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

In the Matter of the Petition to Revoke Probation Against:	)	
James Edward Pero, M.D.	)	**Case No. 800-2016-026746**
Physician's and Surgeon's Certificate No. G 70281	)	
Respondent	)	

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 February 10, 2017.

IT IS SO ORDERED January 11, 2017.

MEDICAL BOARD OF CALIFORNIA

Michelle Anne Bholat MD

By: _____
Michelle Anne Bholat, M.D., Chair
Panel B

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

In the Matter of the Petition to Revoke Probation of: JAMES EDWARD PERO, M.D. Physician's and Surgeon's Certificate No. G70281, Respondent.	Case No. 800-2016-026746 OAH No. 2016100683

PROPOSED DECISION

This matter was heard by Julie Cabos-Owen, Administrative Law Judge (ALJ) with the Office of Administrative Hearings, on November 9 and 10, 2016, in Los Angeles, California. Complainant was represented by E.A. Jones III, Supervising Deputy Attorney General. James Edward Pero, M.D. (Respondent) was present and was represented by Kathleen M. Duggan, with Ropers, Majeski, Kohn & Bentley.

Oral and documentary evidence was received, and argument was heard. The record was closed, and the matter was submitted for decision on November 10, 2016.

FACTUAL FINDINGS

Jurisdiction

1. On October 5, 2016, Kimberly Kirchmeyer (Complainant) filed the Petition to Revoke Probation while acting in her official capacity as the Executive Director of the Medical Board of California (Board), Department of Consumer Affairs.

2. Respondent filed a Notice of Defense requesting a hearing on the Petition to Revoke Probation.

//

//

History of Licensure, License Discipline, and Biological Fluid Testing

3. On November 13, 1990, the Board issued Physician's and Surgeon's Certificate Number G70281 to Respondent. That certificate was scheduled to expire on October 31, 2016. If the certificate was not renewed, the Board retains jurisdiction over this matter pursuant to Business and Professions Code section 118, subdivision (b).

4. In a Decision and Order, effective November 13, 1990, adopting a Stipulation for a Probationary Certificate in Case No. R-33 (1990 Probation Order), the Board issued Respondent, then an applicant for licensure, a one-year probationary license on specified terms and conditions including that he complete the Board's Diversion Program. The 1990 Probation Order was based on Respondent's forgery of prescriptions for controlled substances to provide to his girlfriend in his fourth year of medical school. Respondent successfully completed that probationary period.

5. In a Decision and Order, effective March 9, 2005, adopting a Stipulated Settlement and Disciplinary Order in Case No. 06-2002-133201 (2005 Probation Order), the Board revoked Respondent's certificate, stayed the revocation and placed Respondent on probation for three years on specified terms and conditions, which included abstaining from use of alcohol and submitting to biological fluid testing. The 2005 Probation Order was based on Respondent's convictions in 2000 and 2002 for driving under the influence of alcohol. Respondent successfully completed that probationary period. Effective March 9, 2008, the Board issued an order restoring Respondent's certificate to a clear status.

6(a). In a Decision and Order, effective May 29, 2015, adopting a Stipulated Settlement and Disciplinary Order in Case No. 05-2013-229351 (2015 Probation Order), the Board revoked Respondent's certificate, stayed the revocation and placed Respondent on probation for five years on specified terms and conditions, which included abstaining from use of alcohol and submitting to biological fluid testing.

6(b). Specifically, Conditions 1 and 2 provided:

> 1. 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 final decision on an accusation and/or a petition to revoke probation. An accusation and/or petition to revoke probation shall be filed by the Board within 15 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. A decision shall be received from the Administrative Law Judge or the Board within 15 days unless

> good cause can be shown for the delay. 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 15 days of the issuance of the notification to cease practice or does not provide respondent with a hearing within 30 days of such a request, the notification of cease practice shall be dissolved.
>
> 2. 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. . . .

(Exhibit 3.)

6(c). The 2015 Probation Order was based on Respondent's 2013 conviction for driving with a blood alcohol concentration of .08 percent or higher with his minor son in the vehicle.

7. On May 28, 2015, Respondent signed a document entitled "Participant Disclosure and Information when Monitoring with [Ethylglucuronide (EtG) and Ethylsulfate (EtS)]" (Participant Disclosure). The document noted:

> [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. . . .*

> [¶] . . . [¶]
>
> **Non-alcohol Beer and Wine**: These beverages . . . contain enough alcohol that they can result in a positive test. While in monitoring you are not permitted to ingest these products.
>
> [¶] . . . [¶]
>
> **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.* (Bold in original; italics added.)

(Exhibit 8, p. AG 0089.)

8. As noted above, the 2015 Probation Order required a cessation of practice if respondent had a confirmed positive biological fluid test for alcohol. On April 27, 2016, the Board issued a Cease Practice Order in Case No. 05-2013-229351 after Respondent's April 12, 2015 blood test returned a result which was positive for Phosphatidyl Ethanol (PEth)[1] at 28 ng/mL. On May 10, 2016, a Petition to Revoke Probation was filed against Respondent.

9(a). On May 16, 2016 Respondent voluntarily underwent an Intensive Diagnostic Evaluation at Promises Professionals Treatment Centers. He was diagnosed with "Unspecified Alcohol-Related Disorder," and was admitted for inpatient treatment on May 19, 2016. (Exhibit 11, p. AG 0118.) He was discharged from Promises on June 15, 2016.

9(b). In a letter dated June 14, 2016, Gregory E. Skipper, M.D., Director of Professionals Health Services at Promises, stated the following:

> [Respondent] has been a good patient in individual and group therapy, attending all groups and lectures and daily 12-step meetings. He has thoroughly reviewed his past and examined the factors that led to his multiple DUIs and his drinking while in monitoring under probation by the [Board].
>
> It is the treatment team's opinion that [Respondent] has made significant progress toward understanding the underlying psychological issues that led to these indiscretions. Furthermore, it is our opinion that with this new knowledge and understanding we believe there is a much

---

[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.

> greater likelihood that he will have no further difficulty with alcohol use. As irresponsible as his drinking behavior has been it has never occurred in the practice setting. . . . [I]t is our opinion that after working with him daily for a month and examining all these issues that he will be safe to return to medical practice subject to monitoring.

(Exhibit 11, p. AG 0018.)

10(a). In a Decision and Order, effective September 28, 2016, adopting a Proposed Decision following a hearing on June 22 and 23, 2016, in Case No. 800-2016-021830 (2016 Probation Order), the Board sustained the Petition to Revoke Probation and ordered Respondent to remain on probation for five years from the effective date of the 2016 Probation Order and to continue submitting to biological fluid testing. One of the conditions of Respondent's continued probation was that he undergo a clinical diagnostic evaluation by a Board-appointed physician and surgeon who would determine "whether respondent has a substance abuse problem, whether respondent is a threat to himself or others, and recommendations for substance abuse treatment, practice restrictions, or other recommendations related to respondent's rehabilitation and ability to practice safely." (Exhibit 7, pp. AG0071-AG0072.)

10(b). The 2016 Probation Order was based on Respondent's probation violation by use of products or beverages containing alcohol, set forth verbatim as follows:

> 5. Respondent failed to comply with Probation Condition 1, as follows:
>
> A. On April 12, 2016, Respondent was selected to provide a sample of his blood for testing for the presence of alcohol, and on April 13, 2016, did provide a blood sample or testing.
>
> B. On April 19, 2016, First Lab provided Respondent's Probation Analyst with the results of the chemical test performed on the blood sample collected from Respondent on April 13, 2016. The chemical results were positive for PEth, indicating Respondent had ingested alcohol in violation of his probationary terms and conditions.
>
> C. On April 20, 2016, his probation analyst spoke with Respondent about his blood test. Respondent said that he may have had ". . . an unintentional consumption of alcohol."
>
> D. Respondent said he was having Becks NA (non-alcoholic) beer on Saturday, April 9, 2016, at a birthday party for his son in his backyard. The green bottles of Becks NA were mixed in with some regular green beer bottles. Respondent said he must have consumed the regular beers by accident and may have had three regular beers this way.

