

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

In the Matter of the Accusation Against:

**LONGS DRUG STORES CALIFORNIA, LLC,
dba CVS PHARMACY #3943**

Pharmacy Permit No. PHY 49619

Respondent

Agency Case No. 7311

OAH No. 2023040021

DECISION AFTER RECONSIDERATION

Administrative Law Judge (ALJ) Jessica Wall, Office of Administrative Hearings, heard this matter by videoconference on May 16, 2023. Evidence was received, the record closed, and the matter submitted for decision that same day.

The ALJ issued a Proposed Decision on June 1, 2023. In the Proposed Decision, the ALJ found cause existed to discipline Respondent's license and ordered revocation of Respondent's Pharmacy Permit, with revocation immediately stayed, subject to probation for a period of two years.

The Proposed Decision was submitted to the Board of Pharmacy (Board). After due consideration thereof, the Board adopted the Proposed Decision by a Decision and Order dated July 17, 2023. Pursuant to the Decision and Order, the Proposed Decision was set to become effective at 5:00 p.m. on August 16, 2023.

Prior to the effective date, on or about August 1, 2023, Complainant Anne Sodergren, Executive Officer of the Board, by and through her attorneys, timely petitioned the Board for reconsideration of the Decision and Order under Government Code section 11521. Specifically, Complainant asked that the Proposed Decision be modified to delete reference to the clear and convincing evidence standard of proof and supporting legal authorities, and include reference to the preponderance of the evidence standard of proof and supporting authorities.¹

On August 16, 2023, pursuant to the provisions of section 11521 of the Government Code, the Board ordered the effective date of the Decision and Order stayed until 5:00 p.m. on August 25, 2023, to allow additional time for the Board to evaluate Complainant's Petition for Reconsideration.

Subsequently, on August 24, 2023, having read and considered Complainant's Petition, and good cause appearing, the Board ordered that reconsideration be granted, said reconsideration to be upon all pertinent parts of the record and such written argument as the parties may wish to submit; that no new evidence may be submitted; that the parties be given until September 23, 2023, to submit written argument; and that the Decision and Order be further stayed until the Board rendered its Decision After Reconsideration. Neither party submitted written argument.

Having now reconsidered the matter, the Board finds Complainant's arguments on the standard of proof issue, as set forth in its Petition for Reconsideration, to be correct and persuasive. The Board's Precedential Decision No. 2020-01 clearly holds that the standard of proof required to prove cause for discipline by a pharmacy is a preponderance of the evidence standard. Accordingly, the application of the clear and convincing evidence standard in the present matter was erroneous, and the Decision and Order should be modified to reflect the correct and established standard of preponderance of the evidence. The Board further finds that because at hearing, Complainant met the higher clear and convincing evidence standard of proof, there need be no reweighing of the evidence; the factual findings in the Proposed Decision do not need reconsideration or modification; and, except as modified by this Decision After Reconsideration, the legal conclusions in the Proposed Decision do not need reconsideration or modification.

¹ It is well established that the applicable standard of proof depends upon the nature of the license at issue. In an action seeking disciplinary action against a professional license, the governing agency bears the burden of establishing cause for discipline by clear and convincing proof to a reasonable certainty. (*Ettinger v. Board of Med. Quality Assurance* (1982) 135 Cal.App.3d 853, 857.) This is because a professional license represents the licensee's fulfillment of extensive education, training, and testing requirements; the licensee has an extremely strong interest in retaining the license that they have expended so much effort in obtaining. The same cannot be said for a licensee's interest in retaining a nonprofessional license. Thus, the revocation of a nonprofessional license requires only the preponderance of the evidence standard. (*Imports Performance v. Dept. of Consumer Affairs, Bur. of Automotive Repair* (2011) 201 Cal.App.4th 911, 916-917; *San Benito Foods v. Veneman* (1996) 50 Cal.App.4th 1889.) The term preponderance of the evidence means "more likely than not" (*Sandoval v. Bank of Am.* (2002) 94 Cal.App.4th 1378, 1387), or "evidence that has more convincing force than that opposed to it." (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.) Thus, the clear and convincing evidence standard requires a higher degree of proof than the preponderance of the evidence standard.

As a result, IT IS HEREBY ORDERED:

ORDER

1. Legal Conclusion 1 on page 12 of the Proposed Decision is deleted and replaced with the following:

Complainant has the burden of proving each ground for discipline alleged in the Accusation by a preponderance of the evidence. (Precedential Decision No. 2020-01, *In the Matter of the Third Amended Accusation Against IV Solutions, Inc. Alireza Varastehpour, President and Renee Sadow* [Case No. 3606, OAH No. 2011050988], at page 6 of the Board's Decision After Reconsideration.)

2. Except as modified by Paragraph 1 above, the Board reimposes its prior decision, dated July 17, 2023, adopting the Proposed Decision as the Board's Decision in this matter.

This Decision shall become effective at 5:00 p.m. on December 20, 2023.

IT IS SO ORDERED this 20th day of November 2023.

BOARD OF PHARMACY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

By

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Seung W. Oh, Pharm.D.
Board President

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

In the Matter of the Accusation Against:

**LONGS DRUG STORES CALIFORNIA, LLC,
dba CVS PHARMACY #3943**

Pharmacy Permit No. PHY 49619

Respondent

Agency Case No. 7311

OAH No. 2023040021

ORDER GRANTING PETITION FOR RECONSIDERATION AND STAY OF EXECUTION OF EFFECTIVE DATE OF DECISION AND ORDER

On July 17, 2023, the California State Board of Pharmacy (Board) issued a Decision and Order adopting the proposed decision of the administrative law judge as its decision in the above-entitled matter. Complainant timely filed a Petition for Reconsideration pursuant to Government Code section 11521. The petition having been read and considered, and good cause appearing, IT IS HEREBY ORDERED:

(1) That reconsideration be, and is, hereby granted, said reconsideration to be upon all pertinent parts of the record and such written argument as the parties may wish to submit. No new evidence may be submitted.

