BEFORE THE DIRECTOR
OF THE DEPARTMENT OF CONSUMER AFFAIRS
PROFESSIONAL FIDUCIARIES BUREAU
STATE OF CALIFORNIA

In the Matter of the First Amended Accusation and Petition to Revoke Probation Against:	Case No. PF-2013-83
MELODIE JO SCOTT,	OAH No. 2014070519
Professional Fiduciary License No. PF 545	

DECISION AND ORDER

The attached Proposed Decision of the Administrative Law Judge is hereby adopted as the Decision of the Director of Consumer Affairs in the above-entitled matter.

This Decision shall become effective on JUNE 1, 2016.

IT IS SO ORDERED APR 27 2016.

Doreathea Johnson

DOREATHEA JOHNSON
Deputy Director, Legal Affairs
Department of Consumer Affairs

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PROFESSIONAL FIDUCIARIES BUREAU
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the First Amended Accusation and Petition to Revoke Probation Against: MELODIE JO SCOTT, Professional Fiduciary License No. PF 545 Respondent.	Case No. PF-2013-83 OAH No. 2014070519

PROPOSED DECISION

Adam L. Berg, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Diego, California, on February 8 and 9, 2016.

Rita M. Lane, Deputy Attorney General, Department of Justice, State of California, represented complainant, Julia Ansel, Bureau Chief, Professional Fiduciaries Bureau, Department of Consumer Affairs, State of California.

Melodie Jo Scott, respondent, appeared on her own behalf.

The matter was submitted for decision on February 9, 2016.

SUMMARY

Complainant seeks to impose discipline upon respondent's professional fiduciary license for alleged misconduct related to respondent's administration of the A'Yana McDonald Special Needs Trust (McDonald trust), as well as respondent's failure to comply with continuing education requirements.

Clear and convincing evidence established respondent failed to read the trust instrument until 2012, when she was required by the probate court to provide an accounting; follow terms contained in the trust that required her to file annual accountings with the court; and obtain court approval before paying herself fees from the trust. Respondent violated standards of care incumbent upon licensed professional fiduciaries. Clear and convincing evidence also established that respondent failed to provide the bureau with appropriate proof

of her completion of required continuing education courses, including ethics courses. Complainant established cause to impose discipline on respondent's professional fiduciary license and revoke her probation.

Respondent's primary defense to the substantive charges was that the beneficiary of the trust did not suffer harm as a result of any wrongdoing. Concerning all charges, respondent asserted the bureau was engaged in a "witch-hunt" designed to punish her unfairly. Respondent argued the evidence of her misconduct, if any, did not justify the suspension or revocation of her license.

Respondent's evidence in explanation, mitigation, and rehabilitation was not compelling.

The revocation of respondent's license is warranted on this record and will protect the public.

FACTUAL FINDINGS

Respondent's License Background

1. On April 9, 2008, respondent submitted to the bureau an application for the issuance of a professional fiduciary license. The bureau denied respondent's application, and respondent requested an administrative hearing.

On January 29, 2010, an administrative law judge (ALJ) issued a proposed decision finding cause to deny respondent's application under Business and Professions Code section 6584, subdivision (h), as a result of respondent for acting as a professional fiduciary without a license. The proposed decision granted respondent a professional fiduciary license, revoked the license, stayed the revocation, and placed the license on probation for three years under terms and conditions.

Following the department's order of nonadoption of the ALJ's proposed decision, the department issued a decision denying respondent's application. Respondent appealed from the decision by filing a writ of mandate in the superior court.

On January 14, 2011, the Superior Court of California, Sacramento County, issued a preemptory writ directing the department to vacate its decision after nonadoption and adopt the ALJ's decision. The superior court's order was stayed pending the department's appeal.

On May 5, 2011, the Court of Appeal, Third Appellate District, lifted the stay and affirmed the Superior Court's order directing the department vacate its decision, and issue a professional fiduciary license to respondent under the terms and conditions imposed in the ALJ's January 29, 2010, proposed decision.

On May 10, 2011, the department issued respondent a professional fiduciary license and placed the license on probation under the terms and conditions set forth in the ALJ's January 29, 2010, proposed decision.

Relevant Conditions of Respondent's Probation

2. Condition No. 1 of the probationary order provided in relevant part:

> OBEY ALL LAWS: Respondent shall obey all federal, state and local laws, and all rules and regulations governing the practice of a professional fiduciary in California . . . .

Jurisdictional Matters

3. On September 11, 2015, complainant signed the first amended accusation and petition to revoke probation. Complainant alleged respondent was subject to disciplinary action for incompetence, unprofessional conduct, failure to obey laws and regulations, and failure to complete and provide proof of continuing education. Complainant alleged these violations violated condition number 1 of respondent's probation.

The A'Yana McDonald Special Needs Trust

4. On December 8, 2004, in connection with a malpractice settlement, the Superior Court of California, Riverside County, authorized the establishment of a Special Needs Trust (SNT) for A'Yana McDonald, a disabled minor, in accordance with Probate Code sections 3604 and 3605. The court appointed respondent as trustee. Respondent executed the trust instrument and $221,423.40 was deposited in the trust.

5. The trust instrument provided in part:

> The intent and purpose of this trust is to provide a discretionary, spendthrift trust, to supplement public resources and benefits when such resources and benefits are unavailable or insufficient to provide for the Special Needs of the Beneficiary. As used in this instrument, the term "Special Needs" means the requisites for maintaining the Beneficiary's good health, safety, and welfare when in the discretion of the Trustee, such requisites are not being provided by any public agency . . . . Special Needs include without limitation special equipment, programs of training, education and habitation, travel needs, and recreation, which are related to and made reasonably necessary by this Beneficiary's disabilities. This is not a trust for the support of the Beneficiary. All payments made under this Trust must be reasonably necessary in providing for this Beneficiary's special needs, as defined herein.

The McDonald trust was subject to the continuing jurisdiction of the superior court. The trust required annual accountings be filed with the probate department of the Riverside County Superior Court, and required that copies of all accountings and notices be filed with the Director of Health Services. The trust permitted respondent to receive reasonable compensation in an amount determined by the court.

6. Respondent administered the McDonald trust until 2012, when the probate department ordered her to file an accounting. On July 18, 2012, respondent, in *pro per*, filed a "First and Final Account and Report of Trustee (Probate Code sections 17200) and Petition for its Settlement and Termination of Trust with Uneconomically Low Principal (Probate Code section 15408)" in the Riverside County Superior Court, in the case of *In re the matter of A'Yana McDonald, Special Needs Trust.* The court appointed an attorney to represent the beneficiary. The beneficiary objected to the accounting. The matter went to a contested probate court hearing, where respondent was represented by attorney David Horspool.

Respondent testified in the probate court hearing. She testified she could not remember having a copy of the trust instrument before filing the first and final accounting. However, she assumed she had a copy of the trust document because she signed it and would have needed it to open a bank account for the trust. She had no recollection reading the trust document. Consequently, she was unaware the trust required court supervision. Her custom was to review the terms of a SNT with counsel; however, she did not do so with the McDonald trust. She could not explain why she did not review this trust with counsel. She testified she did not refer to the terms of the trust document in making decisions concerning the McDonald trust because it was a "cookie-cutter" SNT.

On June 23, 2014, the superior court issued a statement of decision suspending respondent as trustee and surcharging her $93,036.75. In the decision, the court found respondent breached her fiduciary duties in multiple respects. The court did not identify the breaches, but cited the beneficiary's closing argument and stated that the beneficiary met her burden in establishing a breach in each respect. Additionally, the court found respondent breached her fiduciary duty by failing to notify the court that she was unlicensed from 2008 to 2010. The court reviewed respondent's expenditures from the McDonald trust and assessed surcharges for several items. The court noted that had respondent filed regular accountings for court approval as required, she could have avoided further liability. The court addressed respondent's inquiry concerning whether any breeches caused actual loss to the beneficiary and whether respondent profited from such breaches. The court found there was actual loss because respondent expended funds without sufficient care or justification and without reference to the text or purpose of the trust. The court found respondent profited because she placated the beneficiary's mother by acceding to her requests for money, thereby providing respondent with "an open road" to charge substantial fees without the mother's objection. Finally, the court denied respondent's request for fees. The court maintained jurisdiction over the case. The case remains pending on appeal.

The Bureau's Investigation

7. In November 2012, as required by her probation with the bureau, respondent submitted to her probation monitor, Investigator Dave Thornton, a copy of the amended objections to respondent's first and final accounting in the McDonald matter. Following the superior court's decision, Investigator Thornton requested an expert consultant review the superior court case to determine whether respondent violated any laws, rules, or regulations governing the practice of a professional fiduciary.

Testimony and Report of Marilyn Kriebel

8. Marilyn Kriebel is a licensed professional fiduciary in California. The bureau requested she review respondent's handling of the McDonald trust.

Ms. Kriebel has been a professional fiduciary since 1984. She completed a paralegal program at University of California San Diego, specializing in estates, trusts, and wills. As a professional fiduciary she has been involved in probate proceedings, guardianships, conservatorships, and trusts, including SNTs. She has provided services in more than 500 cases. She currently has assets exceeding $160 million under her management. She has testified as expert witness regarding breaches of duty by a fiduciary. Ms. Kriebel was well qualified to render expert opinions concerning respondent's handling of the McDonald trust.

According to Ms. Kriebel, a trustee's failure to comply with the professional fiduciary's code of ethics and the professional fiduciary standard of care constitutes unprofessional conduct. Ms. Kriebel defined incompetence as a lack of knowledge and skill required to perform the duties of a professional fiduciary.

Mr. Kriebel offered opinions related to respondent's handling of the McDonald trust. In reaching her conclusions, she reviewed the court order creating the trust; the trust document; the accounting report and objections thereto; closing arguments; the superior court's statement of decision; and trial transcripts. Ms. Kriebel testified in this hearing and her report was received as evidence. Ms. Kriebel was familiar with the standard of care incumbent upon a professional fiduciary and the professional fiduciary code of ethics.[1] Her conclusions follow.

A SNT is created to set aside funds for a beneficiary who is receiving public benefits. The purpose of the trust is to cover certain expenses without compromising the beneficiary's ability to receive public benefits. The standard of care requires a professional fiduciary appointed as the trustee of a SNT to read and understand the trust document. A professional fiduciary should possess a copy of the trust document in order to refer to the document's terms. A trustee determines his or her authorities or powers from the trust document itself. The standard of care requires a trustee follow the terms of a trust document so long as its

[1] The Professional Fiduciary Code of Ethics is codified at California Code of Regulations, title 16, sections 4470 through 4484.

terms do not conflict with public policy or law. Ms. Kriebel testified it is a breach of fiduciary duty for a professional fiduciary to fail to possess a copy of the trust document and to fail to consult the trust document when making decisions related to the administration of the trust. Mr. Kriebel testified such omissions constitute incompetence and unprofessional conduct.

Under the Probate Code and the terms of the McDonald trust, respondent was required to file an annual accounting with the court. The Probate Code also required an annual accounting be provided to the beneficiary. According to Ms. Kriebel, respondent's failure to file accountings with the court for the first seven years she served as the trustee of the McDonald trust was a breach of her fiduciary duties. Respondent's failure to file annual accountings violated the court order and Probate Code section 3604 and 3605. Ms. Kriebel believed these violations constituted unprofessional conduct and incompetence.

Ms. Kriebel did not believe respondent filed annual accountings to the beneficiary as required by the trust. This omission also violated Probate Code section 16062, constituted a breach of respondent's fiduciary duty, involved unprofessional conduct, and demonstrated incompetence.

Ms. Kriebel believed respondent improperly terminated the trust by distributing the remaining balance of approximately $15,574.85 to the beneficiary's mother for purchase of a modular home. Ms. Kriebel believed respondent neither sought nor obtained court authority before terminating the trust. Under the terms of the trust, termination could only occur upon the death of the beneficiary or exhaustion of trust assets. In Ms. Kriebel's opinion, when the beneficiary has not died, termination could occur only when all of the funds held in trust were depleted. Before that, the trustee was required to petition the court for authority to disperse any funds remaining in trust. Respondent was required to file a petition seeking authorization from the court for the final distribution of funds, and to provide state agencies with a copy of that petition to enable the agencies to make a claim on the remaining funds held in trust under Probate Code 3605. Court approval was required to terminate the trust.

