

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

In the Matter of the Petition to Revoke
Probation Against:

BRIAN D. HIGHSMITH

Pharmacy Technician License No.
TCH 64644

Respondent.

Case No. 3871

OAH No. 2011020413

PROPOSED DECISION

Administrative Law Judge Jill Schlichtmann, State of California, Office of Administrative Hearings, heard this matter on July 12, 2011 in Oakland, California.

Deputy Attorney General Joshua A. Room represented complainant Virginia K. Herold, Executive Officer of the California State Board of Pharmacy.

Ellen Mendelsen, Attorney-at-Law represented Brian D. Highsmith (respondent) who was present throughout the administrative hearing.

The record was left open for receipt of a declaration from Tina Silveira, which was timely received on July 21, 2011, marked and admitted as administrative hearsay. A response was filed by respondent on July 22, 2011, and a response to that filing was filed by complainant on July 25, 2011. Both responses were marked and admitted as administrative hearsay. The matter was submitted on July 25, 2011.

PRELIMINARY MATTERS

1. Complainant moved at hearing to amend the First Amended Petition to Revoke Probation according to proof by adding the following:

Adding to paragraph 8, line 26, the dates "April 2011 and July 2011" immediately before the end of the sentence.

Adding to paragraph 13, line 12, the dates "April 2011 and July 2011" immediately before the end of the sentence.

Adding a Ninth Cause to Revoke Probation on page seven, paragraph 15A as follows:

(Failure to Submit Written Change of Address)

15A. At all times after the effective date (June 23, 2010) of the Decision and Order imposing probation on Respondent's License, Term and Condition 8 of that Order required that Respondent submit a written notice of change of address within 10 days. Respondent failed to submit said change of address until July 27, 2010, more than 10 days after he moved.

There was no objection to the motion, which was granted pursuant to Government Code section 11507.

FACTUAL FINDINGS

1. Virginia K. Herold made this accusation in her official capacity as Executive Officer of the California State Board of Pharmacy (Board).
2. On August 22, 2005, the Board issued Pharmacy Technician Registration Number TCH 64644 to respondent Brian Highsmith. The registration is scheduled to expire on September 30, 2011, unless renewed.
3. On June 23, 2010, respondent's technician license was revoked, however, the revocation was stayed and he was placed on probation for a period of five years with certain terms and conditions, pursuant to a Stipulated Settlement and Disciplinary Order. As part of the stipulated settlement, respondent admitted the facts contained in the first amended accusation, including the following:
 - a. On September 5, 2004, Oakland Police found respondent in a parked car belonging to his mother with 31 small bags of suspected rock cocaine and ½ ounce of marijuana.
 - b. On January 21, 2007, Oakland Police found respondent in a parked car with two other men. The police found three small bags containing suspected heroin, and a bag of suspected marijuana. Respondent was later convicted of violating Health and Safety Code section 11357, subdivision (a) (possession of concentrated cannabis), a misdemeanor.
 - c. On October 23, 2009, respondent was convicted of violating Vehicle Code section 23103 (reckless driving), a misdemeanor.

4. The terms of the stipulated settlement and decision provided for various terms and conditions, the following which are relevant here:

- a. The submission of quarterly reports beginning on October 10, 2010;
- b. The notification of the decision to respondent's employer and a written acknowledgement from the pharmacist-in-charge and the owner/corporate representative of the pharmacy, confirming that they had read the decision and conditions imposed;
- c. The abstention from non-prescribed drug and alcohol use;
- d. The timely submission to random drug screening and testing as directed by the Board;
- e. The immediate observation of a Board-ordered suspension;
- f. The regular attendance, at least once per week, at a recognized and established substance abuse recovery support group;
- g. The payment (in quarterly installments of \$300) of the Board's costs of investigation and prosecution;
- h. The cooperation with Board staff; and,
- i. The notification of a change in address within 10 days.

5. In addition, the stipulation and decision provided that if respondent violated any of the terms of probation, the Board could set aside its stay order and revoke his license. Respondent was represented by counsel when he entered into the stipulated settlement. In the settlement agreement, respondent agreed that he had carefully read, fully discussed with counsel and understood the effects of the document. On May 24, 2010, the Board adopted the stipulated settlement and disciplinary order, with an effective date of June 23, 2010. The Board sent a copy of the decision to respondent by certified mail on May 24, 2010.

6. Tina Thomas, an enforcement analyst with the Board, testified at hearing. Thomas has been employed by the Board for three and one-half years. She has monitored probationers for two years, and was assigned to monitor respondent's compliance with his probation.

Failure to Timely Submit Quarterly Reports

7. Condition 3 of the Stipulated Settlement and Order requires respondent to report in writing to the Board on a quarterly basis. The first report was due on October 10,

2010. Later reports were due in January, April and July 2011. Respondent never submitted a quarterly report to the Board.

Failure to Submit Compliant Employer Acknowledgements

8. Condition 9 of the Stipulated Settlement and Order requires respondent to notify his employer of the decision and order and to submit to the Board within 30 days a written acknowledgement of the decision with original signatures by the Pharmacist-in-Charge and the owner or a corporate officer of the pharmacy. This requirement was further explained to respondent during an office conference with him on July 22, 2010. Respondent submitted by facsimile transmission, a verification of employment form signed by his Pharmacist-in-Charge on August 3, 2010. Respondent did not submit the original as required. Respondent did not submit the form signed by a corporate officer of Rite Aid, his employer. Thomas testified that she regularly receives these forms from corporate officers, although at times it takes probationers longer than 30 days to obtain them.

Failure to Abstain from Non-prescribed Drug Use, to Submit to Random Drug Screening and to Abide by Suspension Order

9. Condition 10 of the Stipulated Settlement and Order requires that respondent completely abstain from the use of controlled substances except when the drugs are lawfully prescribed as part of medical treatment. Condition 11 requires respondent to participate in random drug testing as directed by the Board and states that "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 respondent." It provides further that during any period of suspension, respondent is not allowed to work as a pharmacy technician.