(2) That the parties are given until September 23, 2023, to submit written argument to the Board at 2720 Gateway Oaks Drive, Suite 100, Sacramento, California, 95833.

(3) That the Board's Decision and Order originally effective August 16, 2023, and stayed until 5:00 p.m. on August 25, 2023, to allow the Board time to consider the petition, is hereby further stayed until the Board renders its decision after reconsideration.

It is so ORDERED on August 24, 2023.

BOARD OF PHARMACY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

By

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Seung W. Oh, Pharm.D.
Board President

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

In the Matter of the Accusation Against:

**LONGS DRUG STORES CALIFORNIA, LLC,
dba CVS PHARMACY #3943**

Pharmacy Permit No. PHY 49619

Respondent

Agency Case No. 7311

OAH No. 2023040021

ORDER STAYING EFFECTIVE DATE OF DECISION

Complainant timely requested reconsideration of the decision in the above-entitled matter pursuant to Section 11518.5 of the Government Code. In order to allow the board additional time to consider the petition, in accordance with the provisions of section 11521 of the Government Code,

IT IS HEREBY ORDERED that the effective date of the Decision and Order, in the above-entitled matter is stayed until 5 p.m. on August 25, 2023.

It is so ORDERED on August 16, 2023.

BOARD OF PHARMACY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

By

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Seung W. Oh, Pharm.D.
Board President

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

In the Matter of the Accusation Against:

**LONGS DRUG STORES CALIFORNIA, LLC,
dba
CVS PHARMACY #3943**

Pharmacy Permit No. PHY 49619

Respondent

Agency Case No. 7311

OAH No. 2023040021

DECISION AND ORDER

The attached Proposed Decision of the Administrative Law Judge 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 August 16, 2023.

It is so ORDERED on July 17, 2023.

BOARD OF PHARMACY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

By

A handwritten signature in black ink, appearing to read "Seung W. Oh". The signature is fluid and cursive, with the first name "Seung" and last name "Oh" clearly distinguishable.

Seung W. Oh, Pharm.D.
Board President

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

In the Matter of the Accusation Against:

**LONGS DRUG STORES CALIFORNIA, LLC,
dba CVS PHARMACY #3943, Respondent**

Agency Case No. 7311

OAH No. 2023040021

PROPOSED DECISION

Jessica Wall, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter by videoconference on May 16, 2023, from Sacramento, California.

Jeff Stone, Deputy Attorney General, represented complainant Anne Sodergren, Executive Officer of the Board of Pharmacy (Board), Department of Consumer Affairs, State of California.

Jeff J. Astarabadi, Attorney at Much Shelist, P.C., represented respondent Longs Drug Stores California, LLC, doing business as (dba) CVS Pharmacy #3943.

Evidence was received, the record closed, and the matter submitted for decision on May 16, 2023.

FACTUAL FINDINGS

Jurisdictional Matters

1. The Board issued respondent Pharmacy Permit Number PHY 49619 (permit) on November 10, 2008. The permit expires November 1, 2023, unless renewed.
2. On November 21, 2022, complainant signed and later filed the Accusation seeking to discipline respondent's permit. The Accusation alleges respondent failed to timely notify the Board about a change in its pharmacist-in-charge (PIC). The Accusation further alleges that the degree of discipline imposed on respondent should reflect respondent's multiple recent citations.

Prior Citations

3. At the hearing, complainant presented four of the five citations referenced in the Accusation. Details about each follow.
 - a. On April 15, 2019, the Board issued respondent Citation No. CI 2018 81259. This citation alleged that respondent violated California Code of Regulations, title 16, section 1764, by exposing patient names and drug information without authorization. The Board assessed respondent a \$1,000 fine, which respondent paid.
 - b. On October 14, 2019, the Board issued respondent Citation No. CI 2019 85825. This citation alleged that respondent violated Business and Professions Code section 4113, subdivision (d), when respondent failed to notify the Board that its PIC dissociated from the pharmacy until 235 days later and operated without a PIC for 95 days. The Board assessed respondent a \$750 fine, which respondent paid.

c. On December 8, 2021, the Board issued respondent Citation No. CI 2021 93539. This citation alleged that respondent violated Business and Professions Code section 4113, subdivisions (a) and (d), when respondent failed to notify the Board that its PIC dissociated from the pharmacy until 162 days later. It further failed to notify the Board that it designated a new PIC until 161 days later. The Board assessed respondent a \$400 fine, which respondent paid.

d. On January 12, 2022, the Board issued respondent Citation No. CI 2020 91824. This citation alleged that respondent violated California Code of Regulations, title 16, section 1716, by dispensing the wrong prescription to a patient. As a result, the patient ingested the wrong prescription for several days. The Board did not assess a fine for this citation.

Board Investigation

4. The Board maintains an "Application for Change of Pharmacist-In-Charge (PIC)" form (PIC form) for pharmacies to submit when they change PICs. The form states at the top:

The owner of a pharmacy and the PIC are required by California law to notify the California State Board of Pharmacy in writing within 30 days after the termination or change of the PIC. Failure to make this notification to the Board may result in a citation and fine or other disciplinary action. The proposed PIC shall be approved by the Board.

