

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

In the Matter of the Accusation Against:

VIRAL SHASHIKANT KOTHARY
7625 Mexico Way
Buena Park, CA 90620
Pharmacist License No. RPH 53998,

Respondent.

Case No. 5137

OAH No. 2016080630

DECISION AND ORDER

The attached Proposed Decision of the administrative law judge is hereby adopted as the decision of the California State Board of Pharmacy in the above-entitled matter, except that, pursuant to Government Code section 11517, subdivision (c)(2)(B), the proposed penalty is reduced or mitigated as follows:

- A. Legal Conclusion 18 is modified to reflect that respondent may retain his license under strict terms and conditions necessary to protect the public, including those pertaining to the misuse of alcohol and/or drugs.
- B. The disciplinary order is modified to read as follows:

ORDER

Pharmacist License Number RPH 53998, issued to respondent Viral Shashikant Kothary, is hereby revoked; however, the order of revocation is stayed and respondent is placed on probation for five (5) years upon the following terms and conditions:

1. 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; and
- 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 a violation of probation.

2. 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.

3. 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.

4. 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 probation. Failure to cooperate shall be considered a violation of probation.

5. Continuing Education

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

6. Notice to Employers

During the period of probation, respondent shall notify all present and prospective employers of the decision in board case number 5137 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 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 board case number 5137, and terms and conditions imposed thereby. It shall be respondent's responsibility to ensure that his 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 direct supervisor, pharmacist in charge, and owner at every entity licensed by the board of the terms and conditions of the decision in board case number 5137 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 direct supervisor with the pharmacy employment service to report to the board in writing acknowledging that he or she has read the decision in board case number 5137 and the terms and conditions imposed thereby. It shall be respondent's responsibility to ensure that his 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.

7. No Serving as Pharmacist in Charge or Designated Representative-in-Charge

During the period of probation, respondent shall not be the pharmacist-in-charge or designated representative-in-charge of any entity licensed by the board

unless otherwise specified in this order. Assumption of any such unauthorized supervision responsibilities shall be considered a violation of probation.

8. Reimbursement of Board Costs

As a condition precedent to successful completion of probation, respondent shall pay to the board its costs of investigation and prosecution in the amount of \$3,912.00. Respondent shall make said payments each month until this obligation is satisfied in accordance with a board-approved payment plan, or as the board in its discretion may otherwise order.

There shall be no deviation from this schedule absent prior written approval by the board or its designee. Failure to pay costs by the deadline(s) as directed shall be considered a violation of probation.

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

9. 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.

10. 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.

11. 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 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 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.

12. 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.

13. Tolling of Probation

This term will apply one year after the effective date of this decision.

Except during periods of suspension, respondent shall, at all times while on probation, be employed as a pharmacist in California for a minimum of 20 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 20 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 20 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 20 hours as a pharmacist as defined by Business and Professions Code section 4000 et seq.

14. Pharmacists Recovery Program (PRP)

Within thirty (30) days of the effective date of this decision, respondent shall contact the Pharmacists Recovery Program (PRP) for evaluation, and shall immediately thereafter enroll, successfully participate in, and complete the treatment contract and any subsequent addendums as recommended and provided by the PRP and as approved by the board or its designee. The costs for PRP participation shall be borne by the respondent.

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. 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.

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.

15. 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 or alcohol 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.

16. Abstain from Drugs 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 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.

17. Prescription Coordination and Monitoring of Prescription Use

Within thirty (30) days of the effective date of this decision, respondent shall submit to the board, for its prior approval, the name and qualifications of a single physician, nurse practitioner, physician assistant, or psychiatrist of respondent's choice, who shall be aware of the respondent's history with the use of alcohol, controlled substances, and/or dangerous drugs, and who will coordinate and monitor any prescriptions for respondent for dangerous drugs, controlled substances or mood-altering drugs. The approved practitioner shall be provided with a copy of the board's accusation and decision. A record of this notification must be provided to the board upon request. Respondent shall sign a release authorizing the practitioner to communicate with the board about respondent's treatment(s). The coordinating physician, nurse practitioner, physician assistant, or psychiatrist shall report to the board on a quarterly basis for the duration of probation regarding respondent's compliance with this condition. If any substances considered addictive have been prescribed, the report shall identify a program for the time limited use of any such substances. The board may require