> E. On April 22, 2016, his probation analyst received Respondent's signed statement dated April 22, 2016, stating he drank beer on April 9, 2016, during a celebration of his son's birthday.
>
> [¶] . . . [¶]
>
> [R]espondent admits that he violated the terms of his [2015 Probation Order] by consuming alcohol during a birthday party for his son. . . .

(Exhibit 4.)

11. Pursuant to the 2016 Probation Order (ordering that the "cease practice order is dissolved"), on August 10, 2016, the April 2016 Cease Practice Order in Case No, 05-2013-229351 was dissolved.

12(a). After the June 2016 hearing, but prior to the September 28, 2016 effective date of the 2016 Probation Order, Respondent again blood-tested positive for PEth as set forth below.

12(b). On July 19, 2016, Respondent was selected to provide a sample of his blood to test for the presence of alcohol. Consequently, on July 19, 2016, Respondent went to Newbury Park Urgent Care (NPUC), which was open from 8:00 a.m. to 8:00 p.m., to provide a blood sample for testing.[2]

12(c). At NPUC, medical assistant Ana Belmonte was responsible for collecting blood samples. At the administrative hearing, Belmonte testified credibly about the process for collecting and shipping Respondent' blood sample to the laboratory. She noted that the individuals submitting a sample often bring their own sample collection kits and collection forms, but NPUC stocked extra kits and forms to use when individuals did not bring a kit or form. Respondent came to NPUC without a kit or form, so Belmonte retrieved a spare blood collection kit and a Drug Scan form. Although the Drug Scan form indicated at the top that the account was the "CA Board of Registered Nurses on Probation," it was the only form she could find. Nevertheless, the nurses' Drug Scan forms and samples were sent to the same place as those for physicians: First Lab, in Pennsylvania, as indicated by the address at the top of the Drug Scan form. Additionally, Respondent provided his name and identification number on the form so that he was identified as the individual submitting the sample.

12(d). Belmonte collected blood sample from Respondent in accordance with the instructions enclosed in the blood sample collection kit. She then sealed Respondent's blood

---

[2] At the administrative hearing, Respondent's counsel attacked the validity of the collection and shipping of Respondent's blood sample. However, the totality of the evidence established that the collection and shipping of the sample was proper and there was no indication that the sample was tainted, as set forth in Findings 12(c) through 12(e).

sample tubes in front of Respondent. Respondent and Belmonte signed Respondent's Drug Scan form and also signed the labels which were attached to the form; the labels listed a sample identification number which matched the sample identification number on Respondent's Drug Scan form. The labels were then detached from the Drug Scan form and affixed to each of Respondent's sample collection tubes. Belmonte then placed Respondent's collection tubes in a plastic pouch, placed Respondent's Drug Scan form in another plastic pouch, and sealed both pouches in front of Respondent. She then placed the pouches in a FedEx package to be sent to First Lab. Respondent's sample collection had been completed at 7:45 p.m., as indicated on the form, so it was too late for FedEx to pick up the samples that day. As was her custom and practice, Belmonte placed the FedEx package in a refrigerator for storing blood specimens, maintained at an appropriate temperature (between 35 to 46 degrees Fahrenheit) per office protocols. At the time she placed Respondent's samples in the refrigerator, the temperature was 40 degrees.

12(e). The evidence did not establish the specific temperature at which the samples were stored after FedEx picked up the package for delivery. However, the totality of the evidence indicated that the package was not refrigerated. Nevertheless, based on the credible uncontroverted testimony of James Ferguson, D.O., Medical Director for First Lab's Recovery Management Services, if the samples were transported at a higher temperature any resulting degradation of the sample would be a reduction, not increase, in PEth biomarkers. The lower PEth value would not have been detrimental to Respondent.

13. First Lab received Respondent's July 19, 2016 blood sample, and the laboratory conducted the required chemical testing on the sample for the presence of alcohol. The chemical results were positive for PEth at 40.7ng/mL.

14. On July 28, 2016, First Lab provided Respondent's Probation Analyst, Virginia Gerard (Gerard), with the results of the chemical test performed on Respondent's July 19, 2016 blood sample which were positive for PEth at 40.7 ng/mL.

15. On July 28, 2016, Gerard sent Respondent an email stating, "My records indicate that blood collected from you on July 19, 2016 tested positive. Please send me a written explanation of why you tested positive for this collection. Also include in your statement a detailed explanation of how you will take steps to ensure that you will not again test positive." (Exhibit 9, p. AG0097.)

16. On July 28, 2016, Respondent sent an email to Gerard stating, "I do not see how my test would have come up positive, as I have been maintaining my sobriety for over 3 1/2 months now. A false positive or incidental exposure of some form would be the only explanation I would have for whatever the test result was. I have not knowingly consumed any alcohol since April of this year." (Exhibit 9, p. AG0097.)

//

//

17. On July 29, 2016, Respondent sent Gerard a letter stating:

> I received your email notification regarding an allegedly positive biofluid test result, a blood test from July 19th. As I stated in my email response, I no longer drink alcohol and have been sober for over 3 1/2 months now. Given the fact that I am not drinking, I am very concerned about the validity and reliability of such a test.
>
> I do not recall any situations prior to that blood test where I may have potentially unknowingly consumed any alcohol. The only exposure I had just prior to that blood test would have been through external contact. Since I am currently not working, I have been doing extensive cleaning and organizing around the house. Earlier this month I found that both our garage and storage shed had rat infestation with droppings. All the surfaces and stored items including children's toys and patio furniture had to be cleaned, sprayed and wiped down with sanitizer. The disinfectant spray I used I borrowed from my office. It is ethyl alcohol based and I used about half a gallon over a three day period. Throughout those many hours of cleaning, there was transdermal and vapor inhalational exposure.
>
> [T]he fact is that I haven't drank any alcohol since April of this year. I don't see how the test would have come up positive other than the effects of the external exposure as I mentioned above or there has to be a problem with the test itself.

(Exhibit 9, p. AG0098.)

18. Respondent's July 29, 2016 letter was sent to Dr. Ferguson at First Lab. On August 2, 2016, Dr. Ferguson sent Gerard a letter stating:

> The PEth result of 40.7 ng/mL collected 7/19/16 is consistent with the ingestion of ethyl alcohol during the period of approximately 6/19/16 to 7/19/16. The transdermal and inhalational exposures mentioned in the letter dated 7/29/16 would not have caused this positive result.

(Exhibit 10, p. AG 01013.)

19. On September 20, 2016, prior to the effective date of the 2016 Probation Order, the Board issued a "Corrected Cease Practice Order" in Case No. 05-2013-229351 (the 2015 probation case), stating that Respondent "has failed to successfully comply with Probationary Condition 1 [of the 2015 Probation Order] by testing positive for [PEth] at 40.7 ng/mL. Accordingly, Respondent . . . is prohibited from engaging in the practice of medicine. The Respondent shall not resume the practice of medicine until a final decision has been issued on an accusation and/or a petition to revoke probation filed pursuant to this matter." (Exhibit 1, p. AG 0002.) That Corrected Cease Practice Order remains in effect.

20(a). Following the effective date of the 2016 Probation Order, Respondent failed to check in twice with First Lab to determine if he had to provide a sample that day.

20(b). On October 15, 2016, Respondent failed to check in with First Lab, but he was not required to provide a sample that day.

20(c). On October 25, 2016, Respondent failed to check in with First Lab and also failed to go in for collection of a sample that day. To explain his failure to provide a sample, Respondent sent Gerard a letter, dated November 4, 2016, stating:

> It was not the best news I got today when I was alerted by you that I had missed checking in on October 25 and thus missing the request for a sample. I have no reason why I did not check in, nothing unusual happened that day. Checking in every day has become such an automatic process since I've been doing it so long. I don't really think about it, I just do it. If for some reason I would have forgotten to do it in the morning, I most likely wouldn't have given it a second thought later in the day unless I'm actively double checking, which has generally not been my routine. I currently have no mechanism to alert me if I've not checked in.
>
> As a result of not working for so long, the days of the week sometimes blend together. I don't know if this lack of structure has at times caused me to lose reference for each day and thus loses awareness about checking in. It's kind of hard to give a reason for forgetting since it was not done purposefully. During the whole past year while I was working, I don't think I forgot to check in even once.