The form requires the applicant to submit a \$130 fee with the form. It contains fields for information about the licensed facility, the new PIC or Interim PIC proposed for Board approval, and the PIC being replaced. Both the new PIC and the corporate

officer, partner, owner, or member must provide an original signature at the bottom under penalty of perjury. The signature of the replaced PIC is optional.

5. On April 4, 2022, the Board received a PIC form from respondent. It stated that respondent's prior PIC, Tran Le, Pharm.D., dissociated from the pharmacy on February 19, 2022. It further stated that respondent designated its new PIC, Michael Cinnamon, Pharm.D., on March 21, 2022, exactly 30 days later. Dr. Cinnamon signed the form a week after he began his PIC duties, on March 28, 2022. Respondent's Assistant Secretary, Kimberley M. DeSousa, signed the form on April 1, 2022.

6. On May 10, 2022, Board employee Brynn Thomison authored an investigation report about respondent's PIC form. The report concluded that respondent failed to notify the Board about its change of PIC within 30 days, as required by Business and Professions Code section 4113, subdivision (d), because Dr. Le dissociated from the pharmacy more than 30 days before the Board received the PIC form.

Testimony from Karla Retherford-Parreira, Pharm.D.

7. Karla Retherford-Parreira, Pharm.D., has been a Board investigator since 2011. She has been licensed as a pharmacist since 1991. Her professional experience as a pharmacist includes 20 years in retail pharmacy, with 16 of those years as a PIC. She testified about the importance of a PIC's role within a pharmacy.

8. A PIC manages a pharmacy's compliance with all state and federal laws and regulations related to the practice of pharmacy. (Bus. & Prof. Code, § 4113, subd. (c).) When PICs change, the pharmacy must send in a form to receive the Board's approval for the new PIC. The Board must receive that form, in writing, within 30 days of when the old PIC disassociated from the pharmacy. A pharmacy receives a 30-day

grace period from when the old PIC dissociates from the pharmacy to when a new PIC must begin. This period is limited because, without a PIC, "it is hard to say who is regulating" the pharmacy's operations. If a pharmacy cannot find a new PIC within 30 days, the statute provides the pharmacy with the opportunity to designate an interim PIC for up to 120 days.

9. While Ms. Thomison was the one who authored the investigation report, Dr. Retherford-Parreira agrees with her conclusion that respondent violated pharmacy law. This violation occurred because the Board received the PIC form 44 days after Dr. Le dissociated from the pharmacy and the form was due within 30 days.

Respondent's Hearing Argument

10. At the hearing, respondent's argument focused on its statutory interpretation of Business and Professions Code section 4113. Under respondent's interpretation, a pharmacy gets 30 days to designate a new PIC after the prior PIC dissociates from the pharmacy, then another 30 days to notify the Board after designating the new PIC. (See Bus. & Prof. Code, § 4113, subds. (a) & (d).) Respondent further contended interpreting Business and Professions Code section 4113, subdivisions (a) and (d), as imposing concurrent deadlines would create an absurd result. Since respondent notified the Board less than 60 days after Dr. Le dissociated from the pharmacy, respondent maintained that no violation took place.

11. Respondent argued that the Board's enforcement efforts constituted a "game of gotcha." Respondent contended it took the entire 30 days to which it was statutorily entitled to find a new PIC and could not have submitted the PIC form that same day. The form required a signature from both the new PIC and the pharmacy's corporate officer, partner, owner, or member. Here, respondent's corporate office is on

the East Coast, making it impossible for the corporate signatory to provide an original signature contemporaneously with the new PIC. Finally, respondent argued that no one was harmed by when it submitted the PIC form.

Analysis

STATUTORY INTERPRETATION

12. In interpreting a statute, the "primary task is to determine the lawmakers' intent." (*Delaney v. Superior Court* (1990) 50 Cal.3d 785, 798.) Statutes "should be construed with reference to the whole system of law of which it is a part so that all may be harmonized and have effect." (*Californians Against Waste v. Dept. of Conservation* (2002) 104 Cal.App.4th 317, 320 [quoting *Select Base Materials, Inc. v. Bd. of Equalization* (1959) 51 Cal.2d 640, 645].)

13. There are three steps to statutory interpretation. (*Id.* at p. 321.) The first step is to look at the statute's actual language. (*Ibid.*) If the statute's meaning is unclear, the second step is to examine legislative history. (*Ibid.*) If the first two steps fail to reveal a clear meaning, the third step is to apply reason. (*Ibid.*) In going through the steps, "words should be interpreted to make them workable and reasonable [citations], in accord with common sense and justice, and to avoid an absurd result [citations]." (*Ibid.*)

14. The two subdivisions of Business and Professions Code section 4113 that respondent referenced in its defense are as follows:

- (a) Every pharmacy shall designate a pharmacist-in-charge and, within 30 days thereof, shall notify the board in writing

of the identity and license number of that pharmacist and the date he or she was designated.

[¶] ... [¶]

(d) Every pharmacy shall notify the board in writing, on a form designed by the board, within 30 days of the date when a pharmacist-in-charge ceases to act as the pharmacist-in-charge, and shall on the same form propose another pharmacist to take over as the pharmacist-in-charge. The proposed replacement pharmacist-in-charge shall be subject to approval by the board. If disapproved, the pharmacy shall propose another replacement within 15 days of the date of disapproval and shall continue to name proposed replacements until a pharmacist-in-charge is approved by the board.

15. At hearing, complainant contended that only subdivision (d) is relevant to this matter, as that was the subdivision pled in the Accusation. Complainant further argued that subdivision (a) applies when a pharmacy opens, rather than when an existing pharmacy changes its PIC. Thus, it does not apply here.