that the single coordinating physician, nurse practitioner, physician assistant or psychiatrist be a specialist in addictive medicine, or consult a specialist in addictive medicine. Should respondent, for any reason, cease supervision by the approved practitioner, respondent shall notify the board immediately and, within thirty (30) days of ceasing treatment, submit the name of a replacement physician, nurse practitioner, physician assistant, or psychiatrist of respondent's choice to the board or its designee for its prior approval. Failure to timely submit the selected practitioner or replacement practitioner to the board for approval, or to ensure the required reporting thereby on the quarterly reports, shall be considered a violation of probation.

If at any time an approved practitioner determines that respondent is unable to practice safely or independently as a pharmacist, the practitioner shall notify the board immediately by telephone and follow up by written letter within three (3) working days. Upon notification from the board or its designee of this determination, respondent shall be automatically suspended and shall not resume practice until notified by the board that practice may be resumed.

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.

18. 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.

19. 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.

20. Completion of Probation

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

This Decision shall become effective at 5:00 p.m. on June 14, 2017.

It is so ORDERED on May 15, 2017.

BOARD OF PHARMACY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA



By _____

Amy Gutierrez, Pharm.D.
Board President

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

In the Matter of the Accusation Against:

VIRAL SHASHIKANT KOTHARY,
Pharmacist License Number RPH 53998,
Respondent.

Case No. 5137

OAH No. 2016080630

PROPOSED DECISION

Administrative Law Judge Ralph B. Dash heard this matter on January 19, 2017, at Los Angeles, California.

Leslie A. Walden, Deputy Attorney General, represented Complainant.

Viral Shashikant Kothary (Respondent) represented himself.

Oral and documentary evidence having been received and the matter having been submitted, the Administrative Law Judge makes the following Proposed Decision.

FINDINGS OF FACT

1. Virginia Herold made the Accusation in her official capacity as the Executive Officer of the Board of Pharmacy (Board).
2. The Board issued Registered Pharmacist License Number RPH 53998 to Respondent on August 28, 2002. At all times pertinent hereto, said license has been and is now in full force and effect.
3. Respondent suffered three alcohol-related convictions between 2013 and 2015 for conduct occurring between 2011 and 2013.
 - a. On May 1, 2013, in the Superior Court of the State of California, County of Fresno, case number 11914798, Respondent was convicted on his nolo contendere plea to one count of violating Vehicle Code section 23152, subdivision (b), driving with a blood-

alcohol content (BAC) of 0.08 percent or higher, a misdemeanor. As part of the plea agreement, Respondent stipulated that his BAC was 0.19 percent. The court suspended imposition of sentence and placed Respondent on probation for three years on condition that he serve 16 days in the Fresno County Jail, with credit for 16 days in "treatment" and that he pay fines and fees totaling \$1,885, with said amount suspended. The court ordered Respondent to complete a "1st offender DUI program."

b. The facts and circumstances of this crime are that on the evening of March 23, 2011, Respondent was involved in a single vehicle accident. Police were called and the arresting officer found Respondent to have slurred speech, red watery eyes, and a staggered gait. Respondent could not pass a field sobriety test. Respondent told the arresting officer that he had attended his first AA meeting that night and then went to a restaurant "for a few drinks."

c. On the same date, in the same court, case number 13911805, Respondent pled nolo contendere and was convicted of another count of violating Vehicle Code section 23152, subdivision (b). Respondent stipulated that his BAC was 0.19 percent. Respondent was ordered to serve 22 days in the Ventura County Jail, with credit for 22 "treatment" days and to pay fines and fees totaling \$1,885. He was also ordered to attend and complete an 18-month "Multiple-Offender Alcohol Program."

d. The circumstances of this crime are that on the evening of July 27, 2011, Respondent was stopped for speeding. The arresting officer noticed that Respondent had red watery eyes, a strong odor of alcohol emanating from him and could not stand without swaying. Respondent could not pass the field sobriety tests.

e. On July 1, 2015, in the Superior Court of the State of California, County of Kern, case number BM829601A, Respondent was convicted on his nolo contendere plea to one count of violating Vehicle Code section 23152, subdivision (a), driving under the influence of alcohol or drugs, a misdemeanor.¹ The court suspended imposition of sentence and placed Respondent on summary probation for three years on condition that he serve 120 days in custody with credit for two days served and two days good time/work time. The court permitted Respondent to perform his jail time through the work release program. It also ordered Respondent to pay fines and fees totaling \$2,018 and to install an ignition interlock device on any vehicle he owned or operated.

