

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

In the Matter of the Accusation and Petition to  
Revoke Probation Against:

**DONALD STEVEN MERKEL**

1330 Reed Street #2  
San Diego, CA 92109

Pharmacist License No. RPH 43281

Respondent.

Case Nos. 3306 and 3682

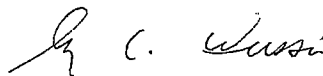
**DECISION AND ORDER**

The attached Stipulated Surrender of License and Order is hereby adopted by the Board of Pharmacy, Department of Consumer Affairs, as its Decision in this matter.

This decision shall become effective on August 20, 2010.

It is so ORDERED on July 21, 2010.

BOARD OF PHARMACY  
DEPARTMENT OF CONSUMER AFFAIRS  
STATE OF CALIFORNIA



By

\_\_\_\_\_  
STANLEY C. WEISSER  
Board President

1 EDMUND G. BROWN JR.  
 Attorney General of California  
 2 JAMES M. LEDAKIS  
 Supervising Deputy Attorney General  
 3 DIANE DE KERVOR  
 Deputy Attorney General  
 4 State Bar No. 174721  
 110 West "A" Street, Suite 1100  
 5 San Diego, CA 92101  
 P.O. Box 85266  
 6 San Diego, CA 92186-5266  
 Telephone: (619) 645-2611  
 7 Facsimile: (619) 645-2061  
*Attorneys for Complainant*

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

12  
 13 In the Matter of the Accusation and Petition to  
 14 Revoke Probation Against:

15 **DONALD STEVEN MERKEL**  
 1330 Reed Street #2  
 San Diego, CA 92109

16  
 17 **Pharmacist License No. RPH 43281**

18 Respondent.

Case Nos. 3306 and 3682

OAH No. L2009080245

**STIPULATED SURRENDER OF  
 LICENSE AND ORDER**

19  
 20 In the interest of a prompt and speedy resolution of these matters, consistent with the public  
 21 interest and the responsibility of the Board of Pharmacy of the Department of Consumer Affairs  
 22 the parties hereby agree to the following Stipulated Surrender of License and Order which will be  
 23 submitted to the Board for approval and adoption as the final disposition of the Accusation and  
 24 Petition to Revoke Probation (Case No. 3306) and the Petition to Revoke Probation (Case No.  
 25 3682).

26 PARTIES

27 1. Virginia Herold (Complainant) is the Executive Officer of the Board of Pharmacy.  
 28 She brought these actions solely in her official capacity and is represented in this matter by

1 Edmund G. Brown Jr., Attorney General of the State of California, by Diane de Kervor, Deputy  
2 Attorney General.

3 2. Donald Steven Merkel (Respondent) is represented in this proceeding by attorney Jim  
4 Byrnes, whose address is: The Law Office of James Byrnes, 964 Fifth Avenue, Suite 500, San  
5 Diego, CA 92101.

6 3. On or about March 15, 1990, the Board of Pharmacy (Board) issued Pharmacist  
7 License No. RPH 43281 to Respondent. The Pharmacist License was in full force and effect at  
8 all times relevant to the charges brought herein and will expire on November 30, 2011, unless  
9 renewed.

10 4. In a disciplinary action entitled "In the Matter of the Accusation Against Donald  
11 Steven Merkel," Case No. 2339, the Board issued a decision effective October 13, 2001, in which  
12 Respondent's Pharmacist License was revoked. However, the revocation was stayed and  
13 Respondent's Pharmacist License was suspended and then placed on probation for a period of five  
14 (5) years with certain terms and conditions.

15 5. The Board's disciplinary order effective on October 13, 2001, contains Probation  
16 Condition 2, Rehabilitation Program - Pharmacist Recovery Program (PRP), which provides that  
17 Respondent shall successfully participate in and complete his current contract and any subsequent  
18 addendums to the PRP. This term also provides that probation shall be extended until  
19 Respondent successfully completes his treatment contract. Because Respondent remained in the  
20 PRP, his probation continued past the five year term.

21 6. On June 23, 2009, a disciplinary action entitled "In the Matter of the Accusation and  
22 Petition to Revoke Probation Against Donald Steven Merkel," Case No. 3306, was filed before  
23 the Board. A hearing was held on the Accusation and Petition to Revoke Probation on September  
24 24, 2009. On March 15, 2010, the proposed decision was submitted to the Board and was  
25 subsequently nonadopted. Oral argument on this matter has not yet been scheduled.

26 7. On or about March 30, 2010, Complainant Virginia Herold, in her official capacity as  
27 the Executive Officer of the Board of Pharmacy, Department of Consumer Affairs, filed Petition  
28 to Revoke Probation No. 3682 against Donald Steven Merkel (Respondent) before the Board of

1 Pharmacy on the grounds that Respondent had failed out of the PRP. The Petition was served on  
2 March 30, 2010. A Notice of Defense has not been filed with respect to the Petition.

3 JURISDICTION

4 8. Accusation and Petition to Revoke No. 3306 and Petition to Revoke Probation No.  
5 3682 were filed before the Board of Pharmacy (Board), Department of Consumer Affairs and are  
6 currently pending against Respondent. A copy of Accusation and Petition to Revoke Probation  
7 No. 3306 is attached as Exhibit A and incorporated herein by reference. A copy of Petition to  
8 Revoke Probation No. 3682 is attached as Exhibit B and incorporated herein by reference.

9 ADVISEMENT AND WAIVERS

10 9. Respondent has carefully read, fully discussed with counsel, and understands the  
11 charges and allegations in Accusation and Petition to Revoke Probation No. 3306 and Petition to  
12 Revoke Probation No. 3682. Respondent also has carefully read, fully discussed with counsel,  
13 and understands the effects of this Stipulated Surrender of License and Order.

14 10. Respondent is fully aware of his legal rights in this matter, including the right to a  
15 hearing on the charges and allegations in the Accusation and Petition to Revoke Probation and the  
16 Petition to Revoke Probation; the right to confront and cross-examine the witnesses against him;  
17 the right to present evidence and to testify on his own behalf; the right to the issuance of  
18 subpoenas to compel the attendance of witnesses and the production of documents; the right to  
19 reconsideration and court review of an adverse decision; and all other rights accorded by the  
20 California Administrative Procedure Act and other applicable laws.

21 11. Respondent voluntarily, knowingly, and intelligently waives and gives up each and  
22 every right set forth above. In addition, Respondent voluntarily, knowingly, and intelligently  
23 waives and gives up any right he may have to written or oral argument to or appearance before  
24 the Board following its nonadoption of the proposed decision regarding the Accusation and  
25 Petition to Revoke Probation in Case No. 3306, and agrees that this surrender makes further  
26 separate consideration of that case and of the matters presented at the hearing in that case  
27 unnecessary and moot.

28 ///

CULPABILITY

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

12. Respondent understands that the charges and allegations in Accusation and Petition to Revoke Probation No. 3306 and Petition to Revoke Probation No. 3682, if proven at a hearing, constitute cause for imposing discipline upon his Pharmacist License.

13. For the purpose of resolving the Accusation and Petition to Revoke Probation and the Petition to Revoke Probation without the expense and uncertainty of further proceedings, Respondent agrees that, at a hearing, Complainant could establish a factual basis for the charges in the Accusation and Petition to Revoke Probation and the Petition to Revoke Probation and that those charges constitute cause for discipline. Respondent hereby gives up his right to contest that cause for discipline exists based on those charges.

14. Respondent understands that by signing this stipulation he enables the Board to issue an order accepting the surrender of his Pharmacist License without further process.

CONTINGENCY

15. This stipulation shall be subject to approval by the Board of Pharmacy. Respondent understands and agrees that counsel for Complainant and the staff of the Board of Pharmacy may communicate directly with the Board regarding this stipulation and surrender, without notice to or participation by Respondent or his counsel. By signing the stipulation, Respondent understands and agrees that he may not withdraw his agreement or seek to rescind the stipulation prior to the time the Board considers and acts upon it. If the Board fails to adopt this stipulation as its Decision and Order, the Stipulated Surrender and Disciplinary Order shall be of no force or effect, except for this paragraph, it shall be inadmissible in any legal action between the parties, and the Board shall not be disqualified from further action by having considered this matter.

16. The parties understand and agree that facsimile copies of this Stipulated Surrender of License and Order, including facsimile signatures thereto, shall have the same force and effect as the originals.

17. This Stipulated Surrender of License and Order is intended by the parties to be an integrated writing representing the complete, final, and exclusive embodiment of their agreement. It supersedes any and all prior or contemporaneous agreements, understandings, discussions,

1 negotiations, and commitments (written or oral). This Stipulated Surrender of License and Order  
2 may not be altered, amended, modified, supplemented, or otherwise changed except by a writing  
3 executed by an authorized representative of each of the parties.

4 18. In consideration of the foregoing admissions and stipulations, the parties agree that  
5 the Board may, without further notice or formal proceeding, issue and enter the following Order:

6 ORDER

7 IT IS HEREBY ORDERED that Pharmacist License No. RPH 43281, issued to Respondent  
8 DONALD STEVEN MERKEL, is surrendered and accepted by the Board of Pharmacy.

9 1. The surrender of Respondent's Pharmacist License and the acceptance of the  
10 surrendered license by the Board shall constitute the imposition of discipline against Respondent.  
11 This stipulation constitutes a record of the discipline and shall become a part of Respondent's  
12 license history with the Board.

13 2. Respondent shall lose all rights and privileges as a pharmacist in California as of the  
14 effective date of the Board's Decision and Order.

15 3. Respondent shall cause to be delivered to the Board both his wall license certificate  
16 and, if one was issued, pocket license on or before the effective date of the Decision and Order.

17 4. If Respondent ever applies for licensure or petitions for reinstatement in the State of  
18 California, the Board shall treat it as a new application for licensure. Respondent must comply  
19 with all the laws, regulations and procedures for licensure in effect at the time the application or  
20 petition is filed, and all of the charges and allegations contained in Accusation and Petition to  
21 Revoke Probation No. 3306 and Petition to Revoke Probation No. 3682 shall be deemed to be  
22 true, correct and admitted by Respondent when the Board determines whether to grant or deny the  
23 application or petition.

24 5. If Respondent should ever apply or reapply for a new license or certification, or  
25 petition for reinstatement of a license, by any other health care licensing agency in the State of  
26 California, all of the charges and allegations contained in Accusation and Petition to Revoke  
27 Probation No. 3306 and Petition to Revoke Probation No. 3682 shall be deemed to be true,  
28

steve merkel

858-272-6330

p. 1

1 correct, and admitted by Respondent for the purpose of any Statement of Issues or any other  
2 proceeding seeking to deny or restrict licensure.


3 6. Respondent must wait three years from the effective date of the decision to file a new  
4 application for licensure.

5 7. Respondent shall pay the Board its costs of investigation and enforcement in the  
6 amount of \$6,348.50 prior to issuance of a new or reinstated license.

7 ACCEPTANCE

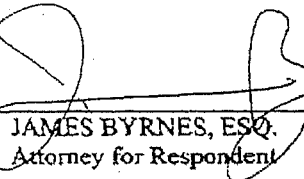
8 I have carefully read the above Stipulated Surrender of License and Order and have fully  
9 discussed it with my attorney, James Byrnes. I understand the stipulation and the effect it will  
10 have on my Pharmacist License. I enter into this Stipulated Surrender of License and Order  
11 voluntarily, knowingly, and intelligently, and agree to be bound by the Decision and Order of the  
12 Board of Pharmacy.

13  
14 DATED: 6/8/10

  
DONALD STEVEN MERKEL  
Respondent

16 I have read and fully discussed with Respondent DONALD STEVEN MERKEL the terms  
17 and conditions and other matters contained in this Stipulated Surrender of License and Order. I  
18 approve its form and content.

19  
20 DATED: June 9 2010

  
JAMES BYRNES, ESQ.  
Attorney for Respondent

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

ENDORSEMENT

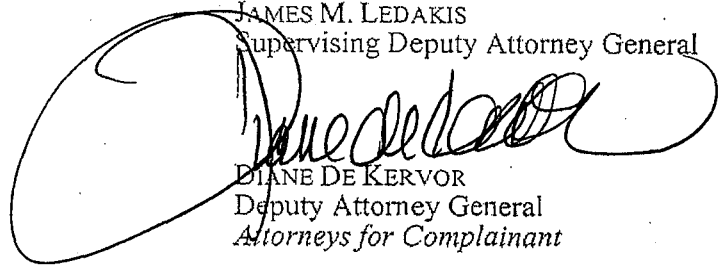
The foregoing Stipulated Surrender of License and Order is hereby respectfully submitted for consideration by the Board of Pharmacy of the Department of Consumer Affairs.

Dated:

*June 11, 2010*

Respectfully submitted,

EDMUND G. BROWN JR.  
Attorney General of California  
JAMES M. LEDAKIS  
Supervising Deputy Attorney General



DIANE DE KERVOR  
Deputy Attorney General  
*Attorneys for Complainant*

SD2009803822; SD2010800376  
80463468.doc





**Exhibit A**

**Accusation and Petition to Revoke Probation No. 3306**

1 EDMUND G. BROWN JR., Attorney General  
of the State of California  
2 JAMES M. LEDAKIS  
Supervising Deputy Attorney General  
3 DIANE DE KERVOR, State Bar No. 174721  
Deputy Attorney General  
4 110 West "A" Street, Suite 1100  
San Diego, CA 92101  
5  
6 P.O. Box 85266  
San Diego, CA 92186-5266  
Telephone: (619) 645-2611  
7 Facsimile: (619) 645-2061  
8 Attorneys for Complainant

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

12 In the Matter of the Accusation and Petition to  
Revoke Probation Against:  
13 DONALD STEVEN MERKEL  
14 1330 Reed Street #2  
San Diego, CA 92109  
15 Pharmacist License No. RPH 43281  
16 Respondent.  
17

Case No. 3306  
**ACCUSATION AND PETITION TO  
REVOKE PROBATION**

18 Complainant alleges:

19 PARTIES

- 20 1. Virginia Herold (Complainant) brings this Accusation and Petition to  
21 Revoke Probation solely in her official capacity as the Executive Officer of the Board of  
22 Pharmacy, Department of Consumer Affairs.  
23 2. On or about March 15, 1990, the Board of Pharmacy issued Pharmacist  
24 License Number RPH 43281 to Donald Steven Merkel (Respondent). Respondent's Pharmacist  
25 License has been on probation since October 31, 2001. His Pharmacist License will expire on  
26 November 30, 2009, unless renewed.  
27 ///  
28 ///

PRIOR DISCIPLINE

1  
2           3.     In a disciplinary action entitled "In the Matter of the Accusation Against  
3 Donald Steven Merkel," Case No. 2339, the Board of Pharmacy issued a decision effective  
4 October 13, 2001, in which Respondent's Original Pharmacist License was revoked for self-  
5 administering controlled substances in a dangerous or injurious manner, moral turpitude or  
6 dishonesty, unprofessional conduct, and violation of various controlled substances laws.  
7 However, the revocation was stayed and Respondent's Original Pharmacist License was  
8 suspended and then placed on probation for a period of five (5) years with certain terms and  
9 conditions. A copy of that decision is attached as Exhibit A and is incorporated by reference.