16. On its face, subdivision (d) seems clear. It specifies that a pharmacy must notify the Board in writing within 30 days of the date when a PIC ceases to act as that pharmacist's PIC. In addition to notifying the Board that the existing PIC has dissociated from the pharmacy, the pharmacy must also propose a new PIC on the same form. By its plain language, subdivision (d) aims to quickly notify the Board that

a pharmacy no longer has an approved PIC and designate a replacement for approval. It requires this notification in 30 days, not 60.

17. Even if the language of subdivision (d) were ambiguous, the legislative history resolves the inquiry. Before its amendment in 2010, Business and Professions Code section 4113 required that “[e]very pharmacy shall notify the board within 30 days of the date when a pharmacist ceases to be a pharmacist-in-charge.” According to the legislative history of Senate Bill No. 821 (2009–2010 Reg. Sess.), which amended Business and Professions Code section 4113, the amendment sought to “[c]larify procedures to be followed by a pharmacy when identifying a pharmacist-in-charge as well as the procedures to notify the board when a change in pharmacist-in-charge has occurred.” (California Bill Analysis, S.B. 821 Sen., 4/27/2009.) The changes also added a section allowing for the use of an interim PIC when a “pharmacy is unable to identify a permanent new pharmacist-in-charge within 30 days as required by board regulation.” (*Ibid.*)

18. In sum, the statutory interpretation of subdivision (d) does not support respondent’s argument. Rather, subdivision (d) harmonizes with the requirement that a PIC must notify the Board in writing within 30 days of when that PIC ceases to act as the approved PIC for a pharmacy. (Bus. & Prof. Code, § 4101, subd. (a).) While a pharmacy may have up to 30 days to choose a new PIC, (Bus. & Prof. Code, § 4113, subd. (a)), that does not stop the clock for when a pharmacy must notify the Board that the former PIC has dissociated. If the pharmacy needs more than 30 days, the legislature provided a solution: the pharmacy can designate an interim PIC for up to 120 days while it seeks a permanent replacement. (Bus. & Prof. Code, § 4113, subd. (e).)

CAUSE FOR DISCIPLINE

19. Dr. Le ceased to function as respondent's PIC on February 19, 2022. Respondent did not submit its PIC form, providing a replacement PIC for Board approval, until 44 days later on April 4, 2022. As the Board had warned respondent on at least two prior occasions, that notification was due to the Board within 30 days. Accordingly, respondent violated Business and Professions Code section 4113, subdivision (d).

APPROPRIATE DISCIPLINE

20. The Board has adopted "Disciplinary Guidelines" (rev. 2/2017) for determining the appropriate discipline when a licensee violates the Pharmacy Law (Bus. & Prof. Code, § 4000 et seq.) or the regulations implementing it. (Cal. Code Regs., tit. 16, § 1760.) The Board has directed that the Disciplinary Guidelines be followed in Board disciplinary actions.

21. The Disciplinary Guidelines provide the following relevant criteria for determining the appropriate discipline: (1) actual or potential harm to the public or any consumer; (2) prior history of discipline, including any warnings, such as citations, letters of admonishment, or correction notices; (3) number of current violations and the nature and severity of the underlying acts; (4) aggravating, mitigating, and rehabilitation evidence; (5) amount of time that has elapsed since the misconduct; and (6) whether the conduct was intentional or negligent, or demonstrated incompetence.

22. Here, respondent was two weeks late in notifying the Board that Dr. Le was no longer PIC. This is an improvement from 2019, when respondent's notice was 235 days late, and 2021, when respondent's notice was 162 days late. Yet being 14 days late is still a violation of pharmacy law with potential harm to patients and the

public. When a pharmacy operates without a PIC, the pharmacy is operating without the person responsible for ensuring its compliance with state and federal pharmacy laws. This puts a pharmacy's patients at greater risk of harm. The law is well established that a licensing agency need not wait until harm occurs before acting. (*Griffiths v. Superior Court* (2002) 96 Cal.App.4th 757, 773 ["The protection of the public, the primary purpose of licensing statutes, does not require harm to a client before licensing discipline can take place."].)

23. Respondent's record of recent discipline includes four citations from 2019 through 2022. Two of those citations are for the same type of violation alleged in the Accusation. This indicates a pattern of misconduct that warnings have not remedied. Respondent presented no mitigating factors or rehabilitative evidence. Only a year has passed since this most recent violation. While respondent's actions in the present case may not have been intentional, they were at the very least negligent given respondent's history of citations for the same violation.

24. The Disciplinary Guidelines categorize different violations of the Pharmacy Law and regulations into one of four categories based on the seriousness of the underlying conduct. Category I violations are the least serious but still pose a potential risk of public harm. Category I violations include "violation(s) of obligations to supply or update information to the board, or to other enforcement or regulatory agencies." The maximum penalty for a Category I violation is revocation, while the minimum penalty is stayed revocation and two years of probation with all standard terms and conditions.

25. Based on the Disciplinary Guidelines for a Category I offense, respondent's pharmacy permit should be placed on two years' probation with all standard terms and conditions. This oversight will protect the public and give

respondent the opportunity to show it is willing and able to comply with pharmacy law.

Request for Costs

26. Under Business and Professions Code section 125.3, complainant requested that respondent reimburse the Board \$8,235 for its enforcement costs. That sum consists entirely of costs the Board incurred for the Office of the Attorney General's time prosecuting this matter.

