

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

**In the Matter of the Petition for Early Termination of
Probation by:**

PACIFIC WEST PHARMACY, Petitioner

Case No. 5745

OAH No. 2020090404

DECISION

This matter was heard by video conference before a quorum of the Board of Pharmacy (Board) in Sacramento, California, on September 17, 2020. Marcie Larson, Administrative Law Judge, Office of Administrative Hearings (OAH), presided at the hearing.

Summer Haro, Deputy Attorney General, appeared pursuant to Government Code section 11522.

Nicholas Jurkowitz, Attorney at Law, represented petitioner Pacific West Pharmacy (Pacific or petitioner) and Arthur Whitney, President and Chief Executive Officer (CEO) of Pacific, who was present at the hearing.

Evidence was received, the record was closed, and the matter was submitted for decision on September 17, 2020,

FACTUAL FINDINGS

Background and Procedural History

1. On December 16, 1994, the Board issued Pacific, Pharmacy Permit No. PHY 40592 (permit), with Mr. Whitney as president and 38 percent shareholder of Pacific. Pacific's permit is valid and will expire on December 1, 2020, unless renewed or revoked.

2. On July 30, 2016, complainant Virginia K. Herold, a former Executive Officer for the Board, issued an Accusation against petitioner, other officers of Pacific, and the pharmacist in charge (PIC) of Pacific. Complainant alleged that an inspection of Pacific conducted in October and November 2015 revealed petitioner engaged in violations of the Business and Professions Code sections 4301, subdivisions (j) and (o); 4115, subdivisions (a) and (f)(1); 4081, subdivision (a); and 4015, subdivision (o), for allowing unsupervised pharmacy technicians to fill prescriptions, compound sterile prescription preparations, and stock and pull drugs from stock for prescriptions. Complainant further alleged petitioner failed to properly maintain the facilities to comply with safety and security requirements which resulted in significant shortages and overages of controlled substances, and failed to maintain an accurate inventory of dangerous drugs and controlled substances.

3. On February 4, 2017, Mr. Whitney signed a Stipulated Settlement and Disciplinary Order (Stipulated Settlement) on behalf of Pacific. Mr. Whitney admitted to the truth of every charge and allegation in the Accusation. Petitioner's permit was

revoked. The revocation was stayed and placed on probation for five years, subject to various terms and conditions, including to obey all laws, submit quarterly reports, reimburse the Board \$8,398.69 for investigation and enforcement costs, complete remedial education on topics of inventory control and drug loss, and retain an independent consultant to review pharmacy operations on a monthly basis to ensure compliance with state and federal laws. The Board adopted the Stipulated Settlement, which was effective on September 6, 2017.

Petition for Early Termination of Probation

4. On August 22, 2019, petitioner signed and thereafter filed with the Board a Petition for Early Termination of Probation (Petition). Petitioner has not previously applied for termination of probation. In support of the petition, Mr. Whitney submitted detailed information and policies Pacific implemented concerning operational changes made to address the violations identified in the Accusation, and four letters of recommendation. In the Petition, and during testimony at hearing, Mr. Whitney explained the circumstances surrounding the events that gave rise to the discipline imposed on Pacific's permit and the steps he has taken to address those issues and prevent future violations.

5. Petitioner is currently in compliance with the terms and conditions of Board probation. Petitioner has completed approximately three years of probation, which is scheduled to end on or about September 6, 2022. The required remedial education has been completed. The investigation and enforcement costs have been paid.

6. Mr. Whitney explained that Pacific is a family-owned independent pharmacy he started in 1987. Pacific is a "closed door" pharmacy that only serves

skilled nursing facilities. As of 2015, Pacific had a PIC who had been employed at Pacific for many years. Mr. Whitney explained that during two days in late 2015, Board inspectors conducted an inspection of Pacific. The inspector identified many deficiencies and violations of the Boards laws and regulations. Mr. Whitney realized he had not been monitoring the PIC and assumed the PIC was ensuring Pacific was complying with all the applicable laws and regulation. Upon learning of the violations, Mr. Whitney immediately began making changes and implementing new policies and procedures to correct the violations.

7. The PIC was demoted, replaced, and eventually left Pacific. The pharmacy's current PIC is subject to a quarterly audit to ensure he is complying with his duties. Pharmacy technicians and input clerks' duties are put in writing and all staff were provided notice of their specific duties. Written schedules are created and posted to ensure proper ratios at all times. Mr. Whitney redesigned Pacific's facility to ensure that staff could be viewed and monitored at all times. Cameras were installed throughout the pharmacy so that all areas of the pharmacy can be viewed from the pharmacist station.