10           4.     The Board's disciplinary order effective on October 31, 2001, contained  
11 Probation Condition 2, Rehabilitation Program - Pharmacist Recovery Program (PRP), which  
12 provides that Respondent shall successfully participate in and complete his current contract and  
13 any subsequent addendums to the PRP. This term also provides that probation shall be extended  
14 until respondent successfully completes his treatment contract. Because respondent remains in  
15 the PRP, his probation has continued to this date.

16           JURISDICTION AND STATUTORY PROVISIONS FOR THE ACCUSATION

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

20           6.     Section 4022 of the Code states:

21           "Dangerous drug" or "dangerous device" means any drug or device unsafe for  
22 self-use, except veterinary drugs that are labeled as such, and includes the following:

23           "(a) Any drug that bears the legend: "Caution: federal law prohibits dispensing  
24 without prescription," "Rx only," or words of similar import.

25           "(b) Any device that bears the statement: "Caution: federal law restricts this  
26 device to sale by or on the order of a \_\_\_\_\_," "Rx only," or words of similar import, the  
27 blank to be filled in with the designation of the practitioner licensed to use or order use of the  
28 device.

1                   “(c) Any other drug or device that by federal or state law can be lawfully  
2 dispensed only on prescription or furnished pursuant to Section 4006.”

3                   7.       Section 4059 of the Code states:

4                   (a) A person may not furnish any dangerous drug, except upon the  
5 prescription of a physician, dentist, podiatrist, optometrist, veterinarian, or  
6 naturopathic doctor pursuant to Section 3640.7.

7                   8.       Section 4060 of the Code states:

8                   No person shall possess any controlled substance, except that furnished to  
9 a person upon the prescription of a physician, dentist, podiatrist, optometrist,  
10 veterinarian, or naturopathic doctor pursuant to Section 3640.7, or furnished  
11 pursuant to a drug order issued by a certified nurse-midwife pursuant to Section  
12 2746.51, a nurse practitioner pursuant to Section 2836.1, or a physician assistant  
13 pursuant to Section 3502.1, or naturopathic doctor pursuant to Section 3640.5, or  
14 a pharmacist pursuant to either subparagraph (D) of paragraph (4) of, or clause  
15 (iv) of subparagraph (A) of paragraph (5) of, subdivision (a) of Section 4052.  
16 This section shall not apply to the possession of any controlled substance by a  
17 manufacturer, wholesaler, pharmacy, pharmacist, physician, podiatrist, dentist,  
18 optometrist, veterinarian, naturopathic doctor, certified nurse-midwife, nurse  
19 practitioner, or physician assistant, when in stock in containers correctly labeled  
20 with the name and address of the supplier or producer.

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

24                   9.       Section 4300 of the Code states:

25                   (a) Every license issued may be suspended or revoked.

26                   .....

27                   10.      Section 4301 of the Code states:

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

.....

(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, or any other state, or of  
the United States regulating controlled substances and dangerous drugs.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

.....

(l) The conviction of a crime substantially related to the qualifications, functions, and duties of a licensee under this chapter. The record of conviction of a violation of Chapter 13 (commencing with Section 801) of Title 21 of the United States Code regulating controlled substances or of a violation of the statutes of this state regulating controlled substances or dangerous drugs shall be conclusive evidence of unprofessional conduct. In all other cases, the record of conviction shall be conclusive evidence only of the fact that the conviction occurred. The board may inquire into the circumstances surrounding the commission of the crime, in order to fix the degree of discipline or, in the case of a conviction not involving controlled substances or dangerous drugs, to determine if the conviction is of an offense substantially related to the qualifications, functions, and duties of a licensee under this chapter. A plea or verdict of guilty or a conviction following a plea of nolo contendere is deemed to be a conviction within the meaning of this provision. The board may take action when the time for appeal has elapsed, or the judgment of conviction has been affirmed on appeal or when an order granting probation is made suspending the imposition of sentence, irrespective of a subsequent order under Section 1203.4 of the Penal Code allowing the person to withdraw his or her plea of guilty and to enter a plea of not guilty, or setting aside the verdict of guilty, or dismissing the accusation, information, or indictment.

.....

(o) Violating or attempting to violate, directly or indirectly, . . . 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.

11. Section 482 of the Code states:

Each board under the provisions of this code shall develop criteria to evaluate the rehabilitation of a person when:

.....

(b) Considering suspension or revocation of a license under Section 490.

Each board shall take into account all competent evidence of rehabilitation furnished by the applicant or licensee.

12. Section 490 of the Code states:

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

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

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

5 (d) The Legislature hereby finds and declares that the application of this  
6 section has been made unclear by the holding in *Petropoulos v. Department of*  
7 *Real Estate* (2006) 142 Cal.App.4th 554, and that the holding in that case has  
8 placed a significant number of statutes and regulations in question, resulting in  
9 potential harm to the consumers of California from licensees who have been  
10 convicted of crimes. Therefore, the Legislature finds and declares that this section  
11 establishes an independent basis for a board to impose discipline upon a licensee,  
12 and that the amendments to this section made by Senate Bill 797 of the 2007 -08  
13 Regular Session do not constitute a change to, but rather are declaratory of,  
14 existing law.

15  
16 13. Section 493 of the Code states:

17 Notwithstanding any other provision of law, in a proceeding conducted by  
18 a board within the department pursuant to law to deny an application for a license  
19 or to suspend or revoke a license or otherwise take disciplinary action against a  
20 person who holds a license, upon the ground that the applicant or the licensee has  
21 been convicted of a crime substantially related to the qualifications, functions,  
22 and duties of the licensee in question, the record of conviction of the crime shall  
23 be conclusive evidence of the fact that the conviction occurred, but only of that  
24 fact, and the board may inquire into the circumstances surrounding the  
25 commission of the crime in order to fix the degree of discipline or to determine if  
26 the conviction is substantially related to the qualifications, functions, and duties  
27 of the licensee in question.

18 As used in this section, 'license' includes 'certificate,' 'permit,'  
19 'authority,' and 'registration.'

20 14. Health and Safety Code section 11170 provides that "No person shall  
21 prescribe, administer, or furnish a controlled substance for himself."

22 15. Health and Safety Code section 11350 provides:

23 (a) Except as otherwise provided in this division, every person who  
24 possesses (1) any controlled substance specified in subdivision (b) or (c), or  
25 paragraph (1) of subdivision (f) of Section 11054, specified in paragraph (14),  
26 (15), or (20) of subdivision (d) of Section 11054, or specified in subdivision (b) or  
27 (c) of Section 11055, or specified in subdivision (h) of Section 11056, or (2) any  
controlled substance classified in Schedule III, IV, or V which is a narcotic drug,  
unless upon the written prescription of a physician, dentist, podiatrist, or  
veterinarian licensed to practice in this state, shall be punished by imprisonment  
in the state prison.

28 ///



1 section 11056(c)(4), and is a dangerous drug pursuant to Code section 4022. Lorcet is used to  
2 treat pain.

3 22. MS Contin, the brand name for Morphine Sulfate, is a Schedule II  
4 controlled substance as designated by Health and Safety Code section 11055(b)(1)(M), and is a  
5 dangerous drug pursuant to Code section 4022. MS Contin is used to treat pain.

6 23. Oxycodone, also sold under the brand name OxyContin, is a Schedule II  
7 controlled substance as designated by Health and Safety Code section 11055(b)(1)(N), and is a  
8 dangerous drug pursuant to Code section 4022. Oxycodone is used to treat pain.

9 24. Soma, the brand name for Carisoprodol, is a dangerous drug pursuant to  
10 Business and Professions Code section 4022. Soma is used as a muscle relaxant.

11 25. Suboxone/Subutex, the brand name for Buprenorphine and Naloxone, is a  
12 Schedule III controlled substance as designated by 21 Code of Federal Regulations section  
13 1308.13(c)(2)(i), and a dangerous drug pursuant to Code section 4022. Suboxone/Subutex is  
14 used in the treatment of opiate addiction.

15 26. Xanax, a brand name for Alprazolam, is a Schedule IV controlled  
16 substance as designated by Health and Safety Code section 11057(d)(1), and is a dangerous drug  
17 pursuant to Code section 4022. Alprazolam is used to treat anxiety.

18 27. Morphine is a Schedule II controlled substance as designated by Health  
19 and Safety Code section 11055(b)(1)(M), and is a dangerous drug pursuant to Code section  
20 4022.

## 21 CAUSES FOR DISCIPLINE

### 22 FIRST CAUSE FOR DISCIPLINE

23 (October 24, 2008 Criminal Conviction -  
24 Driving Under the Influence of Controlled Substances on February 1, 2008)

25 28. Grounds exist to revoke Respondent's license under sections 490, 493,  
26 and 4301, subdivisions (l), (j), and (o), for a criminal conviction that is substantially related to  
27 the qualifications, functions, and duties of a Pharmacist. The circumstances are as follows:

28 29. On or about February 1, 2008, at 12:17 am, Respondent was detained by



1 the police in the parking lot when he was observed trying to drive over a raised curb several  
2 times. His car was half way in the street and half way in the parking lot. He kept trying to start  
3 the car, although it was already on. When asked, Respondent could not locate his driver's  
4 license. The Officer located it in a small wallet in Respondent's shirt pocket. Upon the  
5 Officer's request, Respondent stepped out of the car and almost fell down. Four different pills  
6 were laying on the seat where Respondent was seated. Respondent had a small bottle of Subutex  
7 pills (8 mg) and numerous loose pills in his pocket.

8           30. When asked if he had consumed any alcohol or drugs, he denied drinking  
9 alcohol and reported to the police that he had taken Coumadin that was prescribed to him. When  
10 asked, Respondent admitted to the Police that he knew that he should maintain pills in their  
11 individual prescription bottles, but that he had put them in a smaller bottle. He told the police  
12 that he had prescriptions for all of them, "at one time or another."

13           31. After the field sobriety test, Respondent was taken to the police  
14 department and given a blood test. He was then arrested for driving under the influence of  
15 drugs/alcohol and possession of controlled substances without a prescription.

16           32. Respondent's blood sample was found to contain the following dangerous  
17 drugs or controlled substances: Opiates, Hydrocodone, Oxycodone, Benzodiazepines, Diazepam,  
18 Nordiazepam, Alprazolam, and Lorazepam.

19           33. The pills in Respondent's possession were seized and later identified as:

20           a. The Subutex (8 mg) bottle contained 2 Darvocet N 100 pills, 3  
21           Suboxone 8N pills, 22 Vicodin pills, 12 Xanax pills, 2 Soma pills,  
22           33 Lorazepam pills, 6 unidentified pills.

23           b. The following pills were loose in Respondent's pockets or found  
24           on the driver's seat: 9 unidentified pills, 1 Vicodin pill, 1  
25           Morphine pill, 22 Xanax pills, and 28 Lorazepam pills.

26           34. On October 28, 2008, in the matter of the *People v. Donald Merkel*, San  
27 Diego Superior Court Case Number SCD213377. Respondent pled guilty to a violation of  
28 Vehicle Code section 23152(a) (driving under the influence), a misdemeanor. Respondent was

1 sentenced to 5 years probation with certain conditions including a 3 month first conviction  
2 program and a MADD impact panel, 90 days license suspension, one day of jail (with credit for  
3 time served of one day), and an \$3,620.00 fine.

4 SECOND CAUSE FOR DISCIPLINE

5 (Consumption of Controlled Substances or Dangerous Drugs in Injurious Manner)

6 35. Grounds exist to revoke Respondent's license under sections 4301,  
7 subdivision (h), for administering to himself and using a dangerous drug to the extent or in a  
8 manner as to be dangerous or injurious to himself and to the public. The facts supporting this  
9 cause for discipline are described in paragraphs 29 to 34 above and are herein incorporated by  
10 reference.

11 THIRD CAUSE FOR DISCIPLINE

12 (Violation of Laws Regarding Controlled Substances)

13 36. Respondent is subject to disciplinary action under section 4301,  
14 subdivisions (j) and (o), for violations of laws regarding controlled substances and pharmacy, as  
15 follows:

- 16 a. Respondent furnished dangerous drugs to himself without a prescription in  
17 violation of Section 4059.
- 18 b. Respondent possessed controlled substances without a prescription and  
19 not in stock containers in violation of Code section 4060.
- 20 c. Respondent administered controlled substances to himself in violation of  
21 Health and Safety Code section 11170.
- 22 d. Respondent possessed controlled substances without a valid prescription  
23 in violation of Health and Safety Code section 11350.

24 37. The facts supporting this cause for discipline are described in paragraphs  
25 29 to 34 above and are herein incorporated by reference.

