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

In the Matter of the First Amended Accusation and Petition to Revoke Probation Against: Donna Elaine Winingham, M.D. Physician's and Surgeon's Certificate No. C 40332 Respondent.	Case No. 800-2020-071255

DECISION

The attached Proposed Decision is hereby adopted as the Decision and Order of the Medical Board of California, Department of Consumer Affairs, State of California.

This Decision shall become effective at 5:00 p.m. on July 30, 2021.

IT IS SO ORDERED July 1, 2021.

MEDICAL BOARD OF CALIFORNIA

Richard E. Thorp, M.D., Chair
Panel B

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

In the Matter of the First Amended Accusation and Petition to Revoke Probation Against:

DONNA ELAINE WININGHAM, M.D.

Physician's and Surgeon's Certificate No. C 40332,

Respondent

Agency Case No. 800-2020-071255

OAH No. 2020110016

PROPOSED DECISION

Julie Cabos Owen, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter by videoconference on May 10, 11, and 12, 2021. William Prasifka (Complainant) was represented by Edward Kim, Deputy Attorney General. Donna Elaine Wininghamm, M.D. (Respondent) was represented by Adam Brown, Attorney at Law.

At the hearing, Complainant amended the First Amended Accusation and Petition to Revoke Probation by replacing the allegations in paragraph 32 with the following text:

> Respondent failed to check-in with FSSolutions to determine if she had been selected for testing on or about each of the following days: September 29, 2020, October 7, 2020, October 14, 2020, October 29, 2020, December 12, 2020 and February 22, 2021. A Board employee sent a non-compliance letter to Respondent in connection with the probation violations, on or about each of the following days: September 30, 2020, October 14, 2020, December 15, 2020 and March 2, 2021.

(Exhibit 22.)

At the hearing, the ALJ was provided with Exhibit A which contained confidential information protected from disclosure to the public. Redaction of the document to obscure this information was not practicable and would not provide adequate privacy protection. In order to prevent the disclosure of confidential information, concurrent with the issuance of this Proposed Decision the ALJ issued a Protective Order providing that Exhibit A shall be placed under seal following its use in preparation of the Proposed Decision. The exhibit shall remain under seal and shall not be opened, except by order of the Medical Board of California, by OAH, or by a reviewing court. A reviewing court, parties to this matter, their attorneys, or a government agency decision maker or designee under Government Code section 11517 may review the documents subject to this order provided that such documents are protected from release to the public.

Testimony and documents were received in evidence. The record closed and the matter was submitted for decision on May 12, 2021.

FACTUAL FINDINGS

Jurisdictional Matters

1. On October 27, 2020, Complainant filed an Accusation and Petition to Revoke Probation in this matter while acting in his official capacity as the Executive Director of the Medical Board of California (Board), Department of Consumer Affairs. On April 8, 2021, Complainant filed the First Amended Accusation and Petition to Revoke Probation in his official capacity.

2. Respondent filed a Notice of Defense requesting a hearing.

License History and Probation Order

3. On April 19, 1982, the Board issued Physician's and Surgeon's Certificate Number C 40332 (license) to Respondent. That license is scheduled to expire on March 31, 2022.

4A. In a Decision and Order in Case Number 800-2016-021131, effective June 10, 2019 (Probation Order), the Board revoked Respondent's license, stayed the revocation, and placed Respondent on probation for three years on specified terms and conditions, including that she comply with the Board's probation unit, abstain from the consumption of alcohol, and submit to random biological fluid testing.

4B. The Probation Order was issued May 3, 2019, with an effective date of May 31, 2019. However, Respondent filed a Petition for Reconsideration, and the Board issued a May 29, 2019 order granting a stay of the Probation Order's effective date until June 10, 2019, to allow the Board time to review and rule on the Petition for

Reconsideration. No action was taken on the Petition for Reconsideration, and the Probation Order became effective by operation of law on June 10, 2019.

5A. The Probation Order arose from Respondent's criminal conviction for driving under the influence (DUI) of alcohol. On May 12, 2016. Respondent was convicted, on her nolo contendere plea, of violating Vehicle Code section 23151, subdivision (b) (driving a vehicle while having a blood alcohol content over .08 percent), a misdemeanor. (Super. Ct. San Luis Obispo County, 2016, No. 16M-03655.)

5B. Respondent was placed on three years' probation and ordered to serve five days in jail. She was also ordered to complete a nine-month, first-offender DUI program, to submit to chemical testing on demand by any peace officer, and to pay fines and fees totaling $2,425. Respondent complied with her criminal probation.

5C. The circumstances leading to Respondent's criminal conviction arose on March 5, 2016. That evening, California Highway Patrol (CHP) officers were dispatched to a high school after receiving a report that an intoxicated parent had driven to the school to pick up her daughter. The Probation Order noted the following facts:

> At hearing, Respondent testified that she rushed to the school after receiving an emergency telephone call from her daughter, who told Respondent that she was stranded there due to her other parent's failure to pick her up. Specifically, the daughter had just completed drama practice late that evening, expected her other parent to be there; her other parent was not there, which prompted the daughter to call Respondent. Respondent and the other parent had been undergoing divorce proceedings and not living in the same

household. The daughter was supposed to be picked up and spend the evening with the other parent.

[R]espondent, who had consumed a substantial amount of wine prior to her daughter's telephone call, left the house in her pajamas, with no shoes, and rushed to pick up her daughter, who expressed that she was feeling frightened. The CHP officers arrived on the scene as Respondent was driving off without her daughter. The daughter had concluded that Respondent was drunk and refused to get inside of the car with Respondent. The CHP officers conducted a traffic stop of Respondent's vehicle and observed that Respondent had all four windows of the vehicle rolled down, even though it was raining heavily at the time. They observed signs of intoxication, such as an odor of alcohol emanating from Respondent's person; red, watery, and bloodshot eyes; slurred speech; and difficulty following instructions. The officers conducted Standardized Field Sobriety Tests and noted that Respondent displayed pronounced psycho-physical impairment[.] Respondent consented to [a breathalyzer test] and provided two breath samples. The first sample revealed a blood alcohol concentration of 0.193 percent, and the second sample, produced one minute later, revealed a blood [alcohol] 6concentration of 0.198 percent. The officers immediately placed Respondent under arrest and transported her to [a

hospital] for a chemical test of her blood, which revealed a blood alcohol level of 0.20 percent.

(Exhibit 3, p. 5.)

Probation Violations

6. On May 22, 2019, Respondent met with her Board probation monitor, Inspector Susan Dvorak, to review the terms of the Probation Order. During that meeting, Respondent was angry and upset about being subject to the Probation Order. Nevertheless, after reviewing the terms of the Probation Order, Respondent signed an "Acknowledgment of Decision" affirming she received a copy of the Probation Order, that the probation monitor explained all of the probationary terms and conditions, and that Respondent understood what was required of her under the Probation Order.

7A. Condition 4 of the Probation Order states:

> **Quarterly Declarations**
>
> Respondent shall submit quarterly declarations under penalty of perjury on forms provided by the Board, stating whether there has been compliance with all the conditions of probation.
>
> Respondent shall submit quarterly declarations not later than 10 calendar days after the end of the preceding quarter.

(Exhibit 3, p. 9.)

7B. Condition 5 of the Probation Order states:

General Probation Requirements

Compliance with Probation Unit

Respondent shall comply with the Board's probation unit.

(Exhibit 3, p. 9.)

7C. Condition 9 of the Probation Order states:

Violation of Probation

Failure to fully comply with any term or condition of probation is a violation of probation.

(Exhibit 3, p. 11.)

8. Condition 12 of the Probation Order states:

Alcohol - Abstain From Use

Respondent shall abstain completely from the use of products or beverages containing alcohol.

If respondent has a confirmed positive biological fluid test for alcohol, respondent shall receive a notification from the Board or its designee to immediately cease the practice of medicine. The respondent shall not resume the practice of medicine until the final decision on an accusation and/or a petition to revoke probation is effective. . . . The cessation

of practice shall not apply to the reduction of the probationary time period. [¶] . . . [¶]

(Exhibit 3, p. 12)

9. Condition 13 of the Probation Order states:

Biological Fluid Testing

Respondent shall immediately submit to biological fluid testing, at respondent's expense, upon request of the Board or its designee. "Biological fluid testing" may include, but is not limited to, urine, blood, breathalyzer, hair follicle testing, or similar drug screening approved by the Board or its designee. Prior to practicing medicine, respondent shall contract with a laboratory or service approved in advance by the Board or its designee that will conduct random, unannounced, observed, biological fluid testing. The contract shall require results of the tests to be transmitted by the laboratory or service directly to the Board or its designee within four hours of the results becoming available. Respondent shall maintain this laboratory or service contract during the period of probation.

A certified copy of any laboratory test result may be received in evidence in any proceedings between the Board and respondent.

> If respondent fails to cooperate in a random biological fluid testing program within the specified time frame, respondent shall receive a notification from the Board or its designee to immediately cease the practice of medicine[.]

(Exhibit 3, pp. 12-13.)

10. On May 23, 2019, Inspector Dvorak sent Respondent a letter summarizing the terms of the Probation Order. In the May 23, 2019 letter, Inspector Dvorak noted, "BIOLOGICAL FLUID TESTING: You have enrolled with First Source Solutions for random testing. Ensure that you check in online or by phone daily." (Exhibit 7.)

11. On May 10, 2019, Board Probation Analyst Jennifer Saucedo sent Respondent a letter regarding the specific requirements of the biological fluid testing program, including that she must check in daily to determine if she would be required to submit to testing. The letter noted, "Failure to cooperate with biological fluid testing is a violation of probation and non-compliance may lead to further disciplinary action taken against your license." (Exhibits 8 and 9.) The letter specifically states, in pertinent part:

> As a condition of probation, you are required to enroll into a Board approved laboratory service, which will conduct random biological fluid testing. The Board's approved laboratory is FirstSource Solutions. Biological fluid testing may include, but is not limited to, urine, blood, breathalyzer, hair follicle testing or similar drug screening. You will need

to enroll in FirstSource upon receipt of this letter but no later than May 31, 2019[.]

FirstSource maintains a list of collection sites available for your use, however, it is your responsibility to identify a collection site(s) in your vicinity with adequate hours of operation should you be called to test on a given day. You must only use a collection site that is on the FirstSource list of approved sites. However, if you find a collection site that you wish to use, you may nominate the site to FirstSource for approval. Provide the name and address of the establishment to Dana Simmons at FirstSource. . . . She will perform an assessment and the site **may** be added to their approved list.

There are biological fluid testing requirements **you must adhere to**, in order to be in compliance with the biological fluid testing condition of the Board's Decision. They include the following:

> You must check-in daily (via landline or internet) between the hours of 12:00 a.m. and 5:00 p.m. to determine if you are required to provide a sample that day. Should you check in via telephone, you must listen to the entire message before hanging up, otherwise your check in may be deemed as a missed check-in.

> You must provide a sample the same day you are selected. It is your responsibility to ensure you have adequate time to provide your sample before your collection site closes.

> All collections must be directly observed.

Failure to cooperate with biological fluid testing is a violation of probation and non-compliance may lead to further disciplinary action taken against your license.

Should you travel while on probation, you must ensure there are adequate collection site available to test when selected at or near your travel destination. FirstSource can assist you in finding a collection site; however, FirstSource requests you provide them with a minimum of two weeks' notice prior to traveling.

The Board does not approve travel nor will the Board excuse you from testing when traveling within the United States or out of the country. Currently, there are no collection sites contracted with FirstSource outside of the United States. [¶] . . . [¶]

Enclosed is a Participant Disclosure and Information when Monitoring with [Ethylglucuronide (EtG) and Ethylsulfate (EtS)] form. Read and sign the document and return it to me by May 31, 2019.

(Exhibit 8, pp. 5-6; Exhibit 29, pp. 94-95. Emphasis in original.)

12. Enclosed with the May 10, 2019 letter was a "Participant Disclosure and Information when Monitoring with EtG/EtS" (Participant Disclosure) which Respondent was instructed to return to Ms. Saucedo by May 31, 2019. The Participant Disclosure warned Respondent to avoid incidental exposure to substances containing alcohol which could affect the results of her biological fluid testing. The Participant Disclosure specifically stated, in pertinent part:

> [W]hen being monitored with EtG/EtS, it is important, as in any monitoring situation, to be aware of items to avoid so that inadvertent "incidental" exposure does not cause a positive test. In other words, it's important to know what items contain alcohol and to avoid them. With reasonable caution it is rare for "incidental" alcohol exposure to cause a positive test.
>
> It is YOUR responsibility to limit and avoid exposure to products and substances that contain ethyl alcohol. It is YOUR responsibility to read product labels to know what is contained in the products you use and inspect these products BEFORE you use them. . . . Use of the products detailed below or any other product containing alcohol is a violation of probation and will NOT be allowed as an excuse for a positive test result[.]
>
> Mouthwash: Many mouthwashes (e.g. Listermint, Copacol, etc.) contain ethyl alcohol. Use of alcohol containing

> mouthwashes can cause positive tests for alcohol because they contain a significant amount of alcohol. Participants are required to read product labels and avoid mouth wash or anything else containing ethyl alcohol. Use of alcohol containing products while on probation is not permitted. Non-alcohol mouthwashes are readily available and are an acceptable alternative. [¶] . . . [¶]
>
> Breathing Alcohol Vapor Can Cause a Positive Test: Avoid breathing fumes of products containing alcohol, such as alcohol based hand sanitizing gels (e.g. Purell), perfumes or colognes, bug sprays, or other chemicals. . . . If you must use these products use them sparingly and avoid breathing the fumes. [¶] . . . [¶] Remember - When in doubt, don't use, consume or apply!!

(Exhibit 29, p. 90.)

13. Respondent did not sign and return the Participant Disclosure by May 31, 2019.

14. Respondent's probation began June 10, 2019. After she learned the Probation Order was stayed on May 29, 2019, Respondent consumed "a couple of glasses of wine" during the first week in June 2019, before the effective date of the Probation Order.

15A. Pursuant to the Probation Order's biological fluid testing mandate, Respondent is required to check in daily with First Source Solutions (FSS or FSSolutions), the biological fluid testing service, between 12:00 a.m. and 5:00 p.m.,

either on the testing service's website or by telephone, to ascertain whether she must submit to testing that day. If selected, Respondent must submit a sample that day for testing. (This same-day testing requirement was modified during the COVID-19 pandemic, as discussed more fully below.)