A "controlled cage" was installed directly in front of the pharmacist's desk. The cage can only be accessed through an identified card that records the name, time and date of every person who enters the cage. Only a pharmacist may remove any items from the cage, including filling prescriptions. There is also an overhead camera inside the cage that records all activity and can be viewed on a screen in the pharmacy and remotely by Mr. Whitney if he is not at Pacific.

8. Pacific also performs daily reconciliation of controlled substances and weekly inventory reconciliations of at least 15 of the top controlled medications. Yearly controlled inventory is also "reconciled against dispense logs, purchases, hard counts

and wasted documentation.” Policies and Procedures were prepared and implemented to detail this process.

9. Mr. Whitney took full responsibility for the violations identified by the inspector and set forth in the Accusation. He hired the PIC and trusted he was doing his job. However, Mr. Whitney failed to verify the PIC’s activities. Through this experience, Mr. Whitney learned that he must verify his employees are complying with the Boards laws and regulations.

10. Mr. Whitney is requesting early termination of Pacific’s probation because of the finance loss it has sustained as a result of the probationary status. Within one year of probation, MedImpact, a pharmacy benefit manager (PBM), cancelled a contract with Pacific because of the probation status. At the time, Pacific had a contract with a skilled nursing home to provide services to all of their eligible clients. As a result, Pacific is still providing medication to MedImpact patients at the contracted facilities, even though Pacific is not reimbursed for the medications. This resulted in a \$18,000 loss per month since the contract was cancelled by MedImpact. Mr. Whitney is concerned that additional PBM’s will cancel Pacific’s contracts as well. If that occurs Pacific may not be able to stay in business.

Recommendations

11. Pursuant to Business and Professions Code section 4309, subdivision (b)¹ petitioner submitted two letters of recommendation from individuals licensed by the

¹ Business and Professions Code section 4309, subdivision (b), provides:

The petition shall state any facts required by the Board, and the petition shall be accompanied by two or more verified

Board and two letters of recommendation from private citizens. All of the authors are aware of the discipline imposed on Pacific's permit. The authors of the letters describe Mr. Whitney as a dedicated businessman who cares for his customers and patients. For example, a letter written by Alex Cavalari, Pharm.D., who serves as the PIC consultant for Pacific, explains that since the discipline of Pacific's permit, Mr. Whitney has instituted significant changes and improvement to Pacific to address the violations identified by the Board. Dr. Cavalari opined that Pacific made the "necessary changes to ensure the safety of the public and to provide higher quality and better care to their patients."

Two letters are written by individuals who have known Mr. Whitney for over 40 years. They describe Mr. Whitney as a person who is passionate about his business, with a high level of integrity and commitment to his community. Harold Burton, M.D., wrote that Mr. Whitney is a "tremendous advocate for the patient and their overall health" and always strives to "do the right thing for the patient."

Analysis

12. Petitioner has completed three years of Board probation. Before Pacific's permit was placed on probation, Mr. Whitney undertook extensive changes to address the violations identified by Board inspectors. Many of the violations were addressed

recommendations from holders of licenses issued by the Board to which the petition is addressed, and two or more recommendations from citizens, each having personal knowledge of the disciplinary penalty imposed by the Board and the activities of the petitioner since the disciplinary penalty was imposed.

before Pacific's probation started in September 2017. The changes and improvements Mr. Whitney implemented have more than addressed the public safety concerns identified by the Board and went beyond the Board's expectation for ensuring compliance with the Board's laws and regulations.

13. When all the evidence is considered, no further public interest will be served by continuing petitioner on probation at this time. Mr. Whitney demonstrated that Pacific can operate as a pharmacy without restrictions, and without harm to the public.

LEGAL CONCLUSIONS

1. In a proceeding for reinstatement of a license, including early termination of probation, the burden at all times is on the petitioner to establish rehabilitation. (See *Flanzer v. Board of Dental Examiners* (1990) 220 Cal.App.3d 1392, 1398, citing *Housman v. Board of Medical Examiners* (1948) 84 Cal.App.2d 308, 315.) The standard of proof is clear and convincing evidence to a reasonable certainty. (*Hippard v. State Bar* (1989) 49 Cal.3d 1084, 1091-1092; *Feinstein v. State Bar* (1952) 39 Cal.2d 541.)

2. Business and Professions Code section 4309, subdivision (d), sets forth the following factors for consideration when the Board reviews a petition for early termination of probation:

- (1) All the activities of the petitioner since the disciplinary action was taken.
- (2) The offense for which the petitioner was disciplined.

- (3) The petitioner's activities during the time the license was in good standing.
- (4) The petitioner's documented rehabilitative efforts.
- (5) The petitioner's general reputation for truth and professional ability.

3. When all the relevant rehabilitation criteria set forth in Business and Professions Code section 4309, subdivision (d), are considered, Mr. Whitney established that it would be consistent with the public health, safety and welfare to terminate Pacific's probation.