Ms. Kriebel believed respondent failed to provide notice to state agencies before she terminated the trust. According to Ms. Kriebel, this omission involved a breach of respondent's fiduciary duties, a violation of Probate Code section 3605, a violation of the terms of the trust, unprofessional conduct, and incompetence. Further, respondent's failure to obtain court approval before terminating the trust and disbursing the remaining funds held in trust involved a breach of respondent's fiduciary duty, a violation of the Probate Code, a violation of the terms of the trust, unprofessional conduct, and incompetence.

Respondent failed to comply with Probate Code 15410 when she disbursed the remaining trust funds to the beneficiary's mother. The terms of the trust did not authorize the distribution of the remaining funds the beneficiary's mother. By disbursing the remaining funds to the beneficiary's mother, respondent breached her fiduciary duty, violated the Probate Code, violated the terms of the trust, committed unprofessional conduct, and was incompetent, according to Ms. Kriebel.

During the seven years that respondent served as trustee for the McDonald trust, she paid fees to herself without first seeking court approval. Under the terms of the trust, respondent was allowed compensation, but only upon court approval. Respondent never obtained court approval. Respondent's failure to obtain court approval before paying herself fees involved a breach of her fiduciary duty, a breach of the terms of the trust, unprofessional conduct, and demonstrated incompetence, according to Ms. Kriebel.

Ms. Kriebel testified it was "inexcusable" for respondent not to have read and retained a copy of the trust document, and to have distributed the remainder of the trust funds to the beneficiary's mother without providing notice to public agencies.

On cross-examination, Ms. Kriebel testified she did not know of respondent or her reputation. Ms. Kriebel was not aware whether an accounting was sent to the Department of Health Care Services (DHCS). Ms. Kriebel believed respondent was required to provide notice to public agencies before exhausting the funds held in trust. Ms. Kriebel believed respondent was incompetent even if there were no damages to the beneficiary. From the material she reviewed, Ms. Kriebel believed the beneficiary's mother never received accountings in the first seven years respondent administered the McDonald trust. Ms. Kriebel thought respondent frustrated the purpose of the trust by disbursing the remainder of the funds held in trust to the beneficiary's mother to purchase a modular home.

Testimony of J. David Horspool

9. Respondent offered the testimony of J. David Horspool, a licensed California attorney, as an expert witness in trust and probate law.

Mr. Horspool holds a master's degree in accounting and an inactive Certified Public Accountant license. He is a certified by the California State Bar as a specialist in estate planning and probate trust law. He has practiced in area of conservatorships for more than 30 years. He has handled trust, probate, and SNT administration cases. He has represented over one thousand clients in probate matters. He taught courses to professional fiduciaries. He has represented fiduciaries, but has never been a fiduciary himself. Mr. Horspool represented respondent in the McDonald matter before probate court.

According to Mr. Horspool, trust distributions and payments must be consistent with the terms of a SNT. He testified a SNT provides the trustee with a large amount of discretion. Expenditures are subject to the court's review to determine whether they are reasonable. He believed a distribution for a modular home purchase could be legitimate SNT expenditure.

Mr. Horspool frequently represents fiduciaries who file late accountings. In his opinion, failing to file an accounting in a timely manner does not violate the standard of care incumbent upon a professional fiduciary; instead, he testified it was simply "bad practice." Professional fiduciaries sometimes get busy and forget to timely file accountings. Mr. Horspool believed the standard of care of upon an attorney was similar to that of a

professional fiduciary: they both owe a duty to a third party to use utmost skill and care to assist the third party.

Mr. Horspool testified the McDonald trust case was currently on appeal. He said the superior court did not find that respondent engaged in fraud. He believed respondent provided notice to the DHCS of the termination of the SNT. He said DHCS could have objected to respondent's accounting, but did not do so. According to Mr. Horspool, respondent provided the beneficiary's mother with yearly accountings. Mr. Horspool believed the beneficiary was not harmed. He opined that if respondent had filed accountings with the court on a regular basis, the court would have approved the expenditures.

Mr. Horspool said the McDonald case was the first time he had known respondent to have been surcharged. He was not aware of respondent ever having been removed as a trustee. He described respondent's representation of clients as "stellar." He believed respondent had a good reputation as a professional fiduciary. He said respondent had the reputation of taking cases that required managing difficult parties. In terms of SNTs, he said "there was no greater protector" than respondent.

Mr. Horspool admitted that except for rare occasions, he had not worked as a fiduciary. He believed the standard of care required a professional fiduciary to prevent harm. The fiduciary is required to act in the "highest faith." Mr. Horspool was not familiar with the professional fiduciary code of ethics. He did not believe it was unprofessional conduct for a trustee to fail to read a SNT instrument. He classified respondent's omission as "an oversight or mistake." When improper conduct does not result in harm, that conduct cannot constitute unprofessional conduct. Mr. Horspool testified special needs trusts were substantially "boilerplate." He said they generally have the same purpose, and although respondent might not have read the McDonald trust document, she had read many others that were similar. Since there was no harm to the beneficiary, respondent did not violate her fiduciary duties.

Mr. Horspool was "shocked" to hear that harm was not an element of the standard of care. Mr. Horspool conceded respondent "should have" petitioned the court before taking fees, otherwise she ran the risk of the court not approving the fees.

Mr. Horspool said it would be a violation of a trustee's fiduciary duty to never file an accounting, but filing an accounting late did not violate any standard of care. Mr. Horspool said the preferred practice required a fiduciary to read the terms of the trust; but if the beneficiary was not harmed, there was no violation of any standard of care in failing to do so. Mr. Horspool believed respondent properly noticed DHCS of the termination of the trust.

Testimony of Daniel G. Stubbs

10. Daniel Stubbs has worked as a fiduciary for the past 31 years. He is licensed by the bureau as a professional fiduciary. He was an instructor in fiduciary services at California State University Fullerton and University of California at Berkeley. He served on

the board of directors of the National Guardianship Association for nine years. From 2008 to 2012, he served on the bureau's Advisory Committee as a member and chair. He has served as a trustee for 35 SNTs.

Based on his experience, Mr. Stubbs was well qualified to render an expert opinion in this matter.

Mr. Stubbs and respondent were charter members of Professional Fiduciaries Association of California (PFAC). Mr. Stubbs testified on behalf of respondent as an expert witness in the McDonald hearing, where he opined that respondent's disbursements were reasonable. Mr. Stubbs testified that SNT documents have certain factors that are in common, but some can "be rather complicated." He was familiar with respondent's activities as a SNT trustee. He testified that serving as a SNT trustee is a specialized area of expertise within the professional fiduciary community.

Respondent asked Mr. Stubbs whether her failure to file accountings with the court deviated from the standard of care of a professional fiduciary. In response, Mr. Stubbs stated the standard of care involves "taking care of the individual client." Mr. Stubbs testified the filing accountings with the court was a different matter and the simple failure to file an accounting with the court would not violate the standard of care.

Mr. Stubbs said that he taught students to review a trust document before agreeing to become a trustee. He said compliance with the code of ethics was part of the standard of care of a professional fiduciary. He said complying with the probate code and terms of the trust were also a part of the standard of care.

Mr. Stubbs personally maintains a copy of the trust document for the trusts he administers. Mr. Stubbs was asked whether respondent's failure to maintain a copy and read the trust document breached a professional fiduciary's standard of care. Mr. Stubbs said it "was extremely unwise," but the standard of care "involves the treatment of a client." He said he could not determine whether respondent engaged in unprofessional conduct by failing to read a trust document because, although doing so was "incredibly unwise," a violation of the standard of care depended on the treatment and care of the beneficiary.

Mr. Stubbs stated that failing to file accountings with the court as required by the SNT "could be considered" a breach of respondent's fiduciary duty. Mr. Stubbs testified that a trustee's failure to notify appropriate state agencies before terminating the SNT might constitute a breach of a professional fiduciary duty. Mr. Stubbs testified that under the terms of the McDonald trust, court approval was required in order for respondent to be paid fees. Mr. Stubbs believed that respondent's payment of fees to herself without first obtaining court approval violated her duty to comply with the terms of the trust.

Testimony of Bryan Hartnell

11. Bryan Hartnell has been licensed as an attorney since 1975. He is a certified specialist in the areas of estate planning, trust, and probate law. He served on the advisory commission for estate planning, trust, and probate law. He served on the state board for legal specialization for eight years. He is trustee for two trusts at court recommendation. Based on his education, training, and experience, Mr. Hartnell was qualified to render expert opinions in the area of estate planning, trusts, and probate law.

Mr. Hartnell believed respondent did not engage in unprofessional conduct because filing an accounting late was a question of degree and dependent on whether the beneficiary was harmed by any delay. Mr. Hartnell noted that the McDonald trust was never transferred from the civil court to the probate court. He said a trustee would have had to file a petition in probate court in order to get a probate case number. Ultimately, this was the trustee's responsibility, but he did not believe that failure to do so constituted a breach of a fiduciary duty.

Mr. Hartnell did not believe that the superior court applied the appropriate standard in disallowing respondent's distributions. Mr. Hartnell did not believe respondent breached her fiduciary responsibility by not filing accountings in probate court. Mr. Hartnell believed whether there was a breach of a fiduciary duty depended on whether there was harm to the beneficiary.

Mr. Hartnell was familiar with respondent's career as a professional fiduciary. He had no knowledge of respondent engaging in any misconduct or any instances where she was surcharged other than the McDonald matter. He believed respondent's handling of the McDonald trust was an aberration. Mr. Hartnell believed the standard of care required a professional fiduciary to protect the estate from harm and provide optimum care for the beneficiary.

Respondent's Testimony

12. Respondent is 58 years old. She graduated from college in 1980. In 1982 she undertook her first case as a fiduciary and has worked in the field since. She has two adult children.

Respondent admitted she failed to timely file an accounting with the court as required by the terms of the McDonald trust. She managed the McDonald trust the same manner as she managed all other court-monitored SNTs. The beneficiary never lost any benefits and was not harmed by the failure to file accountings.

Although the probate court disagreed with certain expenditures respondent made, she believed those expenditures were reasonable, and she is appealing the court's decision. She stated her handling of the McDonald trust was an anomaly. She had never before failed to make herself fully aware of the contents of a trust document.

She believed there were mitigating circumstances. She explained she was appointed trustee at the end of 2004, and in 2005, a negative article was published about her in the Los Angeles Times that caused her business to plummet. However, regardless of her financial hardships, her clients never suffered. She has never been surcharged, and the only time she was removed as a trustee was when she was fighting to obtain her professional fiduciary license. She has handled hundreds of cases without incident. Her "heart and soul" are geared toward the care of her clients. She takes cases no other professional fiduciary will take. She believed she has been punished already because of the surcharge imposed in the McDonald matter and the cost to hire counsel for appeal. She does not believe she is a threat to the community.

Respondent testified about her role as a respected member of the professional fiduciary community. She believes she "fell out" of the bureau's favor. She said she was "throwing herself under the bus" by admitting her failure to file an accounting. However, she believed the beneficiary of the McDonald trust had a "good run" when she was trustee, and there was no objection to her failure to provide an accounting other than that made by the beneficiary's court-appointed counsel. Respondent did not believe the beneficiary was harmed.

Respondent has handled approximately 10 to 20 SNTs during her career. Before appointment in the McDonald trust, respondent handled less than approximately five SNTs. She now considers herself an expert in SNTs. Respondent said she did not recall ever reading the trust document for the McDonald trust. Respondent explained the McDonald trust was a "cookie-cutter" trust because it was very similar to other SNTs. However, when she was assigned the trust in 2004, she did not read the trust. She said she administered the trust by providing the beneficiary with support while preserving the beneficiary's public benefits. Respondent said she retained counsel for the other SNTs she handled, but did not do so for the McDonald trust. She did not explain why she did not retain counsel for the McDonald trust. Respondent was not sure whether she had a copy of the trust document until she was ordered to file an accounting in 2012. Respondent admitted she received fees for her services in the McDonald matter before obtaining court approval. Respondent admitted she exhausted the trust without first obtaining court approval. Her intent was to terminate the trust when she distributed the remaining $15,574.85 to the beneficiary's mother. Respondent did not believe that the beneficiary was harmed when she disbursed the remaining trust funds to the beneficiary's mother to enable her to purchase a modular home.

