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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 Accusation Against:

Case No. 4771

12 **ADVANTACARE INFUSION**  
13 **5 Mandeville Ct., Ste. 100**  
**Monterey, CA 93940**

**A C C U S A T I O N**

14 **Pharmacy License No. PHY 48323**

15 **and**

16 **DUNCAN LINCK MCCARTER**  
17 **1209 Ocean View Blvd.**  
**Pacific Grove, CA 93950**

18 **Pharmacist License No. RPH 26117**

19 Respondents.

20  
21 Complainant alleges:

22 **PARTIES**

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

25 2. On or about April 26, 2007, the Board of Pharmacy issued Pharmacy License No.  
26 PHY 48323 to AdvantaCare Infusion (Respondent AdvantaCare). The Pharmacy License was in  
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1 full force and effect at all times relevant to the charges brought herein and will expire on April 1,  
2 2014, unless renewed.

3 3. On or about July 15, 1969, the Board of Pharmacy issued Pharmacist License  
4 Number RPH 26117 to Duncan Linck McCarter (Respondent McCarter). The Pharmacist  
5 License was in full force and effect at all times relevant to the charges brought herein and will  
6 expire on January 31, 2014, unless renewed. Since on or about August 20, 2007, and for all time  
7 periods relevant to the charges herein, Respondent McCarter served and/or was reflected in Board  
8 records as the Pharmacist-in-Charge (PIC) for Respondent AdvantaCare.

9 **JURISDICTION**

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

13 5. Section 4011 of the Code provides that the Board shall administer and enforce both  
14 the Pharmacy Law (Bus. & Prof. Code, § 4000 et seq.) and the Uniform Controlled Substances  
15 Act (Health & Safety Code, § 11000 et seq.).

16 6. Section 4300, subdivision (a) of the Code provides that every license issued by the  
17 Board may be suspended or revoked.

18 7. Section 4300.1 of the Code provides that the expiration, cancellation, forfeiture, or  
19 suspension of a Board-issued license, the placement of a license on a retired status, or the  
20 voluntary surrender of a license by a licensee, shall not deprive the Board of jurisdiction to  
21 commence or proceed with any investigation of, or action or disciplinary proceeding against, the  
22 licensee or to render a decision suspending or revoking the license.

23 **STATUTORY PROVISIONS**

24 8. Section 4301 of the Code provides in relevant part:

25 "The board shall take action against any holder of a license who is guilty of unprofessional  
26 conduct or whose license has been procured by fraud or misrepresentation or issued by mistake.

27 Unprofessional conduct shall include, but is not limited to, any of the following:

28 ...

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

3           ...

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

8           ...”

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

11           10. Section 4081, subdivision (a) of the Code states:

12           “All records of manufacture and of sale, acquisition, or disposition of dangerous drugs or  
13 dangerous devices shall be at all times during business hours open to inspection by authorized  
14 officers of the law, and shall be preserved for at least three years from the date of making. A  
15 current inventory shall be kept by every manufacturer, wholesaler, pharmacy, veterinary  
16 food-animal drug retailer, physician, dentist, podiatrist, veterinarian, laboratory, clinic, hospital,  
17 institution, or establishment holding a currently valid and unrevoked certificate, license, permit,  
18 registration, or exemption under Division 2 (commencing with Section 1200) of the Health and  
19 Safety Code or under Part 4 (commencing with Section 16000) of Division 9 of the Welfare and  
20 Institutions Code who maintains a stock of dangerous drugs or dangerous devices.”

21           11. Section 4105 of the Code provides, in relevant part:

22           “(a) All records or other documentation of the acquisition and disposition of dangerous  
23 drugs and dangerous devices by any entity licensed by the board shall be retained on the licensed  
24 premises in a readily retrievable form.

25           ...

26           “(c) The records required by this section shall be retained on the licensed premises for a  
27 period of three years from the date of making.

28           ...”

1           12. Section 4113, subdivision (c) of the Code states:

2           “The pharmacist-in-charge shall be responsible for a pharmacy’s compliance with all state  
3 and federal laws and regulations pertaining to the practice of pharmacy.”

