

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

In the Matter of the Accusation Against:

**KENNETH ROGER FOLMAR**  
PO Box 1741  
Colfax, CA 95713

Pharmacy Technician License No. TCH 8785

Respondent.

Case No. 3693

OAH No. 2010100503

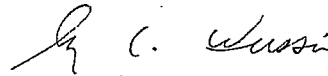
**DECISION**

The attached Proposed Decision of the Administrative Law Judge is hereby adopted by the Board of Pharmacy as its Decision in the above-entitled matter.

This decision shall become effective on November 17, 2011.

It is so ORDERED October 18, 2011.

BOARD OF PHARMACY  
DEPARTMENT OF CONSUMER AFFAIRS  
STATE OF CALIFORNIA



By

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

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In the Matter of the Accusation Against:

KENNETH ROGER FOLMAR  
Colfax, California 95713

Original Pharmacy Technician No. TCH 5785

Respondent.

Case No. 3693

OAH No. 2010100503

**PROPOSED DECISION**

This matter was heard before Dian M. Vorters, Administrative Law Judge, Office of Administrative Hearings, State of California, on June 10, 2011, in Sacramento, California.

Geoffrey S. Allen, Deputy Attorney General, represented Virginia Herold (Complainant), Executive Officer, Board of Pharmacy (Board), Department of Consumer Affairs.

Kenneth Roger Folmar (respondent) appeared on his own behalf.

Evidence was received and the matter was submitted on June 10, 2011.

**FACTUAL FINDINGS**

1. Complainant made and filed the Accusation in her official capacity.
2. On March 18, 1993, the Board issued Original Pharmacy Technician Number TCH 5785 to respondent. The original pharmacy technician registration was in effect at all times relevant to this matter. Respondent's license expired on February 28, 2011, and as of the hearing date had not been renewed. Jurisdiction to hear the case on its merits is proper pursuant to Business and Professions Code sections 118 and 4402. (See Legal Conclusion 1.)
3. On November 16, 2009, respondent was convicted in the Superior Court of California, County of Nevada, in Case Number M09-1200, on his plea of guilty to violating Vehicle Code section 23152, subdivision (a) (driving under the influence of alcohol (DUI)), a misdemeanor. The court suspended imposition of sentence, placed respondent on three

years conditional probation, ordered him to pay fines, and serve 26 days in jail, which would be satisfied upon successful completion of an inpatient treatment program at St. Helena.

4. The facts and circumstances of the conviction were that on July 22, 2009, respondent was driving his car while intoxicated. Due to his intoxicated state, he was unable to stop behind stationary traffic and rear-ended an official vehicle that had come to a complete stop. Law enforcement contacted respondent on the scene and observed him to have droopy eyelids, bloodshot eyes, and slow slurred speech. He admitted drinking two beers and taking anti-depressant medication. His movements were slow and his gait was staggered. The officer smelled alcohol on respondent's breath. Based on his poor performance on field sobriety tests, he was arrested for DUI. Respondent's blood toxicology report revealed an alcohol content of .30 percent and the presence of Diazepam (17 ng/mL) and Nordiazepam (351 ng/mL). Diazepam is prescribed to treat anxiety disorders. Nordiazepam is a metabolite of Diazepam.

5. At hearing, respondent admitted drinking several margaritas at a local restaurant, on an empty stomach, up to ten minutes prior to the collision. He was alone in the car. He had taken prescription anti-depressants and anti-anxiety medication. His medication is prescribed by his treating psychiatrist and physician. No injury was reported.

#### *Rehabilitation / Mitigation*

6. Respondent stated that he will be off probation in 2012. He was ordered to pay approximately \$2,100 in court fines and makes payments on his current balance of \$700.

7. In June 2010, Benjamin Yu, M.D., respondent's psychiatrist, diagnosed respondent with Attention Deficit Hyperactivity Disorder (ADHD), combined type, Major Depressive Disorder, and Anxiety. Respondent's mental health is related to personal problems occurring at the time of the collision. He explained that in September 2006, his wife and the mother of their three minor sons left the family. His divorce was final in September 2007. The next couple of years were "difficult." During the summer of 2008, his ex-wife moved to San Diego. He stated, "My children and I were devastated." He admitted having "too many drinks" and expressed deep regret for his poor judgment and behavior. He stated, "I made a very big mistake. It will never happen again." He added, "I must be strong in order to take care of my three minor children who I have custody of."