15B. On May 17, 2019, Respondent enrolled in FSS and created an online account. On the FSS online enrollment agreement, next to Respondent's electronic signature, a box was checked indicating, "By checking this box I am certifying that I agree to the Terms and Conditions of the Professional Health Monitoring Program." (Exhibit 30.) The terms of the FSS agreement included Respondent's agreement to:

> 2. Call [in] and/or log on to the FSSolutions Test Notification web site during the program's specified call-in time on the days of the week specified by the Program to see whether Participant has been selected for testing that day.
>
> 3. If selected for testing, report to a FSSolutions approved testing site and be tested that same day[.]
>
> 4. Agree that failure to call or test will be considered a lack of compliance with the [Board's Probation Order] requiring such testing and will result in reporting that lack of compliance to the [Board].

(Exhibit 30.)

16. After May 22, 2019, Respondent notified Inspector Dvorak of periods of time she would be traveling for work and for vacation. These dates included June 14 to 30, 2019, for a previously scheduled vacation in Europe.

17A. On June 11, 2019, Ms. Saucedo sent Respondent an email (copied to Inspector Dvorak), stating:

> This email is in response to your scheduled travel to Europe. The Board does not approve travel requests. . . . There are no testing locations out of the country so if you are selected to test, you may be in violation of the Biological Fluid Testing condition and the Board may take disciplinary action against you.

(Exhibit 8, p. 15.)

17B. That same day, Respondent sent Ms. Saucedo a responsive email stating:

> As you know, I am scheduled to depart for Europe with my children on Sat. June 15, 2019. I [*sic*] is of note that I received this notice on June 11, 2019. My probation terms do not state that I cannot travel outside California. I will test whenever there is a testing site available approved by the Board. When not, then I do not have the ability to test. This trip is a family reunion type of occasion, planned for over a year and most likely the last time my 85 [year old] mother will travel abroad. I will be accompanying her.

(Exhibit 8, p. 14.)

17C. Given the correspondence from Ms. Saucedo on May 10, 2019, and her email on June 11, 2019, Respondent understood that there were no FSS-approved collection sites outside the United States, and that if she traveled to Europe for vacation from June 14 to 30, 2019, she risked violation of the Probation Order if selected to test during that time frame. Respondent chose to travel to Europe.

18A. On seven consecutive days, from June 15, 2019, through July 1, 2019, Respondent failed to check in with FSS to determine if she was selected for testing. Because she failed to check in on those dates, Respondent also failed to provide biological fluid samples to FSS on the following dates when she was selected for testing: June 15, 20, 25, and 29, 2019.

18B. On June 20, 2019, Ms. Saucedo sent Respondent a letter noting Respondent's failure to check in with FSS and her failure to submit to testing on June 15, 2019. Ms. Saucedo instructed Respondent to provide a written explanation by June 30, 2019.

18C. On June 27, 2019, Respondent sent Ms. Saucedo an email stating:

> [A]s you know I have been out of the country since June 15th and will not return until late night on June 30th. I have not had a facility for testing. Internet has also been very limited. I cannot make a phone call unless the number is in my contacts. I will send a written response at the first opportunity on my return to the USA which will be after June 30th, 2019.

(Exhibit 8, p. 18.)

18D. On July 2, 2019, Respondent sent Ms. Saucedo a written explanation, stating:

> As you know from prior correspondence, I traveled to Europe on June 15, 2019. There were no testing sites available. There was no ability to call in. There were poor internet conditions. Thus, no check in with [FSS] from June 15-July 1, 2019. In review of court orders, there is no restriction on travel.

(Exhibit 8, p. 23.)

18E. On August 13, 2019, the Board issued Citation Number 8002019057888 (2019 Citation) to Respondent, for violation of California Code of Regulations, title 16, section 1364.11, subdivision (b) (violating a term or condition of her probation). The stated cause for the 2019 Citation was that Respondent violated conditions 9 and 13 of the Probation Order by failing to provide biological fluid samples on June 15, 20, 25, and June 29, 2019. The 2019 Citation contained an order of abatement stating:

> The Board is ordering you to maintain compliance with all terms and conditions of the [Probation Order]. You are given notice that any future violation of your probationary terms and conditions may result in the filing of formal disciplinary action to revoke your probation.

(Exhibit 29, p. 2.)

18F. Respondent's failure to check in with FSS from June 15 through July 1, 2019, constituted a failure to cooperate with the biological fluid testing program and

violations of the Probation Order, Condition 13. Additionally, Respondent's failure to provide biological fluid samples on June 15, 20, 25, and June 29, 2019, constituted a failure to cooperate with the biological fluid testing program and violations of the Probation Order, Condition 13.

19A. On July 19, 2019, Respondent was selected to provide a biological fluid sample for testing, and she provided a blood sample that day. The results of that blood test were positive for metabolites of alcohol in the form of Phosphatidyl Ethanol (PEth)[1] at 25 ng/mL.

19B. On July 26, 2019, Ms. Saucedo sent Respondent an email notifying her of the positive test result and asking Respondent to provide a written explanation. Respondent replied by email, asking to be provided with the July 19, 2019 test results and the lab results for tests from the prior two months. Ms. Saucedo responded and explained that the Board does not release the actual lab results. Thereafter, Respondent emailed Ms. Saucedo her explanation stating:

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[1] PEth is formed only in the presence of ethanol. Levels of PEth in blood are used as markers of previous alcohol consumption, and PEth is more sensitive than urinary EtG and EtS.

> Since I have no idea what results you are getting, I cannot explain what your test results are. Testing for metabolites is fraught with problems which is why these tests are not approved by FDA or used in criminal proceedings. My job is not to drink alcohol and I am doing my job.

(Exhibit 9, p. 11.)

19C. Ms. Saucedo sent an email inquiry to the FSS Medical Director, James Ferguson, M.D., asking him to verify that the July 19, 2019 results confirm alcohol ingestion. Dr. Ferguson responded, "That [25 ng/mL] is a very low level but it is still consistent with some type of alcohol ingestion or possibly inhalation. Sorry I can't be more specific than that." (Exhibit 9, p. 15.)

19D. The July 19, 2019 results, while indicative of alcohol exposure, were insufficient to establish Respondent's consumption of alcohol during the probationary period.

19E. On August 5, 2019, Ms. Saucedo sent Respondent a letter reminding her about her probationary responsibilities. Specifically, the letter stated:

> This letter is to bring to your attention my concerns regarding your compliance with conditions ordered pursuant to your probation with the [Board]. As you are aware, you are required to submit to biological fluid testing as a condition of your probation.
>
> It has been brought to the attention of the Board that the recent positive biological fluid sample received by the

> Board may have been the result of ingestion or inhalation of products or substances containing ethyl alcohol. When subject to biological fluid testing it is your responsibility to abstain from alcohol and limit exposure to product or substances that may cause a positive result for alcohol.
>
> Failure to cooperate with the Biological Fluid Testing condition is considered a violation of probation. Should you continue to use, consume, or ingest any consumable products you have been instructed by the Board not to use, you may be in violation of the Biological Fluid Testing condition and the Board may take disciplinary action against your license.

(Exhibit 10, p. 13.)

20A. On August 14, 2019, Respondent finally signed the Participant Disclosure that was due May 31, 2019. The signed Participant Disclosure was received by the Board on September 12, 2019.

20B. Respondent's signature on the Participant Disclosure form indicated she understood her specified responsibilities to avoid exposure to products containing ethyl alcohol. However, near the signature line, Respondent placed the following handwritten notation: "However, my only court orders are to abstain from alcohol and controlled drugs. Your other recommendations are because of the limits of your testing. Not my responsibility." (Exhibit 28.)

20C. Respondent's defiant handwritten assertion is incorrect. Probation Order Condition 12 requires, "Respondent shall abstain completely from the use of <u>products</u>

or beverages containing alcohol." (Exhibit 3, p. 12. Emphasis added.) Additionally, the Participant Disclosure listed some of the alcohol-based products Respondent should avoid and noted, "It is YOUR responsibility to limit and avoid exposure to products and substances that contain ethyl alcohol. . . . . Use of the products detailed below or any other product containing alcohol is a violation of probation and will NOT be allowed as an excuse for a positive test result[.]" (Exhibit 29, p. 90.)

21. Respondent is licensed to practice medicine in Alaska, and she travels there frequently to work. As noted in Ms. Saucedo's May 10, 2019 letter, when Respondent travels during her probationary period, she must ensure there are FSS-approved collection sites available to test at her travel destination. FSS provides probationers assistance finding collection sites and requests probationers to provide them with a minimum of two weeks' notice before traveling.

22A. On January 10, 2020, Respondent was selected to provide a urine sample during travel to Wasilla, Alaska, but she did not submit a sample. Respondent had provided 14 days' notice of her Alaska travel to FSS, which identified an approved collection site for her. However, as Respondent explained to the Board in a January 13, 2020 email, when she went to the collection site, she was informed it no longer performs drug screenings. FSS personnel contacted the site and later confirmed with Ms. Saucedo that the site was unable to perform the requested test on January 10, 2020. Given the collection site error by FSS, no action was taken by the Board.

22B. On January 29, 2020, Respondent sent an email to Ms. Saucedo informing her that she had been selected for testing that day. Respondent noted:

> I am working in Wasilla, a fact known by FSS. You will recall that the last time I tried to test here, the only site given for

> testing was no longer testing. You will see that FSS is included on these emails. They have not given me a replacement site.
>
> I took it on myself to test at a certified DOT testing site, Valley Phlebotomy Services, LLC. in Wasilla, AK. This is a recurrent problem.

(Exhibit 10, pp. 22-23.)

22C. On February 3, 2020, an FSS representative sent an email to Ms. Saucedo identifying four collection sites for Respondent to use during subsequent travel to Alaska, including Valley Phlebotomy Services, the facility Respondent had found and used.

23A. On January 27, 2020, February 24, 2020, and March 3, 2020, Respondent failed to check in with FSS to determine if she was selected for testing on those days.

23B. On March 20, 2020, Ms. Saucedo sent Respondent a non-compliance letter again reminding her about her probationary responsibilities. Specifically, the letter stated:

> This letter is to bring to your attention my concerns regarding your compliance with conditions ordered pursuant to your probation with the [Board]. . . .
>
> Upon enrollment with [FSS], you were provided information on how to "check in" with the [FSS] system daily, either by phone, mobile app, or website, to determine if you are selected for testing. You must check-in daily during the

> program hours of 12:00 a.m. and 5:00 p.m. to avoid receiving a missed check-in violation and being unable to receive your testing notification. You failed to check in with [FSS] during program hours on the following date: January 27, 2020, February 24, 2020, and March 3, 2020.
>
> Failure to cooperate in the random biological fluid testing is considered a violation of probation. This letter serves as notice that you are in violation of the biological fluid testing requirement of your probation order and continued failure to cooperate with the biological fluid testing requirement could constitute grounds to issue a citation and fine.

(Exhibit 10, p. 15.)

23C. At the administrative hearing, Respondent admitted she missed checking in with FSS on January 27, 2020, February 24, 2020, and March 3, 2020. She explained that she was in Alaska and it was "a very difficult winter up there," and she "had to shovel snow out of her driveway with a skillet." This explanation did not adequately explain or excuse her failure to check in with FSS on the dates listed above.

23D. Respondent's failure to check in with FSS on January 27, 2020, February 24, 2020, and March 3, 2020, to determine if she was selected for testing constituted a failure to cooperate with the biological fluid testing program and violations of the Probation Order, Condition 13.

24A. On March 4, 2020, Respondent was selected to provide a hair sample for testing at a specified testing location in San Luis Obispo, California. The testing kit was sent to the San Luis Obispo testing facility. However, Respondent did not submit to

the test on that date because she was in Alaska. She had failed to notify FSS of her travel.

24B. On March 6, 2020, Respondent sent Ms. Saucedo and Ms. Dvorak an email informing them she had been working in Alaska since February 29, and she was unable to submit to the hair test since the testing kit was sent to the testing location in San Luis Obispo. Respondent's March 6, 2020 email acknowledged she did not submit her travel request to FSS and stated, "Thought I had sent all Alaska dates to FSS. My probation monitor Susan Dvorak was aware of this. I will be back and can test in San Luis on Mar. 18, 2020." (Exhibit 10, p. 29.)

24C. Due to Respondent's failure to submit a travel notification to FSS, the hair kit was sent to San Luis Obispo, and she was unable to submit to required testing on March 4, 2020.

24D. Respondent's failure to submit to testing on March 4, 2020, constituted a violation of the Probation Order, Condition 13.

25A. On April 24, 2020, the Board issued Citation Number 8002020066352 (April 2020 Citation) to Respondent for violation of California Code of Regulations, title 16, section 1364.11, subdivision (b) (violating a term or condition of her probation). The stated causes for issuance of the April 2020 Citation were that Respondent violated conditions 9 and 13 of the Probation Order by failing to check in with FSS during required hours on January 27, 2020, February 24, 2020, and March 3, 2020, and by failing to provide a hair sample when selected to do so on March 4, 2020. The April 2020 Citation contained an order of abatement stating:

> The Board is ordering you to maintain compliance with all terms and conditions of the [Probation Order]. You are

given notice that any future violation of your probationary terms and conditions may result in the filing of formal disciplinary action to revoke your probation.

(Exhibit 29, p. 6.)

25B. At the administrative hearing, Respondent expressed frustration with her cited probation violation for failure to submit to the March 4, 2020 hair follicle testing due to her failure to notify FSS of her Alaska travel. She insisted she would have tested in Alaska and asserted, "I could do hair follicle testing any time, any place, and I did not know what the problem was." Respondent testified, "In the judicial order [i.e., the Probation Order], it says I have to submit to testing, and it does not say I have to be at a specific location, and I should be able to test where I was."

26A. Sometime after March 2020, the Board approved a 48-hour testing window for probationers to submit a biological fluid sample. This allowed an extra 24 hours to provide a sample in the event a collection site had limited business hours during the COVID-19 pandemic.

26B. At the administrative hearing, Ms. Saucedo explained that the original 24-hour testing window was between 12:00 a.m. (midnight) to 11:59 p.m. on the date of the testing selection. The 24-hour extension allowed the probationers to submit to testing until 11:59 p.m. on the day following the selected testing date. For example, if a probationer was selected for testing on April 1, she must submit to testing between 12:00 a.m. (midnight) on April 1 and 11:59 p.m. on April 2.

