

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

ALI KHAN, M.D.,	:	
	:	
Appellant	:	CASE NO. 12CV-12914
	:	
vs.	:	JUDGE BEATTY
	:	
STATE MEDICAL BOARD OF OHIO,	:	
	:	
Appellee	:	

ALI KHAN, M.D.,	:	
	:	
Appellant	:	CASE NO. 13CV-13794
	:	
vs.	:	JUDGE BEATTY
	:	
STATE MEDICAL BOARD OF OHIO,	:	
	:	
Appellee	:	

**ENTRY GRANTING APPELLANT’S MOTION FOR SUSPENSION OF THE
ORDER OF THE STATE MEDICAL BOARD OF OHIO
PENDING APPEAL TO THE TENTH DISTRICT COURT OF APPEALS**

On September 25, 2014, this Court affirmed the Order of the State Medical Board (the “Board”) permanently revoking Appellant’s certificate to practice medicine and surgery in Ohio.

On September 30, 2014, Appellant filed the Motion for Suspension of the Board’s Order Pending Appeal to the Tenth District Court of Appeals now before the Court. The Motion is opposed by the Board.

R.C. 119.12 provides as follows:

The filing of a notice of appeal shall not automatically operate as a suspension of the order of an agency. ... In the case of an appeal from the state medical board ..., the court may grant a suspension and fix its terms

if it appears to the court that an unusual hardship to the appellant will result from the execution of the agency's order pending determination of the appeal and the health, safety, and welfare of the public will not be threatened by suspension of the order.

Pursuant to R.C. 119.12, this Court has previously granted stays in this matter on October 24, 2012 and January 22, 2014.

The first issue for consideration under R.C. 119.12 is whether Appellant has demonstrated “unusual hardship.”

Appellant argues that permanent revocation of his medical license will cause him to lose his right to a meaningful appeal and lose his entire medical practice. The Board argues that Appellant’s financial harm does not constitute unusual hardship.

At issue here, according to Appellant, is not simply a loss of income, but rather, the likely loss of Appellant’s practice. Appellant asserts that nothing will be able to compensate for this damage. The Court finds that this qualifies as an unusual hardship.

The second issue for consideration is whether the health, safety, and welfare of the public will be threatened by suspension of the Order. The Court notes that this disciplinary proceeding was pending before the Board for over two years, during which time the Board did not impose a summary suspension of Appellant’s certificate under R.C. 4731.22(G) on the grounds that Appellant’s practice presents a “danger of immediate and serious harm to the public.” The only direct patient injury alleged to have been caused by Appellant consists of markings on a patient’s face that are correctable. (T. 242-243). The Court finds that the health, safety, and welfare of the public will not be threatened by suspension of the Order.

For the foregoing reasons, Appellant's Motion is GRANTED, and the Board's December 11, 2013 Order is hereby suspended pending appeal to the Tenth District Court of Appeals.

Franklin County Court of Common Pleas

Date: 10-07-2014

Case Title: ALI KAHN MD -VS- OHIO STATE MEDICAL BOARD

Case Number: 13CV013794

Type: DECISION/ENTRY

It Is So Ordered.

A handwritten signature in black ink, "Alan C. Travis", is written over a blue circular seal. The seal contains the text "FRANKLIN COUNTY OHIO" around the top and "ALL THINGS ARE" around the bottom. The signature is written in a cursive style.

/s/ Visiting Judge Alan C. Travis

Court Disposition

Case Number: 13CV013794

Case Style: ALI KAHN MD -VS- OHIO STATE MEDICAL BOARD

Motion Tie Off Information:

1. Motion CMS Document Id: 13CV0137942014-09-3099980000
Document Title: 09-30-2014-MOTION TO STAY
Disposition: MOTION GRANTED
2. Motion CMS Document Id: 13CV0137942014-09-3099980000
Document Title: 09-30-2014-MOTION TO STAY
Disposition: MOTION GRANTED

Respectfully submitted,

/s/ Eric J. Plinke

Eric J. Plinke (0059463)
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Counsel for Appellant Ali Khan, M.D.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served by electronic mail and regular U.S. mail this 30th day of September, 2014 upon:

Heidi Dorn
Assistant Attorney General
Ohio Attorney General's Office
Health and Human Services
30 East Broad Street, 26th Floor
Columbus, Ohio 43215

/s/ Eric J. Plinke

Eric J. Plinke

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Franklin County Ohio Court of Appeals Clerk of Courts- 2014 Sep 30 3:01 PM-14AP000773

procedures on two patients (Patients 4 and 7); taking delivery of and using non-FDA approved Botox on his patients; reusing single-use medical supplies; making false statements in and falsifying a patient's chart; and violating his December, 2007 Board Order.

Dr. Khan requested an administrative hearing, which was held on November 14 and 15, 2011. During the hearing, the State presented the testimony of Dr. Khan, Sara Mazur (a Registered Nurse who worked in Dr. Khan's office), Patient 4, Patient 7, Allison Leatherman (a former employee of Dr. Khan's office), and Board Investigator Amy Myers. In his case, Dr. Khan testified.

On September 12, 2012, the Board issued an Order permanently revoking Dr. Khan's medical license (the "First Order").

Dr. Khan appealed to this Court in Case No. 12CV-12914. On April 2, 2013, this Court issued a Decision and Entry affirming the Board's Order, with one exception. The evidence relating to the allegations against Dr. Khan was reviewed in the Court's 17-page Decision and will not be repeated in detail here. The Court's Decision affirmed the Board's findings that Dr. Khan knowingly took delivery of and used non-FDA approved Botox on patients (Decision, p. 10-13); that he reused a liner for a liposuction procedure on a patient (*Id.*, p. 13-14); that he made false statements in a progress note and a letter that procedures were done on a patient under his supervision (*Id.*, p. 14-16); that the violations occurred when he was subject to the terms and conditions of a 2007 Order issued as a result of his conviction of misdemeanor theft of a credit card of a nurse he worked with at a hospital (*Id.*, p. 5,14); and that he improperly delegated to an unlicensed person laser procedures performed on Patient 4. (*Id.*, p. 2).

The one area in which the Court did not affirm the First Order involved allegations of delegation of a laser procedure performed on Patient 7. The Court concluded that the record did

not establish the exact nature of the medical device used to treat Patient 7 and whether it constituted a “light based medical device.” (*Id.*, p. 9). Administrative code provisions prohibited delegation of application of certain “light based medical devices” and also contained exceptions permitting delegation for certain types of devices. The Court’s Decision stated as follows:

As set forth in detail above, the Court affirms the Board’s Order, with the following exception. As to the findings in Conclusion of Law 3 of the Hearing Examiner’s Report and Recommendation, this matter is remanded to the Board for consideration of whether the equipment used by Ms. Mazur in treating Patient 7 was a “light based medical device” as defined in Ohio Admin. Code 4731-18-02 and whether the exception in Ohio Admin. Code 4731-18-04(B) applies to Ms. Mazur’s treatment of Patient 7. (*Id.*, p. 17).

An appeal to the Tenth District followed. On November 4, 2013, the Court of Appeals dismissed the appeal for lack of a final appealable order.

On remand, the Board considered this matter at its December 11, 2013 meeting.

The Board voted to reconsider Conclusion of Law 3 and Finding of Fact 5 on the question of whether the equipment used by the nurse in treating Patient 7 was a “light based medical device” as defined in Ohio Admin. Code 4731-18-02 and whether the exception in Ohio Admin. Code 4731-18-04(B) applies to the treatment of Patient 7. (R. 32; Minutes p. 21774). Board member Mr. Giacalone reviewed the background and facts on which the Board had based its original decision. (R. 33, p. 21775). He stated that the Board must consider the issue remanded and “then issue a new Order, which may or may not be permanent revocation of Dr. Khan’s medical license.” (*Id.*). He discussed the Board’s options, which included finding that there is insufficient evidence in the record to determine whether the device used to treat Patient 7 was a light-based medical device, relying on the Board’s expertise regarding the nature of the device, or remanding the matter to the Hearing Examiner to analyze these issues. (*Id.*). Mr.

Giacalone moved that the Board find that there was insufficient evidence to determine whether the device in question was a light-based medical device and that the Board issue “an order, based on the remaining Findings, permanently revoking Dr. Khan’s license to practice medicine and surgery in Ohio.” (*Id.*). The motion carried. (R. 35, p. 21777).

On December 11, 2013, the Board issued its Order dismissing the allegation that Dr. Khan permitted an unlicensed person to perform a laser skin treatment on Patient 7’s face and permanently revoking Dr. Khan’s certificate (R. 39-40; the “Second Order”).

On December 24, 2013, Dr. Khan appealed the Second Order, in Case No. 13CV-13794. On January 22, 2014, the Court consolidated these cases.

II. LAW

When considering an appeal from an order of the Medical Board, a common pleas court must uphold the order if it is supported by reliable, probative, and substantial evidence, and is in accordance with law. R.C. 119.12. *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 621 (1993); *Landefeld v. State Med. Bd.*, 10th Dist. No. 99AP-612, 2000 Ohio App. LEXIS 2556.

The Ohio Supreme Court has recognized that the General Assembly granted the Medical Board a broad measure of discretion. *Arlen v. State*, 61 Ohio St.2d 168, 174 (1980). In *Farrand v. State Med. Bd.*, 151 Ohio St. 222, 224 (1949), the court stated:

... The purpose of the General Assembly in providing for administrative hearings in particular fields was to facilitate such matters by placing the decision on facts with boards or commissions composed of men equipped with the necessary knowledge and experience pertaining to a particular field. ...

“Accordingly, when courts review a medical board order, they are obligated to accord due deference to the board’s interpretation of the technical and ethical requirements of the medical profession.” *Landefeld, supra*, at pg. 9.

III. THE COURT'S FINDINGS AND CONCLUSIONS

Dr. Khan's first assignment of error asserts that the Board failed to provide him with notice and an opportunity to be heard and failed to conduct an adjudicatory hearing before issuing the Second Order. Dr. Khan argues that the failure to hold a hearing before issuance of the Second Order violated provisions of R.C. Chapter 119 and his due process rights.

R.C. 119.06 provides that "No adjudication order shall be valid unless an opportunity for hearing is afforded in accordance with sections 119.01 to 119.13 of the Revised Code." R.C. 119.07 provides that when a hearing is required, notice shall be given.

The Board agrees that the Second Order was an "adjudication order" for purposes of R.C. Chapter 119. (Brief, p. 5). The Board asserts that it complied with R.C. Chapter 119 and due process requirements by providing Dr. Khan with a notice of opportunity for hearing and a hearing before issuance of the First Order.

In *Douglas Bigelow Chevrolet, Inc. v. General Motors Corp.*, 138 Ohio App.3d 841 (10th Dist. 2000) ("*Bigelow I*"), the Court of Appeals remanded the matter to the Motor Vehicle Dealers Board ("MVDB") to "reconsider the evidence." (*Id.* at 846). In a second appeal, 10th Dist. No. 02AP-1156, 2003-Ohio-5942 ("*Bigelow II*"), the appellant argued that on remand, the MVDB erred by failing to conduct a new hearing and/or receive new evidence. (*Id.*, ¶50). The Court held that on remand, a second hearing was not required. (*Id.*, ¶52). The Court stated that appellants' contention they were denied due process because a second hearing was not conducted "is unpersuasive." (*Id.*, ¶53). The Court stated:

Appellants construe R.C. 119.09 as requiring the MVDB to have conducted a second hearing upon remand. We believe such an expansive interpretation of R.C. 119.01 is unwarranted based upon the plain and unambiguous language of the statute. ...

... R.C. 119.09 does not provide for a second hearing on remand. To hold otherwise would be to impermissibly add, enlarge, supply, expand, extend or improve R.C. 119.09 to meet a situation not provided for. ... (*Id.*, ¶56-57).

In *Matter of Vaughn v. State Med. Bd.*, 10th Dist. No. 95APE05-645, 1995 Ohio App. LEXIS 5258, a physician's license was revoked based upon multiple violations of the Medical Practices Act. On appeal, some of the violations were reversed, and the case was remanded for reconsideration of the sanction based upon the remaining violations. (*Id.*, p. 2-3). On remand, the Board denied a request to present additional evidence and again revoked the physician's license. (*Id.*, p. 3). In a second appeal, the physician argued that the denial of another hearing on remand deprived her of due process. The Court of Appeals stated:

We find that, under these circumstances, a physician has no cognizable due process interest in having another opportunity to be heard. ... Appellant's opportunities to be heard included the hearing before the hearing examiner, written objections to the hearing examiner's report, and motions before the board. ... The board and two courts have already considered the question of appellant's guilt. The remand to the board was for the sole purpose of reconsidering the sanction. ...

[W]e conclude that the board's denial of appellant's requests to testify and to present additional evidence in mitigation of sanction did not violate appellant's rights of due process ... (*Id.*, p. 9-10).

In arguing that the Board was required to conduct a second hearing, Dr. Khan relies upon *In re Mingo Junction Safety Forces Association*, 74 Ohio App.3d 313 (1991). *Mingo Junction* is inapposite because both administrative orders at issue in that case were issued without a hearing.

In the April 2, 2013 Decision and Entry, the Court remanded this matter for consideration of a specific issue, as in *Bigelow I, supra*; the Court did not require the Board to conduct a new hearing or receive additional evidence.

Dr. Khan already had an opportunity to be heard, and a hearing, on all the allegations included in the 2010 Notice, as well as on any sanctions to be imposed relating to those

allegations. The remand was for the Board's reconsideration of a specific issue related to the violations already addressed during the hearing prior to the First Order. There was no new alleged violation to be addressed on remand. Thus, Dr. Khan had already had a hearing on the issue remanded to the Board.

Under these circumstances, as held in *Bigelow II, supra*, R.C. Chapter 119 does not require a second hearing on remand.

The outcome on the issue remanded to the Board was the best possible for Dr. Khan even if a hearing had been held, as the Board dismissed the charge relating to that issue. The only issue for the Board, then, was the sanction to be imposed based upon the remaining violations. To the extent that Dr. Khan is arguing that he was entitled to a second hearing to address the sanction, *Vaughn, supra*, applies. In *Vaughn*, the Court of Appeals held that no second hearing was necessary where the only issue was the sanction to be imposed on violations that had already been affirmed.

The Court of Appeals has made clear that no second hearing is required by due process or by R.C. Chapter 119 on a remand for reconsideration of a violation. The Board therefore did not err in proceeding without a second hearing.

Dr. Khan's second assignment of error asserts that the Board's Second Order violates R.C. 119.09 because the Board failed to review and consider the entire record.

In *Lies v. Ohio Veterinary Medical Board*, 2 Ohio App.3d 204 (1981), the appellant argued that the board's order was invalid because the members of the board did not read the transcript of the hearing. The Court stated:

R.C. 119.09 states, in pertinent part, that the board's final order "based on * * * [the examiner's] report, recommendation, transcript of testimony and evidence, or objections of the parties * * * shall have the same effect as if such hearing had been conducted by the * * * [board]." The statute does not create a mandatory

duty to read the transcript of testimony and evidence; it merely states that the board's decision must be "based on" the same. ...

...
[W]e conclude that ... the institutional (organizational) decision made by an administrative board may properly be based on written findings of fact prepared by a hearing examiner appointed under R.C. 119.09, so long as the findings of fact constitute a basis for making informed, deliberate, and independent conclusions about the issues, and the board members need not read the entire transcript of testimony in the absence of any affirmative demonstration that the findings of fact are in any way defective. (*Id.*, p. 209-210).

There has been no showing that the Board violated its duties under R.C. 119.09 or that the Board was not provided with, or did not consider, the record.

The September 2012 Meeting Minutes state that the Board received, read, and considered the hearing records, including the Findings of Fact, Conclusions of Law, and objections of Dr. Khan. (R. 815). The Board then entered the First Order, which was affirmed on appeal with the exception of the remand to consider issues relating to the laser treatment on Patient 7.

On remand, the Board voted to reconsider the issue remanded. (R. 32; Minutes p. 21774). A Board member reviewed the background and facts on which the Board had based its original decision, including the allegations, the findings, and the order issued. There was a discussion of the Board's options with respect to the issue remanded and possible findings that could be made on the issue. (R. 33, p. 21775). Board members discussed their views on whether the device used to treat Patient 7 was a "light based medical device. (R. 34-35; pgs. 21776-21777). After the discussion, the Board voted to dismiss the allegation relating to treatment of Patient 7. (R. 35, p. 21777).

The cases cited by Dr. Khan on this issue are inapposite. The record does not show the Board's "blind acceptance of the hearing officer's findings" or Board deliberations "void of any discussion of the facts" as in *State Medical Bd. v. Ioannidis*, 3rd Dist. No. 1-86-52, 1987 Ohio

App. LEXIS 7640, p. 30, 34. Nor does the record make it “abundantly clear” that the Board did not consider the evidence, as in *State v. Carroll*, 54 Ohio App.2d 160, 171 (1977).

Dr. Khan’s third assignment of error asserts that the Board failed to comply with R.C. 119.12 by failing to file a complete record of its proceedings. Dr. Khan argues that the record is incomplete because it includes minutes, but not a transcript, of the Board’s December 11, 2013 Meeting.

Dr. Khan has cited no authority requiring that the Board file a transcript, rather than minutes, of its meetings. In *Mahajan v. State Med. Bd. of Ohio*, 10th Dist. No. 11AP-421, 2011-Ohio-6728, ¶27, the Court addressed the adequacy of the Board’s minutes as follows:

[W]e conclude that the board's minutes contain sufficient facts and information to permit the public to understand and appreciate the rationale behind its decision to impose probation upon Dr. Mahajan's certificate to practice medicine and surgery in Ohio. The minutes are seven, single-spaced pages in length. They include detailed notes of each speaker's statements, identification of each motion, and the official votes of the board members on each motion. While Dr. Mahajan contends that the minutes do not contain every statement made by board members, having reviewed the minutes and the transcript, we conclude that the minutes are full and accurate. They reflect substantial reasoning and explanation by the board members and certainly reflect enough for us to understand and appreciate their rationale.

Applying these principles here, the Court concludes that the Board’s Minutes of its December 11, 2013 Meeting constitute a complete record of its proceedings. The minutes contain detailed notes of each speaker’s statements, identification of the motions, a detailed statement of the proposed order, and the official votes of each member. While the Minutes may not contain every statement made, they reflect sufficient reasoning and explanation by the Board members for an understanding of the rationale behind the Board’s Decision.

Dr. Khan’s Motion for Judgment, filed February 4, 2014, raising the same issue as the third assignment of error, is denied.

