| 1<br>2<br>3<br>4<br>5 | KAMALA D. HARRIS<br>Attorney General of California<br>FRANK H. PACOE<br>Supervising Deputy Attorney General<br>JOSHUA A. ROOM<br>Deputy Attorney General<br>State Bar No. 214663<br>455 Golden Gate Avenue, Suite 11000<br>San Francisco, CA 94102-7004<br>Telephone: (415) 703-1299 |   |  |
|-----------------------|--|---|--|
| 6                     | Facsimile: (415) 703-5480<br>Attorneys for Complainant   |   |  |
| 7<br>8<br>9           | BEFORE THE<br>BOARD OF PHARMACY<br>DEPARTMENT OF CONSUMER AFFAIRS  |   |  |
| 10                    |  |   |  |
| 11                    | In the Matter of the Accusation Against:   | Case No. 4116                                     |  |
| 12                    | DENYS JOSEPH MICHAUD<br>3811 Briarwood Street  |   |  |
| 13                    | Napa, CA 94558   | ACCUSATION  |  |
| 14                    | Pharmacist License No. RPH 26275   |   |  |
| 15                    | Respondent.  |   |  |
| 16                    | Complainant alleges:   | · · · · · · · · · · · · · · · · · · ·             |  |
| 17                    | PARTIES  |   |  |
| 18                    | 1. Virginia Herold (Complainant) bring   | s this Accusation solely in her official capacity |  |
| 19                    | as the Executive Officer of the Board of Pharmac   | cy, Department of Consumer Affairs.               |  |
| 20                    | 2. On or about August 5, 1969, the Boa   | rd of Pharmacy issued Pharmacist License          |  |
| 21                    | Number RPH 26275 to Denys Joseph Michaud (   | Respondent). The Pharmacist License was in full   |  |
| 22                    | force and effect at all times relevant to the charge   | es brought herein and will expire on August 31,   |  |
| 23                    | 2012, unless renewed.  |   |  |
| 24                    |  |   |  |
| 25                    | JURISE   | DICTION   |  |
| 26                    | 3. This Accusation is brought before th  | e Board of Pharmacy (Board), Department of        |  |
| 27                    | Consumer Affairs, under the authority of the foll  | owing laws. All section references are to the     |  |
| 28                    | Business and Professions Code (Code) unless oth  | nerwise indicated.                                |  |
|                       | · · · · · · · · · · · · · · · · · · ·  | 1 .   |  |
|                       |  | Accusation  |  |

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, 6 surrender, or cancellation of a license shall not deprive the Board of jurisdiction to proceed with a 7 disciplinary action during the period within which the license may be renewed, restored, reissued 8 or reinstated. Section 4402(a) of the Code provides that any pharmacist license that is not 9 renewed within three years following its expiration may not be renewed, restored, or reinstated 10 and shall be canceled by operation of law at the end of the three-year period. Section 4402(e) of 11 the Code provides that any other license issued by the Board may be canceled by the Board if not 12 13 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. 14

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## 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.

(1) The conviction of a crime substantially related to the qualifications, functions, and dutiesof 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.

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.

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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."

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

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

21 12. Section 4327 of the Code makes it unlawful for any person, while on duty, to sell,
22 dispense or compound any drug while under the influence of a dangerous drug or alcohol.

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

14. 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.