ORDER

The petition for early termination of probation of Pacific West Pharmacy, Pharmacy Permit No. PHY 40592, is GRANTED.

This Decision shall become effective at 5:00 p.m. on December 15, 2020.

It is so ORDERED on January 14, 2021.

BOARD OF PHARMACY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA



By

Greg Lippe
Board President

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

In the Matter of the Accusation Against:

**PACIFIC WEST PHARMACY, INC.
ARTHUR C. WHITNEY, PRESIDENT/SHAREHOLDER
HELEN S. WHITNEY, SEC./TREAS./SHAREHOLDER
HORIZON WEST, INC., SHAREHOLDER
TOM ROGERS aka THOMAS STEVEN ROGERS,
PHARMACIST-IN-CHARGE
4363 Pacific Street
Rocklin, CA 95677**

Pharmacy Permit No. PHY 40592

Respondent.

Case No. 5745

**STIPULATED SETTLEMENT AND
DISCIPLINARY ORDER AS TO
PACIFIC WEST PHARMACY, INC.**

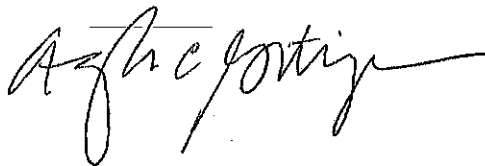
DECISION AND ORDER

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

This Decision shall become effective at 5:00 p.m. on September 6, 2017.

It is so ORDERED on August 7, 2017.

BOARD OF PHARMACY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA



By

Amy Gutierrez, Pharm.D.
Board President

1 XAVIER BECERRA
Attorney General of California
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Supervising Deputy Attorney General
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Attorneys for Complainant

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

10 In the Matter of the Accusation Against:

Case No. 5745

11 **PACIFIC WEST PHARMACY, INC.**
12 **ARTHUR C. WHITNEY,**
13 **PRES./SHAREHOLDER**
14 **HELEN S. WHITNEY,**
15 **SEC./TREAS./SHAREHOLDER**
16 **HORIZON WEST, INC., SHAREHOLDER**
17 **TOM ROGERS aka THOMAS STEVEN**
18 **ROGERS, PHARMACIST-IN-CHARGE**
19 **4363 Pacific Street**
Rocklin, CA 95677

STIPULATED SETTLEMENT AND
DISCIPLINARY ORDER AS TO
PACIFIC WEST PHARMACY, INC.

20 **Pharmacy Permit No. PHY 40592**

21 Respondent.

22 **IT IS STIPULATED AND AGREED** by and between the parties to the above-entitled
23 proceedings that the following matters are true:

24 **PARTIES**

25 1. Virginia Herold (Complainant) is the Executive Officer of the Board of Pharmacy
26 (Board). She brought this action solely in her official capacity and is represented in this matter by
27 Xavier Becerra, Attorney General of the State of California, by Jeffrey M. Phillips, Deputy
28 Attorney General.

1. Respondent Pacific West Pharmacy, Inc. (Respondent) is represented in this
proceeding by attorney Gregory Matzen, whose address is: 2104 Big Sandy Court, Gold River,

1 CA, 95670.

2 3. On or about December 16, 1994, the Board issued Pharmacy Permit No. PHY 40592
3 to Pacific West Pharmacy, Inc. (Respondent). The Pharmacy Permit was in full force and effect
4 at all times relevant to the charges brought in Accusation No. 5745, and will expire on December
5 1, 2017, unless renewed.

6 **JURISDICTION**

7 4. Accusation No. 5745 was filed before the Board, and is currently pending against
8 Respondent. The Accusation and all other statutorily required documents were properly served
9 on Respondent on August 12, 2016. Respondent timely filed its Notice of Defense contesting the
10 Accusation.

11 5. A copy of Accusation No. 5745 is attached as exhibit A and incorporated herein by
12 reference.

13 **ADVISEMENT AND WAIVERS**

14 6. Respondent has carefully read, fully discussed with counsel, and understands the
15 charges and allegations in Accusation No. 5745. Respondent has also carefully read, fully
16 discussed with counsel, and understands the effects of this Stipulated Settlement and Disciplinary
17 Order.

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

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

26 **CULPABILITY**

27 9. Respondent admits the truth of each and every charge and allegation in Accusation
28 No. 5745.

1 delinquency in submission of reports as directed may be added to the total period of probation.
2 Moreover, if the final probation report is not made as directed, probation shall be automatically
3 extended until such time as the final report is made and accepted by the board.

4 **3. Interview with the Board**

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

10 **4. Cooperate with Board Staff**

11 Respondent owner shall cooperate with the board's inspection program and with the board's
12 monitoring and investigation of respondent's compliance with the terms and conditions of their
13 probation. Failure to cooperate shall be considered a violation of probation.