27. Complainant introduced a Certification of Prosecution Costs: Declaration of Jeff Stone in which Mr. Stone certified that the Office of the Attorney General charged the Board \$8,235 for the time its employees spent enforcing this matter. Mr. Stone attached a document entitled "Matter Time Activity By Professional Type" to his Certification, which itemized the Office of the Attorney General's charges by employee, date, task performed, time spent on each task, hourly rate charged, and total amount charged for each task. Complainant argued at hearing that its enforcement costs were raised by the amount of time required to address respondent's arguments against the Accusation.

28. Respondent argued that complainant's enforcement costs are unreasonably high. It further contended that enforcement in this matter was contrary to the Board's requirement to prioritize its investigative and prosecutorial resources to violations presenting the greatest threat of patient harm. (See Bus. & Prof. Code, § 4301.1.) It did not introduce any evidence of its inability to pay costs.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. Complainant has the burden of proving each ground for discipline alleged in the Accusation by clear and convincing evidence. (*Sternberg v. Cal. State Bd. of Pharmacy* (2015) 239 Cal.App.4th 1159, 1171.) "The courts have defined clear and convincing evidence as evidence which is so clear as to leave no substantial doubt and as sufficiently strong to command the unhesitating assent of every reasonable mind." (*In re Terry D.* (1978) 83 Cal.App.3d 890, 899.)

Applicable Law

2. The Board has authority to discipline a license for violations of the Pharmacy Law and/or the regulations implementing it by revoking the license, suspending it, or placing it on probation. (Bus. & Prof. Code, § 4300, subds. (a) & (b)(2).) The term "license" means and includes any license, permit, registration, certificate, or exemption issued by the Board. (Bus. & Prof. Code, § 4032.)

3. The purpose of an administrative proceeding for the discipline of a professional license is public protection, not punishment. (*Ettinger v. Bd. of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 856.) Indeed, public protection is the Board's highest priority. (Bus. & Prof. Code, § 4001.1.) The Board must consider its Disciplinary Guidelines when deciding the appropriate discipline. (Cal. Code Regs., tit. 16, § 1760.)

CAUSE FOR DISCIPLINE

4. The Board may discipline a pharmacy permit if the holder has engaged in "unprofessional conduct." (Bus. & Prof. Code, § 4301.) Unprofessional conduct includes violating any provision of the Pharmacy Law or the regulations implementing it. (*Id.*, subd. (o).)

5. Respondent failed to submit its PIC form within 30 days of when Dr. Le ceased being its PIC, as required by Business and Professions Code section 4113, subdivision (d). Therefore, cause exists to discipline its permit pursuant to Business and Professions Code section 4301, subdivision (o).

PROHIBITION AGAINST SERVING IN OWNERSHIP OR MANAGERIAL ROLE

6. The holder of a permit that has been placed on probation "shall be prohibited from serving as a manager, administrator, owner, member, officer, director, associate, partner, or in any other position with management or control of a licensee" for up to five years. (Bus. & Prof. Code, § 4307, subd. (a)(1).) Cause exists to place respondent's permit on probation for the reasons explained above. Therefore, cause also exists under Business and Professions Code section 4307, subdivision (a)(1), to prohibit respondent from serving in an ownership or managerial role of another permittee during the probationary period.

Conclusion

7. Cause exists to discipline respondent's permit for the reasons explained above. Considering all the evidence, public health, safety, and welfare are best served by allowing respondent to continue practicing pharmacy while being monitored by the

Board. Therefore, respondent's permit should be placed on probation as specified further in the Order below.

Award of Costs

8. An order resolving a disciplinary proceeding in complainant's favor may require respondent to pay the Board's reasonable investigation and prosecution costs. (Bus. & Prof. Code, § 125.3, subd. (a).)

A certified copy of the actual costs ... signed by the entity bringing the proceeding or its designated representative shall be prima facie evidence of reasonable costs of investigation and prosecution of the case. The costs shall include the amount of investigative and enforcement costs up to the date of the hearing, including, but not limited to, charges imposed by the Attorney General.

(*Id.*, subd. (c).)

9. Reasonable investigation and enforcement costs may be established by "[d]eclarations that contain specific and sufficient facts to support findings regarding actual costs incurred and the reasonableness of the costs." (Cal. Code Regs., tit. 1, § 1042, subd. (b).) For services provided by someone other than a Board employee, "the [d]eclaration shall be executed by the person providing the service and describe the general tasks performed, the time spent on each task and the hourly rate or other compensation for the service." (*Id.*, subd. (b)(2).)

10. In *Zuckerman v. Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, the California Supreme Court set forth factors for consideration in determining the

reasonableness of costs sought under statutory provisions like Business and Professions Code section 125.3. Those factors include: (1) the licensee's success in getting the charges dismissed or reduced; (2) the licensee's subjective good faith belief in the merits of its position; (3) whether the licensee raised a colorable challenge to the proposed discipline; (4) the licensee's financial ability to pay; and (5) whether the scope of the investigation was appropriate in light of the alleged misconduct. (*Id.* at p. 45.)

11. Complainant produced prima facie evidence of the Board's reasonable enforcement costs. (Bus. & Prof. Code, § 125.3, subd. (c); Cal. Code Regs., tit. 10, § 1042, subd. (b)(2).) Additionally, complainant did not seek any cost reimbursement for the Board's investigation. Persuasive evidence established that more enforcement time was necessary to counter respondent's legal arguments.

12. Respondent broadly argued the time billed by complainant was excessive and that its actions did not warrant discipline. Its legal arguments were unsuccessful and did not raise a colorable challenge to the proposed discipline. Respondent presented no evidence about its ability to pay and did not address any specific billing entries as inappropriate. Considering all the evidence and the *Zuckerman* factors, the entire amount of costs complainant requested is reasonable and awarded as set forth in the Order below.

