

1 XAVIER BECERRA
 Attorney General of California
 JAMES M. LEDAKIS
 2 Supervising Deputy Attorney General
 DIANE DE KERVOR
 3 Deputy Attorney General
 State Bar No. 174721
 4 600 West Broadway, Suite 1800
 San Diego, CA 92101
 5 P.O. Box 85266
 San Diego, CA 92186-5266
 6 Telephone: (619) 738-9415
 Facsimile: (619) 645-2061
 7 Attorneys for Petitioner

8 **BEFORE THE**
 9 **OFFICE OF ADMINISTRATIVE HEARINGS**
STATE OF CALIFORNIA

10 In the Matter of the Petition for Interim Order
 of Suspension Against:
 11 **MICHAEL WILLIAM WITHERBY**
 12 21102 White Horse Lane
 Huntington Beach, CA 92646
 13 Respondent.

Case No. 5163
 OAH Case No. **2017 03 0931**
STIPULATED INTERIM SUSPENSION
OF LICENSE
 [Bus. and Prof. Code, § 494]
 Date: April 5, 2017
 Time: 9:00 am
 Place: Office of Administrative Hearings
 San Diego, California

17 **IT IS HEREBY STIPULATED** by and between the parties, Complainant and Petitioner,
 18 Virginia Herold, Executive Officer of the Board of Pharmacy (Board), Department of Consumer
 19 Affairs, represented by Xavier Becerra, Attorney General of the State of California and by Diane
 20 de Kervor, Deputy Attorney General, and Respondent Michael William Witherby that:

- 21 1. On March 20, 2017, Petitioner filed a noticed Petition for an Interim Suspension
- 22 Order against Respondent pursuant to Business and Professions Code section 494;
- 23 2. The hearing on that petition has been set for April 5, 2017 at the San Diego Office of
- 24 Administrative Hearings;
- 25 3. Respondent denies all allegations, but in order to save time and expense, agrees to the
- 26 interim suspension of his Pharmacy Board License No. RPH 38874 which will expire on May 31,
- 27 2018, unless renewed (California License). Respondent's California License shall be suspended
- 28

1 as of the date he signs this stipulation until a final decision is issued by the Board in the
2 Accusation Matter. The interim suspension is not a final action.

3 4. Respondent further waives his right to a hearing on the Petition pursuant to Business
4 and Professions Code section 494(c).

5 5. Respondent and Petitioner further agree to the following timelines pursuant to
6 Business and Professions Code section 494(f):

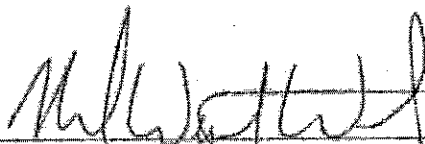
7 a. The board shall file an Accusation within 15 days of the issuance of this order;

8 b. If Respondent files a notice of defense, the parties shall request an
9 administrative hearing within 30 days after he files the notice of defense; and

10 c. A decision shall be rendered on the Accusation no later than 30 days after the
11 submission of the matter.

12 IT IS SO STIPULATED.

13 DATED: 03/24/2017


MICHAEL WILLIAM WITHERBY
Respondent

15 DATED: 3/27/17


DIANE DE KERVOR
Deputy Attorney General
Attorney for Complainant/Petitioner

18 IT IS SO ORDERED pursuant to the above Stipulation that Respondent's Pharmacy
19 Board License No. RPH 38874 is temporarily suspended and Respondent Michael William
20 Witherby is prohibited from practicing ^{pharmacy} until final disposition of Accusation against him.

21 It is further ordered that the hearing currently scheduled for April 5, 2017 is vacated.

22 DATED: March 27, 2017


Administrative Law Judge
Office of Administrative Hearings

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P.O. Box 85266
6 San Diego, CA 92186-5266
Telephone: (619) 738-9415
7 Facsimile: (619) 645-2061
Attorneys for Complainant

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

11 In the Matter of the Accusation Against:

Case No. 5163

12 **MICHAEL WILLIAM WITHERBY**
13 **21102 White Horse Lane**
Huntington Beach, CA 92646

A C C U S A T I O N

14 **Pharmacist License No. RPH 38874**

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 August 23, 1984, the Board of Pharmacy issued Pharmacist License
22 Number RPH 38874 to Michael William Witherby (Respondent). The Pharmacist License was in
23 full force and effect at all times relevant to the charges brought herein and will expire on May 31,
24 2018, unless renewed.