For the foregoing reasons, the Court finds that the Board's Second Order is supported by reliable, probative and substantial evidence and is in accordance with law.

The Board's Order is **AFFIRMED**. This is a final, appealable Order. Costs to Appellant. Pursuant to Civil Rule 58, the Clerk of Court shall serve upon all parties notice of this judgment and its date of entry.

Franklin County Court of Common Pleas

Date: 09-25-2014

Case Title: ALI KHAN MD -VS- OHIO STATE MEDICAL BOARD

Case Number: 12CV012914

Type: DECISION/ENTRY

It Is So Ordered.

The image shows a handwritten signature in black ink, which appears to be "G. L. Reece, II". The signature is written over a circular blue seal. The seal contains the text "COMMON PLEAS COURT OHIO" around the top edge, "FRANKLIN COUNTY OHIO" around the bottom edge, and "ALL THINGS ARE POSSIBLE" at the very bottom. The seal also features a central emblem with a sun and a landscape.

/s/ Judge Guy L. Reece, II

Court Disposition

Case Number: 12CV012914

Case Style: ALI KHAN MD -VS- OHIO STATE MEDICAL BOARD

Case Terminated: 18 - Other Terminations

Final Appealable Order: Yes

Motion Tie Off Information:

1. Motion CMS Document Id: 12CV0129142014-02-0499980000

Document Title: 02-04-2014-MOTION

Disposition: MOTION DENIED

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

ALI KHAN, M.D.,	:	
	:	
Appellant	:	CASE NO. 12CV-12914
	:	
vs.	:	JUDGE BEATTY
	:	
STATE MEDICAL BOARD OF OHIO,	:	
	:	
Appellee	:	

ALI KHAN, M.D.,	:	
	:	
Appellant	:	CASE NO. 13CV-13794
	:	
vs.	:	JUDGE BEATTY
	:	
STATE MEDICAL BOARD OF OHIO,	:	
	:	
Appellee	:	

ENTRY GRANTING APPELLANT’S MOTION FOR SUSPENSION OF THE ORDER OF THE STATE MEDICAL BOARD PENDING APPEAL

This matter is before the Court on Appellant’s Motion for Suspension of the Order of the State Medical Board of Ohio Pending Appeal filed December 26, 2013.

By letter dated April 14, 2010, the State Medical Board (the “Board”) notified Appellant that it proposed to take disciplinary action against his certificate to practice medicine and surgery in Ohio based on alleged violations that included allowing a registered nurse to perform laser skin procedures on two patients; making false statements in and falsifying a patient’s chart; taking delivery of and using non-FDA approved Botox on his patients; and reusing single-use medical supplies. A hearing was conducted on November 14 and 15, 2011. On September 12, 2012, the Board issued an

Order permanently revoking Appellant's certificate to practice medicine and surgery in Ohio.

On October 11, 2012, Appellant filed an appeal from the Board's Order, in case no. 12CV12914. On October 24, 2012, the Court granted Appellant's Motion for Suspension of the Order pending appeal. On April 2, 2013, the Court issued a Decision and Entry affirming, in part, the Board's Order, and remanding to the Board issues relating to the allegations concerning treatment of one patient, Patient 7. An appeal followed, but was dismissed for lack of a final appealable order.

On remand, the Board entered an Order dated December 11, 2013 dismissing the allegations relating to Patient 7 and permanently revoking Appellant's certificate to practice medicine and surgery in Ohio.

On December 24, 2013, Appellant filed this appeal, in case no. 13CV13794. On December 26, 2013, Appellant filed the Motion for Suspension of the Order of the State Medical Board of Ohio Pending Appeal now before the Court. The Motion is opposed by the Board.

R.C. 119.12 provides as follows:

The filing of a notice of appeal shall not automatically operate as a suspension of the order of an agency. ... In the case of an appeal from the state medical board ..., the court may grant a suspension and fix its terms if it appears to the court that an unusual hardship to the appellant will result from the execution of the agency's order pending determination of the appeal and the health, safety, and welfare of the public will not be threatened by suspension of the order.

The first issue for consideration is whether Appellant has demonstrated "unusual hardship." Appellant submitted an affidavit stating that if he is not permitted to continue practicing during the pendency of the appeal, he will lose his sole source of income and

his reputation will be prejudicially affected in the medical community and with his patients. His affidavit states that “nothing will be able to compensate me for the damage that would result from the likely loss of my practice and harm to my reputation.”

The Board argues that Appellant’s financial harm does not constitute unusual hardship. At issue here, according to Appellant’s affidavit, is not simply a loss of income, but rather, the likely loss of Appellant’s practice. Appellant asserts that nothing will be able to compensate for this damage. The Court finds that this qualifies as an unusual hardship.

The second issue for consideration is whether the health, safety, and welfare of the public will be threatened by suspension of the Order. The Court notes that this disciplinary proceeding was pending before the Board for over two years, during which time the Board did not impose a summary suspension of Appellant’s certificate under R.C. 4731.22(G) on the grounds that Appellant’s practice presents a “danger of immediate and serious harm to the public.” The only direct patient injury alleged to have been caused by Appellant consists of markings on a patient’s face that are correctable. (T. 242-243). Appellant’s affidavit states that as soon as he learned that laser procedures could not be delegated to a nurse and Botox could not be ordered from a source other than directly from the manufacturer, these issues were corrected and his practice presents no threat to the residents of Ohio. The Court finds that the health, safety, and welfare of the public will not be threatened by suspension of the Order.

The Board argues that a suspension of the Order should not be granted because the Court’s April 2, 2013 Decision affirms the Board’s Order on all issues except the allegations concerning Patient 7. However, Appellant has indicated that in this appeal he

intends to raise additional issues, including the issue of whether the Board violated his due process rights by allegedly failing to provide notice or an opportunity to be heard prior to issuance of the Board's December 11, 2013 Order. Suspension of the Order is appropriate to allow time for review of the new issues raised by this appeal.

For the foregoing reasons, Appellant's Motion is GRANTED, and the Board's December 11, 2013 Order is hereby suspended pending the determination of this appeal.

IT IS SO ORDERED.

Franklin County Court of Common Pleas

Date: 01-22-2014
Case Title: ALI KHAN MD -VS- OHIO STATE MEDICAL BOARD
Case Number: 12CV012914
Type: DECISION/ENTRY

It Is So Ordered.

The image shows a handwritten signature in black ink that reads "Laurel Beatty". The signature is written over a circular blue seal. The seal contains the text "COMMON PLEAS COURT" at the top, "FRANKLIN COUNTY" in the middle, and "ALL THINGS ARE POSSIBLE" at the bottom. The seal also features a central emblem with a sunburst design.

/s/ Judge Laurel A. Beatty

BEFORE THE STATE MEDICAL BOARD OF OHIO

ALI KAHN, M.D.
4145 Levis Commons Blvd.
Perrysburg, Ohio 43551

Appellant,

vs.

STATE MEDICAL BOARD OF OHIO
30 East Broad Street, 3rd Floor
Columbus, Ohio 43215

Appellee.

Case No. 12 CV 12914

Judge Beatty

APPEAL FROM THE ENTRY
OF ORDER OF DECEMBER 11, 2013
MAILED DECEMBER 23, 2013

STATE MEDICAL BOARD
OF OHIO
2013 DEC 30 AM 10:00

NOTICE OF APPEAL

Appellant Ali Khan, M.D., by and through counsel, and pursuant to Ohio Revised Code § 119.12, timely submits this notice of appeal from the Entry of Order of Appellee, the State Medical Board of Ohio ("Board"), which permanently revoked Dr. Khan's certificate to practice medicine and surgery in the State of Ohio. The Board's Entry of Order is dated December 11, 2013, and was mailed on December 23, 2013. The Board's Entry of Order is not supported by reliable, probative, and substantial evidence and is not in accordance with law. A copy of the Board's Entry of Order is attached as "Exhibit A."

Respectfully submitted,

DINSMORE & SHOHL LLP

Eric Plinke by Tyler Williams
Eric J. Plinke (0059463)
Nicole M. Loucks (0076912) (0089775)

191 West Nationwide Blvd., Suite 300
Columbus, Ohio 43215-8120
Telephone: (614) 227-4213
Facsimile: (614) 628-6890
E-mail: eric.plinke@dinsmore.com
nicole.loucks@dinsmore.com
Attorneys for Ali Khan, M.D.

2013 DEC 30 PM 12:20
13CV013794

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 24th day of December, 2013, the foregoing Notice of Appeal was filed via hand delivery with the State Medical Board of Ohio, and a copy filed with the Franklin County Court of Common Pleas, and with an additional copy served by regular U.S. mail upon the following:

Heidi Dorn, Esq.
Assistant Attorney General
Ohio Attorney General's Office
Health and Human Services
30 East Broad Street, 26th Floor
Columbus, Ohio 43215

Eric Plinke by Jeff Wilkins
Eric J. Plinke (0089775)

State Medical Board of Ohio

30 E. Broad Street, 3rd Floor, Columbus, OH 43215-6127

(614) 466-3934

med.ohio.gov

December 11, 2013

Ali Khan, M.D.
4145 Lewis Common Blvd.
Perrysburg, OH 43551

RE: Case No. 10-CRF-040

Dear Dr. Khan:

Please find enclosed a certified copy of the Order and Entry in the above matter approved and confirmed by the State Medical Board of Ohio meeting in regular session on December 11, 2013. This Order and Entry documents the Medical Board's reconsideration of the Report and Recommendation in the above referenced case in accordance with the instruction of the Franklin County Court of Common Pleas.

Section 119.12, Ohio Revised Code, may, but does not necessarily, authorize an appeal from this Order. Such an appeal setting forth the Order appealed from and the grounds of the appeal must be commenced by the filing of a Notice of Appeal with the State Medical Board of Ohio and the Franklin County Court of Common Pleas within fifteen (15) days after the mailing of this notice and in accordance with the requirements of Section 119.12 of the Ohio Revised Code.

THE STATE MEDICAL BOARD OF OHIO

J. Craig Strafford, M.D., M.P.H.

J. Craig Strafford, M.D., M.P.H.
Secretary

*Per telephone
authorization
Sally J. Roberts*

JCS:jam
Enclosures

CERTIFIED MAIL RECEIPT NO. 91 7199 9991 7032 2901 1948
RETURN RECEIPT REQUESTED

cc: Eric J. Plinke, Esq.

CERTIFIED MAIL RECEIPT NO. 91 7199 9991 7032 2901 1955
RETURN RECEIPT REQUESTED

Mailed 12-23-13

CERTIFICATION

I hereby certify that the attached copy of the Order and Entry of the State Medical Board of Ohio; attached copy of the Report and Recommendation of R. Gregory Porter, Attorney Hearing Examiner, State Medical Board; December 11, 2013, Entry of Order in the matter of Ali Khan, M.D.; and attached excerpt of draft Minutes of the State Medical Board, meeting in regular session on December 11, 2013, including a Motion approving and amending the Findings of Fact, amending the Conclusions of Law, and adopting an amended Order, constitute a true and complete copy of the Order and Entry of the State Medical Board in the Matter of Ali Khan, M.D., as it appears in the Journal of the State Medical Board of Ohio.

This certification is made by authority of the State Medical Board of Ohio and in its behalf.

J. Craig Strafford, M.D., M.P.H.
J. Craig Strafford, M.D., M.P.H.
Secretary *per telephone authorization*
Sally J. Helbert

(SEAL)

December 11, 2013

Date

BEFORE THE STATE MEDICAL BOARD OF OHIO

In the Matter of :
 :
 : CASE NO. 10-CRF-040
ALI KHAN, M.D. :

ORDER AND ENTRY

On September 12, 2012, the State Medical Board of Ohio issued its Findings and Order in the Matter of Ali Khan, M.D., whereby Dr. Khan's license to practice medicine and surgery in the State of Ohio was permanently revoked. A copy of the Findings and Order is attached hereto and incorporated herein.

Pursuant to Section 119.12, Ohio Revised Code, Dr. Khan appealed the Medical Board's Order to the Franklin County Court of Common Pleas. By Decision and Judgment Entry on April 2, 2013, the Franklin County Court of Common Pleas affirmed the Medical Board's Order in part, and remanded the matter for further proceedings concerning Conclusion of Law 3 and Finding of Fact 5 of the Hearing Examiner's Report and Recommendation on the question of whether the equipment used by the nurse in treating Patient 7 was a "light based medical device" as defined in Rule 4731-18-02, Ohio Administrative Code, and whether the exception provided in Rule 4731-18-04(B), Ohio Administrative Code, is applicable to the treatment of Patient 7.

WHEREFORE, pursuant to the instructions of the Franklin County Court of Common Pleas and upon consideration of the findings and conclusions made by this Board on September 12, 2012 and affirmed by the Franklin County Court of Common Pleas on April 2, 2013, and upon approval and confirmation by vote of the Medical Board on December 11, 2013, the following Order is hereby entered on the Journal of the State Medical Board of Ohio for that date.

RATIONALE FOR ORDER ON REMAND: The allegation concerning the treatment on Patient 7's face is dismissed for insufficient evidence.

It is hereby ORDERED that:

1. The allegation that on or about June 2, 2008, Dr. Khan permitted an unlicensed person to perform a laser skin treatment on Patient 7's face is hereby dismissed.

2. The certificate of Ali Khan, M.D., to practice medicine and surgery in the State of Ohio shall be PERMANENTLY REVOKED.

This Order shall become effective immediately upon the mailing of notification of approval by the Medical Board.

(SEAL)

J. Craig Strafford, M.D., M.P.H.
J. Craig Strafford, M.D., M.P.H.
Secretary *Per telephone authorization*
Sally J. Dahlert

December 11, 2013

Date

BEFORE THE STATE MEDICAL BOARD OF OHIO

In the Matter of	*	
	*	Case No. 10-CRF-040
Ali Khan, M.D.,	*	Hearing Examiner Porter
Respondent.	*	

REPORT AND RECOMMENDATION

Basis for Hearing and History of the Matter

By notice of opportunity for hearing dated April 14, 2010 (“Notice”), the State Medical Board of Ohio (“Board”) notified Ali Khan, M.D., that it had proposed to take disciplinary action against his certificate to practice medicine and surgery in Ohio. The Board based its proposed action on allegations concerning Dr. Khan’s care and treatment of seven patients identified on a confidential Patient Key, and on allegations that Dr. Khan: (a) had purchased and utilized Botox that was not approved by the U.S. Food and Drug Administration (“FDA”), (b) had permitted an unlicensed person to perform laser skin treatment on patients, (c) had inappropriately reused single-use medical supplies, and (d) had violated a December 2007 Board Order. The Board further alleged that Dr. Khan’s conduct constitutes violations of several sections of the Ohio Medical Practice Act. Accordingly, the Board advised Dr. Khan of his right to request a hearing, and received Dr. Khan’s written hearing request on May 10, 2010. (State’s Exhibits (“St. Exs.”) 1A, 1B, 1D)

Subsequently, by Entry of the Secretary and the Supervising Member of the Board dated May 10, 2011, the Board dismissed all allegations that concerned violations of the Board’s office-based surgery rules (Chapter 4731-25, Ohio Administrative Code) in light of the Board’s decision in another case, *In the Matter of David K. Zipfel* (Case No. 09-CRF-138), which was decided after Dr. Khan’s Notice had been issued. (St. Ex. 1D)

Following the May 10, 2011 Entry, the Board continued to allege through the remainder of the Notice that Dr. Khan’s conduct, including his care and treatment of three patients identified on a confidential Patient Key, violated the following sections of the Ohio Medical Practices Act:

- “Commission of an act that constitutes a felony in this state, regardless of the jurisdiction in which the act was committed,” as that clause is used in Ohio Revised Code Section (“R.C.”) 4731.22(B)(10), to wit:
 - R.C. 2925.09, Unapproved Drugs, and/or
 - R.C. 2923.03, Complicity, as applied to R.C. 4731.41, Practice of Medicine or Surgery without Certificate, based upon a violation of Ohio Administrative Code Rules (“Rules”) 4731-18-02 and/or 4731-18-03. Pursuant to R.C. 4731.99(A), a violation of R.C. 4731.41 constitutes a felony offense.

- “Commission of an act in the course of practice that constitutes a misdemeanor in this state, regardless of the jurisdiction in which the act was committed,” as that clause is used in R.C. 4731.22(B)(12), to wit: 21 U.S.C. 331(a), Prohibited Acts, and/or R.C. 2913.42, Tampering with Records.
- “Making a false, fraudulent, deceptive, or misleading statement in the solicitation of or advertising for patients; in relation to the practice of medicine and surgery, osteopathic medicine and surgery, podiatric medicine and surgery, or a limited branch of medicine; or in securing or attempting to secure any certificate to practice or certificate of registration issued by the board,” as that clause is used in R.C. 4731.22(B)(5).
- “[V]iolating or attempting to violate, directly or indirectly, or assisting in or abetting the violation of, or conspiring to violate, any provisions of this chapter or any rule promulgated by the board,” as that clause is used in R.C. 4731.22(B)(20), to wit: Rule 4731-17-04(G). Pursuant to Rule 4731-17-07, a violation of Rule 4731-17-04 also violates R.C. 4731.22 (B)(6), (B)(20), and (B)(29).
- “Violation of the conditions of limitation placed by the board upon a certificate to practice,” as that clause is used in R.C. 4731.22(B)(15).

(St. Ex. 1A)

Appearances

Mike DeWine, Attorney General, and Heidi W. Dorn, Assistant Attorney General, for the State of Ohio. Eric J. Plinke and Nicole M. Loucks, Esqs., on behalf of Dr. Khan.

Hearing Dates: November 14 and 15, 2011

PROCEDURAL MATTERS

1. Pursuant to discussions at hearing, the hearing record was held open in order to give the parties an opportunity to file written closing arguments. The parties timely filed their closing arguments. The Hearing Examiner marked the State’s Closing Argument as State’s Exhibit 16 and the Respondent’s Closing Argument as Respondent’s Exhibit BB and admitted them to the hearing record. The hearing record closed on January 9, 2012.
2. Subsequently, the hearing record was briefly reopened to admit State’s Exhibit 9 over the objection of the Respondent as expressed at hearing. The record closed on July 12, 2012. (Hearing Transcript (“Tr.”) at 468-470, 623)
3. With the agreement of the parties, the Notice (St. Ex. 1A), court documents (St. Exs. 8A, 8B), and a patient key (St. Ex. 14A) were redacted to reflect the dismissal of allegations

pursuant to the Board's May 10, 2011, Entry. (Tr. at 457-463, 473-474; St. Ex. 1D) In addition, State's Exhibits 9 and 14A were sealed to protect patient confidentiality.