26C. On July 8, 2020, Respondent was selected to provide a biological fluid sample to FSS. Respondent failed to provide a biological fluid sample within the 48-

hour submission period. However, she submitted a sample on July 10, 2020, at 7:11 a.m., over seven hours after the 48-hour cut-off.

26D. On July 28, 2020, Ms. Saucedo sent Respondent a non-compliance letter regarding her failure to submit to testing on either July 8 or July 9, 2020. The letter specifically stated:

> Due to the COVID-19 pandemic, the Medical Board of California (Board) has approved a 48 hour testing window to submit a biological fluid sample, which allows one extra day to provide a sample in the event a collection site has limited business hours. You failed to submit a sample on both July 8, 2020 and July 9, 2020.
>
> In a letter dated July 16, 2020, you explained that it was your understanding the testing window extended two days, and you submitted a sample on July 10, 2020. Moving forward, please be aware you are to submit a sample the day you are selected, or by 11:59 p.m. the following day, to avoid it being considered a missed test. If you are selected two or more days in a row, you must submit a sample for each day you are selected and you may submit more than one sample in a day.

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> Continued non-compliance with the biological fluid testing requirement is considered a violation of probation and could result in a citation and fine or further disciplinary action against your license.

(Exhibit 11, p. 22.)

26E. Respondent's failure to timely submit to testing by 11:59 p.m. on July 9, 2020, constituted a violation of the Probation Order, Condition 13. However, her misunderstanding was reasonable, and she did provide a sample the following morning, seven hours past the deadline.

27A. On September 9, 2020, Respondent was selected to provide a blood sample for testing, which she provided on September 10, 2020. On September 22, 2020, the Board received notice that Respondent's laboratory test results were a positive for PEth at 161.5 ng/mL, indicating alcohol consumption.

27B. After notification of Respondent's positive test result, Ms. Saucedo sent Respondent a letter requesting an explanation for the positive test and a plan for avoiding recurrence. On September 28, 2020, Respondent sent an email to Ms. Saucedo with her explanation for the positive blood test as follows:

> Just before the test on the 10th, I received a severe burn while grilling. I picked up a gardening tool from the side of the grill and unfortunately it was partially plastic. This molten plastic adhered to my thumb and forefinger resulting in an immediate second degree burn with excruciating pain. I attempted to relieve this with all ointments I could think of including tepid water, comfrey,

> aloe gel, burn relief gel and even topical lidocaine. Despite taking NSAIDS, I was in as severe pain as I have ever experienced. That includes a fracture dislocation of my ankle and multiple vertebral fractures. I only received a mild relief by putting the digits on ice. This is not good for the burn and exacerbates the damage. So despite my trepidation, I had several shots of alcohol to numb the pain centers. That did allow me to finally sleep after several hours. I don't think there were other alternative other than going to ER for shot of morphine. This burn was so bad my fingerprint disappeared and couldn't get into my phone even a week later.
>
> As far as plans for the future, I did not plan on this situation and think it unlikely to reoccur.

(Exhibit 11, p. 26.)

27C. Respondent's consumption of alcohol constituted a violation of the Probation Order, Condition 12.

27D. Respondent's explanation for her probation violation is unpersuasive. Although she sustained a burn to her thumb, her decision to consume alcohol as pain relief, rather than seek medical treatment, is unreasonable and a knowing violation of her probation. Additionally, the fact that she would turn to alcohol rather than medical treatment is concerning given her assertion that she is not reliant on alcohol. (See Factual Finding 41.)

28. The Probation Order requires a cessation of practice if Respondent has a confirmed positive biological fluid test for alcohol. On October 1, 2020, the Board issued a Cease Practice Order after Respondent's September 10, 2020 blood test was positive for metabolites of alcohol.

29. Although Respondent ceased practice in California, she continues to practice medicine in Alaska.

30A. Respondent continued failing to check in daily with FSS on several occasions between September 29, 2020, and February 22, 2021.

30B. On September 29, 2020, Respondent failed to check in with FSS to determine if she had been selected for testing. On September 30, 2020, Ms. Saucedo emailed a non-compliance letter to Respondent regarding that violation. The letter stated, in pertinent part:

> As you are aware, you are required to submit to biological fluid testing as a condition of your probation.
>
> Upon enrollment with FSSolutions, you were provided information on how to "check-in" with" the FSSolutions system daily, either by phone, mobile app, or website, to determine if you are selected for testing. You must check-in daily during the program hours of 12:00 a.m. and 5:00 p.m. to avoid receiving a missed check-in violation and being unable to receive your testing notification.
>
> You failed to check-in with FSSolutions during program hours on the following date: September 29, 2020. Failure to

> cooperate in the random biological fluid testing is considered a violation of probation. This letter serves as notice that you are in violation of the biological fluid testing requirement of your, probation order and continued failure to cooperate with the biological fluid testing requirement could constitute grounds for issuance of a citation and fine or further disciplinary action against your license.

(Exhibit 11, p. 32.)

30C. On September 30, 2020, Respondent emailed Ms. Saucedo defiantly asserting that she was not required to check in daily with FSS. Her email specifically stated:

> The judicial order said I am to biological test when requested. It did not say I must call in everyday. It is your probation program which decided it was more convenient to have me carry the burden of discovering when I was selected rather than have yourself send notification of such. There is nothing in my life that I do every day. I do not brush my teeth everyday. I do not take my 5 prescription meds everyday. I do not go to sleep everyday. I may and do forget things occasionally. Your threats do nothing to change this. Especially if something get[s] me out of routine. Yesterday, I was already planning to go for the Biological Test so forgot to check the website. And what difference did it make, since I was already testing yesterday? None. So reality is that whether I called did not

> matter, you are trying to make this out to be a crime not to follow your rigid rules. My license and medical practice should not hinge on whether I complete your check boxes. If you want to make this out that I am intentionally not following your guidelines, then continue as you are. But I am very disappointed that this program is run with total disregard and lack of respect for me as a physician and for what should be the whole emphasis of your probation program

(Exhibit 11, p. 35.)

30D. Respondent's assertion that she was not required by the Probation Order to check in daily with FSS demonstrated her continued unwillingness to cooperate with probation and her disregard for the following: Respondent's Probation Order requires that she "comply with the Board's probation unit" (Condition 5) and that she "cooperate in a random biological fluid testing program" (Condition 13); Condition 13 of the Probation Order requires her to "contract with a laboratory or service approved in advance by the Board or its designee that will conduct random, unannounced, observed, biological fluid testing" (*Ibid.*); and, under her contract with FSS, Respondent agreed to call in daily, and she also agreed "that failure to call or test will be considered a lack of compliance with the [Board's Probation Order] requiring such testing." (Exhibit 30.) Additionally, Ms. Saucedo's May 10, 2019 and March 20, 2020 letters, Inspector Dvorak's May 23, 2019 letter, and the April 2020 Citation all reminded Respondent she was required to check in daily with FSS.

30E. Despite prior admonitions from the Board, Respondent failed to check in with FSS to determine if she had been selected for testing on October 7, 2020.

30F. On October 14, 2020, Ms. Saucedo sent Respondent a non-compliance letter similar to the September 30, 2020 non-compliance letter. (See Finding 30B.)

30G. Despite prior admonitions from the Board, Respondent again failed to check in with FSS to determine if she had been selected for testing on October 29, 2020, and December 12, 2020.

30H. On December 15, 2020, Ms. Saucedo sent Respondent a non-compliance letter similar to the September 30, 2020 non-compliance letter. (See Finding 30B.)

30I. Despite prior admonitions from the Board, Respondent again failed to check in with FSS to determine if she had been selected for testing on February 22, 2021.

30J. On March 2, 2021, Ms. Saucedo sent Respondent a non-compliance letter similar to the September 30, 2020 non-compliance letter. (See Finding 30B.)

30K. Respondent's failures to check in with FSS to determine if she had been selected for testing on September 29, 2020, October 7, 2020, October 29, 2020, December 12, 2020, and February 22, 2021, constitute violations of Probation Order Condition 13.

31A. On or about February 6, 2021, Respondent was selected to provide a blood sample for testing, which she provided the same day. On February 12, 2021, the Board was notified that Respondent's test results were positive for PEth at 24.2 ng/mL.

31B. On February 12, 2021, Ms. Saucedo sent Respondent a letter by email and mail requesting an explanation for the positive test on February 6, 2021. On February 14, 2021, Respondent emailed the following response:

> [A]s I have previously noted, I cannot comment on results from a test you will not share with me. As you know from numerous biological tests over the past 2 years, I believe maybe 100 of them, I have not been indulging in alcohol. Whether your test picks up low levels of alcohol in products used for the pandemic or other subtle sources of alcohol, those possibilities exist and are likely. While you may again note that you have instructed that hand sanitizers and mouthwash are not to be used, you have given no acceptable alternative in our current pandemic. Those are the products required to be used when moving about the communities and work and indeed while obtaining food sources. Not to mention the fact that I am not working. So until you or State of CA comes up with any acceptable alternative, I will continue to follow CDC and STATE of CA recommendations for use of these products during this pandemic.

(Exhibit 15, p. 61.)

31C. Ms. Saucedo forwarded Respondent's explanation to Dr. Ferguson for his opinion on the positive test results. On February 16, 2021, Dr. Ferguson responded:

> The PEth positive is unlikely to be caused only by use of hand sanitizer in a person who is not working in a health care setting. And if she or anyone else asks, isopropyl alcohol does work in place of the ethanol based hand sanitizers and does not affect EtG/EtS testing.

(Exhibit 15, p. 65.)

31D. On February 17, 2021, Ms. Saucedo sent an email to Respondent stating, in pertinent part:

> Per your [Probation Order] you are to abstain completely from the use of products or beverages containing alcohol. While on probation it is your responsibility to limit and avoid exposure to products and substances containing alcohol. Non-alcoholic mouthwashes are readily available and are an acceptable alternative to mouthwash containing alcohol. The CDC recommends the use of ethanol or isopropyl based hand sanitizer. I posed your question to our Medical Review Officer and he recommends isopropyl alcohol based hand sanitizer in place of ethanol based hand sanitizer.

(Exhibit 15, p. 68.)

31E. (1) At the administrative hearing, Respondent testified she "had no idea why" she tested positive on February 6, 2021. Nevertheless, Respondent noted "there was an incident that week" when she cared for her next-door neighbor "with COVID." Respondent recalled she "did not have a mask or gloves" while tending to him, and when she returned home, she "gargled with mouthwash and inhaled it to get [her] nasal passages clear." Respondent insisted she consumed no alcohol other than her sanitizing efforts.

(2) Respondent did not explain why, as a physician and as a California resident during a time when mask mandates had been in place for almost a year, she

had no mask when entering her ill neighbor's home. Viewing the totality of the evidence (including Respondent's admitted alcohol use in September 2020 and her questionable explanation for that alcohol consumption), Respondent's explanation for her positive PEth test on February 6, 2021, is not credible. Additionally, even if Respondent's positive PEth test resulted from her gargling and inhaling alcohol-based products, Respondent knew she was responsible for avoiding the use of products containing alcohol (and specifically mouth wash and hand sanitizer), and the Participant Disclosure form specifically noted that "Use of [such] products . . . or any other product containing alcohol is a violation of probation and will NOT be allowed as an excuse for a positive test result." (Exhibit 29, p. 90.)

31F. Given that Respondent's explanation for her February 6, 2021 positive PEth test has been discredited, and in any event would not excuse a positive test result, the evidence established that Respondent's knowing use of alcohol-based products constituted a violation of the Probation Order, Condition 12.

32. At hearing, both parties addressed Respondent's positive test results for marijuana use and her attempts to explain those test results. The Probation Order does not prohibit Respondent's marijuana use. Consequently, this Decision will not address this issue.

Additional Evidence in Aggravation and Rehabilitation

33A. In addition to the instances of non-compliance and outright defiance noted above, Respondent's probation monitor, Inspector Dvorak also testified about Respondent's general lack of cooperation with probation.

33B. Respondent's uncooperativeness began with their first meeting in May 2019. Inspector Dvorak recalled Respondent was upset and made disparaging remarks

about the Board. Respondent did not bring documentation Inspector Dvorak had requested (i.e., evidence of her malpractice insurance, her Drug Enforcement Agency registration, her completed information summary, her curriculum vitae, and a passport size photo). Inspector Dvorak found this very unusual in her experience as a probation monitor.

33C. (1) Inspector Dvorak noted Respondent started probation with non-compliance issues when she traveled to Europe knowing her failure to submit to biological testing during that trip would be considered probation violations. Despite these probation violations, when later completing her first required Quarterly Declaration on July 8, 2019, Respondent answered "Yes" to the question, "Have you complied with each term and condition of your probation, including all time requirements outlined in your Order?" (Exhibit 29, p. 64.) Respondent signed the Quarterly Declaration below the paragraph stating:

> I hereby submit this Quarterly Declaration as required by the [Board] and its Order of probation thereof and declare under penalty of perjury under the laws of the State of California that I have read the foregoing declaration and any attachments in their entirety and know their contents and that all statements made are true in every respect and I understand and acknowledge that any misstatements, misrepresentations, or omissions of material fact or failure to submit complete and timely reports may be cause for further disciplinary action.

(Exhibit 29, p. 64.)

(2) Inspector Dvorak informed Respondent this response was incorrect and gave her an opportunity to correct her answer. On September 10, 2019, Inspector Dvorak sent Respondent a letter stating, in pertinent part:

> This letter is to notify you that you are in non-compliance with the terms and conditions of your disciplinary order, which required you to truthfully swear to the answers provided on your quarterly declaration.
>
> You reported false information on your quarterly declaration for Quarter II 2019, in that you were not compliant with the terms and conditions of your probation during the quarter, and answered that you were. The non-compliance was due to the failure to check-in and submit to biological fluid testing during that quarter, which resulted in a Citation and Fine. Please initial and date page 2 of the enclosed photocopy [of the Quarterly Declaration] where indicated, and sign the bottom of the form below the prior signature (where indicated), and return it to me. Please submit it back to me no later than September 20, 2019.

(Exhibit 29, p. 9.)

(3) Respondent refused to change her response. In a September 19, 2019 letter, Respondent wrote to Ms. Dvorak:

> I cannot initial to change my Qtr Statement as I do not believe it to be true. There is nothing in the Judicial Order stating that I must be calling in every day or that I have a

> drug screen only at your approved facilities. I do so because it is part of your requirements, however, the Statement references the Order. I also see nothing in the Order about making true Statements or statements approved by the Board. Also as no perjury case has been won, it is a mystery to me how you can say that it is Non Compliance based on a statement you do not agree with. Not to mention that I have already paid an Administrative fine for deviance from your plan. I would hope the Board is looking at something more substantial like the 15 normal drug screens.

