully cooperate with the Board or its designee in doing so.  
7 Respondent failed to timely submit to random drug screening/testing as directed by the Board or  
8 its designee, and/or to cooperate with the Board or its designee in doing so, as follows:

9 a. On or about June 1, 2010, in preparation for the commencement of probation,  
10 Board staff sent Respondent a letter with instructions for his compliance with the testing required  
11 by Term and Condition 11, including directions for enrollment with and testing by FirstLab;

12 b. Respondent failed to immediately enroll with or be tested by FirstLab;

13 c. On or about July 22, 2010, Respondent appeared for an in-person meeting at the  
14 Board offices wherein the terms and conditions of his probation (including Term and Condition  
15 11) were fully explained to him. He was instructed that he needed to complete enrollment with  
16 FirstLab as soon as possible. He signed and dated a declaration stating he understood the terms.

17 d. Respondent did not complete enrollment with FirstLab until on or about August  
18 19, 2010. Following enrollment with FirstLab, the testing protocol requires Respondent to call or  
19 login to the FirstLab management system every day, at which time he is instructed whether he is  
20 required to submit to testing on that day. Respondent failed to call or login to the FirstLab system  
21 at all between August 20, 2010 and September 19, 2010, resulting in four missed test days.

22 e. On or about September 13, 2010, Board staff sent Respondent a letter noting his  
23 failure to call FirstLab or login to the FirstLab system, and therefore his failure to be tested.

24 f. Respondent finally began calling in or logging in on September 20, 2010, but  
25 failed to call in and/or missed scheduled testing on several dates in September and October 2010.

26 g. On or about November 4, 2010, Board staff sent Respondent a letter regarding  
27 several items of non-compliance with the terms and conditions of his probation, including his  
28 repeated failure(s) to call in and/or to miss scheduled testing date(s).

1 h. On or about November 18, 2010, Respondent tested positive for **oxycodone**, a  
2 narcotic controlled substance. Board staff sent Respondent a letter documenting this positive test  
3 and requiring that Respondent submit proof of valid prescription(s) for this substance.

4 i. Respondent failed to submit proof of valid prescription(s) for **oxycodone**. He  
5 asserted that the positive result must have been an error. On or about December 17, 2010, Board  
6 staff instructed Respondent that if he wished to do so, he could (a) pay the fee necessary to have  
7 FirstLab retest the (hair) sample that had produced the positive **oxycodone** result, and/or (b) send  
8 a letter the Board or its designee stating that he has never taken **oxycodone**. To date, Respondent  
9 has not contacted FirstLab to have the sample retested, and has not submitted a letter.

10 j. On or about January 4, 2011, a Notice of Suspension was issued to Respondent,  
11 placing his License in suspended status on the basis of the positive **oxycodone** test result and the  
12 failure by Respondent to document or otherwise address the positive result.

13 k. Respondent has continued to fail to log or call in to FirstLab, and/or to test on  
14 required dates. The last date that he logged or called in to FirstLab was January 23, 2011.

15 l. The positive test for oxycodone without provision of documentation showing a  
16 valid prescription, and the failure(s) to timely submit to random drug testing and/or to cooperate  
17 with the Board or its designee on testing, subject(s) Respondent's License to revocation.

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19 FIFTH CAUSE TO REVOKE PROBATION

20 (Failure to Abide by Board-Ordered Suspension)

21 12. At all times after the effective date (June 23, 2010) of the Decision and Order  
22 imposing probation on Respondent's License, Term and Condition 11 of that Order further stated  
23 that any confirmed positive test for alcohol or for any drug not lawfully prescribed by a licensed  
24 practitioner as part of a documented medical treatment would result in automatic suspension, in  
25 which case Respondent may not resume practicing as a pharmacy technician until notified by the  
26 Board, and may not enter a pharmacy during suspension. As described in paragraph 11 above, on  
27 or about January 4, 2011, a Notice of Suspension was issued to Respondent. Despite knowledge  
28 of his suspension, Respondent continued to work in a pharmacy until at least January 21, 2011.