8. Respondent has attended Alcoholics Anonymous for over a year. He presented evidence of completion of his court-ordered DUI class on July 26, 2010. Initially, his license was restricted to allow him to drive for work and his children's schools. He currently has no restrictions on his license. He also presented two letters from St. Helena Hospital where he attended a 30-day in-patient treatment program in November 2009. The program included lectures, films, group and individual counseling, exercise, 12-step meetings, and an educational component. Respondent's last drink was on March 15, 2011, when he consumed a glass of wine. He does not drink and drive. He learned at St. Helena that, "I have a disease and I am in recovery and I always will be."

9. Respondent earned his pharmacy technician license by being "grandfathered-in" based on his experience. He has worked as an in-house pharmacy technician since 1983. He began working at a hospital in Gilroy, at the age of 15, on a permit. He was responsible for transcribing doctors' orders into the computer, filling patient bins with tablets, making intravenous bags as ordered by physicians, and administering Total Parenteral Nutrition (TPN). He left Gilroy and began working at Sierra Vista Hospital at CalPoly. In 1993, the Board issued his registration. He had a short tenure at Sawyer College in San Jose as a pharmacy technician instructor. He has never worked retail pharmacy.

Respondent subsequently decided to attain skills as an anesthesia technician. In 1994, he established a temporary contractor agency for "medical instrument technologists or medical anesthesia technologists." This function allows individuals to assist anesthesiologists, for example, with equipment, ambulatory breathing bags, and endotracheal tubes. He began working at Good Samaritan Hospital in San Jose and then obtained a job at Stanford University Hospital in Palo Alto. He submitted evidence of attendance of a continuing education seminar conducted by the American Society of Anesthesia Technologists and Technicians in October 2007.

10. Respondent is self-employed. He owns two businesses, Antech Enterprises, Inc., and Antech Wildlife Management. Antech Enterprises recruits and provides temporary to permanent placement of medical technicians to area hospitals. Antech Wildlife performs wildlife management and abatement services including trapping and removing birds, rodents, bats, gophers, raccoons, and skunks. Respondent opened a second division of Antech Wildlife Management in Santa Clara County. His oldest son, age 20, works for the company and attends Cabrillo College. Though respondent has not practiced as a pharmacy technician in 18 years, he has consistently paid his renewal dues. He wishes to retain the license in the event that he should someday need it. He did not pay his 2011 dues because the accusation was pending and he was unclear as to the outcome. He testified that he was considering relinquishing his license when he received the license renewal bill in the amount of \$150. He does not believe that his actions make him unsafe to practice as a pharmacy technician and sought a hearing to establish his position.

11. In 2003, respondent moved to Colfax with his wife because they believed it would be a better place to raise their sons. He was clearly devastated by her decision to leave and move to Southern California. This does not excuse but does explain his drinking binge on the evening of July 22, 2009. It was also apparent that he loves his sons, one of whom he set up in a family apartment in Los Gatos and one of whom has special needs. Respondent lives with his two remaining minor sons and his girlfriend who does not drink.

12. After moving to Colfax, respondent founded and coached little league football. He submitted plaques presented in recognition of his service as a head coach in 2006 and vice president of operations in 2004. He also submitted a letter dated January 7, 2007, written by Kenneth Delfino, Mayor of Colfax that corroborated respondent's business, family, and community involvement and described him as selfless and his character as "above reproach." This letter precedes respondent's DUI and as such does not mention the July 2009 offense. Respondent also submitted a letter dated May 1, 2011, written by Jeffrey

Anderson, president of JC Anderson Corporation. Respondent worked for Mr. Anderson from January 2003 to May 2008, as a sales representative and wild life technician. Mr. Anderson described respondent's work as "consistent and dependable." Mr. Anderson wrote that he had received numerous complements from clients regarding respondent's knowledge, skill, and performance. Mr. Anderson did not mention respondent's DUI offense in his letter.