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¹ Count One is set forth in the police report (Exhibit 9), however, the remaining counts referenced in Paragraph 11e of the Accusation, to which it is also alleged Respondent entered a plea, were not identified in the incomplete (missing first six pages) court docket (Exhibit 8). These allegations are that Respondent also violated Vehicle Code sections 23578 (excessive BAC) and 23545, subdivision (a) (third alcohol-related conviction within 10 years). Accordingly, no Findings are made with respect to those allegations.

f. The facts and circumstances of this conviction are that in the early morning hours of September 21, 2013, Respondent was stopped by a Highway Patrol officer for weaving. Respondent had red watery eyes, slurred speech, a staggered gait and a strong odor of alcohol emanating from him. Respondent could not successfully complete the field sobriety tests. According to the arresting officer's report, Respondent gave two breath samples, one of which measured his BAC at 0.175 percent and one at 0.164 percent. None of the documents offered by Complainant showed Respondent's BAC to be 0.22 percent as alleged in the Accusation. Respondent told the arresting officer that he had not had a drink in the past year, that he was on Antabuse which he had taken that morning,² and that he had a "one year chit" (presumably a "birthday token" given out by AA to those who have remained abstinent for one year). Respondent's clearly inebriated condition shows that he had not taken Antabuse that day and that he had ingested a significant amount of alcohol. It could not be determined whether Respondent's "one year chit" was earned by Respondent himself, who then relapsed, or whether he had simply found the token.

4. Respondent appears to be a gifted pharmacist. He has a Commission for Certification in Geriatric Pharmacy and a Board of Pharmacy Specialties certificate as a Pharmacotherapy Specialist. He is also a Certified HIPAA Privacy Associate. He offered eight glowing reference letters from former employers, students and associates (all part of Exhibit A). However, these letters all appear to be employment references. None of them mention any of Respondent's convictions or his history of alcohol abuse and thus are given little weight.

5. Respondent worked in a hospital for the Veterans Affairs Department from 2002 to 2012. Since then he has worked per diem at various pharmacies and skilled nursing facilities. He offered no witness testimony nor did he offer any documentary evidence from former employers or associates who have any knowledge of his alcoholism. Exhibit A contains a photocopy of three AA one year sobriety tokens and Respondent testified his sobriety date is the date of his last alcohol-related arrest, September 21, 2013. However, he also told the Highway Patrol Officer that he had not had a drink for one year preceding that date, including the date he was arrested, a clear fabrication. This lessened his credibility which, if based solely on manner and demeanor while testifying, would have been judged highly.³

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² Antabuse is the trade name for disulfiram which causes nausea and vomiting to occur if alcohol is also ingested. It is specifically intended to help people stop drinking.

³ California Jury Instruction, Civil, number 107 reads, in part, "[I]f you decide that a witness has deliberately testified untruthfully about something important, you may choose not to believe anything that witness said."

6. Respondent has two young children from a prior marriage. He testified that it was difficult for his wife to conceive, so she underwent fertility treatments. According to Respondent, it was the stress and financial strain of these treatments that led him to find solace in alcohol. Respondent has not had any problem with abuse of any other licit or any illicit substance.

7. Respondent is currently unemployed. He lives with his parents for whom he provides some help with their activities of daily living. He stated that he is currently undergoing psychotherapy, but offered no further details. He went to a 30-day recovery program in Bakersfield, California in 2013, and avowed that he has been clean and sober ever since. Respondent stated that he actively attends AA meetings, but gave no details. He also stated that he is involved in the "Secular Order of Sobriety" which apparently is a group that supports sober living, but has no religious component. Again, Respondent gave no details. Respondent testified that he "accepts" that he has "made some very poor judgments" but that he has "made amends." This latter statement went unexplained.