(Exhibit 29, p. 16)

33D. (1) Thereafter, Respondent continued criticizing her probation requirements and began quibbling over the wording of the required Quarterly Declarations she signed.

(2) For example, in the Quarterly Declaration she signed on October 5, 2019, Respondent refused to check either "Yes" or "No" in response to the question, "Have you complied with each term and condition of your probation, including all time requirements outlined in your Order?" (Exhibit 29, p. 67.) Under the question, she hand wrote, "There are no time requirements in Order. Only to present for testing for reports. [Board] wants daily check in fine [and] one of them was missed. Memory is imperfect." (*Ibid.*) Respondent also circled the word "license" in the question, "Have you maintained a current and valid license?" and she hand wrote "What kind of license?" (*Ibid.*) She checked "Yes," and hand wrote, "If medical." (*Ibid.*) This feigned lack of comprehension was not evident in her response to the first Quarterly Declaration, on which she answered "Yes" to the same question. (Exhibit 29, p. 64.) At

the bottom of the form, Respondent wrote, "It is not reasonable to require 2 - 3 hrs of my day to test as in AK. Or that multiple times a week when I am working 50 hrs to escape from work and expect patients not to suffer. Poor medical practice." (*Ibid.*)

(3) In the Quarterly Declaration Respondent signed on July 8, 2020, Respondent checked "Yes" in response to the question, "Have you complied with each term and condition of your probation, including all time requirements outlined in your Order?" (Exhibit 29, p. 74.) Under the question, she hand wrote, "judicial order has no requirements for daily check in." (*Ibid.*)

(4) In the Quarterly Declaration Respondent signed in September 2020, Respondent refused to check either "Yes" or "No" in response to the question, "Have you complied with each term and condition of your probation, including all time requirements outlined in your Order?" (Exhibit 29, p. 76.) Under the question, she hand wrote, "+ [positive] Bio test 9/10/20 due to self medication following severe burn." (*Ibid.*)

(5) In the Quarterly Declaration Respondent signed on April 1, 2021, Respondent checked "No" in response to the question, "Have you complied with each term and condition of your probation, including all time requirements outlined in your Order?" (Exhibit 29, p. 81.) Under the question, she hand wrote, "My Order does not outline any requirement to contact the Board daily. My Order does not restrict from use of personal protection required in pandemic. Yes, I do not follow [Board] requirements to not use alcohol sanitizers incl[uding] mouthwash." (*Ibid.*)

33E. Inspector Dvorak noted that other Board probationers during the pandemic were able to comply with the biological fluid testing requirements and avoid ethyl alcohol products such as hand sanitizer.

33F. Inspector Dvorak observed that Respondent was rude and non-compliant throughout her probation.

34A. At the administrative hearing clinical psychiatrist, Nathan Lavid, M.D., testified on Respondent's behalf. Dr. Lavid conducted a comprehensive psychiatric evaluation of Respondent on December 15, 2020, and he issued his report on April 8, 2021. His noted reason for Respondent's referral was as follows: "Considering the positive test results and her testament that she's not an alcoholic, [she] subsequently referred for a comprehensive psychiatric evaluation with a focus on substance abuse. (Exhibit A, p. 7.) As part of the psychiatric evaluation, Dr. Lavid conducted psychological testing. Respondent also submitted urine and blood samples for an alcohol and drug screen, and the results were negative.

34B. Dr. Lavid diagnosed Respondent with Major Depressive Disorder, in remission. He did not find she suffered from a substance abuse disorder as defined by the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5).[2] Dr. Lavid noted Respondent practiced medicine for nearly 40 years without incident or discipline, which is atypical for an alcoholic. Dr. Lavid pointed out that alcoholics "are impaired by their addiction [such that] they cannot function in the workplace." (Exhibit A, p. 11.)

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[2] The ALJ took official notice of the DSM-5 as a generally accepted tool for diagnosing mental and developmental disorders. However, no excerpt from the DSM-5 was offered at hearing. Consequently, there could be no exploration of the validity of Dr. Lavid's determination that Respondent did not meet the diagnostic criteria for alcohol use disorder as specified in the DSM-5.

34C. Dr. Lavid testified that, when he conducts his evaluations, he doesn't "assess an individual's ability to practice medicine," but rather their ability to function normally in the activities of daily living." He insisted he "cannot go outside the scope of [his] practice," and can only assess if a psychiatrist is fit to practice psychiatry. Despite his reluctance at hearing to opine about Respondent's ability to practice medicine, in his report, Dr. Lavid concluded, "From a mental standpoint, her depression is well treated and does not impair her ability to function as a physician." (Exhibit A, p. 12.)

34D. Although Dr. Lavid found Respondent "does not have a clinical course that is indicative that she is an alcoholic," he further opined her personality traits affect her cooperation with the Board's probation. Specifically, Dr. Lavid concluded:

> However, she appears to have some personality traits that might not be in line with the terms and conditions she agreed with, with the [Board]. Possibly, if there could be a compromise with this, so she does not feel that she is being punished every day by calling in to the Bodily Fluid Testing Service, she might be more cooperative with this type of testing. . . . However, from a psychiatric standpoint, there is no indication that [Respondent] suffers from a substance abuse disorder, though, I am in agreement that she continues to be monitored for her abstinence from alcohol, as I do not believe it is in her best interest to drink in light of her previous DUI.

(Exhibit A, p. 12.)

35A. Respondent is a radiologist who has been practicing in California for 40 years. During her third year of medical school, she received a scholarship from the United States Navy, and she was commissioned as an ensign, completing her internship and residency at a Naval hospital in San Diego. Respondent served in the United States military for 15 years, first on active duty, and later in the reserves.

35B. Before the Cease Practice Order, Respondent worked in San Luis Obispo County with a 15-physician radiology group. In 2019, she retired from the radiology group partnership, and she was thereafter employed as an independent contractor.

35C. Respondent continues to work in Alaska two to three times per year. She was born in Alaska and has family stationed there.

36. Respondent has never been sued for medical malpractice, and she has been subject to no discipline by the Board prior to the Probation Order.

37. Respondent has suffered no additional criminal convictions since her 2016 DUI.

38A. At the administrative hearing, Respondent again sought to justify her consumption of alcohol in September 2020. She reiterated that she drank alcohol for pain relief because "it was the only solution prior to going to the ER for morphine." She explained, "I was in excruciating pain and come to my wits ends and was in fact being tortured. It breaks your mind. When you look at soldiers being tortured, their minds break. They do things they otherwise might not do. They tell secrets or something like that." Respondent insisted her alcohol consumption, "makes so much common sense, and I don't understand why they are making such a big deal about it."

38B. Nevertheless, Respondent regrets drinking alcohol in September 2020, and she acknowledges she "should have gone to the ER." However, Respondent qualified her concession, noting "but they [the Board's probation monitors] probably would not accept that. I don't have any confidence in them."

39. Regarding her numerous assertions that she was not required by the Probation Order to check in daily with FSS, Respondent testified, "The Order does not say that. It says the Board will notify me. I repeated that to the probation people, that as part of their probation, they want me to do that." Although Respondent now realizes any failure to check in daily is "a horrible violation," and she has "developed a program on [her] phone" to remind her to check in daily, Respondent continues to criticize the daily check-in requirement. When asked if she now understands she must check in every day, Respondent side-stepped the question, and responded, "Well, this day is an example. I was already testing that day. Why should I call in, if I am already going to test?" When asked again if she now understands she must check in every day, Respondent answered, "I will point out the fact that I called in 700 times, [other than] the Europe trip, [and] missed less than one percent." Respondent acknowledged receiving emails and correspondence from FSS and from the probation monitors explaining that it is her responsibility to check in with FSS daily. However, she asserted, "There is nowhere in this letter or other letters that says it is a violation of probation if I do not check in." Finally, when asked if she understands that she is required to cooperate with probation and abide by the biological fluid testing terms, Respondent answered, "Yes, that is why I called in 680 times." She pointed out she "only missed two check-ins" within the past year, and asserted, "Out of 365 check-ins, missing two is pretty good."

40. Respondent insists she will comply with the Probation Order going forward. She testified she realized "later in the program," that her probation monitors "were personally offended," but she insisted she did not intend to be rude to them. She explained that she believed she was "bringing problems" to their attention "and they considered that extreme." Respondent stated she would apologize to them if allowed to remain on probation.

41. Respondent asserts she is not an alcoholic and is not dependent upon alcohol.

42. Respondent seeks to retain her California medical license because she believes she still has "an important role to play in the community," especially for patients in rural areas.

43A. Respondent has the support of her colleagues and friends who wrote letters and testified on her behalf. The letters from Stephen Holtzman, M.D., M.S., Sean P. Murray, M.D., Timothy Watson, M.D., M.P.H., and Kim Silsbee, A.S., R.D.M.S., collectively described Respondent as a competent and compassionate physician.

43B. Dr. Murray also testified at the hearing. He has known Respondent for 20 years and previously worked with her. He described her as "great, but at times a stubborn radiologist, but that is what makes her a great radiologist." Dr. Murray expressed concern about "los[ing] a doctor based on something not related to their medical competence."

43C. Ms. Silsbee also testified at the administrative hearing. She described Respondent as a "very precise, tenacious, [and] compassionate" physician.

LEGAL CONCLUSIONS

1. First Cause to Revoke Probation: Cause exists to revoke Respondent's probation and impose the stayed revocation of Respondent's license for failure to comply with the Probation Order, Condition Number 12 (abstain from alcohol use), as set forth in Factual Findings 4 through 34, 38, and 39.

2. Second Cause to Revoke Probation: Cause exists to revoke Respondent's probation and impose the stayed revocation of Respondent's license for failure to comply with the Probation Order, Condition Number 13 (failure to cooperate with biological fluid testing program through failure to check in daily and to submit to testing), as set forth in Factual Findings 4 through 34, 38, and 39.

3. Third Cause to Revoke Probation: Cause exists to revoke Respondent's probation and impose the stayed revocation of Respondent's license for failure to comply with the Probation Order, Condition Number 5 (failure to cooperate with probation), as set forth in Factual Findings 4 through 34, 38, and 39.

4. Accusation – Cause for Discipline: Cause does not exist to revoke or suspend Respondent's license, pursuant to Business and Professions Code section 2234, since Complainant did not prove by clear and convincing evidence that, in violating Conditions 5, 12, and 13 of her probation, Respondent engaged in unprofessional conduct as defined by Business and Professions Code section 2234.

5A. By all accounts, Respondent is a valued and skilled clinician. However, her probation was not imposed to verify that her clinical skills are within the standard of care. Rather, Respondent was placed on probation after her DUI conviction to allow the Board to monitor her and to verify she is not impaired and is safe to practice

medicine. Although Respondent has an exemplary work record, the Board is not required to postpone the imposition of discipline until a problem with alcohol begins to affect a physician's work. (*In re Kelley* (1990) 52 Cal.3d 487, 495.) A physician suffering from clouded judgment may cause harm or death, and even one instance of work-related alcohol use could pose a grave danger to patients.

5B. Respondent has been on probation since June 10, 2019, and she has been uncooperative and non-compliant since its inception. Respondent failed to provide requested documentation at her first meeting with her probation monitor in May 2019, prior to the stay order. Respondent did not check in with FSS from June 15 through July 1, 2019, and as a result, she failed to submit to testing on June 15, 20, 25, and 29, 2019. Thereafter, Respondent continued her defiance and non-compliance. She submitted quarterly declarations parsing over the wording of the Probation Order and the wording of questions contained in the quarterly declarations. Despite documentation to the contrary (see Factual Finding 30D), Respondent continued to challenge the Board's authority to require her daily FSS check-ins as evidenced in her notations on the quarterly declarations (including her latest April 2021 quarterly declaration – see Factual Finding 33), in her emails and letters, and in her testimony at hearing (see Factual Finding 39). In addition to her continued challenge of the daily check-in requirement, and despite numerous admonitions from the Board, Respondent failed to check in with FSS to determine if she had been selected for testing on January 27, 2020, February 24, 2020, March 3, 2020, September 29, 2020, October 7, 2020, October 29, 2020, December 12, 2020, and February 22, 2021.

5C. Even the most diligent probationers may miss one or two check-ins. However, after the Cease Practice Order was issued and the Petition to Revoke Probation was filed, Respondent should have been making an earnest effort to

demonstrate strict compliance with her probationary terms. Respondent was reminded several times in writing about her obligation to check in daily. She continued to disregard her obligation, failing to check in and challenging the daily check-in requirement up to the date of this hearing.

5D. Even more concerning is Respondent's choice to consume alcohol and ignore the Probation Order's requirement of complete abstinence from alcohol use. Respondent's decision to consume alcohol as pain relief, rather than seek medical treatment, was unreasonable and a knowing violation of probation. Additionally, the fact that she would turn to alcohol rather than medical treatment is concerning given her assertions that she is not reliant on alcohol.

5E. Respondent's defiance of her probationary terms regarding alcohol use continued after the issuance of the Cease Practice Order and the filing of the Petition to Revoke Probation, as evidenced by her positive PEth test in February 2021. Respondent's explanation for the positive test (that she wore no mask while helping a COVID-stricken neighbor and then "gargled with mouthwash and inhaled it to get [her] nasal passages clear") was not credible. (See Factual Finding 31.) Furthermore, Respondent knew she was responsible for avoiding the use of products containing alcohol (and specifically mouth wash and hand sanitizer), and the Participant Disclosure form specifically noted that the use of such products "is a violation of probation and will NOT be allowed as an excuse for a positive test result." (Exhibit 29, p. 90.) Despite this knowledge, Respondent chose to use alcohol-based products, and she continued her defiance through her last (April 2021) quarterly declaration, in which she wrote, "My Order does not restrict from use of personal protection required in pandemic. Yes, I do not follow [Board] requirements to not use alcohol sanitizers incl[uding] mouthwash." (See Factual Finding 33.)