3. The Hearing Examiner paginated State's Exhibit 13 and Respondent's Exhibit P post-hearing.

SUMMARY OF THE EVIDENCE

All exhibits and the transcript, even if not specifically mentioned, were thoroughly reviewed and considered by the Hearing Examiner prior to preparing this Report and Recommendation.

Background Information

1. Ali Khan, M.D., obtained his medical degree in 1996 from the Allama Iqbal Medical College in Lahore, Pakistan. From 1996 through 2000, Dr. Khan practiced as a medical officer of internal medicine at Mustafa Ali Hospital in Lahore. In July 2001, Dr. Khan entered a family medicine residency at St. Vincent Mercy Hospital in Toledo, Ohio, which he completed in July 2004. He was first licensed to practice medicine and surgery in Ohio in 2003 and is also licensed in Florida. He is board-certified in family medicine. (Tr. at 25; Respondent's Exhibit ("Resp. Ex.") A)
2. Dr. Khan has practiced in emergency room and urgent care settings since November 2003. He currently practices at Alexis Medical Center in Toledo, Ohio, which he described as a "fast-track" urgent care center. In addition, since 2006, Dr. Khan has been the CEO and Medical Director of Pure M.D. Lasers and Cosmetics, ("Pure MD") in Toledo and Dayton, Ohio. The allegations at issue in this matter exclusively concern Dr. Khan's practice at Pure MD. (Tr. at 25-26; Resp. Ex. A)

Dr. Khan's December 2007 Board Order

3. On December 12, 2007, the Board issued an Order that permanently revoked Dr. Khan's license, but stayed the permanent revocation subject to suspension for 30 days and subsequent probationary terms, conditions, and limitations for at least two years. The Board based its Order on Dr. Khan having pled guilty to one misdemeanor count of Theft of a credit card from a nurse while he was working in an emergency department.¹ Dr. Khan currently remains subject to the terms, conditions, and limitations of that Board Order. (Tr. at 26-29; St. Ex. 10)
4. Paragraph B.1 of the Order states as follows: "Dr. Khan shall obey all federal, state, and local laws, and all rules governing the practice of medicine and surgery in Ohio." (St. Ex. 10 at 4)

¹ The misdemeanor conviction that formed the basis of the 2007 Board Order was expunged by the Seneca County Common Pleas Court in August 2011. (Tr. at 572; Resp. Ex. K)

5. The Order became effective on February 3, 2008, thirty days following the date of mailing of the Board's notification of approval of the Order. (St. Ex. 10 at 2, 6)

Witnesses

6. In addition to Dr. Khan and two of his former patients, Patients 4 and 7, the following witnesses testified in this matter:

- Sara Mazur, R.N., testified that she graduated in 1992 from Bowling Green State University with a Bachelor's of Science degree in Nursing. Prior to working for Dr. Khan at Pure MD, she had worked in oncology at the Medical College of Ohio, in home health care for Hospice of Northwest Ohio, and in labor and delivery at Toledo Hospital. She then worked at Pure MD for about two years. Ms. Mazur was unable to recall the year she began working at Pure MD. (Tr. at 67-71)

Ms. Mazur testified that her duties at Pure MD included patient care and occasionally assisting with scheduling and ordering supplies. Ms. Mazur testified that, during the time she worked at Pure MD, she had been the only nurse in the office. (Tr. at 70, 73)

- Allison Leatherman testified that she had worked for Pure MD from May 2008 through March 2010. She testified that she had started at Pure MD as a receptionist but eventually was given the job title of clinic manager. Ms. Leatherman further testified that she had worked both part-time and full-time for Pure MD depending on her school schedule. (Tr. at 271-273)

Ms. Leatherman and Patient 7 are friends. Ms. Leatherman referred Patient 7 to Dr. Khan for laser skin treatment in 2008. (Tr. at 234-235, 249, 330)

- Amy Myers is an Enforcement Investigator for the Board, and has held that position since 2008. She testified that her job duties include interviewing complainants, licensees, and other witnesses, and reviewing documents. In connection with those duties, she investigated Dr. Khan's practice at Pure MD. (Tr. at 358-359)

Allegation: "In or about 2009, [Dr. Khan] unlawfully purchased and took delivery of multiple 100-unit vials of Botox that were not FDA approved, and utilized some of the Botox in [his] practice."

7. Dr. Khan testified that he performs Botox injections in his practice at Pure MD. Dr. Khan further testified that he usually purchased Botox from Allergan, the manufacturer of Botox, but that he had also purchased Botox from another seller, "Jon Robinson." (Tr. at 29-30, 488)

Dr. Khan testified that he had learned of Jon Robinson during his residency when he attended CME-accredited courses to learn about Botox. Dr. Khan stated that the physician

who did the training, Dr. Goodman, had been appointed by Allergan to train other physicians in the use of Botox. Moreover, Dr. Khan testified “he gave Jon Robinson’s card to about, like, 50 plus or a hundred plus or so attendees who were physicians from all over the country and he says he orders from Jon Robinson on a regular basis and that he supplies Botox.” (Tr. at 485)

8. Dr. Khan testified that he had contacted Mr. Robinson in 2006 to obtain information and introduce himself. He testified that Mr. Robinson told him that he carries a lot of things that Dr. Khan had been ordering from McKesson,² including Botox, and tried to convince Dr. Khan to buy all of his supplies from him. Dr. Khan further testified that Mr. Robinson called him frequently to get him to buy products. (Tr. at 486-488)

Dr. Khan explained why he decided to buy Botox from Mr. Robinson:

I don’t recall what were the exact circumstances. As I said, he used to call me once a month so during the period of these years I told him, I said, yeah, why don’t I try the Botox ordered through you, which he claimed is an Allergan-made Botox.

He claimed that he’s based in the United States, in Boston, and I tried it because of his constant calling, like, and he said apart from me there are hundreds of doctors all over the country who he’s supplying not only Botox but fillers and injectables and other stuff, too.

(Tr. at 488)

9. The State presented a number of Dr. Khan’s receipts for purchases of Botox. The receipts include approximately 45 receipts for purchases of Botox from Allergan³ and three email receipts from “Jon Robinson (robijon@gmail.com)” for purchases of Botox from Jon Robinson. (St. Ex. 13)

The Allergan receipts indicate that Dr. Khan paid \$525 per 100-Unit vial from Allergan. Also, the majority of his receipts from Allergan concern small orders of one vial of Botox each. (St. Ex. 13) (Emphasis omitted) The receipts from Jon Robinson concerned the following shipments of Botox:

- 7/14/09 – ten vials of Botox at \$410 each. (St. Ex. 13 at 22)
- 7/27/09 – five vials of Botox at \$410 each. (St. Ex. 13 at 51)
- 10/29/09 – 12 vials of Botox at \$410 each. (St. Ex. 13 at 52)

10. A note that appears on Mr. Robinson’s receipts states: “Please note that if you are paying by credit card this charge may appear on your credit card statement under one of the

² McKesson is a company that sells medical supplies. (Tr. at 493)

³ The Allergan receipts also reflect Dr. Khan’s purchases of other products from Allergan, such as Juvederm, that are not relevant to this matter. (St. Ex. 13)

following billing descriptors: 'Global Health Supplies', 'Global Meds', 'Canada Health', or 'Canada Health Solutions.'" Another note states:

Depending on the type of credit card used for this transaction, you may experience a fluctuation in the actual amount billed to your credit card compared to the amount shown on your invoice. This fluctuation can be due to a number of factors including daily changes in currency exchange rates and credit card company service fees.

(St. Ex. 13 at 22, 51, 52)

Testimony of Investigator Myers

11. On November 10, 2009, Investigator Myers and an agent from the FDA went to Pure MD with a Board subpoena for "[a]ll Botox stocks and records relating to the purchase and administration of Botox." Pursuant to the subpoena, Investigator Myers found nine boxes of Botox, eight of which were unopened. Investigator Myers testified that she brought the stock back to the Board's offices in Columbus. She photographed them sometime later. At hearing, she identified State's Exhibits 5A through 5D as copies of the photographs she took.⁴ (Tr. at 395-396; St. Ex. 13 at 1)

State's Exhibit 5B is a photograph of an opened Botox box that indicates that the contents were manufactured by Allergan Pharmaceuticals Ireland in Westport, County Mayo, Ireland. State's Exhibit 5D is a photograph of eight unopened Botox boxes and the label on each box also indicates that the contents were manufactured by Allergan Pharmaceuticals Ireland in Westport. An expiration date of December 2011 is discernible on the opened and unopened Botox in State's Exhibits 5A and 5C. (Tr. at 397; St. Exs. 5A-5D)

Investigator Myers testified that the boxes of Botox that she obtained from Pure MD did not include information concerning FDA approval. Moreover, Investigator Myers testified that the package insert from the opened box also says nothing about FDA approval and includes the word "colourless," a non-U.S. spelling. (Tr. at 399-400; St. Ex. 4 at 1)

12. Investigator Myers testified that, during a November 10, 2009 interview, she questioned Dr. Khan about the Botox invoices from Mr. Robinson, specifically concerning the statements on the invoices concerning billing and references to Canada Health, Global Health, et cetera, and currency exchange rates. Dr. Khan replied that he had not paid any attention to that information. (Tr. at 403-404; St. Ex. 13 at 22, 51, 52)

Investigator Myers further testified that, during the interview, Dr. Khan advised her that he had ordered Botox from Mr. Robinson when he needed multiple vials because Mr. Robinson gave him a discounted price. Dr. Khan also told Investigator Myers that he

⁴ Investigator Myers noted that the date on the photographs, March 30, 2008, was imprinted by the camera she used and is not the correct date that the photographs were taken. Investigator Myers testified that she had actually taken the photographs sometime in 2010. (Tr. at 413-414; St. Exs. 5A-5D)

had assumed that the medication sent to him by Mr. Robinson had come from California. Further, Dr. Khan told Investigator Myers that he had never paid any attention to the packaging that the Botox came in and that he just threw the packaging out. Investigator Myers testified that, at the time she interviewed Dr. Khan, she pointed out to Dr. Khan the label where it said, "UK." Dr. Khan replied to her that he does not look at the labeling and that he did not know where it had come from. (Tr. at 391-393)

Testimony of Dr. Khan

13. At hearing, Dr. Khan denied that he had engaged in illegal activity by purchasing Botox from Mr. Robinson because he had not known from where the Botox he ordered had originated. Dr. Khan further testified that he had had no reason to be suspicious concerning the Botox he received from Mr. Robinson because the orders had arrived the day after the order was placed and because it was shipped via Federal Express from an address in New Jersey or Boston,. Dr. Khan added that Mr. Robinson had told Dr. Khan that he worked in Boston. Dr. Khan added that the shipment looked the same as the Botox he had ordered from Allergan except "the color of the box was maybe slightly lighter than the one that comes from Allergan, but [he] didn't think too much of it if it's a little dark pink and a little light pink." Moreover, Dr. Khan testified that his credit card was always charged in U.S. dollars, and that he was never charged in Canadian dollars. Finally, Dr. Khan testified that the information on the receipts did not alert him that he may have been billed from another country. (Tr. at 32-33, 483-484, 489-490)
14. However, Dr. Khan testified that he later became suspicious of Mr. Robinson sometime shortly before Investigator Myers contacted him. Dr. Khan testified that a patient had presented him with a coupon for \$50 or \$100 off Botox if Dr. Khan signed it and sent it to Allergan. Dr. Khan testified that he contacted Mr. Robinson about the coupon, and that Mr. Robinson told Dr. Khan that he could not honor the coupon. (Tr. at 489-490, 494)
Dr. Khan testified:

So I said, why can't you do that, like, it's an Allergan product. You apparently work with or for Allergan, just send this to Allergan so my patient could get a refund.

He didn't have a very clear cut answer at that time so I think I called [Dr.] Goodman after that because from his voice, the way he was talking to me, I just didn't have a good feeling. So I called Dr. Goodman who trained me four, five years ago that, you know, where is he physically located, you know, because I'd like to know where is he actually sitting, is he sitting in Maryland, Boston, or somewhere else.

Dr. Goodman didn't give me a clear cut answer, either, so in a nutshell I kind of then called Jon Robinson and I confronted him. I called, I think, the Allergan rep from Michigan and she said, well, why didn't you ask Jon Robinson.

So I called him and he said he supplies about 200 doctors all over the United States and, like, Botox is not a drug, it's—he was using some legal terms, so obviously I'm very cognizant of the fact that I was—at that time I had a prior experience with the Board so everything I do should be completely legal so I just stopped, like, you know, ordering or using him. So that's why I ordered from Allergan most of the time.

(Tr. at 491-492)

15. Dr. Khan testified that he did not do any further business with Mr. Robinson after Investigator Myers visited him in November 2009. (Tr. at 496)

Testimony of Ms. Mazur

16. Ms. Mazur testified that she had ordered Botox for the office on occasion. She further testified that Botox was ordered on an as-needed basis. When a patient came in for a consult and paid for a Botox treatment, Dr. Khan asked Ms. Mazur to order a vial. She testified that she had ordered Botox from Allergan only. (Tr. at 110, 113)
17. Ms. Mazur testified that Botox was ordered in bulk when Dr. Khan offered specials on the price of Botox injections. Ms. Mazur testified that, ordinarily, Dr. Khan charged \$11 per unit of Botox. When he offered a special, Ms. Mazur testified, he would lower the price to perhaps \$9 per unit. (Tr. at 117-118)

Ms. Mazur further testified that Dr. Khan offered “Botox parties” during which he reduced the price of Botox. Ms. Mazur testified that these would be held at the office in the evening. Refreshments would be served, and patients would be taken back to a treatment room one at a time and receive Botox injections. Ms. Mazur testified that it was an incentive to get a lot of patients in for Botox treatments. (Tr. at 118, 120-121)

18. Ms. Mazur further testified that she is familiar with the name Jon Robinson. She testified that she had heard Dr. Khan mention his name, and that Dr. Khan had ordered Botox from Mr. Robinson when ordering large quantities because it was cheaper than ordering it from Allergan. (Tr. at 111-113)

Testimony of Ms. Leatherman

19. In contrast to Ms. Mazur's testimony, Ms. Leatherman testified that a Botox party was not a one-time event but stretched over a two-week period. During this time Botox injections were offered at a discounted price. Ms. Leatherman testified that Dr. Khan offered these discounts about every three or four months because that is how long the effects of Botox treatment last. She added, “I always thought it was just to kind of keep 'em on board with Botox * * *.” (Tr. at 288-289)

20. Ms. Leatherman further testified that Botox vials came packed individually in small boxes. Moreover, she testified that the Botox boxes from Allergan had a hologram, and the boxes from Jon Robinson did not. (Tr. at 285-286)

Allegation: Dr. Khan permitted a person who was not licensed to practice medicine to perform laser skin treatments – Background Information

21. Ms. Mazur testified that she had performed light-based procedures at Pure MD, primarily laser hair removal and “photofacials.” In addition, Ms. Mazur testified that when the practice obtained a new laser, she had performed fractional laser procedures. Ms. Mazur testified that laser hair removal, photofacials, and fractional laser procedures were performed using the same laser machine but with different handpieces. Ms. Mazur testified that she had performed approximately eight procedures per day. (Tr. at 73-75, 105)
22. Dr. Khan testified that he utilizes a Palomar Lux1540 laser handpiece (“Lux1540”) at Pure MD to perform fractional laser treatment.⁵ Dr. Khan also offers light-based hair removal, photofacials, and tattoo removal using different handpieces. (Tr. at 35-36, 517-523; Resp. Ex. Z, AA)
23. Dr. Khan acknowledged that he had allowed Ms. Mazur to utilize the Lux1540 to perform fractional laser treatments on patients. (Tr. at 34-35)
24. Dr. Khan testified that he had been trained by Palomar in the use of his laser, and that a nurse had done the training. Dr. Khan further testified that Palomar had told him “that in the State of Ohio nurses could use light-based laser treatments.” Dr. Khan further testified that he is now aware that, except for light-based hair removal, that is not correct. However, he testified:

At that time, from my understanding from the rules, some rules or reports or—I don’t know how I exactly got to that. I thought that the area is gray, or the laws are vague, so on those bases I was letting Sara do these treatments on Patient 4 under my supervision.

* * *

And we stopped it as soon as it was black and white to us, which has been now three, three-and-a-half years. Now I do the treatments myself, personally.

(Tr. at 550-553)

⁵ The name of the laser handpiece and the procedure at issue is spelled differently by different sources, either as “fraxional” or “fractional.” “Fractional” is used in the Report and Recommendation because that is the spelling used by Palomar Medical Technologies, Inc., which manufactures the laser equipment. (St. Ex. 12) However, the spelling “fractional” and another synonymous term, “fraxel,” are used in this report occasionally when quoting documents and the Hearing Transcript. (See, for example, Tr. at 196-197)

25. Similarly, Ms. Mazur testified that she too had been trained at Pure MD concerning the use of the Lux1540 by a nurse who worked for Palomar. Ms. Mazur testified that she had received a certificate from the Palomar nurse following her training. Ms. Mazur assumed that the Palomar nurse had been aware that Ms. Mazur was also a nurse. (Tr. at 157-159)

Ms. Mazur testified that it had been her understanding that nurses can use laser devices for hair removal. Ms. Mazur further testified that she had assumed that nurses could also use the Lux1540 as well, based on the fact that a nurse trained her on the device. (Tr. at 160)

26. Dr. Khan's and Ms. Mazur's November 26, 2007, certificates of training in the use of the Lux1540 were signed by a Palomar representative who signed her name with the suffix: "BSN." (Resp. Exs. F, T)
27. Ms. Mazur testified that the Lux1540 was used only for fractional laser procedures. Ms. Mazur further testified that the fractional laser procedure "would stimulate collagen to fill in skin imperfections such as lines or scars." (Tr. at 74-76)
28. Ms. Mazur testified that she never performed laser tattoo removal; that procedure was only performed by Dr. Khan. (Tr. at 81-82)

Allegation: Dr. Khan permitted a person who was not licensed to practice medicine to perform laser skin treatments on Patient 4's face and made false statements in Patient 4's medical record

29. Patient 4 is a female born in 1978. She first visited Pure MD on November 12, 2007, for a consultation. Patient 4 testified that she had originally decided to see Dr. Khan because she wanted a "facial." However, she had seen an advertisement for fractional laser treatment and discussed that procedure with Dr. Khan and Ms. Mazur during her consultation. She testified that she had learned that fractional laser treatment would help with a scar on her forehead, along with fine lines and wrinkles. She decided to go forward with a series of five procedures. (Tr. at 195-197, 211; St. Ex. 2 at 1, 4)
30. Patient 4 testified that she had assumed during her consultation visit that Dr. Khan would perform the procedure. However, she subsequently called Ms. Mazur to learn more about the procedure, and, during that conversation, Ms. Mazur told her that "most people feel comfortable with [Ms. Mazur] doing it." Patient 4 further testified:

I said, well, whatever is normal there. I mean, I had no idea what's right or wrong so I just said, that's fine, and I came in that day and Sara actually performed the laser on me.