Respondent said the standard of care of a professional fiduciary is intended to ensure the client is cared for and expenses are appropriate. Respondent was familiar with the professional fiduciary's code of ethics, adding "I think I helped write it." Respondent said she made an error by not filing an accounting, but it was a harmless error because the beneficiary did not lose benefits. Respondent believed unprofessional conduct required action that resulted in harm to a client. Respondent testified she notified state agencies about the termination of the trust by mailing her final accounting to the agencies. Respondent testified a trust would not terminate until a court enters an order. Thus, she believed she gave proper notice to state agencies as required under the Probate Code.

In conclusion, respondent admitted that she made mistakes, but the mistakes did not involve violations of any standard of care because there was no harm to the client. She thought it was unwise to have represented herself. She believed the trust at issue required her fees be approved by the court, not that the court approve the fees in advance. She believed personal hardships clouded her judgment, including a difficult divorce. She has since become much more careful in her review of files.

Respondent said the bureau was on a "witch-hunt" against her and she had been singled-out for particularly harsh treatment. She said revocation was not an appropriate sanction for her "inadvertent failure to file an accounting." Respondent said when the court of appeal overturns the superior court's decision, this proceeding "will have been moot."

Respondent's Continuing Education

13. On April 13, 2013, respondent signed and submitted to the bureau an application for license renewal. In the application, respondent certified she had completed 15 hours of continuing education within the last year.

14. Angela Cuadra[2] has been a program analyst with the bureau since 2009. In February 2014, she was tasked with performing the bureau's first audit of continuing education for professional fiduciaries who renewed their licenses in 2013. Ms. Cuadra received from the bureau's IT department a list of 35 active licensees. That list was randomly generated and contained five percent of active licensee.

On February 6, 2014, Ms. Cuadra sent a letter to respondent that advised respondent had been randomly selected for the bureau's audit of continuing education. The letter requested respondent submit "proof of completion" of at least 15 hours of continuing education for the period of May 18, 2011 through April 13, 2013. The letter requested respondent submit documentation no later than March 8, 2014.

On February 28, 2014, the bureau received respondent's response. Respondent wrote,

> I am convinced I completed all fifteen hours for the 2011, 2012, and 2013 years in question, however, I cannot locate all of the necessary paperwork. I have attended Inland Empire PFAC meetings, University of Redlands sessions, San Bernardino County Probate Bar brown bag lunch meetings, interned with Dr. Lalas at Loma Linda University Behavior Medical Center, extensively researched, conferred on legal and ethical issues in preparation to serve as a consultant/expert witness in fiduciary matters.

[2] In 2013 Ms. Cuadra went by the name Angela Bigelow.

Additionally, respondent represented she had completed more than 20 hours as a participant in a "trial run" of a program called "Retrain Your Brain," a program provided by the University of Alabama Birmingham. She represented she met with Dr. Lalas, a psychiatrist, implementing a training program for individuals with traumatic brain injuries.

Respondent enclosed documents she "was able to locate" relating to her completed education hours. Respondent submitted three attendance records from the San Bernardino County Bar Association establishing three hours of credit. Only two documents were signed by respondent that indicated she participated in the activity and was entitled to receive California MCLE hours. Respondent submitted an email invitation for a San Bernardino probate section meeting offering one hour of MCLE credit. Respondent also submitted a flyer for a Professional Fiduciaries Association Inland Empire Chapter meeting. None of the documents respondent submitted identified courses in ethics.

On March 24, 2014, Investigator Thornton emailed respondent. The e-mail outlined the courses respondent identified as qualifying for CE. In the email, Investigator Thornton stated the hours with Loma Linda Behavior Health Institute would not be accepted because Loma Linda was not an approved CE provider and the content of the "trial run" was not considered CE. For other courses, Investigator Thornton stated the bureau would accept them as credit for CE only upon proof of attendance indicating the number of CE hours received. The email noted that one of the courses respondent attended and claimed credit for predated the audit window. Investigator Thornton claimed the documentation respondent submitted qualified for one hour of CE. Investigator Thornton requested respondent provide additional proof of completion of 15 hours of CE by March 28, 2014, of which two hours was required in the area of ethics. Investigator Thornton warned that failure to comply would result in referral to the Office of the Attorney General.

Respondent emailed Investigator Thornton on March 21, 2014. She stated it was her understanding that the bureau had the authority to require her attend more CE courses and extend her probation as a "sanction." She said she would attempt to obtain signatures by the deadline. She also represented that she believed that PFAC sent proof of attendance at its trainings directly to the bureau.

On July 18, 2014, Investigator Thornton emailed respondent indicating that he received from her a certificate of completion for a 15 hour course in palliative care and pain management. The bureau accepted the course for 15 hours of CE. From this course, the bureau credited respondent 12 hours of CE for the audit period of May 18, 2011 to April 30, 2013, even though the course was completed in 2014. However, Investigator Thornton's letter noted respondent still needed to complete two hours of CE in ethics for that period.

15. Respondent testified she had "plenty" of hours of CE. She admitted she had trouble gathering the paperwork but said her clients came first. She said she tried to explain her hardship to the bureau and provide the bureau with the required information. She said she gathered the information, but the bureau suspended her. Because of the suspension, she lost professional credibility and suffered a loss in business. Respondent believed the bureau

had remedies other than pursuing revocation and was treating her unfairly compared to treatment of others who had engaged far more egregious misconduct.

16. Respondent noted this was the first CE audit the bureau conducted. She said one hour of CE was rejected by the bureau because she did not sign the form indicating she had completed the course. Respondent said some of the training she attended did not provide forms that enabled her to demonstrate completion. Respondent believed signing the renewal application under perjury was sufficient to document her completion of the required CE courses. She said the bureau failed to instruct professional fiduciaries what was required. She said "none of us knew" what kind of documentation the bureau wanted. She said PFAC did not provide any documentation for courses she completed. She described the Loma Linda program as a "study" to create a course on traumatic brain injuries.

Cost Recovery

17. Complainant submitted certifications of costs and requested cost recovery under Business and Professions Code section 125.3. Complainant submitted a certification of investigative costs in the amount of $3,798.72. However, the certification did not describe the general tasks performed by the investigator or expert consultant as required by California Code of Regulations, title 1, section 1042, subdivision (b). The certification did not include a bill, invoice or similar supporting documentation to support the court transcript costs. Therefore, no investigative costs are awarded.

The certification by the deputy attorney general contained information related to services provided by the Office of the Attorney General and included costs of prosecution in the amount of $16,347.50. The evidence established those costs were reasonably incurred. The certification complied with the requirements of California Code of Regulations, title 1, section 1042, subdivision (b).

Respondent testified that she could not afford to pay costs. She testified she lives "hand to mouth." She has no savings and no retirement. She has spent large amounts of money in defending this administrative action on her professional fiduciary license denial case and in the appeal of the McDonald trust legal action.

LEGAL CONCLUSIONS

Burden and Standards of Proof

1. The standard of proof in an administrative action seeking to suspend or revoke a professional license is "clear and convincing evidence." (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 856.) Clear and convincing evidence requires a finding of high probability, or evidence so clear as to leave no substantial doubt; it requires sufficiently strong evidence to command the unhesitating assent of every reasonable mind. (*Katie V. v. Superior Court* (2005) 130 Cal.App.4th 586, 594.)

2. In a petition to revoke probation, the standard of proof is preponderance of the evidence. (*Sandarg v. Dental Bd. of California* (2010) 184 Cal.App.4th 1434, 1441-1442.)

Relevant Statutes and Regulations

3. Business and Professions Code section 6584 provides that a professional fiduciary license may be disciplined for the following:

> [¶] . . . [¶]
>
> (d) Fraud, dishonesty, corruption, willful violation of duty, gross negligence or incompetence in practice, or unprofessional conduct in, or related to, the practice of a professional fiduciary. For purposes of this section, unprofessional conduct includes, but is not limited to, acts contrary to professional standards concerning any provision of law substantially related to the duties of a professional fiduciary.
>
> [¶] . . . [¶]
>
> (h) Violation of this chapter or of the applicable provisions of Division 4 (commencing with Section 1400), Division 4.5 (commencing with Section 4000), Division 4.7 (commencing with Section 4600), or Division 5 (commencing with Section 5000) of the Probate Code or of any of the statutes, rules, or regulations pertaining to duties or functions of a professional fiduciary.

4. Business and Professions Code section 6580 authorizes the bureau to investigate the actions of a professional fiduciary and impose sanctions, including license revocation, upon a finding of a violation or a breach of fiduciary duty.

5. Probate Code section 16000 provides:

> On acceptance of the trust, the trustee has a duty to administer the trust according to the trust instrument and, except to the extent the trust instrument provides otherwise, according to this division."

6. Probate Code section 3604 provides:

> (a) (1) If a court makes an order under Section 3602 or 3611 that money of a minor or person with a disability be paid to a special needs trust, the terms of the trust shall be reviewed and approved by the court and shall satisfy the requirements of this

section. The trust is subject to continuing jurisdiction of the court, and is subject to court supervision to the extent determined by the court. The court may transfer jurisdiction to the court in the proper county for commencement of a proceeding as determined under Section 17005.

7. Probate Code section 3605 provides in pertinent part:

[¶] . . . [¶]

(b) While the special needs trust is in existence, the statute of limitations otherwise applicable to claims of the State Department of Health Care Services, the State Department of State Hospitals, the State Department of Developmental Services, and any county or city and county in this state is tolled. Notwithstanding any provision in the trust instrument, at the death of the special needs trust beneficiary or on termination of the trust, the trust property is subject to claims of the State Department of Health Care Services, the State Department of State Hospitals, the State Department of Developmental Services, and any county or city and county in this state to the extent authorized by law as if the trust property is owned by the beneficiary or is part of the beneficiary's estate

(c) At the death of the special needs trust beneficiary or on termination of the trust, the trustee shall give notice of the beneficiary's death or the trust termination, in the manner provided in Section 1215, to all of the following:

(1) The State Department of Health Care Services, the State Department of State Hospitals, and the State Department of Developmental Services, addressed to the director of that department at the Sacramento office of the director . . . .

8. Probate Code section 16062, subdivision (a), requires a trustee to provide annual accountings to the beneficiary.

9. Probate Code section 15410 outlines the disposition to trust property upon termination of the trust.

10. California Code of Regulations, title 16, section 4470 provides in part:

(a) A licensee's fiduciary duties recognized under this Article are based upon the fiduciary relationship established with the consumer as follows:

[¶] . . . [¶]

(4) A licensee's relationship to a beneficiary when acting as a trustee.

(b) The licensee shall comply with all local, state, and federal laws, regulations, and requirements developed by the courts and the Judicial Council as a minimum guide for the fulfillment of the fiduciary duties recognized under this Article . . . .

11. California Code of Regulations, title 16, section 4442 provides:

(a) Annual time requirements.

(1) To renew a license, a licensee shall earn during each annual renewal period a minimum of fifteen (15) hours of continuing education credit from approved education courses as defined in Section 4444 subject to the conditions of this Article.

(2) Courses qualifying for continuing education credit must be completed following licensure and within the one-year renewal period each cycle. . . .

(b) Annual subject topic requirements.

(1) Continuing education credit shall be earned by taking approved education courses in at least one of the subject topics as provided for in Section 4444.

(2) At least 2 hours of continuing education credits each year shall be in ethics for fiduciaries.

12. California Code of Regulations, title 16, section 4444 provides:

(a) Eligible education courses, as defined in subdivision (b), offered or approved by an approved education provider listed in Section 4446, are approved education courses that meet the prelicensing and continuing education requirements of this Article.

(b) Programs, seminars, and courses of study that are relevant to fiduciary responsibilities of estate management or of fiduciary responsibilities of the person for at least one of the subject topics as specified in subdivision (e), that address the areas of proficiency, competency, and performance of a fiduciary, and

impart knowledge and increase understanding of the fiduciary profession or of the California judiciary or the legal process as it relates to the administration of fiduciary responsibilities are eligible education courses. . . .

13. California Code of Regulations, title 16, section 4452 provides:

Each applicant is responsible for ensuring compliance with the continuing education requirements of this Article.