14 **5. Reimbursement of Board Costs**

15 As a condition precedent to successful completion of probation, respondent owner shall pay
16 to the board its costs of investigation and prosecution in the amount of \$ 8,398.69. Respondent
17 owner may make said payments in a payment plan approved by the Board. There shall be no
18 deviation from the payment plan absent prior written approval by the board or its designee.
19 Failure to pay costs by the deadline(s) as directed shall be considered a violation of probation.

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

22 **6. Probation Monitoring Costs**

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

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1 **7. Status of License**

2 Respondent owner shall, at all times while on probation, maintain current licensure with the
3 board. If respondent owner submits an application to the board, and the application is approved,
4 for a change of location, change of permit or change of ownership, the board shall retain
5 continuing jurisdiction over the license, and the respondent shall remain on probation as
6 determined by the board. Failure to maintain current licensure shall be considered a violation of
7 probation.

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

12 **8. License Surrender While on Probation**

13 Following the effective date of this decision, should respondent owner discontinue
14 business, respondent owner may tender the premises license to the board for surrender. The
15 board or its designee shall have the discretion whether to grant the request for surrender or take
16 any other action it deems appropriate and reasonable. Upon formal acceptance of the surrender of
17 the license, respondent will no longer be subject to the terms and conditions of probation.

18 Upon acceptance of the surrender, respondent owner shall relinquish the premises wall and
19 renewal license to the board within ten (10) days of notification by the board that the surrender is
20 accepted. Respondent owner shall further submit a completed Discontinuance of Business form
21 according to board guidelines and shall notify the board of the records inventory transfer.

22 Respondent owner shall also, by the effective date of this decision, arrange for the
23 continuation of care for ongoing patients of the pharmacy by, at minimum, providing a written
24 notice to ongoing patients that specifies the anticipated closing date of the pharmacy and that
25 identifies one or more area pharmacies capable of taking up the patients' care, and by cooperating
26 as may be necessary in the transfer of records or prescriptions for ongoing patients. Within five
27 days of its provision to the pharmacy's ongoing patients, Respondent owner shall provide a copy
28 of the written notice to the board. For the purposes of this provision, "ongoing patients" means

1 those patients for whom the pharmacy has on file a prescription with one or more refills
2 outstanding, or for whom the pharmacy has filled a prescription within the preceding sixty (60)
3 days.

4 Respondent owner may not apply for any new licensure from the board for three (3) years
5 from the effective date of the surrender. Respondent owner shall meet all requirements applicable
6 to the license sought as of the date the application for that license is submitted to the board.

7 Respondent owner further stipulates that he or she shall reimburse the board for its costs of
8 investigation and prosecution prior to the acceptance of the surrender.

9 **9. Notice to Employees**

10 Respondent owner shall, upon or before the effective date of this decision, ensure that all
11 employees involved in permit operations are made aware of all the terms and conditions of
12 probation, either by posting a notice of the terms and conditions, circulating such notice, or both.
13 If the notice required by this provision is posted, it shall be posted in a prominent place and shall
14 remain posted throughout the probation period. Respondent owner shall ensure that any
15 employees hired or used after the effective date of this decision are made aware of the terms and
16 conditions of probation by posting a notice, circulating a notice, or both. Additionally,
17 respondent owner shall submit written notification to the board, within fifteen (15) days of the
18 effective date of this decision, that this term has been satisfied. Failure to submit such
19 notification to the board shall be considered a violation of probation.

20 "Employees" as used in this provision includes all full-time, part-time,
21 volunteer, temporary and relief employees and independent contractors employed or
22 hired at any time during probation.

23 **10. Owners and Officers: Knowledge of the Law**

24 Respondent shall provide, within thirty (30) days after the effective date of this decision,
25 signed and dated statements from its owners, including any owner or holder of ten percent (10%)
26 or more of the interest in respondent or respondent's stock, and any officer, stating under penalty
27 of perjury that said individuals have read and are familiar with state and federal laws and
28 regulations governing the practice of pharmacy. The failure to timely provide said statements

1 under penalty of perjury shall be considered a violation of probation.

2 **11. Posted Notice of Probation**

3 Respondent owner shall prominently post a probation notice provided by the board in a
4 place conspicuous and readable to the public. The probation notice shall remain posted during
5 the entire period of probation.

6 Respondent owner shall not, directly or indirectly, engage in any conduct or make any
7 statement which is intended to mislead or is likely to have the effect of misleading any patient,
8 customer, member of the public, or other person(s) as to the nature of and reason for the probation
9 of the licensed entity.

10 Failure to post such notice shall be considered a violation of probation.

11 **12. Violation of Probation**

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

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

24 **13. Completion of Probation**

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


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1 Board of Pharmacy.