(Tr. at 200-201)

31. Patient 4 testified that she went to Pure MD for her first treatment on November 23, 2007, and was taken back to a treatment room. She signed a consent form, and Ms. Mazur explained the treatment to her, including that the treatment “will get a little stronger” the next time and that it might hurt. Patient 4 testified: “I asked if I could have any, like, numbing topical—Lidocaine, numbing treatments, and she said no, that she couldn’t because Dr. Khan wasn’t there.” (Tr. at 204-205)
32. The November 23, 2007 progress note was written and initialed by Ms. Mazur. Ms. Mazur testified that she had performed the procedure with the Lux1540 fractional laser handpiece using the settings that Dr. Khan had recommended. The chart indicates that the settings used were 50 joules / 15 milliseconds / 10 millimeters. Ms. Mazur testified that Dr. Khan had given her the settings to use. (Tr. at 86-90, 182-183; St. Ex. 2 at 4)
33. Patient 4 testified that the first procedure “really hurt and it was red.” However, she further testified that Ms. Mazur “was very nice” and “explained everything well.” Ms. Mazur gave Patient 4 an ice pack following the treatment. Patient 4 testified that, after the treatment, her face remained red for a while, as Ms. Mazur had told her. Patient 4 testified: “I was kind of nervous to get another one ’cause it hurt so bad, so I waited about a month before I got my second procedure.” (Tr. at 206-207)
34. On December 14, 2007, Patient 4 returned to Pure MD for her second procedure. Ms. Mazur testified that she performed the second procedure that day using the Lux1540 handpiece. The chart indicates that the laser settings used were 60 joules / 15 milliseconds / 10 millimeters. Dr. Khan testified that he had given Ms. Mazur the laser settings to use. The chart indicates that lidocaine cream was applied to Patient 4’s face prior to the procedure with Dr. Khan’s approval. Ms. Mazur was unable to recall whether Dr. Khan had been present in the room with her when she performed Patient 4’s December 14, 2007 procedure. (Tr. at 90-92, 189-190, 547-548; St. Ex. 2 at 4)
35. Patient 4 testified that, when she went to Pure MD for her second procedure, Ms. Mazur again administered the treatment. Patient 4 noted that she had received a topical anesthetic prior to the second procedure after Ms. Mazur left the treatment room and obtained Dr. Khan’s permission to use it. However, Patient 4 testified that the anesthetic did not help and that the procedure was again painful. Patient 4 testified that Ms. Mazur informed her that she had increased the strength of the laser a little bit for the second procedure. Patient 4 further testified that the post-procedure course was the same as before. (Tr. at 207-208)
36. Patient 4 testified that she waited to schedule the next procedure because she became pregnant and could not submit to such procedures during her pregnancy. Patient 4 further testified that she did not notice any benefit from the first two procedures. However, she testified that she had noticed that a waffle-like pattern on her face developed during her pregnancy. She called Pure MD and was asked to come in. (Tr. at 208-210)
37. Patient 4 went to Pure MD on March 11, 2008. Ms. Mazur examined her (and probably Dr. Khan as well) and saw the marks that Patient 4 complained of. Patient 4 was very

concerned and told Ms. Mazur that she believed the marks had been caused by the fractional laser treatment. Photographs were taken of Patient 4's marks but are not included in State's Exhibit 2.⁶ (Tr. at 92-95, 98-99, 209-210; St. Ex. 2 at 4)

38. Patient 4 testified that she never saw Dr. Khan after the initial consult until she went in to have pictures taken of her face after the treatments. (Tr. at 205-206)

39. Ms. Mazur contacted a Palomar representative to find out what could be done about the marks on Patient 4's face. A printout of an email exchange included in Patient 4's chart states, in pertinent part:

- From Ms. Mazur on March 11, 2008:

We have a patient who was last treated on 12/14/07 with her second lux 1540 treatment. Since then, she has not been treated because she has become pregnant. However, since the last treatment, she is left with waffle marks on her face. What can we do for this? This is the only patient that has been left with this type of mark for a long period of time. Please respond asap.

- Response from Palomar representative dated March 11, 2008:

Unfortunately, due to her pregnancy, there is not much you can do at this point. The "waffle" marks will probably subside during her pregnancy. If she were not pregnant, I would recommend the G HP to remove or HQ 4% or higher. Do not treat at this time however. Encourage strict sun avoidance.
Have you noticed that "waffling" with other patients? Was she over treated? Had she had sun?

- From Ms. Mazur on March 12, 2008:

Jan, What is G HP? Dr. Khan does not know what this is. The HQ I know is for "bleaching" but her problem is more of the waffle texture which was left. I believe this occurred before we received our new handpiece. The old one we sent back because they said it needed repair.

- Response from Palomar representative dated March 12, 2008:

"G HP" is our Green handpiece for photofacials, pigmented lesions, vascular lesions. You may also try microdermabrasion or a gentle exfoliant! Hope this helps!

(St. Ex. 2 at 6-7)

⁶ Ms. Mazur testified that photographs at Pure MD are usually stored on a computer or in the camera. (Tr. at 94)

40. On March 12, 2008, Ms. Mazur contacted Patient 4. An entry in the chart evidently written by Ms. Mazur describes their conversation:

Spoke c̄ pt today regarding concern of waffle like marks on face.⁷ (Note correspondence c̄ Palomar.) Pt told nothing recommended until p̄ pregnancy. Offered tx of photofacials at that time after delivery of her baby. Pt states that she wishes to be refunded. Pt notified we would get back to her tomorrow.

(St. Ex. 2 at 4) A note written below Ms. Mazur's note by Dr. Khan states, "I agree c̄ [illegible]." (St. Ex. 2 at 4)

41. A March 18, 2008 progress note concerning a conversation between Dr. Khan and Patient 4 states that Dr. Khan and Patient 4 had had a detailed discussion. Dr. Khan's note indicates that he offered her different options but that she wanted a refund. Dr. Khan further wrote, "all Tx done by me and nurse with direct supervision." The progress note further references a letter that he gave or sent to Patient 4 that indicates that any further treatment she received at Pure MD would be performed for free. In addition, Dr. Khan documented that Patient 4's marks can be fixed but that any further treatment would have to wait until after her pregnancy. (St. Ex. 2 at 4, 10)

With respect to that progress note, Dr. Khan testified that he had made an effort to document a discussion that he had had with the patient that day. Dr. Khan opined that it is good medical practice. (Tr. at 43-45, 529-532; St. Ex. 2 at 4) When asked what he had meant by the phrase, "All [treatment] done by me and nurse with direct supervision," Dr. Khan testified:

That means I was telling the nurse what to do regarding the settings, applying Lidocaine, correspondence between the Clinic and Palomar, the manufacturer of the laser, the consult.

All these treatments from start to finish were done either by me or under my supervision.

(Tr. at 534; St. Ex. 2 at 4) When asked why he had written that particular statement in the chart, Dr. Khan replied:

There's no reason why I'm putting it there. I think, like, she was questioning who was supervising the treatments and I had to just write it down. But there's no specific reason, like we were discussing these things, like different options, refund, who did the treatments, are my treatments gonna be free, is it okay to do it under pregnancy. So it's part of the whole story here.

⁷ The symbol c̄ is a common medical symbol for "with." The symbol p̄ is a common medical symbol for "after." The abbreviation tx is a common medical abbreviation for "treatment."

(Tr. at 535)

42. Dr. Khan further testified concerning his understanding of the phrase, “direct supervision”: “To tell someone or to direct someone to do a procedure or a treatment. Like telling the nurse to start an IV, telling the nurse to do a laser treatment with hair or fraxel. That’s called direct supervision.” (Tr. at 536)
43. Patient 4 testified that she had talked to Dr. Khan about possibly doing something about the waffle marks following her pregnancy. However, she testified that, after a while, she became “leery of having something else wrong happen” and requested a refund for the remaining three procedures for which she had prepaid. She testified that Dr. Khan had been reluctant to refund her money and offered to do anything he could to fix it. However, Patient 4 testified that she declined because she did not feel comfortable. She just wanted her money back. (Tr. at 210-212)
44. Dr. Khan testified that, on October 6, 2008, Patient 4’s husband came to Pure MD to pick up Patient 4’s chart.⁸ Dr. Khan further testified that Patient 4’s husband had asked Dr. Khan to write “on a piece of paper that if we get further treatment they’ll be free and they were done under my supervision.” (Tr. at 41-42) The October 6, 2008, letter states, in part:

[R]egarding [Patient 4] all procedure[s] [were] done by me or under supervision. Pt will be offered full refund if she wants. * * * I still stand by future treatments to be free.

(St. Ex. 2 at 11) (Emphasis in original)

Dr. Khan testified that he had written the letter at the request of Patient 4’s husband and had written it in front of him while he was in the office. Dr. Khan stated: “He just wanted, like, some sort of a receipt written and say that if she gets more treatment they’ll be free * * *.” (Tr. at 42, 537-540)

45. Dr. Khan further testified that his statements in his March 18, 2008 progress note and in the October 6, 2008 letter had been accurate. Dr. Khan further testified:

Because they were done under supervision. I was supervising the nurse, Registered Nurse, in applying Lidocaine and discussing the imprint, different treatment options, different treatments, back and forth.

This is all treatment of a patient. It’s just not one isolated thing that someone uses a laser and that’s the treatment. The treatment starts from when the

⁸ A progress note written by someone other than Dr. Khan indicates that this occurred on October 7 rather than October 6. The progress note is in error. (Tr. at 606; St. Ex. 2 at 4, 6)

patient enters the Clinic till her husband took her chart away, took this letter on the last day of the—when she—when he took the chart, you know.

(St. Ex. 538)

46. Patient 4 testified that she waited awhile and then consulted with a plastic surgeon. Patient 4 further testified that, following an examination, the plastic surgeon told her that it appeared to be “a permanent scar.” Patient 4 testified that he told her he could try dermabrasion, but that that is a drastic procedure that “could leave a big scab on [her] face” and might not be effective. Moreover, Patient 4 testified that he told her that only a physician is supposed to perform the procedure that Ms. Mazur had performed. Patient 4 testified, “[F]rom there, I contacted a lawyer.” The lawyer had her examined by two additional plastic surgeons who concurred that the waffle-like marks were a scar. (Tr. at 212-213)
47. Patient 4 filed a lawsuit against Dr. Khan, Ms. Mazur, and Pure MD, which ultimately settled for \$85,000. (Tr. at 214-215; St. Exs. 8A, 8B, 9)
48. Patient 4 testified that, as of the date of the hearing, the waffle-like marks on her face remain. She testified that she had seen a dermatologist five times during the preceding five months. Moreover, Patient 4 testified that the recommended treatment with Retin-A has so far proven ineffective and has resulted in unpleasant and unsightly side effects. (Tr. at 215)
49. Patient 4 testified that the marks that she received as a result of the procedures performed at Pure MD have substantially affected her physical appearance and are extremely upsetting to her. She further testified that she is never going to allow anyone to treat her face again because she “doesn’t trust anything anymore, laser or anything.” She never realized that that sort of thing could happen to her. (Tr. at 221-222)

Additional Evidence Concerning the Supervision Issue

50. Ms. Mazur recalled that she had performed the November and December 2007 procedures on Patient 4 under supervision, but could not recall whether Dr. Khan had been in the room with her during either procedure. She testified that he had not been in the room with her during at least one of the procedures “[a]nd/or not at the office.” (Tr. at 86-87, 90-92, 177-179)
51. Dr. Khan testified concerning the Board’s allegation that, on November 23, 2007: “[Y]ou allowed an unlicensed person to perform a laser skin treatment on Patient 4 at your office without your presence and/or supervision.” Dr. Khan testified that Ms. Mazur is a licensed nurse, that he was present in his office at the time of the procedure, and that Ms. Mazur performed the procedure under his supervision. With respect to his testimony that he had been present in the office when Patient 4’s first procedure was performed, Dr. Khan referred to the first page of Respondent’s Exhibit E, which he testified is a copy of Pure MD’s schedule for November 23, 2007, as support for that statement. (Tr. at 543-544; St. Ex. 1A; Resp. Ex. E)

The November 23, 2007, appointment schedule indicates that Patient 4's appointment had been scheduled for 10:15 a.m. Dr. Khan was asked how he knows he was there from looking at that page. Dr. Khan replied: "Well, I was there. I'm the one who does Botox,⁹ and I could just say I was there. Like, that's my routine. I'm usually there at 8:45, 9:00, and I leave at 6:00, 6:30." Dr. Khan acknowledged that he does not have any specific recollection of being in the office at 10:15 a.m. on November 23, 2007, but that he knows he had been there because he had told Ms. Mazur which laser settings to use. (Tr. at 544-546; Resp. Ex. E at 1)

52. With respect to the supervision issue, Dr. Khan acknowledged that he had not personally performed Patient 4's first laser procedure; however, he testified that Ms. Mazur performed the procedure under his supervision. He testified that he knows that to be true because "[i]t's written on the schedule book [he] was there in the Clinic." Dr. Khan further testified that he recalls that Ms. Mazur asked him what settings to use and he told her to "go low, use 50 joules or 55 joules" along with "the spot size, ten millimeter, and the speed, 15 milliseconds." Dr. Khan added that Ms. Mazur "would never know these things by herself." (Tr. at 541-543)
53. The Board alleged concerning Patient 4's second laser procedure: "[O]n or about December 14, 2007, you allowed an unlicensed person to perform a laser skin treatment on Patient 4 at your office and you were never in the room during the treatment." Dr. Khan noted that the chart entry for December 14, 2007, states, among other things, that lidocaine cream was applied to Patient 4's face prior to treatment with Dr. Khan's permission. Dr. Khan further testified that Ms. Mazur increased the laser energy to 60 joules, which would have required Dr. Khan's permission. In addition, Dr. Khan testified that he recalls talking with Ms. Mazur concerning increasing the laser energy during the same conversation in which they talked about lidocaine. (Tr. at 547-548; St. Ex. 1A)

Moreover, Dr. Khan testified that the Pure MD schedule for December 14, 2007, indicates that he was present in the office. That page indicates that two appointments had been scheduled for 1:00 p.m. that day: Patient 4 was scheduled for a Lux1540 treatment and another patient was scheduled for tattoo removal. Several other tattoo treatments and consults were scheduled throughout the day. Dr. Khan testified: "Sara was doing the light treatment, light-based treatment Lux1540 on Patient 4 and I was doing a tattoo treatment at the same time." Dr. Khan testified that the procedures were performed in two different rooms that are next to each other, and that he was only four or five steps away from where Ms. Mazur was treating Patient 4. (Tr. at 548-550; Resp. Ex. E at 2)

54. When asked if he could have given Ms. Mazur the laser settings for Patient 4's treatment at an earlier date during the consult, Dr. Khan acknowledged that he sometimes does that. However, he testified that he typically waits until the day of the procedure because, for example, the patient may have been to a tanning booth during the interim. Dr. Khan

⁹ The page shows one appointment for Botox injections on November 23, 2007, scheduled for 1:00 p.m. (Resp. Ex. E)

testified that if a patient had been to a tanning booth it would be necessary to use a lower setting to avoid burning the patient. (Tr. at 586)

55. Dr. Khan testified that it was not until around the time that Patient 4 filed her lawsuit that he discovered that it was improper for Ms. Mazur to have performed fractional laser treatments. (Tr. at 563)
56. Sometime after Patient 4 filed her lawsuit, Ms. Mazur left Pure MD. Ms. Mazur explained the reason she left Pure MD: "I left because I was feeling uncomfortable about working for Dr. Khan and we had been served a civil suit, served papers of a civil suit, and he asked me to lie in court about the civil suit so I just couldn't stay there." She testified that Dr. Khan had asked her to say that he had performed Patient 4's laser treatment, and not her. Ms. Mazur testified that she did not testify in court and was never deposed. (Tr. at 71-72, 95-97)
57. Dr. Khan testified vehemently that he had never asked Ms. Mazur to lie in connection with Patient 4's lawsuit. Dr. Khan further testified that Ms. Mazur was lying when she stated that Dr. Khan told her to lie in connection with Patient 4's lawsuit. Dr. Khan testified that, during the pendency of that lawsuit, it was known to Dr. Khan, Ms. Mazur, and other people in the office that Ms. Mazur had performed the laser procedures. It was also known to Patient 4. Moreover, Dr. Khan testified that one could have simply reviewed the chart and discovered that Ms. Mazur had performed the procedures, and Patient 4's husband had been provided with Patient 4's chart in October 2008 prior to the lawsuit being filed. Furthermore, Dr. Khan testified that, during the lawsuit, he and Ms. Mazur admitted in answers to Patient 4's request for admissions that Ms. Mazur had performed the procedures.¹⁰ (Tr. at 558-567, 580; St. Ex. 8B)

Dr. Khan testified that he and Ms. Mazur had provided those answers to Patient 4 and her husband on February 9, 2009, approximately two months after the lawsuit had been filed. Dr. Khan further testified that it made no sense to ask someone to lie after admitting to the court and everyone else that Ms. Mazur had performed the procedures. (Tr. at 566-567; St. Exs. 8A, 8B)

58. Investigator Myers, who had been present throughout the hearing, testified that Ms. Mazur's testimony was "[s]omewhat" consistent with what she had said to Investigator Myers during the investigation. Investigator Myers explained:

In my discussion with her about her fallout with Dr. Kahn she advised me that it was because he wanted her to say in Court that he was present for the procedures, and he wasn't.

In [her hearing] testimony she said that it was due to him wanting her to say he performed them when he didn't, so there was a little conflict there.