| 1   | 15. Health and Safety Code section 11350, in pertinent part, makes it unlawful to possess            |  |
|-----|--|--|
| 2   | any controlled substance listed in Schedule II (Health and Safety Code section 11055),               |  |
| 3   | subdivision (b) or (c), or any narcotic drug in Schedules III-V, absent a valid prescription.        |  |
| 4   | 16. Health and Safety Code section 11550, in pertinent part, makes it unlawful for any               |  |
| 5   | person to use or be under the influence of any controlled substance in Schedule II (Health and       |  |
| 6   | Safety Code section 11055), subdivision (c), or any narcotic drug in Schedules III-V, except when    |  |
| 7   | administered by or under the direction of an authorized licensee.                                    |  |
| : 8 | COST RECOVERY  |  |
| 9   | 17. Section 125.3 of the Code provides, in pertinent part, that the Board may request the            |  |
| 10  | administrative law judge to direct a licentiate found to have committed a violation of the licensing |  |
| 11  | act to pay a sum not to exceed its reasonable costs of investigation and enforcement.                |  |
| 12  | CONTROLLED SUBSTANCES / DANGEROUS DRUGS  |  |
| 13  | 18. Section 4021 of the Code states:   |  |
| 14  | "Controlled substance' means any substance listed in Chapter 2 (commencing with Section              |  |
| 15  | 11053) of Division 10 of the Health and Safety Code."  |  |
| 16  | 19. Section 4022 of the Code states, in pertinent part:  |  |
| 17  | "Dangerous drug' or 'dangerous device' means any drug or device unsafe for self use,                 |  |
| 18  | except veterinary drugs that are labeled as such, and includes the following:                        |  |
| 19  | "(a) Any drug that bears the legend: 'Caution: federal law prohibits dispensing without              |  |
| 20  | prescription,' 'Rx only,' or words of similar import.  |  |
| 21  | ••••   |  |
| 22  | "(c) Any other drug or device that by federal or state law can be lawfully dispensed only on         |  |
| 23  | prescription or furnished pursuant to Section 4006."   |  |
| 24  | 20. Norco, Vicodin, Vicodin ES, Lortab, and Lorcet are among the brand names for                     |  |
| 25  | compounds of varying dosages of acetaminophen (aka APAP) and hydrocodone, a Schedule III             |  |
| 26  | controlled substance as designated by Health and Safety Code section 11056(e)(4) and dangerous       |  |
| 27  | drug as designated by Business and Professions Code section 4022. The varying compounds are          |  |
| 28  | also known generically as Hydrocodone with APAP. These are all narcotic drugs.                       |  |
|     | 4  |  |

Accusation

## FACTUAL BACKGROUND

21. From an unknown start date until on or about November 3, 2010, Respondent was employed as a staff pharmacist at a Raley's Pharmacy in Napa, CA (# 319; PHY 41724), where by virtue of his licensure he had access to controlled substances and dangerous drugs.

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22. In the period prior to and/or including November 2010, Respondent used this access to divert/steal controlled substances and dangerous drugs for his own use, including Norco and/or generic Hydrocodone with APAP 10/325 (the Norco generic equivalent) products.

8 23. The exact number of instances of diversion/theft by Respondent, and the full quantity
9 of controlled substances or dangerous drugs diverted/stolen by Respondent, are not known, but
10 investigations by Raley's, police, and Board Inspector(s) revealed/reported the following.

a. In or about May 2010, discrepancies discovered during inventories and audits
of the pharmacy's controlled substance inventory, particularly its Hydrocodone with APAP
10/325 (generic Norco) supplies, led to suspicions that Respondent might be the cause because
the counts were off on a number of occasions after he worked a shift;

b. An audit of the controlled substance inventory for the pharmacy showed that in
the period between May 5, 2010 and October 16, 2010, the pharmacy was short six hundred and
sixty-seven (667) tablets of Norco and/or Hydrocodone with APAP 10/325 (generic Norco);

c. On or about October 27, 2010, diversion was confirmed when a hard count of
 the Hydrocodone with APAP 10/325 inventory was performed on succeeding days, and there
 were tablets missing without intervening prescriptions being filled to explain the missing tablets;

d. On or about October 20, October 22, October 25, and November 3, 2010, video
 surveillance of Respondent showed him behaving suspiciously and appearing to place tablets of
 Norco and/or Hydrocodone with APAP 10/325 in his pocket(s) and/or in his mouth;

e. On or about November 3, 2010, Respondent admitted to taking generic Norco
pills (Hydrocodone with APAP 10/325) from the pharmacy, and to consuming them throughout
the day while he was on duty in the pharmacy (at a rate of 2-8 pills a day). He admitted to having
taken them from the pharmacy for "at least" the last 30-45 days. Respondent agreed to reimburse
Raley's the value of six hundred and ninety-five (695) tablets of generic Norco (\$854.85).