(Exhibit 13.)

20(d). At the current administrative hearing, Respondent testified that, after he sent his explanation to Gerard, he recalled that on the morning of October 25, 2016, he was sent a "tremendous amount of data for this trial." He noted that preparing for the hearing had been stressful, and this was coupled with his being off work and his losing daily structure. Respondent ruminated, "It is hard to say why I forgot to do something because I forgot." However, he denied any intent to avoid testing.

Dispute re: Implication of July 19, 2016 Test Result

21(a). Respondent stipulated to the terms of his 2015 Probation Order, including Condition 2 which stated, "A certified copy of any laboratory test result may be received in evidence in any proceedings between the Board and respondent." (Exhibit 3.) However, at the administrative hearing he argued that the July 19, 2016 laboratory test result was not valid for forensic purposes to establish that he drank alcohol.

21(b). The undisputed evidence established that a positive PEth test is an indication of the presence of ethanol in the blood. Consequently, there can be no "false positive" in that regard. However, the parties disagreed about the implication of the positive PEth test results, i.e., the source of the ethanol in Respondent's blood.

21(c)(1). In contesting the conclusion that he drank alcohol in July 2016, Respondent testified that he has not consumed any alcohol since April 2016. Respondent maintained that his only exposure to alcohol just prior to the July 19, 2016 blood test was from "cleaning activities" he had undertaken the weekend prior to July 19, 2016. According to Respondent, that weekend he cleaned out his garage and storage shed which contained a large number of toys he wanted to salvage. He noted that when he moved everything out of the shed, the linoleum flooring contained rat droppings and rat urine.

21(c)(2). To sanitize the toys and clean the area around them, Respondent testified that he used hand sanitizer which he obtained from his medical office. Respondent provided a picture of a partially empty gallon jug of Avant Instant Hand Sanitizer and a picture of the affixed label indicating its active ingredient was "Ethanol 60%." (Exhibit L.) The label also indicated "Uses" as: "Hand Sanitizer to help reduce bacterial on the skin." (*Ibid.*) The stated directions for use were: "Dispense an adequate amount in your palm to cover all surfaces of hands completely. Rub hands together until dry." (*Ibid.*) Avant was apparently a gel-textured hand sanitizer typically dispensed by pumping or squeezing from a container. It did not appear to be a "disinfectant spray" as indicated by respondent's July 29, 2016 letter to Gerard.

21(c)(3). Respondent contended that he used more than half of the gallon of Avant containing 60 percent ethanol for 8 to 10 hours per day on July 15, 16, and 17, 2016 (Friday through Sunday). According to Respondent, he wore a T-shirt, shorts and sandals but no gloves. He also noted that the shed had no ventilation and the portion of the garage he was cleaning was in the corner away from the door with a limited breeze.

21(c)(4). Respondent acknowledged that he read the information on the Participant Disclosure form listing hand sanitizer as an alcohol-containing product which should be used "sparingly and avoid breathing the fumes." (Exhibit 8, p. AG 0089.) The Participant Disclosure form specifically noted that "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. . . ." (*Ibid.*) Nevertheless, Respondent contended that the Participant Disclosure form addressed only EtG and EtS from urine testing and was insufficient "warning" about precautions to take for PEth blood testing. Respondent also contended that if he had known PEth testing would be positive for his use of hand sanitizer, he would have would have avoided using it on a day he was to be tested due to the possibility of a false positive. However, his assertions were unconvincing. Respondent admitted that he is tested randomly so he would not have known if he had to submit to testing until the day in question and he would not have known whether that test would be of his urine or blood. Therefore, Respondent should have taken steps to comply with the instructions in the Participant Disclosure to avoid a violation of his probation.

21(c)(5). Furthermore, Respondent could not adequately explain why he would use half a gallon of hand sanitizer containing 60 percent ethanol, without gloves, in a poorly ventilated area, for three days, up to 10 hours per day, when he knew it was his responsibility to limit exposure to alcohol vapors and products such a hand sanitizer in order to avoid a positive test result. Respondent unconvincingly pointed out that that the Participant Disclosure form "says 'limit' not avoid," and that "limit means to use less." However, he did not (and could not in good faith) explain how using more than half a gallon of hand sanitizer could be viewed as using "less." Respondent's implausible attempt to avoid admission of wrongdoing further taints his credibility.

21(c)(6). Viewing the totality of the evidence (including Respondent's history of alcohol abuse; his prior excuse of drinking only non-alcoholic beer and but later admission of drinking regular beer; his current implausible explanation for his positive PEth test; and his lack of sincerity in his testimony), Respondent's denial of consuming alcohol in July 2016 is not credible. Additionally, Respondent acknowledged that he is responsible for avoiding the use of products containing alcohol (and specifically hand sanitizer), and the Participant Disclosure form specifically noted that "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 8.) Given that Respondent's explanation for his positive PEth test has been discredited and in any event would not be allowed as an excuse for a positive test result, the evidence established that Respondent committed a violation of his probation.

22(a). At the administrative hearing, the parties offered the testimony of expert witnesses to address whether the PEth level from Respondent's July 19, 2016 test was a valid indicator of his alcohol consumption. Complainant's expert opined that the level of 40.7 ng/mL could not have resulted solely from incidental transdermal and/or inhalational exposure. Respondent's expert discounted the conclusion that the level of 40.7 ng/mL indicated Respondent's alcohol consumption and opined that the laboratory cutoff of 20 ng/mL was not a scientifically valid cutoff to establish alcohol consumption (and rule out environmental exposure) for forensic purposes.

22(b)(1). Complainant's expert, Dr. Ferguson, is an addiction medicine specialist and the Medical Director of Recovery Management Services at First Lab. He credibly testified that the laboratories with which First Lab contracts all meet the requisite certifications. As indicated in the documentation of Respondent's laboratory PEth testing results, the cutoff for a positive test is 20 ng/mL. Dr. Ferguson pointed out that the cutoff is set off well above the lowest level at which a laboratory can obtain a quantifiable result (about 7 to 8 ng/mL), which is the lowest level at which PEth can be detected. However, laboratories do not use the lowest level as a cutoff because they want to build in a "safety factor." The 20 ng/mL cutoff was not set by Dr. Ferguson's contracted laboratories but is the standard cutoff in the industry, both nationally and internationally. Dr. Ferguson has accepted that 20 ng/mL is the cutoff that laboratories choose. He admitted that there are probably no studies involving the

forensic use of PEth testing which set the cutoff at 20 ng/mL and determined it to be the appropriate standard.

22(b)(2). During his testimony, Dr. Ferguson was asked about a paper published on October 26, 2013, entitled "Drug Testing: A White Paper of the American Society of Addiction Medicine (ASAM)." The ASAM White Paper addressed the "rapidly evolving technology" of random drug testing "as a primary prevention, diagnostic, and monitoring tool" to identify the presence or absence of drugs of abuse related to addiction medicine. (Exhibit D.) Although Dr. Ferguson was one of the authors of the 2013 ASAM White Paper, he did not contribute to the section on alcohol testing. In that section, the ASAM authors noted that PEth testing had "recently become commercially available." The authors noted that PEth is "formed only in the presence of ethanol." The authors also noted that "blood PEth [is] a potential confirmation test for alcohol consumption. There is no large scale study, however, examining the effect of coincident medications, illness, and/or variations among individuals with regard to kinetics of PEth. Because it is a new test its use should be limited to non-forensic applications at this time." (*Ibid.*) Dr. Ferguson agreed that "in 2013," the suggested limitation of PEth testing to non-forensic applications "was correct." However, as pointed out in the ASAM White Paper itself, in 2013, PEth testing was only "recently" available as a "potential" confirmation test, and given the "rapidly evolving technology" of drug testing, Dr. Ferguson credibly opined that this admonition may not be relevant in 2016.

22(b)(3). At the administrative hearing, Dr. Ferguson reiterated his credible opinion that the PEth value of 40.7 signifies alcohol ingestion and could not have been reached solely through transdermal and inhalational exposures, even under the circumstances proffered by Respondent. He opined that while there are circumstances, such as using hand sanitizer, which may cause false positives from urine EtG/EtS, testing, the use of hand sanitizer could not cause the PEth value of 40.7.