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3 DATED: 2/4/17


PACIFIC WEST PHARMACY, INC.
Respondent

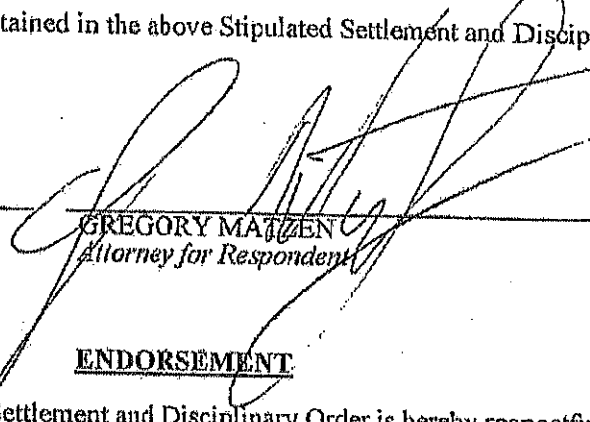
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6 I have read and fully discussed with Respondent Pacific West Pharmacy, Inc. the terms and
7 conditions and other matters contained in the above Stipulated Settlement and Disciplinary Order.

8 I approve its form and content.

9

10 DATED: 2/3/17


GREGORY MATZEN
Attorney for Respondent

12

13 ENDORSEMENT


14 The foregoing Stipulated Settlement and Disciplinary Order is hereby respectfully
15 submitted for consideration by the Board of Pharmacy.

16

17 Dated: 2/6/17

Respectfully submitted,
XAVIER BECERRA
Attorney General of California
JANICE K. LACEMAN
Supervising Deputy Attorney General

21



JEFFREY M. PHILLIPS
Deputy Attorney General
Attorneys for Complainant

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Stipulation.rtf

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Exhibit A

Accusation No. 5745

1 KAMALA D. HARRIS
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Supervising Deputy Attorney General
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7 *Attorneys for Complainant*

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. 5745

12 **PACIFIC WEST PHARMACY, INC.**
13 **ARTHUR C. WHITNEY, PRES./SHAREHOLDER**
HELEN S. WHITNEY, SEC./TREAS./SHAREHOLDER
14 **HORIZON WEST, INC., SHAREHOLDER**
TOM ROGERS aka THOMAS STEVEN ROGERS,
15 **PHARMACIST-IN-CHARGE**
4363 Pacific Street
Rocklin, CA 95677

A C C U S A T I O N

16 **Pharmacy Permit No. PHY 40592**

17 **and**

18 **THOMAS STEVEN ROGERS**
19 **20291 Rim Rock Court**
Foresthill, CA 95631

20 **Pharmacist License No. RPH 30137**

21 Respondents.
22

23 Complainant alleges:

24 **PARTIES**

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

27 2. On or about December 16, 1994, the Board issued Pharmacy Permit Number PHY
28 40592 to Pacific West Pharmacy, Inc. ("Respondent Pacific West Pharmacy" or "Pacific West

1 Pharmacy”), with Arthur C. Whitney as president and 38 percent shareholder, Helen S. Whitney
2 as secretary, treasurer, and 12 percent shareholder, and Horizon West, Inc. as 50 percent
3 shareholder. On or about October 25, 2005, Tom Rogers, also known as Thomas Steven Rogers
4 (“Respondent Rogers” or “PIC Rogers”), became the pharmacist-in-charge. The pharmacy
5 permit was in full force and effect at all times relevant to the charges brought herein and will
6 expire on December 1, 2016, unless renewed.

7 3. On or about May 4, 1976, the Board issued Pharmacist License Number RPH 30137
8 to Respondent Rogers. The pharmacist license was in full force and effect at all times relevant to
9 the charges brought herein and will expire on June 30, 2016, unless renewed.

10 JURISDICTION

11 4. This Accusation is brought before the Board under the authority of the following
12 laws. All section references are to the Business and Professions Code (“Code”) unless otherwise
13 indicated.

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

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

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

18 (1) Suspending judgment.

19 (2) Placing him or her upon probation.

20 (3) Suspending his or her right to practice for a period not exceeding one
21 year.

22 (4) Revoking his or her license.

23 (5) Taking any other action in relation to disciplining him or her as the
board in its discretion may deem proper . . .

24 6. Section 4300.1 of the Code states:

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

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STATUTORY AND REGULATORY PROVISIONS

7. 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:

....

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

....

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

8. Section 4115 of the Code states:

(a) A pharmacy technician may perform packaging, manipulative, repetitive, or other nondiscretionary tasks only while assisting, and while under the direct supervision and control of, a pharmacist. The pharmacist shall be responsible for the duties performed under his or her supervision by a technician.

9. Section 4023.5 of the Code states that “‘direct supervision and control’ means that a pharmacist is on the premises at all times and is fully aware of all activities performed by either a pharmacy technician or intern pharmacist.”