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| 1    | FIRST CAUSE FOR DISCIPLINE   |  |
| 2    | (Act(s) Involving Moral Turpitude, Dishonesty, Fraud, Deceit or Corruption)                        |  |
| 3    | 24. Respondent is subject to discipline under section 4301(f) of the Code in that                  |  |
| 4    | Respondent, as described in paragraphs 21 to 23 above, committed one or more acts involving        |  |
| 5    | moral turpitude, dishonesty, fraud, deceit, or corruption.   |  |
| 6    | SECOND CAUSE FOR DISCIPLINE  |  |
| 7    | (Self-Administration of Controlled Substance(s))   |  |
| 8    | 25. Respondent is subject to discipline under section 4301(h) of the Code and/or Health            |  |
| 9    | and Safety Code section 11170, in that Respondent, as described in paragraphs 21 to 23 above,      |  |
| 10   | administered one or more controlled substances to himself.   |  |
| 11   | THIRD CAUSE FOR DISCIPLINE   |  |
| 12   | (Furnishing of Controlled Substance(s))  |  |
| 13   | 26. Respondent is subject to discipline under section 4301(j) and/or (o) and/or section            |  |
| 14 · | 4059 of the Code, and/or Health and Safety Code section 11170, in that Respondent, as described    |  |
| 15   | in paragraphs 21 to 23 above, furnished to himself or another without a valid prescription, and/or |  |
| 16   | conspired to furnish, and/or assisted or abetted furnishing of, a controlled substance.            |  |
| 17   | FOURTH CAUSE FOR DISCIPLINE  |  |
| 18   | (Possession of Controlled Substance(s))  |  |
| 19   | 27. Respondent is subject to discipline under section 4301(j) and/or (o) and/or section            |  |
| 20   | 4060 of the Code, and/or Health and Safety Code section 11350, in that Respondent, as described    |  |
| 21   | in paragraphs 21 to 23 above, possessed, conspired to possess, and/or assisted in or abetted       |  |
| 22   | possession of, a controlled substance, without a prescription.                                     |  |
| 23   | FIFTH CAUSE FOR DISCIPLINE   |  |
| 24   | (Working While Under the Influence)  |  |
| 25   | 28. Respondent is subject to discipline under section 4301(j) and/or (o) of the Code,              |  |
| 26   | and/or section 4327 of the Code, in that Respondent, as described in paragraphs 21 to 23 above,    |  |
| 27   | was under the influence of controlled substances while selling or dispensing drugs.                |  |
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|      | 6  |  |
| 1    | Accusation   |  |