26 ///

27 ///

28 ///

1 ///

2 JURISDICTION FOR THE PETITION TO REVOKE PROBATION

3 38. Section 4300(d) of the Code states:

4 The board may initiate disciplinary proceedings to revoke or suspend any  
5 probationary certificate of licensure for any violation of the terms and conditions  
6 of probation. Upon satisfactory completion of probation, the board shall convert  
7 the probationary certificate to a regular certificate, free of conditions.

8 39. Grounds exist for revoking the probation and reimposing the order of  
9 revocation of Pharmacy License Number RPH 43281 issued to Respondent. The Board's  
10 disciplinary order effective on October 31, 2001, contained Probation Condition 24, Violation of  
11 Probation, which provides as follows:

12 If respondent violates probation in any respect, the board, after giving  
13 respondent notice and an opportunity to be heard, may revoke probation and carry  
14 out the disciplinary order which was stayed. If a petition to revoke probation or an  
15 accusation is filed against respondent during probation, the board shall have  
16 continuing jurisdiction and the period of probation shall be extended, until the  
17 petition to revoke probation or accusation is heard and decided.

18 If respondent has not complied with any term or condition of probation,  
19 the board shall have continuing jurisdiction over respondent, and probation shall  
20 automatically be extended until all terms and conditions have been satisfied or the  
21 board has taken other action as deemed appropriate to treat the failure to comply  
22 as a violation of probation, to terminate probation, and to impose the penalty  
23 which was stayed.

24 40. Respondent has violated the conditions of his probation as set forth in the  
25 following paragraphs.

26 FIRST CAUSE TO REVOKE PROBATION

27 (Failure to Obey All Laws)

28 41. The Board's disciplinary order effective on October 31, 2001, contained  
29 Probation Condition 9, Obey All Laws, which required Respondent to do the following:

30 Respondent shall obey all federal and state laws and regulations  
31 substantially related or governing the practice of pharmacy.

32 42. Respondent's probation is subject to revocation because he failed to  
33 comply with Probation Condition 9, referenced above in the following ways.

34 a. Respondent was convicted of driving under the influence of drugs

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

in the matter of the *People v. Donald Merkel*, San Diego Superior Court Case Number SCD213377. The circumstances supporting this cause to revoke probation are set forth in paragraphs 29 to 34 above and are herein incorporated by reference.

b. Respondent consumed controlled substances or dangerous drugs in an injurious manner in violation of sections 4301, subdivision (h). The circumstances supporting this cause to revoke probation are set forth in paragraphs 29 to 35 above and are herein incorporated by reference.

c. Respondent furnished dangerous drugs to himself without a prescription in violation of Section 4059. The circumstances supporting this cause to revoke probation are set forth in paragraphs 29 to 37 above and are herein incorporated by reference.

d. Respondent possessed controlled substances without a prescription and not in stock containers in violation of Code section 4060. The circumstances supporting this cause to revoke probation are set forth in paragraphs 29 to 37 above and are herein incorporated by reference.

e. Respondent administered controlled substances to himself in violation of Health and Safety Code section 11170. The circumstances supporting this cause to revoke probation are set forth in paragraphs 29 to 37 above and are herein incorporated by reference.

f. Respondent possessed controlled substances without a valid prescription in violation of Health and Safety Code section 11350. The circumstances supporting this cause to revoke probation are set forth in paragraphs 29 to 37 above and are herein

1 incorporated by reference.

2  
3 SECOND CAUSE TO REVOKE PROBATION

4 (Failure to Abstain From Drug Use)

5 43. The Board's disciplinary order effective on October 31, 2001, contained  
6 Probation Condition 4, Abstain From Drug Use, which required Respondent to do the following:

7 Respondent shall abstain completely from the possession or use or  
8 possession of controlled substances and dangerous drugs. This order does not  
9 apply in instances where medications are lawfully prescribed to the respondent  
10 for a legitimate illness or condition by a physician, dentist or podiatrist and where  
11 respondent, upon request of the Board or its designee, provides documentation  
12 from the treating physician, dentist or podiatrist that the prescription was  
13 legitimately issued and is a necessary part of the treatment of the respondent.

14 If at any time during the period of probation respondent tests positive for  
15 controlled substances or dangerous drugs as a result of any biological fluid testing  
16 and if respondent does not have a legitimate prescription from a physician, dentist  
17 or podiatrist as set forth above for those controlled substances or dangerous drugs,  
18 the Board shall, without affording respondent notice and the opportunity to be  
19 heard, revoke probation and carry out the disciplinary order that was stayed.

20 44. Respondent's probation is subject to revocation because he failed to  
21 comply with Probation Condition 4, referenced above. Respondent consumed dangerous drugs  
22 or controlled substances without a prescription when he was arrested for driving under the  
23 influence of drugs. The circumstances supporting this cause to revoke probation are set forth in  
24 paragraphs 29 to 37 above and are herein incorporated by reference.

25 DISCIPLINE CONSIDERATIONS

26 45. To determine the degree of discipline, if any, to be imposed on  
27 Respondent's license, Complainant alleges that disciplinary action has been taken against  
28 Respondent previously in Case No. 2339, as is outlined above in paragraphs 3 to 4.  
Respondent's pharmacist license remains on probation and he has remained on the PRP since  
2001.

///

///

///

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

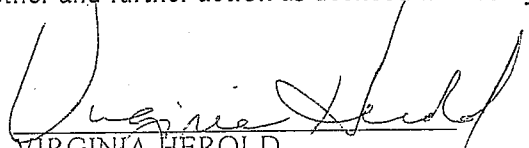
///  
///

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. 2339 and imposing the disciplinary order that was stayed thereby revoking Original Pharmacist License No. RPH 43281 issued to Donald Steven Merkel;
- 2. Revoking or suspending Pharmacist License Number RPH 43281, issued to Donald Steven Merkel.
- 3. Ordering Donald Steven Merkel 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;
- 4. Taking such other and further action as deemed necessary and proper.

DATED: 6/23/09

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

SD2009803822  
80348207.wpd

**Exhibit B**

**Petition to Revoke Probation No. 3682**

1 EDMUND G. BROWN JR., Attorney General  
of the State of California  
2 JAMES M. LEDAKIS  
Supervising Deputy Attorney General  
3 DIANE DE KERVOR, State Bar No. 174721  
Deputy Attorney General  
4 110 West "A" Street, Suite 1100  
San Diego, CA 92101  
5  
6 P.O. Box 85266  
San Diego, CA 92186-5266  
Telephone: (619) 645-2611  
7 Facsimile: (619) 645-2061  
8 Attorneys for Complainant

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

12 In the Matter of the Petition to Revoke Probation  
Against:

Case No. 3682

13 DONALD STEVEN MERKEL  
14 1330 Reed Street #2  
San Diego, CA 92109  
15 Pharmacist License No. RPH 43281

**PETITION TO REVOKE  
PROBATION**

16 Respondent.  
17

18 Complainant alleges:

19 PARTIES

20 1. Virginia Herold (Complainant) brings this Petition to Revoke Probation  
21 solely in her official capacity as the Executive Officer of the Board of Pharmacy, Department of  
22 Consumer Affairs.

23 2. On or about March 15, 1990, the Board of Pharmacy (Board) issued  
24 Pharmacist License Number RPH 43281 to Donald Steven Merkel (Respondent). Respondent's  
25 Pharmacist License has been on probation since October 31, 2001. His Pharmacist License will  
26 expire on November 30, 2011, unless renewed.

27 ///

28 ///



1 PRIOR DISCIPLINE

2 3. In a disciplinary action entitled "In the Matter of the Accusation Against  
3 Donald Steven Merkel," Case No. 2339, the Board issued a decision effective October 13, 2001,  
4 in which Respondent's Original Pharmacist License was revoked for self-administering  
5 controlled substances in a dangerous or injurious manner, moral turpitude or dishonesty,  
6 unprofessional conduct, and violation of various controlled substances laws. However, the  
7 revocation was stayed and Respondent's Original Pharmacist License was suspended and then  
8 placed on probation for a period of five (5) years with certain terms and conditions. A copy of  
9 that decision is attached as Exhibit A and is incorporated by reference.

10 4. The Board's disciplinary order effective on October 31, 2001, contained  
11 Probation Condition 2, Rehabilitation Program - Pharmacist Recovery Program (PRP), which  
12 provides that Respondent shall successfully participate in and complete his current contract and  
13 any subsequent addendums to the PRP. This term also provides that probation shall be extended  
14 until respondent successfully completes his treatment contract. Because respondent remains in  
15 the PRP, his probation has continued to this date.

16 OUTSTANDING ACCUSATION AND PETITION TO REVOKE PROBATION

17 5. In a disciplinary action entitled "In the Matter of the Accusation and  
18 Petition to Revoke Probation Against Donald Steven Merkel," Case No. 3306, the Board has  
19 sought to discipline Respondent's license based upon an October 24, 2008, criminal conviction  
20 for driving under the influence of drugs. The accusation seeks discipline for the criminal  
21 conviction as well as violations for the consumption of drugs and other drug laws. The Board  
22 also seeks to revoke Respondent's probation for violating the terms of his probation in that he  
23 failed to obey all laws and failed to abstain from drug use. A hearing was held on these matters  
24 on September 24, 2009. The proposed decision was just submitted to the agency and is still  
25 pending before the Board.

26 ///

27 ///

28 ///

1 **JURISDICTION FOR THE PETITION TO REVOKE PROBATION**

2 6. Section 4300(d) of the Code states:

3 The board may initiate disciplinary proceedings to revoke or suspend any  
4 probationary certificate of licensure for any violation of the terms and conditions  
5 of probation. Upon satisfactory completion of probation, the board shall convert  
6 the probationary certificate to a regular certificate, free of conditions.

7 7. California Code of Regulations, title 16, section 1773 states:

8 (a) Unless otherwise directed by the Board in its sole discretion, any  
9 pharmacist who is serving a period of probation shall comply with the following  
10 conditions:

11 (1) Obey all laws and regulations substantially related to the  
12 practice of Pharmacy;

13 (2) Report to the Board or its designee quarterly either in person or  
14 in writing as directed; the report shall include the name and address of the  
15 probationer's employer. If the final probation report is not made as directed, the  
16 period of probation shall be extended until such time as the final report is made;

17 (3) Submit to peer review if deemed necessary by the Board;

18 (4) Provide evidence of efforts to maintain skill and knowledge as  
19 a pharmacist as directed by the Board;

20 (5) Inform all present and prospective employers of license  
21 restrictions and terms of probation. Probationers employed by placement agencies  
22 must inform all permittees in whose premises they work of license restrictions and  
23 terms of probation.

24 (6) Not supervise any registered interns nor perform any of the  
25 duties of a preceptor;

26 (7) The period of probation shall not run during such time that the  
27 probationer is engaged in the practice of pharmacy in a jurisdiction other than  
28 California.

(b) If ordered by the Board in an administrative action or agreed upon in  
the stipulated settlement of an administrative action, any registered pharmacist  
who is serving a period of probation shall comply with any or all of the following  
conditions;

(1) Take and pass all or any sections of the pharmacist licensure  
examination and/or attend continuing education courses in excess of the required  
number in specific areas of practice if directed by the Board;

(2) Provide evidence of medical or psychiatric care if the need for  
such care is indicated by the circumstances leading to the violation and is directed  
by the Board;

///

1 (3) Allow the Board to obtain samples of blood or urine (at the  
2 pharmacist's option) for analysis at the pharmacist's expense, if the need for such a  
3 procedure is indicated by the circumstances leading to the violation and is directed  
4 by the Board;

5 (4) If and as directed by the Board, practice only under the  
6 supervision of a pharmacist not on probation to the Board. The supervision  
7 directed may be continuous supervision, substantial supervision, partial  
8 supervision, or supervision by daily review as deemed necessary by the Board for  
9 supervision, partial supervision, or supervision by daily review as deemed  
10 necessary by the Board for the protection of the public health and safety.

11 (5) Complete an ethics course that meets the requirements of  
12 section 1773.5.

13 (c) When the circumstances of the case so require, the Board may impose  
14 conditions of probation in addition to those enumerated herein by the terms of its  
15 decision in an administrative case or by stipulation of the parties.

#### 16 DRUG LAWS

17 8. Section 4022 of the Code states:

18 "Dangerous drug" or "dangerous device" means any drug or device unsafe for  
19 self-use, except veterinary drugs that are labeled as such, and includes the following:

20 "(a) Any drug that bears the legend: "Caution: federal law prohibits dispensing  
21 without prescription," "Rx only," or words of similar import.

22 "(b) Any device that bears the statement: "Caution: federal law restricts this  
23 device to sale by or on the order of a \_\_\_\_\_," "Rx only," or words of similar import, the  
24 blank to be filled in with the designation of the practitioner licensed to use or order use of the  
25 device.

26 "(c) Any other drug or device that by federal or state law can be lawfully  
27 dispensed only on prescription or furnished pursuant to Section 4006."

28 9. Section 4059 of the Code states:

(a) A person may not furnish any dangerous drug, except upon the  
prescription of a physician, dentist, podiatrist, optometrist, veterinarian, or  
naturopathic doctor pursuant to Section 3640.7.

10. Section 4060 of the Code states:

No person shall possess any controlled substance, except that furnished to  
a person upon the prescription of a physician, dentist, podiatrist, optometrist,  
veterinarian, or naturopathic doctor pursuant to Section 3640.7, or furnished  
pursuant to a drug order issued by a certified nurse-midwife pursuant to Section

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

10  
11 Nothing in this section authorizes a certified nurse-midwife, a nurse  
12 practitioner, a physician assistant, or a naturopathic doctor, to order his or her own  
13 stock of dangerous drugs and devices.

14 11. Section 4300 of the Code states:

15 (a) Every license issued may be suspended or revoked.

16 .....

17 12. Section 4301 of the Code states:

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

22 .....

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

.....

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

.....

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

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

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

12  
13 13. Health and Safety Code section 11170 provides that "No person shall  
14 prescribe, administer, or furnish a controlled substance for himself."