4           13. Section 4332 of the Code states:

5           “Any person who fails, neglects, or refuses to maintain the records required by Section  
6 4081 or who, when called upon by an authorized officer or a member of the board, fails, neglects,  
7 or refuses to produce or provide the records within a reasonable time, or who willfully produces  
8 or furnishes records that are false, is guilty of a misdemeanor.”

9           14. Section 4333 of the Code states, in pertinent part, that all prescriptions filled by a  
10 pharmacy and all other records required by Section 4081 shall be maintained on the premises and  
11 available for inspection by authorized officers of the law for a period of at least three years. In  
12 cases where the pharmacy discontinues business, these records shall be maintained in a  
13 board-licensed facility for at least three years.

14           15. Section 4021 of the Code provides that a “controlled substance” means any substance  
15 listed in Schedules I through V contained in Health and Safety Code section 11053 et seq.

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

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

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

21           ...

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

24           17. Health and Safety Code section 11165 provides, in pertinent part, for the  
25 establishment and maintenance of a Controlled Substance Utilization Review and Evaluation  
26 System (CURES) for the electronic monitoring of and prescribing and dispensing of Schedule II,  
27 III, and IV controlled substances, and requires, in pertinent part, that for each prescription for a  
28 Schedule II, III, or IV controlled substance, the dispensing pharmacy or clinic transmit a report

1 with certain information on the patient, prescriber, controlled substance, and prescription, to the  
2 California Department of Justice, on a weekly basis in a format prescribed by the California  
3 Department of Justice.<sup>1</sup>

#### 4 REGULATORY PROVISIONS

5 18. California Code of Regulations, title 16, section 1707.1 provides, in pertinent part:

6 “(a) A pharmacy shall maintain medication profiles on all patients who have prescriptions  
7 filled in that pharmacy except when the pharmacist has reasonable belief that the patient will not  
8 continue to obtain prescription medications from that pharmacy.

9 “(1) A patient medication record shall be maintained in an automated data processing or  
10 manual record mode such that the following information is readily retrievable during the  
11 pharmacy’s normal operating hours.

12 “(A) The patient’s full name and address, telephone number, date of birth (or age) and  
13 gender;

14 “(B) For each prescription dispensed by the pharmacy:

15 “1. The name, strength, dosage form, route of administration, if other than oral, quantity  
16 and directions for use of any drug dispensed;

17 “2. The prescriber’s name and where appropriate, license number, DEA registration number  
18 or other unique identifier;

19 “3. The date on which a drug was dispensed or refilled;

20 “4. The prescription number for each prescription; and

21 “5. The information required by section 1717.

22 ...

23 “(2) The patient medication record shall be maintained for at least one year from the date  
24 when the last prescription was filled.”

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26 \_\_\_\_\_  
27 <sup>1</sup> Health and Safety Code section 11165 was first amended to impose CURES reporting  
28 requirements effective January 1, 2005; as of that date, prescriptions for Schedule II and III drugs  
had to be reported. Effective January 1, 2007, Schedule IV prescriptions also had to be reported.

1 19. California Code of Regulations, title 16, section 1714 provides, in relevant part:

2 “(b) Each pharmacy licensed by the board shall maintain its facilities, space, fixtures, and  
3 equipment so that drugs are safely and properly prepared, maintained, secured and distributed.  
4 The pharmacy shall be of sufficient size and unobstructed area to accommodate the safe practice  
5 of pharmacy.

6 . . .

7 “(d) Each pharmacist while on duty shall be responsible for the security of the prescription  
8 department, including provisions for effective control against theft or diversion of dangerous  
9 drugs and devices, and records for such drugs and devices. Possession of a key to the pharmacy  
10 where dangerous drugs and controlled substances are stored shall be restricted to a pharmacist.”

11 20. California Code of Regulations, title 16, section 1715 provides, in pertinent part:

12 “(a) The pharmacist-in-charge of each pharmacy as defined under section 4029 or section  
13 4037 of the Business and Professions Code shall complete a self-assessment of the pharmacy’s  
14 compliance with federal and state pharmacy law. The assessment shall be performed before July  
15 1 of every odd-numbered year. The primary purpose of the self-assessment is to promote  
16 compliance through self-examination and education.