(a) To demonstrate compliance a licensee shall sign under penalty of perjury on an annual renewal application form provided by the Bureau that they have completed fifteen (15) hours of approved continuing education courses.

(b) A licensee shall maintain documentation of completion of continuing education courses for a period of at least three years from the date of renewal.

(c) Each licensee shall provide any information requested by the Bureau within ten (10) business days of the request, to determine compliance with the continuing education requirements for license renewal.

Unprofessional Conduct

14. Complainant alleged that respondent's license is subject to disciplinary action under Business and Professions Code section 6584, subdivision (d), for failing to meet the standards of conduct of a professional fiduciary in her handling of the McDonald trust as follows:

a. Respondent failed to read the SNT instrument and failed to refer to the SNT's terms prior to taking action as the Trustee.

b. Respondent failed to refer to pertinent Probate Code sections and took numerous actions which were contrary to the specific terms of the trust instrument as well as the laws of the State of California.

c. Respondent failed to follow the terms of the SNT and the laws of the State of California which resulted in a loss to the beneficiary for whom the SNT was established.

d. Respondent failed to administer the SNT pursuant to its terms.

e. Respondent failed to seek court authority prior to compensating herself as Trustee.

f. Respondent failed to file accountings with the court as required under the SNT.

g. Respondent failed to seek court authority prior to electing to terminate the SNT.

h. Respondent failed to distribute the remaining SNT assets as set forth in the SNT.

i. Respondent failed to give notice to health agencies that had provided benefits to the Beneficiary that she was terminating the SNT.

15. As defined in the code, unprofessional conduct "includes, but is not limited to, acts contrary to professional standards concerning any provision of law substantially related to the duties of a professional fiduciary." (Bus. & Prof. Code, § 6584, subd. (d).)

Respondent was appointed trustee for the McDonald trust in late 2004. It is undisputed that respondent failed to read the McDonald trust instrument until 2012, when she was ordered by the probate court to provide an accounting. Ms. Kriebel testified that respondent's failure to read and understand the McDonald trust instrument was contrary to the professional standards of a professional fiduciary and violated respondent's fiduciary duties to the beneficiary. Ms. Kriebel understood the definition of professional conduct to require compliance with the laws and regulations of a professional fiduciary.

Respondent's experts believed that respondent's actions were "unwise," but did not believe that she committed unprofessional conduct. Of respondent's experts, Mr. Stubbs, a professional fiduciary, had the clearest understanding of what constituted unprofessional conduct. However, all of respondent's experts believed unprofessional conduct was contingent upon a client being harmed. In their view, since the beneficiary was not harmed, respondent's failure to appreciate that the trust was court supervised did not involve a breach of her fiduciary duty or unprofessional conduct.

In resolving any conflict in the testimony of expert witnesses, the opinion of one expert should be weighed against that of another. Consideration should be given to the qualifications and believability of each witness, the reasons for each opinion, and the matter upon which it is based. (BAJI 2.41.) California courts have repeatedly underscored that an expert's opinion is only as good as the facts and reason upon which that opinion is based. (*Kennemur v. State of California* (1982) 133 Cal.App.3d 907, 924.)

Respondent's experts categorized respondent's actions as "unwise" or "a mistake," but did not believe this constituted unprofessional conduct because they opined that the

beneficiary was not harmed. The opinion expressed by respondent's experts – actual harm must be shown to conclude a licensed individual has engaged in unprofessional conduct – is simply incorrect. (*Griffiths v. Superior Court* (2002) 96 Cal.App.4th 757, 772.)

Ms. Kriebel's testimony was more persuasive as she had the clearest understanding that unprofessional conduct does not require harm, but rather requires a departure from the standards of conduct of a professional fiduciary.

16. Expert testimony was not required to reach the conclusion that professional standards require a professional fiduciary read and understand a trust instrument before administering a trust. This concept is such so fundamental that the failure to do so cannot be anything but unprofessional conduct. Even if a professional fiduciary were to believe that the trust was "cookie-cutter," in that it was similar to other trusts, the failure to read a trust instrument is such a clear departure from professional standards that no reasonable factfinder could conclude otherwise. Respondent's failure to read and understand the McDonald trust instrument constituted unprofessional conduct.

17. Because respondent failed to read the trust instrument, she was unaware that the trust was court supervised. As such, she failed to follow the terms of the trust, which required her to file annual accountings with the court and public agencies and to obtain court approval for trustee fees. Her failure to administer the McDonald trust pursuant to the terms of the trust violated Probate Code section 16000 and constituted unprofessional conduct.

18. Complainant alleged respondent failed to seek court authority before electing to terminate the trust. Although respondent depleted the trust by distributing the remaining $15,574.85 to the beneficiary's mother for the purchase of a modular home, respondent filed a petition with the court to terminate the trust with uneconomically low principal under Probate Code section 15408. Respondent served this petition on the Department of Health Care Services and the Department of Developmental Services. Since only the superior court had authority to terminate the trust, the evidence did not establish that respondent failed to seek court authority prior to terminating the trust. She in fact sought court approval, which the court denied and instead surcharged respondent. The evidence did not establish that respondent failed to give notice to public agencies that she was terminating the trust.

19. Finally, complainant alleged respondent failed to distribute the remaining trust assets as required by the trust instrument. Complainant alleged respondent's failure to follow the terms of the trust resulted in a loss to the beneficiary. In response to respondent's first and final accounting and the objections lodged by the beneficiary's counsel, the court disallowed many of respondent's distributions, including the final $15,574.85 distribution. The court ordered that respondent reimburse the trust in the amount of $93,036.75. In surcharging respondent, the court found respondent breached her fiduciary duties and made inappropriate distributions, thereby causing harm to the beneficiary. Ms. Kriebel believed that respondent's final distribution was inconsistent with the intent and purpose of the trust, and circumvented the public entities' right to file a claim against the trust. Respondent believed her distributions were appropriate and disagreed with the probate court's ruling.

She testified that final distribution to the mother for purchase of a new home was an appropriate expenditure.

Although the court's findings that respondent made inappropriate distributions are given deference, the court's decision did not provide sufficient detail to support its rationale for disallowing certain expenditures. Thus, the weight of the evidence did not establish these distributions constituted unprofessional conduct. The trickier question was whether the final distribution enabling the beneficiary's mother to purchase a modular home conformed to the purpose and intent of the trust. Although the court and Ms. Kriebel did not believe this was the case, there was insufficient evidence to establish this disbursement was contrary to professional standards or law. On the record in this matter, it cannot be concluded that respondent's disbursements constituted unprofessional conduct.

Incompetence

20. Complainant alleged that respondent was incompetent because her conduct demonstrated a lack of knowledge or ability to perform her professional obligations.

21. The technical term "incompetency" is used in a variety of factual contexts to indicate an absence of qualification, ability or fitness to perform a prescribed duty or function. It is commonly defined to mean a general lack of present ability to perform a given duty as distinguished from inability to perform such duty as a result of mere neglect or omission. Such an interpretation is totally consistent with the declared legislative objective of public protection by requiring a minimum standard of professional conduct on the part of those licensed to engage in regulated activities. (*Pollak v. Kinder* (1978) 85 Cal.App.3d 833, 837-838.) The *Pollack* court concluded: "While it is conceivable that a single act of misconduct under certain circumstances may be sufficient to reveal a *general* lack of ability to perform the licensed duties, thereby supporting a finding of incompetency under the statute, we reject the notion that a single, honest failing in performing those duties -- without more -- constitutes the functional equivalent of incompetency justifying statutory sanctions." (*Pollak, supra*, at p. 839, italics in original.)

22. By failing to read the trust instrument, respondent failed to comply with the terms of the trust instrument and the Probate Code. Respondent testified that her handling of the trust was an anomaly and did not reflect her normal practice. There is no question that respondent's failure to read the trust instrument deviated from the standard of care on a professional fiduciary. Although not alleged, respondent's actions likely constituted gross negligence, i.e., an extreme departure from the standard of care. However, it cannot be determined that respondent's misconduct was so pervasive as to establish she lacked the qualification, ability, and fitness to act as a professional fiduciary. Respondent has served as a professional fiduciary for over 30 years. There was no evidence that she has ever been surcharged or removed as a trustee based on a lack of fitness other than in the McDonald matter. Her handling of the McDonald trust demonstrated carelessness but not incompetence. This allegation is dismissed.

Violation of State Law and Regulations

23. Complainant alleged that respondent failed to comply with Probate Code section 16000 by failing to administer the McDonald trust in accordance with its terms. As previously held, the evidence established respondent violated Probate Code section 16000.

24. Complainant alleged that respondent failed to provide annual accountings to the beneficiary as required under Probate Code section 16062. Respondent testified she provided the beneficiary annual accounting. There was no indication in the probate court's decision or hearing transcript that respondent did not provide required beneficiary annual accountings. The evidence did not establish a violation of Probate Code section 16062.

25. Complainant alleged that respondent failed to comply with Probate Code section 3605 by failing to provide notice of her intention to terminate the trust to state public service agencies. As previously discussed, respondent did notify these agencies when she filed her petition for termination with the probate court. The evidence did not establish a violation of law.

26. Complainant alleged that respondent failed to distribute the remaining trust principal in accordance with Probate Code section 15410 and the terms of the SNT. Section 15410 outlines the distribution of funds upon termination of the trust. However, the trust had not been terminated by court order when respondent disbursed the remaining principal. Although the court ordered respondent to reimburse the trust for the final disbursement, there was insufficient evidence to establish there was a violation of the Probate Code.

27. Finally, complainant alleged respondent failed to comply with California Code of Regulations, title, 16, section 4482, by failing to protect the assets of the trust and causing a loss to the beneficiary. Section 4482 applies to management of an estate, not trust, and is inapplicable to respondent's handling of the trust. No violation was established.

Continuing Education

28. Complaint alleged respondent failed to complete 15 hours of approved continuing education (CE) courses and failed to maintain documentation of completion of these hours. Whether respondent actually completed 15 hours of approved CE during the required renewal period is debatable. Certainly, respondent completed several courses the bureau agreed would satisfy CE requirements had respondent submitted proof of completion. The bureau ended up crediting respondent with an additional 12 CE hours for the audit period for the course she completed in palliative care and pain management. As a result of the bureau's retroactively crediting her with these hours, respondent established she completed 13 hours of CE. Although the bureau did not credit respondent for the one hour

CE offered by the San Bernardino Bar Association, where respondent did not sign the form, the evidence established she attended this course and is entitled to the one hour credit.[3]

However, respondent was still required to have completed two hours of CE in ethics for fiduciaries. (Cal. Code Regs., tit. 16, § 4442, subd. (b)(2).) Respondent failed to establish she completed two CE hours in ethics during her renewal period. As such, respondent failed to comply with her CE requirements.

29. Additionally, respondent failed to maintain documentation establishing proof of completion of CE courses as required by California Code of Regulations, title 16, section 4452, subdivision (b). The documentation respondent provided was insufficient to establish completion of her required CE credit. The regulations required respondent maintain proof of completion of CE for a period of three years. Although "proof of completion" is not defined by regulation, it can be reasonably be defined as any document establishing attendance at an approved CE course. The invitations respondent submitted were not proof of her attendance at these courses. Respondent's belief that because CE was new to professional fiduciaries, and she did not know what documents the bureau would accept, did not excuse her from the record-keeping requirement. Nor was her belief that her attestation in the renewal was sufficient, by itself, to establish proof of completion. Respondent's failure to timely provide the bureau with proof of completion of CE violated the regulations. (Cal. Code Regs., tit. 16, § 4452, subd. (c).).

Cause Exists to Revoke Respondent's License and Revoke Respondent's Probation

30. Cause exists to revoke respondent's license and revoke respondent's probation on the grounds that respondent committed unprofessional conduct in her handling of the McDonald trust. (Bus. & Prof. Code, § 6584, subd. (d.).) Respondent's misconduct violated Probation Condition No. 1, requiring respondent to obey all laws and regulations.

31. Cause exists to revoke respondent's license and revoke respondent's probation on the grounds that respondent failed to comply with state laws governing a professional fiduciary. (Bus. & Prof. Code, § 6584, subd. (h).) Respondent violated Probation Condition No. 1, in that respondent failed to obey all laws and regulations.