15  
16 14. Health and Safety Code section 11350 provides:

17 (a) Except as otherwise provided in this division, every person who  
18 possesses (1) any controlled substance specified in subdivision (b) or (c), or  
19 paragraph (1) of subdivision (f) of Section 11054, specified in paragraph (14),  
20 (15), or (20) of subdivision (d) of Section 11054, or specified in subdivision (b) or  
21 (c) of Section 11055, or specified in subdivision (h) of Section 11056, or (2) any  
22 controlled substance classified in Schedule III, IV, or V which is a narcotic drug,  
23 unless upon the written prescription of a physician, dentist, podiatrist, or  
24 veterinarian licensed to practice in this state, shall be punished by imprisonment  
25 in the state prison.

#### 26 PETITION TO REVOKE PROBATION

27 15. Grounds exist for revoking the probation and reimposing the order of  
28 revocation of Pharmacy License Number RPH 43281 issued to Respondent. The Board's  
disciplinary order effective on October 31, 2001, contained Probation Condition 24, Violation of  
Probation, which provides as follows:

If respondent violates probation in any respect, the board, after giving  
respondent notice and an opportunity to be heard, may revoke probation and carry  
out the disciplinary order which was stayed. If a petition to revoke probation or an  
accusation is filed against respondent during probation, the board shall have  
continuing jurisdiction and the period of probation shall be extended, until the  
petition to revoke probation or accusation is heard and decided.

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

1                   16.    Respondent has violated the conditions of his probation as set forth in the  
2 following paragraphs.

3   FIRST CAUSE TO REVOKE PROBATION

4   **(Failure to Comply With Rehabilitation Program)**

5                   17.    The Board's disciplinary order effective on October 31, 2001, contained  
6 Probation Condition 2, Rehabilitation Program - Pharmacist Recovery Program (PRP), which  
7 required Respondent to do the following:

8   Respondent's participation in the Pharmacist Recovery Program is now  
9 mandatory, as of the date this decision is effective. Respondent shall successfully  
10 participate in and complete his current contract and any subsequent addendums  
with the PRP. Probation shall be extended until Respondent successfully  
completes his treatment contract.

11   After the 120 day suspension period discussed above, respondent shall not  
12 resume the practice of pharmacy unless and until permitted by the PRP to do so.

13                   18.    Respondent's probation is subject to revocation because he failed to  
14 comply with Probation Condition 2, referenced above. On February 8, 2010, the Board received  
15 a relapse occurrence report from Maximus which indicated that Respondent notified his Clinical  
16 Case Manager that he had relapsed when he found a prescription for Soma and took the  
17 medication followed by beer on February 5, 2010 and then again on February 6, 2010. Soma, the  
18 brand name for Carisoprodol, is a dangerous drug pursuant to Business and Professions Code  
19 section 4022. Soma is used as a muscle relaxant. On February 8, 2010, the Board was notified  
20 that Respondent had been terminated from the Pharmacist Recovery Program and was deemed a  
21 public risk. Respondent was suspended from practice until further notice.

22                   19.    Respondent's probation is subject to revocation because he failed to  
23 comply with Probation Condition 2, referenced above. Respondent was required to participate  
24 and complete the Pharmacist Recovery Program. Respondent's termination from the program  
25 after his use of drugs and alcohol is a violation of the terms of his probation.

26 ///

27 ///

28 ///

1 SECOND CAUSE TO REVOKE PROBATION

2 **(Failure to Abstain From Drug Use)**

3 20. The Board's disciplinary order effective on October 31, 2001, contained  
4 Probation Condition 4, Abstain From Drug Use, which required Respondent to do the following:

5 Respondent shall abstain completely from the possession or use or  
6 possession of controlled substances and dangerous drugs. This order does not  
7 apply in instances where medications are lawfully prescribed to the respondent  
8 for a legitimate illness or condition by a physician, dentist or podiatrist and where  
9 respondent, upon request of the Board or its designee, provides documentation  
10 from the treating physician, dentist or podiatrist that the prescription was  
11 legitimately issued and is a necessary part of the treatment of the respondent.

12  
13 If at any time during the period of probation respondent tests positive for  
14 controlled substances or dangerous drugs as a result of any biological fluid testing  
15 and if respondent does not have a legitimate prescription from a physician, dentist  
16 or podiatrist as set forth above for those controlled substances or dangerous drugs,  
17 the Board shall, without affording respondent notice and the opportunity to be  
18 heard, revoke probation and carry out the disciplinary order that was stayed.

19  
20 21. Respondent's probation is subject to revocation because he failed to  
21 comply with Probation Condition 4, referenced above. Respondent consumed dangerous drugs  
22 or controlled substances without a prescription when he consumed soma. The circumstances  
23 supporting this cause to revoke probation are set forth in paragraph 18 above and are herein  
24 incorporated by reference.

25 THIRD CAUSE TO REVOKE PROBATION

26 **(Failure to Abstain From Alcohol Use)**

27 22. The Board's disciplinary order effective on October 31, 2001, contained  
28 Probation Condition 5, Abstain From Alcohol Use, which required Respondent to do the  
following:

Respondent shall abstain completely from the use of alcoholic beverages.

23  
24 23. Respondent's probation is subject to revocation because he failed to  
25 comply with Probation Condition 5, referenced above. Respondent consumed alcohol when he  
26 drank beer. The circumstances supporting this cause to revoke probation are set forth in  
27 paragraph 18 above and are herein incorporated by reference.

28 ///

1 FOURTH CAUSE TO REVOKE PROBATION

2 (Failure to Obey All Laws)

3 24. The Board's disciplinary order effective on October 31, 2001, contained  
4 Probation Condition 9, Obey All Laws, which required Respondent to do the following:

5 Respondent shall obey all federal and state laws and regulations  
6 substantially related or governing the practice of pharmacy.

7 25. Respondent's probation is subject to revocation because he failed to  
8 comply with Probation Condition 9, referenced above in the following ways.

- 9 a. Respondent consumed controlled substances or dangerous drugs in  
10 an injurious manner in violation of sections 4301, subdivision (h).  
11 The circumstances supporting this cause to revoke probation are  
12 set forth in paragraph 18 above and are herein incorporated by  
13 reference.
- 14 b. Respondent furnished dangerous drugs to himself without a  
15 prescription in violation of Section 4059. The circumstances  
16 supporting this cause to revoke probation are set forth in paragraph  
17 18 above and are herein incorporated by reference.
- 18 c. Respondent possessed controlled substances without a prescription  
19 and not in stock containers in violation of Code section 4060. The  
20 circumstances supporting this cause to revoke probation are set  
21 forth in paragraph 18 above and are herein incorporated by  
22 reference.
- 23 d. Respondent administered controlled substances to himself in  
24 violation of Health and Safety Code section 11170. The  
25 circumstances supporting this cause to revoke probation are set  
26 forth in paragraph 18 above and are herein incorporated by  
27 reference.

28 ///



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

e. Respondent possessed controlled substances without a valid prescription in violation of Health and Safety Code section 11350. The circumstances supporting this cause to revoke probation are set forth in paragraph 18 above and are herein incorporated by reference.

DISCIPLINE CONSIDERATIONS

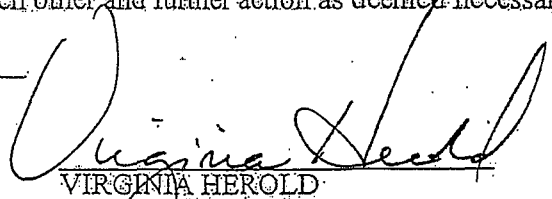
26. To determine the degree of discipline, if any, to be imposed on Respondent's license, Complainant alleges that disciplinary action has been taken against Respondent previously in Case No. 2339, as is outlined above in paragraphs 3 to 4. He also has an outstanding Accusation and Petition to Revoke Probation before the Board based upon a conviction of Driving Under the Influence of Drugs. Respondent's pharmacist license remains on probation and he was terminated from the Pharmacist Recovery Program, which he has been under since 2001.

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. 2339 and imposing the disciplinary order that was stayed thereby revoking Original Pharmacist License No. RPH 43281 issued to Donald Steven Merkel;
2. Revoking or suspending Pharmacist License Number RPH 43281, issued to Donald Steven Merkel.
3. Taking such other and further action as deemed necessary and proper.

DATED: 3/30/10



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

**Decision and Order**  
**Case No. 2339**

1 **BILL LOCKYER**, Attorney General  
of the State of California  
2 **SUSAN A. RUFF**, State Bar No. 115869  
Deputy Attorney General  
3 California Department of Justice  
110 West "A" Street, Suite 1100  
4 San Diego, California 92101  
5 P.O. Box 85266  
San Diego, California 92186-5266  
6 Telephone: (619) 645-2077  
Facsimile: (619) 645-2061

7 Attorneys for Complainant

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

12 In the Matter of the Accusation Against:

13 **DONALD STEVEN MERKEL**  
14 1330 Reed St. #2  
San Diego, CA 92109  
15 Pharmacist License No. RPH 43281

16 Respondent.

Case No. 2339

OAH No. L-2001020525

17  
18  
19  
20  
21 **STIPULATED SETTLEMENT AND**  
**DISCIPLINARY ORDER**

22 In the interest of a prompt and speedy settlement of this matter, consistent with  
23 the public interest and the responsibility of the Board of Pharmacy of the Department of  
24 Consumer Affairs, ("Board"), the parties hereby agree to the following Stipulated Settlement and  
25 Disciplinary Order which will be submitted to the Board for its approval and adoption as the  
26 final disposition of the Accusation.

27 PARTIES

28 1. Complainant Patricia F. Harris is the Executive Officer of the Board of Pharmacy.  
She brought this action solely in her official capacity and is represented in this matter by Bill  
Lockyer, Attorney General of the State of California, by Susan A. Ruff, Deputy Attorney  
General.

1           2.     Respondent Donald Steven Merkel ("respondent") is represented in this  
2 proceeding by attorney Michael D. Stein, whose address is: 286 Third Avenue, Suite 202, Chula  
3 Vista, California 91910.

4           3.     On or about March 15, 1990, the Board of Pharmacy issued Pharmacist License  
5 Number RPH 43281 to respondent. The license will expire on November 30, 2001, unless  
6 renewed.

7                                 JURISDICTION

8           4.     Accusation No. 2339, was filed before the Board and is currently pending against  
9 respondent. The Accusation, together with all other statutorily required documents, was duly  
10 served on respondent on January 30, 2001, and respondent timely filed his Notice of Defense  
11 contesting the Accusation. A copy of Accusation No. 2339 is attached as Exhibit A and  
12 incorporated herein by reference.

13                                 ADVISEMENT AND WAIVERS

14           5.     Respondent has carefully read and discussed with his counsel the nature of the  
15 charges and allegations in the Accusation and the effects of this Stipulated Settlement and  
16 Disciplinary Order.

17           6.     Respondent is fully aware of his legal rights in this matter, including the right to a  
18 hearing on the charges and allegations in the Accusation, the right to confront and cross-examine  
19 the witnesses against him, the right to present evidence and to testify on his own behalf, the right  
20 to the issuance of subpoenas to compel the attendance of witnesses and the production of  
21 documents, the right to reconsideration and court review of an adverse decision, and all other  
22 rights accorded by the California Administrative Procedure Act and other applicable laws.

23           7.     Respondent voluntarily, knowingly and intelligently waives and gives up each and  
24 every right set forth above.

25                                 CULPABILITY

26           8.     Respondent understands that the charges and allegations in the Accusation, if  
27 proven at a hearing, constitute cause for imposing discipline upon his license.

28     ///

1 9. Respondent admits the truth of each and every charge and allegation in  
2 Accusation No. 2339, except for the final sentence of paragraph 6 on page 5, lines 21-23 of the  
3 Accusation, which begins: "He also admitted that..." and ends with: "orders for the drugs."  
4 Respondent denies the allegations contained in that sentence.

5 10. Respondent agrees that his license is subject to discipline and he agrees to be  
6 bound by the Board's imposition of discipline as set forth in the Order below.

7 CONTINGENCY

8 11. This stipulation shall be subject to the approval of the Board. Respondent  
9 understands and agrees that, in deciding whether to adopt this stipulation, the Board may receive  
10 oral and written presentation from, and make inquiries of, complainant, her attorneys, the Board's  
11 attorneys, consulting experts, and the Board's enforcement committee. Respondent further  
12 understands and agrees that the Board's staff and counsel for complainant may communicate  
13 directly with the Board regarding this stipulation and settlement, without notice to or  
14 participation by respondent or his counsel. If the Board fails to adopt this stipulation as its  
15 Order, except for this paragraph the Stipulated Settlement and Disciplinary Order shall be of no  
16 force or effect, it shall be inadmissible in any legal action between the parties, and the Board  
17 shall not be disqualified from further action by having considered this matter.

18 12. The parties agree that facsimile copies of this Stipulated Settlement and  
19 Disciplinary Order, including facsimile signatures thereto, shall have the same force and effect as  
20 the original Stipulated Settlement and Disciplinary Order and signatures.

21 13. In consideration of the foregoing admissions and stipulations, the parties agree  
22 that the Board shall, without further notice or formal proceeding, issue and enter the following  
23 Disciplinary Order:

24 DISCIPLINARY ORDER

25 IT IS HEREBY ORDERED that Pharmacist License Number RPH 43281 issued  
26 to respondent Donald Steven Merkel is revoked. However, the revocation is stayed and  
27 respondent is placed on probation for five (5) years on the following terms and conditions.

28 ///

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

1. **Actual Suspension**

As part of probation, respondent is suspended from the practice of pharmacy for one hundred twenty (120) days beginning the effective date of this decision.

During suspension, respondent shall not enter any pharmacy area or any portion of the licensed premises of a wholesaler, medical device retailer or any other distributor of drugs which is licensed by the Board, or any manufacturer, or where dangerous drugs, controlled substances or legend drugs are maintained. Respondent shall not practice pharmacy nor do any act involving drug selection, selection of stock, manufacturing, compounding, dispensing or patient consultation; nor shall respondent manage, administer, or be a consultant to any licensee of the Board, or have access to or control the ordering, manufacturing or dispensing of dangerous drugs or controlled substances. Respondent shall not direct or control any aspect of the practice of pharmacy.