8. Respondent was highly respectful of the Board and these proceedings. He appeared to express genuine remorse for his past behavior. He did not attempt to palliate or vitiate his conduct.

9. The Board incurred costs, including fees of the Attorney General, in the total sum of \$5,994.50. This sum includes copying charges from the Superior Court, and billings by paralegals in the Attorney General's office. The billing records from the Attorney General (part of Exhibit 3) show that two Deputies Attorney General billed time to this case. The amount Ms. Walden billed since she was assigned this case in 2014, \$2,295, is reasonable. The amount her predecessor billed in 2013 and 2014 (\$2,082.5), work which Ms. Walden apparently had to duplicate, should not be assessed against Respondent since it was not his choice for Complainant to change attorneys. Accordingly, it is found that the total sum of costs, including fees of the Attorney General, is \$3,912.

LEGAL CONCLUSIONS

The Burden and Standard of Proof

1. An individual who holds a license to practice a particular profession has a fundamental vested right to continue in that licensed activity. Procedural due process requires a regulatory board or agency seeking to suspend or revoke a professional license to prove the allegations of an accusation by clear and convincing evidence rather than proof by a preponderance of the evidence. (*Owen v. Sands* (2009) 176 Cal.App.4th 985, 991-992.) The burden of proof in this matter was on Complainant to establish the allegations in the accusation by clear and convincing evidence.

2. Clear and convincing evidence requires a finding of high probability; the evidence must be so clear as to leave no substantial doubt; it must be sufficiently strong to

command the unhesitating assent of every reasonable mind. This requirement presents a heavy burden, far in excess of the preponderance of evidence standard that is sufficient for most civil litigation. (*Christian Research Institute v. Alnor* (2007) 148 Cal.App.4th 71, 84.)

Imposing License Discipline

3. The suspension or revocation of a license to engage in a profession is not penal; its purpose is to protect the public from incompetence and lack of integrity in those practicing the profession. The business of compounding prescriptions and selling drugs is intimately connected with and has a vital relationship to the health, safety, and welfare of the public. Public safety must be regarded as superior to private rights. (*Brodsky v. California State Board of Pharmacy* (1959) 173 Cal.App.2d 680, 688-689.)

4. Business and Professions Code section 4301 provides in part:

The board shall take action against any holder of a license who is guilty of unprofessional conduct . . . 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.[¶] . . . [¶]

(k) The conviction of more than one misdemeanor or any felony involving the use, consumption, or self-administration of any dangerous drug or alcoholic beverage, or any combination of those substances.

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

Substantial Relationship

5. To justify the imposition of discipline, there must be some nexus between an act or omission and the professional’s fitness or competence to practice. The Legislature has established such a nexus with respect to certain acts or omissions even where the acts or omissions do not actually impair a professional’s ability to practice. It does so by expressly

identifying the act or omission as an instance of "unprofessional conduct." (*Medical Bd. of California v. Superior Court (Liskey)* (2003) 111 Cal.App.4th 163, 174.)

6. California Code of Regulations, title 16, section 1770, provides:

For the purpose of denial, suspension, or revocation of a personal or facility license . . . a crime or act shall be considered substantially related to the qualifications, functions or duties of a licensee or registrant if to a substantial degree it evidences present or potential unfitness of a licensee or registrant to perform the functions authorized by his license or registration in a manner consistent with the public health, safety, or welfare.

7. The Legislature specifically provided in Business and Professions Code section 4301, subdivision (h), that the use of alcoholic beverages to the extent or in a manner as to be dangerous or injurious to oneself or others, is grounds for license discipline. California Code of Regulations, title 16, section 1770 provides that any crime or act shall be considered substantially related to the qualifications of a licensee if to a substantial degree it evidences present or potential unfitness to perform the duties of a Board licensee. Respondent's three misdemeanor alcohol-related convictions, jointly and severally, constitute unprofessional conduct and are substantially related to the qualifications, functions and duties of a pharmacist.

Cause Exists to Impose Discipline Against Respondent's License

8. Cause exists under Business and Professions Code section 4301, subdivision (h), to impose discipline on Respondent's license. The clear and convincing evidence established that Respondent used alcoholic beverages in a manner and to an extent that was dangerous or injurious to himself and to the public. Anyone who drinks and drives puts him/herself and the public at risk.