(Tr. at 449-450)

¹⁰ See the answers to requests for admissions number 1, 2, and 3. (St. Ex. 8B)

Allegation: Dr. Khan permitted a person who was not licensed to practice medicine to perform laser skin treatments on Patient 7's face

59. Patient 7 is a female born in 1982. Her chart indicates that she had visited Pure MD on June 2, 2008, concerning fractional laser treatment. Dr. Khan testified that a hand-drawn diagram in the chart had been made by him during an explanation to Patient 7 concerning how fractional laser treatment works. Further, Patient 7's chart includes a Consent for Fraxional Non-Ablative Skin Resurfacing that Patient 7 signed on June 2, 2008. However, the chart did not contain any progress note describing Patient 7's consultation visit or of any fractional laser treatment being provided. The only progress notes included in the chart concern two sets of Botox injections provided on October 2 and 10, 2008.¹¹ (Tr. at 557; St. Ex. 3 at 1, 1A, 3, 4)

Testimony of Patient 7

60. Patient 7 testified that she had been referred to Dr. Khan by her friend, Ms. Leatherman. Patient 7 testified that she had originally seen Dr. Khan in June 2008 to have some "sun spots" removed from her forehead and her nose and that Ms. Leatherman had told her that Dr. Khan could do that. (Tr. at 233-235, 252-253)

Patient 7 testified that it is a bit difficult to remember the sequence of events that occurred three years earlier, but that she believes she was treated at her first visit. She does not recall having a consultation visit beforehand. Patient 7 did recall being in the treatment room alone with Ms. Mazur who performed the laser treatment of her face. Patient 7 also testified that "Dr. Khan came in at the very end and lasered [her] nose." (Tr. at 234-235)

Patient 7 identified her signature on a patient intake form dated June 2, 2008, that is included in her chart, and she identified her signature on a June 2, 2008 Consent for Fraxional Non-Ablative Skin Resurfacing. (Tr. at 236-237; St. Ex. 3 at 1, 3)

61. With respect to the procedure itself, Patient 7 testified that she had lain down in a chair and Ms. Mazur had "had this big laser machine and she told me that it was gonna sting a little bit, kind of like a bee sting or a sunburn, and that my face would be red and probably swollen. She went ahead and did my entire face, and it took probably 20 minutes." Patient 7 further testified, "Dr. Khan came in after with a different laser and he lasered a couple spots on the end of my nose that had some dark spots." Patient 7 received discharge instructions and left. (Tr. at 240-242)

62. Patient 7 testified that the laser Ms. Mazur used had had a rectangular protuberance at the end of it that was roughly the size of a deck of cards. When Dr. Khan came into the room to treat her nose, he brought with him a different laser that was smaller and "[k]ind of like a wand * * *." (Tr. at 253-256)

¹¹ Patient 7's Botox injections are not addressed in the Notice and are therefore irrelevant to this matter.

63. Patient 7 testified that she had paid for the laser treatment by credit card on the day it was performed. She identified State's Exhibit 11 as her credit card statement from June 2008. The statement reflects a payment of \$618 to "MD Laser & Cosmetics L Perrysburg OH." The transaction date is June 2, 2008. (Tr. at 239-240; St. Ex. 11) (Emphasis omitted)
64. Patient 7 testified that, a couple months after the laser procedure, she noticed that she had a pattern on her face. She testified: "You can see it when I'm not wearing makeup. It's like these tiny little squares." Patient 7 further testified that she had thought that they would go away on their own, but they did not. She went to a plastic surgeon. Patient 7 testified: "I found out that if I had more fraxel, if I had fraxel surgery several times, that it should take care of the pattern." However, Patient 7 testified that she has not had any further laser skin treatment. (Tr. at 242-243)
- Patient 7 testified that she never spoke with Dr. Khan concerning the marks on her face. However, she did go back to Dr. Khan in October 2008 for Botox treatment. (Tr. at 244, 246; St. Ex. 3 at 4)
65. Patient 7 testified that she had nothing to gain by coming to the Board hearing to testify. She further testified that she missed a class to come to the hearing. (Tr. at 265-266)
66. Patient 7 acknowledged telling Ms. Leatherman the following during a Facebook chat: "Allie, don't quit. Let him fire you. That way if you can't find a job right away you can at least get unemployment till you can get back on your feet." (Tr. at 263-265; Resp. Ex. L)

Testimony of Ms. Mazur

67. Ms. Mazur recalled that Patient 7 had come to Pure MD for Botox injections. Ms. Mazur did not recall that Patient 7 had come in for any other purpose or that she had performed a laser procedure on Patient 7. (Tr. at 101-103, 153)

However, Ms. Mazur testified that a patient typically signed a consent form for a procedure right before the procedure was performed. Therefore, if a patient signed a consent form for fractional laser skin treatment, Ms. Mazur testified that she "would think that [the patient] did receive fractional treatments." (Tr. at 103)

Testimony of Dr. Khan

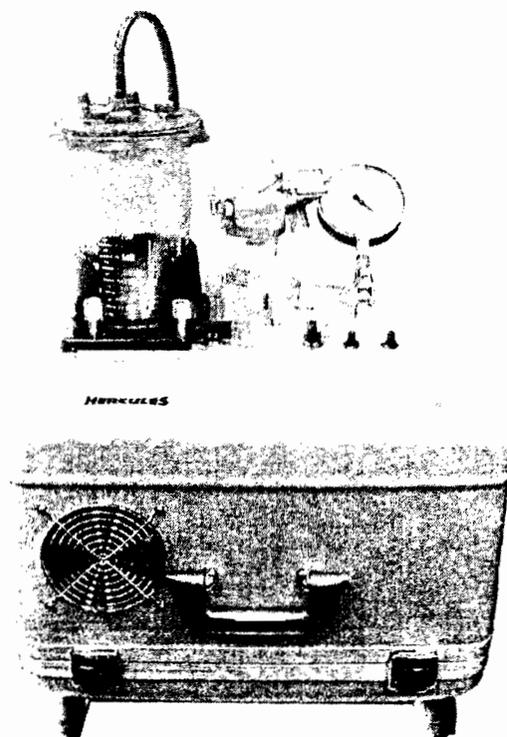
68. Dr. Khan testified that he had discussed the fractional laser process with Patient 7, but that he has no recollection of performing laser skin treatment on Patient 7. Dr. Khan further testified that he cannot explain the credit card payments evidenced by State's Exhibit 11. He acknowledged that, if the procedures were performed as Patient 7 testified, then he does not have documentation of having performed those procedures. However, Dr. Khan testified that it is usually his custom to make progress notes concerning his procedures. (Tr. at 48-50, 515-516, 523-525)
69. Dr. Khan testified that the wand-like device described by Patient 7 that he had used to treat Patient 7's nose describes the appearance of a Lux1540 fractional laser handpiece. Dr. Khan's

fractional laser handpiece, the Lux1540, is pictured in Respondent's Exhibit AA. Dr. Khan further testified that the type of laser used to treat the "sun spots" that Patient 7 referred to in her testimony describes a photofacial laser, which is a lower-level laser. Dr. Khan's photofacial laser handpiece is pictured in Respondent's Exhibit Z. In addition, Dr. Khan testified that he did not use a fractional laser for sun spots and that the less-intense photofacial laser would be more appropriate to treat that condition. (Tr. at 514-523; Resp. Exs. Z, AA)

70. With respect to Patient 7 and the Board's allegation that Dr. Khan had allowed an unlicensed person to perform laser skin treatment on her face on June 2, 2008, Dr. Khan testified that Ms. Mazur is a licensed, registered nurse. Dr. Khan further testified that the drawing that he made that is included in Patient 7's chart demonstrates that he had been in the room with Patient 7 doing a consult with her and describing to her how the fractional laser treatment works. (Tr. at 550-553, 557; St. Ex. 1A; St. Ex. 3 at 1A)

Liposuction – In General

71. Dr. Khan testified that he performs a liposuction procedure in his office called "SmartLipo." (Tr. at 38-39)
72. During his testimony, Dr. Khan referred to a picture of the SmartLipo aspiration pump that he uses in his office to remove liposuction fluid from patients, which is reproduced below:



(Resp. Ex. P)

73. Dr. Khan identified the canister as the large, cylindrical-shaped object pictured on top of the machine. Dr. Khan testified that a liner is placed in the vacuum canister for SmartLipo procedures. The liner, which is used to hold the aspirated fluid, can then be removed from the canister following a procedure and discarded. Dr. Khan compared the two items to a trash can and a trash bag. The canister is like the trash can, and the liner is analogous to a trash bag that is placed in the trash can. Dr. Khan testified that the canister can be used multiple times and is not a sterile item.¹² Dr. Khan testified that the liner that is placed into the canister for procedures is a single-use item. However, he testified that the liners do not come into contact with the patients, that they do not come packed in sterile packaging, and that they are not sterile or required to be sterile. Their purpose is simply to collect the aspirated fluid that is removed from the patient during the liposuction procedure. He presented a photograph of an unused liner which was marked as Respondent's Exhibit S. The liner appears to be a roughly cylindrical piece of plastic with one opening at the top. There is a red plastic seal around the opening. (Tr. at 51-57, 63-65; Resp. Ex. P at 1; Resp. Ex. S)
74. Ms. Mazur corroborated Dr. Khan's testimony that the canister liners are not sterile. (Tr. at 164-164)

Allegation: Dr. Khan inappropriately reused single-use medical supplies that had become contaminated by blood or other bodily fluids – Evidence concerning liposuction aspiration tubing

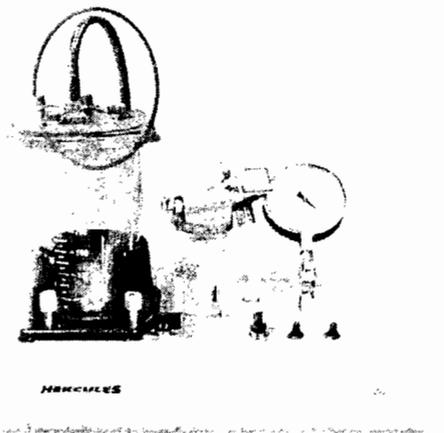
75. Dr. Khan testified that the infiltration tubing and aspiration tubing that are used during SmartLipo are sterile, single-use items and come packed in sterile packaging. He presented pictures of infiltration tubing (Respondent's Exhibit Q) and aspiration tubing (Respondent's Exhibit R) from his office in sterile packaging. Dr. Khan testified that, following use, these items must be discarded in a biohazard container. Dr. Khan testified that he has never reused either type of tubing. (Tr. at 58-59; Resp. Exs. Q, R)

Testimony of Ms. Mazur

76. Ms. Mazur testified that it had been her responsibility when assisting Dr. Khan to set up the aspiration machine. She testified that she inserted the liner into the canister and placed the lid on top of the liner and the canister, which formed a seal. She removed the aspiration tubing from its package and inserted the tube in the canister lid. The cannula that the doctor used to suction out the aspirate from the patient is attached to the other end of the aspiration tubing. (Tr. at 166-168)

¹² Dr. Khan testified that he has an autoclave in his office that is used to sterilize instruments, and that the canister can be run through the autoclave. However, he does not do that because there is no requirement that the canister be sterile. (Tr. at 56)

77. Ms. Mazur testified that, on one occasion when Dr. Khan was performing liposuction procedures and she was assisting, the office ran out of aspiration tubing before the procedure had been performed on the last patient for that day. Ms. Mazur testified that Dr. Khan told her to reuse the tubing from the previous patient.¹³ Ms. Mazur testified that she had questioned Dr. Khan about that, and that she thinks he was afraid that the patient would not go through with the procedure or ask for a refund. Ms. Mazur further testified that Dr. Khan performed the last procedure that day with the reused tubing. (Tr. at 129-130, 164)
78. Ms. Mazur testified that the tubing that Dr. Khan had reused was the aspiration tubing that is attached to the canister lid on the aspiration machine. The tubing she identified is circled below:



(Tr. at 163-164; Resp. Ex. P)

Testimony of Dr. Khan

79. Dr. Khan testified that the tubing that Ms. Mazur had identified in the photograph is actually a permanent part of the canister. Dr. Khan indicated that her testimony that that tubing had been reused was accurate, but that the tubing she is referring to is not a single-use item. Dr. Khan further testified that no blood or body fluids pass through that tubing. (Tr. at 607-608)

Information from the Aspiration Machine User's Manual

80. The set-up instructions for the aspiration pump using the canister system pictured states, in part:
1. Place canister on top panel of the Hercules™ inside canister holder.
 2. Snap the red liner lid onto a soft-shell liner. Insert the hard-shell canister.
 3. Plug the red hose on the canister into the top of the liner lid on the port marked **Vacuum**.

¹³ Ms. Mazur testified that the liner may also have been reused, but she was unsure. (Tr. at 129)

4. Attach the 9" piece of silicon tubing from the overflow trap to the red spout on the side of the canister.
 5. The sterile aspiration tubing will connect to the port labeled: **Patient**
- THE CANISTER SYSTEM IS NOW READY FOR OPERATION.

(Resp. Ex. P at 7) (Emphasis in original)

Testimony of Investigator Myers

81. With respect to her interview with Ms. Mazur, Investigator Myers testified that Ms. Mazur told her that Dr. Khan had reused liposuction tubing, but she did not tell Investigator Myers that he had reused a liposuction canister liner. (Tr. at 380-381, 434-436)

Allegation: On or about March 31, 2009, Dr. Khan performed a liposuction procedure on Patient 6. During this procedure, Dr. Khan reused a lining from a prior liposuction procedure.

Testimony of Ms. Leatherman

82. Ms. Leatherman testified that her job duties had included ordering supplies for SmartLipo procedures. Ms. Leatherman recalled an occasion when, due to a delay in the parcel delivery process, the office ran out of canister liners. (Tr. at 282-283, 297) The following exchange took place concerning that occurrence:

A. [by Ms. Leatherman] Dr. Khan told me if I didn't figure it out I was gonna lose my job, so I went into the Biohazard and I poured the fat out of the thing and gave it to him.

Q. [by Ms. Dorn] What did you give him?

A. The fat canister, the empty fat canister. I took it out of the Biohazard box and poured it down the toilet and gave it to Dr. Khan.

Q. Was it actually a canister or a liner?

A. Liner, canister, I use those [terms] interchangeably. I suppose it was the liner that held the fat. I think the technical term is a liner.

Q. Okay.

And is that what you would reorder?

A. Yes.

Q. Okay.

And do you recall anything more about that?

A. He was very happy that I did that. He was happy that I figured out how to accommodate the situation, that I figured it out.

Q. Did he know what you did?

A. He had to have, because there is initials on the canisters and so those initials were scribbled out in order for the new initials to be placed on the canister.

* * *

Q. Did you bring this to Dr. Khan's attention after the procedure?

A. Yeah. He knew, yeah. I said, yeah, I had to get that out, and he was just—I'm pretty sure he gave me a high five and I'm almost 80 percent sure he gave me a fifty dollar bill that day.

(Tr. at 297-299)

83. Ms. Leatherman later modified her testimony that she and Dr. Khan may not have literally done a "high five" after she handed him the liner, but testified that he was very happy and applauded her quick thinking. She also stated that she is "about 80 percent sure" that Dr. Khan gave her \$50 that day. (Tr. at 329)
84. Ms. Leatherman could not recall the date of that procedure but recalled that Ms. Mazur had not been present because "she wasn't working there then." Moreover, Ms. Leatherman recalled that that procedure "was the one where the power went out * * *." In addition, Ms. Leatherman recalled the name of the patient, which was the name listed on the Patient Key as Patient 6. (Tr. at 320-324; St. Ex. 14A)
85. Ms. Leatherman testified that she had washed out the liner with soap. Ms. Leatherman then handed the liner to Dr. Khan. Ms. Leatherman added that the previous patient's initials had been written on the liner. However, Ms. Leatherman testified that she did not tell Dr. Khan that she had just reached into the biohazard bag and dumped the contents of the liner out. (Tr. at 324-325, 328)

Testimony of Dr. Khan

86. Dr. Khan was asked if he had ever reused a canister liner. He replied:

Not that I'm aware of. These things are set up by the girls, like, the nurses and the staff. They come in in a box with brown paper stuffed in it, so obviously they're not sterile.

They come in, I don't see that box, but I've seen it initially years ago, and the brown paper is thrown away and these things are, like, shoved under a stand and then the nurses come in and then they use this and they set up the room.

(Tr. at 57)

Dr. Khan was then asked if he had ever been made aware following a procedure that a staff member had reused a canister liner. Dr. Khan replied that that had happened on one occasion. (Tr. at 57)

87. Dr. Khan testified that his office takes photographs of a liposuction patient prior to the procedure so that they have a "before" picture, and also of the canister liner with the patient's initials on it. Dr. Khan identified Respondent's Exhibit Y as a photograph of the canister liner used during Patient 6's March 31, 2009 chin-liposuction procedure that has the patient's initials written on the liner. Dr. Khan testified that he can tell it was from a chin-liposuction procedure because of the relatively small amount of aspirate that can be seen in the liner. Dr. Khan added that Patient 6 had had only one liposuction procedure performed. Dr. Khan further testified that the photograph had been included in Patient 6's medical records that were provided to the Board pursuant to a subpoena. (Tr. at 499, 504-505; Resp. Ex. Y)

Dr. Khan testified that the liner that he had used during Patient 6's liposuction procedure had been new, and that Ms. Leatherman had not handed him a used liner. Dr. Khan further testified that it is clear from the photograph that the liner had not been reused:

It's common sense. There's no other initials of anyone else, which Miss Allie Leatherman has been claiming yesterday. Like, you only—you don't need four different views of a canister to look at the canister. It's very obvious that no one tampered with it. It's brand new. * * * How could you erase markings from this and put [Patient 6's initials] on it and then picture it within 15 minutes of the surgery.

(Tr. at 505-506)

88. Dr. Khan testified that Ms. Leatherman had been lying when she stated that she had reused a liner from a previous procedure. (Tr. at 579-580; Resp. Ex. Y)
89. Patient 6's liposuction procedure took place on March 31, 2009. (Tr. at 505)

Testimony of Investigator Myers

90. Investigator Myers testified that Ms. Leatherman's description at hearing of Dr. Khan reusing a canister liner was similar to what Ms. Leatherman had told her during the investigation. (Tr. at 436-437)

Allegation: Dr. Khan inappropriately reused single-use medical supplies that had become contaminated by blood or other bodily fluids – Evidence concerning Botox syringes

Testimony of Dr. Khan

91. Dr. Khan testified that the process for reconstituting Botox and injecting the solution into the patient requires two syringes of different sizes. Dr. Khan testified that a 5 cc syringe is used to insert 4 ml of saline solution into the Botox vial. The Botox is reconstituted by gently swirling the vial to dissolve the Botox into the saline. The reconstituted solution is then drawn into 1 cc syringes for injecting the patient. Dr. Khan further testified that a different needle is placed on the end of the syringe prior to injecting the patient because the needle used to draw the Botox solution may have become contaminated when it was inserted into the vial. The old needle is discarded into a sharps container. (Tr. at 506-509)
92. Dr. Khan testified that he likes to perform his preparation of the Botox solution and the filling of syringes in front of the patient:

So I just start in front of the patient. We don't even touch the Botox. We bring it from the freezer in front of them and I kind of—when I'm administering Botox I'm actually explaining to the patient that this is a hundred units, this is one syringe.