2. **Rehabilitation Program - Pharmacist Recovery Program (PRP)**

Respondent's participation in the Pharmacist Recovery Program is now mandatory, as of the date this decision is effective. Respondent shall successfully participate in and complete his current contract and any subsequent addendums with the PRP. Probation shall be extended until respondent successfully completes his treatment contract.

After the 120 day suspension period discussed above, respondent shall not resume the practice of pharmacy unless and until permitted by the PRP to do so.

3. **Random Fluid Testing**

Respondent shall immediately submit, with or without prior notice, to biological fluid testing, at respondent's expense, upon the request of the Board or its designee. The length and frequency of this testing requirement will be determined by the Board.

///  
///  
///  
///  
///

1           4.    Abstain From Drug Use

2                   Respondent shall abstain completely from the personal use or possession of  
3 controlled substances and dangerous drugs. This order does not apply in instances where  
4 medications are lawfully prescribed to the respondent for a legitimate illness or condition by a  
5 physician, dentist or podiatrist and where respondent, upon request of the Board or its designee,  
6 provides documentation from the treating physician, dentist or podiatrist that the prescription was  
7 legitimately issued and is a necessary part of the treatment of the respondent.

8                   If at any time during the period of probation respondent tests positive for  
9 controlled substances or dangerous drugs as a result of any biological fluid testing and if  
10 respondent does not have a legitimate prescription from a physician, dentist or podiatrist as set  
11 forth above for those controlled substances or dangerous drugs, the Board shall, without  
12 affording respondent notice and the opportunity to be heard, revoke probation and carry out the  
13 disciplinary order that was stayed.

14           5.    Abstain from Alcohol Use

15                   Respondent shall abstain completely from the use of alcoholic beverages.

16           6.    Supervised Practice

17                   Respondent shall practice only under the supervision of a pharmacist not on  
18 probation to the Board. Respondent shall not practice until the supervisor is approved by the  
19 board or its designee. The supervision as required by the Board, may be:

20                   Continuous - 75% to 100% of a work week

21                   Substantial - At least 50% of a work week

22                   Partial - At least 25% of a work week

23                   Daily Review - Supervisor's review of probationer's daily activities within 24

24  
25                   Within thirty (30) days of the effective date of this decision, respondent shall  
26 have his supervisor submit a report to the Board in writing stating the supervisor has read  
27 the decision in Accusation case number 2339. If respondent changes employment, respondent  
28 shall have his new supervisor, within fifteen (15) days after employment commences, submit

1 a report to the Board in writing stating the supervisor has read the decision in Accusation case  
2 number 2339.

3           Within ten (10), days of leaving employment, respondent shall so notify  
4 the Board in writing.

5           7.     No Supervision

6           Respondent shall not supervise any ancillary personnel, including, but not  
7 limited to, registered technicians or exemptees, of any pharmacy or wholesaler licensed by the  
8 Board.

9           8.     No Ownership of Premises

10           Respondent shall not own, have any legal or beneficial interest in, or serve as a  
11 manager, administrator, member, officer, director, associate, or partner of any business, firm,  
12 partnership, or corporation currently or hereinafter licensed by the Board. Respondent shall  
13 sell or transfer any legal or beneficial interest in any entity licensed by the Board within 90 days  
14 following the effective date of this decision and shall immediately thereafter provide written  
15 proof thereof to the Board.

16           9.     Obey All Laws

17           Respondent shall obey all federal and state laws and regulations substantially  
18 related or governing the practice of pharmacy.

19           10.    Reporting to the Board

20           Respondent shall report to the Board or its designee quarterly. The report shall be  
21 made either in person or in writing, as directed. If the final probation report is not made  
22 as directed, probation shall be extended automatically until such time as the final report is  
23 made.

24           11.    Interview with the Board

25           Upon receipt of reasonable notice, respondent shall appear in person for  
26 interviews with the Board or its designee upon request at various intervals at a location to be  
27 determined by the Board or its designee. Failure to appear for a scheduled interview without  
28 prior notification to Board staff shall be considered a violation of probation.



1           12.    Cooperation with Board Staff

2                   Respondent shall cooperate with the Board's inspectional program and in the  
3 Board's monitoring and investigation of the respondent's compliance with the terms and  
4 conditions of his probation. Failure to cooperate shall be considered a violation of probation.

5           14.    Peer Review

6                   Respondent shall submit to peer review as deemed necessary by the Board.

7           15.    Continuing Education

8                   Respondent shall provide evidence of efforts to maintain skill and knowledge as a  
9 pharmacist as directed by the Board.

10          16.    Notice to Employers

11                   Respondent shall notify all present and prospective employers of the decision in  
12 Accusation case number 2339 and the terms, conditions and restrictions imposed on respondent  
13 by the decision. Within thirty (30) days of the effective date of this decision, and within fifteen  
14 (15) days of respondent undertaking new employment, respondent shall cause his employer to  
15 report to the Board in writing acknowledging the employer has read the decision in Accusation  
16 case number 2339.

17                   If respondent works for or is employed by or through a pharmacy employment  
18 service, respondent must notify the pharmacist-in-charge and/or owner at every pharmacy at  
19 which he is to be employed or used of the fact and terms of the decision in Accusation case  
20 number 2339 in advance of the respondent commencing work at the pharmacy.

21                   "Employment" within the meaning of this provision shall include any full-time,  
22 part-time, temporary or relief service or pharmacy management service as a pharmacist, whether  
23 the respondent is considered an employee or independent contractor.

24          17.    No Preceptorships, Supervision of Interns, Being Pharmacist-in-Charge

25                   Respondent shall not supervise any intern pharmacist or perform any of the duties  
26 of a preceptor, nor shall respondent be the pharmacist-in-charge of any pharmacy licensed by the  
27 Board.

28    ///

1           18.    Reimbursement of Board Costs

2                   Respondent shall pay to the Board its costs of investigation and prosecution in  
3 the amount of \$6,000.00.

4                   Respondent shall make said payments as follows: Respondent shall make monthly  
5 payments of \$200.00, on the first day of each month, beginning 120 days after the effective date  
6 of this decision.

7                   If respondent fails to pay the costs as specified by the Board and on or before the  
8 date(s) determined by the Board, the Board shall, without affording the respondent notice and  
9 the opportunity to be heard, revoke probation and carry out the disciplinary order that was  
10 stayed.

11           19.    Probation Monitoring Costs

12                   Respondent shall pay the costs associated with probation monitoring as  
13 determined by the Board each and every year of probation. Such costs shall be payable to the  
14 Board at the end of each year of probation. Failure to pay such costs shall be considered a  
15 violation of probation.

16           20.    Status of License

17                   Respondent shall, at all times while on probation, maintain an active current  
18 license with the Board, including any period during which suspension or probation is tolled.

19                   If respondent's license expires by operation of law or otherwise, upon renewal or  
20 reapplication, respondent's license shall be subject to all terms of this probation not previously  
21 satisfied.

22           21.    Notification of Employment/Mailing Address Change

23                   Within ten (10) days of a change in employment -- either leaving or  
24 commencing employment -- respondent shall so notify the Board in writing, including the  
25 address of the new employer; within ten (10) days of a change of mailing address, respondent  
26 shall notify the Board in writing. If respondent works for or is employed through a pharmacy  
27 employment service, respondent shall, as requested, provide to the Board or its designee with  
28 a work schedule, indicating dates and location of employment.

1           22.    **Tolling of Probation**

2                    If respondent leaves California to reside or practice outside this state, respondent  
3 must notify the Board in writing of the dates of departure and return within ten (10) days of  
4 departure or return. Periods of residency, except such periods where the respondent is  
5 actively practicing pharmacy within California, or practice outside California shall not apply to  
6 reduction of the probationary period.

7                    Should respondent, regardless of residency, for any reason cease practicing  
8 pharmacy in California, respondent must notify the Board in writing within ten (10) days of  
9 cessation of the practice of pharmacy or resuming the practice of pharmacy. "Cessation of  
10 practice" means any period of time exceeding thirty (30) days in which respondent is not  
11 engaged in the practice of pharmacy as defined in section 4052 of the Business and Professions  
12 Code.

13                    It is a violation of probation for respondent's probation to remain tolled pursuant  
14 to the provisions of this condition for a period exceeding a consecutive period of three years.

15           23.    **Tolling of Suspension**

16                    If respondent leaves California to reside or practice outside this state, or for any  
17 period exceeding ten (10) days (including vacation), respondent must notify the Board in writing  
18 of the dates of departure and return. Periods of residency or practice outside the state - or any  
19 absence exceeding a period of ten (10) days shall not apply to the reduction of the suspension  
20 period.

21                    Respondent shall not practice pharmacy upon returning to this state until  
22 notification by the Board the period of suspension has been completed.

23           24.    **Violation of Probation**

24                    If respondent violates probation in any respect, the Board, after giving respondent  
25 notice and an opportunity to be heard, may revoke probation and carry out the disciplinary  
26 order which was stayed. If a petition to revoke probation or an accusation is filed against  
27 respondent during probation, the Board shall have continuing jurisdiction, and the period of  
28 probation shall be extended, until the petition to revoke probation is heard and decided.

1                   **If a respondent has not complied with any term or condition of probation, the**  
 2 **Board shall have continuing jurisdiction over respondent, and probation shall automatically be**  
 3 **extended until all terms and conditions have been met or the Board has taken other action as**  
 4 **deemed appropriate to treat the failure to comply as a violation of probation, to terminate**  
 5 **probation, and to impose the penalty which was stayed.**

6           25.    **Completion of Probation**

7                   **Upon successful completion of probation, respondent's license will be fully**  
 8 **restored.**

9    ///  
 10    ///  
 11    ///  
 12    ///  
 13    ///  
 14    ///  
 15    ///  
 16    ///  
 17    ///  
 18    ///  
 19    ///  
 20    ///  
 21    ///  
 22    ///  
 23    ///  
 24    ///  
 25    ///  
 26    ///  
 27    ///  
 28    ///

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

ACCEPTANCE

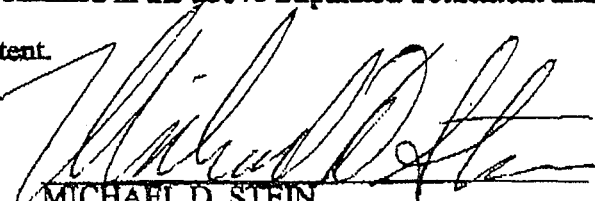
I have carefully read the above Stipulated Settlement and Disciplinary Order and have fully discussed the terms and conditions and other matters contained therein with my attorney Michael D. Stein. I understand the effect this stipulation will have on my Pharmacist License. I enter into this Stipulated Settlement voluntarily, knowingly and intelligently and agree to be bound by the Disciplinary Order and Decision of the Board of Pharmacy. I further agree that a facsimile copy of this Stipulated Settlement and Disciplinary Order, including facsimile copies of signatures, may be used with the same force and effect as the originals.

DATED: 5/29/01

  
DONALD STEVEN MERKEL  
Respondent

I have read and fully discussed with Respondent Donald Steven Merkel the terms and conditions and other matters contained in the above Stipulated Settlement and Disciplinary Order. I approve its form and content.

DATED: 5/29/01

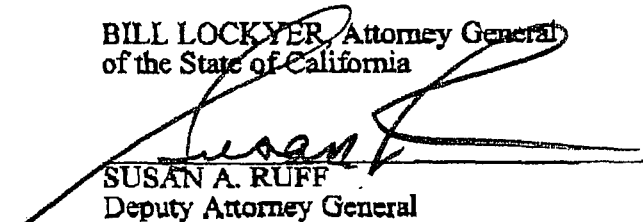
  
MICHAEL D. STEIN  
Attorney for Respondent

ENDORSEMENT

The foregoing Stipulated Settlement and Disciplinary Order is hereby respectfully submitted for consideration by the Board of Pharmacy of the Department of Consumer Affairs.

DATED: 5/31/01

BILL LOCKYER, Attorney General  
of the State of California

  
SUSAN A. RUFF  
Deputy Attorney General

Attorneys for Complainant

BEFORE THE  
BOARD OF PHARMACY  
DEPARTMENT OF CONSUMER AFFAIRS  
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

DONALD STEVEN MERKEL  
1330 Reed St. #2  
San Diego, CA 92109

Pharmacist License No. RPH 43281

Respondent.

Case No. 2339

OAH No. L-2001020525

DECISION AND ORDER

The attached Stipulated Settlement and Disciplinary Order is hereby adopted by the Board of Pharmacy of the Department of Consumer Affairs, as its Decision in the above entitled matter.

This Decision shall become effective on October 13, 2001.

IT IS SO ORDERED September 13, 2001.

BOARD OF PHARMACY  
DEPARTMENT OF CONSUMER AFFAIRS  
STATE OF CALIFORNIA

By

  
STEVE LITSEY  
Board President

Received: 5/30/01 8:39AM;

619-224-6775 -> DEPT OF JUSTICE; Page 13

05/30/2001 08:32 619-224-6775

RO2

PAGE 13

Sent by: DEPT OF JUSTICE

619 845 2061;

05/24/01 5:02PM; JustFax #427; Page 18/24

**Exhibit A:**

**Accusation Number 2339**

---

1 **BILL LOCKYER, Attorney General**  
 of the State of California  
 2 **SUSAN A. RUFF, State Bar No. 115869**  
 Deputy Attorney General  
 3 California Department of Justice  
 110 West "A" Street, Suite 1100  
 4 San Diego, California 92101

5 P.O. Box 85266  
 San Diego, California 92186-5266  
 6 Telephone: (619) 645-2077  
 Facsimile: (619) 645-2061

7 Attorneys for Complainant

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

12 In the Matter of the Accusation Against:

Case No. 2339

13 **DONALD STEVEN MERKEL**  
 14 1330 Reed St. #2  
 San Diego, CA 92109

15 Pharmacist License No. RPH 43281

**ACCUSATION**

16 Respondent.

17  
 18 Complainant alleges:

19 **PARTIES**

- 20 1. Patricia F. Harris ("Complainant") brings this Accusation solely in her official  
 21 capacity as the Executive Officer of the Board of Pharmacy, Department of Consumer Affairs.
- 22 2. On or about March 15, 1990, the Board of Pharmacy issued Pharmacist License  
 23 Number RPH 43281 to Donald Steven Merkel ("respondent"). The Pharmacist License was in  
 24 full force and effect at all times relevant to the charges brought herein and will expire on  
 25 November 30, 2001, unless renewed.