10. Title 16, California Code of Regulations, section 1793.2 defines “nondiscretionary tasks,” as used in Business and Professions Code section 4115, as:

- (a) removing the drug or drugs from stock;
- (b) counting, pouring, or mixing pharmaceuticals;
- (c) placing the product into a container;
- (d) affixing the label or labels to the container;
- (e) packaging and repackaging.

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1 11. Section 4081 of the Code states, in pertinent part:

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

13 (b) The owner, officer, and partner of any pharmacy, wholesaler, or
14 veterinary food-animal drug retailer shall be jointly responsible, with the
15 pharmacist-in-charge or representative-in-charge, for maintaining the records and
16 inventory described in this section . . .

17 12. Section 4105, subdivision (a), of the Code states:

18 All records or other documentation of the acquisition and disposition of
19 dangerous drugs and dangerous devices by any entity licensed by the board shall be
20 retained on the licensed premises in a readily retrievable form.

21 13. Section 4113, subdivision (c), of the Code states that “[t]he pharmacist-in-charge
22 shall be responsible for a pharmacy’s compliance with all state and federal laws and regulations
23 pertaining to the practice of pharmacy.”

24 14. Section 4115 of the Code states, in pertinent part:

25 (a) A pharmacy technician may perform packaging, manipulative,
26 repetitive, or other nondiscretionary tasks, only while assisting, and while under the
27 direct supervision and control of a pharmacist. The pharmacist shall be responsible
28 for the duties performed under his or her supervision by a technician.

....

21 (d) The board shall adopt regulations to specify tasks pursuant to
22 subdivision (a) that a pharmacy technician may perform under the supervision of a
23 pharmacist. Any pharmacy that employs a pharmacy technician shall do so in
24 conformity with the regulations adopted by the board.

....

25 (f)(1) A pharmacy with only one pharmacist shall have no more than one
26 pharmacy technician performing the tasks specified in subdivision (a). The ratio of
27 pharmacy technicians performing the tasks specified in subdivision (a) to any
28 additional pharmacist shall not exceed 2:1, except that this ratio shall not apply to
personnel performing clerical functions pursuant to Section 4116 or 4117. This ratio
is applicable to all practice settings, except for an inpatient of a licensed health
facility, a patient of a licensed home health agency, as specified in paragraph (2), an

1 inmate of a correctional facility of the Department of Corrections and Rehabilitation,
2 and for a person receiving treatment in a facility operated by the State Department of
State Hospitals, the State Department of Developmental Services, or the Department
of Veterans Affairs.

3 (2) The board may adopt regulations establishing the ratio of pharmacy
4 technicians performing the tasks specified in subdivision (a) to pharmacists applicable
5 to the filling of prescriptions of an inpatient of a licensed health facility and for a
6 patient of a licensed home health agency. Any ratio established by the board pursuant
7 to this subdivision shall allow, at a minimum, at least one pharmacy technician for a
single pharmacist in a pharmacy and two pharmacy technicians for each additional
pharmacist, except that this ratio shall not apply to personnel performing clerical
functions pursuant to Section 4116 or 4117 . . .

8 15. Title 16, California Code of Regulations ("CCR"), section 1714 states, in part:

9

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

13 16. Title 16, CCR, section 1718 states:

14 "Current Inventory" as used in Sections 4081 and 4332 of the Business
15 and Professions Code shall be considered to include complete accountability for all
dangerous drugs handled by every licensee enumerated in Sections 4081 and 4332.

16 The controlled substances inventories required by Title 21, CFR, Section
17 1304 shall be available for inspection upon request for at least 3 years after the date of
the inventory.

18 17. Title 16, CCR, section 1793.7 states, in pertinent part:

19 (a) Except as otherwise provided in section 1793.8, any function
20 performed by a pharmacy technician in connection with the dispensing of a
prescription, including repackaging from bulk and storage of pharmaceuticals, must
21 be verified and documented in writing by a pharmacist. Except for the preparation of
prescriptions for an inpatient of a hospital and for an inmate of a correctional facility,
22 the pharmacist shall indicate verification of the prescription by initialing the
prescription label before the medication is provided to the patient.

23 (b) Pharmacy technicians must work under the direct supervision of a
24 pharmacist and in such a relationship that the supervising pharmacist is fully aware of
all activities involved in the preparation and dispensing of medications, including the
25 maintenance of appropriate records.

26

27 (e) A pharmacist shall be responsible for all activities of pharmacy
28 technicians to ensure that all such activities are performed completely, safely and
without risk of harm to patients . . .

1 **COST RECOVERY**

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

6 **DRUG CLASSIFICATIONS**

7 19. "Xanax," a brand name for alprazolam, is a Schedule IV controlled substance
8 pursuant to Health and Safety Code section 11057, subdivision (d)(1). Xanax is used to treat
9 anxiety.