I mix it up, swirl it gently, look at the powder and I take out the needle. I change the needle, and I show it. I'm giving you this needle now, this is 25 units, and this is how much it will cost. And that's what it is.

Is that okay? Do I have your permission? And then I go and proceed, and that's with every patient.

(Tr. at 510-511)

Dr. Khan testified that, if there is Botox solution left in a vial after treating a patient, the remaining solution can be used to treat additional patients. However, he testified that a fresh needle is used to draw the solution and then replaced with a fresh needle prior to injecting the patient. Dr. Khan noted that the reconstituted Botox must be used within 72 hours. (Tr. at 510-513)

Testimony of Ms. Mazur

93. Ms. Mazur testified that she had witnessed Dr. Khan reusing syringes during Botox procedures, although she is not certain that he reused the needles. Ms. Mazur testified that the syringes are single-use items. Ms. Mazur further testified that she had seen this occur with multiple patients. (Tr. at 131-132, 135) The following exchange took place:

Q. [By Mr. Plinke] So the way Botox was administered, then, is you would be in the room, present?

A. [By Ms. Mazur] Not every single patient that he treated Botox with –

Q. Okay.

A. —but, yes.

Q. I'm talking about the ones you witnessed.

But you saw –

A. There was a time that I saw multiple patients, more than one patient, be in a room—I never left the room—and I saw the same syringe being used.

Q. On multiple patients?

A. More than one patient.

Q. And when did that occur?

A. I don't know a date.

THE EXAMINER: Would that have been at one of these Botox parties?

THE WITNESS: Possibly.

BY MR. PLINKE:

Q. When you say “possibly” it suggests to me that maybe your recollection isn't clear.

A. No. It was sometime during my employment with Pure MD Lasers that I was in a room and I saw a syringe being reused for more than one patient for the treatment of Botox.

Q. So the patient—and there was usually only one patient in the room at a time, correct?

A. In a treatment room?

Q. Yes.

A. Yes.

Q. Okay.

And that's where this would take place –

A. Yes.

Q. —in a treatment room?

A. Yes.

Q. So the patient would come in, you'd observe the procedure, the patient would leave, another patient would come in, and you'd still be in the room the whole time?

A. Sure. Possibly, yeah. Or maybe we would step out and I would get the cleaning solution just to wipe off the treatment table, you know. Possibly he would step out.

The next patient would come in, the syringe would be on the counter and, you know, it would be the same syringe. I would not see another syringe being unwrapped.

Q. Okay.

But you may not have been in the room the whole time?

A. May not have.

Q. Okay.

And you can't specify a date?

A. No.

Q. And you can't even specify whether it was at a Botox party or at a normal day in the office?

A. No, but I don't know why that would make a difference. It was just a patient, whatever time of day, whatever day, you know. It could have been a regular work day and not a Botox party day.

Q. Okay.

Were there other staff involved in the administration of Botox?

A. No.

Q. So if you weren't doing the administering what was your role in being in the room?

A. Just sometimes to support the patient, if it was painful or if they were nervous.

(Tr. at 134-137)

94. Ms. Mazur testified that there had been occasions when she had drawn up saline solution into the first syringe and injected the saline into a bottle of dry Botox to reconstitute it, although this process was usually done by Dr. Khan: "[H]e was very specific he wanted to do that himself, usually, the reconstituting." Moreover, Ms. Mazur testified that Dr. Khan always drew the Botox solution into the second syringe and injected the patient himself. (Tr. at 118, 138-140)

95. When asked if she had handled the second syringe after it had been used to draw up the reconstituted Botox solution, Ms. Mazur indicated that she may have disposed of it after the patient left following the procedure. She noted that her job duties had included cleaning the room and setting it up for the next patient. (Tr. at 140-141) Whereupon the following exchange took place:

Q. [By Mr. Plinke] So what you're saying you observed was a Botox procedure would be done and you wouldn't prepare the next Botox for the next patient.

Is that what you're saying?

A. [By Ms. Mazur] I seem to remember that, yes.

Q. Okay.

And why wasn't that done?

A. Maybe it was during, like, a Botox party, to go back to that, just because maybe, like, a multiple—you know, that the patient would just sit down, have the treatment of Botox, you know, and then the next person would sit down.

Q. Okay.

But you don't actually know whether it was at a Botox party or a regular patient visit, do you?

A. A Botox party or a regular –

Q. Yeah, a Botox party or a regular patient.

A. No, no.

Q. Okay.

So if it's not at a Botox party can you explain why—if part of your duty was to dispose of the syringe –

A. Uh-huh.

Q. – and sort of get the room ready for the next procedure, why you wouldn't have done that?

A. Maybe just a busy day, multiple patients coming, you know.

Q. Okay.

A. Maybe.

Q. Because Dr. Khan leaves the room, correct?

A. Not every time, but possibly, just like I would.

Q. What about on the occasion you were testifying to that you witnessed where the same syringe was used more than once on the same patient, did he leave the room on that occasion?

A. I can't remember.

Q. Okay.

And I think from your testimony before you can't remember if you left the room?

A. Correct.

Q. Okay.

But you must remember that you didn't tear the room down, so to speak. In other words, throw away the syringe, get a new one out and prepare it for the next case.

A. Yes.

Q. Okay.

Do you know why you didn't do that?

A. Not exactly. Like, what are the—one of the circumstances I mentioned, just waiting patients and, you know, treating maybe one right after another, possibly, at a Botox party.

Q. Okay.

But you don't recall which it was, whether it was a Botox party or –

* * *

A. No.

(Tr. at 141-144)

96. Ms. Mazur testified that she had never seen a syringe being reused prior to working for Dr. Khan. (Tr. at 173)

Additional Testimony of Dr. Khan

97. Dr. Khan denied that he had ever reused a syringe during Botox procedures. Dr. Khan further testified that Ms. Mazur was lying when she testified that she saw him reuse a Botox syringe. (Tr. at 506, 580)

Testimony of Investigator Myers

98. Investigator Myers testified that, when she had interviewed Ms. Mazur as part of her investigation, Ms. Mazur had been unable to recall any patients or dates when Dr. Khan had reused syringes. (Tr. at 434-435)

Additional Testimony of Ms. Leatherman

99. When asked if she was aware of any occasion when Dr. Khan altered a patient chart, Ms. Leatherman recalled that on one occasion following a SmartLipo procedure, after the patient left, Dr. Khan asked the nurse, another employee, and Ms. Leatherman to note in the chart how inappropriate the patient's behavior had been. Ms. Leatherman testified that the patient had made a number of inappropriate, suggestive comments that caused Dr. Khan to feel uncomfortable. However, Ms. Leatherman felt that it had been unfair "that we were doing that without her being present or that she wasn't, like, made aware that she created an uncomfortable situation."¹⁴ (Tr. at 304-305, 316-319)

¹⁴ Ms. Leatherman's concerns notwithstanding, this addition to the chart seems to have been appropriate.

Ms. Leatherman further recalled that: “before that procedure happened there was a power outage in the room so the power was, like, back up and running. So I think he was just kind of—he wanted to make sure that everything was notated.”¹⁵ (Tr. at 305)

100. Ms. Leatherman testified that her working relationship with Dr. Khan varied. She stated that Dr. Khan was always understanding about her school schedule and worked around it, and he included her in some of his discussions concerning the business side of his practice. However, she testified that he could be short with her and sometimes told her she was stupid. Ms. Leatherman testified that he fired her on March 3, 2010, after Ms. Leatherman evidently failed to contact a patient to reschedule an appointment. (Tr. at 305-309)

On November 9, 2009, Ms. Leatherman presented a letter to Dr. Khan indicating that “it has been mutually decided that [she] should be laid off.” Ms. Leatherman testified that she had written this letter with the hope that Dr. Khan would agree to lay her off after learning from a co-worker that Dr. Khan had said some unkind things about her, and because she had felt that her job was in jeopardy because of the Board investigation. However, she continued working for Dr. Khan until March 2010. Ms. Leatherman testified that he fired her on March 3, 2010, after she failed to contact a patient to reschedule an appointment. (Tr. at 309-311; Resp. Ex. U)

101. Dr. Khan presented a document that Ms. Leatherman identified as a printout of a Facebook chat among Ms. Leatherman, Patient 7, and other parties. Ms. Leatherman testified that this chat took place on November 9, 2009, the same day she wrote the letter described above. (Tr. at 333-334; Resp. Ex. L) During that chat, Ms. Leatherman had evidently expressed a desire to quit Dr. Khan’s employ. As stated earlier in this report, Patient 7 advised Ms. Leatherman: “allie, don’t quit . . . let him FIRE you . . . that way if you can’t find a job right away you can at least get unemployment till you can get back on your feet * * *.” (Resp. Ex. L) During the chat, Ms. Leatherman replied:

Oh, yeah, I’m not quitting, no way in hell. He’s going to fire me, but still, . . . I guess there’s an issue with my getting unemployment since I had to cut work hours down because of school, so I don’t know what the fuck is going to happen, I’m scared and clueless and pissed off, and it’s becoming a dangerous combination as I have a fucking midterm in 2 hours and have no clue what the hell is on it, I can’t read, I can’t focus, I’m shaking livid. Fuck him. OMG fuck him.

(Resp. Ex. L) Ms. Leatherman subsequently wrote: “I hope he has fun with his state medical board invesetigations, [sic] too, stupid asshole.” (Resp. Ex. L)

¹⁵ It is unclear whether this patient had been treated the same day as Patient 6 whom Ms. Leatherman also recalled had been treated when there was a power outage, whether this patient *was* Patient 6, or whether there had been more than one power outage. Patient 6’s chart was not presented at hearing.

Additional Testimony of Investigator Myers

102. Investigator Myers testified that Dr. Khan had been cooperative when she visited his office on November 10, 2009, and that he had complied with the subpoena that she served that day. (Tr. at 412-413)
103. Investigator Myers testified that the hearing testimony of Patient 4, Patient 7, and Ms. Leatherman was consistent with what they had told her during the investigation. (Tr. at 448-451)

Additional Testimony of Ms. Mazur

104. Ms. Mazur believes that, aside from some pay-related disputes, she and Dr. Khan had had a good working relationship. (Tr. at 127-128)
105. Ms. Mazur testified that she had felt comfortable asking Dr. Khan questions that arose during procedures. (Tr. at 128)

Additional Testimony of Dr. Khan

106. Dr. Khan noted that he has been subject to probation pursuant to the Board's Order since March 2008. (Tr. at 480-483)
107. Dr. Khan testified that both Ms. Mazur and Ms. Leatherman are disgruntled former employees "and they are unreliable witnesses and they can lie * * *." Dr. Khan further testified that his own credibility should not be questioned based on a misdemeanor conviction from five years earlier. (Tr. at 582)

RELEVANT STATUTES AND RULES

21 U.S.C. 331(a), Prohibited acts, states:

The following acts and the causing thereof are prohibited:

- (a) The introduction or delivery for introduction into interstate commerce of any food, drug, device, tobacco product, or cosmetic that is adulterated or misbranded.

R.C. 2913.42, Tampering with records, states in relevant part:

- (A) No person, knowing the person has no privilege to do so, and with purpose to defraud or knowing that the person is facilitating a fraud, shall do any of the following:

- (1) Falsify, destroy, remove, conceal, alter, deface, or mutilate any writing, computer software, data, or record;

* * *

- (B)
 - (1) Whoever violates this section is guilty of tampering with records.
 - (2) Except as provided in division (B)(4) of this section, if the offense does not involve data or computer software, tampering with records is whichever of the following is applicable:
 - (a) If division (B)(2)(b) of this section does not apply, a misdemeanor of the first degree;

* * *

R.C. 2923.03, Complicity, states in relevant part:

- (A) No person, acting with the kind of culpability required for the commission of an offense, shall do any of the following:
 - (1) Solicit or procure another to commit the offense;
 - (2) Aid or abet another in committing the offense;
 - (3) Conspire with another to commit the offense in violation of section 2923.01 of the Revised Code;
 - (4) Cause an innocent or irresponsible person to commit the offense.

* * *

- (F) Whoever violates this section is guilty of complicity in the commission of an offense, and shall be prosecuted and punished as if he were a principal offender. A charge of complicity may be stated in terms of this section, or in terms of the principal offense.

R.C. 2925.09, Unapproved drugs - dangerous drug offenses involving livestock, states:

- (A) No person shall administer, dispense, distribute, manufacture, possess, sell, or use any drug,¹⁶ other than a controlled substance, that is not approved by the United

¹⁶ Pursuant to R.C. 2925.01, the term "drug" as used in R.C. 2925.09(A) is defined in R.C. 4729.01(E), which states:

- (E) "Drug" means:
 - (1) Any article recognized in the United States pharmacopoeia and national formulary, or any supplement to them, intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in humans or animals;
 - (2) Any other article intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in humans or animals;

States food and drug administration, or the United States department of agriculture, unless one of the following applies:

- (1) The United States food and drug administration has approved an application for investigational use in accordance with the “Federal Food, Drug, and Cosmetic Act,” 52 Stat. 1040 (1938), 21 U.S.C.A. 301, as amended, and the drug is used only for the approved investigational use;
 - (2) The United States department of agriculture has approved an application for investigational use in accordance with the federal “Virus-Serum-Toxin Act,” 37 Stat. 832 (1913), 21 U.S.C.A. 151, as amended, and the drug is used only for the approved investigational use;
 - (3) A licensed health professional authorized to prescribe drugs, other than a veterinarian, prescribes or combines two or more drugs as a single product for medical purposes;
 - (4) A pharmacist, pursuant to a prescription, compounds and dispenses two or more drugs as a single product for medical purposes.
- (B) (1) As used in this division, “dangerous drug,” “prescription,” “sale at retail,” “wholesale distributor of dangerous drugs,” and “terminal distributor of dangerous drugs,” have the same meanings as in section 4729.01 of the Revised Code.
- (2) Except as provided in division (B)(3) of this section, no person shall administer, dispense, distribute, manufacture, possess, sell, or use any dangerous drug to or for livestock or any animal that is generally used for food or in the production of food, unless the drug is prescribed by a licensed veterinarian by prescription or other written order and the drug is used in accordance with the veterinarian’s order or direction.
- (3) Division (B)(2) of this section does not apply to a registered wholesale distributor of dangerous drugs, a licensed terminal distributor of dangerous drugs, or a person who possesses, possesses for sale, or sells, at retail, a drug in accordance with Chapters 3719., 4729., or 4741. of the Revised Code.
- (C) Whoever violates division (A) or (B)(2) of this section is guilty of a felony of the fifth degree on a first offense and of a felony of the fourth degree on each subsequent offense.

R.C. 4731.41, Practicing medicine without certificate, states:

No person shall practice medicine and surgery, or any of its branches, without the appropriate certificate from the state medical board to engage in the practice. No person shall advertise or claim to the public to be a practitioner of medicine and surgery, or

-
- (3) Any article, other than food, intended to affect the structure or any function of the body of humans or animals;
 - (4) Any article intended for use as a component of any article specified in division (E)(1), (2), or (3) of this section; but does not include devices or their components, parts, or accessories.

any of its branches, without a certificate from the board. No person shall open or conduct an office or other place for such practice without a certificate from the board. No person shall conduct an office in the name of some person who has a certificate to practice medicine and surgery, or any of its branches. No person shall practice medicine and surgery, or any of its branches, after the person's certificate has been revoked, or, if suspended, during the time of such suspension. A certificate signed by the secretary of the board to which is affixed the official seal of the board to the effect that it appears from the records of the board that no such certificate to practice medicine and surgery, or any of its branches, in this state has been issued to the person specified therein, or that a certificate to practice, if issued, has been revoked or suspended, shall be received as prima-facie evidence of the record of the board in any court or before any officer of the state.

Rule 4731-17-04(G), Disinfection and sterilization, states in relevant part:

Instruments and other reusable equipment used by licensees who perform or participate in invasive procedures shall be appropriately disinfected and sterilized according to acceptable and prevailing standards for disinfection and sterilization which shall include at least the following:

* * *

- (G) Single use items used in treating a patient, which have become contaminated by blood or other body fluids, shall be discarded and not reused. Unless sterilized and reused in accordance with current guidelines established by the FDA. [Sentence fragment sic] Single use items being reused in treating a patient shall be adequately cleaned and sterilized. Single use items shall not be reused if the items' physical characteristics and quality have been adversely affected or if the items are incapable of being reused safely and effectively for their intended use.

Rule 4731-18-02, Use of light based medical devices, states:

- (A) For purposes of this rule, light based medical device shall mean any device that can be made to produce or amplify electromagnetic radiation at wavelengths equal to or greater than one hundred eighty nm but less than or equal to 1.0×10^6 nm [ten to the sixth power]¹⁷ and that is manufactured, designed, intended or promoted for in vivo irradiation of any part of the human body for the purpose of affecting the structure or function of the body.

¹⁷ This bracketed information is included in the rule.

- (B) *The application of light based medical devices to the human body is the practice of medicine and surgery, osteopathic medicine and surgery and podiatric medicine and surgery.* [Emphasis added]
- (C) *Except as provided in rule 4731-18-03 and rule 4731-18-04 of the Administrative Code, no physician licensed pursuant to Chapter 4731. of the Revised Code shall delegate the application of light based medical devices to the human body to any person not authorized to practice medicine and surgery, osteopathic medicine and surgery or podiatric medicine and surgery pursuant to Chapter 4731. of the Revised Code.* [Emphasis added]
- (D) A violation of paragraph (C) of this rule shall constitute “a departure from, or the failure to conform to, minimal standards of care of similar practitioners under the same or similar circumstances, whether or not actual injury to a patient is established,” as that clause is used in division (B)(6) of section 4731.22 of the Revised Code and “violating or attempting to violate, directly or indirectly, or assisting in or abetting the violation of, or conspiring to violate, any provisions of this chapter or any rule promulgated by the board,” as that clause is used in division (B)(20) of section 4731.22 of the Revised Code, to wit: section 4731.41 of the Revised Code.

