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

In the Matter of the Accusation
Against:

RICHARD WARREN CUNNINGHAM, MD
Physician's and Surgeon's Certificate No. G40588
Respondent

Case No. 11-2013-229623

DECISION

The attached Stipulated Surrender of License and 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 March 18, 2016.

IT IS SO ORDERED March 11, 2016.

MEDICAL BOARD OF CALIFORNIA

By: Kimberly Kirchmeyer
   Executive Director
In the Matter of the Accusation Against:

RICHARD W. CUNNINGHAM, M.D. 
445 Hidden Pines Lane 
Del Mar, CA 92014-3313 

Physician's and Surgeon's Certificate No. 
G40588,

Respondent.

In the interest of a prompt and speedy settlement of this matter, consistent with the public interest and the responsibility of the Medical Board of California of the Department of Consumer Affairs, the parties hereby agree to the following Stipulated Surrender and Disciplinary Order which will be submitted to the Board for approval and adoption as the final disposition of the Accusation.

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 Richard D. Marino, Deputy Attorney General.
2. RICHARD W. CUNNINGHAM, M.D. (Respondent) is represented in this proceeding by attorney David M. Balfour, Esq., whose address is DiCaro, Coppo and Popske, 2780 Gateway Road, Carlsbad CA 92009.

3. On or about August 20, 1979, the Medical Board of California issued Physician's and Surgeon's Certificate No. G40588 to RICHARD W. CUNNINGHAM, M.D. (Respondent). The Physician's and Surgeon's Certificate expired on April 30, 2015, and has not been renewed.

JURISDICTION

4. Accusation No. 11-2013-229623 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 September 16, 2015. Respondent timely filed his Notice of Defense contesting the Accusation. A copy of Accusation No. 11-2013-229623 is attached as Exhibit A and incorporated by reference.

ADVISEMENT AND WAIVERS

5. Respondent has carefully read, fully discussed with counsel, and understands the charges and allegations in Accusation No. 11-2013-229623. Respondent also has carefully read, fully discussed with counsel, and understands the effects of this Stipulated Surrender of License and Order.

6. 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.

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

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Stipulated Surrender of License (Case No. 11-2013-229623)
CULPABILITY

8. Respondent admits that, if the matter proceeded to hearing, Complainant would be able to present a _prima facie_ case for each and every charge and allegation in Accusation No. 11-2013-229623; agrees that cause exists for discipline; and, hereby, surrenders his Physician's and Surgeon's Certificate No. G40588 for the Board's formal acceptance.

9. Respondent understands that by signing this stipulation he enables the Board to issue an order accepting the surrender of his Physician's and Surgeon's Certificate without further process.

RESERVATION

10. The admissions made by Respondent herein are only for the purposes of this proceeding, or any other proceedings in which the Medical Board of California or other professional licensing agency is involved, and shall not be admissible in any other criminal or civil proceeding.

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 surrender, 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 Surrender 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 Surrender of License and 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 Order:

ORDER

IT IS HEREBY ORDERED that Physician's and Surgeon's Certificate No. G40588, issued to Respondent RICHARD W. CUNNINGHAM, M.D., is surrendered and accepted by the Medical Board of California.

1. The surrender of Respondent’s Physician’s and Surgeon’s Certificate and the acceptance of the surrendered license by the Board shall constitute the imposition of discipline against Respondent. This stipulation constitutes a record of the discipline and shall become a part of Respondent’s license history with the Medical Board of California.

2. Respondent shall lose all rights and privileges as a physician and surgeon in California as of the effective date of the Board’s Decision and Order.

3. Respondent shall cause to be delivered to the Board his pocket license and, if one was issued, his wall certificate on or before the effective date of the Decision and Order.

4. If Respondent ever files an application for licensure or a petition for reinstatement in the State of California, the Board shall treat it as a petition for reinstatement. Respondent must comply with all the laws, regulations and procedures for reinstatement of a revoked license in effect at the time the petition is filed, and all of the charges and allegations contained in Accusation No. 11-2013-229623 shall be deemed to be true, correct and admitted by Respondent when the Board determines whether to grant or deny the petition.