26 ///

27 ///

28 ///



JURISDICTION

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

3. This Accusation is brought before the Board of Pharmacy ("Board"), under the authority of the following sections of the Business and Professions Code ("Code").

a. Section 4301 states, in part:

"The board shall take action against any holder of a license who is guilty of unprofessional conduct or whose license has been procured by fraud or misrepresentation or issued by mistake. Unprofessional conduct shall include, but is not 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 Chapter 9 (commencing with Section 4000) of the Business and Professions Code, 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 or of the United States regulating controlled substances and dangerous drugs.

b. Section 4022 states, in 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.

(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.

///  
///

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

c. Section 4059 provides, in part, that: "(a) No person shall furnish any dangerous drug, except upon the prescription of a physician, dentist, podiatrist, optometrist, or veterinarian. No person shall furnish any dangerous device, except upon the prescription of a physician, dentist, podiatrist, optometrist, or veterinarian."

d. Section 4060 provides, in part, that: "No person shall possess any controlled substance, except that furnished to a person upon the prescription of a physician, dentist, podiatrist, or veterinarian, or furnished pursuant to a drug order issued by a physician assistant pursuant to Section 3502.1 or a nurse practitioner pursuant to Section 2836.1. This section shall not apply to the possession of any controlled substance by a manufacturer, wholesaler, pharmacy, physician, podiatrist, dentist, veterinarian, physician assistant, or nurse practitioner, when in stock in containers correctly labeled with the name and address of the supplier or producer."

e. Section 4327 provides that: "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."

f. Section 4402 provides, in part, that:  
(a) 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.

g. Section 118(b) 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.

h. Section 4307 provides, in part, that:  
(a) Any person who has been denied a license or whose license has been revoked or is under suspension, or who has failed to renew his or her license while it was under suspension, or who has been a manager, administrator, owner, member, officer, director, associate, or partner of any partnership, corporation, firm, or association whose

1 application for a license has been denied or revoked, is under suspension or has been  
 2 placed on probation, and while acting as the manager, administrator, owner, member,  
 3 officer, director, associate, or partner had knowledge of or knowingly participated in any  
 4 conduct for which the license was denied, revoked, suspended, or placed on probation,  
 5 shall be prohibited from serving as a manager, administrator, owner, member, officer,  
 6 director, associate, or partner of a licensee as follows: (1) Where a probationary license is  
 7 issued or where an existing license is placed on probation, this prohibition shall remain in  
 8 effect for a period not to exceed five years. (2) Where the license is denied or revoked,  
 9 the prohibition shall continue until the license is issued or reinstated."

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

14 DRUGS

15 4. The following drugs are dangerous drugs pursuant to Code section 4022 and  
 16 controlled substances pursuant to the Health and Safety Code ("H&S Code"):

17 a) Dexedrine, a brand name for dextroamphetamine sulfate, is a Schedule II  
 18 controlled substance pursuant to H&S Code section 11055.

19 b) Dilaudid, a brand name for hydromorphone hydrochloride, is a Schedule II  
 20 controlled substance pursuant to H&S Code section 11055(b).

21 c) MSIR, a brand name for morphine sulfate immediate release tablets, is a  
 22 Schedule II controlled substance pursuant to H&S Code section 11055(b).

23 d) MS Contin, a brand name for morphine sulfate controlled release, is a  
 24 Schedule II controlled substance pursuant to H&S Code section 11055(b).

25 e) Percocet, a brand name for oxycodone and acetaminophen, is a Schedule II  
 26 controlled substance pursuant to H&S Code section 11055(b).

27 f) Ritalin, a brand name for methylphenidate, is a Schedule II controlled  
 28 substance pursuant to H&S Code section 11055.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

g) Oxycontin, a brand name for oxycodone controlled release, is a Schedule II controlled substance pursuant to H&S Code section 11055(b).

h) Roxiprin, a brand name for oxycodone and aspirin, is a Schedule II controlled substance pursuant to H&S Code section 11055(b).

i) Vicodin, a brand name for hydrocodone and acetaminophen, is a Schedule III controlled substance pursuant to H&S Code section 11056.

j) Valium, a brand name for diazepam, is a Schedule IV controlled substance pursuant to H&S Code section 11057.

k) Fastin, a brand name for phentermine, is a Schedule IV controlled substance pursuant to H&S Code section 11057.

FIRST CAUSE FOR DISCIPLINE

(Self-Administering Controlled Substances  
In a Manner Dangerous or Injurious)

5. Complainant realleges the allegations of paragraphs 1 through 4 set forth above and incorporates those allegations by reference herein as if fully set forth at this point.

6. In or before October 1996, respondent, while working as a pharmacist at Sav-on #3137 pharmacy, stole from the pharmacy supply and self-administered various quantities of some or all of the following controlled substances: Dexedrine, MS Contin, MSIR, Vicodin, Ritalin, Oxycontin, Percocet, Fastin, Valium, Dilaudid and Roxiprin. Respondent admitted to self-administering the drugs while working as a pharmacist. He stated that his addiction and drug use impaired him to the extent that he could not remember all the drugs he stole. He also admitted that, while impaired, he may have furnished or dispensed controlled substances to customers who did not have valid refill orders for the drugs.

7. Respondent's conduct, as more particularly alleged in paragraph 6 above, violated Code section 4301(h) in that respondent self-administered controlled substances and used controlled substances to the extent or in a manner dangerous or injurious to himself or others or to the extent that the use impaired his ability to safely practice as a pharmacist.

///

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

SECOND CAUSE FOR DISCIPLINE

(Moral Turpitude or Dishonesty)

8. Complainant realleges the allegations of paragraphs 1 through 6 set forth above and incorporates those allegations by reference herein as if fully set forth at this point.

9. Respondent's conduct, as more particularly set forth in paragraph 6 above, constituted dishonesty or moral turpitude in violation of Code section 4301(f) in that respondent, while working as a pharmacist, stole controlled substances and dangerous drugs from his employer.

THIRD CAUSE FOR DISCIPLINE

(Violation of Laws Regarding Controlled Substances)

10. Complainant realleges the allegations of paragraphs 1 through 6 set forth above and incorporates those allegations by reference herein as if fully set forth at this point.

11. Respondent's conduct, as more particularly set forth in paragraph 6 above, violated Code section 4301 (j) in that respondent violated the following statutes regulating controlled substances and dangerous drugs:

a) Respondent furnished dangerous drugs to himself without a prescription in violation of Code section 4059.

b) Respondent possessed controlled substances without a prescription in violation of Code section 4060.

c) Respondent, while on duty as a pharmacist, sold, dispensed or compounded drugs while under the influence of dangerous drugs and controlled substances in violation of Code section 4327.

d) Respondent administered or furnished controlled substances to himself in violation of H&S Code section 11170.

e) Respondent possessed Schedule II controlled substances specified in H&S Code section 11055(b) without a valid, written prescription in violation of H&S Code section 11350.

///

FOURTH CAUSE FOR DISCIPLINE

(Unprofessional Conduct)

12. Complainant realleges the allegations of paragraphs 1 through 6 set forth above and incorporates those allegations by reference herein as if fully set forth at this point.

13. Respondent's conduct, as more particularly set forth in paragraph 6 above, constituted unprofessional conduct in violation of Code section 4301.

OTHER

14. Pursuant to Code section 4307, if respondent's license is revoked, suspended or placed on probation, respondent should be prohibited from serving as a manager, administrator, owner, member, officer, director, associate, or partner of a licensee during any time while his license is revoked or suspended, or for five years after his license is placed on probation.

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 Number RPH 43281 issued to respondent;
- 2. Ordering respondent to pay the Board the reasonable costs of the investigation and enforcement of this case, pursuant to Code section 125.3;
- 3. Prohibiting respondent from serving as a manager, administrator, owner, member, officer, director, associate, or partner of a licensee during any time while his license is revoked or suspended, or for five years after his license is placed on probation, pursuant to Code section 4307; and

///  
///  
///  
///  
///  
///

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

4. Taking such other and further action as deemed necessary and proper.

DATED: 1/22/01

P. F. Harris  
PATRICIA F. HARRIS  
Executive Officer  
Board of Pharmacy  
Department of Consumer Affairs  
State of California  
Complainant

03583110-SD2000AD0790

**Order of Nonadoption of Proposed Decision No. 3306**



BEFORE THE  
BOARD OF PHARMACY  
DEPARTMENT OF CONSUMER AFFAIRS  
STATE OF CALIFORNIA

In the Matter of the Accusation and Petition to  
Revoke Probation Against:

DONALD STEVEN MERKEL  
1330 Reed Street #2  
San Diego, CA 92109

Pharmacist License No. RPH 43281

Respondent.

Case No. 3306

OAH No. 2009080245

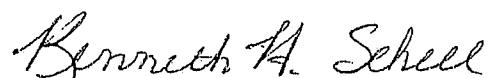
TO ALL PARTIES AND THEIR ATTORNEY OF RECORD:

ORDER OF NONADOPTION OF PROPOSED DECISION

YOU ARE HEREBY NOTIFIED pursuant to Section 11517 of the Government Code, the California State Board of Pharmacy hereby non-adopts the proposed decision in Administrative Case number 3306. A copy of the proposed decision is attached hereto.

The board will decide the case itself upon the record, including the transcript, exhibits and oral argument of the parties, without taking additional evidence. The Board has ordered a transcript and will notify the parties when the transcript has been prepared and of the date set for the parties to provide oral argument directly to the full Board at an open session meeting of the Board.

IT IS SO ORDERED THIS 3<sup>rd</sup> day of May 2010.



---

KENNETH H. SCHELL  
President  
State Board of Pharmacy

BEFORE THE  
BOARD OF PHARMACY  
DEPARTMENT OF CONSUMER AFFAIRS  
STATE OF CALIFORNIA

In the Matter of the Accusation and  
Petition to Revoke Probation Against:

DONALD STEVEN MERKEL,

Pharmacist License No. RPH 43281

Respondent.

Case No. 3306

OAH No. 2009080245

**PROPOSED DECISION**

Alan R. Alvord, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter at San Diego, California on September 24, 2009.

Diane DeKervor, Deputy Attorney General, Office of the Attorney General, State of California, represented complainant Virginia Herold, Executive Officer of the Board of Pharmacy, Department of Consumer Affairs, State of California.

James Byrnes, Law Office of James Byrnes, represented, respondent, who was present throughout the administrative proceeding.

The matter was submitted on September 24, 2009.

**FACTUAL FINDINGS**

*Jurisdictional Matters*

1. On July 20, 2009, complainant Virginia Herold, Executive Officer of the Board of Pharmacy, Department of Consumer Affairs, State of California (Board), State of California, signed the accusation and petition to revoke probation in her official capacity.

The accusation and petition sought to revoke respondent's earlier probation and to revoke his pharmacist license based on an incident that led to respondent's conviction for driving under the influence.

Respondent was served with the accusation and petition to revoke and other required jurisdictional documents. He timely filed a notice of defense.

On September 24, 2009, the record in the administrative action was opened. Jurisdictional documents were presented, documentary evidence and sworn testimony were received, closing arguments were given and the matter was submitted.

### *Respondent's License History*

2. On March 15, 1990, the Board of Pharmacy (board) issued pharmacist license number RPH 43281 to Donald Steven Merkel (Merkel or respondent). In 2001, the board's then executive officer issued an accusation against respondent alleging that he self-administered controlled substances in a manner dangerous or injurious, that he engaged in acts involving moral turpitude or dishonesty, that he violated laws regarding controlled substances, and that he engaged in unprofessional conduct. On May 29, 2001, respondent entered into a Stipulated Settlement and Disciplinary Order under which respondent agreed to five years' probation under certain terms and conditions which included, among others, 120 days' actual suspension, participation in a pharmacist recovery program, random fluid testing, abstention from use of drugs and alcohol, supervised practice and notice to employers.

The circumstances underlying the earlier administrative disciplinary action were that, in or before 1996, respondent stole from pharmacy supply and self-administered a total of 11 different controlled substances.

### *Respondent's Probation and Recovery*

3. On November 8, 1996, respondent began a recovery program for his addiction to drugs. He participated in Alcoholics Anonymous and Narcotics Anonymous meetings and actively worked these programs for 13 years. By the time the board filed its accusation against him in 2001, respondent had been clean and sober for five years. Respondent took responsibility for his conduct, admitted the allegations, and accepted discipline against his pharmacist license.

Under the 2001 disciplinary stipulation, respondent participated in the pharmacist recovery program, which included random fluid testing for drugs and alcohol. He has never tested positive for any prohibited substance in this program.

As of the time of the hearing, respondent had completed all terms and conditions of his probation with one exception: he had not yet been released from the pharmacist recovery program because of the intervening health problems discussed below. As of the time of the hearing, respondent continued to work under monitoring although the terms of his probation no longer required him to do so.

## *Intervening Health Problems*

4. Respondent's disciplinary probation and his recovery from drug addiction were hampered by several serious health problems. In 2005 he was racing off road motorcycles and had an accident. He broke several ribs, an ankle and shoulder bone, and had a collapsed lung. He required surgery and was given prescription medications for pain. He tried to take the pain medications as little as possible. He sometimes lived with pain or tried to manage pain with over the counter pain medications like acetaminophen and ibuprofen. After he recovered from the injuries, he was again drug free.

In January 2007, respondent felt pain and congestion in his chest. He had a pulmonary embolism. He was hospitalized and treated with anticoagulants. He was diagnosed with another pulmonary embolism in June 2007. He was given prescriptions for pain medications, and tried not to use them at all.