### *Costs*

13. Complainant has requested costs of investigation and enforcement pursuant to Business and Professions Code section 125.3 in the total amount of \$3,060. This amount includes 14 hours of attorney case work at \$170.00 per hour as of June 1, 2011, and an additional four hours anticipated through hearing. The time spent appears to be reasonable, and the activities conducted appear to be necessary and appropriate to the development and presentation of the case.

Respondent testified as to his current financial status. He has a mortgage which he is in the process of modifying. He supports two minor children at home. In October 2010, he discharged a bankruptcy (Chapter 7). He stated that this was necessary due to debts that accrued as a byproduct of his divorce. His income is \$2,000 monthly, mortgage is \$1,400, car payment is \$380, gas, utilities, and other expenses total \$900 per month. Respondent receives assistance for food and for his disabled child. Based on his testimony, his monthly expenses not including food total \$2,680. He also has seven more monthly payments of \$100 toward his criminal court fines. Clearly, his ability to pay costs is restricted.

## LEGAL CONCLUSIONS

### *Applicable Laws*

1. Pursuant to Business and Professions Code section 4402, subdivision (e), any license issued by the Board other than a pharmacist license, "may be canceled by the Board if the license is not renewed within 60 days after its expiration. Any license canceled under this subdivision may not be reissued. Instead, a new application will be required."

Additionally, Business and Professions Code section 118 provides that the "suspension, expiration, forfeiture by operation of law of a license issued by a board ... or its suspension, forfeiture, or cancellation by order of the board or by order of a court of law, or its surrender ... shall not, during any period in which it may be renewed, restored, reissued, or reinstated, deprive the Board of its authority to institute or *continue a disciplinary proceeding* against the licensee upon any ground provided by law..." (Italics added.)

The Board filed its Accusation against respondent on or about June 9, 2010. When the Board filed the Accusation, the license was in full force and effect. Respondent timely requested a hearing on July 14, 2010. Respondent's license expired on February 28, 2011, and he did not submit dues based on the pending nature of the case. The Board exercised its discretion to cancel respondent's license on June 5, 2011. (Bus. & Prof. Code, § 4402.) At

no time did the Board move to withdraw the Accusation, either before or after cancelling respondent's license. As such, the Accusation is still pending. The Board has the authority to decide the merits of the Accusation pursuant to Business and Professions Code section 118. Further, respondent acted in reliance on the pending nature of the litigation concerning his license, which he has a vested interest in retaining. As a matter of law and equity, the cancellation of respondent's license does not operate to deprive the Board of its right to discipline respondent's license by the filing of an Accusation or respondent's right to defend his license at an administrative hearing.

2. Business and Professions Code section 4301, states that the Board shall take action against any holder of a license who is guilty of unprofessional conduct. In relevant part, 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 these substances.

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

3. An administrative agency may not bar an individual from practicing a lawful profession unless the conduct at issue is substantially related to his or her fitness or competence to practice that profession. (*Cartwright v. Board of Chiropractic Examiners* (1976) 16 Cal.3d 762, 767.) The use of alcoholic beverages to the extent, or in such a manner as to be dangerous or injurious to the licensee, to any other person, or to the public, as enumerated by the legislature, satisfies the nexus requirement between specific acts and unfitness to practice medicine. (*Watson v. Superior Court* (2009) 176 Cal.App.4th 1407, 1423.) The main purpose of license discipline is protection of the public and hence, does not require a showing of actual harm to patients. (*Griffiths v. Superior Court* (2002) 96 Cal.App.4th 757, 772.)

### *Cause for Discipline*

4. Cause for discipline of respondent's pharmacy technician license exists in that he engaged in an instance of excessive alcohol consumption that made him a danger to himself or others and constituted unprofessional conduct pursuant to Business and Professions Code section 4301, subdivision (h).

5. Cause for discipline of respondent's pharmacy technician license does not exist pursuant to Business and Professions Code section 4301, subdivision (l), in that he suffered one misdemeanor conviction for DUI. The statute covering DUI convictions is Business and Professions Code section 4301, subdivision (k). That statute clearly mandates evidence of two misdemeanor DUI convictions or a single felony DUI conviction for a finding of unprofessional conduct.