9. Cause exists under Business and Professions Code section 4301, subdivision (l), to impose discipline on Respondent's license. The clear and convincing evidence established that Respondent was convicted of three misdemeanors for driving under the influence of alcohol and that these crimes are substantially related to the qualifications, functions and duties of a pharmacist.

10. Cause exists under Business and Professions Code section 4301, subdivision (k), to impose discipline on Respondent's license. The clear and convincing evidence established that Respondent was convicted of three misdemeanors for crimes related to driving under the influence of alcohol.

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Rehabilitation

11. California Code of Regulations, title 16, section 1769 sets forth criteria for rehabilitation. It provides in part:

(c) When considering the suspension or revocation of a facility or a personal license on the ground that the licensee or the registrant has been convicted of a crime, the board, in evaluating the rehabilitation of such person and his present eligibility for a license will consider the following criteria:

- (1) Nature and severity of the act(s) or offense(s).
- (2) Total criminal record.
- (3) The time that has elapsed since commission of the act(s) or offense(s).
- (4) Whether the licensee has complied with all terms of parole, probation, restitution or any other sanctions lawfully imposed against the licensee.
- (5) Evidence, if any, of rehabilitation submitted by the licensee.

12. 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 misconduct is greatly diminished by the passage of time and by the absence of similar, more recent misconduct. (*Kwasnik v. State Bar* (1990) 50 Cal.3d 1061, 1070.)

Disciplinary Guidelines

13. California Code of Regulations, title 16, section 1760, provides that in reaching a decision in a disciplinary action under the Administrative Procedure Act, the Board must consider its Recommended Guidelines for Disciplinary Orders and Conditions of Probation (guidelines). Deviation from the guidelines is appropriate when the Board, in its sole discretion, determines that the facts of the particular case warrant such a deviation, for example: the presence of mitigating factors, the age of the case, or evidentiary problems in the case.

14. Under the guidelines, the recommended discipline for violation of Business and Professions Code section 4301, subdivisions (h) and (l), ranges from a minimum discipline of revocation, stayed, three years' probation, to a maximum disciplinary order of revocation. The recommended discipline for violation of Business and Professions Code section 4301, subdivision (k), unprofessional conduct consisting of the conviction of more than one misdemeanor involving the consumption of alcohol, ranges from a minimum of revocation, stayed, 90 days actual suspension, three to five years' probation, to a maximum of revocation.

15. The Board's guidelines provide criteria to consider in determining the appropriate level of discipline, including: the nature and severity of the acts under consideration, the number and/or variety of current violations, the actual or potential harm to the public, the actual or potential harm to any consumer, Respondent's prior disciplinary record, evidence of mitigation and rehabilitation, and the amount of time that has passed since the occurrence of the acts under consideration.

16. The guidelines permit Respondent to present evidence demonstrating his rehabilitative or corrective efforts and competency, such as:

- a. Recently dated written statements from persons in positions of authority who have on-the-job knowledge of the Respondent's current competence in the practice of pharmacy. Each statement should include the period of time and capacity in which the person worked with the Respondent and should be signed under the penalty of perjury and subject to verification.
- b. Recently dated letters from counselors regarding Respondent's participation in a rehabilitation or recovery program. These should include a description of the program, a psychologist's diagnosis of Respondent's condition and current state of recovery, and the psychologist's basis for determining rehabilitation.
- c. Recently dated letters describing Respondent's participation in support groups, e.g., Alcoholics Anonymous, Narcotics Anonymous, professional support groups, etc.
- d. Recently dated laboratory analyses or drug screen reports, confirming abstention from drugs and alcohol.
- e. Recently dated physical examination or assessment report by a licensed physician confirming the absence of any physical impairment that would prohibit Respondent from practicing safely.
- f. Recently dated letters from probation or parole officers regarding Respondent's participation in and/or compliance with terms and conditions of probation or parole. The letter should include a description of the terms and conditions and the officer's basis for determining compliance.