32. Cause exists to revoke respondent's license and revoke respondent's probation on the grounds that respondent failed to comply with the continuing education requirements established in California Code of Regulations, title 16, section 4442 and 4452. (Bus. & Prof. Code, §§ 6538, subd. (h) & 6580, subd. (b).) This failure to comply with such continuing education requirements constituted a violation of Probation Condition No. 1, that respondent obey all laws and regulations.

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[3] The bureau did not credit the course because respondent did not sign the certification. However, the certification was that the participant was entitled to MCLE credit. As respondent was not entitled to MCLE as a non-attorney, her signature was not required to establish completion of the course.

33. Cause does not exist to discipline respondent's license or revoke her probation on the grounds that she was incompetent. (Bus. & Prof. Code, § 6584, subd. (d).) The evidence did not establish respondent was incompetent.

Measure of Discipline

34. Respondent repeatedly emphasized that her handling of the McDonald trust was an anomaly and did not represent how she handled hundreds of other trusts during her career. Respondent and her witnesses believed that respondent did not violate her duty to the beneficiary because the beneficiary was not harmed by her actions. The probate court clearly found harm and surcharged respondent in the amount $93,036.75. Respondent's focus on her perceived lack of harm to the beneficiary reflects a misunderstanding of what is required to impose license discipline; specific harm is not required.

35. Protection of the public is the highest priority for the bureau 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. (Bus. & Prof. Code, § 6516.) Of critical importance is whether respondent has sufficiently learned from her misconduct to the extent that there is little chance that the same behavior will be repeated. Rehabilitation is a "state of mind" and the law looks with favor upon rewarding with the opportunity to serve, one who has achieved "reformation and regeneration." (*Pacheco v. State Bar* (1987) 43 Cal.3d 1041, 1058.) Fully acknowledging the wrongfulness of past actions is an essential step towards rehabilitation. (*Seide v. Committee of Bar Examiners* (1989) 49 Cal.3d 933, 940.)

36. Respondent believed that the bureau was conducting a "witch-hunt" against her. She repeatedly expressed the belief that she was unfairly targeted; by seeking revocation of her license, the bureau was exacting an inappropriately harsh sanction, compared to others who committed far greater misconduct. While respondent is correct in that she did not steal or misappropriate her client's funds, this does mean that she does not pose a danger to the public.

Respondent repeatedly stated the only mistake she made was in "filing an accounting late." Respondent expressed remorse for this and admitted wrongdoing, stating it would never happen again. However, the far greater concern is that respondent administered a SNT for seven years without having read the trust document. Instead of recognizing this as the problem, respondent asserted there was no harm to the beneficiary; stated that she "had a good run"; and expressed her belief the probate court's decision will be overturned on appeal. While many trust instruments are undoubtedly similar, boilerplate, or "cookie-cutter," respondent did not simply miss a small detail buried in the trust document – she completely failed to recognize the McDonald trust was subject to court monitoring.

Finally, respondent suggested that her mistake was representing herself in the proceedings. Respondent testified it was her custom to obtain legal counsel, which she did not do when she was appointed trustee. Of course, once respondent was ordered to provide

an accounting, she represented herself because she had already exhausted the trust's funds and would not be able to seek reimbursement for legal fees.

37. Respondent's failure to read the trust document and follow the terms of the trust was a serious violation for a professional fiduciary, whose main job is to execute the trust in accordance with the terms of the trust and law. Respondent repeatedly deflected responsibility for her actions. By casting the issue as her "failure to timely file an accounting," respondent failed to appreciate the seriousness of her actions. Furthermore, her failure to understand why the bureau would seek disciplinary action against her for this misconduct reflected a complete lack of understanding of the bureau's role in protecting the public. Respondent has been on probation since she became licensed. Regardless of respondent's resentment over how she became licensed or the board's actions since she became licensed, she was still subject to terms and conditions of probation.

As for her continuing education violations, respondent again failed to accept responsibility. Her testimony came across as indignant that the bureau would not have credited her with the continuing education credits she claimed to have completed or provide her more time to produce documentation. All respondent had to do was attend 15 hours of CE (2 in the area of ethics), retain proof of completion for three years, and provide the documentation to the bureau within 10 days of request. Instead of complying with her professional obligations, she blamed the bureau for "not knowing what it wants" in terms of proof of completion. This attitude reflected a complete lack of acceptance of responsibility for her professional obligations and constituted a violation of her probation. The bureau was under no obligation to provide her more time to submit the documentation or consider her personal hardships. Nonetheless, the bureau credited her with 12 credits retroactively.

38. The mere expression of remorse does not demonstrate rehabilitation. A truer indication of rehabilitation will be presented if a petitioner can demonstrate by sustained conduct over an extended period of time that he is rehabilitated and fit to practice. (*In re Menna* (1995) 11 Cal.4th 975, 987, 991.) The evidentiary significance of an applicant's misconduct is greatly diminished by the passage of time and by the absence of similar, more recent misconduct. (*Kwasnik v. State Bar* (1990) 50 Cal.3d 1061, 1070.)

Respondent was on probation during the time she administered the McDonald trust. Simply extending respondent's probation in this case would not adequately protect the public. Respondent's inability to appreciate the seriousness of her misconduct and her deflection of responsibility for the misconduct demonstrates that the public would not be adequately protected should respondent's probation be extended. As such, revocation is the only measure of discipline that will protect the public.

Costs of Investigation and Enforcement

39. Complainant is seeking recovery of the reasonable costs of prosecution. The California Supreme Court in *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32 held that a regulation imposing costs for investigation and enforcement under

California Code of Regulations, title 16, section 317.5, which is similar to Business and Professions Code section 125.3, did not violate due process. But it was incumbent on the board in that case to exercise discretion to reduce or eliminate cost awards in a manner such that costs imposed did not "deter [licensees] with potentially meritorious claims or defenses from exercising their right to a hearing."

The Supreme Court set forth four factors to consider in deciding whether to reduce or eliminate costs: whether the licensee used the hearing process to obtain dismissal of other charges or a reduction in the severity of the discipline imposed; whether the licensee had a "subjective" good faith belief in the merits of his or her position; whether the licensee raised a "colorable challenge" to the proposed discipline; and whether the licensee had the financial ability to make payments. The reasoning of *Zuckerman* must be applied to Business and Professions Code section 125.3 since the language in the cost recovery regulation at issue in *Zuckerman* and section 125.3 are substantially the same.

Applying the *Zuckerman* criteria, respondent did not receive a reduction in the severity of the discipline imposed. Respondent had a good faith belief in the merits of her position, but she did not raise a "colorable challenge" to the proposed discipline given the violations and the fact that she was on probation. Respondent's ability to pay costs is directly related to her ability to continue work as a professional fiduciary. Therefore, she will not be ordered to pay costs at this time. It is determined that respondent should pay $7,000 in costs in a manner determined by the bureau as a condition precedent to respondent reapplying for a license.

ORDER

The order staying the revocation of respondent's license in Case No. A1-2008-01 is vacated. Professional Fiduciary license number 545 issued to Melodie Jo Scott is revoked.

If respondent applies for a new license as a professional fiduciary, respondent shall pay to the bureau $7,000 in costs as a precondition (or condition precedent) to licensure, or as otherwise directed by the bureau.

DATED: March 9, 2016

DocuSigned by:
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BEFORE THE
PROFESSIONAL FIDUCIARIES BUREAU
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation and Petition to Revoke Probation Against: **MELODIE JO SCOTT** **P.O. Box 7890** **Redlands, CA 92375** **Professional Fiduciary License No. PF 545** Respondent.	Case No. PF-2013-83 **FIRST AMENDED ACCUSATION AND PETITION TO REVOKE PROBATION**

Complainant alleges:

PARTIES

1. Julia Ansel (Complainant) brings this First Amended Accusation and Petition to Revoke Probation solely in her official capacity as the Bureau Chief of the Professional Fiduciaries Bureau, Department of Consumer Affairs.

2. On or about May 18, 2011, the Professional Fiduciaries Bureau (Bureau) issued Professional Fiduciary License Number PF 545 to Melodie Jo Scott (Respondent). The Professional Fiduciary License was in full force and effect at all times relevant to the charges brought herein and will expire on April 30, 2016, unless renewed.

3. In a disciplinary action entitled *In the Matter of the Statement of Issues Against Melodie Jo Scott,* Case No. A1-2008-01, the Bureau issued a Decision and Order effective May 1,

2011, in which Respondent's Professional Fiduciary License was revoked. However, the revocation was stayed and Respondent's Professional Fiduciary License was placed on probation for three (3) years with certain terms and conditions. A copy of that Decision and Order is attached as Exhibit A and is incorporated by reference.

JURISDICTION

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

5. Section 118, subdivision (b), of the Code provides that the expiration or surrender of a license shall not deprive the Bureau of jurisdiction to proceed with a disciplinary action during the period within which the license may be renewed, restored, reissued or reinstated.

STATUTORY PROVISIONS FOR ACCUSATION

6. Section 6538 of the Code states:

> (a) To qualify for licensure, an applicant shall have completed 30 hours of prelicensing education courses provided by an educational program approved by the bureau.
>
> (b) To renew a license, a licensee shall complete 15 hours of approved continuing education courses each year.
>
> (c) The cost of any educational course required by this chapter shall not be borne by any client served by a licensee.

7. Section 6580 of the Code states:

> (a) The bureau may upon its own, and shall, upon the receipt of a complaint from any person, investigate the actions of any professional fiduciary. The bureau shall review a professional fiduciary's alleged violation of statute, regulation, or the Professional Fiduciaries Code of Ethics and any other complaint referred to it by the public, a public agency, or the department, and may impose sanctions upon a finding of a violation or a breach of fiduciary duty.
>
> (b) Sanctions shall include any of the following:
>
> (1) Administrative citations and fines as provided in Section 125.9 for a violation of this chapter, the Professional Fiduciaries Code of Ethics, or any regulation adopted under this chapter.
>
> (2) License suspension, probation, or revocation.
>
> (c) The bureau shall provide on the Internet information regarding any sanctions imposed by the bureau on licensees, including, but not limited to,

information regarding citations, fines, suspensions, and revocations of licenses or other related enforcement action taken by the bureau relative to the licensee.

8. Section 6582 of the Code states:

All proceedings against a licensee for any violation of this chapter or any regulations adopted by the bureau shall be conducted in accordance with the Administrative Procedure Act (Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code), and shall be prosecuted by the Attorney General's office, and the bureau shall have all the powers granted therein.

9. Section 6584 of the Code states, in pertinent part:

A license issued under this chapter may be suspended, revoked, denied, or other disciplinary action may be imposed for one or more of the following causes:

. . .

(d) Fraud, dishonesty, corruption, willful violation of duty, gross negligence or incompetence in practice, or unprofessional conduct in, or related to, the practice of a professional fiduciary. For purposes of this section, unprofessional conduct includes, but is not limited to, acts contrary to professional standards concerning any provision of law substantially related to the duties of a professional fiduciary.

. . .

(h) Violation of this chapter or of the applicable provisions of Division 4 (commencing with Section 1400), Division 4.5 (commencing with Section 4000), Division 4.7 (commencing with Section 4600), or Division 5 (commencing with Section 5000) of the Probate Code or of any of the statutes, rules, or regulations pertaining to duties or functions of a professional fiduciary.

10. California Probate Code section 3605 states, in pertinent part:

. . .

(b) While the special needs trust is in existence, the statute of limitations otherwise applicable to claims of the State Department of Health Care Services, the State Department of State Hospitals, the State Department of Developmental Services, and any county or city and county in this state is tolled. Notwithstanding any provision in the trust instrument, at the death of the special needs trust beneficiary or on termination of the trust, the trust property is subject to claims of the State Department of Health Care Services, the State Department of State Hospitals, the State Department of Developmental Services, and any county or city and county in this state to the extent authorized by law as if the trust property is owned by the beneficiary or is part of the beneficiary's estate.

(c) At the death of the special needs trust beneficiary or on termination of the trust, the trustee shall give notice of the beneficiary's death or the trust termination, in the manner provided in Section 1215, to all of the following:

///

(1) The State Department of Health Care Services, the State Department of State Hospitals, and the State Department of Developmental Services, addressed to the director of that department at the Sacramento office of the director.

11. California Probate Code section 15410 states, in pertinent part:

At the termination of a trust, the trust property shall be disposed of as follows:

. . .