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SIXTH CAUSE TO REVOKE PROBATION

(Failure to Attend/Timely Submit Proof of Attendance at Recovery Groups)

13. At all times after the effective date (June 23, 2010) of the Decision and Order imposing probation on Respondent's License, Term and Condition 12 of that Order required that within 30 days Respondent begin regular attendance at a recognized and established substance abuse recovery support group in California (e.g., Alcoholics Anonymous, Narcotics Anonymous) which has been approved by the Board or its designee, that he attend at least one group meeting per week unless otherwise directed by the Board or its designee, and that he submit signed and dated documentation confirming attendance with each quarterly report. The deadline for the first quarterly report and therefore Respondent's first submission of proof of attendance at one or more recovery groups was October 10, 2010. Respondent has failed to submit any proof of attendance at recovery groups, including those due in October 2010 and/or in January 2011. This failure to attend and/or timely submit proof subjects Respondent's License to revocation.

SEVENTH CAUSE TO REVOKE PROBATION

(Failure to Timely Pay Cost Recovery)

14. At all times after the effective date (June 23, 2010) of the Decision and Order imposing probation on Respondent's License, Term and Condition 13 of that Order required that Respondent pay to the Board its costs of investigation and prosecution totaling \$4,800.00, during the first 4 years of probation, in equal quarterly installments of \$300.00. The first payment was due October 10, 2010. Respondent has not submitted any cost recovery payments. This failure to make timely payment toward cost recovery subjects Respondent's License to revocation.

EIGHTH CAUSE TO REVOKE PROBATION

(Failure to Cooperate with Board Staff)

15. At all times after the effective date (June 23, 2010) of the Decision and Order imposing probation on Respondent's License, Term and Condition 5 of that Order required that Respondent cooperate with the Board's inspection program and with the Board's monitoring and

1 investigation of Respondent's compliance with terms and conditions of his probation. As detailed  
2 in paragraphs 8-14 above, Respondent failed to timely cooperate on one or more occasions. His  
3 failure(s) to timely cooperate as required subject Respondent's License to revocation.

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5 OTHER MATTERS – EXTENSION OF PROBATION

6 16. At all times after the effective date (June 23, 2010) of the Decision and Order  
7 imposing probation on Respondent's License, Term and Condition 17 of that Order required:

8 **17. Violation of Probation.**

9 If respondent has not complied with any term or condition of probation, the board  
10 shall have continuing jurisdiction over respondent, and probation shall automatically be  
11 extended, until all terms and conditions have been satisfied or the board has taken other  
12 action as deemed appropriate to treat the failure to comply as a violation of probation; to  
13 terminate probation, and to impose the penalty that was stayed.

14 If respondent violates probation in any respect, the board, after giving respondent  
15 notice and an opportunity to be heard, may revoke probation and carry out the disciplinary  
16 order that was stayed. Notice and opportunity to be heard are not required for those  
17 provisions stating that a violation thereof may lead to automatic termination of the stay  
18 and/or revocation of the license. If a petition to revoke probation or an accusation is filed  
19 against respondent during probation, the board shall have continuing jurisdiction, and the  
20 period of probation shall be automatically extended until the petition to revoke probation or  
21 accusation is heard and decided.

22  
23 17. Pursuant to the operation of Term and Condition 17 of the probation order applicable  
24 to Respondent's License, probation is automatically extended by the filing hereof, and/or by  
25 Respondent's failure to comply with the terms and conditions of probation, until such time as this  
26 Petition to Revoke Probation is heard and decided, or until the Board has taken other action as  
27 deemed appropriate to treat the failure to comply as a violation of probation.

28 PRAYER

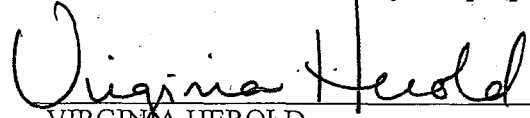
WHEREFORE, Complainant requests that a hearing be held on the matters herein alleged,  
and that following the hearing, the Board of Pharmacy issue a decision:

1. Revoking the probation that was granted by the Board of Pharmacy in Case No. 3351  
and imposing the disciplinary order that was stayed, thereby revoking Pharmacy Technician  
License No. TCH 64644, issued to Brian Highsmith (Respondent);

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

DATED: 2/23/11



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

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