17 . . .

18 “(d) Each self-assessment shall be kept on file in the pharmacy for three years after it is  
19 performed.”

20 21. California Code of Regulations, title 16, section 1717, subdivision (b) provides:

21 “(b) In addition to the requirements of Business and Professions Code section 4040, the  
22 following information shall be maintained for each prescription on file and shall be readily  
23 retrievable:

24 “(1) The date dispensed, and the name or initials of the dispensing pharmacist. All  
25 prescriptions filled or refilled by an intern pharmacist must also be initialed by the supervising  
26 pharmacist before they are dispensed.

27 “(2) The brand name of the drug or device; or if a generic drug or device is dispensed, the  
28 distributor’s name which appears on the commercial package label; and



1 that Respondent AdvantaCare purchased numerous dangerous drugs in September 2011,  
2 December 2011, and July 2012.

3 26. On or about August 21, 2012, Respondent McCarter told one of the inspectors that he  
4 had ordered dangerous drugs for himself and his family. On the same day, the inspector faxed to  
5 Respondent McCarter a letter requesting (1) copies of invoices of acquisition for any and all  
6 purchases of dangerous drugs between August 22, 2009, and August 21, 2012; and (2) copies of  
7 prescriptions/invoices for disposition of any and all dangerous drugs for the same time period.

8 27. On or about August 27, 2012, Respondent McCarter provided one of the inspectors  
9 with some, but not all, of the invoices for the dangerous drugs listed on Respondent  
10 AdvantaCare's then current wholesaler's report. The inspector then asked Respondent McCarter  
11 for invoices from Respondent AdvantaCare's previous wholesaler beginning on August 22, 2009.  
12 Respondent McCarter was unable to provide the inspector with these earlier invoices. The  
13 inspector also asked Respondent McCarter for dispensing records. Respondent McCarter was  
14 only able to produce one prescription record. The inspector then asked Respondent McCarter if  
15 he could provide any other records. Respondent McCarter told the inspector that no other records  
16 were available at that time. Furthermore, with one exception, Respondent McCarter did not  
17 provide the inspector with any prescriptions for the dangerous drugs he had ordered for himself  
18 and his family. Nor did Respondent McCarter maintain medication profiles for patients who had  
19 prescriptions filled in the pharmacy.

20 28. On or about September 7, 2012, one of the inspectors requested and received from  
21 Respondent AdvantaCare's previous wholesaler a summary of prescription medications  
22 purchased by Respondent AdvantaCare between August 22, 2009, and August 20, 2012. The  
23 summary indicates that on or about December 31, 2009, Respondent AdvantaCare purchased one  
24 (1) sixteen ounce bottle of Cheratussin AC. Cheratussin contains codeine, a Schedule V  
25 controlled substance and dangerous drug. Neither prescription information nor dispensing  
26 information for the Cheratussin AC was readily retrievable by Respondent McCarter during the  
27 pharmacy inspection on August 16, 2012.

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**FIRST CAUSE FOR DISCIPLINE**

**(Furnishing a Dangerous Drug Without a Prescription)**

29. Respondents are subject to disciplinary action under sections 4301, subdivision (j) and/or (o), 4113, subdivision (c), and 4059 of the Code, in that Respondents furnished dangerous drugs without a prescription of an authorized prescriber. The circumstances of Respondents' conduct are set forth above in paragraphs 26-28.

**SECOND CAUSE FOR DISCIPLINE**

**(Failure to Maintain and Preserve Records of Dangerous Drugs)**

30. Respondents are subject to disciplinary action under sections 4301, subdivision (j) and/or (o), 4081, 4113, subdivision (c), 4332, and 4333 of the Code, and California Code of Regulations, title 16, sections 1707.1, subdivision (a)(1)(B) and 1717, subdivision (b), in that Respondents failed to maintain prescriptions and other records of the sale, acquisition, or disposition of dangerous drugs, to make those records available for inspection, and to preserve those records for at least three years from the date of making. The circumstances of Respondents' conduct are set forth above in paragraphs 24-28.

