- 1			
. 1	Kamala D. Harris Attorney General of California		
2	Frank H. Pacoe Supervising Deputy Attorney General		
3	Joshua A. Room		
4	Deputy Attorney General State Bar No. 214663		
5	455 Golden Gate Avenue, Suite 11000 San Francisco, CA 94102-7004		
6	Telephone: (415) 703-1299 Facsimile: (415) 703-5480		
7	Attorneys for Complainant		
8	BEFORE THE BOARD OF PHARMACY DEPARTMENT OF CONSUMER A FEW ANDS		
9	DEPARTMENT OF CONSUMER AFFAIRS STATE OF CALIFORNIA		
10			
11	In the Matter of the Accusation Against: Case No. 3884		
12	CLAYTON EUGENE WHEELER 326 Lorraine Court		
13	Sebastopol, CA 95472 A C C U S A T I O N		
14	Pharmacist License No. RPH 28905		
15	Respondent.		
16	Complainant alleges:		
17			
18	<u>PARTIES</u>		
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 17, 1990, the Board of Pharmacy issued Pharmacist License No.		
22	RPH 28905 to Clayton Eugene Wheeler (Respondent). The License was in full force and effect a		
23	all times relevant to the charges herein and will expire on March 31, 2012, unless renewed.		
24	<u>JURISDICTION</u>		
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.		
28	///		

2.6

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

- 6. 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.
- (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.
- 7. 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.

- 8. 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.
- 9. 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.
- 10. 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.
  - 11. 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."

12. 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

- 13. 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."
  - 14. 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.

26.

"(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."

- 15. Cheratussin AC and Robitussin AC are among the brand names for a compound of the expectorant guaifenesin and codeine, a Schedule V controlled substance as designated by Health and Safety Code section 11058(c)(1) and a dangerous drug as designated by Business and Professions Code section 4022. These are also known generically as Guaifenesin with Codeine. These combinations are an expectorant cough syrup, and a narcotic analgesic.
- 16. **Percocet** and **Endocet** are among the brand names for a compound of acetaminophen (APAP) and **oxycodone**, a Schedule II controlled substance as designated by Health and Safety Code section 11055(b)(1)(N) and a dangerous drug as designated by Business and Professions Code section 4022. These are also known as **Oxycodone with APAP**. These are narcotic drugs.

## FACTUAL BACKGROUND

- 17. From an unknown start date until on or about March 30, 2010, Respondent worked as a pharmacist for a Kaiser Pharmacy (PHY 46492) located in Santa Rosa, CA. For at least part of that time, and until on or about March 30, 2010, Respondent served as pharmacist in charge. As such, Respondent had access to the stock of controlled substances and dangerous drugs.
- 18. During the tenure of his employment, Respondent used his access to divert/steal controlled substances and dangerous drugs, including **Guaifenesin with Codeine**.
- 19. 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 investigations by Kaiser and by the Board, the following were reported:
- a. An audit/investigation of controlled substance/dangerous drug inventory and stock on hand by Kaiser auditors/investigators determined that between in or around May 2009 and March 2010 the Kaiser Pharmacy by which Respondent was employed showed a shortage of **Guaifenesin with Codeine** cough syrup product(s) of approximately 30,863 mls.
- b. Covert video footage showed Respondent engaged in suspicious activity with regard to the supplies of **Guaifenesin with Codeine** in the pharmacy, including after hours.

	c.	On unknown dates in or around February or March 2010, an empty bottle of	
Guaifenesin with Codeine from pharmacy stock was found in a waste basket in the pharmacy			
and an unlabeled bottle from pharmacy stock containing 97 tablets of Oxycodone with APAP			
was found	in an ı	unlocked desk drawer in a desk used by Respondent.	

- d. Respondent told Kaiser auditor/investigators and Board Inspector(s) that he was not involved in drug diversion/theft or self-use, that the video footage of his activities with regard to **Guaifenesin with Codeine** was because of his own after-hours investigation of possible theft or diversion by other employee(s), and that he put the **Oxycodone with APAP** in his desk drawer after he found it elsewhere in the pharmacy premises and/or it was returned by a customer.
- e. On or about April 12, 2010, Kaiser filed a Report of Theft or Loss of Controlled Substances (DEA Form 106) with the Drug Enforcement Administration, in which Kaiser reported losses due to employee pilferage of 129 bottles (236 mls per bottle, total of 30,844 mls) of Cheratussin AC (Guaifenesin with Codeine) and 97 tablets of Oxycodone with APAP.
- g. Respondent subsequently admitted to Board Inspector(s) that he had a problem with **Robitussin AC** (**Guaifenesin with Codeine**), and that he had diverted same from Kaiser drug stock (for self-use). Respondent reported seeking treatment/counseling for his problem.

#### FIRST CAUSE FOR DISCIPLINE

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

20. Respondent is subject to discipline under section 4301(f) of the Code in that Respondent, as described in paragraphs 17 to 19 above, committed numerous acts involving moral turpitude, dishonesty, fraud, deceit, or corruption.

#### SECOND CAUSE FOR DISCIPLINE

(Self-Administration of Controlled Substance and/or Alcohol)

21. Respondent is subject to discipline under section 4301(h) of the Code, and/or 4301(j) and/or (o) of the Code and Health and Safety Code section 11170, in that Respondent, as described in paragraphs 17 to 19 above, administered a controlled substance to himself.

## **DISCIPLINE CONSIDERATIONS**

26. To determine the appropriate level of discipline, if any, to be imposed on Respondent, Complainant further alleges that on or about February 2, 2002, in a prior disciplinary action titled In the Matter of the Accusation against Jerry E. Dannenberg, et al., Case No. 2243 before the Board of Pharmacy, Respondent's License was subjected to prior discipline. By a Decision and Order of the Board adopting a Stipulated Settlement, effective February 2, 2002, Respondent was issued a letter of public reprimand on the basis of allegations that Respondent gave up his right to contest, including that in his role as pharmacist in charge (PIC) of a Kaiser pharmacy, Respondent failed to keep and maintain a complete and accurate inventory of controlled substances in stock in the pharmacy (and so failed to detect a pattern of diversion and self-use by another pharmacist), and also failed to timely notify the appropriate authorities upon discovery of the diversion. That decision is now final and is incorporated by reference as if fully set forth herein.

#### **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 Pharmacist License Number RPH, issued to Clayton Eugene Wheeler (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: 4/5/11

VIRGINIA HEROLI Executive Officer Board of Pharmacy

Department of Consumer Affairs

State of California

Complainant

SF2010202897 20418367.doc