22(b)(4). Nevertheless, Dr. Ferguson tempered his opinion, pointing out that his August 2, 2016 letter "does not say [Respondent] was drinking [alcohol], . . . only that the result was consistent with ingestion but not inhalation or transdermal" exposure based on his experience and studies he has reviewed. He stated that he understands "the ramifications of a false positive can be catastrophic to physicians in a monitoring program."

22(c)(1). Respondent's expert witness, Richard Geller, M.D. is a medical toxicologist with a Master's degree in forensic toxicology. Dr. Geller opined that the proffered PEth cutoff level, used to discriminate between alcohol ingestion and non-ingestion/environmental exposure, has no scientific basis. He noted that there is nothing in the scientific literature validating the cutoff level of 20 ng/mL and that the literature instead says "now is the time to begin to explore what the appropriate cutoff level should be." According to Dr. Geller, the literature indirectly states that a cutoff level does not exist since there would be no need to explore establishing a cutoff level if it already existed. At this point, there has been no scientific verification of which PEth value indicates alcohol consumption but not

environmental exposure. Consequently, Dr. Geller opined that 20 ng/mL "is an arbitrary number" and has no scientific value to exclude environmental exposure.

22(c)(2). Dr. Geller agreed with the ASAM White Paper's admonition to limit PEth testing to non-forensic uses. He noted that forensic testing "has consequences" and "creates jeopardies [which] clinical testing does not create." Dr. Geller opined that before "using testing in the forensic arena, [you] have to be certain that [the test results are] scientifically justifiable" and can be "properly validated.

22(c)(3). Dr. Gellar considered the use of hand sanitizer as a possible cause for Respondent's positive PEth test. He did not believe the 40.7 ng/mL was a certain indicator that Respondent drank alcohol because he believed there was an acceptable alternative medical explanation (i.e., an extraordinarily large environmental exposure). Based on Dr. Geller's review of the laboratory results, Respondent's July 29, 2016 explanatory letter, and the current science involving PEth testing, Dr. Gellar opined that he "would have accepted [Respondent's] alternative medical explanation, and verified the test as being negative." Dr. Geller explained that he "would have no choice but to verify [the test] as negative unless [he] determined [Respondent] was not being truthful." In reaching his opinion, Dr. Geller assumed that Respondent was being truthful about his use of hand sanitizer to clean his garage and shed. However, as set forth above, Respondent's explanation for his positive PEth test was not credible. Given that the factual basis for Dr. Geller's opinion was discredited, Dr. Geller's opinion negating Respondent's PEth test results was flawed.[3]

22(d). Although the 20 ng/mL cutoff is the standard cutoff in the industry, the preponderance of the evidence failed to establish that the 20 ng/mL had sufficient scientific validity to exclude environmental exposure. Additionally, the preponderance of the evidence did not establish that Respondent's PEth test result of 40.7 ng/mL alone was scientifically sufficient to establish that Respondent consumed alcohol in July 2016; even Dr. Ferguson's credible opinion did not extend that far, but only stated that the 40.7 PEth value ruled out Respondent's explanation. However, there is no need to rely solely on Respondent's positive PEth test result to establish his alcohol consumption in July 2016 since the preponderance of the evidence (which included Respondent's history of alcohol abuse; his lack of a credible alternative explanation for his current positive PEth test; and his prior positive PEth value of .28 ng/mL when he admittedly drank alcohol) established that in July 2016 Respondent consumed alcohol in violation of his probation.

//

//

---

[3] The expert's opinion is no better than the facts on which it is based and, "where the facts underlying the expert's opinion are proved to be false or nonexistent, not only is the expert's opinion destroyed but the falsity permeates his entire testimony." (*Kennemur v. State of California* (1982) 133 Cal.App.3d 907, 923–924.)

Additional Evidence at Hearing

23(a). As noted above, the 2016 Probation Order included a condition that Respondent undergo a clinical diagnostic evaluation by a Board-appointed physician and surgeon who would determine "whether respondent has a substance abuse problem, whether respondent is a threat to himself or others, and recommendations for substance abuse treatment, practice restrictions, or other recommendations related to respondent's rehabilitation and ability to practice safely." (Exhibit 7, pp. AG0071-AG0072.)

23(b). On October 4, 2016, James L. Gagne, M.D., who is board certified in Pain Medicine, Internal Medicine, and Addiction Medicine, performed a physical examination of Respondent at the Board's request. Dr. Gagne reviewed a 2015 psychiatric evaluation of Respondent and the 2016 Probation Order, and he interviewed Respondent. In an October 15, 2016 report, Dr. Gagne diagnosed Respondent with "Alcohol use disorder, mild to moderate, in remission," and concluded that Respondent was able to practice medicine safely and "should do well with the restrictions imposed by the [2016 Probation Order]." (Exhibit 11, p. AG 0105.) At the time of the October 4, 2016 evaluation, Dr. Gagne was unaware of Respondent's positive PEth test in July 2016. Based on this new information, Dr. Gagne issued an October 29, 2016 Addendum to his prior report, wherein he diagnosed Respondent with "Alcohol use disorder, moderate, in remission," and concluded that Respondent was able to practice medicine safely with recommended conditions, including attending "a substance abuse program devoted to specifically treating physicians with a substance abuse disorder," and possibly use of naltrexone. (Exhibit 12, p. AG 0121-0122.)

23(c). At the time of Dr. Gagne's report and addendum, Respondent had already attended the Promises inpatient program which treated professionals, a large percentage of whom are physicians.

24. Respondent is a board certified urologist. Prior to the cease practice orders preventing him from practicing, he operated a solo practice which he began in 2000. He has held several leadership positions at Los Robles Hospital and Regional Medical Center (LRHRMC), including Chairman of the Department of Surgery (2000-2003), Chairman of the Operating Room Committee (2003-2004), Vice Chief of Staff (2015-2016), and Vice Chairman of the Department of Surgery (2016). At the administrative hearing, Respondent testified that he feels he can safely practice medicine and that he has no desire to drink alcohol. He noted that he is "very motivated" to return to work for his patients and for his family who have felt the impact of this stressful situation. Respondent continued to maintain that he has not imbibed alcohol since April 2016. However, as set forth above this assertion was not credible, and Respondent's lack of credibility in this regard taints the trustworthiness of the remainder of his testimony.

25(a). Respondent has the support of numerous colleagues who submitted letters on his behalf. They collectively described Respondent as a well-respected physician, an exceptional professional, a superb clinician, and one of the best urologists with whom they have worked. Several also noted that while working alongside him for many years, they

have never seen any behavior or had any suspicion regarding Respondent's improper use of alcohol or impairment from substance abuse.

25(b). Respondent also has the support of his Chief of Staff at LRHRMC, Stephen Reidy, M.D., who submitted a letter and testified on Respondent's behalf. Dr. Reidy credibly noted that, as Chief of Staff, he was aware of Respondent's three DUIs and that any suspicious behavior by Respondent would have been brought to his attention. However, Dr. Reidy has never received information from other hospital employees or personally witnessed Respondent impaired at work. Additionally, Dr. Reidy has observed Respondent at social events and has never seen Respondent drink alcohol at any of these events. According to Dr. Reidy, Respondent is very professional and he is well-respected among the physicians, nurses, administrative staff, and patients. He stated that Respondent "is a vital part of our medical community, and we miss him." Dr. Reidy would like for Respondent to return to work and treat patients again.

LEGAL CONCLUSIONS

1. Cause exists to revoke Respondent's probation in Case No. 05-2013-229351, (which probation was continued in Case No. 800-2016-021830) and impose the stayed revocation of Respondent's license for failure to comply with Condition Number 1 of his probation by failing to abstain completely from the use of products or beverages containing alcohol, as set forth in Factual Findings 3 through 22.

2(a). "Administrative proceedings to revoke, suspend, or impose discipline on a professional license are noncriminal and nonpenal; they are not intended to punish the licensee, but rather to protect the public." (*Griffiths, supra*, 96 Cal.App. 4th 757, 768, citing *Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 785–786.)