10 20. "Soma", a brand name for carisoprodol, is a Schedule IV Controlled Substance
11 pursuant to Title 21, Code of Federal Regulations ("CFR"), section 1308.14, subdivision (c)(6).
12 Soma is used as a muscle relaxant.

13 21. "Norco", a brand name for hydrocodone/acetaminophen (APAP), was a Schedule III
14 controlled substance pursuant to Health and Safety Code section 11056, subdivision (e). Norco
15 was reclassified as a Schedule II controlled substance pursuant to Title 21, CFR, section 1308.12,
16 effective October 6, 2014. Norco is used to treat pain.

17 22. "Dilaudid," a brand name for hydromorphone, is a Schedule II controlled substance
18 pursuant to Health and Safety Code section 11055, subdivision (b)(1)(J). Dilaudid is used to treat
19 pain.

20 23. "Ativan," a brand name for lorazepam, is a Schedule IV controlled substance
21 pursuant to Health and Safety Code section 11057, subdivision (d)(16). Ativan is used to treat
22 anxiety.

23 24. "Dolophine", a brand name for methadone, is a Schedule II controlled substance
24 pursuant to Health and Safety Code section 11055, subdivision (c)(14). Dolophine is used to treat
25 pain.

26 25. "Roxanol", a brand name for morphine sulfate, is a Schedule II controlled substance
27 pursuant to Health and Safety Code section 11055, subdivision (b)(1)(L). Roxanol is used to treat
28 pain.

1 32. Upon completion of the inspection, Inspector S. K. issued an inspection report and
2 provided PIC Rogers with a copy. Inspector S. K. requested that PIC Rogers provide complete
3 records of all acquisitions and dispositions of all controlled substances from December 13, 2013
4 to October 4, 2015, other than from Cardinal, ParMed, and ANDA. The 2013 and 2014
5 controlled substance inventories did not include a count of controlled substances in the ADDS
6 and E-kits. PIC Rogers stated that these controlled substances were stored at the off site facilities
7 in the ADDS and E-kits in order to provide emergency access to medications needed by patients.
8 Inspector S. K. requested an accounting of all controlled substances which were not on the
9 premises during the previous inventories.

10 33. On or about October 21, 2015, Inspector S. K. received the pharmacy's dispensing
11 data and the 2013 and 2014 offsite inventory information.

12 34. On or about October 22, 2015, Inspector S. K. sent Cardinal/ParMed and ANDA
13 letters, requesting records of all Schedule II to V controlled substances sold to Pacific West
14 Pharmacy from December 13, 2013 to October 4, 2015; including all credits. ANDA and
15 Cardinal/ParMed provided the information to Inspector S. K. on October 26, 2015 and November
16 10, 2015, respectively.

17 35. Inspector S. K. conducted an audit based on the 2013 inventory, 2015 inventory,
18 disposition data from Pacific West Pharmacy, and acquisition and credit data from Cardinal/
19 ParMed and ANDA. Inspector S. K. found that the pharmacy had significant shortages and
20 overages of controlled substances from December 13, 2014 to October 4, 2015, as set forth
21 below.

22 36. On or about November 18, 2015, Board Inspector S. K. returned to the pharmacy with
23 Board Inspector J. H. to conduct an inspection and follow up on the audit results. Inspector S. K.
24 found that PIC Rogers was the only pharmacist on duty and in the building. Inspector S. K.
25 observed TCH A. M. pulling drugs for prescriptions from stock and filling prescriptions, TCH's
26 P. P. and Y. Y. filling and labeling prescriptions, and TCH C. Y. compounding sterile
27 prescription preparations.

28 //

1 **FIRST CAUSE FOR DISCIPLINE**

2 **(Violations of the Pharmacy Law/Pharmacy Technician to Pharmacist Ratio)**

3 37. Respondent Pacific West Pharmacy is subject to disciplinary action for
4 unprofessional conduct pursuant to section 4301, subdivision (o), of the Code in that Respondent
5 violated section 4115, subdivisions (a) and (f)(1), of the Code and Title 16, CCR, section 1793.7,
6 subdivision (b), as follows: On or about October 15, 2015, and November 18, 2015, Respondent
7 authorized or allowed at least four pharmacy technicians to fill prescriptions, compound sterile
8 prescription preparations, stock ADDS', or pull drugs from stock for prescriptions, as set forth in
9 paragraphs 28 - 36, above, when, in fact, Respondent Rogers was the only pharmacist on duty and
10 in the building. Further, Respondent Rogers was not in a position to directly supervise, and/or
11 was not fully aware of, all of the activities of the technicians, who were preparing and dispensing
12 medications.