10. Thomas sent respondent a letter on June 1, 2010, by regular and certified mail, advising him that he was required to participate in random drug testing conducted by First Lab. Respondent was given instructions on enrollment procedures. He was advised that he was required to enroll no later than June 18, 2010. Thomas provided her contact information in case respondent had any questions about the enrollment process, which could be completed online or by mail. Thomas also advised respondent in writing that he should immediately advise the Board if he was taking any prescription medication that might result in a positive drug screen because any positive result for a controlled substance would result in automatic suspension of his license.

11. On June 17, 2010, Thomas received a voicemail message from respondent, stating that because he had no access to the internet and no credit card, he was unable to enroll with First Lab. Thomas called him to suggest that he contact First Lab and enroll by telephone. On June 21, 2010, respondent contacted First Lab, stating that he was having problems enrolling online. A representative of First Lab, Tina Silveira, emailed him an enrollment packet. On July 23, 2010, respondent advised a First Lab representative that he

did not have a printer and could not print out the enrollment packet. The First Lab representative then mailed an enrollment packet to respondent.

12. On August 19, 2010, First Lab received respondent's enrollment information by facsimile transmission. He was entered into the system to begin the process on August 20, 2010. Respondent failed to call in between June 23 and September 19, 2010, on October 17, 2010, October 20, 2010, October 22 and 23, 2010, October 29 to 31, 2010, and on November 3, 2010; and failed to submit to testing on August 23, 2010, August 27, 2010, September 7, 2010, September 13, 2010, September 23, 2010 and October 29, 2010.

13. On October 22, 2010, Thomas was contacted by First Lab and advised that respondent had submitted to testing on October 18, 2010, and the test was positive for the presence of hydrocodone and hydromorphone. Thomas sent respondent a letter by regular and certified mail advising him of the test result and requesting documentation of prescriptions for the controlled substances within five days. On November 2, 2010, respondent sent Thomas by facsimile transmission, a copy of prescriptions for Soma (carisoprodol) and Norco (acetaminophen and hydrocodone) pain medications for a lumbar degeneration, codeine for a cough, Flexeril (cyclobenzaprine) for a neck sprain. These prescriptions adequately explained the positive test results.

14. On November 4, 2010, Thomas wrote to respondent advising him that he was in violation of his probation for failing to call into First Lab on numerous dates and failing to submit to testing.

15. On November 18, 2010, respondent submitted to a drug screening. Thomas was advised by First Lab that the test was positive for Oxycodone, an opiate. On December 3, 2010, Thomas requested a copy of a prescription for Oxycodone within five days. Respondent advised Thomas that he did not recall taking Oxycodone, did not have a prescription for it and he wanted to re-test the sample. Thomas advised him to contact the lab to arrange for a re-test and to write a letter to the Board contesting the result. No letter was received by the Board contesting the result of the test until May 2011. Respondent did not arrange for a re-test. It was not established by competent evidence that respondent had tested positive for Oxycodone.

16. Respondent missed calling First Lab on December 5, 2011. He provided a specimen on December 23, 2010. First Lab notified the Board that the specimen tested positive for Codeine, Morphine, and Soma. These results were consistent with the prescriptions that respondent had previously submitted to the Board. Respondent failed to call in on December 24, 25 and January 1, 2011.

Failure to Abide by Suspension

17. On January 4, 2011, the Board issued a notice of automatic suspension as a result of the positive drug screening for Oxycodone. The notice of suspension was sent to respondent by overnight mail, but was not delivered after three attempts because respondent

was not available for receipt of the package. Respondent failed to appear for drug screening on January 4, 2011. On January 5, 2011, Thomas received a voicemail from respondent in which he indicated that he did not go in for a scheduled drug test because he did not have time and was having financial problems. On January 6, 2011, Thomas spoke with respondent on the telephone and advised him that his license was suspended. That same day, respondent again failed to appear for a test. Respondent failed to call First Lab on January 9, 12, 15, 21, 24 and thereafter.

18. On January 21, 2011, Anne Hunt, an inspector with the Board, served respondent with the Notice of Suspension at work. Respondent admitted to Hunt that Thomas had talked to him about the suspension. He told Hunt that he had not received the package because it was addressed to his mother's home, where he was "in and out." According to the Pharmacist-in-Charge, Deon Pretorius, respondent had worked 13 days between January 4, 2011 and January 21, 2011.

Failure to Attend/Submit Proof of Attendance at Recovery Groups

19. Condition 12 of the Stipulated Settlement and Order provides that respondent is required within 30 days to begin regular attendance, at least once per week, at a recognized and established substance abuse recovery group, and to submit signed and dated documentation of his attendance with his quarterly reports to the Board, beginning October 10, 2010. Respondent did not submit proof of the required attendance on October 10, 2010, or in January, April or July 2011.

20. On May 19, 2011, respondent submitted proof of sporadic attendance at 12-step meetings as follows: one meeting in July 2010, three in August 2010, three in September 2010, four in October 2010, four in November 2010, three in December 2010, one in January 2011, and one in February 2011.

Failure to Pay Cost Recovery

21. Condition 13 of the Stipulated Settlement and Order requires respondent to submit payments of \$300 each quarter with his quarterly report toward the Board's cost recovery of \$4,800. Respondent never submitted any payments toward the cost recovery.

Failure to Notify the Board of Address Change

22. Condition 8 of the Stipulated Settlement and Order requires respondent to notify the Board of a change of address within 10 days. On July 12, 2010, respondent told Thomas that he had moved. Thomas advised him that he needed to formally provide his new address to the Board within 10 days, and she emailed him a change of address form. Respondent did not submit the form before his office conference on July 22, 2010. Many of the Board's attempts to contact respondent by mail were unsuccessful both before his change of address form was filed and afterwards.