2(b). Business and Professions Code section 2229 provides in pertinent part:

> (a) Protection of the public shall be the highest priority for the Division of Medical Quality . . . and administrative law judges of the Medical Quality Hearing Panel in exercising their disciplinary authority.
>
> (b) In exercising his or her disciplinary authority an administrative law judge of the Medical Quality Hearing Panel, [or] the division . . . shall, wherever possible, take action that is calculated to aid in the rehabilitation of the licensee. . . .

2(c). In addressing the Board's paramount concern, protection of the public, the analysis must focus on the likelihood that Respondent will again violate his probation and use alcohol, possibly in a dangerous manner. Although Respondent has an exemplary work record, the Board is not required to postpone 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. In this case, Respondent has a long history of alcohol-related recidivism, and he has been unable to comply with probation despite several attempts to allow him to continue his licensure. No doubt, the leniency has been due to his laudatory work performance and his asserted efforts to maintain his abstinence. However, at the hearing of this matter, Respondent was unable to provide adequate assurances that, if probation was extended once again, he would be now able to comply with the condition he has previously violated. Rather, the evidence established that Respondent is either unable or unwilling to comply with the terms of his probation. Moreover, Respondent's refusal to admit his current violation bodes poorly for the success of continued probation. License revocation of a valued physician is an unfortunate consequence of Respondent's continued failure to comply with his 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 G70281, issued to Respondent, James Edward Pero, M.D., is hereby revoked.

DATED: December 12, 2016

DocuSigned by:
Julie Cabos-Owen
18236F95DE98452...
JULIE CABOS-OWEN
Administrative Law Judge
Office of Administrative Hearings

KAMALA D. HARRIS
Attorney General of California
E. A. JONES III
Supervising Deputy Attorney General
WENDY WIDLUS
Deputy Attorney General
State Bar No. 82958
California Department of Justice
300 So. Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 897-2867
Facsimile: (213) 897-9395
E-mail: Wendy.Widlus@doj.ca.gov
Attorneys for Complainant

FILED
STATE OF CALIFORNIA
MEDICAL BOARD OF CALIFORNIA
SACRAMENTO Oct 5 2016
BY L. Richards ANALYST

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

In the Matter of the Petition to Revoke Probation Against, **JAMES EDWARD PERO, M.D.** **2230 Lynn Rd., Suite 350** **Thousand Oaks, CA 93160** **Physician's and Surgeon's Certificate No. G70281** Respondent.	Case No. 800-2016-026746 PETITION TO REVOKE PROBATION

Complainant alleges:

PARTIES

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

2. On or about November 13, 1990, the Medical Board of California (Board) issued Physician's and Surgeon's Certificate Number G70281 to James Edward Pero, 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 October 31, 2018, unless renewed.

3. On September 20, 2016, the Board issued a *Cease Practice Order* in Case No. 05-2013-229351 due to Respondent testing positive for phosphatidyl ethanol thereby violating

Probationary Condition No. 1 as ordered in the below Decision.

4. In a disciplinary action entitled "In the Matter of Accusation Against James Edward Pero, M.D.," Case No. 05-2013-229351, the Medical Board of California issued a decision, effective May 29, 2015, 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 five (5) years with certain terms and conditions. A copy of that decision is attached as Exhibit A and is incorporated by reference.

JURISDICTION

5. This 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 unless otherwise indicated.

6. 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."

7. 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 [b]oard, 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."

8. Section 2234 of the Code states in pertinent part:

"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.

"..."

"..."

"(e) The commission of any act involving dishonesty or corruption which is substantially related to the qualifications, functions, or duties of a physician and surgeon.

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

"..."

CAUSE TO REVOKE PROBATION

(Alcohol-Failure To Abstain From Use)

9. At all times after the effective date of Respondent's probation, Condition 1 stated:

"**ALCOHOL--ABSTAIN FROM USE.** Respondent shall abstain completely from the use of the products or beverages containing alcohol.

"If Respondent has a confirmed positive biological fluid testing 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 final decision on an

accusation and/or petition to revoke probation. An accusation and/or petition to revoke probation shall be filed by the Board within 15 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. A decision shall be received from the Administrative Law Judge or the Board within 15 days unless good cause can be shown for the delay. The cessation of practice shall not apply to the reduction of the probationary time period.

". . ."

10. Respondent's probation is subject to revocation because he failed to comply with Probation Condition 1, referenced above. The facts and circumstances regarding this violation are as follows:

A. On or about July 19, 2016, Respondent was selected to provide a sample of his blood for testing for the presence of alcohol, and on July 19, 2016, did provide a blood sample for testing.

B. On or about July 28, 2016, First Lab provided Respondent's Probation Analyst VG with the results of the chemical test performed on the blood sample collected from Respondent on July 19, 2016. The chemical results were positive for phosphatidylethanols,[1] indicating Respondent had ingested alcohol in violation of his probationary terms and conditions.

C. On or about July 28, 2016, VG requested Respondent to provide her with an explanation for the positive test result from the blood sample collected from Respondent on July 19, 2016.

D. In his written response to VG Respondent stated:

"I do not recall any situations prior to that blood test where I may have potentially unknowingly consumed any alcohol. The only exposure I had just prior to that blood test would have been through external contact. Since I am currently not working, I have been doing

[1] Phosphatidylethanols are a group of phospholipids formed only in the presence of ethanol via the action of phospholipase D. Levels of phosphatidylethanols in blood are used as markers of previous alcohol consumption. For this purpose, PEth is more sensitive than carbohydrate deficient transferrin (CDT), urinary ethyl glucuronide (EtG) and ethyl sulfate (EtS.)

extensive cleaning and organizing around the house. Earlier this month I found that both our garage and storage shed had rat infestation with droppings. All the surfaces and stored items including children's toy and patio furniture had to be cleaned, sprayed and wiped down with sanitizer. The disinfectant spray I used I borrowed from my office. It is ethyl alcohol based and I used about half a gallon over a three day period. Throughout those many hours of cleaning, there was transdermal and vapor inhalational exposure.

"On my copy of the lab request, I saw that the account listed was the California Board of Registered Nurses on Probation. I don't know if that has any relevance, but I would like to be sure there were no clerical errors. The fact is that I haven't drank any alcohol since April of this year. I don't see how the test would have come up positive other than the effects of the external exposure as I mentioned above or there has to be a problem with the test itself."

E. Respondent's explanation for his positive test result is not scientifically valid.

DISCIPLINE CONSIDERATIONS

11. On or about February 15, 2000, in case number 99S003147 in a criminal proceeding entitled *People v. James Edward Pero,* in the Superior Court of the State of California, County of Ventura, Respondent was convicted of the offense of driving under the influence of alcohol or drugs, in violation of Vehicle Code section 23152, subdivision (a).

12. On or about July 5, 2002, in case number 2001025853 in a criminal proceeding entitled *People v. James Edward Pero,* in the Superior Court of the State of California, County of Ventura, Respondent was convicted in Count 1 of the offense of driving under the influence of alcohol or drugs, in violation of Vehicle Code section 23152 (a) and the offense of prior conviction of driving under the influence of alcohol or drugs.

13. Respondent's Physician's and Surgeon's Certificate has suffered two prior orders of discipline, in case number R-33 (02-1990-5685) and 06-2002-133201. The Disciplinary Order in case No. 06-2002-133201, became effective on March 9, 2005, and placed Respondent's Physician's and Surgeon's Certificate on three years probation with various terms and conditions based upon Respondent's prior convictions related to alcohol as set forth in paragraphs 11 and 12, inclusive, which are incorporated by reference herein as if fully set forth. The probation ended on

or about March 9, 2008. That decision is now final and is incorporated by reference as if fully set forth.

14. An Order for Probationary Certificate, effective November 13, 1990, in case number R-33 (02-1990-5685), placed Respondent's Physician's and Surgeon's Certificate on probation for one year with various terms and conditions, from approximately November 19, 1990, to approximately November 19, 1991, based on findings that included the following:

(a) Respondent, while in his fourth year of medical school in the State of Illinois, used the name of a licensed Illinois physician to forge one prescription for the controlled substance "Plegine" for his girlfriend's use and multiple prescriptions for the controlled substance "Fastin." Respondent's temporary Illinois medical license was placed on probation for a two-year period.