17. The mitigating evidence that Respondent produced and his evidence of rehabilitation were insufficient to support a conclusion that he presently possesses the sobriety required to practice pharmacy safely, even on a probationary basis. Public safety

should not be placed at risk to enable Respondent to establish that he has changed his ways. The laws are designed to protect the public before a licensee harms a patient rather than after harm has occurred. (*Griffiths v. Superior Court* (2002) 96 Cal.App.4th 757, 770-771). The safer approach is to have Respondent establish his rehabilitation outside of the profession and to place the burden on Respondent to file a request for reinstatement when he has become rehabilitated. While on probation, people are expected to behave in exemplary fashion, and little weight is generally given to law-abiding activity in that time period. *In re Gossage* (2000) 23 Cal.4th 1080, 1099.

18. No sanction other than an outright revocation is supported by this record.

Costs of Prosecution

19. Business and Professions Code section 125.3 provides in part:

(a) Except as otherwise provided by law . . . upon request of the entity bringing the proceeding, the administrative law judge may direct a licentiate found to have committed a violation or violations of the licensing act to pay a sum not to exceed the reasonable costs of the investigation and enforcement of the case.

20. *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32 held that the regulation imposing costs for investigation and enforcement under California Code of Regulations, title 16, section 317.5 (which is similar to Bus. & Prof. Code § 125.3) did not violate due process in a case involving the discipline of a chiropractor. But, it was incumbent on the State Board of Chiropractic Examiners to exercise its discretion to reduce or eliminate cost awards in a manner that ensured that section 317.5 did not “deter chiropractors with potentially meritorious claims or defenses from exercising their right to a hearing.”

The Supreme Court set forth four factors that the State Board of Chiropractic Examiners was required to consider in deciding whether to reduce or eliminate costs: (1) whether the chiropractor used the hearing process to obtain dismissal of other charges or a reduction in the severity of the discipline imposed; (2) whether the chiropractor had a “subjective” good faith belief in the merits of his position; (3) whether the chiropractor raised a “colorable challenge” to the proposed discipline; and (4) whether the chiropractor had the financial ability to make payments.

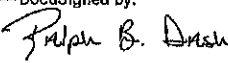
The *Zukerman* criteria were applied in this matter, and it is concluded that issuing an order directing Respondent to pay the Board’s costs of prosecution in this matter will not have a chilling effect on future Respondents’ exercise of their right to a hearing.. Respondent shall be required to pay \$3,912 in prosecution costs. The costs shall be payable as a condition precedent to re-licensure.

ORDER

1. Registered Pharmacist License Number RPH 53998 issued to Respondent Viral Shashikant Kothary is revoked. Respondent shall relinquish his wall license and pocket renewal license to the board within 10 days of the effective date of this decision.

2. As a condition precedent to reinstatement of his license, Respondent shall reimburse the Board for its costs of investigation and prosecution in the amount of \$3,912. Said amount shall be paid in full prior to the reinstatement of his license unless otherwise ordered by the Board.

DATED: February 3, 2017

DocuSigned by:

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RALPH B. DASH
Administrative Law Judge
Office of Administrative Hearings

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7 *Attorneys for Complainant*

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

11 In the Matter of the Accusation Against:
12 **VIRAL SHASHIKANT KOTHARY**
7625 Mexico Way
13 Buena Park, CA 90620
14 Pharmacist License No. RPH 53998
15 Respondent.

Case No. 5137
ACCUSATION

17 Complainant alleges:

18 **PARTIES**

- 19 1. Virginia Herold ("Complainant") brings this Accusation solely in her official capacity
20 as the Executive Officer of the Board of Pharmacy, Department of Consumer Affairs.
- 21 2. On or about August 28, 2002, the Board of Pharmacy ("Board") issued Pharmacist
22 License No. RPH 53998 to Viral Shashikant Kothary ("Respondent"). The Pharmacist License
23 was in full force and effect at all times relevant to the charges brought herein and will expire on
24 October 31, 2017, unless renewed.

25 **JURISDICTION**

- 26 3. This Accusation is brought before the Board under the authority of the following
27 laws. All section references are to the Business and Professions Code ("Code") unless otherwise
28 indicated.