Failure to Cooperate with Board Staff

23. Condition 5 of the Stipulated Settlement and Order requires respondent to cooperate with Board staff and with the conditions of his probation. At the office conference on July 22, 2010, the terms of respondent's probation were fully explained to him and he signed a declaration stating that he understood the terms. Respondent's behavior in failing to 1) enroll in the drug screening process within the prescribed period; 2) call in to the lab as directed; 3) appear for tests when directed; 4) keep the Board advised of his correct address; 5) submit quarterly reports; 6) submit the verification of employment form as directed; 6) pay costs as ordered; 7) attend substance abuse treatment and submit proof as directed; and, 7) abide by the Board's notice of suspension, demonstrate a lack of cooperation with the Board and its staff.

24. Condition 17 of the Stipulated Settlement and Order states that 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.

Respondent's Evidence

25. On May 19, 2011, respondent provided a letter to the Board contesting the positive result for Oxycodone. He also provided copies of his prescriptions, his pharmacy technician certificate and a letter from his employer, pharmacist Deon Pretorius. Pretorius stated that respondent has worked for him since November 2005, and was his right hand at the pharmacy. Pretorius stated that there had never been any complaints about respondent and he had seen no signs of drug use. He indicated that respondent is a single and responsible father, as well as a hard-working technician who is "very well-loved by staff at the pharmacy" and customers. Pretorius stated that he was aware of the accusation. The letter is not dated.

26. Respondent did not receive some of his mail from the Board because he was living part-time with his mother and used her address for Board communication, but she moved and he did not change his address with the Board right away.

27. Respondent had difficulty enrolling in the First Lab system because he did not have internet access except on his phone, and he had no printer. He also had difficulty initially because he did not have a credit card. He also was confused about the password that he was supposed to use.

28. Respondent never had time to send in the quarterly reports or to provide proof of substance abuse treatment attendance. He did not always have time to attend the substance abuse treatment because of his work schedule.

29. Respondent took prescription medication Soma and Norco for back pain, and Tylenol Codeine intermittently for a cough.

30. Respondent did not realize that he had to get a corporate signature on his notification to employer form. He thought the document he sent by facsimile transmission was sufficient.

31. Although he discussed his positive test for Oxycodone with Thomas, respondent states that he did not realize that he was suspended until Anne Hunt served him with the suspension order. Since at that point he was not going to be able to continue working as required by his probation, he stopped calling in to First Lab.

LEGAL CONCLUSIONS

1. The standard of proof to be used in deciding the Petition to Revoke Probation is the preponderance of the evidence. (Evid. Code § 115; *Sandarg v. Dental Board of California* (2010) 184 Cal.App.4th 1434, 1441.)

2. Business and Professions Code section 4300 authorizes the Board to revoke or suspend any probationary certificate of licensure for any violation of the terms and conditions of probation.


3. The Board proved that respondent violated Condition Numbers 3 (submit quarterly reports), 5 (cooperate with Board staff), 8 (advise Board of change of address within 10 days), 9 (submit properly completed employer verification form), 11 (participate in random drug screening), 12 (attend and submit proof of attendance at substance abuse treatment) and 13 (payment of Board costs). (Factual Findings 3 through 24.) Respondent disputes violating Condition 10 (abstaining from controlled substances without a prescription) and disputes the positive test result for Oxycodone on November 18, 2010. The Board properly acted upon the information after it was notified of the positive test result, however, it produced only hearsay evidence to support its allegation that respondent failed to abstain from the use of controlled substances without a prescription. In light of respondent's denial, this allegation is not proved. However, respondent's lack of cooperation and his violation of the other conditions demonstrate that he is unable to accomplish what is required by the terms of the order, and therefore, protection of the public requires the revocation of respondent's license.

ORDER

1. Pharmacy technician license number TCH 64644, issued to respondent Brian D. Highsmith is revoked. Respondent shall relinquish his pocket technician registration to the Board within 10 days of the effective date of this decision. Respondent may not reapply or petition the Board for reinstatement of his revoked technician license for three years from the effective date of this decision.

2. A condition of reinstatement shall be that the respondent is certified as defined in Business and Professions Code section 4202, subdivision (a)(4) and provides satisfactory proof of certification to the Board.

DATED: 8/8/11


JILL SCHLICHTMANN
Administrative Law Judge
Office of Administrative Hearings

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

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

Case No. 3871

PETITION TO REVOKE PROBATION

12 **BRIAN HIGHSMITH**
13 **76 Overlook Lane**
Richmond, CA 94803

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

15 Respondent.

16
17 Complainant alleges:

18 PARTIES

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

1 d. Respondent did not complete enrollment with FirstLab until on or about August
2 19, 2010. Following enrollment with FirstLab, the testing protocol requires Respondent to call or
3 login to the FirstLab management system every day, at which time he is instructed whether he is
4 required to submit to testing on that day. Respondent failed to call or login to the FirstLab system
5 at all between August 20, 2010 and September 19, 2010, resulting in four missed test days.

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

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

10 e. These failures to timely submit to random drug testing and/or to cooperate with
11 the Board or its designee with regard to same subjects Respondent's License to revocation.
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14 FOURTH CAUSE TO REVOKE PROBATION

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

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

2 (Failure to Timely Pay Cost Recovery)

3 12. At all times after the effective date (June 23, 2010) of the Decision and Order
4 imposing probation on Respondent's License, Term and Condition 13 of that Order required that
5 Respondent pay to the Board its costs of investigation and prosecution totaling \$4,800.00, during
6 the first 4 years of probation, in equal quarterly installments of \$300.00. The first payment was
7 due October 10, 2010. Respondent failed to submit any payment by this date. This failure to
8 make timely payment toward cost recovery subjects Respondent's License to revocation.