(b) Respondent failed to disclose the Illinois Probationary Order to the Division of Licensing of the Medical Board of California when he applied for a Physician's and Surgeon's Certificatc in 1990. That decision is now final and is incorporated by reference as if fully set forth.

15. On April 27, 2016, the Board issued a *Cease Practice Order* in Case No. 05-2013-229351 due to Respondent testing positive for phosphatidyl ethanol thereby violating Probationary Condition No. 1 as ordered in the disciplinary action entitled "In the Matter of Accusation Against James Edward Pero, M.D.," Case No. 05-2013-229351, the Medical Board of California issued a decision, effective May 29, 2015.

16. On May 10, 2016, a Petition to Revoke Probation in Case No. 800-2016-021830 was filed based upon Respondent's violation of probation due to his admission that he drank beer on April 9, 2016.

17. In a disciplinary action entitled "In the Matter of Accusation Against James Edward Pero, M.D.," Case No. 800-2016-021830, the Medical Board of California issued a decision, effective September 28, 2016, in which the Petition to Revoke Probation was sustained and Respondent's Physician's and Surgeon's Certificate was placed on probation for a period of five (5) years with certain terms and conditions.

///

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. 05-2013-229351 and imposing the disciplinary order that was stayed thereby revoking Physician's and Surgeon's Certificate No. G70281 issued to James Edward Pero, M.D.;

2. Revoking or suspending Physician's and Surgeon's Certificate No. G70281, issued to Respondent;

3. Revoking, suspending or denying approval of Respondent's authority to supervise physician assistants, pursuant to section 3527 of the Code;

4. Ordering Respondent to pay the Medical Board of California, if placed on probation, the costs of probation monitoring; and

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

DATED: October 5, 2016

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

LA2016501267
62138311.docx

Exhibit A

Decision and Order

Medical Board of California Case No. 05-2013-229351

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

In the Matter of the Accusation Against:	)	
	)	
	)	
JAMES EDWARD PERO, M.D.	)	Case No. 05-2013-229351
	)	
Physician's and Surgeon's Certificate No. G 70281	)	
	)	
Respondent	)	
	)	

DECISION AND ORDER

The attached Stipulated Settlement and Disciplinary Order 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 29, 2015.

IT IS SO ORDERED: May 1, 2015.

MEDICAL BOARD OF CALIFORNIA

By: Dev Gnanadev MD
Dev Gnanadev, M.D., Chair
Panel B

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.
Cynthia Kauza
Signature
Ton Custodian of records
Title
4/20/2016
Date

KAMALA D. HARRIS
Attorney General of California
E. A. JONES III
Supervising Deputy Attorney General
VLADIMIR SHALKEVICH
Deputy Attorney General
State Bar No. 173955
California Department of Justice
300 So. Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 897-2148
Facsimile: (213) 897-9395
Attorneys for Complainant

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

In the Matter of the Accusation Against: **JAMES EDWARD PERO, M.D.** **2230 Lynn Rd., Suite350** **Thousand Oaks, CA 93160** **Physician's and Surgeon's Certificate No. G 70281** Respondent.	Case No. 05-2013-229351 OAH No. 2014060051 **STIPULATED SETTLEMENT AND DISCIPLINARY ORDER**

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

PARTIES

1. Kimberly Kirchmeyer ("Complainant") is the Executive Director of the Medical Board of California. She brought this action solely in her official capacity and is represented in this matter by Kamala D. Harris, Attorney General of the State of California, by Vladimir Shalkevich, Deputy Attorney General.

2. Respondent JAMES EDWARD PERO, M.D. ("Respondent") is represented in this proceeding by attorney Henry Lewin, Esq., whose address is: 11377 West Olympic Blvd., 5th Floor, Los Angeles, CA 90064-1683.

3. On or about November 13, 1990, the Medical Board of California issued Physicians and Surgeon's Certificate No. G 70281 to JAMES EDWARD PERO, M.D. (Respondent). The

Physician's and Surgeon's Certificate was in full force and effect at all times relevant to the charges brought in Accusation No. 05-2013-229351 and will expire on October 31, 2016, unless renewed.

JURISDICTION

4. Accusation No. 05-2013-229351 was filed before the Medical Board of California (Board,) Department of Consumer Affairs, and is currently pending against Respondent. The Accusation and all other statutorily required documents were properly served on Respondent on April 21, 2014. Respondent timely filed his Notice of Defense contesting the Accusation.

5. A copy of Accusation No. 05-2013-229351 is attached as exhibit A and incorporated herein by reference.

ADVISEMENT AND WAIVERS

6. Respondent has carefully read, fully discussed with counsel, and understands the charges and allegations in Accusation No. 05-2013-229351. Respondent has also carefully read, fully discussed with counsel, and understands the effects of this Stipulated Settlement and Disciplinary Order.

7. Respondent is fully aware of his legal rights in this matter, including the right to a hearing on the charges and allegations in the Accusation; the right to be represented by counsel at his own expense; the right to confront and cross-examine the witnesses against him; the right to present evidence and to testify on his own behalf; the right to the issuance of subpoenas to compel the attendance of witnesses and the production of documents; the right to reconsideration and court review of an adverse decision; and all other rights accorded by the California Administrative Procedure Act and other applicable laws.

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

CULPABILITY

9. Respondent does not contest that, at an administrative hearing, Complainant could establish a prima facie case with respect to the charges and allegations contained in Accusation No. 05-2013-229351 and that he has thereby subjected his license to disciplinary action.

10. Respondent agrees that if he ever petitions for early termination or modification of probation, or if the Board ever petitions for revocation of probation, all of the charges and allegations contained in Accusation No. 05-2013-229351 shall be deemed true, correct and fully admitted by Respondent for purposes of that proceeding or any other licensing proceeding involving respondent in the State of California.

CONTINGENCY

11. This stipulation shall be subject to approval by the Medical Board of California. Respondent understands and agrees that counsel for Complainant and the staff of the Medical Board of California may communicate directly with the Board regarding this stipulation and settlement, without notice to or participation by Respondent or his counsel. By signing the stipulation, Respondent understands and agrees that he may not withdraw his agreement or seek to rescind the stipulation prior to the time the Board considers and acts upon it. If the Board fails to adopt this stipulation as its Decision and Order, the Stipulated Settlement and Disciplinary Order shall be of no force or effect, except for this paragraph, it shall be inadmissible in any legal action between the parties, and the Board shall not be disqualified from further action by having considered this matter.

12. The parties understand and agree that Portable Document Format (PDF) and facsimile copies of this Stipulated Settlement and Disciplinary Order, including Portable Document Format (PDF) and facsimile signatures thereto, shall have the same force and effect as the originals.

13. In consideration of the foregoing admissions and stipulations, the parties agree that the Board may, without further notice or formal proceeding, issue and enter the following Disciplinary Order:

DISCIPLINARY ORDER

IT IS HEREBY ORDERED that Physician's and Surgeon's Certificate No. G 70281 issued to Respondent JAMES EDWARD PERO, M.D. (Respondent) is revoked. However, the revocation is stayed and Respondent is placed on probation for five (5) years on the following terms and conditions.

1. 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 final decision on an accusation and/or a petition to revoke probation. An accusation and/or petition to revoke probation shall be filed by the Board within 15 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. A decision shall be received from the Administrative Law Judge or the Board within 15 days unless good cause can be shown for the delay. 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 15 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.

2. 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 final decision on an accusation and/or a petition to revoke probation. An accusation and/or petition to revoke probation shall be filed by the Board within 15 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. A decision shall be received from the Administrative Law Judge or the Board within 15 days unless good cause can be shown for the delay. 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 15 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.

3. PROFESSIONALISM PROGRAM (ETHICS COURSE). Within 60 calendar days of the effective date of this Decision, Respondent shall enroll in a professionalism program, that meets the requirements of Title 16, California Code of Regulations (CCR) section 1358. Respondent shall participate in and successfully complete that program. Respondent shall provide any information and documents that the program may deem pertinent. Respondent shall successfully complete the classroom component of the program not later than six (6) months after Respondent's initial enrollment, and the longitudinal component of the program not later than the time specified by the program, but no later than one (1) year after attending the classroom component. The professionalism program shall be at Respondent's expense and shall be in addition to the Continuing Medical Education (CME) requirements for renewal of licensure.