### *Rehabilitation*

6. The department has developed guidelines for use in evaluating the rehabilitation of an applicant subject to license discipline, which are set forth in California Code of Regulations, title 16, section 1769, subdivision (b). Factors to consider include the nature and severity of the act or offense, total criminal record, the time that has elapsed since commission of the act/offense, compliance with the terms of probation, and evidence of rehabilitation.

7. In consideration of these guidelines, there is evidence of a single instance of excessive drinking resulting in a DUI conviction in November 16, 2009. Two years have passed since this conduct and respondent has suffered no additional DUI convictions. In assessing the nature and severity of the act, the facts show that respondent drank several margaritas at a restaurant shortly before the collision. There is no evidence of physical injury to any party. He has complied with criminal probation, which is set to expire in November 2012.

8. Respondent was honest at hearing about the circumstances in his personal life in July 2009. He was seeking treatment for depression and anxiety at the time. He was raising three sons, one of whom has special needs. He was also under extreme financial pressure following his wife's departure. He expressed genuine regret for his poor judgment. He has been able to maintain his home and business, raise his sons and provide for their needs, attend to his own psychological needs, and continue his former law-abiding lifestyle. He was very proud of his involvement in the Colfax little league community and his efforts are corroborated by certificates and letters of appreciation and recognition.

9. Respondent sought a hearing in the matter to show that he is fit to work as a pharmacy technician. He prefers in-house technician work in a hospital or clinic. He seeks to retain his license and find employment to supplement his income. He did not timely pay his license fees due to the pending litigation. His license was cancelled by the Board five days before the administrative hearing in this matter.

*Conclusion*

10. All of the evidence presented in this matter has been considered. Though grounds for discipline exist pursuant to Legal Conclusion 4, respondent has demonstrated rehabilitation pursuant to Legal Conclusions 6 through 9. Clear and convincing evidence does not establish that respondent is presently unfit to practice as a pharmacy technician in a manner consistent with the public health, safety, or welfare. It would not be against the public interest to allow respondent to maintain his license or licensing rights as a pharmacy technician. As such, the Accusation is dismissed.

*Cost Recovery Analysis*

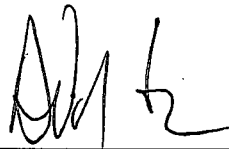
11. Pursuant to Business and Professions Code section 125.3, subdivision (a), an administrative law judge may direct "a licensee found to have violated the licensing act to pay a sum not to exceed the reasonable costs of the investigation and enforcement of the case." The purpose of cost reimbursement is to discourage meritless administrative proceedings and prevent groundless challenges to disciplinary proceedings. (*Zuckerman v. Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, 40.)

In this case, respondent raised a colorable defense to the charges in this matter. Though cause exists to discipline his license based on one instance of excessive alcohol consumption, this conduct does not demonstrate clear and convincing evidence that respondent is unfit to practice as a pharmacy technician. Because there exists insufficient grounds to discipline respondent's license, no cost award is ordered. (*Zuckerman, supra.*)

ORDER

The Accusation No. 2010100503, against respondent Kenneth Roger Folmar (Original Pharmacy Technician No. TCH 5785) is DISMISSED.<sup>1</sup>

DATED: July 13, 2011



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DIAN M. VORTERS  
Administrative Law Judge  
Office of Administrative Hearings

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<sup>1</sup> The Board has discretion to proceed as to respondent's license in the manner set forth in Business and Professions Code section 4402, subdivision (e).



COPY

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

11 In the Matter of the Accusation Against:  
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 13 **KENNETH ROGER FOLMAR**  
 P.O. Box 1741  
 14 **Colfax, California 95713**  
 15 **Pharmacy Technician Registration No. TCH**  
**5785**  
 16 Respondent.

Case No. 3693

**ACCUSATION**

17  
 18 Complainant alleges:

19 **PARTIES**

- 20 1. Virginia Herold (Complainant) brings this Accusation solely in her official capacity  
 21 as the Executive Officer of the Board of Pharmacy, Department of Consumer Affairs.  
 22 2. On or about March 18, 1993, the Board of Pharmacy issued Pharmacy Technician  
 23 Registration Number TCH 5785 (License) to Kenneth Roger Folmar (Respondent). The License  
 24 was in full force and effect at all times relevant to the charges brought herein and will expire on  
 25 February 28, 2011, unless renewed.