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11 SIXTH CAUSE TO REVOKE PROBATION

12 (Failure to Cooperate with Board Staff)

13 13. At all times after the effective date (June 23, 2010) of the Decision and Order
14 imposing probation on Respondent's License, Term and Condition 5 of that Order required that
15 Respondent cooperate with the Board's inspection program and with the Board's monitoring and
16 investigation of Respondent's compliance with terms and conditions of his probation. As detailed
17 in paragraphs 8-12 above, Respondent failed to timely cooperate on one or more occasions. His
18 failure(s) to timely cooperate as required subject Respondent's License to revocation.

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22 OTHER MATTERS – EXTENSION OF PROBATION

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

25 **17. Violation of Probation.**

26 If respondent has not complied with any term or condition of probation, the board
27 shall have continuing jurisdiction over respondent, and probation shall automatically be
28 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.

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

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

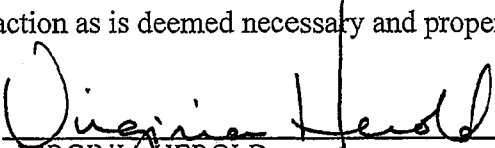
14 PRAYER

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

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

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

21 DATED: 11/3/10

22 
23 VIRGINIA HEROLD
24 Executive Officer
25 Board of Pharmacy
26 Department of Consumer Affairs
27 State of California
28 Complainant

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Exhibit A

Decision and Order

Board of Pharmacy Case No. 3351

Exhibit A

Decision and Order

Board of Pharmacy Case No. 3351

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

In the Matter of the Accusation Against:

Case No.3351

BRIAN HIGHSMITH
2808 Garvin Street
Richmond, CA 94801

Pharmacy Technician Registration No. TCH
64644

Respondent.

DECISION AND ORDER

The attached Stipulated Settlement and Disciplinary 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 June 23, 2010.

It is so ORDERED on May 24, 2010.

BOARD OF PHARMACY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

By

Kenneth H. Schell

KENNETH H. SCHELL
Board President

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7
8 **BEFORE THE**
BOARD OF PHARMACY
9 **DEPARTMENT OF CONSUMER AFFAIRS**
STATE OF CALIFORNIA

10 In the Matter of the Accusation Against:

Case No. 3351

11 **BRIAN D. HIGHSMITH**
12 2808 Garvin Street
13 Richmond, California 94801

OAH No. 2010010089

14 Pharmacy Technician License No. TCH 64644

**STIPULATED SETTLEMENT AND
DISCIPLINARY ORDER**

15 Respondent.

16 In the interest of a prompt and speedy settlement of this matter, consistent with the public
17 interest and the responsibility of the Board of Pharmacy of the Department of Consumer Affairs,
18 the parties hereby agree to the following Stipulated Settlement and Disciplinary Order which will
19 be submitted to the Board for approval and adoption as the final disposition of the Accusation.

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21 PARTIES

22 1. Virginia Herold (Complainant), Executive Officer, Board of Pharmacy, brought this
23 action solely in her official capacity and is represented in this matter by Edmund G. Brown Jr.,
24 Attorney General of the State of California, by Joshua A. Room, Deputy Attorney General.

25 2. Respondent Brian D. Highsmith (Respondent) is represented in this proceeding by
26 attorney Edgardo Gonzalez, whose address is Law Offices of Edgardo Gonzalez, 1300 Clay
27 Street, Suite 600, Oakland, CA 94612 (telephone (888) 800-9200).

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1 3. On or about August 22, 2005, the Board of Pharmacy issued Pharmacy Technician
2 License No. TCH 64644 to Brian D. Highsmith (Respondent). The Pharmacy Technician License
3 was in full force and effect at all times relevant to the charges brought in Accusation No. 3351
4 and will expire on September 30, 2011, unless renewed.

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6 JURISDICTION

7 4. Accusation No. 3351 was filed before the Board of Pharmacy (Board), Department of
8 Consumer Affairs, and is currently pending against Respondent. The Accusation and all other
9 statutorily required documents were properly served on Respondent on October 30, 2009, and
10 Respondent timely filed his Notice of Defense contesting the Accusation. A First Amended
11 Accusation was then filed before the Board, and served along with accompanying documentation
12 on Respondent on February 2, 2010. A copy of First Amended Accusation No. 3351 is attached
13 as exhibit A and incorporated herein by reference.

14
15 ADVISEMENT AND WAIVERS

16 5. Respondent has carefully read, fully discussed with counsel, and understands the
17 charges and allegations in First Amended Accusation No. 3351. Respondent has also carefully
18 read, fully discussed with counsel, and understands the effects of this Stipulated Settlement and
19 Disciplinary Order.

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

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

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CULPABILITY

8. Respondent admits the truth of each and every charge and allegation in First Amended Accusation No. 3351.

9. Respondent agrees that his Pharmacy Technician License is subject to discipline and he agrees to be bound by the Board of Pharmacy (Board)'s imposition of discipline as set forth in the Disciplinary Order below.

RESERVATION

10. The admissions made by Respondent are only for the purposes of this proceeding, or any other proceedings in which the Board of Pharmacy or other professional licensing agency is involved, and shall not be admissible in any other criminal or civil proceeding.

CONTINGENCY

11. 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 settlement, 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 Settlement 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.

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

1 13. The parties understand and agree that facsimile copies of this Stipulated Settlement
2 and Disciplinary Order, including facsimile signatures thereto, shall have the same force and
3 effect as the originals.

4 14. 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:

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9 **DISCIPLINARY ORDER**

10 IT IS HEREBY ORDERED that Pharmacy Technician License No. TCH 64644, issued to
11 Respondent Brian D. Highsmith (Respondent), is revoked. However, the revocation is stayed and
12 Respondent is placed on probation for five (5) years on the following terms and conditions.