Rule 4731-18-03, Delegation of the use of light based medical devices, states in relevant part:

- (A) *A physician licensed pursuant to Chapter 4731. of the Revised Code may delegate the application of light based medical devices only for the purpose of hair removal and only if all the following conditions are met:* [All emphases added]
- (1) The light based medical device has been specifically approved by the United States food and drug administration for the removal of hair from the human body; and
 - (2) The use of the light based medical device for the purpose of hair removal is within the physician’s normal course of practice and expertise; and
 - (3) The physician has seen and personally evaluated the patient to determine whether the proposed application of a light based medical device is appropriate; and,
 - (4) The physician has seen and personally evaluated the patient following the initial application of a light based medical device, but prior to any continuation of treatment in order to determine that the patient responded well to that initial application; and,
 - (5) *The person to whom the delegation is made is one of the following:*
 - (a) A physician assistant registered pursuant to Chapter 4730. of the Revised Code and the physician has a board approved supplemental utilization plan allowing such delegation; or,
 - (b) A cosmetic therapist licensed pursuant to Chapter 4731. of the Revised Code; or,

- (c) *A registered nurse or licensed practical nurse licensed pursuant to Chapter 4723. of the Revised Code; and,*
- (6) The person to whom the delegation is made has received adequate education and training to provide the level of skill and care required; and,
- (7) *The physician provides on-site supervision at all times the person to whom the delegation is made is applying the light based medical device; and,*
- (8) The physician supervises no more than two persons pursuant to this rule at the same time.

* * *

- (D) *For purposes of this rule, on-site supervision requires the physical presence of the supervising physician in the same location (i.e., the physician's office suite) as the cosmetic therapist, physician assistant, registered nurse or licensed practical nurse, but does not require his or her presence in the same room.*

* * *

- (F) A violation of paragraph (A) (B) or (C) of this rule by a physician shall constitute "a departure from, or the failure to conform to, minimal standards of care of similar practitioners under the same or similar circumstances, whether or not actual injury to a patient is established," as that clause is used in division (B)(6) of section 4731.22 of the Revised Code. A violation of division (A)(5) of this rule shall constitute "violating or attempting to violate, directly or indirectly, or assisting in or abetting the violation of, or conspiring to violate, any provisions of this chapter or any rule promulgated by the board," as that clause is used in division (B)(20) of section 4731.22 of the Revised Code, to wit: section 4731.41 of the Revised Code.

Rule 4731-18-04, Delegation of the use of light based medical devices; Exceptions, states:

- (A) A physician authorized pursuant to Chapter 4731. of the Revised Code to practice medicine and surgery or osteopathic medicine and surgery may delegate to any appropriate person the application of light based medical devices approved by the United States food and drug administration for phototherapy in treatment of hyperbilirubinemia in neonates.
- (B) A physician authorized pursuant to Chapter 4731. of the Revised Code to practice medicine and surgery or osteopathic medicine and surgery may delegate to any appropriate person the application of a light based medical device that is a fluorescent lamp phototherapy device for treatment of psoriasis and similar skin diseases. A fluorescent lamp phototherapy device is a device that emits ultraviolet light through the use of one or more fluorescent bulbs and is approved by the

United States food and drug administration for phototherapy in the treatment of psoriasis or similar skin diseases.

FINDINGS OF FACT

1. On December 12, 2007, the Board issued to Ali Khan, M.D., an Order that imposed the permanent revocation of his medical license, stayed the revocation subject to suspension for 30 days, and established subsequent probationary terms, conditions, and limitations for at least two years. The Order was based on Dr. Khan having pled guilty to one misdemeanor count of Theft of a credit card from a nurse while he was working in an emergency department. The Order became effective on February 3, 2008. Dr. Khan currently remains subject to the terms, conditions, and limitations of the Order.
 - a. Pursuant to paragraph B.1 of the Order, Dr. Khan is required to obey all federal, state, and local laws, and all rules governing the practice of medicine and surgery in Ohio.
2. In 2009, Dr. Khan purchased and took delivery of multiple 100-unit vials of Botox that were not FDA-approved. Further, although not proven directly at hearing, it is reasonable to find that Dr. Khan utilized some of the non FDA-approved Botox in his practice. It is very unlikely that he purchased the Botox and then disposed of it some other way. Moreover, Dr. Khan did not deny or contest whether he had used some of the non FDA-approved Botox in his practice.

Dr. Khan asserted that he had been unaware that the Botox that he had purchased from Jon Robinson was not FDA-approved, but these assertions are unconvincing. First, according to Ms. Leatherman, the individual boxes purchased from Jon Robinson lacked a hologram that was always present on the boxes that came from Allergan. Second, Dr. Khan himself testified that the boxes from Jon Robinson were a slightly different color than the boxes he received from Allergan. Third, the boxes were clearly labeled as having been manufactured in Ireland, and there was no information on the boxes concerning FDA approval. Dr. Khan's statement to Investigator Myers that he never read the labels on the boxes is not credible. Fourth, the email receipts he received from Mr. Robinson informed Dr. Khan that his credit card could be billed by entities with names such as "Global Health Supplies," "Global Meds," and "Canada Health Solutions," and that the amount charged could vary depending on factors such as "daily changes in currency exchange rates * * *." Again, Dr. Khan's statement to Investigator Myers that he never read or paid any attention to that information is simply not credible.

Any or all of these factors should have led Dr. Khan to realize that there was a problem with the product he received from Mr. Robinson. Moreover, Dr. Khan cannot excuse his conduct by claiming a lack of knowledge—willful blindness is not an excuse. Accordingly, Dr. Khan's assertion that he had been unaware that the Botox was not FDA-approved is not accepted.

3. From 2007 to 2009, Dr. Khan provided care in the routine course of his practice to Patients 4, 6, and 7, as identified on a confidential Patient Key.
4. On November 23, 2007, and December 14, 2007, Dr. Khan permitted a person not licensed to practice medicine and surgery (“non-physician”)¹⁸ to perform laser skin treatments on Patient 4. In an entry dated March 18, 2008, Dr. Khan indicated in a progress note in Patient 4’s chart that “all Tx done by me and nurse with direct supervision.” Further, on October 6, 2008, Dr. Khan generated a letter regarding Patient 4 in which he stated: “regarding [Patient 4] all procedure[s] [were] done by me or under supervision.”

In fact, Dr. Khan did not personally perform nor did he supervise the laser skin treatment procedure that Patient 4 received on November 23, 2007. Rather, Dr. Khan allowed a non-physician to perform a laser skin treatment on Patient 4 at his office. Moreover, Patient 4 testified that she had been told by Ms. Mazur that day that she could not receive lidocaine prior to the procedure because Dr. Khan was not at the office. The Hearing Examiner believes that Patient 4 is a highly credible witness. In addition, Dr. Khan’s appointment schedule for November 23, 2007, does not prove that he had been present in the office during Patient 4’s first procedure because Dr. Khan was not scheduled for a procedure until later in the day. Further, Dr. Khan was unable to recall with certainty that he had been in the office at the time Patient 4 underwent her procedure. Accordingly, the evidence supports a finding that Patient 4’s first procedure occurred without Dr. Khan’s supervision or presence at the office.

In addition, the evidence supports a finding that on December 14, 2007, Dr. Khan allowed a non-physician to perform a laser skin treatment on Patient 4 at his office and was never present in the room during the treatment. Dr. Khan and/or his insurer subsequently paid \$85,000.00 to Patient 4 and her husband in settlement of Patient 4’s claims against him related to these events.

Dr. Khan asserted that, at the time Patient 4’s procedures were performed, he had believed that nurses in Ohio were allowed to perform the laser skin procedure that Ms. Mazur performed on Patient 4. Dr. Khan and Ms. Mazur both testified that a nurse had trained them on how to use the Lux1540 fractional laser handpiece. Their testimony was corroborated to a large extent by Dr. Khan’s and Ms. Mazur’s certificates of training which were indeed signed by a nurse. Dr. Khan asserted that that had led him to believe that nurses are allowed to use that device.

With respect to his statements in Patient 4’s chart that he had either performed or supervised both procedures, Dr. Khan defined supervision in such a broad and self-serving way as to render it meaningless. It is at odds with the Board’s rules, which requires “on-site” supervision over nurses performing light-based therapy. Moreover, it is undisputed that Dr. Khan did not personally perform either procedure.

¹⁸ The Notice referred to “a person not licensed to perform medicine and surgery” as an “unlicensed person.” (St. Ex. 1A)

5. Evidence presented by the State, including Patient 7's chart, Patient 7's credit card receipt, and the testimony of Patient 7, establishes that on June 2, 2008, Dr. Khan permitted a non-physician to perform a "photofacial" laser skin treatment on Patient 7's face.
6. The evidence supports a finding that Dr. Khan reused a liner from a prior liposuction procedure during a March 31, 2009 liposuction procedure on Patient 6. The Hearing Examiner found Ms. Leatherman's testimony regarding that incident to be convincing. Moreover, her testimony was consistent with the statement she had made to Investigator Myers during Investigator Myers' investigation.

Dr. Khan asserted that a photograph of the liner used in Patient 6's procedure shows that it had been a new liner. However, the photograph shows only one angle and does not convincingly demonstrate that the liner did not have a second pair of initials on it. Moreover, the Hearing Examiner does not believe Dr. Khan's assertion that Ms. Leatherman is lying because she is a disgruntled ex-employee. It is clear from the printout of a Facebook chat that Ms. Leatherman had been very angry with him in November 2009; however, the chat preceded her testimony by about two years. The Hearing Examiner does not believe that Ms. Leatherman lied under oath at hearing to get revenge on Dr. Khan. Aside from the revenge issue, there is no evidence that Ms. Leatherman had anything to gain by lying about Dr. Khan reusing a canister liner. Accordingly, Dr. Khan's assertions are not persuasive.

- 7.a. The evidence is insufficient to find that Dr. Khan inappropriately reused single use medical supplies with respect to Botox syringes. Ms. Mazur testified that this had occurred; however, her recollection concerning these events seemed very uncertain, particularly during cross-examination. If this occurred, it appears that Ms. Mazur's memory with respect to this issue has faded to the point of being unreliable. Therefore, the State did not prove by a preponderance of the evidence that Dr. Khan reused Botox syringes.
- 7.b. For the reasons set forth below, the evidence is insufficient to find that, on one occasion, Dr. Khan inappropriately reused a single-use item, liposuction aspiration tubing, that had become contaminated by blood and other bodily fluids.

Ms. Mazur testified that her job duties included assisting Dr. Khan during liposuction procedures. According to Ms. Mazur, on one occasion, Pure MD had run out of aspiration tubing prior to the last procedure of the day, and Dr. Khan told her to reuse aspiration tubing that had been used during a previous patient's procedure. Dr. Khan then performed the last procedure of the day with the reused tubing. The evidence establishes that aspiration tubing is a single-use, sterile item that must be discarded following use.

Ms. Mazur testified that, when she assisted Dr. Khan with liposuction procedures, her duties included setting up the aspiration machine. Setting up the machine included attaching the aspiration tubing to the canister lid. When presented with a photograph of the aspiration machine, however, Ms. Mazur misidentified the vacuum tube as the aspiration tube. The evidence establishes that vacuum tubing is part of the canister, and is reusable.

Ms. Mazur's misidentification of the vacuum tubing does not necessarily diminish her reliability as a witness. The photograph of the aspiration machine shows only one piece of tubing attached to the canister lid, which may not be the way the machine would appear when set up for a procedure. During a procedure, there must be two pieces of tubing attached to the lid: the vacuum tubing that creates suction and the aspiration tubing which uses the suction to draw fat and other fluid out of the patient and deposit it into the canister liner. Accordingly, this misidentification, by itself, does not necessarily diminish her reliability as a witness.

Nevertheless, Ms. Mazur made other statements during the hearing that caused the Hearing Examiner to question her reliability as a witness. First, she was unable to recall what year she began working for Dr. Khan. This seemed odd because it was not that long ago, possibly around 2006. Second, Ms. Mazur testified that Dr. Khan had asked her to state during court proceedings that Dr. Khan had performed the laser skin procedures on Patient 4, and not her. However, this statement contradicts the statement that she had originally made to Investigator Myers during the investigation. At that time, Ms. Mazur told Investigator Myers that Dr. Khan asked her to state that he had been present during Patient 4's laser skin procedures, which significantly differs from her testimony at hearing.¹⁹ Third, Ms. Mazur's recollection and testimony concerning Dr. Khan's reuse of Botox syringes was uncertain and confusing.

Dr. Khan argued that Ms. Mazur is a disgruntled ex-employee who might have lied during her testimony. However, the Hearing Examiner does not believe that Ms. Mazur was untruthful. There was no evidence produced that Ms. Mazur had anything to gain by testifying falsely about Dr. Khan. In fact, her testimony may have been offered against her own interest as a nurse to any extent that she admitted participating in the reuse of a single-use item. Moreover, if she was simply lying about the alleged incident, there would have been no reason for her to express uncertainty whether a liner had also been reused during the same procedure, as she did at the hearing. Accordingly, the Hearing Examiner believes Ms. Mazur to be a truthful witness. However, witness reliability requires both truthfulness and an ability to recall events accurately. Based upon the evidence presented, the Hearing Examiner finds Ms. Mazur's testimony with regard to this issue to be unreliable based on her inability to recall events accurately. Accordingly, the evidence is insufficient to support a finding that Dr. Khan reused aspiration tubing that had become contaminated by blood and other bodily fluids.

CONCLUSIONS OF LAW

1. For the reasons set forth below, Dr. Khan's acts, conduct, and/or omissions as described in Finding of Fact 4, individually and/or collectively, constitute "[m]aking a false, fraudulent, deceptive, or misleading statement in the solicitation of or advertising for patients; in

¹⁹ Dr. Khan was not charged with asking Ms. Mazur to make false statements during a court proceeding, nor does the evidence establish that that actually occurred. This testimony was offered and evaluated only for the limited purpose of assessing witness credibility.

relation to the practice of medicine and surgery, osteopathic medicine and surgery, podiatric medicine and surgery, or a limited branch of medicine; or in securing or attempting to secure any certificate to practice or certificate of registration issued by the board,” as that clause is used in R.C. 4731.22(B)(5).

As set forth in Finding of Fact 4, Patient 4 received her first treatment on November 23, 2007, which was performed by Ms. Mazur. The evidence establishes that Dr. Khan was not in the office at the time of the procedure. Patient 4 received her second treatment on December 14, 2007, also performed by Ms. Mazur. The evidence establishes that Dr. Khan had been present in the office at the time of the second procedure.

With respect to R.C. 4731.22(B)(5), the conduct at issue concerns two statements made by Dr. Khan that are included in Patient 4’s chart. Each of these statements concerns both of the aforementioned procedures. The first statement is included in a March 18, 2008 progress note that documents a telephone conversation that occurred that day between Dr. Khan and Patient 4. It states that the procedures had been performed by Dr. Khan and a nurse with direct supervision. The second statement is included in a letter dated October 6, 2008, that Dr. Khan wrote for Patient 4’s husband. It states that all procedures had been performed by Dr. Khan *or* under supervision.

Both statements are clearly false with respect to the first procedure. Dr. Khan did not perform that procedure nor was he even present in the office when the procedure was performed. Further, the March 18, 2008 progress note is also clearly false with respect to the second procedure. In it, Dr. Khan stated that he had actually been involved in performing the procedure and provided “direct supervision,” which he did not. Moreover, the evidence is sufficient to conclude that the October 6, 2008 statement concerning the second procedure was also false because it suggested that Dr. Khan *might* have performed the procedure, and Dr. Khan knew or should have known that he did not. Dr. Khan himself testified that it should have been obvious to anyone who reviewed the chart that both procedures had been performed by Ms. Mazur, and Patient 4’s chart was available to Dr. Khan. Accordingly, the evidence is sufficient to find that Dr. Khan violated R.C. 4731.22(B)(5).

2. For the reasons that follow, Dr. Khan’s acts, conduct, and/or omissions as described in Finding of Fact 4, individually and/or collectively, constitute “[c]ommission of an act that constitutes a felony in this state, regardless of the jurisdiction in which the act was committed,” as that clause is used in R.C. 4731.22(B)(10), to wit: R.C. 2923.03, Complicity, as applied to R.C. 4731.41, Practice of Medicine or Surgery without Certificate, based upon violations of Rules 4731-18-02 and 4731-18-03. Pursuant to R.C. 4731.99(A), violation of R.C. 4731.41 constitutes a felony offense.

As set forth in Rule 4731-18-02(B), the application of light-based medical devices to the human body constitutes the practice of medicine. However, Rule 4731-18-02(C) provides that, under exceptions set forth in to Rules 4731-18-03 and 4731-18-04, physicians may delegate the application of light-based medical devices to non-physicians. However, none

of these exceptions apply to Finding of Fact 4. The evidence establishes that Dr. Khan delegated to a non-physician the application of fractional laser treatment to Patient 4. In so doing, Dr. Khan was complicit in the offense of practicing medicine without a certificate, in violation of R.C. 4731.41.

Dr. Khan asserted that he had believed that nurses were allowed to perform fractional laser procedures because he and Ms. Mazur had been trained by a nurse to use the fractional laser handpiece. Therefore, he implied, it had been reasonable for him to believe that nurses could perform fractional laser treatment and to allow Ms. Mazur to perform such treatment on patients. The Hearing Examiner believes Dr. Khan's assertion that he and Ms. Mazur were trained by a nurse; however, the Hearing Examiner does not believe that it was reasonable for Dr. Khan to therefore allow Ms. Mazur to perform fractional laser procedures. Physicians are required to be familiar with the laws and rules that govern their profession. This is especially necessary with respect to laws and rules that have direct patient-safety ramifications, as do the Board's rules concerning the delegation of light-based treatment.²⁰ Moreover, with respect to acts constituting a crime, the State is not required to prove that the licensee actually intended to commit a crime. The State must simply prove that the licensee intended to commit the acts that constitute a crime. Accordingly, the evidence is sufficient to support a conclusion that Dr. Khan violated R.C. 4731.22(B)(10).

3. For the reasons that follow, the evidence is sufficient to find that Dr. Khan's acts, conduct, and/or omissions as described in Finding of Fact 5, individually and/or collectively, constitute "[c]ommission of an act that constitutes a felony in this state, regardless of the jurisdiction in which the act was committed," as that clause is used in R.C. 4731.22(B)(10), to wit: R.C. 2923.03, Complicity, as applied to R.C. 4731.41, Practice of Medicine or Surgery without Certificate, based upon violations of Rules 4731-18-02 and 4731-18-03. Pursuant to R.C. 4731.99(A), violation of R.C. 4731.41 constitutes a felony offense.