(d) In any other case, as provided in the trust instrument or in a manner directed by the court that conforms as nearly as possible to the intention of the settlor as expressed in the trust instrument.

12. California Probate Code section 16000 states:

On acceptance of the trust, the trustee has a duty to administer the trust according to the trust instrument and, except to the extent the trust instrument provides otherwise, according to this division.

13. California Probate Code section 16062 states, in pertinent part:

(a) Except as otherwise provided in this section and in Section 16064, the trustee shall account at least annually, at the termination of the trust, and upon a change of trustee, to each beneficiary to whom income or principal is required or authorized in the trustee's discretion to be currently distributed.

REGULATORY PROVISIONS FOR ACCUSATION

14. California Code of Regulations, title 16, section 4442, states, in pertinent part:

(a) Annual time requirements.

(1) To renew a license, a licensee shall earn during each annual renewal period a minimum of fifteen (15) hours of continuing education credit from approved education courses as defined in Section 4444 subject to the conditions of this Article.

(2) Courses qualifying for continuing education credit must be completed following licensure and within the one-year renewal period each cycle.

(3) A licensee who serves as an instructor in an approved education course for continuing education as provided for in subdivision (a) of Section 4444, may receive 1.5 hours of continuing education course participation credit for each hour of new course instruction presented. A maximum of 6 of the fifteen (15) hours of continuing education credit may be earned under this paragraph.

(4) A maximum of 4 of the fifteen (15) hours of continuing education credit may be earned through independent study under the supervision of an approved education provider pursuant to Section 4446 that supplies evidence of completion.

(b) Annual subject topic requirements.

(1) Continuing education credit shall be earned by taking approved education courses in at least one of the subject topics as provided for in Section 4444.

(2) At least 2 hours of continuing education credits each year shall be in ethics for fiduciaries.

15. California Code of Regulations, title 16, section 4452, states, in pertinent part:

Each applicant is responsible for ensuring compliance with the continuing education requirements of this Article.

(a) To demonstrate compliance a licensee shall sign under penalty of perjury on an annual renewal application form provided by the Bureau that they have completed fifteen (15) hours of approved continuing education courses.

(b) A licensee shall maintain documentation of completion of continuing education courses for a period of at least three years from the date of renewal.

(c) Each licensee shall provide any information requested by the Bureau within ten (10) business days of the request, to determine compliance with the continuing education requirements for license renewal.

16. California Code of Regulations, title 16, section 4470, states, in pertinent part:

. . .

(b) The licensee shall comply with all local, state, and federal laws and regulations, and requirements developed by the courts and the Judicial Council as a minimum guide for the fulfillment of the fiduciary duties recognized under this Article.

17. California Code of Regulations, title 16, section 4482, states, in pertinent part:

(a) The licensee shall protect the assets of the estate.

. . .

(e) Consistent with the licensee's fiduciary duties, the licensee shall manage the assets of the estate in the best interest of the consumer.

(f) The licensee shall manage the estate with prudence, care and judgment, maintaining detailed fiduciary records as required by law.

COST RECOVERY

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

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FACTS

19. On December 8, 2004, in connection with a money judgment in favor of AM, a disabled minor (Beneficiary), the Riverside County Superior Court (court) authorized the establishment of a Special Needs Trust (SNT) in accordance with Probate Code Sections 3604 and 3605. The court appointed Respondent as the Trustee of the SNT. On December 8, 2004, Respondent executed the SNT and deposited $221,423.40 in the SNT.

20. During the time Respondent administered the SNT, she made discretionary payments on behalf of the Beneficiary and paid costs of administration, including the payment of trustee fees to herself.

21. On January 13, 2012, Respondent unilaterally elected to terminate the SNT and pay the remaining SNT balance to the Beneficiary's mother. Respondent did not seek court authority to terminate the SNT. Respondent did not give proper notice to the public agencies that had provided services to the Beneficiary of her intention to terminate the SNT and pay the remaining SNT corpus to the Beneficiary's parent.

22. Respondent did not file an accounting for the SNT during the 7 year period that she was Trustee.

23. On April 25, 2012, the court ordered Respondent to file an accounting regarding the SNT.

24. On July 18, 2012, Respondent filed a "First and Final Account and Report of Trustee and Petition for its Settlement and Termination of Trust with Uneconomically Low Principle" with the court. The court appointed attorney DM to represent the Beneficiary in the matter.

25. On October 25, 2012, DM filed objections to Respondent's accounting.

26. The final accounting matter went to hearing on the afternoons of November 12, 13, and 14, 2013. Respondent testified that she did not have a recollection of ever reading the SNT. Written closing arguments were submitted and the court took the matter under submission on January 30, 2014.

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27. On April 18, 2014, the court rendered a tentative decision expressing an intention to surcharge Respondent the sum of $93,036.75 and suspended Respondent as Trustee. On April 28, 2014, Respondent submitted a Request for Statement of Decision.

28. On June 23, 2014, the court entered a Statement of Decision finding that Respondent's accounting is approved, that Respondent had abused her discretionary authority, and had breached her duties as a Trustee. The court imposed a surcharge on Respondent in the following amounts:

1. $1,250 paid for family rent
2. $34,229.55 paid for trustee fees
3. $17,577.85 of the "living expense" total set forth on page 4 of Schedule C
4. $15,574.85 "final distribution"
5. $24,404.50 vehicle expenses

The court ordered Respondent to reimburse the SNT in the amount of $93,036.75 and continued Respondent's suspension as Trustee. The court found Respondent had breached her fiduciary duty by failing to notify the court of her unlicensed status from 2008 to 2010.

FIRST CAUSE FOR DISCIPLINE

(Incompetence)

29. Respondent is subject to disciplinary action under Code section 6584(d) in that she was incompetent when she demonstrated a lack of knowledge or ability to perform her professional obligations to the Beneficiary. The circumstances are set forth in detail in paragraphs 19 through 28, above, and are incorporated herein as though fully set forth, and as follows:

a. Respondent failed to read the SNT instrument and failed to refer to the SNT's terms prior to taking actions as Trustee.

b. Respondent failed to refer to pertinent Probate Code sections and took numerous actions which were contrary to the specific terms of the trust instrument as well as the laws of the State of California.

c. Respondent failed to follow the terms of the SNT and the laws of the State of California which resulted in a loss to the Beneficiary for whom the SNT was established.

d. Respondent failed to administer the SNT pursuant to its terms.

e. Respondent failed to seek court authority prior to compensating herself as Trustee.

f. Respondent failed to file accountings with the court as required under the SNT.

g. Respondent failed to seek court authority prior to electing to terminate the SNT.

h. Respondent failed to distribute the remaining SNT assets as set forth in the SNT.

i. Respondent failed to give notice to health agencies that had provided benefits to the Beneficiary that she was terminating the SNT.

SECOND CAUSE FOR DISCIPLINE

(Unprofessional Conduct)

30. Respondent is subject to disciplinary action under Code section 6584(d) in that she failed to meet the standards of conduct of a Professional Fiduciary in the manner she handled the Beneficiary's SNT. The circumstances are set forth in detail in paragraphs 19 through 28, above, and are incorporated herein as though fully set forth, and as follows:

a. Respondent failed to read the SNT instrument and failed to refer to the SNT's terms prior to taking actions as Trustee.

b. Respondent failed to refer to pertinent Probate Code sections and took numerous actions which were contrary to the specific terms of the trust instrument as well as the laws of the State of California.

c. Respondent failed to follow the terms of the SNT and the laws of the State of California which resulted in a loss to the Beneficiary for whom the SNT was established.

d. Respondent failed to administer the SNT based on its terms.

e. Respondent failed to seek court authority prior to compensating herself as Trustee.

f. Respondent failed to file accountings with the court as required under the SNT.

g. Respondent failed to seek court authority prior to electing to terminate the SNT.

h. Respondent failed to distribute the remaining SNT assets as set forth in the SNT.

i. Respondent failed to give notice to health agencies that had provided benefits to the Beneficiary that she was terminating the SNT.

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THIRD CAUSE FOR DISCIPLINE

(Obey all Laws- Violation of State Law and Regulations)

31. Respondent is subject to disciplinary action under Code section 6584(h) and California Code of Regulations, title 16, section 4470(b), in that she failed to comply with all state laws and regulations governing a Professional Fiduciary. The circumstances are set forth in detail in paragraphs 19 through 28, above, and are incorporated herein as though fully set forth, and as follows:

a. Respondent failed to comply with Probate Code section 16000 in that she failed to administer the SNT in accordance with its terms.

b. Respondent failed to comply with Probate Code section 16062 in that she failed to provide annual accountings to the Beneficiary.

c. Respondent failed to comply with Probate Code section 3605 in that on the termination of the SNT, she failed to give proper notice of her intention to terminate the SNT to the State Department of Health Care Services, the State Department of State Hospital, and the State Department of Developmental Services.

d. Respondent failed to distribute the remaining SNT principal as directed under Probate Code section 15410 and the terms of the SNT.

e. Respondent failed to comply with California Code of Regulations, title 16, section 4482, when she failed to protect the assets of the SNT and ended up causing a loss to the Beneficiary for whom the SNT was established.

FOURTH CAUSE FOR DISCIPLINE

(Failure to Complete and Prove Continuing Education)

32. Respondent is subject to disciplinary action under Code sections 6538(b), 6580(a) and 6584(h), and under California Code of Regulations, title 16, sections 4442(a)(1) and 4452, in that she violated the law by failing to complete 15 hours of approved continuing education courses, and by falsely stating under penalty of perjury that she had completed said hours, and/or by failing to maintain documentation of completion of said hours, as follows:

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33. On or about April 13, 2013, Respondent signed and submitted to the Bureau an application for renewal of her professional fiduciary license. In the application Respondent stated, under penalty of perjury, that she had completed 15 hours of continuing education courses during the last year.

34. On or about February 6, 2014, the Bureau audited Respondent, requesting documentation of Respondent's completion of 15 hours of continuing education courses. Respondent failed to provide the required documentation.

JURISDICTION FOR PETITION TO REVOKE PROBATION

35. The allegations of paragraphs 1 through 34 of the First Amended Accusation and Petition to Revoke Probation are incorporated herein by reference and are realleged as if fully set forth.

36. This Petition to Revoke Probation is brought before the Bureau under Probation Term Number 7 of the Decision and Order, *In the Matter of the Statement of Issues Against Melodie Jo Scott,* Case No. A1-2008-01. Condition 7 states:

> **Violation of Probation.** If Respondent violates the conditions of her probation, the bureau, after giving respondent notice and an opportunity to be heard, may set aside the stay order and impose the stayed revocation of respondent's license.
>
> If during the period of probation, an accusation or petition to revoke probation has been filed against respondent's license or the Attorney General's Office has been requested to prepare an accusation or petition to revoke probation against respondent's license, the probationary period shall automatically be extended and not expire until the accusation or petition has been acted upon by the bureau.

FIRST CAUSE TO REVOKE PROBATION

(Obey all Laws-Incompetence)

37. At all times after the effective date of Respondent's probation, Condition 1 stated, in pertinent part:

> **Obey All Laws.** Respondent shall obey all federal, state and local laws, and all rules and regulations governing the practice of a professional fiduciary in California. A full and detailed account of any and all violations of law shall be reported by respondent to the bureau in writing within 72 hours of occurrence. If respondent is under criminal court orders, including probation or parole, and the order is violated, this shall be deemed a violation of these probation conditions, and may result in the filing of an accusation and/or petition to revoke probation.

38. Respondent's probation in Case No. A1-2008-01 is subject to revocation because she failed to comply with Probation Condition 1, in that she violated the law by being incompetent in performing her professional obligations to the Beneficiary in the SNT pursuant to Code section 6584(d), and as more specifically set forth in paragraphs 19 through 29, above, and incorporated herein as though fully set forth.

SECOND CAUSE TO REVOKE PROBATION

(Obey all Laws-Unprofessional Conduct)

39. Respondent's probation in Case No. A1-2008-01 is subject to revocation because she failed to comply with Probation Condition 1, in that she violated the law by engaging in unprofessional conduct in performing her professional obligations to the Beneficiary in the SNT pursuant to Code section 6584(d), and as more specifically set forth in paragraphs 19 through 30, above, and incorporated herein as thought fully set forth.