5. If Respondent should ever apply or reapply for a new license or certification, or petition for reinstatement of a license, by any other health care licensing agency in the State of California, all of the charges and allegations contained in Accusation, No. 11-2013-229623 shall be deemed to be true, correct, and admitted by Respondent for the purpose of any Statement of Issues or any other proceeding seeking to deny or restrict licensure.
ACCEPTANCE

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

DATED: 12-31-2015

RICHARD W. CUNNINGHAM, M.D.
Respondent

I have read and fully discussed with Respondent RICHARD W. CUNNINGHAM, M.D. the terms and conditions and other matters contained in this Stipulated Surrender of License and Order. I approve its form and content.

DATED: 12/31/2015

DAVID M. BALFOUR, ESQ.
Attorney for Respondent

ENDORSEMENT

The foregoing Stipulated Surrender of License and Order is hereby respectfully submitted for consideration by the Medical Board of California of the Department of Consumer Affairs.

Dated: 1/19/2016

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
JUDITH T. ALVARADO
Supervising Deputy Attorney General

RICHARD D. MARINO
Deputy Attorney General
Attorneys for Complainant

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Exhibit A

Accusation No. 11-2013-229623
BEFORE THE
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

Richard W. Cunningham, M.D.
445 Hidden Pines Lane
Del Mar, CA 92014

Physician's and Surgeon's Certificate
No. G40588,

Respondent.

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, State of California (Board).

2. On or about August 20, 1979, the Board issued Physician's and Surgeon's Certificate
Number G40588 to Richard W. Cunningham, M.D. (Respondent). The Physician's and Surgeon's
Certificate expired on April 30, 2015, and has not been renewed.

JURISDICTION

3. This Accusation is brought before the Board, under the authority of the following
laws. All section references are to the Business and Professions Code unless otherwise indicated.
4. Section 2227 of the Code provides:

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

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

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

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

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

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

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

5. Section 2234 of the Code, states:

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

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

   "(b) Gross negligence."
“(c) Repeated negligent acts. To be repeated, there must be two or more negligent acts or omissions. An initial negligent act or omission followed by a separate and distinct departure from the applicable standard of care shall constitute repeated negligent acts.

“(1) An initial negligent diagnosis followed by an act or omission medically appropriate for that negligent diagnosis of the patient shall constitute a single negligent act.

“(2) When the standard of care requires a change in the diagnosis, act, or omission that constitutes the negligent act described in paragraph (1), including, but not limited to, a reevaluation of the diagnosis or a change in treatment, and the licensee’s conduct departs from the applicable standard of care, each departure constitutes a separate and distinct breach of the standard of care.

“(d) Incompetence.

“(e) The commission of any act involving dishonesty or corruption 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.

“(g) The practice of medicine from this state into another state or country without meeting the legal requirements of that state or country for the practice of medicine. Section 2314 shall not apply to this subdivision. This subdivision shall become operative upon the implementation of the proposed registration program described in Section 2052.5.

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

6. Section 2241 of the Code provides:

“(a) A physician and surgeon may prescribe, dispense, or administer prescription drugs, including prescription controlled substances, to an addict under his or her treatment for a purpose other than maintenance on, or detoxification from, prescription drugs or controlled substances.

“(b) A physician and surgeon may prescribe, dispense, or administer prescription drugs or prescription controlled substances to an addict for purposes of maintenance on, or
detoxification from, prescription drugs or controlled substances only as set forth in
subdivision (c) or in Sections 11215, 11217, 11217.5, 11218, 11219, and 11220 of the
Health and Safety Code. Nothing in this subdivision shall authorize a physician and
surgeon to prescribe, dispense, or administer dangerous drugs or controlled substances to a
person he or she knows or reasonably believes is using or will use the drugs or substances
for a nonmedical purpose.

“(c) Notwithstanding subdivision (a), prescription drugs or controlled substances may
also be administered or applied by a physician and surgeon, or by a registered nurse acting
under his or her instruction and supervision, under the following circumstances:

“(1) Emergency treatment of a patient whose addiction is complicated by the presence
of incurable disease, acute accident, illness, or injury, or the infirmities attendant upon age.