In October 2007, respondent had a stroke. He was again given prescription medications.

All of these acute health problems interfered with respondent's probation. Although he completed all other terms and conditions of probation, he could not be released from the pharmacist recovery program because the intervening health problems required him to use prescription drugs, albeit to a limited extent.

### *The February 1, 2008 Incident*

5. In late January 2008, respondent went to the emergency room with an extreme headache. He was diagnosed with a sinus infection and prescribed antibiotics. A week later, respondent was still experiencing the headache. Despite the headache, he worked a 12 hour shift at a pharmacy on January 31, 2008. He left work early in the morning on February 1, 2008. He went to his truck in the parking lot. He had a severe headache. He wanted to stop at McDonald's for some food. He fell asleep in the truck. He woke up an hour later and his headache was still severe. He reached for a bottle of prescription medications in his glove compartment.<sup>1</sup> Although respondent did not remember doing it, he admits he must have consumed a number of different prescription drugs. The next thing he knew, he was being arrested. The police found him trying to drive his truck over a curb. His truck had not left the parking space.

Subsequent blood toxicology tests found the opiates hydrocodone and oxycodone and the benzodiazepines diazepam, nordiazepam, alprazolam and lorazepam in his system.

---

<sup>1</sup> Respondent's mother-in-law had died some months earlier and Lisa Merkel, respondent's wife, had custody of a number of the mother-in-law's leftover prescription medications. She gave them to respondent about four days before the incident so he could dispose of the drugs at work and he had them in his car. Respondent also had valid prescriptions for various medications as described below.

## *Conviction*

6. On October 28, 2008, respondent pled guilty and was convicted of one count of violating California Vehicle Code section 23152(a) driving under the influence, a misdemeanor. As a result of this conviction, respondent was sentenced to five years' probation and required to attend a three month first conviction program, MADD impact panel, 90 days' drivers license suspension, he served one day in custody and was ordered to pay fines and restitution totaling approximately \$3,600. He has satisfied the terms and conditions of his criminal probation, which expires in 2013.

## *Mitigating Factor: Severe Illness*

7. The day after he was released from custody, respondent went to his usual morning recovery meeting, called "The Dawn Patrol." The Dawn Patrol meeting was frequented by healthcare professionals. There were medical doctors at the meeting that morning. Respondent collapsed during the meeting. He was sent to the hospital and was diagnosed with cranial osteomyelitis.<sup>2</sup> Respondent was told people usually don't recover from this disease. He and his wife were advised to get his affairs in order and prepare for the end of his life.

Respondent was hospitalized for 12 days. He received antibiotic infusion therapy. After release from the hospital, he went once a day to an infusion center. Infusion center treatments continued through July 2008. He also received antibiotics through a portable infusion pump. He was again given prescription pain medications, which he tried to take sparingly.

Against all odds, Respondent fully recovered from the infection. He adjusted his sobriety date to June 1, 2008, when he was able to stop taking all prescription medications. He has remained clean and sober since that date.

8. The presence of this life-threatening infection in respondent's cranium at the time of his DUI arrest is a significant factor that mitigates his ingestion of controlled substances and his attempt to drive his vehicle.

## *Did Respondent Possess or Consume Controlled Substances without a Prescription?*

9. *Consumption of Controlled Substances* Complainant alleged that respondent consumed controlled substances without a valid prescription. Valerie L. Knight, RPH (Knight), the board's investigator and expert witness, reviewed the toxicology reports and a CURES<sup>3</sup> patient activity report of prescriptions dispensed to respondent. Ms. Knight's analysis found evidence of valid prescriptions for all of the substances found to be in

---

<sup>2</sup> Osteomyelitis is an acute or chronic bone infection. Cranial osteomyelitis is an infection in the cranium or skull.

<sup>3</sup> CURES stands for the Controlled substance Utilization Review and Evaluation System operated by the California Department of Justice Bureau of Narcotic Enforcement. The purpose of the CURES system is to analyze healthcare provider prescribing practices to identify unusual or excessive prescribing patterns. The data in the CURES report is provided through pharmacies' electronic reporting directly to the Department of Justice.

respondent's blood except alprazolam, the generic form of Xanax. Based upon this review, complainant contended that respondent did not have a valid prescription for a drug containing alprazolam. Respondent testified that he had a prescription for Xanax, but that he could not locate documentary evidence of the prescription.

Knight admitted that the CURES report is not a comprehensive list of all prescriptions that were ever issued to respondent. Knight conceded that it is possible respondent had a valid prescription for a drug that was not listed on the CURES report. The CURES report by itself is not sufficient to establish by clear and convincing evidence that respondent lacked a prescription for Xanax. Respondent testified that he did have a valid prescription for Xanax, although he could not find written documentation of the existence of this prescription.

10. *Possession of Controlled Substances* Knight reviewed the CURES report and compared the dosages of drugs for which respondent had valid prescriptions to the dosages of drugs found in his possession at the time of the incident. Knight identified some discrepancies between the dosages prescribed and the dosages respondent possessed. Based on that analysis, Complainant alleged that respondent possessed certain controlled substances without a valid prescription. Respondent admits that he had in his possession certain drugs prescribed to his deceased mother-in-law. His explanation that he was in possession of these drugs for the purpose of safely disposing of them is consistent with legitimate activity of a licensed pharmacist and is not a violation of law or the terms of his probation. This explanation was not contradicted by any evidence from complainant, and was credible. Respondent testified about this explanation directly and clearly. His demeanor strongly suggested he was telling the truth when describing the circumstances of how he came into possession of his deceased mother in law's prescription medications. Respondent candidly admitted information that was clearly against his interest, suggesting credibility. The explanation was consistent, and was also supported by credible testimony from respondent's wife.

### *Rehabilitation Evidence*

11. Respondent presented testimony from family members, including his wife, teenage daughter, and his ex-wife. He also presented testimony from his recovery program sponsor, one of respondent's recovery program sponsees and several other members of his recovery program meeting groups. Some of these character witnesses were themselves healthcare professionals in recovery. They credibly and compellingly described respondent's commitment to his recovery.

The rehabilitation evidence was consistent and persuasive. Respondent is committed to his family, his profession, his community and his recovery. He has been a mentor and support to many others, including many healthcare professionals struggling with addiction.

### *Evaluation*

12. This was not a clear case of an addict pharmacist on probation who fell off the wagon. Respondent was in a strong recovery and drug-free for 13 years until a serious life

threatening infection contributed to a single lapse in judgment which may or may not be clinically described as a relapse. The circumstances of this case present one of the most vivid and compelling pictures of mitigation. While respondent's conduct was a clear violation of the terms of his probation, the mitigating factors argue against the most severe consequence for such a violation. More importantly, respondent's continued commitment to recovery immediately after the incident supports the conclusion that respondent has, through his hard work in recovery, developed the personal and internal resources to cope with a severe threat to his sobriety. It is difficult to imagine a better example of how addiction recovery is supposed to work.

13. The board is legitimately concerned about the circumstances of this incident. Given the evidence, the appropriate measure of discipline which ensures public protection is an extended period of probation. A complete revocation of respondent's license under the circumstances of this case would go beyond what is necessary for public protection and into the realm of punishment.

#### *Costs of Enforcement and Prosecution*

14. Cost certifications supporting enforcement and prosecution costs of \$6,348.50 were received. Counsel for complainant was well prepared and presented the case efficiently and professionally. The evidence established costs of \$6,348.50 were reasonable.

### LEGAL CONCLUSIONS

1. Complainant/petitioner has the burden in this matter of proving by clear and convincing evidence that there is a basis for discipline and a basis to revoke probation.

2. California Business and Professions Code section 490<sup>4</sup> authorizes discipline against a license on the ground that a licensee has been convicted of a crime, if the crime is substantially related to the qualifications, functions, or duties of the business or profession for which the license was issued.

Section 4301 authorizes disciplinary action against the holder of a license for unprofessional conduct, and defines unprofessional conduct to include "The administering to oneself, of any controlled substance, or the use of any dangerous drug or any of alcoholic beverages to the extent or in a manner as to be dangerous or injurious to oneself..." (subdivision (h)), "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," (subdivision (j)), conviction of a crime substantially related to the qualifications, functions, and duties of a licensee (subdivision (l)) and "[v]iolating or attempting 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," (subdivision (o)).

---

<sup>4</sup> All statutory references are to the California Business and Professions Code unless otherwise indicated.

Section 4300, subdivision (d) authorizes disciplinary proceedings to revoke or suspend a probationary certificate or license for violation of terms and conditions of the probation.

3. A board may impose license discipline on the ground that the licensee has been convicted of a crime if the crime is substantially related to the qualifications, functions, or duties of the business or profession for which the license was issued. Thus a determination that a licensee's conviction justifies discipline cannot rest on the moral reprehensibility of the underlying conduct, but requires a reasoned determination that the conduct was in fact substantially related to the licensee's fitness to engage in the profession. (*Gromis v. Medical Board* (1992) 8 Cal.App.4th 589, 598.)

4. Rehabilitation is a "state of mind" and the law looks with favor upon rewarding with the opportunity to serve, one who has achieved "reformation and regeneration." (*Pacheco v. State Bar* (1987) 43 Cal.3d 1041, 1058.) The evidentiary significance of an applicant's misconduct is greatly diminished by the passage of time and by the absence of similar, more recent misconduct. (*Kwasnik v. State Bar* (1990) Cal.3d 1061, 1070.) Since persons under the direct supervision of judicial or correctional authorities must behave in exemplary fashion, little weight is generally placed on the fact that such an individual did not commit additional crimes or continue inappropriate behavior while under supervision. (*In re Gossage* (2000) 23 Cal.4th 1080, 1099.)

5. The board has promulgated disciplinary guidelines (revised, 10/2007). The guidelines include factors to be included in determining penalties, mitigating evidence, and rehabilitation criteria. The guidelines have been considered and applied to the analysis of issues in this case.

6. The clear and convincing evidence established that respondent was convicted of a crime substantially related to the qualifications, functions, or duties of a pharmacist and cause for discipline was established. This conclusion is based on all factual findings and legal conclusions.

7. The clear and convincing evidence established that respondent consumed controlled substances or dangerous drugs in an injurious manner in violation of section 4301, subdivision (h) and cause for discipline was established. This conclusion is based on all factual findings and legal conclusions.

8. The clear and convincing evidence did not establish that respondent furnished dangerous drugs to himself without a prescription. Cause for discipline was not established. This conclusion is based on all factual findings and legal conclusions.

8. The clear and convincing evidence did not establish that respondent possessed controlled substances without a prescription. Cause for discipline was not established. This conclusion is based on all factual findings and legal conclusions.



9. The clear and convincing evidence did not establish that respondent prescribed, administered, or furnished a controlled substance for himself in violation of section 11170. Cause for discipline was not established. This conclusion is based on all factual findings and legal conclusions.

### ORDER

The pharmacist license no. RPH 43281 issued to respondent Donald Steven Merkel is revoked. However, the revocation is stayed and respondent is placed on probation for five years from the effective date of the decision in this matter upon the following terms and conditions:

1. **Rehabilitation Program –Pharmacist Recovery Program (PRP)**

Respondent shall participate in the Pharmacist Recovery Program. Respondent shall successfully complete his current contract and any subsequent addendums with the PRP. The term of this probation shall be extended until respondent successfully completes his contract with PRP.

Failure to timely contact or enroll in the PRP, or successfully participate in and complete the treatment contract and/or any addendums, shall be considered a violation of probation.

Probation shall be automatically extended until respondent successfully completes the PRP. Any person terminated from the PRP program shall be automatically suspended by the board. Respondent may not resume the practice of pharmacy until notified by the board in writing.

Any confirmed positive test for alcohol or for any drug not lawfully prescribed by a licensed practitioner as part of a documented medical treatment shall result in the automatic suspension of practice by respondent and shall be considered a violation of probation. Respondent may not resume the practice of pharmacy until notified by the board in writing.

During suspension, respondent shall not enter any pharmacy area or any portion of the licensed premises of a wholesaler, veterinary food-animal drug retailer or any other distributor of drugs which is licensed by the board, or any manufacturer, or where dangerous drugs and devices or controlled substances are maintained. Respondent shall not practice pharmacy nor do any act involving drug selection, selection of stock, manufacturing, compounding, dispensing or patient consultation; nor shall respondent manage, administer, or be a consultant to any licensee of the board, or have access to or control the ordering, manufacturing or dispensing of dangerous drugs and controlled substances. Respondent shall not resume practice until notified by the board.

During suspension, respondent shall not engage in any activity that requires the professional judgment of a pharmacist. Respondent shall not direct or control any aspect of

the practice of pharmacy. Respondent shall not perform the duties of a pharmacy technician or a designated representative for any entity licensed by the board.

Failure to comply with this suspension shall be considered a violation of probation.

Respondent shall pay administrative fees as invoiced by the PRP or its designee. Fees not timely paid to the PRP shall constitute a violation for probation. The board will collect unpaid administrative fees as part of the annual probation monitoring costs if not submitted to the PRP.

## 2. Random Drug Screening

Respondent, at his own expense, shall participate in random testing, including but not limited to biological fluid testing (urine, blood), breathalyzer, hair follicle testing, or other drug screening program as directed by the board or its designee. Respondent may be required to participate in testing for the entire probation period and the frequency of testing will be determined by the board or its designee. At all times, respondent shall fully cooperate with the board or its designee, and shall, when directed, submit to such tests and samples for the detection of alcohol, narcotics, hypnotics, dangerous drugs or other controlled substances as the board or its designee may direct. Failure to timely submit to testing as directed shall be considered a violation of probation. Upon request of the board or its designee, respondent shall provide documentation from a licensed practitioner that the prescription for a detected drug was legitimately issued and is a necessary part of the treatment of the respondent. Failure to timely provide such documentation shall be considered a violation of probation.