5F. In addressing the Board's paramount concern, protection of the public, the analysis must focus on the likelihood that Respondent will again violate her probation and use alcohol, possibly in a dangerous manner. Respondent sought to assure the Board that she is not a substance abuser and that she is not a danger to the public. However, the Board should not be left to rely on Respondent's assurances. It has the authority to monitor and verify her sobriety through the methods specified in the Probation Order. Respondent has not sufficiently respected the means through which the Board has chosen to monitor and confirm her sobriety. Instead, she defied the Probation Order without excuse several times and minimized her violations. Even after issuance of the Cease Practice order and when faced with revocation of her probation, and despite several written warnings, Respondent continued to flout her probationary obligations and demonstrated her lack of reliability as a probationer.

5G. The Board relies on its probationers to respect its authority and to comply with the terms and conditions of probation, just as it relies on its licensed physicians to respect the Board's regulatory authority and thus obey the laws and regulations governing their profession. At hearing Respondent, assured the Board that she would comply with the Probation Order in the future. However, she also continued to challenge the daily check-in requirement and the alcohol-based product prohibition, and she refused to fully admit her probation violations, minimizing her failures to check in for testing and her choices to consume and use alcohol in violation of her probation. Respondent was unable to provide adequate assurances that, if probation were extended, she would now be willing and able to comply with the conditions she previously violated. Even Dr. Lavid noted in his report that Respondent "appears to have some personality traits that might not be in line with the terms and conditions" of the Probation Order. This all bodes poorly for Respondent's future compliance with, and successful completion of, her probation.

5H. Revocation of a valued physician's license is an unfortunate consequence of Respondent's continued failure to comply with her probationary conditions. However, given the foregoing, the Board's priority of public protection necessitates revocation at this time.

ORDER

Physician's and Surgeon's Certificate Number C 40332, issued to Respondent, Donna Elaine Winingham, M.D., is hereby revoked.

DATE: 05/25/2021

Julie Cabos-Owen

JULIE CABOS-OWEN

Administrative Law Judge

Office of Administrative Hearings

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

In the Matter of the First Amended Accusation and Petition to Revoke Probation Against: **DONNA ELAINE WININGHAM, M.D.** **545 Elizabeth Court** **Templeton, California 93465-4017** **Physician's and Surgeon's Certificate No. C 40332,** Respondent.	Case No. 800-2020-071255 **FIRST AMENDED ACCUSATION AND PETITION TO REVOKE PROBATION**

Complainant alleges:

PARTIES

1. William Prasifka (Complainant) brings this First Amended Accusation and Petition to Revoke Probation solely in his official capacity as the Executive Director of the Medical Board of California, Department of Consumer Affairs (Board).

2. On or about April 19, 1982, the Board issued Physician's and Surgeon's Certificate Number C 40332 to Donna Elaine Wininghan, M.D. (Respondent). The Physician's and Surgeon's Certificate was in effect at all times relevant to the charges brought herein and will expire on March 31, 2022, unless renewed.

DISCIPLINARY HISTORY

3. In a disciplinary action titled "In the Matter of Accusation Against Donna Elaine Wininghan, M.D.," Case No. 800-2016-021131, the Board, issued a Decision, effective June 10,

2019, in which Respondent's Physician's and Surgeon's Certificate was revoked. However, the revocation was stayed and Respondent's Physician's and Surgeon's Certificate was placed on probation for a period of three (3) years with certain terms and conditions. A copy of that Decision is attached as Exhibit A (Decision) and is incorporated by reference.

JURISDICTION

4. This First Amended Accusation and Petition to Revoke Probation is brought before the Board under the authority of the following laws. All section references are to the Business and Professions Code (Code) unless otherwise indicated.

5. Section 2227 of the Code provides that a licensee who is found guilty under the Medical Practice Act may have his or her license revoked, suspended for a period not to exceed one year, placed on probation and required to pay the costs of probation monitoring, or such other action taken in relation to discipline as the Board deems proper.

6. Section 2234 of the Code, states:

> The board shall take action against any licensee who is charged with unprofessional conduct. In addition to other provisions of this article, unprofessional conduct includes, but is not limited to, the following:
>
> (a) Violating or attempting to violate, directly or indirectly, assisting in or abetting the violation of, or conspiring to violate any provision of this chapter.
>
> (b) Gross negligence.
>
> (c) Repeated negligent acts. To be repeated, there must be two or more negligent acts or omissions. An initial negligent act or omission followed by a separate and distinct departure from the applicable standard of care shall constitute repeated negligent acts.
>
> (1) An initial negligent diagnosis followed by an act or omission medically appropriate for that negligent diagnosis of the patient shall constitute a single negligent act.
>
> (2) When the standard of care requires a change in the diagnosis, act, or omission that constitutes the negligent act described in paragraph (1), including, but not limited to, a reevaluation of the diagnosis or a change in treatment, and the licensee's conduct departs from the applicable standard of care, each departure constitutes a separate and distinct breach of the standard of care.
>
> (d) Incompetence.
>
> (e) The commission of any act involving dishonesty or corruption that is substantially related to the qualifications, functions, or duties of a physician and surgeon.

(f) Any action or conduct that would have warranted the denial of a certificate.

(g) The failure by a certificate holder, in the absence of good cause, to attend and participate in an interview by the board. This subdivision shall only apply to a certificate holder who is the subject of an investigation by the board.

PROBATION

7. At all times after the effective date of the Decision, the Board's related disciplinary order contained the following conditions:

8. Condition 3 states:

Obey All Laws

Respondent shall obey all federal, state and local laws, all rules governing the practice of medicine in California and remain in full compliance with any court ordered criminal probation, payments, and other orders.

9. Condition 5, in pertinent part, states:

General Probation Requirements

Compliance with Probation Unit

Respondent shall comply with the Board's probation unit.

. . .

Travel or Residence Outside California

Respondent shall immediately inform the Board or its designee, in writing, of travel to any areas outside the jurisdiction of California which lasts, or is contemplated to last, more than thirty (30) calendar days.

In the event respondent should leave the State of California to reside or to practice respondent shall notify the Board or its designee in writing 30 calendar days prior to the dates of departure and return.

10. Condition 9 states:

Violation of Probation

Failure to fully comply with any term or condition of probation is a violation of probation. If respondent violates probation in any respect, the Board, after giving respondent notice and the opportunity to be heard, may revoke probation and carry out the disciplinary order that was stayed. If an Accusation, or Petition to Revoke Probation, or an Interim Suspension Order is filed against respondent during probation, the Board shall have continuing jurisdiction until the matter is final, and the period of probation shall be extended until the matter is final.

11. Condition 12 states:

Alcohol - Abstain From Use

Respondent shall abstain completely from the use of products or beverages containing alcohol.

If respondent has a confirmed positive biological fluid test for alcohol, respondent shall receive a notification from the Board or its designee to immediately cease the practice of medicine. The respondent shall not resume the practice of medicine until the final decision on an accusation and/or a petition to revoke probation is effective. An accusation and/or petition to revoke probation shall be filed by the Board within 30 days of the notification.to cease practice. If the respondent requests a hearing on the accusation and/or petition to revoke probation, the Board shall provide the respondent with a hearing within 30 days of the request, unless the respondent stipulates to a later hearing. If the case is heard by an Administrative Law Judge alone, he or she shall forward a Proposed Decision to the Board within 15 days of submission of the matter. Within 15 days of receipt by the Board of the Administrative Law Judge's proposed decision, the Board shall issue its Decision, unless good cause can be shown for the delay. If the case is heard by the Board, the Board shall issue its decision within 15 days of submission of the case, unless good cause can be shown for the delay. Good cause includes, but is not limited to, non-adoption of the proposed decision, request for reconsideration, remands and other interlocutory orders issued by the Board. The cessation of practice shall not apply to the reduction of the probationary time period.

12. Condition 13 states:

Biological Fluid Testing

Respondent shall immediately submit to biological fluid testing, at respondent's expense, upon request of the Board or its designee. "Biological fluid testing" may include, but is not limited to, urine, blood, breathalyzer, hair follicle testing, or similar drug screening approved by the Board or its designee. Prior to practicing medicine, respondent shall contract with a laboratory or service approved in advance by the Board or its designee that will conduct random, unannounced, observed, biological fluid testing. The contract shall require results of the tests to be transmitted by the laboratory or service directly to the Board or its designee within four hours of the results becoming available. Respondent shall maintain this laboratory or service contract during the period of probation.

A certified copy of any laboratory test result may be received in evidence in any proceedings between the Board and respondent.

If respondent fails to cooperate in a random biological fluid testing program within the specified time frame, respondent shall receive a notification from the Board or its designee to immediately cease the practice of medicine. The respondent shall not resume the practice of medicine until the final decision on an accusation and/or a petition to revoke probation is effective. An accusation and/or petition to revoke probation shall be filed by the Board within 30 days of the notification to cease practice. If the respondent requests a hearing on the accusation and/or petition to revoke probation, the Board shall provide the respondent with a hearing within 30 days of the request, unless the respondent stipulates to a later hearing. If the case is heard by an Administrative Law Judge alone, he or she shall forward a Proposed Decision to the Board within 15 days of submission of the matter. Within 15 days of receipt by the Board of the Administrative Law Judge's proposed decision, the Board shall issue its Decision, unless good cause can be shown for the delay. If the case is heard by the Board, the Board shall issue its decision within 15 days of submission of the case, unless good cause can be shown for the delay. Good cause includes, but is not limited to, non-adoption of the proposed decision, request for reconsideration,

remands and other interlocutory orders issued by the Board. The cessation of practice shall not apply to the reduction of the probationary time period.

If the Board does not file an accusation or petition to revoke probation within 30 days of the issuance of the notification to cease practice or does not provide respondent with a hearing within 30 days of a such a request, the notification of cease practice shall be dissolved.

CEASE PRACTICE ORDER

13. On or about October 1, 2020, the Board issued a Cease Practice Order (CPO) to Respondent prohibiting her from engaging in the practice of medicine and ordering her not to resume the practice of medicine until issuance of a final decision on an accusation and/or a petition to revoke probation filed pursuant to this matter. The CPO was based on her failure to obey/abide by, the conditions of her probation as ordered in the Decision, including by testing positive for alcohol consumption.

14. Respondent's probation is subject to revocation because she failed to comply with the terms and conditions of her probation. The facts and circumstances regarding her violations are as set forth below.

FACTUAL ALLEGATIONS

15. On or about May 10, 2019, the Board sent to Respondent a letter advising her that she was required to enroll and participate in the Board's approved biological laboratory testing service, FirstSource (FSSolutions), which would conduct random biological fluid testing during Respondent's probation with the Board and that she needed to check their system daily to determine if testing is required for that day.

16. On or about May 22, 2019, Respondent received a copy of the Decision with full explanation of these probation conditions.

17. On or about May 23, 2019, Respondent signed and dated the "Acknowledgement of Decision" indicating she understood the conditions.

18. On or about May 23, 2019, a Board employee sent a letter to Respondent, stating in pertinent part:

> Thank you for traveling to my office in Fresno to review the terms and conditions of your probation, which becomes effective May 31, 2019. The following is a summary of what we discussed.

. . .

BIOLOGICAL FLUID TESTING: You have enrolled with First Source Solutions for random testing. Ensure that you ***check in online or by phone daily***. (emphasis added)

. . .

19. On or about May 10, 2019, a Board employee sent a letter to Respondent, stating in pertinent part:

There are biological fluid testing requirements you must adhere to, in order to be in compliance with the biological fluid testing condition of the Board's Decision. They include the following:

You must check-in daily (via landline or internet) between the hours of 12:00 a.m. and 5:00 p.m. to determine if you are required to provide a sample that day. Should you check in via telephone, you must listen to the entire message before hanging up, otherwise your check in may be deemed as a missed check-in.

You must provide a sample the same day you are selected. It is your responsibility to ensure you have adequate time to provide your sample before your collection site closes.

All collections must be directly observed.

Failure to cooperate with biological fluid testing is a violation of probation and non-compliance may lead to further disciplinary action taken against your license.

Should you travel while on probation, you must ensure there are adequate collection sites available to test when selected at or near your travel destination. FirstSource can assist you in finding a collection site; however FirstSource requests you provide them with a minimum of two weeks' notice prior to traveling.

The Board does not approve travel nor will the Board excuse you from testing when traveling within the United States or out of the country. Currently, there are no collection sites contracted with FirstSource outside of the United States.

. . . (Emphasis added.)

20. On or about each of the consecutive days beginning on June 15, 2019, through July 1, 2019, Respondent failed to check in with FSSolutions to determine if she had been selected for testing. Because Respondent failed to check in with FSSolutions on those dates, she failed to provide biological fluid samples to FSSolutions when she was selected for testing on each of the following dates: June 15, 2019, June 20, 2019, June 25, 2019, and June 29, 2019. On or about June 20, 2019, a Board employee sent to Respondent, via U.S. mail and email, a letter requesting an explanation for her failure to check-in and failure to submit a sample when selected. On or about June 27, 2019, Respondent sent an email to the Board stating her failure to check-in with

FirstSource and failure to test when selected was the result of her travel outside of the United States. She further stated that she did not have "a facility for testing," and was unable to check-in due to limited internet availability and an inability to call numbers not saved in her cellular phone contact list. On or about August 13, 2019, the Board issued a citation for these probation violations.

21. On or about July 19, 2019, Respondent was randomly selected to provide a biological fluid sample to FSSolutions. Respondent provided the sample on or about July 19, 2019. On or about July 26, 2019, the Board received laboratory test results based upon that sample that were positive for alcohol metabolites in violation of Condition 12 of the Decision. On or about August 5, 2019, a Board employee sent a non-compliance letter to Respondent in connection with the probation violation.

22. On or about August 14, 2019, Respondent signed a Participant Disclosure and Information form acknowledging that she understood her responsibilities to limit and avoid exposure to products and substances containing ethyl alcohol.

23. Respondent failed to check-in with FSSolutions to determine if she had been selected for testing on or about each of the following days: January 27, 2020, February 24, 2020, and March 3, 2020. On or about March 20, 2020, a Board employee sent a non-compliance letter to Respondent in connection with the probation violations.

24. On or about March 4, 2020, Respondent was selected to provide a hair sample to FSSolutions. However, Respondent failed to submit to a hair sample test. On or about March 6, 2020, Respondent notified the Board that she was working in Alaska since on or about February 29, 2020 and unable to submit to the hair test as the testing kit was sent to a testing location in San Luis Obispo. Due to Respondent's failure to submit travel notification to FSSolutions, the hair kit was sent to a facility located in San Luis Obispo. On or about March 9, 2020, Respondent admitted in an email that she did not submit her travel request to FSSolutions. On or about April 24, 2020, the Board issued a citation and fine in connection with her probation violation.