1 4. Section 118, subdivision (b), of the Code provides that the suspension, expiration,
2 surrender, or cancellation of a license shall not deprive the Board of jurisdiction to proceed with a
3 disciplinary action during the period within which the license may be renewed, restored, reissued
4 or reinstated.

5 5. Section 4300.1 of the Code states:

6 "The expiration, cancellation, forfeiture, or suspension of a board-issued license by
7 operation of law or by order or decision of the board or a court of law, the placement of a license
8 on a retired status, or the voluntary surrender of a license by a licensee shall not deprive the board
9 of jurisdiction to commence or proceed with any investigation of, or action or disciplinary
10 proceeding against, the licensee or to render a decision suspending or revoking the license."

11 6. Section 4011 of the Code provides that "[t]he board shall administer and enforce this
12 chapter [Pharmacy Law, (Business and Professions Code, Sec 4000 et seq.)] and the Uniform
13 Controlled Substances Act (Division 10 (commencing with Section 11000) of the Health and
14 Safety Code). "

15 7. Section 4300, subdivision (a), of the Code states, in pertinent part, that "[e]very
16 license issued may be suspended or revoked."

17 STATUTORY AND REGULATORY PROVISIONS

18 8. Section 4301 of the Code states, in pertinent part:

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

22

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

28

1 (k) The conviction of more than one misdemeanor or any felony involving the use,
2 consumption, or self-administration of any dangerous drug or alcoholic beverage, or any
3 combination of those substances.

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

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

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

28 ///

1 **COST RECOVERY**

2 10. Section 125.3 of the Code provides that the Board may request the administrative law
3 judge to direct a licentiate found to have committed a violation or violations of the licensing act to
4 pay a sum not to exceed the reasonable costs of the investigation and enforcement of the case,
5 with failure of the licentiate to comply subjecting the license to not being renewed or reinstated.
6 If a case settles, recovery of investigation and enforcement costs may be included in a stipulated
7 settlement.

8 **FIRST CAUSE FOR DISCIPLINE**

9 **(Convictions of Substantially Related Crimes)**

10 11. Respondent is subject to disciplinary action under Code section 4301, subdivision (l),
11 in conjunction with California Code of Regulations, title 16, section 1770, in that Respondent was
12 convicted of crimes substantially related to qualifications, functions, or duties of a pharmacist
13 which to a substantial degree evidence his present or potential unfitness to perform the functions
14 authorized by the license in a manner consistent with the public health, safety, or welfare, as
15 follow:

16 a. On or about May 1, 2013, after pleading nolo contendere, Respondent was convicted
17 of one misdemeanor count of violating Vehicle Code section 23152, subdivision (b) [driving with
18 a 0.08% or higher blood alcohol content ("BAC"), by weight], with a further allegation of
19 violating Vehicle Code section 23578 [having a BAC of 0.15% or higher] in the criminal
20 proceeding entitled *The People of the State of California v. Viral Shashikant Kothary* (Super. Ct.
21 Fresno County, 2013, No. M11914798). Respondent's BAC was 0.19% pursuant to a stipulation.

22 The Court sentenced Respondent to 16 days in county jail, placed him on three years probation
23 with terms and condition, ordered him to complete a first offender DUI program, and ordered him
24 to pay fines.

25 b. The circumstances underlying the conviction are that on or about March 23, 2011,
26 Respondent drove a vehicle, ran a red traffic light, and hit a pole while driving at a high speed.
27 Upon contact, law enforcement officers noticed Respondent was slurring his words heavily and
28 emitting an odor of an alcoholic beverage from him. Respondent told the officers that he went to

1 his first alcoholic anonymous meeting and had a few drinks afterwards. Respondent's BAC was
2 0.22% and 0.21%.

3 c. On or about May 1, 2013, after pleading nolo contendere, Respondent was convicted
4 of one misdemeanor count of violating Vehicle Code section 23152, subdivision (b) [driving with
5 a 0.08% or higher BAC, by weight], with a further allegation of violating Vehicle Code section
6 23578 [having a BAC of 0.15% or higher] in the criminal proceeding entitled *The People of the*
7 *State of California v. Viral Shashikant Kothary* (Super. Ct. Fresno County, 2013, No.
8 M13911805). Respondent's BAC was 0.19% pursuant to a stipulation and he admitted to a prior
9 conviction of violating Vehicle Code section 23152, subdivision (b). The Court sentenced
10 Respondent to 22 days in county jail, placed him on three years probation with terms and
11 conditions, ordered him to complete a 18-month Multiple Offender Alcohol Program, and ordered
12 him to pay fines.