**THIRD CAUSE FOR DISCIPLINE**

**(Failure to Report Controlled Substance Prescriptions to CURES)**

31. Respondents are subject to disciplinary action under sections 4301, subdivision (j) and/or (o) and 4113, subdivision (c) of the Code, and Health and Safety Code section 11165, in that Respondents failed to transmit controlled substances dispensing data to CURES.

**FOURTH CAUSE FOR DISCIPLINE**

**(Failure to Retain Records of Dangerous Drugs on Licensed Premises)**

32. Respondents are subject to disciplinary action under sections 4301, subdivision (j) and/or (o), 4105, subdivisions (a) and (c), and 4113, subdivision (c) of the Code, in that Respondents failed to retain on the licensed premises in a readily retrievable form records or other documentation of the acquisition and disposition of dangerous drugs for three years from the date of making. The circumstances of Respondents' conduct are set forth above in paragraphs 24, 27, and 28.

1 **FIFTH CAUSE FOR DISCIPLINE**

2 **(Failure to Maintain Patient Medication Profiles)**

3 33. Respondents are subject to disciplinary action under sections 4301, subdivisions (j)  
4 and/or (o) and 4113, subdivision (c) of the Code, and California Code of Regulations, title 16,  
5 section 1707.1, in that Respondents failed to maintain medication profiles for all patients who had  
6 prescriptions filled in Respondents' pharmacy. The circumstances of Respondents' conduct are  
7 set forth above in paragraph 27.

8 **SIXTH CAUSE FOR DISCIPLINE**

9 **(Failure to Safely and Properly Secure Drugs)**

10 34. Respondents are subject to disciplinary action under sections 4301, subdivisions (j)  
11 and/or (o) and 4113, subdivision (c) of the Code, and California Code of Regulations, title 16,  
12 section 1714, subdivision (b), in that Respondents failed to safely and properly secure drugs. The  
13 circumstances of Respondents' conduct are set forth above in paragraph 23.

14 **SEVENTH CAUSE FOR DISCIPLINE**

15 **(Possession of Pharmacy Key by Non-Pharmacist)**

16 35. Respondents are subject to disciplinary action under sections 4301, subdivisions (j)  
17 and/or (o) and 4113, subdivision (c) of the Code, and California Code of Regulations, title 16,  
18 section 1714, subdivision (d), in that on or about August 16, 2012, a non-pharmacist employee of  
19 Respondents' pharmacy was in possession of a key to the pharmacy.

20 **EIGHTH CAUSE FOR DISCIPLINE**

21 **(Failure to Complete and Retain a Self-Assessment)**

22 36. Respondents are subject to disciplinary action under sections 4301, subdivisions (j)  
23 and/or (o) and 4113, subdivision (c) of the Code, and California Code of Regulations, title 16,  
24 section 1715, subdivisions (a) and (d), in that Respondent McCarter failed to complete and retain  
25 a self-assessment of Respondent AdvantaCare's compliance with federal and state pharmacy law.  
26 The circumstances of Respondents' conduct are set forth above in paragraph 24.

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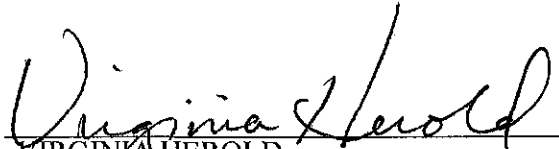
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**PRAYER**

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

1. Revoking or suspending Pharmacy License No. PHY 48323 issued to AdvantaCare Infusion (Respondent AdvantaCare);
2. Revoking or suspending Pharmacist License No. RPH 26117 issued to Duncan Linck McCarter (Respondent McCarter);
3. Ordering Respondent AdvantaCare and Respondent McCarter to jointly and severally be responsible to pay the Board of Pharmacy the reasonable costs of the investigation and enforcement of this case pursuant to Business and Professions Code section 125.3;
4. Taking such other and further action as is deemed necessary and proper.

DATED: 5/10/14   
VIRGINIA HEROLD  
Executive Officer  
Board of Pharmacy  
Department of Consumer Affairs  
State of California  
*Complainant*

SF2013405537