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|--------|---|--|
| 1      | SIXTH CAUSE FOR DISCIPLINE  |  |
| 2      | (Obtaining Controlled Substance by Fraud, Deceit or Subterfuge)   |  |
| 3      | 29. Respondent is subject to discipline under section 4301(j) and/or (o) of the Code,                     |  |
| 4      | and/or Health and Safety Code section 11173(a), in that Respondent, as described in paragraphs            |  |
| 5      | 21 to 23 above, obtained, conspired to obtain, and/or assisted in or abetted the obtaining of a           |  |
| 6      | controlled substance, by fraud, deceit, subterfuge, or concealment of material fact.                      |  |
| 7      | SEVENTH CAUSE FOR DISCIPLINE  |  |
| 8      | (Unlawful Use of Narcotic Controlled Substances)  |  |
| 9      | 30. Respondent is subject to discipline under section 4301(j) and/or (o) of the Code,                     |  |
| 10     | and/or Health and Safety Code section 11550, in that, as described in paragraphs 21 to 23 above,          |  |
| 11     | Respondent used or was under the influence of, conspired to use/be under the influence of, and/or         |  |
| 12     | assisted in or abetted use/being under the influence of, certain identified controlled substances,        |  |
| 13     | not administered by or under the direction of an authorized licensee.                                     |  |
| 14     | EIGHTH CAUSE FOR DISCIPLINE   |  |
| 15     | (Conviction of Substantially Related Crime(s))  |  |
| 16     | 31. Respondent is subject to discipline under section 4301(l) and/or section 490 of the                   |  |
| 17     | Code, by reference to California Code of Regulations, title 16, section 1770, for the conviction of       |  |
| 18     | substantially related crime(s), in that on or about April 7, 2011, in the criminal case <i>People v</i> . |  |
| 19     | Denys Joseph Michaud, Case No. CR154374 in Napa County Superior Court, Respondent was                     |  |
| 20     | convicted on the basis of the conduct described in paragraphs 21 to 23 of violating Penal Code            |  |
| 21     | section(s) 484/488 (Petty Theft), a misdemeanor. The conviction was entered as follows:                   |  |
| 22     | a. On or about November 5, 2010, based on the conduct described in paragraphs                             |  |
| 23     | 21 to 23 (and other conduct), Respondent was charged by criminal Complaint in Case No.                    |  |
| 24     | CR154374 with violating (1) Penal Code section 487(a) (Grand Theft of Personal Property), a               |  |
| 25     | felony; (2) Penal Code section 459 (Second Degree Commercial Burglary), a felony; (3) Penal               |  |
| 26     | Code section 459 (Second Degree Commercial Burglary), a felony; (4) Penal Code section 459                |  |
| 27     | (Second Degree Commercial Burglary), a felony; (5) Penal Code section 459 (Second Degree                  |  |
| 28     | Commercial Burglary), a felony; and (6) Penal Code section 242 (Battery), a misdemeanor.                  |  |
|        | 7   |  |

| 1  | b. On or about April 7, 2011, upon motion of the District Attorney, a new count                   |  |
|----|---|--|
| 2  | was added to the criminal Complaint in Case No. CR 154374 by amendment, for violation of (7)      |  |
| 3  | Penal Code section(s) 484/488 (Petty Theft), a misdemeanor. Respondent entered a plea of nolo     |  |
| 4  | <i>contendere</i> to this new seventh count, and the existing six prior counts were dismissed.    |  |
| 5  | c. On or about May 5, 2011, Respondent was found guilty of violating Penal Code                   |  |
| 6  | section(s) 484/488 (Petty Theft), a misdemeanor, in Case No. CR 154374. Imposition of sentence    |  |
| 7  | was suspended and Respondent was placed on criminal probation for three (3) years on terms and    |  |
| 8  | conditions including four (4) days in jail (4 days CTS), payment of restitution, completion of an |  |
| 9  | outpatient treatment program if required by probation, a non-harassment order for the victim of   |  |
| 10 | the alleged battery, search and drug testing conditions, and fines and fees.                      |  |
| 11 | NINTH CAUSE FOR DISCIPLINE  |  |
| 12 | (Unprofessional Conduct)  |  |
| 13 | 32. Respondent is subject to discipline under section 4301 of the Code in that                    |  |
| 14 | Respondent, as described in paragraphs 21 to 31 above, engaged in unprofessional conduct.         |  |
| 15 |   |  |
| 16 | PRAYER  |  |
| 17 | WHEREFORE, Complainant requests that a hearing be held on the matters herein alleged,             |  |
| 18 | and that following the hearing, the Board of Pharmacy issue a decision:                           |  |
| 19 | 1. Revoking or suspending Pharmacist License Number RPH 26275, issued to Denys                    |  |
| 20 | Joseph Michaud (Respondent);  |  |
| 21 | 2. Ordering Respondent to pay the Board the reasonable costs of the investigation and             |  |
| 22 | enforcement of this case, pursuant to Business and Professions Code section 125.3;                |  |
| 23 | 3. Taking such other and further action as is deemed necessary and proper.                        |  |
| 24 | DATED: 12/1/1 Jugins thered   |  |
| 25 | VIRGINIAHERÔLD<br>Executive Officer   |  |
| 26 | Board of Pharmacy<br>Department of Consumer Affairs   |  |
| 27 | State of California<br>Complainant  |  |
| 28 | SF2011202830; 20534172.doc  |  |
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|    | Accusation  |  |