13 1. **Certification Prior-to Resuming Work**

14 Respondent shall be automatically suspended from working as a pharmacy technician until
15 he is certified as defined by Business and Professions Code section 4202(a)(4) and provides
16 satisfactory proof of certification to the board. Respondent shall not resume working as a
17 pharmacy technician until notified by the board. Failure to achieve certification within one (1)
18 year shall be considered a violation of probation. Respondent shall not resume working as a
19 pharmacy technician until notified by the board.

20 During suspension, respondent shall not enter any pharmacy area or any portion of any
21 other board licensed premises (wholesaler, veterinary food-animal drug retailer or any other
22 distributor of drugs) any drug manufacturer, or any other location where dangerous drugs and
23 devices or controlled substances are maintained. Respondent shall not do any act involving drug
24 selection, selection of stock, manufacturing, compounding or dispensing; nor shall respondent
25 manage, administer, or assist any licensee of the board. Respondent shall not have access to or
26 control the ordering, manufacturing or dispensing of dangerous drugs and devices or controlled
27 substances. Respondent shall not resume work until notified by the board.

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

1 2. **Obey All Laws**

2 Respondent shall obey all state and federal laws and regulations.

3 Respondent shall report any of the following occurrences to the board, in writing, within
4 seventy-two (72) hours of such occurrence:

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

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

16 3. **Report to the Board**

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

25 4. **Interview with the Board**

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

1 5. **Cooperate with Board Staff**

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

5 6. **Status of License**

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

9 If respondent's pharmacy technician license expires or is cancelled by operation of law or
10 otherwise at any time during the period of probation, including any extensions thereof due to
11 tolling or otherwise, upon renewal or reapplication respondent's license shall be subject to all
12 terms and conditions of this probation not previously satisfied.

13 7. **No Ownership of Licensed Premises**

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

21 8. **Notification of a Change in Name, Address(es), or Employment**

22 Respondent shall notify the board in writing within ten (10) days of any change of
23 employment. Said notification shall include the reasons for leaving, the address of the new
24 employer, the name of the supervisor and owner; and the work schedule if known. Respondent
25 shall further notify the board in writing within ten (10) days of a change in name, residence
26 address and mailing address, or phone number.

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

1 9. Notice to Employers

2 During the period of probation, respondent shall notify all present and prospective
3 employers of the decision in case number 3351 and the terms, conditions and restrictions imposed
4 on respondent by the decision, as follows:

5 Within thirty (30) days of the effective date of this decision, and within fifteen (15) days of
6 respondent undertaking any new employment, respondent shall cause his direct supervisor,
7 pharmacist-in-charge (including each new pharmacist-in-charge employed during respondent's
8 tenure of employment) and owner to report to the board in writing acknowledging that the listed
9 individual(s) has/have read the decision in case number 3351 and the terms and conditions
10 imposed thereby. It shall be respondent's responsibility to ensure that his employer(s) and/or
11 supervisor(s) submit timely acknowledgement(s) to the board.

12 If respondent works for or is employed by or through a pharmacy employment service;
13 respondent must notify his direct supervisor, pharmacist-in-charge and owner at every pharmacy
14 of the terms and conditions of the decision in case number 3351 in advance of the respondent
15 commencing work at each pharmacy. A record of this notification must be provided to the board
16 upon request.

17 Furthermore, within thirty (30) days of the effective date of this decision, and within fifteen
18 (15) days of respondent undertaking any new employment by or through a pharmacy employment
19 service, respondent shall cause his direct supervisor with the pharmacy employment service to
20 report to the board in writing acknowledging that he has read the decision in case number 3351
21 and the terms and conditions imposed thereby. It shall be respondent's responsibility to ensure
22 that his employer(s) and/or supervisor(s) submit timely acknowledgment(s) to the board.

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

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

1 10. **Abstain from Drugs and Alcohol Use**

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

13 11. **Random Drug Screening**

14 Respondent, at his own expense, shall participate in random testing, including but not
15 limited to biological fluid testing (urine, blood), breathalyzer, hair follicle testing, or other drug
16 screening program as directed by the board or its designee. Respondent may be required to
17 participate in testing for the entire probation period and frequency of testing will be determined
18 by the board or its designee. At all times respondent shall fully cooperate with the board or its
19 designee, and shall, when directed, submit to such tests and samples for the detection of alcohol,
20 narcotics, hypnotics, dangerous drugs or other controlled substances as the board or its designee
21 may direct. Failure to timely submit to testing as directed shall be considered a violation of
22 probation. Upon request of the board or its designee, respondent shall provide documentation
23 from a licensed practitioner that the prescription for a detected drug was legitimately issued and is
24 a necessary part of treatment of respondent. Failure to timely provide such documentation shall
25 be considered a violation of probation. Any confirmed positive test for alcohol or for any drug
26 not lawfully prescribed by a licensed practitioner as part of a documented medical treatment shall
27 be considered a violation of probation and shall result in the automatic suspension of respondent.
28 Respondent may not resume work as a pharmacy technician until notified by the board in writing.

1 During any such suspension, respondent shall not enter any pharmacy area or any portion of
2 or any other board licensed premises (wholesaler, veterinary food-animal drug retailer or any
3 other distributor of drugs) any drug manufacturer, or any other location where dangerous drugs
4 and devices or controlled substances are maintained. Respondent shall not direct, control or
5 perform any aspect of the practice of pharmacy. Respondent shall not do any act involving drug
6 selection, selection of stock, manufacturing, compounding or dispensing; nor shall respondent
7 manage, administer, or assist any licensee of the board. Respondent shall not have access to or
8 control the ordering, manufacturing or dispensing of dangerous drugs and devices or controlled
9 substances. Respondent shall not resume work until notified by the board.