25. In or around the period after March-April 2020, the Board approved a 48-hour testing window for probationers to submit a biological fluid sample (which allows one extra day to

provide a sample in the event a collection site has limited business hours) during the COVID-19 pandemic.

26. On or about July 8, 2020, Respondent was selected to provide a biological fluid sample to FSSolutions. However, Respondent failed to provide a biological fluid sample within the 48-hour submission period. On or about July 28, 2020, a Board employee sent a non-compliance letter to Respondent in connection with the probation violation.

27. On or about September 9, 2020, Respondent was selected to provide a blood sample for testing. On or about September 22, 2020, the Board received laboratory test results indicating a positive result for the metabolites of alcohol from Respondent's blood sample submitted on or about September 10, 2020.

28. On or about September 22, 2020, a Board employee sent a letter to Respondent, via email and US Mail, requesting an explanation for the positive test on September 10, 2020. On or about September 28, 2020, Respondent emailed the Board employee with her explanation for the positive blood test. Respondent stated that a few days before her blood test, she received a severe burn to her thumb and she consumed several shots of alcohol to numb the pain.

29. On or about September 29, 2020, Respondent failed to check in with FSSolutions to determine if she had been selected for testing. On or about September 30, 2020, a Board employee mailed a non-compliance letter to Respondent in connection with the violation.

30. On or about September 30, 2020, Respondent emailed a Board employee stating her Board order only requires her to test when requested and does not require her to check-in daily.

31. On or about October 1, 2020, the Board received a letter of explanation from Respondent regarding her September 10, 2020 positive blood test. The letter is dated September 27, 2020, and reiterates her statements about consuming alcohol that Respondent made in her September 28, 2020 email to the Board.

32. Respondent failed to check-in with FSSolutions to determine if she had been selected for testing on or about each of the following days: September 29, 2020, October 7, 2020 and October 29, 2020. A Board employee sent a non-compliance letter to Respondent in connection with the probation violations, on or about each of the following days: September 30, 2020 and

October 14, 2020.

33. On or about February 6, 2021, Respondent was selected to provide a blood sample for testing. On or about February 12, 2021, the Board received laboratory test results indicating a positive result for the metabolites of alcohol from Respondent's blood sample submitted on or about February 6, 2021.

34. On or about February 12, 2021, a Board employee sent a letter to Respondent, via email and US Mail, requesting an explanation for the positive test on February 6, 2021. On or about February 14, 2021, Respondent emailed the Board employee stating she could not comment without seeing the test results, and further that if the test picked up low levels of alcohol it could be from the use of hand sanitizer and mouthwash containing alcohol.

FIRST CAUSE TO REVOKE PROBATION

(Alcohol - Abstain From Use)

35. Respondent's probation is subject to revocation because she failed to comply with Probation Condition Number 12 of her probationary order in her Decision, referenced above. The facts and circumstances regarding this violation are as follows:

36. The allegations of paragraphs 15 through 34 inclusive are incorporated herein by reference as if fully set forth.

37. Respondent's positive test results from her biological samples as alleged above represent violations of Respondent's order of probation with the Board.

SECOND CAUSE TO REVOKE PROBATION

(Failure to Check-in For Testing and Failure to Test)

38. Respondent's probation is subject to revocation because she failed to comply with Probation Condition Number 13 of her probationary order in her Decision, referenced above. The facts and circumstances regarding this violation are as follows:

39. The allegations of paragraphs 15 through 34 inclusive are incorporated herein by reference as if fully set forth.

40. Respondent's failure to call-in and/or otherwise cooperate with the Board's biological testing program as alleged above represent violations of Respondent's order of probation with the

Board.

THIRD CAUSE TO REVOKE PROBATION

(General Probation Requirements and Obey All Laws)

41. Respondent's probation is subject to revocation because she failed to comply with Probation Condition Numbers 3 and 5 of her probationary order in her Decision, referenced above. The facts and circumstances regarding this violation are as follows:

42. Respondent has violated term and Condition Numbers 3 and 5 by engaging in unprofessional conduct. The circumstances are as follows:

43. The allegations of the First and Second Causes to Revoke Probation are incorporated herein by reference as if fully set forth.

44. The allegations of the Cause for Discipline below is incorporated here by reference as if fully set forth.

FIRST CAUSE FOR DISCIPLINE

(General Unprofessional Conduct)

45. Respondent is subject to disciplinary action under section 2234, in that her action(s) and/or inaction(s) represent unprofessional conduct, generally. The facts and circumstances regarding this violation are as follows:

46. The allegations of the First, Second and Third Causes to Revoke Probation, inclusive, are incorporated herein by reference as if fully set forth.

DISCIPLINE CONSIDERATIONS

47. To determine the degree of discipline to be imposed on Respondent, Complainant alleges that effective June 10, 2019, Respondent's license was placed on probation for three years by the Decision.

MATTERS IN AGGRAVATION

48. To determine the degree of discipline to be imposed on Respondent, Complainant alleges as described in the Decision, that on March 5, 2016, Respondent was arrested for driving under the influence.

///

49. On May 12, 2016, in the case entitled the *People of the State of California v. Donna Elaine Winingham*; case number 16M-03655, in the Superior Court of California, County of San Luis Obispo, Respondent, upon her plea of no contest, was convicted of driving a vehicle while having a blood alcohol content of approximately 0.20 percent, in violation of Vehicle Code Section 23152, subdivision (b), a misdemeanor.

PRAYER

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

1. Revoking the probation that was granted by the Medical Board of California in Case No. 800-2016-021131 and imposing the disciplinary order that was stayed thereby revoking Physician's and Surgeon's Certificate No. C 40332 issued to Donna Elaine Winingham, M.D.;

2. Revoking or suspending Physician's and Surgeon's Certificate No. C 40332, issued to Donna Elaine Winingham, M.D.;

3. Revoking, suspending or denying approval of Donna Elaine Winingham, M.D.'s authority to supervise physician assistants pursuant to Section 3527 of the Code, and advanced practice nurses;

4. If placed on probation, ordering Donna Elaine Winingham, M.D. to pay the Board the costs of probation monitoring; and

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

DATED: April 8, 2021

WILLIAM PRASIFKA
Executive Director
Medical Board of California
Department of Consumer Affairs
State of California
Complainant

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Exhibit A

Decision and Order

Medical Board of California Case No. 800-2016-021131

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

In the Matter of the Accusation Against: DONNA ELAINE WININGHAM, M.D. Physician's and Surgeon's Certificate No. C 40332 Respondent	Case No. 800-2016-021131

DENIAL BY OPERATION OF LAW
PETITION FOR RECONSIDERATION

No action having been taken on the petition for reconsideration, filed by Donna Elaine Winingham, M.D., and the time for action having expired at 5:00 p.m. on June 10, 2019, the petition is deemed denied by operation of law.

MEDICAL BOARD OF CALIFORNIA
I do hereby certify that this document is a true and correct copy of the original on file in this office.
S. Woods
Signature
for Custodian of Records
Title
9/30/2020
Date

DCU68 (Rev 01-2019)

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

In the Matter of the Accusation Against:	)	
	)	MBC No. 800-2016-021131
DONNA ELAINE WININGHAM, M.D.	)	
	)	
Physician's and Surgeon's	)	**ORDER GRANTING STAY**
Certificate No. C 40332	)	
	)	(Government Code Section 11521)
	)	
Respondent	)	

Respondent, Donna Elaine Wininghan, M.D., has filed a Petition for Reconsideration of the Decision in this matter with an effective date of May 31, 2019, at 5:00 p.m.

Execution is stayed until June 10, 2019, at 5:00 p.m.

This stay is granted solely for the purpose of allowing the Board time to review and consider the Petition for Reconsideration.

DATED: May 29, 2019

Kimberly Kirchmeyer
Executive Director
Medical Board of California

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

In the Matter of the Accusation Against:	
DONNA ELAINE WININGHAM, M.D.	Case No. 800-2016-021131
Physician's and Surgeon's Certificate No. C 40332	OAH No. 2018090546
Respondent	

DECISION AND ORDER

The attached Proposed Decision is hereby adopted as the Decision and Order of the Medical Board of California, Department of Consumer Affairs, State of California.

This Decision shall become effective at 5:00 p.m. on May 31, 2019.

IT IS SO ORDERED: May 3, 2019.

MEDICAL BOARD OF CALIFORNIA

Kristina Lawson

Kristina D. Lawson, J.D., Chair
Panel B

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

In the Matter of the Accusation Against: DONNA ELAINE WININGHAM, M.D., Physician's and Surgeon's Certificate No. C 40332, Respondent.	Case No. 800-2016-021131 OAH No. 2018090546

PROPOSED DECISION

Carla L. Garrett, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter on February 5, 2019, in Los Angeles.

Nicholas B.C. Schultz, Deputy Attorney General, represented Kimberly Kirchmeyer (Complainant), Executive Director of the Medical Board of California (Board), Department of Consumer Affairs. James R. Murphy, Jr., Attorney at Law, represented Donna Elaine Wininghan, M.D. (Respondent), who was present.

The record was closed and the matter was submitted for decision on February 5, 2019.

FACTUAL FINDINGS

Jurisdiction

1. Complainant filed the Accusation in her official capacity. Respondent filed a Notice of Defense. This hearing ensued.

2. The Board issued Physician's and Surgeon's Certificate No. C 40332 to Respondent on April 19, 1982. That certificate is scheduled to expire on March 31, 2020.

Respondent's Conviction

3. On May 12, 2016, in the case of *People of the State of California v. Donna Elaine Wininghan* in the Superior Court of California, County of San Luis Obispo, Case No. 16M-03655, pursuant to a plea of nolo contendere, Respondent suffered a conviction of driving

a vehicle while having a blood alcohol content of approximately 0.20 percent, in violation of Vehicle Code section 23152, subdivision (b), a misdemeanor.

4. The facts and circumstances underlying the conviction occurred on March 5, 2016, beginning at 9:43 p.m., when California Highway Patrol (CHP) officers were dispatched to Templeton High School after receiving a report that an intoxicated parent had driven to the school to pick up her daughter. At hearing, Respondent testified that she rushed to the school after receiving an emergency telephone call from her daughter, who told Respondent that she was stranded there due to her other parent's failure to pick her up. Specifically, the daughter had just completed drama practice late that evening, expected her other parent to be there; her other parent was not there, which prompted the daughter to call Respondent. Respondent and the other parent had been undergoing divorce proceedings and not living in the same household. The daughter was supposed to be picked up and spend the evening with the other parent.

5. Respondent, who had consumed a substantial amount of wine prior to her daughter's telephone call, left the house in her pajamas, with no shoes, and rushed to pick up her daughter, who expressed that she was feeling frightened. The CHP officers arrived on the scene as Respondent was driving off without her daughter. The daughter had concluded that Respondent was drunk and refused to get inside of the car with Respondent. The CHP officers conducted a traffic stop of Respondent's vehicle, and observed that Respondent had all four windows of the vehicle rolled down, even though it was raining heavily at the time. They observed signs of intoxication, such as an odor of alcohol emanating from Respondent's person; red, watery, and bloodshot eyes; slurred speech; and difficulty following instructions. The officers conducted Standardized Field Sobriety Tests and noted that Respondent displayed pronounced psycho-physical impairment before she terminated the testing by requesting a breathalyzer test. Respondent consented to and provided two breath samples. The first sample revealed a blood alcohol concentration of 0.193 percent, and the second sample, produced one minute later, revealed a blood concentration of 0.198 percent. The officers immediately placed Respondent under arrest and transported her to Twin Cities Hospital for a chemical test of her blood, which revealed a blood alcohol level of 0.20 percent.

6. The court placed Respondent on three years of court-supervised probation, pursuant to terms and conditions, including serving five days in the San Luis Obispo County Jail with credit for one day served in custody. Additionally, she was required to complete a nine-month driving under the influence program for first-time offenders, ordered not to drive with any measurable amount of alcohol in her blood, and ordered to submit to chemical testing on demand of any peace or probation officers. Respondent was also ordered to obey all laws, and pay fines, fees, and assessments totaling $2,425.

7. Respondent has paid all fines, fees, and assessments, has completed the alcohol program, and has complied with all conditions of her probation. She also completed the five days of incarceration by undergoing house arrest for those days. Respondent has committed no probation violations. Her probation is scheduled to terminate on May 12, 2019.

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Mitigation and Rehabilitation

8. Respondent expressed deep regret for making the poor choice to drive after consuming alcohol. She recognizes that she posed a danger to herself and others.

9. One month prior to her arrest, Respondent's wife had filed a petition for divorce. The divorce was devastating to Respondent as it "came from left field." Respondent and her wife had considered themselves married for 28 years, before it was officially legal in California, and had been together for nearly 30 years. Respondent used alcohol to help cope with the divorce.

10. Respondent voluntarily attended Alcoholics Anonymous meetings, even though not imposed by the court, and she also voluntarily participated in the Soberlink Program. The Soberlink Program is an alcohol monitoring breathalyzer and recovery management software system used in addiction treatment. She was required to submit to breathalyzer tests four times per day. Respondent submitted well over 500 Soberlink tests, and none of those tests revealed any positive results for drugs or alcohol.

11. Respondent also received therapy from her psychiatrist, whom she had been seeing for the last 15 years, for treatment of chronic depression. Respondent testified that she "leaned" on the psychiatrist to get through the divorce, as well as through the criminal matter.

12. Respondent, who is a board-certified radiologist, practiced nearly 40 years without incident, suffering no malpractice claims or discipline. She has reviewed approximately 1,000,000 diagnostic tests. Respondent has never consumed alcohol while practicing or reviewing scans.

13. Respondent testified at hearing that she has markedly reduced the amount of alcohol that she consumes, and currently drinks once or twice per month. During the Board's investigation interview of Respondent on September 15, 2016, Respondent stated that she consumed "a couple of glasses of wine maybe three or four times a week or less." Respondent never attempts to drive after consuming alcohol.

14. Respondent's psychiatrist, Dugald D. Chisholm, M.D., wrote a December 5, 2016 letter stating that he had been treating Respondent for Recurrent Major Depressive Disorder, and with the break-up of her marriage and resultant child custody issues, began treating her for Adjustment Disorder with Anxiety and Depression. Dr. Chisholm stated the following:

> I am aware that [Respondent] has had some problems with excessive alcohol consumption in the past, but she has addressed this very seriously . . . and has diligently followed the Court's requirements . . . and has tested negative for alcohol 100% of the time.