ORDER

Pharmacy Permit Number PHY 49619, issued to respondent Longs Drug Stores California, LLC, dba CVS Pharmacy #3943, is revoked; however, the revocation is

stayed, and respondent is placed on probation for two years upon the following terms and conditions:

a. Definition of "Respondent." For the purposes of these terms and conditions, "respondent" shall refer to Longs Drug Stores California, LLC, dba CVS Pharmacy #3943. All terms and conditions stated herein shall bind and be applicable to the licensed premises and to all owners, managers, officers, administrators, members, directors, trustees, associates, or partners thereof. For purposes of compliance with any term or condition, any report, submission, filing, payment, or appearance required to be made by respondent to or before the Board or its designee shall be made by an owner or executive officer with authority to act on behalf of and legally bind the licensed entity.

1. **Obey All Laws:** Respondent shall obey all state and federal laws and regulations. Respondent shall report any of the following occurrences to the Board, in writing, within 72 hours of such occurrence:

- an arrest or issuance of a criminal complaint for violation of any provision of the Pharmacy Law, state and federal food and drug laws, or state and federal controlled substances laws;
- a plea of guilty, or nolo contendere, no contest, or similar, in any state or federal criminal proceeding to any criminal complaint, information or indictment;
- a conviction of any crime;
- the filing of a disciplinary pleading, issuance of a citation, or initiation of another administrative action filed by any state or federal agency which

involves respondent's license or which is related to the practice of pharmacy or the manufacturing, obtaining, handling, distributing, billing, or charging for any drug, device or controlled substance.

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

2. **Report to the Board:** Respondent shall report to the Board quarterly, on a schedule as directed by the Board or its designee. The report shall be made either in person or in writing, as directed. Among other requirements, respondent shall state in each report under penalty of perjury whether there has been compliance with all the terms and conditions of probation.

Failure to submit timely reports in a form as directed shall be considered a violation of probation. Any period(s) of delinquency in submission of reports as directed may be added to the total period of probation. Moreover, if the final probation report is not made as directed, probation shall be automatically extended until such time as the final report is made and accepted by the Board.

3. **Interview with the Board:** Upon receipt of reasonable prior notice, respondent shall appear in person for interviews with the Board or its designee, at such intervals and locations as are determined by the Board or its designee. Failure to appear for any scheduled interview without prior notification to Board staff, or failure to appear for two or more scheduled interviews with the Board or its designee during the period of probation, shall be considered a violation of probation.

4. **Cooperate with Board Staff:** Respondent shall timely cooperate with the Board's inspection program and with the Board's monitoring and investigation of respondent's compliance with the terms and conditions of its probation, including but

not limited to: timely responses to requests for information by Board staff; timely compliance with directives from Board staff regarding requirements of any term or condition of probation; and timely completion of documentation pertaining to a term or condition of probation. Failure to timely cooperate shall be considered a violation of probation.

5. **Reimbursement of Board Costs:** As a condition precedent to successful completion of probation, respondent shall pay to the Board its costs of investigation and prosecution in the amount of \$8,235. Respondent shall be permitted to pay these costs in a payment plan approved by the Board or its designee, so long as full payment is completed no later than one year prior to the end date of probation. Failure to pay costs by the deadline(s) as directed shall be considered a violation of probation.

6. **Probation Monitoring Costs:** Respondent shall pay any costs associated with probation monitoring as determined by the Board each and every year of probation. Such costs shall be payable to the Board on a schedule as directed by the Board or its designee. Failure to pay such costs by the deadline(s) as directed shall be considered a violation of probation.

7. **Status of License:** Respondent shall, at all times while on probation, maintain a current pharmacy permit with the Board. Failure to maintain current licensure shall be considered a violation of probation.

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

8. **Permit Surrender While on Probation:** Following the effective date of this decision, should respondent wish to discontinue business, respondent may tender the pharmacy permit to the Board for surrender. The Board or its designee shall have the discretion whether to grant the request for surrender or take any other action it deems appropriate and reasonable. Upon formal acceptance of the surrender of the permit, respondent will no longer be subject to the terms and conditions of probation.

Upon acceptance of the surrender, respondent shall relinquish the premises wall and renewal permit to the Board within 10 days of notification by the Board that the surrender is accepted. Respondent shall further submit a completed Discontinuance of Business form according to Board guidelines and shall notify the Board of the records inventory transfer within five days. Respondent shall further arrange for the transfer of all records of acquisition and disposition of dangerous drugs and/or devices to premises licensed and approved by the Board.

Respondent shall also, within 10 days of notification by the Board that the surrender is accepted, arrange for the continuation of care for ongoing patients of the pharmacy by, at minimum, providing a written notice to ongoing patients that specifies the anticipated closing date of the pharmacy and that identifies one or more area pharmacies capable of taking up the patients' care, and by cooperating as may be necessary in the transfer of records or prescriptions for ongoing patients. Within five days of its provision to the pharmacy's ongoing patients, respondent shall provide a copy of the written notice to the Board. For the purposes of this provision, "ongoing patients" means those patients for whom the pharmacy has on file a prescription with one or more refills outstanding, or for whom the pharmacy has filled a prescription within the preceding 60 days.

Respondent may not apply for any new license from the Board for three years from the effective date of the surrender. Respondent shall meet all requirements applicable to the license sought as of the date the application for that license is submitted to the Board.

Respondent further stipulates that it shall reimburse the Board for its costs of investigation and prosecution prior to the acceptance of the surrender.