A professionalism program taken after the acts that gave rise to the charges in the Accusation, but prior to the effective date of the Decision may, in the sole discretion of the Board or its designee, be accepted towards the fulfillment of this condition if the program would have been approved by the Board or its designee had the program been taken after the effective date of this Decision.

Respondent shall submit a certification of successful completion to the Board or its designee not later than 15 calendar days after successfully completing the program or not later

than 15 calendar days after the effective date of the Decision, whichever is later.

4. PSYCHIATRIC EVALUATION. Within 30 calendar days of the effective date of this Decision, and on whatever periodic basis thereafter may be required by the Board or its designee, Respondent shall undergo and complete a psychiatric evaluation (and psychological testing, if deemed necessary) by a Board-appointed board certified psychiatrist, who shall consider any information provided by the Board or designee and any other information the psychiatrist deems relevant, and shall furnish a written evaluation report to the Board or its designee. Psychiatric evaluations conducted prior to the effective date of the Decision shall not be accepted towards the fulfillment of this requirement. Respondent shall pay the cost of all psychiatric evaluations and psychological testing.

Respondent shall comply with all restrictions or conditions recommended by the evaluating psychiatrist within 15 calendar days after being notified by the Board or its designee.

5. WORKSITE MONITOR. Within 30 calendar days of the effective date of the Decision, the Respondent shall submit to the Board of its designee for prior approval the name of a worksite monitor. The worksite monitor shall meet the following criteria to be approved by the Board: The worksite monitor shall not have a current or former financial, personal, or familial relationship with the Respondent, or other relationship that could reasonably be expected to compromise the ability of the monitor to render impartial and unbiased reports to the Board. Under no circumstances shall a worksite monitor be an employee or supervisee of Respondent. The worksite monitor's scope of practice shall include the scope of practice of the licensee being monitored, or be another licensed health care professional if no monitor with like scope of practice is available, or, as approved by the Board, be a person in a position of authority who is capable of monitoring Respondent at work. If a licensed professional, the worksite monitor shall have an active unrestricted license with no disciplinary action within the last five (5) years. The worksite monitor shall sign an affirmation that he or she has reviewed the terms and conditions of the Respondent's disciplinary order and agrees to monitor the Respondent as set forth by the Board.

The worksite monitor shall adhere to the following required methods of monitoring the

Respondent: 1) Have face-to-face contact with Respondent in the work environment on a weekly basis as determined by the Board; 2) interview other staff in the office regarding the Respondent's behavior, if requested by the Board; 3) Review the Respondent's work attendance.

Reporting by the worksite monitor to the Board shall comply with the following: 1) worksite monitor shall verbally report any suspected substance abuse to the Board and the Respondent's employer or supervisor within one (1) business day of occurrence. If the suspected substance abuse does not occur during the Board's normal business hours, the verbal report shall be made to the Board within one (1) hour of the beginning of the next business day. A written report that includes the date, time, and location of the suspected abuse, the licensee's actions and any other information deemed important by the worksite monitor shall be submitted to the Board within 48 hours of the occurrence.

The worksite monitor shall complete and submit a written report monthly or as directed by the Board. The report shall include the following: a) Respondent's name and license number; b) the worksite monitor's name and signature; c) the worksite monitor's license number, if applicable; d) the worksite location; e) the dates the Respondent had face to face contact with the monitor; f) the names of worksite staff interviewed, if applicable; g) an attendance report; h) any change in behavior and/or personal habits; and i) any indicators that can lead to suspected substance abuse.

Respondent shall complete any required consent forms and execute agreements with the approved worksite monitor(s) and the Board authorizing the Board and worksite monitor to exchange information.

If the worksite monitor resigns or is no longer available, the Respondent shall, within five (5) calendar days of such resignation or unavailability, submit to the Board the name and qualifications of a replacement monitor who will be assuming that responsibility within 15 calendar days. If the Respondent fails to obtain approval of a replacement monitor within 60 calendar days of the resignation or unavailability of the monitor, the licensee 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 licensee shall cease the practice of medicine until a

replacement monitor is approved and assumes monitoring responsibility.

Worksite monitoring costs shall be borne by the licensee.

6. NOTIFICATION. Within seven (7) days of the effective date of this Decision, the 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.

7. SUPERVISION OF PHYSICIAN ASSISTANTS. During probation, Respondent is prohibited from supervising physician assistants.

8. 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. 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.

10. GENERAL PROBATION REQUIREMENTS.

Compliance with Probation Unit

Respondent shall comply with the Board's probation unit and all terms and conditions of this Decision.

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.

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.

11. 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.

12. 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 in California 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. All time spent in an intensive training program which has been approved by the Board or its designee shall not be considered non-practice. 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 a clinical training 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 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; and General Probation Requirements.

13. 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.

14. 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.

15. 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 his or 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.

16. 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.

ACCEPTANCE

I have carefully read the above Stipulated Settlement and Disciplinary Order and have fully discussed it with my attorney, Henry Lewin, Esq.. I understand the stipulation and the effect it will have on my Physician's and Surgeon's Certificate I enter into this Stipulated Settlement and Disciplinary Order voluntarily, knowingly, and intelligently, and agree to be bound by the Decision and Order of the Medical Board of California.

DATED: 3/6/2015

JAMES EDWARD PERO, M.D.
Respondent

I have read and fully discussed with Respondent JAMES EDWARD PERO, M.D. the terms and conditions and other matters contained in the above Stipulated Settlement and Disciplinary Order I approve its form and content

DATED: 3/09/15

Henry Lewin, Esq.
Attorney for Respondent

ENDORSEMENT

The foregoing Stipulated Settlement and Disciplinary Order is hereby respectfully submitted for consideration by the Medical Board of California.

Dated: 3/9/15

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
E. A. JONES III
Supervising Deputy Attorney General

VLADIMIR SHALKEVICH
Deputy Attorney General
Attorneys for Complainant

LA2014611571
61496119.doc

Exhibit A

Accusation No. 05-2013-229351

KAMALA D. HARRIS
Attorney General of California
E. A. JONES III
Supervising Deputy Attorney General
VLADIMIR SHALKEVICH
Deputy Attorney General
State Bar No. 173955
California Department of Justice
300 So. Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 897-7336
Facsimile: (213) 897-9395
Attorneys for Complainant

FILED
STATE OF CALIFORNIA
MEDICAL BOARD OF CALIFORNIA
SACRAMENTO April 21 2014
BY R. FIRDAUS ANALYST

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

In the Matter of the Accusation Against:	Case No. 05-2013-229351
JAMES EDWARD PERO, M.D. **2230 Lynn Rd., Suite 350** **Thousand Oaks, CA 93160** **Physician's and Surgeon's Certificate No. G 70281** Respondent.	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.

2. On or about November 13, 1990, the Medical Board of California issued Physicians and Surgeon's Certificate Number G 70281 to James Edward Pero, M.D. (Respondent). The Physician's and Surgeon's Certificate was in full force and effect at all times relevant to the charges brought herein and will expire on October 31, 2014, unless renewed.

JURISDICTION

3. This Accusation is brought before the Medical Board of California (Board), Department of Consumer Affairs, under the authority of the following laws. All section

references are to the Business and Professions Code unless otherwise indicated.

4. Section 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.

5. 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 Division of Medical Quality[1] may order discipline of the licensee in accordance with Section 2227 or the Division of Licensing 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.

///

---

[1] 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 (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.

FACTUAL ALLEGATIONS

2013 Conviction

6. On or about April 12, 2013, in the Superior Court of the State of California, for the County of Los Angeles case number 2012045466MA, entitled *People vs. James Edward Pero*, Respondent was convicted, upon his plea of guilty, of misdemeanor violation of Vehicle Code section 23152, subdivision (b), driving while having a blood alcohol level of 0.08% or higher (Count 2). In addition, Respondent admitted the special allegation that a minor passenger was present in the vehicle at the time of the violation subject of the guilty plea, pursuant to Vehicle Code section 23572, subdivision (a)(3).