Any confirmed positive test for alcohol or for any drug not lawfully prescribed by a licensed practitioner as part of a documented medical treatment shall be considered a violation of probation and shall result in the automatic suspension of practice of pharmacy by respondent. Respondent may not resume the practice of pharmacy until notified by the board in writing.

During suspension, respondent shall not enter any pharmacy area or any portion of the licensed premises of a wholesaler, veterinary food-animal drug retailer or any other distributor of drugs which is licensed by the board, or any manufacturer, or where dangerous drugs and devices or controlled substances are maintained. Respondent shall not practice pharmacy nor do any act involving drug selection, selection of stock, manufacturing, compounding, dispensing or patient consultation; nor shall respondent manage, administer, or be a consultant to any licensee of the board, or have access to or control the ordering, manufacturing or dispensing of dangerous drugs and controlled substances. Respondent shall not resume practice until notified by the board.

During suspension, respondent shall not engage in any activity that requires the professional judgment of a pharmacist. Respondent shall not direct or control any aspect of the practice of pharmacy. Respondent shall not perform the duties of a pharmacy technician or a designated representative for any entity licensed by the board.

Subject to the above restrictions, respondent may continue to own or hold an interest in any licensed premises in which he or she holds an interest at the time this decision becomes effective unless otherwise specified in this order.

Failure to comply with this suspension shall be considered a violation of probation.

3. **Abstain from Drug and Alcohol Use**

Respondent shall completely abstain from the possession or use of alcohol, controlled substances, dangerous drugs and their associated paraphernalia except when the drugs are lawfully prescribed by a licensed practitioner as part of a documented medical treatment. Upon request of the board or its designee, respondent shall provide documentation from the licensed practitioner that the prescription for the drug was legitimately issued and is a necessary part of the treatment of the respondent. Failure to timely provide such documentation shall be considered a violation of probation. Respondent shall ensure that he or she is not in the same physical location as individuals who are using illicit substances even if respondent is not personally ingesting the drugs. Any possession or use of alcohol, controlled substances, or their associated paraphernalia not supported by the documentation timely provided, and/or any physical proximity to persons using illicit substances, shall be considered a violation of probation.

4. **Supervised Practice**

During the period of probation, respondent shall practice only under the supervision of a licensed pharmacist not on probation with the board. Upon and after the effective date of this decision, respondent shall not practice pharmacy and his or her license shall be automatically suspended until a supervisor is approved by the board or its designee. The supervision shall be, as required by the board or its designee, either:

Continuous – At least 75% of a work week

Substantial - At least 50% of a work week

Partial - At least 25% of a work week

Daily Review - Supervisor's review of probationer's daily activities within 24 hours

Within thirty (30) days of the effective date of this decision, respondent shall have his or her supervisor submit notification to the board in writing stating that the supervisor has read the decision in case number 3306 and is familiar with the required level of supervision as determined by the board or its designee. It shall be the respondent's responsibility to ensure that his or her employer(s), pharmacist-in-charge and/or supervisor(s) submit timely acknowledgement(s) to the board. Failure to cause the direct supervisor and the pharmacist-in-charge to submit timely acknowledgements to the board shall be considered a violation of probation.

If respondent changes employment, it shall be the respondent's responsibility to ensure that his or her employer(s), pharmacist-in-charge and/or supervisor(s) submit timely

acknowledgement(s) to the board. Respondent shall have his or her new supervisor, within fifteen (15) days after employment commences, submit notification to the board in writing stating the direct supervisor and pharmacist-in-charge have read the decision in case number 3306 and is familiar with the level of supervision as determined by the board. Respondent shall not practice pharmacy and his or her license shall be automatically suspended until the board or its designee approves a new supervisor. Failure to cause the direct supervisor and the pharmacist-in-charge to submit timely acknowledgements to the board shall be considered a violation of probation.

Within ten (10) days of leaving employment, respondent shall notify the board in writing.

During suspension, respondent shall not enter any pharmacy area or any portion of the licensed premises of a wholesaler, veterinary food-animal drug retailer or any other distributor of drugs which is licensed by the board, or any manufacturer, or where dangerous drugs and devices or controlled substances are maintained. Respondent shall not practice pharmacy nor do any act involving drug selection, selection of stock, manufacturing, compounding, dispensing or patient consultation; nor shall respondent manage, administer, or be a consultant to any licensee of the board, or have access to or control the ordering, manufacturing or dispensing of dangerous drugs and controlled substances. Respondent shall not resume practice until notified by the board.

During suspension, respondent shall not engage in any activity that requires the professional judgment of a pharmacist. Respondent shall not direct or control any aspect of the practice of pharmacy. Respondent shall not perform the duties of a pharmacy technician or a designated representative for any entity licensed by the board.

Failure to comply with this suspension shall be considered a violation of probation.

5. **No Supervision of Ancillary Personnel**

During the period of probation, respondent shall not supervise any ancillary personnel, including, but not limited to, pharmacy technicians or designated representatives in any entity licensed by the board.

Failure to comply with this provision shall be considered a violation of probation.

6. **No Ownership of Licensed Premises**

Respondent shall not own, have any legal or beneficial interest in, or serve as a manager, administrator, member, officer, director, trustee, associate, or partner of any business, firm, partnership, or corporation currently or hereinafter licensed by the board. Respondent shall sell or transfer any legal or beneficial interest in any entity licensed by the board within ninety (90) days following the effective date of this decision and shall immediately thereafter provide written proof thereof to the board. Failure to timely divest

any legal or beneficial interest(s) or provide documentation thereof shall be considered a violation of probation.

7. **Criminal Probation/Parole Reports**

Respondent shall provide a copy of the conditions of any criminal probation/parole to the board, in writing, within ten (10) days of the issuance or modification of those conditions. Respondent shall provide the name of his or her probation/parole officer to the board, in writing, within ten (10) days after that officer is designated or a replacement for that officer is designated. Respondent shall provide a copy of all criminal probation/parole reports to the board within ten (10) days after respondent receives a copy of such a report. Failure to timely make any of the submissions required hereby shall be considered a violation of probation.

8. **Obey All Laws**

Respondent shall obey all state and federal laws and regulations. Respondent shall report any of the following occurrences to the board, in writing, within seventy-two (72) hours of such occurrence:

- an arrest or issuance of a criminal complaint for violation of any provision of the Pharmacy Law, state and federal food and drug laws, or state and federal controlled substances laws
- a plea of guilty or nolo contendere in any state or federal criminal proceeding to any criminal complaint, information or indictment
- a conviction of any crime
- discipline, citation, or other administrative action filed by any state or federal agency which involves respondent's pharmacist license or which is related to the practice of pharmacy or the manufacturing, obtaining, handling, distributing, billing, or charging for any drug, device or controlled substance.

Failure to timely report such occurrence shall be considered a violation of probation.

9. **Report to the Board**

Respondent shall report to the board quarterly, on a schedule as directed by the board or its designee. The report shall be made either in person or in writing, as directed. Among other requirements, respondent shall state in each report under penalty of perjury whether there has been compliance with all the terms and conditions of probation. Failure to submit timely reports in a form as directed shall be considered a violation of probation. Any period(s) of delinquency in submission of reports as directed may be added to the total period of probation. Moreover, if the final probation report is not made as directed, probation shall be automatically extended until such time as the final report is made and accepted by the board.

10. **Interview with the Board**

Upon receipt of reasonable prior notice, respondent shall appear in person for interviews with the board or its designee; at such intervals and locations as are determined by the board or its designee. Failure to appear for any scheduled interview without prior notification to board staff, or failure to appear for two (2) or more scheduled interviews with the board or its designee during the period of probation, shall be considered a violation of probation.

11. **Cooperate with Board Staff**

Respondent shall cooperate with the board's inspection program and with the board's monitoring and investigation of respondent's compliance with the terms and conditions of his or her probation. Failure to cooperate shall be considered a violation of probation.

12. **Continuing Education**

Respondent shall provide evidence of efforts to maintain skill and knowledge as a pharmacist as directed by the board or its designee.

13. **Notice to Employers**

During the period of probation, respondent shall notify all present and prospective employers of the decision in case number 3306 and the terms, conditions and restrictions imposed on respondent by the decision, as follows:

Within thirty (30) days of the effective date of this decision, and within fifteen (15) days of respondent undertaking any new employment, respondent shall cause his or her direct supervisor, pharmacist-in-charge (including each new pharmacist-in-charge employed during respondent's tenure of employment) and owner to report to the board in writing acknowledging that the listed individual(s) has/have read the decision in case number 3306, and terms and conditions imposed thereby. It shall be respondent's responsibility to ensure that his or her employer(s) and/or supervisor(s) submit timely acknowledgment(s) to the board.

If respondent works for or is employed by or through a pharmacy employment service, respondent must notify his or her direct supervisor, pharmacist-in-charge, and owner at every entity licensed by the board of the terms and conditions of the decision in case number 3306 in advance of the respondent commencing work at each licensed entity. A record of this notification must be provided to the board upon request.

Furthermore, within thirty (30) days of the effective date of this decision, and within fifteen (15) days of respondent undertaking any new employment by or through a pharmacy employment service, respondent shall cause his or her direct supervisor with the pharmacy employment service to report to the board in writing acknowledging that he or she has read the decision in case number 3306 and the terms and conditions imposed thereby. It shall be

respondent's responsibility to ensure that his or her employer(s) and/or supervisor(s) submit timely acknowledgment(s) to the board.

Failure to timely notify present or prospective employer(s) or to cause that/those employer(s) to submit timely acknowledgments to the board shall be considered a violation of probation.

"Employment" within the meaning of this provision shall include any full-time, part-time, temporary, relief or pharmacy management service as a pharmacist or any position for which a pharmacist license is a requirement or criterion for employment, whether the respondent is an employee, independent contractor or volunteer.

14. **No Supervision of Interns, Serving as Pharmacist-in-Charge (PIC), Serving as Designated Representative-in-Charge, or Serving as a Consultant**

During the period of probation, respondent shall not supervise any intern pharmacist, be the pharmacist-in-charge or designated representative-in-charge of any entity licensed by the board nor serve as a consultant unless otherwise specified in this order. Assumption of any such unauthorized supervision responsibilities shall be considered a violation of probation.

15. **Reimbursement of Board Costs**

As a condition precedent to successful completion of probation, respondent shall pay to the board its reasonable costs of investigation and prosecution in the amount of \$6,348.50.

The board may enter into payment arrangements with respondent at the board's sole discretion. The failure to make payments according to any payment arrangement agreement shall be considered a violation of the terms of probation. The filing of bankruptcy by respondent shall not relieve respondent of his or her responsibility to reimburse the board its costs of investigation and prosecution.

16. **Probation Monitoring Costs**

Respondent shall pay any costs associated with probation monitoring as determined by the board each and every year of probation. Such costs shall be payable to the board on a schedule as directed by the board or its designee. Failure to pay such costs by the deadline(s) as directed shall be considered a violation of probation.

17. **Status of License**

Respondent shall, at all times while on probation, maintain an active, current license with the board, including any period during which suspension or probation is tolled. Failure to maintain an active, current license shall be considered a violation of probation.

If respondent's license expires or is cancelled by operation of law or otherwise at any time during the period of probation, including any extensions thereof due to tolling or

otherwise, upon renewal or reapplication respondent's license shall be subject to all terms and conditions of this probation not previously satisfied.

18. **License Surrender While on Probation/Suspension**

Following the effective date of this decision, should respondent cease practice due to retirement or health, or be otherwise unable to satisfy the terms and conditions of probation, respondent may tender his or her license to the board for surrender. The board or its designee shall have the discretion whether to grant the request for surrender or take any other action it deems appropriate and reasonable. Upon formal acceptance of the surrender of the license, respondent will no longer be subject to the terms and conditions of probation. This surrender constitutes a record of discipline and shall become a part of the respondent's license history with the board.

Upon acceptance of the surrender, respondent shall relinquish his or her pocket and wall license to the board within ten (10) days of notification by the board that the surrender is accepted. Respondent may not reapply for any license from the board for three (3) years from the effective date of the surrender. Respondent shall meet all requirements applicable to the license sought as of the date the application for that license is submitted to the board, including any outstanding costs.

19. **Notification of a Change in Name, Residence Address, Mailing Address or Employment**

Respondent shall notify the board in writing within ten (10) days of any change of employment. Said notification shall include the reasons for leaving, the address of the new employer, the name of the supervisor and owner, and the work schedule if known.

Respondent shall further notify the board in writing within ten (10) days of a change in name, residence address, mailing address, or phone number.

Failure to timely notify the board of any change in employer(s), name(s), address(es), or phone number(s) shall be considered a violation of probation.

20. **Tolling of Probation**

Except during periods of suspension, respondent shall, at all times while on probation, be employed as a pharmacist in California for a minimum of 80 hours per calendar month. Any month during which this minimum is not met shall toll the period of probation, i.e., the period of probation shall be extended by one month for each month during which this minimum is not met. During any such period of tolling of probation, respondent must nonetheless comply with all terms and conditions of probation.

Should respondent, regardless of residency, for any reason (including vacation) cease practicing as a pharmacist for a minimum of 80 hours per calendar month in California, respondent must notify the board in writing within ten (10) days of the cessation of practice, and must further notify the board in writing within ten (10) days of the resumption of



practice. Any failure to provide such notification(s) shall be considered a violation of probation.

It is a violation of probation for respondent's probation to remain tolled pursuant to the provisions of this condition for a total period, counting consecutive and non-consecutive months, exceeding thirty-six (36) months.

“Cessation of practice” means any calendar month during which respondent is not practicing as a pharmacist for at least 80 hours, as defined by Business and Professions Code section 4000 et seq. “Resumption of practice” means any calendar month during which respondent is practicing as a pharmacist for at least 10 hours as a pharmacist as defined by Business and Professions Code section 4000 et seq.

21. **Violation of Probation**


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

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

22. **Completion of Probation**

Upon written notice by the board or its designee indicating successful completion of probation, respondent's license will be fully restored.

DATED: March 2, 2010

  
\_\_\_\_\_  
ALAN R. ALVORD  
Administrative Law Judge  
Office of Administrative Hearings