9. **Sale or Discontinuance of Business:** During the period of probation, should respondent sell, trade, or transfer all or part of the ownership of the licensed entity, discontinue doing business under the permit issued to respondent, or should practice at that location be assumed by another full or partial owner, person, firm, business, or entity, under the same or a different pharmacy permit number, the Board or its designee shall have the sole discretion to determine whether to exercise continuing jurisdiction over the licensed location, under the current or new premises permit number, and/or carry the remaining period of probation forward to be applicable to the current or new pharmacy permit number of the new owner.

10. **Notice to Employees:** Respondent shall, upon or before the effective date of this decision, ensure that all employees involved in permit operations are made aware of all the terms and conditions of probation, either by posting a notice of the terms and conditions, circulating such notice, or both. If the notice required by this provision is posted, it shall be posted in a prominent place and shall remain posted throughout the probation period. Respondent shall ensure that any employees hired or used after the effective date of this decision are made aware of the terms and conditions of probation by posting a notice, circulating a notice, or both. Additionally, respondent shall submit written notification to the Board, within 15 days of the effective date of this decision, that this term has been satisfied. Failure to timely

provide such notification to employees, or to timely submit such notification to the Board shall be considered a violation of probation.

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

11. **Owners and Officers: Knowledge of the Law.** Respondent shall provide, within 30 days after the effective date of this decision, signed and dated statements from its owners, including any owner or holder of 10 percent or more of the interest in respondent or respondent’s stock, and all of its officers, stating under penalty of perjury that said individuals have read and are familiar with state and federal laws and regulations governing the practice of pharmacy. The failure to timely provide said statements under penalty of perjury shall be considered a violation of probation.

12. **Premises Open for Business:** Respondent shall remain open and engaged in its ordinary business as a pharmacy in California for a minimum of 300 hours per calendar month. Any month during which this minimum is not met shall toll the period of probation, i.e., the period of probation shall be extended by one month for each month during which this minimum is not met. During any such period of tolling of probation, respondent must nonetheless comply with all terms and conditions of probation, unless respondent is informed otherwise in writing by the Board or its designee. If respondent is not open and engaged in its ordinary business as a pharmacy for a minimum of 300 hours in any calendar month, for any reason (including vacation), respondent shall notify the Board in writing within 10 days of the conclusion of that calendar month. This notification shall include at minimum all the following: the date(s) and hours respondent was open; the reason(s) for the

interruption or why business was not conducted; and the anticipated date(s) on which respondent will resume business as required. Respondent shall further notify the Board in writing within 10 days following the next calendar month during which respondent is open and engaged in its ordinary business as a pharmacy in California for a minimum of hours. Any failure to timely provide such notification(s) shall be considered a violation of probation.

13. **Posted Notice of Probation:** Respondent shall prominently post a probation notice provided by the Board or its designee in a place conspicuous to and readable by the public within two days of receipt thereof from the Board or its designee. Failure to timely post such notice, or to maintain the posting during the entire period of probation, shall be considered a violation of probation.

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

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

If respondent violates probation in any respect, the Board, after giving respondent notice and an opportunity to be heard, may revoke probation and carry out the disciplinary order that was stayed. If a petition to revoke probation or an

accusation is filed against respondent during probation, the Board shall have continuing jurisdiction and the period of probation shall be automatically extended until the petition to revoke probation or accusation is heard and decided.

15. **Completion of Probation:** Upon written notice by the Board or its designee indicating successful completion of probation, respondent's permit will be fully restored.

DATE: June 1, 2023


Jessica Wall (Jun 1, 2023 09:01 PDT)

JESSICA WALL

Administrative Law Judge

Office of Administrative Hearings

1 ROB BONTA
Attorney General of California
2 ANDREW M. STEINHEIMER
Supervising Deputy Attorney General
3 JEFF STONE
Deputy Attorney General
4 State Bar No. 155190
1300 I Street, Suite 125
5 P.O. Box 944255
Sacramento, CA 94244-2550
6 Telephone: (916) 210-7726
Facsimile: (916) 327-8643
7 E-mail: Jeff.Stone@doj.ca.gov
Attorneys for Complainant
8

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

13 In the Matter of the Accusation Against:

Case No. 7311

14 **LONGS DRUG STORES CALIFORNIA,**
15 **LLC DBA CVS PHARMACY #3943**

ACCUSATION

16 **5039 Folsom Blvd.**
17 **Sacramento, CA 95819**

18 **Pharmacy Permit Number PHY 49619**

Respondent.

19
20 Complainant alleges:

21 **PARTIES**

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

25 2. On or about November 10, 2008, the Board issued Pharmacy Permit Number PHY
26 49619 to Longs Drug Stores California, LLC dba CVS Pharmacy #3943 ("Respondent"). The
27 Pharmacy Permit was in full force and effect at all times relevant to the charges brought herein
28 and will expire on November 1, 2022, unless renewed.

JURISDICTION

3. This Accusation is brought before the Board under the authority of the following laws.

4. Business and Professions Code (“Code”) section 4011 provides that the Board shall administer and enforce the Pharmacy Law [Code section 4000 et seq.].

5. Code section 4032 defines “license” to include any license, permit, registration, certificate or exemption issued by the Board.

6. Code section 4300 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.

...

(7) Compliance with laws and regulations governing the practice of pharmacy.

...

(d) The board may initiate disciplinary proceedings to revoke or suspend any probationary certificate of licensure for any violation of the terms and conditions of probation. Upon satisfactory completion of probation, the board shall convert the probationary certificate to a regular certificate, free of conditions.

(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.