THIRD CAUSE TO REVOKE PROBATION

(Obey all Laws-Violation of State Law and Regulations)

40. Respondent's probation in Case No. A1-2008-01 is subject to revocation because she failed to comply with Probation Condition 1, in that she violated the law by failing to comply with all state laws and regulations governing a Professional Fiduciary, including the Probate Code, as more specifically set forth in paragraphs 19 through 31, above, and incorporated herein as though fully set forth.

FOURTH CAUSE TO REVOKE PROBATION

(Obey all Laws-Continuing Education)

41. Respondent's probation in Case No. A1-2008-01 is subject to revocation because she failed to comply with Probation Condition 1, in that she violated the law by failing to complete 15 hours of approved continuing education courses, and by falsely stating under penalty of perjury that she had completed said hours, and/or by failing to maintain documentation of completion of said hours, as set forth in paragraphs 32 through 34, above, and incorporated herein as though fully set forth.

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PRAYER

WHEREFORE, Complainant requests that a hearing be held on the matters alleged in this First Amended Accusation and Petition to Revoke Probation, and that following the hearing, the Professional Fiduciaries Bureau issue a decision:

1. Revoking the probation that was granted by the Professional Fiduciaries Bureau in Case No. A1-2008-01 and imposing the disciplinary order that was stayed thereby revoking Professional Fiduciary License No. PF 545 issued to Melodie Jo Scott;

2. Revoking or suspending Professional Fiduciary License No. PF 545, issued to Melodie Jo Scott;

3. Ordering Melodie Jo Scott to pay the Professional Fiduciaries Bureau the reasonable costs of the investigation and enforcement of this case, pursuant to Business and Professions Code section 125.3; and

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

DATED: September 11, 2015

JULIA ANSEL
Bureau Chief
Professional Fiduciaries Bureau
Department of Consumer Affairs
State of California
Complainant

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Exhibit A

Decision and Order

Professional Fiduciaries Bureau Case No. A1-2008-01

BEFORE THE DIRECTOR
DEPARTMENT OF CONSUMER AFFAIRS
FOR THE PROFESSIONAL FIDUCIARIES BUREAU
STATE OF CALIFORNIA

In the Matter of the Statement of Issues Against: MELODIE JO SCOTT, Respondent.	Case No. A1-2008-01 OAH No. 2009030280

DECISION PURSUANT TO ORDER OF COURT OF APPEAL OF THE STATE OF CALIFORNIA IN AND FOR THE THIRD APPELLATE DISTRICT

Administrative Law Judge Melissa G. Crowell, State of California, Office of Administrative Hearings, heard this matter in Oakland, California, on May 26 and 27, October 20, 21, 22, and October 29, 2009.

Deputy Attorney General Jonathan D. Cooper represented complainant.[1]

Steven L. Simas and Hugh R. Slayton, Attorneys at Law, represented respondent Melodie Jo Scott, who was present. The record was left open for submission of closing briefs. Respondent's Closing Argument and Lodging of Non-California Authorities, was marked as a group Exhibit RRRR; complainant's Closing Argument was marked as Exhibit 65; and respondent's Reply Brief was marked as Exhibit SSSS. The record was closed and the matter submitted for decision on December 14, 2009.

The Proposed Decision of the Administrative Law Judge was submitted to the Director ("Director") of Consumer Affairs' designee, the Deputy Director of Legal Affairs ("Deputy Director"), on February 22, 2010. After due consideration thereof, the Deputy Director declined to adopt said Proposed Decision and on February 24, 2010 issued an Order of Nonadoption. On April 5, 2010, 2010, the Bureau received the complete transcript of the hearing and thereafter, on April 12, 2010, the Deputy Director issued an Order Fixing Date for Submission of Written Argument. On July 7, 2010, the Deputy Director issued an Order, pursuant to Government Code section 11517, delaying the issuance of its decision until August 13, 2010. Written arguments were received from

[1] Mellonie Yang was Chief of the Professional Fiduciaries Bureau when the Statement of Issues was filed. Gil DeLuna is the current Interim Chief.

Complainant and Respondent and the time for written argument in this matter expired, the entire record, including the transcript of said hearing, was read and considered pursuant to Government Code Section 11517, the Deputy Director decided to deny the application of Melodie Jo Scott for a Professional Fiduciary License.

Subsequently, Ms. Scott filed administrative and traditional writs of mandate with the Superior Court for Sacramento County. On or about January 14, 2011, the Superior Court issued a Peremptory Writ requiring the Director of the Department of Consumer Affairs to set aside its Decision after Nonadoption denying respondent's application for a professional fiduciary license and adopt the decision of the administrative law judge sequentially granting the respondent's application for a professional fiduciary license, revoking the license, staying the revocation and placing the license on probation for three years subject to specified terms and conditions. The Superior Court's Peremptory Writ ordering issuance of the license was stayed pending appeal by the Director to the Court of Appeal of the State of California, Third Appellate District. Respondent requested the Court of Appeal to lift the stay and order the Peremptory Writ to take effect during the pendency of the appeal. On May 5, 2011, the Court of Appeal granted respondent's Motion to Require Issuance of a Professional Fiduciary License under the terms and conditions imposed by the Administrative Law Judge in the proposed decision dated January 29, 2010. This order is to remain in effect pending the appeal and further order of the court.

ORDER

The Decision after Nonadoption denying respondent's application for a professional fiduciary license is hereby set aside. In accordance with the order of the Court of Appeal of the State of California in and for the Third Appellate District, the respondent shall be issued a professional fiduciary license subject to the terms and conditions imposed by the Administrative Law Judge in the proposed decision dated January 29, 2010.

This Order is effective immediately.

DATED: May 10, 2011

DOREATHEA JOHNSON
Deputy Director, Legal Affairs
Department of Consumer Affairs

BEFORE THE
DIRECTOR OF THE DEPARTMENT OF CONSUMER AFFAIRS
FOR THE PROFESSIONAL FIDUCIARIES BUREAU
STATE OF CALIFORNIA

In the Matter of the Statement of Issues Against: MELODIE JO SCOTT, Respondent.	Case No. A1-2008-01 OAH No. 2009030280

PROPOSED DECISION

Administrative Law Judge Melissa G. Crowell, State of California, Office of Administrative Hearings, heard this matter in Oakland, California, on May 26 and 27, October 20, 21 and 22, and October 29, 2009.

Deputy Attorney General Jonathan D. Cooper represented complainant.[1]

Steven L. Simas and Hugh R. Slayton, Attorneys at Law, represented respondent Melodie Jo Scott, who was present.

The record was left open for submission of closing briefs. Respondent's Closing Argument and Lodging of Non-California Authorities, was marked as a group Exhibit RRRR; complainant's Closing Argument was marked as Exhibit 65; and respondent's Reply Brief was marked as Exhibit SSSS. The record was closed and the matter submitted for decision on December 14, 2009.

FACTUAL FINDINGS

1. On April 9, 2008, the Professional Fiduciaries Bureau, Department of Consumer Affairs, received an application for a Professional Fiduciary License from respondent Melodie Jo Scott. Respondent signed the application on March 31, 2008, certifying under of penalty of perjury that all statements, answers, and representations made in the application were true and accurate.

[1] Mellonie Yang was Chief of the Professional Fiduciaries Bureau when the Statement of Issues was filed. Rick Wallinder is the current Interim Chief.

2. By letter dated August 7, 2008, the bureau informed respondent that her application was denied. Respondent filed a timely notice of defense.

Background

3. The Professional Fiduciaries Act (Bus. & Prof. Code, § 6500 et seq.) was enacted by the legislature effective January 1, 2007. In order to act or hold oneself out to the public as a professional fiduciary after January 1, 2009, a license issued by the bureau was required. (Bus. & Prof. Code, §§ 6502 & 6530; see also Prob. Code, § 2340 [a superior court may not appoint a person to carry out the duties of a professional fiduciary, or permit a person to continue those duties, unless that person holds a license issued by the bureau].)

4. A professional fiduciary is defined by the Act in Business and Professions Code section 6501, subdivision (f). It provides:

> a person who acts as a conservator or guardian for two or more persons at the same time who are not related to the professional fiduciary or to each other by blood, adoption, marriage, or registered domestic partnership. "Professional fiduciary" also means a person who acts as a trustee, agent under durable power of attorney for health care, or agent under a durable power of attorney for finances, for more than three people or more than three families, or a combination of people and families that totals more than three, at the same time, who are not related to the professional fiduciary by blood, adoption, marriage, or registered domestic partnership.

5. Prior to the creation of the bureau, and commencing in January 2000, persons who acted as a private conservator or guardian were required to hold a registration obtained through application to the Statewide Registry of Private Conservators and Guardians, operated by the Department of Justice. (See former Prob. Code, §§ 2850 to 2586, & former Cal. Code Regs., tit. 11, §§ 313-319.) Some counties also required persons serving as private conservators and guardians in their county to file information with the county clerk. (See former Prob. Code, § 2340.)

First Cause for Denial (License Application)

6. In her application for licensure, respondent answered "no" to questions regarding whether she had ever "resigned" or "settled" as a fiduciary in a matter in which a "complaint" had been filed with the court. The application directed that if either question is answered in the affirmative, the applicant must provide requested information, including the case name, number, court location and date, a written statement of the issues and facts regarding the case, and copies of court orders.

7. The statement of issues alleges that respondent knowingly made a false statement of fact required to be revealed on the application (Bus. & Prof. Code, § 480, subd. (c)), and that she engaged in fraud or misrepresentation in applying for the license (Bus. & Prof. Code, § 6536, subd. (c)). It alleges that in two cases she settled a matter which involved complaints made to the court regarding her actions as a fiduciary; that in one case she resigned as conservator in a matter after complaints were made to the court regarding her actions as a fiduciary; and that in one case, she settled a matter and resigned as conservator after complaints were made against her to the court regarding her actions as a fiduciary.

8. The application form used by respondent was issued by the bureau in December 2007. The application did not define the term "complaint." The term "complaint" was not defined by bureau regulation at that time.

9. The term complaint had a meaning in the context of the operation of the Statewide Registry. Former Probate Code section 2850, subdivision (e), provided:

> Each court clerk shall forward a copy of any complaint filed with that court, and found to be meritorious by that court, against a conservator or guardian in his or her capacity as a conservator or guardian for inclusion in the Statewide Registry. The Statewide Registry shall place any copies of those complaints in the file of that conservator or guardian.

In the regulations adopted by the Department of Justice for the Statewide Registry, it defined the term complaint by simply referencing former Probate Code section 2850, subdivision (e). (See former Cal. Code Regs., tit. 11, § 314, subd. (d).)

10. The bureau issued a new application form in March 2008. This application contained an asterisk next to the word "complaint," and defined the term as follows:

> A complaint means a civil complaint, a petition, motion, objection, or other pleading filed with the court against the licensee alleging the licensee has not properly performed the duties of a fiduciary.

Applicants like respondent who had completed and submitted the earlier version of the application form were not notified that the bureau had re-issued the application with the term complaint defined.

11. In May 2008 the bureau adopted in regulatory form the requirements for disclosure in an application for licensure as a professional fiduciary. The regulation, which is set forth in California Code of Regulations, title 16, section 4422, defines in subdivision (c) the term "complaint." It provides:

As used in this section "complaint" means a civil complaint, a petition, motion, objection, or other pleading filed with the court against the licensee alleging the licensee has not properly performed the duties of a fiduciary.

12. Respondent testified that when she completed the December 2007 version of the application, she answered the questions in the negative because she had never resigned or settled a matter in a case in which a complaint which had been found to be meritorious by a court and which had been reported to the Statewide Registry. Respondent had never been reported to the Statewide Registry by any court for any reason. Respondent was not aware that the bureau was using a different definition of the term complaint. Had she known that the bureau was expanding the definition from that used in the Statewide Registry process, she would have answered the questions differently. And, had she been given the opportunity to supplement her application after the bureau had defined the term, she would have done that as well. Respondent's testimony in this regard was found to be credible and persuasive.

13. Much evidence was presented regarding whether there was a common understanding in the trade of the word "complaint" at the time respondent completed her application. It was not established that the term had only the meaning now attributed to it by the bureau. Because there was not a common understanding of the term, the bureau, as established through the testimony of its then Chief, Mellonie Yang, decided to define the term by regulation, which was proposed in the end of February 2008, and not adopted until two months after respondent filed her application.