25 3. On March 27, 2017, the Office of Administrative Hearings Issued a Stipulated
26 Interim Suspension of License suspending Respondent's Pharmacy Board License until final
27 disposition of the Accusation against Respondent. Accordingly, Respondent is suspended from
28 practice at this time.

1 veterinarian, or naturopathic doctor pursuant to Section 3640.7, or furnished pursuant
2 to a drug order issued by a certified nurse-midwife pursuant to Section 2746.51, a
3 nurse practitioner pursuant to Section 2836.1, or a physician assistant pursuant to
4 Section 3502.1, or naturopathic doctor pursuant to Section 3640.5, or a pharmacist
5 pursuant to either subparagraph (D) of paragraph (4) of, or clause (iv) of
6 subparagraph (A) of paragraph (5) of, subdivision (a) of Section 4052. This section
7 shall not apply to the possession of any controlled substance by a manufacturer,
8 wholesaler, pharmacy, pharmacist, physician, podiatrist, dentist, optometrist,
9 veterinarian, naturopathic doctor, certified nurse-midwife, nurse practitioner, or
10 physician assistant, when in stock in containers correctly labeled with the name and
11 address of the supplier or producer.

12 Nothing in this section authorizes a certified nurse-midwife, a nurse
13 practitioner, a physician assistant, or a naturopathic doctor, to order his or her own
14 stock of dangerous drugs and devices.

15 11. Section 4301 of the Code states:

16 The board shall take action against any holder of a license who is guilty
17 of unprofessional conduct or whose license has been issued by mistake.
18 Unprofessional conduct shall include, but is not limited to, any of the following:

19

20 (f) The commission of any act involving moral turpitude, dishonesty,
21 fraud, deceit, or corruption, whether the act is committed in the course of relations as
22 a licensee or otherwise, and whether the act is a felony or misdemeanor or not.

23

24 (h) The administering to oneself, of any controlled substance, or the use
25 of any dangerous drug or of alcoholic beverages to the extent or in a manner as to be
26 dangerous or injurious to oneself, to a person holding a license under this chapter, or
27 to any other person or to the public, or to the extent that the use impairs the ability of
28 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.

12. Section 4327 of the code states:

Any person who, while on duty, sells, dispenses or compounds any drug
while under the influence of any dangerous drug or alcoholic beverages shall be
guilty of a misdemeanor.

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

3 14. Health and Safety Code section 11171 provides that “no person shall prescribe,
4 administer, or furnish a controlled substance except under the conditions and in the manner
5 provided by this division.”

6 15. Health and Safety Code section 11173 states:

7 (a) No person shall obtain or attempt to obtain controlled substances, or
8 procure or attempt to procure the administration of or prescription for controlled
9 substances, (1) by fraud, deceit, misrepresentation, or subterfuge; or (2) by the
concealment of a material fact.

10 (b) No person shall make a false statement in any prescription, order, report, or
record, required by this division.

11 (c) No person shall, for the purpose of obtaining controlled substances, falsely
12 assume the title of, or represent himself to be, a manufacturer, wholesaler,
pharmacist, physician, dentist, veterinarian, registered nurse, physician s assistant, or
other authorized person.

13 (d) No person shall affix any false or forged label to a package or receptacle
14 containing controlled substances.

15 16. Health and Safety Code section 11175 states:

16 No person shall obtain or possess a prescription that does not comply with this
17 division, nor shall any person obtain a controlled substance by means of a
18 prescription which does not comply with this division or possess a controlled
substance obtained by such a prescription.

19 17. Health and Safety Code section 11180 states that “no person shall obtain or possess a
20 controlled substance obtained by a prescription that does not comply with this division.”

21 18. United States Code, title 21, section 843, subdivision (a)(3) states:

22 (a) It shall be unlawful for any person knowingly or intentionally – (3) to
23 acquire or obtain possession of a controlled substance by misrepresentation, fraud,
24 forgery, deception, or subterfuge.