7. Respondent's sentence included summary probation for a period of 36 months, and other terms and condition including, serving ten days in the county jail, subject to work release, with credit for one day, payment of fines, including $2,377.00, and reporting to a driving under the influence program, among other things.

8. On or about January 1, 2013, at approximately 1:30 a.m., Respondent drove his black car southbound on US 101 freeway in the #2 lane directly in front of a fully marked black and white California Highway Patrol (CHP) patrol vehicle (PV) at a high rate of speed. Two CHP officers were in the PV traveling southbound on US 101 north of Pleasant Valley Rd. in the #3 lane. A CHP officer observed the right side tires of Respondent's car cross the broken white lines that separate the #2 lane and the #3 lane by approximately one foot and then drift back to the left. A CHP officer placed the PV directly behind the Respondent's car and established a bumper pace matching the speed of Respondent's car with that of the PV, and determined the speed of Respondent's car as approximately 82 mph. The CHP officers initiated a traffic stop. A CHP officer observed a small child sitting in the front passenger seat of Respondent's car. The driver appeared lethargic and fumbled through his wallet for several seconds. The CHP officer asked for Respondent's insurance twice. Respondent seemed confused and dazed and was unable to provide insurance or registration. His eyes were red/watery and his speech was slow and slurred. The officer also smelled the odor of an alcoholic beverage emitting from within Respondent's car, and asked Respondent how much he had to drink. He replied that he had several glasses of

champagne. The officer asked Respondent to exit his car and to stand to the right side of the PV. The officer noticed that Respondent was unsteady on his feet. He could also still smell the odor of an alcoholic beverage emitting from Respondent's person. The officer once again asked Respondent how much he had to drink. He replied that he had consumed approximately three glasses of champagne at his friend's house in Camarillo. The officer asked Respondent who was his passenger. Respondent replied that it was his eight-year-old son. The officer asked more questions and administered field sobriety tests (FST) to Respondent. Finally, based on Respondent's driving, objective signs of intoxication, statements, and his FST performance, the CHP officer arrested him for driving while under the influence. When the officer sat Respondent in his PV and advised him of his implied consent, Respondent became irritated and began to use profanity stating that he is not going to do anymore tests. The officer told Respondent a second time about his implied consent and he chose to submit to a breath test. On the way to the CHP office, the PV made another traffic stop that took approximately 30-40 minutes.

9. At the CHP office, Respondent asked if he could use the restroom. He was observed at least 30 minutes prior to the anticipated breath test. However, when the test was about to be administered. Respondent refused, stating he wanted to provide a blood sample instead. Respondent was transported to VCMC for his blood to be drawn. At VCMC, however, Respondent initially refused to consent to a blood draw. Respondent eventually allowed an RN to collect a blood sample from him, after delaying collection of his blood sample for more than three hours after the time he was initially stopped by the police. The blood sample was booked into the Ventura County Crime Lab refrigerator. Testing showed that at the time it was collected Respondent's blood alcohol level was .12%.

CAUSE FOR DISCIPLINE

(Dangerous Use of Alcohol)

10. Respondent is subject to disciplinary action under section 2239, because he consumed alcohol in a manner that was dangerous or injurious to himself, to others, or to the public. The facts and circumstances are as set forth in paragraphs 6 through 9, inclusive, which are incorporated by reference herein as if fully set forth. Respondent consumed alcohol and drove his

vehicle in a dangerous manner, endangering himself and/or others, including his minor son, who was sitting in the front passenger seat of his speeding car.

DISCIPLINE CONSIDERATIONS

11. To determine the degree of discipline, if any, to be imposed on Respondent, Complainant alleges that Respondent has suffered two prior criminal convictions involving the use of alcohol, which resulted in disciplinary action by the Board. The circumstances are as follows:

2000 Conviction

12. On or about February 15, 2000, in case number 99S003147 of the Superior Court of the State of California, County of Ventura, in the proceeding entitled People v. James Edward Pero, Respondent was convicted by the Court of the offense of driving under the influence of alcohol or drugs, in violation of Vehicle Code section 23152(a). On or about February 15, 2000, the imposition of sentence was suspended and Respondent was placed on 3 years of formal probation with terms and conditions which included 5 days in county jail, driver license suspension for 90 days, and the payment of $1,832.00 in fines and court fees.

13. The circumstances of the February 15, 2000, conviction are that on or about September 15, 1999, Respondent was stopped for making an improper lane change and for running a red stop signal. The CHP officer who stopped Respondent smelled alcohol and, after administering an FST, arrested Respondent for driving under the influence of alcohol or drugs in violation of Vehicle Code section 23152, subdivision (a).

2002 Conviction

14. On or about July 5, 2002, in case number 2001025853 of the Superior Court of the State of California, County of Ventura, in the proceeding entitled *People v. James Edward Pero*, Respondent was convicted by plea of guilty and special allegation admission as follows: (a) Count 1 - Driving under the influence of alcohol or drugs, in violation of Vehicle Code section 23152(a); and (b) Count 2 - Prior conviction of driving under the influence of alcohol or drugs on February 15, 2000, a violation of Vehicle Code section 23152(a).

15. On or about July 5, 2002, the imposition of sentence was suspended and Respondent was placed on 5 years of formal probation with terms and conditions which included 30 days in county jail, driver license suspension for 18 months, and the payment of $1,811.00 in fines and court fees.

16. The circumstances of the July 5, 2002, conviction are that on June 13, 2001, a CHP officer stopped Respondent for driving in excess of the speed limit and for making an abrupt lane change. The officer smelled alcohol on Respondent's breath and, after administering an FST, arrested Respondent for driving under the influence of alcohol or drugs in violation of Vehicle Code section 23152, subdivision (a).

17. On or about July 5, 2002, Respondent was found in violation of his probation by having been arrested on June 13, 2001, for driving under the influence of alcohol or drugs in violation of Vehicle Code section 23152, subdivision (a) and for driving with a blood alcohol level of 0.08 percent or more in violation of Vehicle Code section 23152, subdivision (b). An order dated July 5, 2002, imposing a 15-day jail term for the probation violation, was modified on July 11, 2002, to allow Respondent to participate in the work furlough program.

18. To further determine the degree of discipline, if any, to be imposed on Respondent, Complainant alleges that Respondent has twice previously been subject to discipline by the Board. The circumstances are as follows:

19. Respondent's Physician's and Surgeon's Certificate has suffered two prior orders of discipline, in cases numbers R-33 (02-1990-5685) and 06-2002-133201. The Disciplinary Order in case No. 06-2002-133201, became effective on March 9, 2005, and placed Respondent's Physician's and Surgeon's Certificate on three years probation with various terms and conditions. The probationary order was based on the Respondent's prior convictions related to alcohol and the facts and circumstances thereof are as set forth in paragraphs 12 through 17, inclusive, which are incorporated by reference herein as if fully set forth. The probation ended on or about March 9, 2008.

20. In addition, an Order for Probationary Certificate, effective November 13, 1990, in case number R-33 (02-1990-5685), placed Respondent's Physician's and Surgeon's Certificate on

probation for one year with various terms and conditions, from approximately November 19, 1990 to approximately November 19, 1991. The probationary order was based on findings that included the following:

(a) Respondent, while in his fourth year of medical school in the State of Illinois, used the name of a licensed Illinois physician to forge for his girlfriend's use one prescription for the controlled substance "Plegine" and multiple prescriptions for the controlled substance "Fastin." Respondent's temporary Illinois medical license was placed on probation for a two-year period. At the end of the two-year probation term, the Illinois license was suspended for 30 days and Respondent paid a fine of $1,500.00.

(b) Respondent moved to California and applied for a Physician's and Surgeon's Certificate in 1990. Respondent failed to disclose the Illinois Probationary Order to the Division of Licensing of the Medical Board of California.

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 Physicians and Surgeon's Certificate Number G 70281, issued to James Edward Pero, M.D.

2. Revoking, suspending or denying approval of James Edward Pero, M.D.'s authority to supervise physician assistants, pursuant to section 3527 of the Code;

3. Ordering James Edward Pero, M.D. to pay the Medical Board of California, if placed on probation, the costs of probation monitoring; and

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

DATED: April 21, 2014

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

LA2014611571
61221990.doc