10 Failure to comply with any such suspension shall be considered a violation of probation.

11 **12. Attend Substance Abuse Recovery Relapse Prevention and Support Groups**

12 Within thirty (30) days of the effective date of this decision, respondent shall begin regular
13 attendance at a recognized and established substance abuse recovery support group in California,
14 (e.g., Alcoholics Anonymous, Narcotics Anonymous, etc.) which has been approved by the board
15 or its designee. Respondent must attend at least one group meeting per week unless otherwise
16 directed by the board or its designee. Respondent shall continue regular attendance and submit
17 signed and dated documentation confirming attendance with each quarterly report for the duration
18 of probation. Failure to attend or timely submit documentation of attendance shall be considered
19 a violation of probation.

20 **13. Reimbursement of Board Costs**

21 As a condition precedent to successful completion of probation, respondent shall pay to the
22 board its costs of investigation and prosecution in the amount of \$4,800.00, payable in full within
23 the first four (4) years of probation in equal quarterly installments of \$300.00. There shall be no
24 deviation from this schedule absent prior written approval by the board or its designee. Failure to
25 pay costs by the deadline(s) as directed shall be considered a violation of probation.

26 The filing of bankruptcy by respondent shall not relieve respondent of his responsibility to
27 reimburse the board its costs of investigation and prosecution.

28 ///

1 14. Probation Monitoring Costs

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

6 15. Tolling of Probation

7 Except during periods of suspension, respondent shall, at all times while on probation, be
8 employed as a pharmacy technician in California for a minimum of forty (40) hours per calendar
9 month. Any month during which this minimum is not met shall toll the period of probation, i.e.,
10 the period of probation shall be extended by one month for each month during which this
11 minimum is not met. During any such period of tolling of probation, respondent must
12 nonetheless comply with all terms and conditions of probation.

13 Should respondent, regardless of residency, for any reason (including vacation) cease
14 working as a pharmacy technician for a minimum of forty (40) hours per calendar month in
15 California, respondent must notify the board in writing within ten (10) days of cessation of work
16 and must further notify the board in writing within ten (10) days of the resumption of the work.
17 Any failure to provide such notification(s) shall be considered a violation of probation.

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

21 "Cessation of work" means any calendar month during which respondent is not
22 working for at least forty (40) hours as a pharmacy technician, as defined in Business
23 and Professions Code section 4115. "Resumption of work" means any calendar
24 month during which respondent is working for at least forty (40) hours as a pharmacy
25 technician as defined by Business and Professions Code section 4115.

26 16. License Surrender While on Probation/Suspension

27 Following the effective date of this decision, should respondent cease work due to
28 retirement or health, or be otherwise unable to satisfy the terms and conditions of probation,
respondent may tender her pharmacy technician license to the board for surrender. The board or

1 its designee shall have the discretion whether to grant the request for surrender or take any other
2 action it deems appropriate and reasonable. Upon formal acceptance of the surrender of the
3 license, respondent will no longer be subject to the terms and conditions of probation. This
4 surrender constitutes a record of discipline and shall become a part of the respondent's license
5 history with the board.

6 Upon acceptance of the surrender, respondent shall relinquish her pharmacy technician
7 license to the board within ten (10) days of notification by the board that surrender is accepted.
8 Respondent may not reapply for any license, permit, or registration from the board for three (3)
9 years from the effective date of the surrender. Respondent shall meet all requirements applicable
10 to the license sought as of the date the application for that license is submitted to the board.

11 17. Violation of Probation

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

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

24 18. Completion of Probation

25 Upon written notice by the board indicating successful completion of probation,
26 respondent's pharmacy technician license will be fully restored.

27 ///

28 ///

ACCEPTANCE

I have carefully read the above Stipulated Settlement and Disciplinary Order and have fully discussed it with my attorney, Edgardo Gonzalez. I understand the stipulation and the effect it will have on my Pharmacy Technician License. I enter into this Stipulated Settlement and Disciplinary Order voluntarily, knowingly, and intelligently, and agree to be bound by the Decision and Order of the Board of Pharmacy.

DATED: 3/10/10 Brian D. Highsmith
BRIAN D. HIGHSMITH
Respondent

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

DATED: 3/10/10 Edgardo Gonzalez
EDGARDO GONZALEZ
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: _____ Respectfully Submitted,
EDMUND G. BROWN JR.
Attorney General of California
FRANK H. PACOE
Sitting Deputy Attorney General

JOSHUA A. ROOM
Deputy Attorney General
Attorneys for Complainant

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Exhibit A

First Amended Accusation No. 3351

1 EDMUND G. BROWN JR.
Attorney General of California
2 FRANK H. PACOE
Supervising Deputy Attorney General
3 JOSHUA A. ROOM
Deputy Attorney General
4 State Bar No. 214663
455 Golden Gate Avenue, Suite 11000
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6 Facsimile: (415) 703-5480
Attorneys for Complainant

7
8 **BEFORE THE**
BOARD OF PHARMACY
9 **DEPARTMENT OF CONSUMER AFFAIRS**
STATE OF CALIFORNIA

10 In the Matter of the Accusation Against:

Case No. 3351

11 **BRIAN D. HIGHSMITH**
12 2808 Garvin Street
13 Richmond, California 94801

FIRST AMENDED ACCUSATION

14 Pharmacy Technician License No. TCH 64644

15 Respondent.

16 Complainant alleges:

17 PARTIES

18 1. Virginia Herold (Complainant) brings this Accusation solely in her official capacity
19 as the Executive Officer of the Board of Pharmacy, Department of Consumer Affairs.

20 2. On or about August 22, 2005, the Board of Pharmacy issued Pharmacy Technician
21 License Number TCH 64644 to Brian D. Highsmith (Respondent). The Pharmacy Technician
22 License was in full force and effect at all times relevant to the charges brought herein and will
23 expire on September 30, 2011, unless renewed.