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DRUGS

BRAND NAME	GENERIC NAME	DANGEROUS DRUG PER B & PC 4022	CONTROLLED SUBSTANCE PER H & SC	INDICATIONS FOR USE
Demerol	Meperidine	Yes	11055	Severe pain
Versed	Midazolam	Yes	11057(d)(21)	Anesthesia, pain
MS Contin, Duramorph, etc.	Morphine	Yes	11055(b)(1)(L)	Severe pain
Duragesic, Sublimaze	Fentanyl	Yes	11055(c)(8)	Severe pain
Vimpat	Lacosamide	Yes	N/A	Seizures

FACTS

19. In October of 2016, Respondent was employed as a Pharmacist at Orange County Global Medical Center (OCGMC) located at 1001 N. Tustin Avenue, Santa Ana, CA 92705.

20. On October 2, 2016, LW, the Director of Pharmacy at OCGMC at the time was notified that Respondent's behavior on duty aroused suspicion of impairment. Respondent had checked out meperidine and fentanyl vials from the pharmacy and then was missing from his post for much of the day. One of the security cameras at the facility showed Respondent entering a single coed restroom at 8:30am with a bin in his hand and exited at 9:08am.

21. Later that afternoon, the Manager of Security, House Supervisor, and LW interviewed Respondent and confirmed that he was red in face, sweaty and dull and appeared to be impaired. Respondent admitted to them that he "had a problem" and that he "was messed up." Respondent admitted that he was taking Norco. Respondent also admitted that he took Meperidine from the pharmacy at OCGMC without a prescription.

22. Respondent refused a drug test and he was released from his duties for the day and the administration offered to pay for a cab to drive him home.

23. On October 4, 2016, Respondent was terminated from his position at the facility.

24. On October 13, 2016, LW reported the issue to the Pharmacy Board and the facility also reported this matter to the Drug Enforcement Administration.

1 25. On October 31, 2016, a Pharmacy Board Inspector commenced an investigation of
2 the complaint. As part of her investigation, the Inspector interviewed Respondent. Respondent
3 reported to the Investigator that he had a neck injury in 1995 and then a re-injury in 2012 and had
4 been taking pain medication to address the pain when he became addicted to them. Respondent
5 reported that he had underwent an outpatient rehabilitation program at Hoag Hospital, had a
6 successful surgery, and the pain resolved. Respondent reported that he returned to work at Hoag
7 Hospital in August of 2012.

8 26. Respondent reported, however, that while he was working at Hoag Hospital, the
9 cravings returned and he started diverting injectable Fentanyl from the pharmacy. He admitted to
10 injecting 50-100 mg to himself anywhere from zero to multiple times per day. He was going
11 through withdrawals in the bathroom, was discovered by staff, and he was terminated from that
12 hospital in September of 2012.

13 27. Respondent reported that he put himself through a recovery program and started
14 working at OCGMC in November of 2012 as a clinical pharmacist in the OR, ICU and CCU.
15 Respondent admitted that after awhile he started taking the expired injectable Meperidine from
16 emergency kits and pocketing them. He was injecting himself with 50-100 mg Meperidine
17 anywhere from zero to multiple times per day. On the day he was caught at OCGMC, he
18 admitted to injecting himself with the medication in the facility restroom.

19 28. Respondent has signed a declaration admitting to the diversion of medication and
20 taking medication while on duty, as follows:

21 I, Michael Witherby, admit to diversion and + self administration of narcotics from
22 Hoag Hospital (Fentanyl = 2012) and also from Orange County Global (Meperidine =
23 2016) – both occasions resulted in termination. Drug use was escalated prior to
24 termination at both hospitals – dose range for Fentanyl 100-150 mg IV – 0 to multiple
times/day – Meperidine 50-100 mg IV 0-multiple times/day... I realize that whatever
occupation I decide upon will be in an environment devoid of any medications.

25 29. On December 31, 2016, the board sent an Inspector to OCGMC to investigate the
26 allegation. A review of the medications at the pharmacy confirmed that Meperidine had been
27 diverted from the facility.