14. Under the circumstances presented here, respondent's interpretation of the application form cannot be found to be unreasonable. As such, it is not necessary to decide whether respondent had an obligation to disclose the four cases the bureau charges her with failing to disclose. Assuming for purposes of argument that she did have an obligation to disclose them, it is concluded that her failure to do so does not amount to fraud or a knowing failure to disclose.

Second Cause for Denial (Unprofessional Conduct)

15. The statement of issues alleges that respondent acted unprofessionally on December 11, 2008, by driving her vehicle in violation of Vehicle Code sections 23152, subdivision (a) (driving while under the influence of alcohol/drugs), and 23152, subdivision (b) (driving with a blood alcohol level in excess of the legal limit of 0.08 percent).

16. The evidence established that respondent drove her vehicle after having an unknown number of glasses of wine at a restaurant. Respondent fully admits to being intoxicated and to driving while intoxicated. Respondent was arrested and charged with driving under the influence; her blood alcohol level was 0.18 percent. Respondent has not yet been criminally convicted.

17. Respondent regrets her conduct and is embarrassed by it. She attended a four-month class on alcohol awareness through Jackson-Bibby Awareness Group. The class focused on the effects of drinking alcohol and driving, and she has a heightened awareness of the risks and pitfalls of drinking and driving. She now has a plan in place so that she does not drive a vehicle after drinking alcohol. She concedes that she exercised poor judgment by driving while intoxicated.

18. At the time that she drove her vehicle while intoxicated, respondent was not at work as a professional fiduciary. She had taken the day off in order to deal with personal matters relating to a close family member, and she had made arrangements for her clients to be served by a case manager. It was a stressful day for respondent, and she did not eat the entire day.

19. Daniel Stubbs testified that a professional fiduciary is required to be available to address an emergency with a client at any hour, and for that reason, it is always unprofessional conduct to drink alcohol to excess. This testimony is found unpersuasive. It was not established that respondent has an alcohol abuse problem in her private life that affects or could affect her fitness to be a professional fiduciary. This is the first time that she has been arrested for driving under the influence of alcohol. While it gives one pause to see a 0.18 percent blood alcohol level, there was no expert evidence presented to interpret the meaning of such a high blood alcohol level with respect to alcohol abuse.

Third Cause for Denial (Unlicensed Practice)

20. The evidence establishes that respondent continued to act as a professional fiduciary after January 1, 2009, in both Riverside and San Bernardino counties. Although respondent did not take on any new clients, she continued to act as a professional fiduciary in more matters than allowed by law. It was not established that she so acted to flaunt the authority of the bureau or to harm the public.

21. Respondent was caught off guard when the bureau denied her application, a license she fully expected to obtain. She decided to keep two conservatorships, and to step down from all the others. Respondent mistakenly believed that she could retain two conservatorships and three trusteeships without licensure.

22. Respondent also continued to act as a professional fiduciary in a large number of other matters until she was finally released from those obligations by the probate court. The process started with a meeting with Probate Court Judge Welch on December 8, 2008, to decide how to handle the appointment of successors to respondent in the numerous cases she had. In each case, the court issued an order to show cause re vacancy in the office, and sent notices to the private professional fiduciaries of the opportunity to petition to be the successor conservator. The court set a date for a hearing on the appointment of successor conservators in each case. For some of the cases, there were competing professional fiduciaries that were interested. In other cases, there were not. Respondent continued to

fulfill obligations to ensure that no harm was done to the beneficiary and the assets. Once respondent's resignation was accepted by the court, she was still required to file final accountings through the date of the appointment of the successor trustee, and then to be followed by a discharge hearing and order by the court. These proceedings took time.

Other Matters

23. Respondent has been a professional private fiduciary since 1982. She has acted as a Conservator, a Guardian, and an Agent under Durable Power of Attorney. She has expertise in asset recovery, with a focus on locating missing assets of elderly clients. Since 1993, respondent has operated under the business name of Conservatorship and Resources for the Elderly, Inc., in Redlands, California. The types of client she has represented over the years are the mentally ill, indigent, and victims of elder abuse. She has taken on many cases pro bono.

24. Respondent has a bachelor's degree from the University of Redlands. Respondent has been a member of the Professional Fiduciary Association of California (PFAC) for over 12 years. She was the president of PFAC in 1999, and its member of the year in 2004. She has served on its Ethics Committee, which developed the first ethical standards for fiduciaries in California. She has many other noteworthy professional and educational achievements. The evidence establishes that respondent has worked for many years to professionalize the industry and to develop ethical and professional standards.

25. Respondent presented evidence from two attorneys who practice with her. Attorney David Horspool has had a probate practice for some 25 years. He is a certified specialist in estate planning, trusts and probate law. He has known respondent for 26 years, and has worked with her on hundreds of cases. In his opinion, respondent has a reputation for truthfulness and honesty. She is not always well-liked, as she can be too direct and too truthful. He believes that her standard of practice is professional and that she is passionate about her cases.

26. James Church is an attorney who specializes in the areas of probate, guardianship, conservatorship, trust administration, and estates in the Redlands area. He has known and worked with respondent for more than ten years, and they have worked together in over 20 cases. She has a reputation for truthfulness and honesty. In Church's view, respondent is competent, professional and compassionate.

27. Joan Elizabeth Roberts is the owner and director of Visiting Angels of Riverside, a large home care agency that provides non-medical care for seniors in Riverside and San Bernardino Counties. In her opinion, respondent is the "best of the best" as a conservator.

28. Not everyone thinks highly of respondent as a fiduciary. The bureau introduced declarations from three family members, Steven L. Price, Sr., Gina Rilke, and

Joseph Quattrochi, Jr., who were not happy with respondent as a fiduciary and who do not think that respondent is ethical or honest as a fiduciary.

LEGAL CONCLUSIONS

First Cause for Denial

1. Pursuant to Business and Professions Code section 480, subdivision (c), an application for licensure as a professional fiduciary may be denied if the applicant has knowingly made a false statement of fact required to be revealed in the application for licensure.

Pursuant to Business and Professions Code section and 6536, subdivision (c), an application for licensure as a professional fiduciary may be denied if the applicant has engaged in fraud or misrepresentation in applying for a license.

By reason of the matters set forth in Factual Findings 6 to 14, cause for denial under these sections was not established. In order to find cause for denial, it must be shown that respondent knew what the bureau meant by the term "complaint filed with the court," and respondent's testimony established that she did not. The term complaint did not have an ordinary meaning in the trade, as evidenced by the need to define the term by regulation and on the revised application form the bureau released. There is no question that the term "complaint" as currently defined by bureau regulation is different than how the term was used in the State Registry process which preceded the creation of the bureau. Respondent may be faulted for rushing through her application; but on this record, she cannot be found to have knowingly made a false statement of fact or to have engaged in fraud in the attempt to obtain a license.

Second Cause for Denial

2. Pursuant to Business and Professions Code section 480, subdivision (a)(3), an application for licensure as a professional fiduciary may be denied if the applicant has done an act which if done by a licentiate would be grounds for license suspension or revocation. Pursuant to Business and Professions Code section 6584, a license issued under the Act may be suspended or revoked for "unprofessional conduct in, or related to, the practice of a professional fiduciary." Unprofessional conduct under the Act "includes, but is not limited to, acts contrary to the professional standards concerning any provision of law substantially related to the duties of a professional fiduciary."

By reason of the matters set forth in Factual Findings 15 to 19, cause for denial under these sections was not established. There is no question that abuse of alcohol may constitute unprofessional conduct by a professional fiduciary. And there is no requirement, as respondent argues, that alcohol abuse be established by a criminal conviction. But respondent's single act of driving while intoxicated, under the circumstances presented here,

does not establish that she has a problem with alcohol in her private life. (Cf. *In re Kelley* (1990) 52 Cal.3d 487, 495 [two DUI convictions within a short period of time may indicate alcohol abuse].) Nor does it in and of itself establish a basis for finding unprofessional conduct in, or related to, the practice of a professional fiduciary. Cause for denial pursuant to Business and Professions Code section 480, subdivision (a)(3), read together with section 6584, was not established.

Third Cause for Denial

3. Pursuant to Business and Professions Code section 6584, subdivision (h), an application for licensure as a professional fiduciary may be denied if the applicant acts as a professional fiduciary without having a license to so act. A professional fiduciary license is required in order for a person to act as a conservator for two or more people or for three or more trusts. (Bus. & Prof. Code, § 6501, subd. (f).) The Professional Fiduciaries Act became effective January 1, 2009. As set forth in Factual Findings 20 to 22, respondent continued to act as a professional fiduciary after January 1, 2009, notwithstanding that she did not have a license to do so. Cause for denial exists pursuant to Business and Professions Code section 6584, subdivision (h).

Licensing Considerations

4. As set forth in Business and Professions Code section 6516, the protection of the public is the highest priority of the bureau in exercising its licensing functions. "Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount." (*Ibid.*) Although it is true that respondent continued to act as a professional fiduciary after the law required her to have a license, the extenuating circumstances are such that her conduct does not demonstrate a serious breach of professional integrity. The public will be adequately protected by the following order, which allows respondent to obtain a professional fiduciary license on a probationary basis.

ORDER

The application of Melodie Jo Scott for a Professional Fiduciary License is granted. Upon successful completion of all licensing requirements, a Professional Fiduciary License shall be issued to respondent. The license shall immediately be revoked, the order of revocation stayed, and respondent shall be placed on probation for three (3) years subject to the following terms and conditions:

1. OBEY ALL LAWS: Respondent shall obey all federal, state and local laws, and all rules and regulations governing the practice of a professional fiduciary in California.

A full and detailed account of any and all violations of law shall be reported by respondent to the bureau in writing within 72 hours of occurrence. If respondent is under criminal court orders, including probation or parole, and the order is violated, this shall be deemed a violation of these probation conditions, and may result in the filing of an accusation and/or petition to revoke probation.

2. COMPLY WITH PROBATION: Respondent shall fully comply with the terms and conditions of probation imposed by the bureau and shall cooperate with representatives of the bureau or its designee in its monitoring and investigation of respondent's compliance with probation terms and conditions.

3. SUBMIT WRITTEN REPORTS: During the period of probation, respondent shall submit written quarterly reports, under penalty of perjury, as required by the bureau. These reports shall contain statements relative to respondent's compliance with all the conditions of probation, and other information as required by the bureau.

4. TOLLING OF PROBATION: In the event respondent should leave California to reside or practice outside of the state, respondent must notify the bureau in writing of the dates of departure and return. Periods of non-California residency or practice outside the state shall not apply to reduction of the probationary period. No obligation imposed as a condition of probation shall be suspended or otherwise affected by such period of out-of-state residency or practice except with the written permission of the bureau.

5. MAINTAIN VALID LICENSE: Respondent shall, at all times, maintain an active current license with the bureau including any period of suspension or period in which probation is tolled.

6. LICENSE SURRENDER: During respondent's term of probation, if she ceases practicing due to retirement, health reasons or is otherwise unable to satisfy the conditions of probation, respondent may surrender her license to the bureau. The bureau reserves the right to evaluate respondent's request and to exercise its discretion whether to grant the request, or to take any other action deemed appropriate and reasonable under the circumstances, without further hearing. Upon formal acceptance of the tendered license respondent will no longer be subject to the conditions of probation.

Surrender of respondent's license shall be considered a disciplinary action and shall become a part of respondent's license history with the bureau.

7. VIOLATION OF PROBATION: If respondent violates the conditions of her probation, the bureau, after giving respondent notice and an opportunity to be heard, may set aside the stay order and impose the stayed revocation of respondent's license.

If during the period of probation, an accusation or petition to revoke probation has been filed against respondent's license or the Attorney General's Office has been requested to prepare an accusation or petition to revoke probation against respondent's license, the probationary period shall automatically be extended and shall not expire until the accusation or petition has been acted upon by the bureau.

8. COMPLETION OF PROBATION: Upon successful completion of probation, respondent's license shall be fully restored.

DATED: January 29, 2010

Melissa Crowell

MELISSA G. CROWELL
Administrative Law Judge
Office of Administrative Hearings