7. Code section 4300.1 states:

The expiration, cancellation, forfeiture, or suspension of a board issued license by

operation of law or by order or decision of the board or a court of law, the 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 investigation of, or action or disciplinary proceeding against, the licensee or to render a decision suspending or revoking the license.

8. Code section 4307 states, in pertinent part:

(a) Any person who has been denied a license or whose license has been revoked or is under suspension, or who has failed to renew his or her license while it was under suspension, or who has been a manager, administrator, owner, member, officer, director, associate, partner, or any other person with management or control of any partnership, corporation, trust, firm, or association whose application for a license has been denied or revoked, is under suspension or has been placed on probation, and while acting as the manager, administrator, owner, member, officer, director, associate, partner, or any other person with management or control had knowledge of or knowingly participated in any conduct for which the license was denied, revoked, suspended, or placed on probation, shall be prohibited from serving as a manager, administrator, owner, member, officer, director, associate, partner, or in any other position with management or control of a licensee as follows:

(1) Where a probationary license is issued or where an existing license is placed on probation, this prohibition shall remain in effect for a period not to exceed five years.

(2) Where the license is denied or revoked, the prohibition shall continue until the license is issued or reinstated.

...

STATUTORY PROVISIONS

9. Code section 4113, subdivision (d), provides, in pertinent part: “[e]very pharmacy shall notify the board in writing, on a form designed by the board, within 30 days of the date when a pharmacist-in-charge ceases to act as the pharmacist-in-charge, and shall on the same form propose another pharmacist to take over as the pharmacist-in-charge.”

10. Code section 4301 states:

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

...

(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.

COST RECOVERY

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

CAUSE FOR DISCIPLINE

(Failure to Timely Notify Board of Change of Pharmacist-In-Charge)

12. Respondent is subject to disciplinary action under Code section 4113, subdivision (d), by and through Code Section 4301, subdivision (o), on the grounds of unprofessional conduct, in that Respondent failed to notify the Board in writing within 30 days that its pharmacist-in-charge had ceased to act as the pharmacist-in-charge. The circumstances are as follows:

13. On or about April 4, 2022, the Board received an *Application for Change of Pharmacist-in-Charge* ("Application") from Respondent, signed under penalty of perjury. The Application stated that the prior pharmacist-in-charge, T.L. (RPH 78622) had ceased to act as the pharmacist-in-charge on February 19, 2022 and that M.C. (RPH 62013) was designated as the new pharmacist-in-charge on March 21, 2022.

DISCIPLINE CONSIDERATIONS/MATTERS IN AGGRAVATION

14. To determine the degree of discipline, if any, to be imposed on Respondent, Complainant alleges that on or about September 10, 2018, in a prior action, the Board issued Citation Number CI 2017 77271 to Respondent for violation of California Code of Regulations ("CCR"), title 16, sections 1714, subdivision (a), failure to maintain an area suitable for confidential patient counseling, and 1764, unauthorized disclosure of a prescription, and ordered Respondent to pay a fine of \$2,500.00. That Citation is now final.

15. Complainant further alleges that on or about April 15, 2019, in a prior action, the Board issued Citation Number CI 2018 81259 to Respondent for violation of CCR, title 16, section 1764, unauthorized disclosure of a prescription, and ordered Respondent to pay a fine of \$1,000.00. That Citation is now final.

16. Complainant further alleges that on or about October 14, 2019, in a prior action, the Board issued Citation Number CI 2019 85825 to Respondent for violation of Code section 4113, subdivision (d), failure to timely notify the Board of designation/change of pharmacist-in-charge and ordered Respondent to pay a fine of \$750.00. That Citation is now final.

17. Complainant further alleges that on or about December 8, 2021, in a prior action, the Board issued Citation Number CI 2021 93539 to Respondent for violation of Code sections 4113, subdivisions (a) and (d), failure to timely notify the Board of designation/change of pharmacist-in-charge and ordered Respondent to pay a fine of \$400.00. That Citation is now final.

18. Complainant further alleges that on or about January 12, 2022, in a prior action, the Board issued Citation Number CI 2020 91824 to Respondent for violation of CCR, title 16, section 1716, dispensing incorrect medication on a prescription. That Citation is now final.

OTHER MATTERS

19. Pursuant to Code section 4307, subdivision (a), if discipline is imposed on Pharmacy Permit Number 49619, issued to Longs Drug Stores California, LLC dba CVS Pharmacy #3943, then Pharmacy Permit Number PHY 49619, issued to Longs Drug Stores California, LLC dba CVS Pharmacy #3943 shall be prohibited from serving as a manager, administrator, owner, member, officer, director, associate, or partner of a licensee for five years if Pharmacy Permit Number 49619, issued to Longs Drug Stores California, LLC dba CVS Pharmacy #3943 is placed on probation or until Pharmacy Permit Number 49619, issued to Longs Drug Stores California, LLC dba CVS Pharmacy #3943 is reinstated, if it is revoked.

PRAAYER

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 1. Revoking or suspending Pharmacy Permit Number PHY 49619, issued to Longs Drug
2 Stores California, LLC dba CVS Pharmacy #3943;

3 2. Ordering Longs Drug Stores California, LLC dba CVS Pharmacy #3943 to pay the
4 Board of Pharmacy the reasonable costs of the investigation and enforcement of this case,
5 pursuant to Business and Professions Code section 125.3, and;

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

7
8 DATED: 11/21/2022

Sodergren, Digitally signed by
Anne@DCA Sodergren, Anne@DCA
Date: 2022.11.21
19:08:00 -08'00'

ANNE SODERGREN
Executive Officer
Board of Pharmacy
Department of Consumer Affairs
State of California
Complainant

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