(Exhibit B)

15. Respondent, who served in the navy for 15 years, is licensed to practice medicine in four states, currently has privileges in three hospitals, and is an assistant professor of radiology at the University of California at Irvine.

Character Reference

16. Stephen Holtzman, M.D., wrote a letter of reference on Respondent's behalf. Dr. Holtzman worked with Respondent for 15 years, and described Respondent as having good moral character.

LEGAL CONCLUSIONS

Applicable Authority

1. The Board's highest priority is to protect the public. (Bus. & Prof. Code, § 2229.)[1]

2. The Board may revoke or suspend a physician's license for unprofessional conduct. (§ 2234.) Unprofessional conduct includes, among other things, (a) violating the Medical Practice Act; (b) being convicted of "any offense substantially related to the qualifications, functions, or duties of a physician and surgeon" (§ 2236, subd. (a)); (c) using any controlled substance or alcohol to an extent or in a manner dangerous to the licensee or to any other person or to the public, or a felony conviction involving the use, consumption, or self-administration of any such substance (§ 2239); and (d) violating any federal or state statute regulating dangerous drugs or controlled substances (§ 2238).

3. An offense is substantially related to the qualifications, functions, or duties of a physician or surgeon "if to a substantial degree it evidences present or potential unfitness" of a licensee to perform licensed functions "in a manner consistent with the public health, safety or welfare." (Cal. Code Regs., tit. 16, § 1360.) A plea or verdict of guilty or a conviction after a plea of nolo contendere is deemed a conviction. (§§ 2236, subd. (d), 2239, subd. (b).)

Burden of Proof

4. The rigorous educational, training, and testing requirements for obtaining a physician's license justify imposing on Complainant a burden of proof of clear and convincing evidence. (Evid. Code, § 115; see *Ettinger v. Bd. of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 856; *Imports Performance v. Dept. of Consumer Affairs, Bur. of Automotive Repair* (2011) 201 Cal.App.4th 911.)

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[1] Further statutory references are to the Business and Professions Code except where otherwise stated.

Cause for Discipline

5. Cause exists to discipline Respondent's license under sections 2236, subdivision (a), and 490, and California Code of Regulations, title 16, section 1360, in that Respondent suffered a conviction of driving under the influence of alcohol, in violation of Vehicle Code section 23152, subdivision (b), a misdemeanor, a crime substantially related to the qualifications, function, or duties of a physician and surgeon, as set forth in Factual Findings 3 through 7.

6. Cause exists to discipline Respondent's license under section 2239, because Respondent suffered a conviction of a misdemeanor related to the use of alcoholic beverages in a dangerous manner, as set forth in Factual Findings 3 through 7.

7. Cause exists to discipline Respondent's license under sections 2234, subdivision (a), and 2236, in that Respondent engaged in unprofessional conduct by suffering a conviction of driving under the influence of alcohol, a crime substantially related to the qualifications, function, or duties of a physician and surgeon, and Respondent used alcoholic beverages to the extent, or in such a manner, as to be dangerous and injurious to herself, or to any other person or to the public, as set forth in Factual Findings 3 through 7.

8. Respondent offered evidence of mitigation and rehabilitation. (Factual Findings 8 through16.) She remains, however, on supervised criminal probation for three more months, and has not had sufficient time or opportunity since her conviction to establish that her continued unsupervised licensure, without probation, would not present a risk to public safety and welfare. Based on Factual Findings 3 through 16, the safety of the public can only be protected if respondent's license is placed on probation.

ORDER

Physician's and Surgeon's Certificate No. C 40332, issued to Donna Elaine Winingham, M.D., is revoked. The revocation is stayed, however, and Respondent is placed on probation for three years on the following terms and conditions.

1. Notification

Within seven (7) days of the effective date of this Decision, Respondent shall provide a true copy of this Decision and Accusation to the Chief of Staff or the Chief Executive Officer at every hospital where privileges or membership are extended to respondent, at any other facility where respondent engages in the practice of medicine, including all physician and locum tenens registries or other similar agencies, and to the Chief Executive Officer at every insurance carrier which extends malpractice insurance coverage to respondent. Respondent shall submit proof of compliance to the Board or its designee within 15 calendar days.

This condition shall apply to any change(s) in hospitals, other facilities or insurance carrier.

2. Supervision of Physician Assistants and Advanced Practice Nurses

During probation, respondent is prohibited from supervising physician assistants and advanced practice nurses.

3. Obey All Laws

Respondent shall obey all federal, state and local laws, all rules governing the practice of medicine in California and remain in full compliance with any court ordered criminal probation, payments, and other orders.

4. Quarterly Declarations

Respondent shall submit quarterly declarations under penalty of perjury on forms provided by the Board, stating whether there has been compliance with all the conditions of probation.

Respondent shall submit quarterly declarations not later than 10 calendar days after the end of the preceding quarter.

5. General Probation Requirements

Compliance with Probation Unit

Respondent shall comply with the Board's probation unit.

Address Changes

Respondent shall, at all times, keep the Board informed of respondent's business and residence addresses, email address (if available), and telephone number. Changes of such addresses shall be immediately communicated in writing to the Board or its designee. Under no circumstances shall a post office box serve as an address of record, except as allowed by Business and Professions Code section 2021(b).

Place of Practice

Respondent shall not engage in the practice of medicine in respondent's or patient's place of residence, unless the patient resides in a skilled nursing facility or other similar licensed facility.

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License Renewal

Respondent shall maintain a current and renewed California physician's and surgeon's license.

Travel or Residence Outside California

Respondent shall immediately inform the Board or its designee, in writing, of travel to any areas outside the jurisdiction of California which lasts, or is contemplated to last, more than thirty (30) calendar days.

In the event respondent should leave the State of California to reside or to practice respondent shall notify the Board or its designee in writing 30 calendar days prior to the dates of departure and return.

6. Interview with the Board or its Designee

Respondent shall be available in person upon request for interviews either at respondent's place of business or at the probation unit office, with or without prior notice throughout the term of probation.

7. Non-practice While on Probation

Respondent shall notify the Board or its designee in writing within 15 calendar days of any periods of non-practice lasting more than 30 calendar days and within 15 calendar days of respondent's return to practice. Non-practice is defined as any period of time respondent is not practicing medicine as defined in Business and Professions Code sections 2051 and 2052 for at least 40 hours in a calendar month in direct patient care, clinical activity or teaching, or other activity as approved by the Board. If respondent resides in California and is considered to be in non-practice, respondent shall comply with all terms and conditions of probation. All time spent in an intensive training program which has been approved by the Board or its designee shall not be considered non-practice and does not relieve respondent from complying with all the terms and conditions of probation. Practicing medicine in another state of the United States or Federal jurisdiction while on probation with the medical licensing authority of that state or jurisdiction shall not be considered non-practice. A Board-ordered suspension of practice shall not be considered as a period of non-practice.

In the event respondent's period of non-practice while on probation exceeds 18 calendar months, respondent shall successfully complete the Federation of State Medical Board's Special Purpose Examination, or, at the Board's discretion, a clinical competence assessment program that meets the criteria of Condition 18 of the current version of the Board's "Manual of Model Disciplinary Orders and Disciplinary Guidelines" prior to resuming the practice of medicine.

Respondent's period of non-practice while on probation shall not exceed two (2) years.

Periods of non-practice will not apply to the reduction of the probationary term.

Periods of non-practice for a respondent residing outside of California, will relieve respondent of the responsibility to comply with the probationary terms and conditions with the exception of this condition and the following terms and conditions of probation: Obey All Laws; General Probation Requirements; Quarterly Declarations; Abstain from the Use of Alcohol and/or Controlled Substances; and Biological Fluid Testing.

8. Completion of Probation

Respondent shall comply with all financial obligations (e.g., restitution, probation costs) not later than 120 calendar days prior to the completion of probation. Upon successful completion of probation, respondent's certificate shall be fully restored.

9. Violation of Probation

Failure to fully comply with any term or condition of probation is a violation of probation. If respondent violates probation in any respect, the Board, after giving respondent notice and the opportunity to be heard, may revoke probation and carry out the disciplinary order that was stayed. If an Accusation, or Petition to Revoke Probation, or an Interim Suspension Order is filed against respondent during probation, the Board shall have continuing jurisdiction until the matter is final, and the period of probation shall be extended until the matter is final.

10. License Surrender

Following the effective date of this Decision, if respondent ceases practicing due to retirement or health reasons or is otherwise unable to satisfy the terms and conditions of probation, respondent may request to surrender her license. The Board reserves the right to evaluate respondent's request and to exercise its discretion in determining whether or not to grant the request, or to take any other action deemed appropriate and reasonable under the circumstances. Upon formal acceptance of the surrender, respondent shall, within 15 calendar days, deliver respondent's wallet and wall certificate to the Board or its designee and respondent shall no longer practice medicine. Respondent will no longer be subject to the terms and conditions of probation. If respondent re-applies for a medical license, the application shall be treated as a petition for reinstatement of a revoked certificate.

11. Probation Monitoring Costs

Respondent shall pay the costs associated with probation monitoring each and every year of probation, as designated by the Board, which may be adjusted on an annual basis.

Such costs shall be payable to the Medical Board of California and delivered to the Board or its designee no later than January 31 of each calendar year.

12. Alcohol - Abstain From Use

Respondent shall abstain completely from the use of products or beverages containing alcohol.

If respondent has a confirmed positive biological fluid test for alcohol, respondent shall receive a notification from the Board or its designee to immediately cease the practice of medicine. The respondent shall not resume the practice of medicine until the final decision on an accusation and/or a petition to revoke probation is effective. An accusation and/or petition to revoke probation shall be filed by the Board within 30 days of the notification to cease practice. If the respondent requests a hearing on the accusation and/or petition to revoke probation, the Board shall provide the respondent with a hearing within 30 days of the request, unless the respondent stipulates to a later hearing. If the case is heard by an Administrative Law Judge alone, he or she shall forward a Proposed Decision to the Board within 15 days of submission of the matter. Within 15 days of receipt by the Board of the Administrative Law Judge's proposed decision, the Board shall issue its Decision, unless good cause can be shown for the delay. If the case is heard by the Board, the Board shall issue its decision within 15 days of submission of the case, unless good cause can be shown for the delay. Good cause includes, but is not limited to, non-adoption of the proposed decision, request for reconsideration, remands and other interlocutory orders issued by the Board. The cessation of practice shall not apply to the reduction of the probationary time period.

If the Board does not file an accusation or petition to revoke probation within 30 days of the issuance of the notification to cease practice or does not provide respondent with a hearing within 30 days of a such a request, the notification of cease practice shall be dissolved.

13. Biological Fluid Testing

Respondent shall immediately submit to biological fluid testing, at respondent's expense, upon request of the Board or its designee. "Biological fluid testing" may include, but is not limited to, urine, blood, breathalyzer, hair follicle testing, or similar drug screening approved by the Board or its designee. Prior to practicing medicine, respondent shall contract with a laboratory or service approved in advance by the Board or its designee that will conduct random, unannounced, observed, biological fluid testing. The contract shall require results of the tests to be transmitted by the laboratory or service directly to the Board or its designee within four hours of the results becoming available. Respondent shall maintain this laboratory or service contract during the period of probation.

A certified copy of any laboratory test result may be received in evidence in any proceedings between the Board and respondent.

If respondent fails to cooperate in a random biological fluid testing program within the specified time frame, respondent shall receive a notification from the Board or its designee to immediately cease the practice of medicine. The respondent shall not resume the practice of medicine until the final decision on an accusation and/or a petition to revoke probation is effective. An accusation and/or petition to revoke probation shall be filed by the Board within 30 days of the notification to cease practice. If the respondent requests a hearing on the accusation and/or petition to revoke probation, the Board shall provide the respondent with a hearing within 30 days of the request, unless the respondent stipulates to a later hearing. If the case is heard by an Administrative Law Judge alone, he or she shall forward a Proposed Decision to the Board within 15 days of submission of the matter. Within 15 days of receipt by the Board of the Administrative Law Judge's proposed decision, the Board shall issue its Decision, unless good cause can be shown for the delay. If the case is heard by the Board, the Board shall issue its decision within 15 days of submission of the case, unless good cause can be shown for the delay. Good cause includes, but is not limited to, non-adoption of the proposed decision, request for reconsideration, remands and other interlocutory orders issued by the Board. The cessation of practice shall not apply to the reduction of the probationary time period.

If the Board does not file an accusation or petition to revoke probation within 30 days of the issuance of the notification to cease practice or does not provide respondent with a hearing within 30 days of a such a request, the notification of cease practice shall be dissolved.

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14. Solo Practice Prohibition

Respondent is prohibited from engaging in the solo practice of medicine. Prohibited solo practice includes, but is not limited to, a practice where: 1) respondent merely shares office space with another physician but is not affiliated for purposes of providing patient care, or 2) respondent is the sole physician practitioner at that location.

If respondent fails to establish a practice with another physician or secure employment in an appropriate practice setting within 60 calendar days of the effective date of this Decision, respondent shall receive a notification from the Board or its designee to cease the practice of medicine within three (3) calendar days after being so notified. The respondent shall not resume practice until an appropriate practice setting is established.

If, during the course of the probation, the respondent's practice setting changes and the respondent is no longer practicing in a setting in compliance with this Decision, the respondent shall notify the Board or its designee within 5 calendar days of the practice setting change. If respondent fails to establish a practice with another physician or secure employment in an appropriate practice setting within 60 calendar days of the practice setting change, respondent shall receive a notification from the Board or its designee to cease the practice of medicine within three (3) calendar days after being so notified. The respondent shall not resume practice until an appropriate practice setting is established.

DATED: March 4, 2019

DocuSigned by:
Carla L. Garrett
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CARLA L. GARRETT
Administrative Law Judge
Office of Administrative Hearings

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FILED
STATE OF CALIFORNIA
MEDICAL BOARD OF CALIFORNIA
SACRAMENTO August 23 20 18
BY K. Voong ANALYST

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

In the Matter of the Accusation Against: DONNA ELAINE WININGHAM, M.D. 545 Elizabeth Court Templeton, California 93465 Physician's and Surgeon's Certificate No. C 40332, Respondent.	Case No. 800-2016-021131 **ACCUSATION**

Complainant alleges:

PARTIES

1. Kimberly Kirchmeyer (Complainant) brings this Accusation solely in her official capacity as the Executive Director of the Medical Board of California, Department of Consumer Affairs (Board).