13 **SECOND CAUSE FOR DISCIPLINE**

14 **(Failure to Maintain Pharmacy, Fixtures, and Equipment**
15 **so that Drugs Were Safely and Properly Secured)**

16 38. Respondent Pacific West Pharmacy is subject to disciplinary action for
17 unprofessional conduct pursuant to section 4301, subdivisions (o) and (j), of the Code in that on
18 and between December 13, 2013 and October 4, 2015, Respondent failed to maintain the
19 pharmacy and its facilities, space, fixtures and/or equipment so that drugs were safely and
20 properly secured, in violation of title 16, CCR, section 1714, subdivision (b), resulting in
21 significant shortages and overages of controlled substances, as follows:

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Drug	Shortage or Overage
alprazolam 2 mg	-908
carisoprodol 350 mg	-94
hydrocodone/APAP 10/325 mg	-27,980
hydrocodone/APAP 5/325 mg	-10,400
hydrocodone/APAP 7.5/325 mg	-945
hydromorphone 2 mg	-544
lorazepam 0.5 mg	-8,216
lorazepam 1 mg	2,862
methadone 10 mg	507
methadone 5 mg	104
morphine 100 mg/5 ml sol.	-324
oxycodone 10 mg	-715
oxycodone 30 mg	-638
oxycodone 5 mg	-356
oxycodone/APAP 10/325 mg	-2,454
oxycodone/APAP 5/325 mg	-398
Total units unaccounted for by the pharmacy	57,445

THIRD CAUSE FOR DISCIPLINE

(Failure to Maintain a Current Inventory of All Dangerous Drugs)

39. Respondent Pacific West Pharmacy is subject to disciplinary action for unprofessional conduct pursuant to section 4301, subdivision (o), of the Code in that Respondent violated sections 4081, subdivision (a), and 4105, subdivision (o), of the Code as follows: Respondent failed to maintain an accurate or current inventory of all dangerous drugs in the pharmacy, resulting in significant shortages and overages of controlled substances, as set forth in paragraph 38, above.

1 **FOURTH CAUSE FOR DISCIPLINE**

2 **(Violations of the Pharmacy Law/Pharmacy Technician to Pharmacist Ratio)**

3 40. Respondent Rogers is subject to disciplinary action for unprofessional conduct
4 pursuant to section 4301, subdivision (o), of the Code in that Respondent violated section 4115,
5 subdivisions (a) and (f)(1), of the Code and Title 16, CCR, section 1793.7, subdivision (b), as
6 follows: On or about October 15, 2015, and November 18, 2015, Respondent authorized or
7 allowed at least four pharmacy technicians to fill prescriptions, compound sterile prescription
8 preparations, stock ADDS', or pull drugs from stock for prescriptions, as set forth in paragraphs
9 28 - 36, above. Respondent Rogers was the only pharmacist on duty and in the building. Further,
10 Respondent Rogers was not in a position to directly supervise and/or was not fully aware of all of
11 the activities of the technicians, who were preparing and dispensing medications.

12 **FIFTH CAUSE FOR DISCIPLINE**

13 **(Failure to Maintain Pharmacy, Fixtures, and Equipment**
14 **so that Drugs Were Safely and Properly Secured)**

15 41. Respondent Rogers is subject to disciplinary action for unprofessional conduct
16 pursuant to section 4301, subdivisions (o) and (j), of the Code in that on and between December
17 13, 2013 and October 4, 2015, Respondent failed to maintain Pacific West Pharmacy, Inc. and its
18 facilities, space, fixtures and/or equipment so that drugs were safely and properly secured, in
19 violation of title 16, CCR, section 1714, subdivision (b), resulting in significant shortages and
20 overages of controlled substances, as set the paragraph 38 above.

21 **SIXTH CAUSE FOR DISCIPLINE**

22 **(Failure to Maintain a Current Inventory of All Dangerous Drugs)**

23 42. Respondent Rogers is subject to disciplinary action for unprofessional conduct
24 pursuant to section 4301, subdivision (o), of the Code in that Respondent violated sections 4081,
25 subdivision (a), and 4105, subdivision (o), of the Code as follows: Respondent failed to maintain
26 an accurate or current inventory of all dangerous drugs in Pacific West Pharmacy, Inc., resulting
27 in significant shortages and overages of controlled substances, as set forth in paragraph 38 above.

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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 Permit Number PHY 40592, issued to Pacific West Pharmacy, Inc.;
2. Revoking or suspending Pharmacist License Number RPH 30137, issued to Tom Rogers, also known as Thomas Steven Rogers;
3. Ordering Pacific West Pharmacy, Inc. and Tom Rogers, also known as Thomas Steven Rogers, 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; and
4. Taking such other and further action as deemed necessary and proper.

DATED: 7/30/16

Virginia Herold

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

SA2016100465