“(2) Treatment of addicts in state-licensed institutions where the patient is kept under
restraint and control, or in city or county jails or state prisons.

“(3) Treatment of addicts as provided for by Section 11217.5 of the Health and Safety
Code.

“(d) (1) For purposes of this section and Section 2241.5, “addict” means a person
whose actions are characterized by craving in combination with one or more of the
following:

“(A) Impaired control over drug use.

“(B) Compulsive use.

“(C) Continued use despite harm.

“(2) Notwithstanding paragraph (1), a person whose drug-seeking behavior is
primarily due to the inadequate control of pain is not an addict within the meaning of this
section or Section 2241.5.

7. Section 2242 of the Code, in pertinent part, provides:

“(a) Prescribing, dispensing, or furnishing dangerous drugs as defined in Section 4022
without an appropriate prior examination and a medical indication, constitutes
unprofessional conduct.
8. Section 725 of the Code, in pertinent part, provides:

"(a) Repeated acts of clearly excessive prescribing, furnishing, dispensing, or
administering of drugs or treatment, repeated acts of clearly excessive use of diagnostic
procedures, or repeated acts of clearly excessive use of diagnostic or treatment facilities as
determined by the standard of the community of licensees is unprofessional conduct for a
physician and surgeon, dentist, podiatrist, psychologist, physical therapist, chiropractor,
optometrist, speech-language pathologist, or audiologist.

"...

FIRST CAUSE FOR DISCIPLINE
(Excessive Prescribing)

6. Respondent Richard W. Cunningham, M.D. is subject to disciplinary action under
Business and Professions Code section 725, in that he prescribed controlled substances, including
but not limited to oxycodone, fentanyl, hydromorphone to a single individual, as follows:

A. On or about and between July 16, 2010 and December 2012, Respondent
wrote 110 prescriptions for controlled substances and other dangerous drugs—namely,
oxycodone, hydromorphone and fentanyl\(^1\)—for D.M.\(^2\)

B. D.M. was not Respondent’s patient and was an individual who Respondent
knew or should have known was an addict.

SECOND CAUSE FOR DISCIPLINE
(Prescribing Without Performing An Appropriate Prior Physical Examination and Without
Medical Indication)

7. Respondent Richard W. Cunningham, M.D. is subject to disciplinary action under
Business and Professions Code section 2242 in that he prescribed controlled substances and other

\(^1\) Oxycodone, hydromorphone and fentanyl are highly addictive opioid pain medications.

\(^2\) All patient references are by initials only to protect the patients' privacy rights.
dangerous drugs to D.M. without performing an appropriate prior physical examination and without medical indication, as follows:

A. Complainant refers to and, by this reference, incorporates herein paragraph 6, above, as though fully set forth.

B. Respondent did not perform an appropriate prior physical examination and did not have a proper medical indication before writing 110 prescriptions for controlled substances and other dangerous drugs for D.M.

**THIRD CAUSE FOR DISCIPLINE**

(Condacting To An Addict)

8. Respondent Richard W. Cunningham, M.D. is subject to disciplinary action under Business and Professions Code section 2241 in that Respondent prescribed to an individual he knew or should have known was an addict, as follows:

A. Complainant refers to and, by this reference, incorporates herein paragraph 6, above, as though fully set forth.

**FOURTH CAUSE FOR DISCIPLINE**

(Unprofessional Conduct)

9. Respondent Richard W. Cunningham, M.D. is subject to disciplinary action under Business and Professions Code section 2234, generally, as follows:

A. Complainant refers to and, by this reference, incorporates herein paragraph 6, above, as though fully set forth.

B. During an interview with representatives of the Medical Board of California investigating allegations of improper prescribing and other violations of the Medical Practice Act, Respondent revealed that D.M. was his girlfriend and that he, Respondent, personally used some of the controlled substances and other dangerous drugs prescribed by him to D.M.

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PRAYER

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

1. Revoking or suspending Physician's and Surgeon's Certificate Number G40588, issued to Richard W. Cunningham, M.D.;

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

3. Ordering Richard W. Cunningham, M.D., if placed on probation, to pay the Board the costs of probation monitoring; and,

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

DATED: September 16, 2015

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

Complainant