24 JURISDICTION

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

28 ///

1 4. Section 4011 of the Code provides that the Board shall administer and enforce both
2 the Pharmacy Law [Bus. & Prof. Code, § 4000 et seq.] and the Uniform Controlled Substances
3 Act [Health & Safety Code, § 11000 et seq.].

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

6 6. Section 118(b) of the Code provides, in pertinent part, that the suspension, expiration,
7 surrender, or cancellation of a license shall not deprive the Board of jurisdiction to proceed with a
8 disciplinary action during the period within which the license may be renewed, restored, reissued
9 or reinstated. Section 4402(a) of the Code provides that any pharmacist license that is not
10 renewed within three years following its expiration may not be renewed, restored, or reinstated
11 and shall be canceled by operation of law at the end of the three-year period. Section 4402(e) of
12 the Code provides that any other license issued by the Board may be canceled by the Board if not
13 renewed within 60 days after its expiration, and any license canceled in this fashion may not be
14 reissued but will instead require a new application to seek reissuance.

15 STATUTORY AND REGULATORY PROVISIONS

16 7. Section 4301 of the Code provides, in pertinent part, that the Board shall take action
17 against any holder of a license who is guilty of "unprofessional conduct," defined to include, but
18 not be limited to, any of the following:

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

21 (l) The conviction of a crime substantially related to the qualifications, functions, and duties
22 of a licensee under this chapter.

23 (o) Violating or attempting to violate, directly or indirectly, or assisting in or abetting the
24 violation of or conspiring to violate any provision or term of this chapter or of the applicable
25 federal and state laws and regulations governing pharmacy, including regulations established by
26 the board or by any other state or federal regulatory agency.

27 ///

28 ///

1 8. Section 490 of the Code provides, in pertinent part, that the Board may suspend or
2 revoke a license when it finds that the licensee has been convicted of a crime substantially related
3 to the qualifications, functions or duties of the license.

4 9. California Code of Regulations, title 16, section 1770, states:

5 "For the purpose of denial, suspension, or revocation of a personal or facility license
6 pursuant to Division 1.5 (commencing with Section 475) of the Business and Professions Code, a
7 crime or act shall be considered substantially related to the qualifications, functions or duties of a
8 licensee or registrant if to a substantial degree it evidences present or potential unfitness of a
9 licensee or registrant to perform the functions authorized by her license or registration in a
10 manner consistent with the public health, safety, or welfare."

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

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

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

17 13. Health and Safety Code section 11350, in pertinent part, makes it unlawful to possess
18 a controlled substance in Schedule I, subdivision(s) (b), (c), or (f)(1), Schedule II, subdivision(s)
19 (b) or (c), or any narcotic drug in Schedules III-V, absent a valid prescription.

20 14. Health and Safety Code section 11351, in pertinent part, makes it unlawful to possess
21 for sale or purchase for purposes of sale, a controlled substance in Schedule I, subdivision(s) (b),
22 (c) or (e), or any narcotic drug in Schedules III-V.

23 15. Health and Safety Code section 11351.5, in pertinent part, makes it unlawful to
24 possess for sale, or purchase for purposes of sale, cocaine base.

25 16. Health and Safety Code section 11357, in pertinent part, makes it unlawful for any
26 person to possess marijuana or concentrated cannabis.

27 17. Health and Safety Code section 11359, in pertinent part, makes it unlawful for any
28 person to possess marijuana for sale.

1 18. Section 125.3 of the Code provides, in pertinent part, that the Board may request the
2 administrative law judge to direct a licentiate found to have committed a violation of the licensing
3 act to pay a sum not to exceed its reasonable costs of investigation and enforcement.

4 CONTROLLED SUBSTANCES / DANGEROUS DRUGS

5 19. Section 4021 of the Code states:

6 “‘Controlled substance’ means any substance listed in Chapter 2 (commencing with Section
7 11053) of Division 10 of the Health and Safety Code.”

8 20. Section 4022 of the Code states, in pertinent part:

9 “‘Dangerous drug’ or ‘dangerous device’ means any drug or device unsafe for self use,
10 except veterinary drugs that are labeled as such, and includes the following:

11 “(a) Any drug that bears the legend: ‘Caution: federal law prohibits dispensing without
12 prescription,’ ‘Rx only,’ or words of similar import. . . .

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

15 21. Marijuana is a Schedule I controlled substance as designated by Health and Safety
16 Code section 11054(d)(13), and a dangerous drug as designated by Business and Professions
17 Code section 4022. It is a hallucinogenic drug.

18 22. Cocaine is a Schedule I (in base form) or Schedule II controlled substance as
19 designated by Health and Safety Code sections 11054(f)(1) and 11055(b)(6) and a dangerous drug
20 as designated by Business and Professions Code section 4022. It is a narcotic drug.

21 23. Heroin is a Schedule I controlled substance as designated by Health and Safety Code
22 section 11054(c)(11) and a dangerous drug as designated by Business and Professions Code
23 section 4022. It is an opiate drug.

24 FACTUAL BACKGROUND

25 24. On or about September 5, 2004, Oakland Police discovered Respondent sitting in the
26 driver’s seat of a parked car with thirty-one (31) small bags of suspected rock (base) cocaine in
27 his lap, a plastic bag with approximately ½ ounce of suspected marijuana on the floorboard at
28 his feet, and other plastic bags containing smaller amounts of marijuana in the driver’s seat.

1 25. On or about January 21, 2007, Oakland Police responded to a report of three men in
2 possession of a firearm, and found Respondent sitting in a parked car with two other men. After
3 Respondent and the two other men were ordered out of the vehicle, and upon detection by the
4 officer(s) of the smell of marijuana, a search of the car turned up, *inter alia*, three (3) small
5 plastic bags containing suspected heroin, and a plastic sandwich bag containing suspected
6 marijuana. Respondent stated that the car belonged to his mother.