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JURISDICTION

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

4. Section 4300 of the Code states, in pertinent part:

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

(b) The board shall discipline the holder of any license issued by the board, whose default has been entered or whose case has been heard by the board and found guilty, by any of the following methods:

- (1) Suspending judgment.
(2) Placing him or her upon probation.
(3) Suspending his or her right to practice for a period not exceeding one year.
(4) Revoking his or her license.
(5) Taking any other action in relation to disciplining him or her as the board in its discretion may deem proper.

(e) The proceedings under this article shall be conducted in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of the Government Code, and the board shall have all the powers granted therein. The action shall be final, except that the propriety of the action is subject to review by the superior court pursuant to Section 1094.5 of the Code of Civil Procedure.

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

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

(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.

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

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

#### 12 COST RECOVERY

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

#### 17 FIRST CAUSE FOR DISCIPLINE

18 (Conviction)

19 7. Respondent is subject to disciplinary action under Code section 4301, subd. (1) in that  
20 Respondent was convicted of a crime substantially related to his License and his practice as a  
21 pharmacy technician. The circumstances are as follows:

22 8. On or about November 16, 2009, in the Superior Court of California, County of  
23 Nevada, in the case entitled, *People of the State of California v. Kenneth Roger Folmar* (Super.  
24 Ct. Nevada County, 2009, Case No. M09-1200); Respondent was convicted on his plea of guilty  
25 of violating Vehicle Code section 23152, subd. (a) [driving under the influence of alcohol], a  
26 misdemeanor. The circumstances of the crime are that on or about July 22, 2009, Officer F. C.  
27 Lilyquist of the California Highway Patrol was dispatched to the scene of a collision involving  
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1 the Respondent's vehicle rear-ending a stopped motor vehicle. Officer Lilyquist approached  
2 Respondent's vehicle to speak with Respondent. Respondent was parked on the side of the road  
3 near the site of the collision. Respondent was in the driver's seat of his vehicle. Officer Lilyquist  
4 observed the Respondent to be in a stupor, with droopy eyelids and bloodshot eyes. Respondent  
5 was slow to answer the officer's questions and his speech was slow and slurred. Respondent  
6 admitted to drinking alcohol and driving. As Respondent exited his vehicle, his movements were  
7 slow and his gait was staggered. Officer Lilyquist observed Respondent sway while standing.  
8 Respondent had an odor of alcohol upon his breath. Officer Lilyquist asked Respondent to  
9 perform field sobriety tests and Respondent agreed. Respondent performed the tests poorly.  
10 Based upon Respondent's poor performance on the field sobriety tests, the collision, and Officer  
11 Lilyquist's observations of Respondent's signs of intoxication, Respondent was placed under  
12 arrest for violating Vehicle Code section 23152, subds. (a) [driving under the influence of  
13 alcohol] and (b) [driving with a blood alcohol content in excess of 0.08%]. Respondent submitted  
14 to a blood alcohol test and his test results were 0.30% blood alcohol content.

## 15 SECOND CAUSE FOR DISCIPLINE

### 16 (Dangerous Use of Alcohol)

17 9. Respondent is subject to disciplinary action under Code section 4301, subd. (h) in that  
18 Respondent committed an act involving an alcoholic beverage to the extent or in a manner as to  
19 be dangerous or injurious to oneself, to a person holding a license under this chapter, or to any  
20 other person or to the public by violating Vehicle Code section 23152, subd. (a) (driving with a  
21 blood alcohol content in excess of 0.08%). The circumstances are detailed above in paragraph 8.

### 22 PRAYER

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

25 1. Revoking or suspending Pharmacy Technician Registration Number TCH 5785,  
26 issued to Kenneth Roger Folmar.

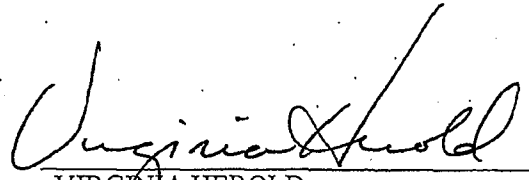
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2. Ordering Kenneth Roger Folmar to pay the Board of Pharmacy the reasonable costs of the investigation and enforcement of this case, pursuant to Business and Professions Code section 125.3;

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

DATED: 6/9/00 

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

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