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1 30. All of the controlled substances at the hospital pharmacy were stored in a locked
2 room called Narcotic Safe, accessed by pharmacists only. Some of the stations had no Pyxis
3 machines. In those stations, access to medication required manual entries for checking the drugs
4 in and the usage. Respondent was checking drugs from the safe but did not check them in.
5

6 31. An audit of all the controlled substances Respondent had checked out of Narcotic
7 Safe during most of his employment confirmed Respondent was diverting meperidine and a few
8 other controlled substances from the pharmacy for self-use. He had withdrawn multiple
9 quantities of drugs for the areas that did not have Pyxis dispensing machines (GI, special
10 procedures, Cath lab, ICU, OR) and never recorded them on the inventory forms at the stations.
11 He either never checked the medications in at the stations or checked them in partially.
12

13 32. The audit reflected that Respondent's diversion increased over the years to almost
14 daily in 2016. In summary, Respondent diverted the following quantities of dangerous drugs:

15	Meperidine 50mg /1ml vial	776
16	Meperidine 75mg/1ml vial	604
17	Meperidine 100mg/1ml vial	357
18	Midazolam 100mg in 100ml NS	1
19	Morphine 10mg/1ml vial	1
20	Morphine 30mg/30cc syringe	1
21	Fentanyl Citrate NICU Syringe 5mcg/1 ml	5
22	Fentanyl Citrate 100mcg/1 ml vial	27
23	Fentanyl Citrate 250mcg/5ml Amp	77
24	Lacosamide 100mg/50ml NS	2

25 **FIRST CAUSE FOR DISCIPLINE**

26 **(Unprofessional Conduct –Use of Controlled Substances While on Duty)**

27 33. Respondent is subject to disciplinary action pursuant to section 4301(h), 4301(j) and
28 4301(o) in that he engaged in unprofessional conduct when Respondent knowingly administered
narcotics to himself without a prescription, while he was addicted to those medications, and such
that he was intoxicated at work, in a manner that was dangerous and injurious to himself,
potentially to the patrons of the pharmacy, and to the public, in violation of sections 4059, 4327

1 and Health and Safety Code section 11170. Specifically, on October 2, 2016 Respondent diverted
2 controlled substances, used those substances, and admitted to being under the influence of those
3 substances at work. The circumstances are further described in paragraphs 19 to 32 above, which
4 are incorporated herein by reference.

5 **SECOND CAUSE FOR DISCIPLINE**

6 **(Unprofessional Conduct – Diversion of Dangerous Drugs from Pharmacy)**

7 34. Respondent is subject to disciplinary action under section 4301(f), 4301(j) and
8 4301(o) in that he engaged in unprofessional conduct involving moral turpitude, dishonesty,
9 fraud, deceit, or corruption when he diverted dangerous drugs from the hospital pharmacy where
10 he worked in violation of Code section 4059. Specifically, from June 12, 2014 to August 6, 2014,
11 Respondent unlawfully diverted 2 bags of lacosamide 100mg/50ml NS without a prescriber's
12 authorization from OCGMC. The circumstances are further described in paragraphs 19 to 33
13 above and are incorporated herein by reference.

14 **THIRD CAUSE FOR DISCIPLINE**

15 **(Unprofessional Conduct – Possession of Narcotics Without a Prescription)**

16 35. Respondent is subject to disciplinary action under section 4301(j) and 4301(o) in that
17 he engaged in unprofessional conduct when he possessed a controlled substance without a
18 prescription in violation of section 4060 and Health and Safety Code sections 11175 and 11180 .
19 Specifically, from January 1, 2013 to October 2, 2106, Respondent unlawfully diverted 776 vials
20 of meperidine 50mg /1ml, 604 vials of meperidine 75mg/1ml vial, 357 vials of meperidine
21 100mg/1ml vial, 1 bag of midazolam 100mg in 100ml NS, 1 vial of morphine 10mg/1ml vial, 1
22 syringe of morphine 30mg/30cc, 5 fentanyl Citrate NICU Syringe 5mcg/1 ml, 27 vials of fentanyl
23 Citrate 100mcg/1 ml vial, and 77 Amps of fentanyl Citrate 250mcg/5ml from the pharmacy where
24 he worked. The circumstances are further described in paragraphs 19 to 34 above, and are
25 incorporated herein by reference.

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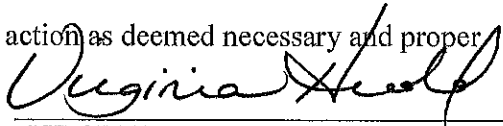
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PRAYER

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

1. Revoking or suspending Pharmacist License Number RPH 38874, issued to Michael William Witherby;
2. Ordering Michael William Witherby to pay the Board of Pharmacy 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: 3/31/17 

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

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