7
8 FIRST CAUSE FOR DISCIPLINE

9 (Conviction of Substantially Related Crime(s))

10 26. Respondent is subject to discipline under section 4301(1) and/or section 490 of the
11 Code, by reference to California Code of Regulations, title 16, section 1770, for conviction of a
12 substantially related crime, in that on or about February 26, 2007, in the criminal case *People v.*
13 *Brian D. Highsmith*, Case No. 526479A in Alameda County Superior Court, Respondent was
14 convicted of violating Health and Safety Code section 11357, subdivision (a) (Possession of
15 concentrated cannabis), a misdemeanor, as follows:

16 a. On or about January 21, 2007, based on the conduct described in paragraph 25
17 above, Respondent was arrested and subsequently charged in *People v. Brian D. Highsmith*, Case
18 No. 526479A in Alameda County Superior Court, in a three-count complaint with counts two and
19 three alleged only against Respondent's co-defendant, with one (1) count of violating Health and
20 Safety Code section 11357, subdivision (a) (Possession of concentrated cannabis), a felony.

21 b. On or about February 26, 2007, Respondent pleaded no contest and was found
22 guilty of a lesser-included version of count one (Health and Safety Code section 11357(a) – the
23 possession of concentrated cannabis), and was convicted of a misdemeanor. The imposition of
24 sentence was suspended in favor of a conditional sentence (probation) of three (3) years, on terms
25 and conditions including time served, fines and fees, search conditions, and an order that he stay
26 away from his co-defendants and the block where the January 21, 2007 arrest took place. If he
27 were able to successfully complete two (2) years of probation, Respondent was eligible to petition
28 for an early termination of probation on or about February 26, 2009.

1
2
3 SECOND CAUSE FOR DISCIPLINE

4 (Conviction of Substantially Related Crime(s))

5 27. Respondent is subject to discipline under section 4301(l) and/or section 490 of the
6 Code, by reference to California Code of Regulations, title 16, section 1770, for conviction of a
7 substantially related crime, in that on or about October 23, 2009, in *People v. Brian Highsmith*,
8 Case No. 2429122 in San Francisco County Superior Court, Respondent was convicted of
9 violating Vehicle Code section 23103 (Reckless driving), a misdemeanor, as follows:

10 a. On or about July 28, 2009, Respondent was arrested and subsequently charged
11 in *People v. Brian Highsmith*, Case No. 2429122 in San Francisco County Superior Court, with
12 violating (1) Vehicle Code section 23152, subdivision (a) (Driving under the influence of alcohol
13 or drugs), a misdemeanor, and (2) Vehicle Code section 23152, subdivision (b) (Driving with a
14 blood alcohol of 0.08 percent or higher), a misdemeanor.

15 b. On or about October 23, 2009, a third count was added in Case No. 2429122 of
16 violating Vehicle Code section 23103 (Reckless driving), a misdemeanor. Respondent pleaded
17 no contest to this third count. The first two counts were dismissed. The imposition of sentence
18 was suspended in favor of an unsupervised probation of two (2) years, on terms and conditions
19 including time served, fines and fees, and enrollment in a 12-hour First Offenders Program. After
20 1 year of probation, Respondent may petition for early termination of the probation period.

21 THIRD CAUSE FOR DISCIPLINE

22 (Furnishing of Controlled Substance)

23 28. Respondent is subject to discipline under section 4301(j) and/or (o) and/or section
24 4059 of the Code, and/or Health and Safety Code section 11170 in that Respondent, as described
25 in paragraphs 24 to 26 above, furnished to himself or another without a valid prescription, and/or
26 conspired to furnish, and/or assisted or abetted furnishing of, a controlled substance.

27 ///

28 ///

///

1 b. On or about July 16, 2003, August 1, 2003, September 27, 2003, May 16, 2004,
2 and/or June 21, 2004, Respondent failed to appear in court as ordered, and bench warrant(s) were
3 issued charging him with two (2) counts of violating Vehicle Code section 40508, subdivision (a)
4 (Willful failure to appear in court following a written promise to appear), both misdemeanors.

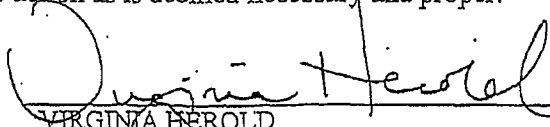
5 c. On or about July 18, 2005, Respondent appeared and pleaded guilty to the one
6 (1) count of violating Vehicle Code section 21956 (Pedestrian on roadway), an infraction and the
7 two (2) counts of violating Vehicle Code section 40508, subdivision (a) (Willful failure to appear
8 in court following a written promise to appear), that were both reduced to infractions. Sentencing
9 on counts two and three was suspended, and Respondent was required to pay total fines and fees
10 on count one of \$62.50 by no later than October 17, 2005. When payment was not made by on or
11 about November 26, 2005, a further bench warrant was issued for Respondent's arrest pursuant to
12 Vehicle Code section 40508, subdivision (b) (Willful failure to pay bail or fine), a misdemeanor,
13 requiring a bail/payment of \$337.50 from Respondent.

14
15 PRAYER

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

- 18 1. Revoking or suspending Pharmacy Technician License Number TCH 64644, issued
19 to Brian D. Highsmith (Respondent);
- 20 2. Ordering Respondent to pay the Board the reasonable costs of the investigation and
21 enforcement of this case, pursuant to Business and Professions Code section 125.3;
- 22 3. Taking such other and further action as is deemed necessary and proper.

23 DATED: 2/2/10

24 
25 VIRGINIA HEROLD
26 Executive Officer
27 Board of Pharmacy
28 Department of Consumer Affairs
State of California
Complainant

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