2. On or about April 19, 1982, the Board issued Physician's and Surgeon's Certificate Number C 40332 to Donna Elaine Wininghan, M.D. (Respondent). That license was in full force and effect at all times relevant to the charges brought herein and will expire on March 31, 2020, unless renewed.

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JURISDICTION

3. This Accusation is brought before the Board under the authority of the following laws. All section references are to the Business and Professions Code unless otherwise indicated.

4. Section 2001.1 of the Code states:

"Protection of the public shall be the highest priority for the Medical Board of California in exercising its licensing, regulatory, and disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount."

5. Section 2227 of the Code states:

"(a) A licensee whose matter has been heard by an administrative law judge of the Medical Quality Hearing Panel as designated in Section 11371 of the Government Code, or whose default has been entered, and who is found guilty, or who has entered into a stipulation for disciplinary action with the board, may, in accordance with the provisions of this chapter:

"(1) Have his or her license revoked upon order of the board.

"(2) Have his or her right to practice suspended for a period not to exceed one year upon order of the board.

"(3) Be placed on probation and be required to pay the costs of probation monitoring upon order of the board.

"(4) Be publicly reprimanded by the board. The public reprimand may include a requirement that the licensee complete relevant educational courses approved by the board.

"(5) Have any other action taken in relation to discipline as part of an order of probation, as the board or an administrative law judge may deem proper.

"(b) Any matter heard pursuant to subdivision (a), except for warning letters, medical review or advisory conferences, professional competency examinations, continuing education activities, and cost reimbursement associated therewith that are agreed to with the board and successfully completed by the licensee, or other matters made confidential or privileged by existing law, is deemed public, and shall be made available to the public by the board pursuant to Section 803.1."

6. Section 2234 of the Code states:

"The board shall take action against any licensee who is charged with unprofessional conduct. In addition to other provisions of this article, unprofessional conduct includes, but is not limited to, the following:

"(a) Violating or attempting to violate, directly or indirectly, assisting in or abetting the violation of, or conspiring to violate any provision of this chapter.

"..."

7. Section 2236 of the Code states:

"(a) The conviction of any offense substantially related to the qualifications, functions, or duties of a physician and surgeon constitutes unprofessional conduct within the meaning of this chapter [Chapter 5, the Medical Practice Act]. The record of conviction shall be conclusive evidence only of the fact that the conviction occurred.

"(b) The district attorney, city attorney, or other prosecuting agency shall notify the Division of Medical Quality[1] of the pendency of an action against a licensee charging a felony or misdemeanor immediately upon obtaining information that the defendant is a licensee. The notice shall identify the licensee and describe the crimes charged and the facts alleged. The prosecuting agency shall also notify the clerk of the court in which the action is pending that the defendant is a licensee, and the clerk shall record prominently in the file that the defendant holds a license as a physician and surgeon.

"(c) The clerk of the court in which a licensee is convicted of a crime shall, within 48 hours after the conviction, transmit a certified copy of the record of conviction to the board. The division may inquire into the circumstances surrounding the commission of a crime in order to fix the degree of discipline or to determine if the conviction is of an offense substantially related to the qualifications, functions, or duties of a physician and surgeon.

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[1] California Business and Professions Code Section 2002, as amended and effective January 1, 2008, provides that, unless otherwise expressly provided, the term "board" as used in the State Medical Practice Act (Cal. Bus. & Prof. Code §§§§ 2000, et seq.) means the "Medical Board of California" and references to the "Division of Medical Quality" and "Division of Licensing" in the Act or any other provision of law shall be deemed to refer to the Board.

"(d) A plea or verdict of guilty or a conviction after a plea of nolo contendere is deemed to be a conviction within the meaning of this section and Section 2236.1. The record of conviction shall be conclusive evidence of the fact that the conviction occurred."

8. Section 2239 of the Code states:

"(a) The use or prescribing for or administering to himself or herself, of any controlled substance; or the use of any of the dangerous drugs specified in Section 4022, or of alcoholic beverages, to the extent, or in such a manner as to be dangerous or injurious to the licensee, or to any other person or to the public, or to the extent that such use impairs the ability of the licensee to practice medicine safely or more than one misdemeanor or any felony involving the use, consumption, or self-administration of any of the substances referred to in this section, or any combination thereof, constitutes unprofessional conduct. The record of the conviction is conclusive evidence of such unprofessional conduct.

"(b) A plea or verdict of guilty or a conviction following a plea of nolo contendere is deemed to be a conviction within the meaning of this section. The Medical Board may order discipline of the licensee in accordance with Section 2227 or the Medical Board may order the denial of the license when the time for appeal has elapsed or the judgment of conviction has been affirmed on appeal or when an order granting probation is made suspending imposition of sentence, irrespective of a subsequent order under the provisions of Section 1203.4 of the Penal Code allowing such person to withdraw his or her plea of guilty and to enter a plea of not guilty, or setting aside the verdict of guilty, or dismissing the accusation, complaint, information, or indictment."[2]

9. Section 490 of the Code states:

"(a) In addition to any other action that a board is permitted to take against a licensee, a board may suspend or revoke a license on the ground that the licensee has been convicted of a

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[2] There is a nexus between a physician's use of alcoholic beverages and his or her fitness to practice medicine, established by the Legislature in Section 2239, in "all cases where a licensed physician used alcoholic beverages to the extent or in such a manner as to pose a danger to himself or others." (*Watson v. Superior Court* (*Medical Board*) (2009) 176 Cal.App.4th 1407, 1411.)

crime, if the crime is substantially related to the qualifications, functions, or duties of the business or profession for which the license was issued.

"(b) Notwithstanding any other provision of law, a board may exercise any authority to discipline a licensee for conviction of a crime that is independent of the authority granted under subdivision (a) only if the crime is substantially related to the qualifications, functions, or duties of the business or profession for which the licensee's license was issued.

"(c) A conviction within the meaning of this section means a plea or verdict of guilty or a conviction following a plea of nolo contendere. Any action that a board is permitted to take following the establishment of a conviction may be taken when the time for appeal has elapsed, or the judgment of conviction has been affirmed on appeal, or when an order granting probation is made suspending the imposition of sentence, irrespective of a subsequent order under the provisions of Section 1203.4 of the Penal Code.

"(d) The Legislature hereby finds and declares that the application of this section has been made unclear by the holding in *Petropoulos* v. *Department of Real Estate* (2006) 142 Cal.App.4th 554, and that the holding in that case has placed a significant number of statutes and regulations in question, resulting in potential harm to the consumers of California from licensees who have been convicted of crimes. Therefore, the Legislature finds and declares that this section establishes an independent basis for a board to impose discipline upon a licensee, and that the amendments to this section made by Chapter 33 of the Statutes of 2008 do not constitute a change to, but rather are declaratory of, existing law."

10. Section 493 of the Code states:

"Notwithstanding any other provision of law, in a proceeding conducted by a board within the department pursuant to law to deny an application for a license or to suspend or revoke a license or otherwise take disciplinary action against a person who holds a license, upon the ground that the applicant or the licensee has been convicted of a crime substantially related to the qualifications, functions, and duties of the licensee in question, the record of conviction of the crime shall be conclusive evidence of the fact that the conviction occurred, but only of that fact, and the board may inquire into the circumstances surrounding the commission of the crime in

order to fix the degree of discipline or to determine if the conviction is substantially related to the qualifications, functions, and duties of the licensee in question.

"..."

11. California Code of Regulations, title 16, Section 1360 states:

"For the purposes of denial, suspension or revocation of a license, certificate or permit pursuant to Division 1.5 (commencing with Section 475) of the code, a crime or act shall be considered to be substantially related to the qualifications, functions or duties of a person holding a license, certificate or permit under the Medical Practice Act if to a substantial degree it evidences present or potential unfitness of a person holding a license, certificate or permit to perform the functions authorized by the license, certificate or permit in a manner consistent with the public health, safety or welfare. Such crimes or acts shall include but not be limited to the following: Violating or attempting to violate, directly or indirectly, or assisting in or abetting the violation of, or conspiring to violate any provision of the Medical Practice Act."

FACTUAL SUMMARY

12. On May 12, 2016, in the case entitled the *People of the State of California v. Donna Elaine Winingham;* case number 16M-03655, in the Superior Court of California, County of San Luis Obispo, Respondent, upon her plea of no contest, was convicted of driving a vehicle while having a blood alcohol content of approximately 0.20 percent, in violation of Vehicle Code Section 23152, subdivision (b), a misdemeanor.[3] The remaining criminal charge was dismissed as part of Respondent's plea agreement with the San Luis Obispo County District Attorney's Office. Respondent was placed on three years of court-supervised probation with the following terms and conditions:

A. Serve five days in the San Luis Obispo County Jail with credit for one day already served in custody;

B. Complete the nine-month driving under the influence program for first-time offenders within the period of probation;

[3] Vehicle Code Section 23152, subdivision (b) provides: "It is unlawful for a person who has 0.08 percent or more, by weight, of alcohol in his or her blood to drive a vehicle..."

C. Not drive a vehicle with any measurable amount of alcohol in her blood;

D. Not drive a vehicle unless licensed and insured;

E. Submit to chemical testing on demand of any peace or probation officer;

F. Pay fines and fees totaling approximately $2,425.00; and

G. Obey all laws.

13. The circumstances leading to Respondent's May 2016 conviction are as follows:

A. At approximately 9:43 p.m. on March 5, 2016, law enforcement officers with the California Highway Patrol (CHP) were dispatched to Templeton High School for the report of an intoxicated driver. The complainant had reported that Respondent was attempting to pick her children up from the high school and was driving while intoxicated. The involved vehicle was described as a gold 2004 Chevrolet Silverado truck. The CHP officers arrived at the high school and observed Respondent leaving the parking lot in the Chevrolet Silverado. The CHP officers proceed to conduct a traffic stop on Main Street in Templeton, California.

B. The CHP officers contacted Respondent who was the sole occupant and driver of the Chevrolet Silverado. As the CHP officers approached the vehicle they quickly observed that Respondent had all four of the vehicle's windows rolled down despite the fact that there was heavy rain. Respondent displayed symptoms of intoxication upon contact including: an odor of alcohol; red, watery, and bloodshot eyes; slurred speech; poor balance; and difficulty following instructions. Standardized Field Sobriety Tests were conducted and Respondent displayed pronounced psycho-physical impairment before she terminated the testing by requesting a "breathalyzer test." During this contact with the CHP officers, Respondent began sobbing and was largely unable to explain the circumstances of her driving under the influence.

C. Respondent consented to and provided two breath samples on the Preliminary Alcohol Screening (PAS) device. The first sample taken at 10:19 p.m. revealed that Respondent's breath alcohol concentration was approximately 0.193 percent. The second sample taken at 10:20 p.m. revealed that Respondent's breath alcohol concentration was approximately 0.198 percent. Respondent was immediately placed under arrest for driving under the influence.

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D. Respondent was transported to Twin Cities Hospital for a chemical test of her blood. A blood sample was collected from Respondent's arm revealing that her blood alcohol level was approximately 0.20 percent. Respondent was transported and booked at the San Luis Obispo County Jail.

14. On September 15, 2016, Respondent voluntarily participated in an interview conducted by an investigator with the Medical Board of California's Complaint Investigation Office in San Luis Obispo, California. During this interview, Respondent stated that she regularly consumes "a couple of glasses of wine maybe three or four times a week or less." With regards to her arrest for driving under the influence on March 5, 2016, Respondent admitted to drinking three or four glasses of wine before driving from her home to Templeton High School in order to pick up her daughter.

FIRST CAUSE FOR DISCIPLINE

(Conviction of a Substantially Related Crime)

15. By reason of the facts set forth in paragraphs 12 through 14 above, Respondent is subject to disciplinary action under Section 2236, subdivision (a), and Section 490 of the Code, as well as California Code of Regulations, title 16, Section 1360, in that Respondent has been convicted of a crime substantially related to the qualifications, function or duties of a physician and surgeon.

16. Respondent's acts and/or omissions as set forth in paragraphs 12 through 14 above, whether proven individually, jointly, or in any combination thereof, constitutes the conviction of a crime substantially related to the qualifications, function or duties of a physician and surgeon, pursuant to Section 2236, subdivision (a), and Section 490 of the Code, as well as California Code of Regulations, title 16, Section 1360.

SECOND CAUSE FOR DISCIPLINE

(Use of Alcoholic Beverages in a Dangerous Manner)

17. By reason of the facts set forth in paragraphs 12 through 14 above, Respondent is subject to disciplinary action under Section 2239 of the Code in that Respondent used alcoholic

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beverages to the extent, or in such a manner, as to be dangerous and injurious to herself or to any other person or to the public.

18. Respondent's acts and/or omissions as set forth in paragraphs 12 through 14 above, whether proven individually, jointly, or in any combination thereof, constitutes the use of alcoholic beverages to the extent, or in such a manner, as to be dangerous and injurious to herself, or to any other person or to the public, pursuant to Section 2239 of the Code.

THIRD CAUSE FOR DISCIPLINE

(Unprofessional Conduct)

19. By reason of the facts set forth in paragraph 12 through 14 above, Respondent is subject to disciplinary action under Section 2234, subdivision (a) of the Code in that Respondent has been convicted of a crime substantially related to the qualifications, functions, or duties of a physician and surgeon, and Respondent has used alcoholic beverages to the extent, or in such a manner, as to be dangerous and injurious to herself, or to any other person or to the public.

20. Respondent's acts and/or omissions as set forth in paragraphs 12 through 14 above, whether proven individually, jointly, or in any combination thereof, constitutes the conviction of a crime substantially related to the qualifications, functions, or duties of a physician and surgeon, and the use of alcoholic beverages to the extent, or in such a manner, as to be dangerous and injurious to herself, or to any other person or to the public, pursuant to Section 2234, subdivision (a) of the Code.

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PRAYER

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

1. Revoking or suspending Physician's and Surgeon's Certificate Number C 40332 issued to Donna Elaine Winingham, M.D.;

2. Revoking, suspending or denying approval of her authority to supervise physician assistants pursuant to Section 3527 of the Code, and advanced practice nurses;

3. If placed on probation, ordering Donna Elaine Winingham, M.D. to pay the Board the costs of probation monitoring; and

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

DATED: August 23, 2018

KIMBERLY KIRCHMEYER
Executive Director
Medical Board of California
Department of Consumer Affairs
State of California
Complainant

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