13 d. The circumstances underlying the conviction are that on or about July 27, 2011,
14 Respondent was stopped by law enforcement officer for a traffic violation. Upon contact, an
15 officer observed that Respondent was showing symptoms of intoxication and emitting a strong
16 odor of an alcoholic beverage from his breath. Furthermore, Respondent told the officer that he
17 had two or two and half alcoholic beverages. Respondent was given field sobriety tests, but he
18 was unable to complete it. Respondent's BAC was 0.23%, 0.20% and 0.24%.

19 e. On or about July 1, 2015, after pleading nolo contendere, Respondent was convicted
20 of one misdemeanor count of violating Vehicle Code section 23152, subdivision (a) [driving
21 under the influence of alcohol], with further allegations of violating Vehicle Code sections 23578
22 [excessive BAC] and 23545, subdivision (a) [third conviction within ten years], in the criminal
23 proceeding entitled *The People of the State of California v. Viral Shashikant Kothary* (Super. Ct.
24 Kern County, 2015, No. BM829601A). The Court sentenced Respondent to 120 days in jail,
25 placed him on three years probation with terms and conditions, ordered him to complete an
26 alcohol education program, ordered him to participate in the victim impact panel, ordered him to
27 install an ignition interlock device on his vehicles, and ordered him to pay fines.

28 f. The circumstances underlying the conviction are that on or about September 21, 2013,

1 a law enforcement officer observed Respondent was unable to drive in a straight in a traffic lane.
2 Upon traffic stop, the officer contacted Respondent and detected a strong odor of an alcoholic
3 beverage emitting from him. Furthermore, the officer noticed a beeping noise from Respondent's
4 vehicle and he told the officer that he was having trouble with his ignition interlock device.
5 When the officer asked if he had any alcoholic beverages, Respondent told the officer that he had
6 not and showed his "One year chit." Respondent further stated that his last alcoholic drink was
7 the year before. Respondent was given the field sobriety tests, but he was unable to complete it.
8 Respondent's subsequent BAC was 0.22%.

9 **SECOND CAUSE FOR DISCIPLINE**

10 **(Dangerous Use of Alcohol)**

11 12. Respondent is subject to disciplinary action under Code section 4301, subdivision (h),
12 on the grounds of unprofessional conduct, in that Respondent used alcoholic beverages to the to
13 the extent or in a manner as to be dangerous or injurious to himself or others, as follows:

14 a. On or about March 23, 2011, July 27, 2011, and September 21, 2013, used alcoholic
15 beverages to the to the extent or in a manner as to be dangerous or injurious to himself or others.
16 Complainant refers to and by this reference incorporates the allegations set for above paragraph
17 11, subparagraphs a though f, inclusive, as though set forth fully.

18 **THIRD CAUSE FOR DISCIPLINE**

19 **(Multiple Convictions Involving Consumption of Alcohol)**

20 13. Respondent is subject to disciplinary action under Code section 4301, subdivision (k),
21 on the grounds of unprofessional conduction, in that Respondent has three convictions involving
22 consumption of alcoholic beverages. Complainant refers to and by this reference incorporates the
23 allegations set for above paragraph 12, subparagraphs a, c, and e, inclusive, as though set forth
24 fully.

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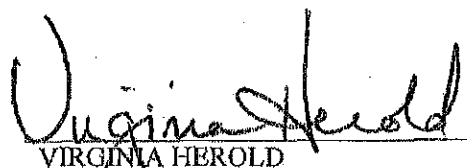
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PRAYER

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

1. Revoking or suspending Pharmacist License No. RPH 53998, issued to Respondent;
2. Ordering Respondent to pay the Board the reasonable costs of the investigation and enforcement of this case, pursuant to section 125.3 of the Code; and
3. Taking such other and further action as deemed necessary and proper.

DATED: 12/22/15



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

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