Rule 4731-18-04(B) authorizes physicians to delegate to any appropriate person the application of fluorescent lamp phototherapy that emits ultraviolet light to a patient to treat psoriasis and similar skin diseases. With respect to Finding of Fact 5, Dr. Khan delegated to Ms. Mazur the task of applying photofacial laser skin treatment to Patient 7's face for the treatment of "sun spots." No evidence was presented concerning: (1) the nature of the photofacial light, or (2) whether sun spots are a condition related to psoriasis. However, the Hearing Examiner strongly suspects that photofacial light is not ultraviolet. It is common knowledge that ultraviolet light causes a person's skin to darken, and the evidence implied that the photofacial light that Ms. Mazur applied to Patient 7 has a bleaching effect. Moreover, the Hearing Examiner further suspects that psoriasis and conditions related to psoriasis are more serious than a sun spot, which the evidence suggests is skin discoloration resulting from sun exposure. Accordingly, the Hearing Examiner concludes that no exception applies to Dr. Khan's delegation of photofacial laser skin treatment to

²⁰ In making this statement, the Hearing Examiner is not suggesting, nor should the Board conclude, that Patient 4 was injured as a result of Dr. Khan's delegation of her treatment to Ms. Mazur. The statement simply reflects that the rules concerning light-based treatment directly relate to patient safety.

Ms. Mazur, and that his conduct violated R.C. 4731.22(B)(10). If the Board, as an expert panel, determines that the exception set forth in Rule 4731-18-04(B) applies to these facts, then it should modify this conclusion in a manner consistent with its determination.

4. For the reasons that follow, Dr. Khan's acts, conduct, and/or omissions as described in Finding of Fact 2, individually and/or collectively, constitute "[c]ommission of an act in the course of practice that constitutes a misdemeanor in this state, regardless of the jurisdiction in which the act was committed," as that clause is used in R.C. 4731.22(B)(12), to wit: 21 U.S.C. 331(a), Prohibited Acts. That statute prohibits "[t]he introduction or delivery for introduction into interstate commerce of any * * * drug * * * that is adulterated or misbranded."

Botox is a drug that has been approved by the FDA and is legally available in the United States. However, on occasion, Dr. Khan purchased cheaper, foreign-made Botox that was not FDA-approved and injected it into patients. There is no evidence that Dr. Khan advised his patients that they were receiving unapproved Botox; in fact, that would be contrary to Dr. Khan's claim that he had been unaware that the Botox he purchased from Jon Robinson was not FDA-approved.

The State argued that Dr. Khan's conduct in purchasing non FDA-approved Botox and administering it to his patients would violate 21 U.S.C. 331(a). In support of its argument, the State relied on *U.S. v. Patwardhan*, 2011 U.S. App. LEXIS 5666 (9th Cir. 2011). The case underlying that appeal, *U.S. v. Patwardhan*, 2009 U.S. Dist. LEXIS 66051 (C.D.Ca 2009), concerned Dr. Patwardhan's motion for acquittal and/or new trial. The district court noted that Dr. Patwardhan had been convicted of several violations of federal law, including 21 U.S.C. 331(a), based upon, among other things, distributing foreign, non FDA-approved drugs to his patients. In affirming the district court's decision to deny Dr. Patwardhan's motion, the appeals court found that Dr. Patwardhan's conviction had been supported by findings including that Dr. Patwardhan "never informed his patients that the drugs administered to them during in-office treatments were not FDA-approved." *U.S. v. Patwardhan*, 2011 U.S. App. LEXIS 5666 at 5.²¹

The facts of the *Patwardhan* case are much more complex than in Dr. Khan's case. However, they are similar with respect to importing foreign, non FDA-approved drugs and administering them to patients without advising the patients that they are not FDA-approved. Like Dr. Patwardhan, Dr. Khan effectively provided to his patients a misbranded drug. Accordingly, Dr. Khan's conduct violated R.C. 4731.22(B)(12) based upon violation of 21 U.S.C. 331(a).

5. For the reasons set forth below, the evidence is sufficient to conclude that Dr. Khan's acts, conduct, and/or omissions as set forth in Finding of Fact 4, individually and/or collectively, constitute "[c]ommission of an act in the course of practice that constitutes a misdemeanor in this state, regardless of the jurisdiction in which the act was committed," as that clause is used in R.C. 4731.22(B)(12), to wit: R.C.2913.42, Tampering with Records.

²¹ The appeals court decision is appended to the State's written closing argument. (St. Ex. 16)

R.C. 2913.42, makes it illegal for anyone who has no privilege to do so to “[f]alsify * * * any writing, computer software, data, or record” with purpose to defraud or knowing that he or she is facilitating a fraud. The question is whether a false statement in a medical record, by itself, constitutes “falsifying” a medical record. The Hearing Examiner believes that it does because physicians have a duty to maintain accurate medical records. Moreover, Dr. Khan’s purpose to defraud may be inferred from the circumstances: Dr. Khan learned that his patient had suffered an injury related to a procedure performed in his office. He would logically have been concerned about a possible lawsuit and, because of his previous contact with the Board, future Board action as well. Further, the fact that he later acknowledged in a court filing that Ms. Mazur had performed the procedures is not exonerating. What matters is his mental state at the time he recorded the false statements in Patient 4’s chart. Accordingly, the evidence is sufficient to support a conclusion that Dr. Khan violated R.C. 4731.22(B)(12) based upon violation of R.C. 2913.42.

6. Dr. Khan’s acts, conduct, and/or omissions as described in Findings of Fact 1 through 6, individually and/or collectively, that occurred on or after February 3, 2008, the effective date of the Board Order, constitute a “[v]iolation of the conditions of limitation placed by the board upon a certificate to practice,” as that clause is used in R.C. 4731.22(B)(15).

Moreover, Dr. Khan’s conduct in delegating Patient 4’s light-based treatment to Ms. Mazur, as described in Finding of Fact 4, does not support violation of R.C. 4731.22(B)(15) because both of Patient 4’s procedures occurred prior to the effective date of the Board Order.

7. The evidence does not support a conclusion that Dr. Khan’s acts, conduct, and/or omissions, as described in Finding of Fact 2, individually and/or collectively, constitute “[c]ommission of an act that constitutes a felony in this state, regardless of the jurisdiction in which the act was committed,” as that clause is used in R.C. 4731.22(B)(10), to wit: R.C. 2925.09, Unapproved Drugs.

R.C. 2925.09(A) states, in relevant part, that “[n]o person shall administer, dispense, * * * possess, * * * or use any drug * * * that is not approved by the United States food and drug administration,” unless certain enumerated exceptions apply. Dr. Khan argued that his use of non FDA-approved Botox did not violate R.C. 2925.09 because it fell under one of the enumerated exceptions. Specifically, he argues that the exception enumerated in R.C. 2925.09(A)(3) is applicable.

R.C. 2925.09(A)(3) specifies that R.C. 2925.09(A) does not apply when “[a] licensed health professional authorized to prescribe drugs, other than a veterinarian, prescribes or combines two or more drugs as a single product for medical purposes.” Dr. Khan argued that he falls under that exception because Botox is shipped dry and must be reconstituted by adding saline solution to the Botox vial. Dr. Khan further argued that, pursuant to the definition of “drug” as used in R.C. 2925.09, saline constitutes a drug. Accordingly, he argued, because Botox must be mixed with saline solution before it is injected, he had combined “two or more drugs as a single product for medical purposes” and that the exception applies.

R.C. 2925.01 defines the term “drug” as used in R.C. 2925.09, and simply refers to one of the statutes governing the Ohio State Board of Pharmacy; specifically, R.C. 4729.01. Subsection (E) of R.C. 4729.01, sets forth the following definition of “drug”:

- (1) Any article recognized in the United States pharmacopoeia and national formulary, or any supplement to them, intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in humans or animals;
- (2) Any other article intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in humans or animals;
- (3) Any article, other than food, intended to affect the structure or any function of the body of humans or animals;
- (4) Any article intended for use as a component of any article specified in division (E)(1), (2), or (3) of this section; but does not include devices or their components, parts, or accessories.

Dr. Khan argued that saline solution can be used to rehydrate a person, which affects the person’s blood by increasing its fluid volume. The Hearing Examiner agrees that, under the broad definition of “drug” set forth in R.C. 4729.01(E), saline solution constitutes a drug. Moreover, R.C. 2925(A)(3) provides an exception for a physician who “combines two or more drugs as a single product for medical purposes.” No other qualifiers or requirements are set forth. Accordingly, the Hearing Examiner finds Dr. Khan’s argument to be persuasive and concludes that the exception listed in R.C. 2925.09(A)(3) applies to this case. Therefore, Dr. Khan’s conduct as set forth in Finding of Fact 2 did not violate R.C. 4731.22(B)(10) based upon acts constituting violation of R.C. 2925.09.

8. The evidence is insufficient to support a conclusion that Dr. Khan’s acts, conduct, and/or omissions as described in Findings of Fact 7.a and 7.b, individually and/or collectively, constitute “violating or attempting to violate, directly or indirectly, or assisting in or abetting the violation of, or conspiring to violate, any provisions of this chapter or any rule promulgated by the board,” as that clause is used in R.C. 4731.22(B)(20), to wit: Rule 4731-17-04(G).

RATIONALE FOR THE PROPOSED ORDER

The evidence establishes that:

- Dr. Khan obtained Botox that was not FDA-approved and used some of it in his practice,
- Dr. Khan allowed a non-physician to perform fractional laser treatment twice on a patient and subsequently made false statements in that patient’s medical record,
- Dr. Khan allowed a non-physician to perform light-based photofacial treatment on another patient, and
- Dr. Khan reused a canister liner during a liposuction procedure on another patient.

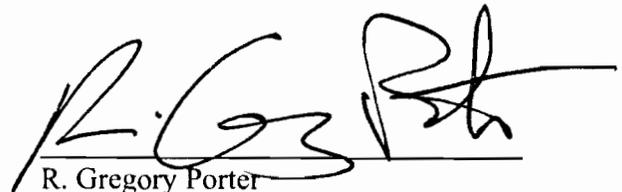
Dr. Khan’s violations of the Ohio Medical Practices Act merit the severest sanction, particularly in light of the Board’s previous stayed permanent revocation.

PROPOSED ORDER

It is hereby ORDERED that:

The certificate of Ali Khan, M.D., to practice medicine and surgery in the State of Ohio shall be PERMANENTLY REVOKED.

This Order shall become effective immediately upon the mailing of the notification of approval by the Board.



R. Gregory Porter
Hearing Examiner

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

ALI KHAN, M.D.,	:	
	:	
Appellant	:	CASE NO. 12CV-12914
	:	
vs.	:	JUDGE BEATTY
	:	
STATE MEDICAL BOARD OF OHIO,	:	
	:	
Appellee	:	

DECISION AND JUDGMENT ENTRY
AFFIRMING, IN PART, THE ORDER OF THE STATE MEDICAL BOARD OF OHIO,
REMANDING THIS MATTER FOR FURTHER PROCEEDINGS,
GRANTING THE MOTION TO STRIKE FILED MARCH 11, 2013, AND
FINDING THAT THE MOTION FOR RECONSIDERATION
FILED OCTOBER 30, 2012 IS MOOT
AND
NOTICE OF FINAL APPEALABLE ORDER

BEATTY, JUDGE

This is an appeal pursuant to R.C. 119.12 from a September 12, 2012, Order of the State Medical Board of Ohio (the "Board") permanently revoking Appellant's certificate to practice medicine and surgery in Ohio.

I. FACTS

On April 14, 2010, the Board issued a Notice of Opportunity for Hearing (the "Notice") to Appellant Ali Khan, M.D. (Ex. 1-A.) The Notice stated that the Board proposed to take disciplinary action against Dr. Khan's certificate to practice medicine and surgery in Ohio based on alleged violations that included allowing a registered nurse to perform laser skin procedures on two patients; taking delivery of and using non-FDA approved Botox on his patients; reusing single-use medical supplies; making false statements in and falsifying a patient's chart; and violating his December, 2007 Board Order.

Dr. Khan requested an administrative hearing, which was held on November 14 and 15, 2011. During the hearing, the State presented the testimony of Dr. Khan, Sara Mazur (a Registered Nurse who worked in Dr. Khan's office), Patient 4, Patient 7, Allison Leatherman (a former employee of Dr. Khan's office), and Board Investigator Amy Myers. In his case, Dr. Khan testified. The evidence was as follows.

The State alleged that Dr. Khan allowed Ms. Mazur to perform laser skin treatments on Patient 4 and Patient 7.

Dr. Khan does not dispute that he violated the Medical Practice Act concerning the delegation of a laser procedure in regard to Patient 4. (Appellant's brief, p. 2.) Dr. Khan testified that he believed delegation of the laser procedure was allowed under Ohio law, and that as soon as he became aware delegation was not permitted, he began performing these procedures himself. (T. 553.) Patient 4 testified that the procedure left a scar on her face and that she filed a civil lawsuit against Dr. Khan and obtained a settlement of \$85,000.00. (T. 210-215.)

The allegations regarding Patient 7 are disputed. Patient 7 testified that Ms. Mazur performed a laser treatment on her "entire face," using a "big laser machine" and lasting "probably twenty minutes." (T. 240.) She stated that she was alone with Ms. Mazur during this treatment. (T. 235.) She stated that Dr. Khan "came in after with a different laser and he lasered a couple spots on the end of my nose." (T. 241.)

Dr. Khan and Ms. Mazur testified that Patient 7 was treated in the clinic, but that they had no recollection of performing laser procedures on Patient 7. (T. 516, 153.) Ms. Mazur testified that if a patient signed a consent form for fraxional laser skin treatment, as did Patient 7, Ms. Mazur "would think that [the patient] did receive fraxional treatments." (T. 103.) However, Ms.

Mazur stated that it was her practice to document her performance of treatments, and no such notation is contained in Patient 7's chart. (T. 149, 153.)

With respect to the allegation that Dr. Khan purchased and used non-FDA approved Botox on his patients, Dr. Khan testified that he usually purchased Botox directly from Allergan, the manufacturer. (T. 29-30, 488.) He also purchased Botox from a Jon Robinson. (*Id.*) Ms. Mazur testified that Dr. Khan ordered Botox from Mr. Robinson when purchasing large quantities, because it was cheaper than ordering it from Allergan. (T. 111-113.)

Investigator Myers testified that while Botox that is approved by the FDA has a notation of FDA approval on the box, boxes of Botox found in Dr. Khan's office did not have FDA approval on them. (T. 398.) Ms. Myers identified photographs of the boxes of Botox, which had labels indicating that the contents were manufactured in Ireland. (Ex. 5B, 5D; T. 397.) Ms. Myers stated that she contacted the Pharmacy Board and the FDA, and learned that it is a violation of federal law to receive non-FDA approved Botox from outside of the country. (T. 398.)

Dr. Khan testified that he did not know where the Botox ordered from Mr. Robinson was coming from, and that Mr. Robinson claimed to be based in the United States. (T. 484, 488.) Dr. Khan testified that information on the packaging and receipts did not alert him to the fact that the Botox was from a different country, and he was always charged in U.S. dollars. (T. 32-33, 489-490.)

The allegation that Dr. Khan reused single use medical supplies involves a disposable liner in a canister used to perform liposuction procedures. Ms. Leatherman testified that the office ran out of the liners prior to a scheduled liposuction procedure. (T. 297-299.) She stated that Dr. Khan told her to "figure out" the problem or she would lose her job. (T. 297.) She

stated that she dumped out the liner and gave it to Dr. Khan; she said that he was happy she did so and that he knew the liner was being reused because the initials were scribbled out to put the initials of another patient on the liner. (T. 298.) She stated that this procedure involved Patient 6. (T. 323.)

Dr. Khan testified that a new liner was used during Patient 6's procedure. (T. 505-506.) He testified that a photograph of the liner used during the procedure shows that it has Patient 6's initials on it. (Ex. Y; T. 504-505.)

The allegations that Dr. Khan made false statements in and falsified a patient's chart involve two statements relating to Patient 4. The first is a progress note made by Dr. Khan on March 18, 2008 stating that "all Tx done by me and nurse with direct supervision." (St. Ex. 2 at 4.) The second is a letter from Dr. Khan dated October 6, 2008 regarding Patient 4 stating that "all procedure[s] [were] done by me or under supervision." (St. Ex. 2 at 11.)

Patient 4 had two laser treatments at Dr. Kahn's office; she stated that she did not see Dr. Khan at either appointment. (T. 205-206.) Patient 4 testified that on the first occasion, November 23, 2007, Ms. Mazur explained the treatment to her and performed the laser treatment procedure. (T. 204-207.) Patient 4 testified that when she went for the second procedure on December 14, 2007, Ms. Mazur again administered the treatment. (T. 207-208.) Patient 4 stated that she received a topical anesthetic prior to the procedure after Ms. Mazur left the treatment room to obtain Dr. Khan's permission to use it. (*Id.*)

Dr. Khan testified that his statements in the March 18, 2008 progress note and the October 6, 2008 letter were accurate, because the procedures were done under his supervision. (T. 538.)

The final allegations relate to the Board's December 12, 2007 Order. The 2007 Order was issued as a result of Dr. Khan's conviction of misdemeanor theft of a credit card of a nurse he worked with at a hospital. (St. Ex. 10 at 18.) The 2007 Order placed Dr. Khan on probation for two years and imposed terms and conditions in effect during that period. (*Id.* at 4.) The terms and conditions required Dr. Khan to obey all federal, state and local laws, and all rules governing the practice of medicine in Ohio. (*Id.*) Evidence was presented that at the time of the alleged violations discussed above, Dr. Khan was subject to the terms and conditions of the 2007 Order, and that the alleged violations also constitute violations of the 2007 Order.

II. FINDINGS OF THE BOARD

On August 2, 2012, the Hearing Examiner issued a 48-page Report and Recommendation. The Hearing Examiner found that Dr. Khan committed the above violations.

On September 12, 2012, the Board approved the Report and Recommendation and modified it by adding a conclusion that by purchasing and used non-FDA approved Botox, Dr. Khan also committed an act that constitutes a felony in violation of R.C. 4731.22(B)(10). The Board's Order permanently revoked Appellant's medical certificate. On October 11, 2012, Appellant filed this appeal from the Board's Order.

III. LAW

When considering an appeal from an order of the Medical Board, a common pleas court must uphold the order if it is supported by reliable, probative, and substantial evidence and is in accordance with law. R.C. 119.12; *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 621 (1993). The Court's scope of review of an agency's decision in an administrative appeal is limited. *Univ. of Cincinnati v. Conrad*, 63 Ohio St.2d 108, 110 (1980). The Court is to "give due deference to the administrative resolution of evidentiary conflicts" because the fact finder had

the opportunity to observe the witnesses and weigh their credibility. (*Id.*) The Court “will not substitute its judgment for the board’s where there is some evidence supporting the board’s order.” *Harris v. Lewis*, 69 Ohio St.2d 577, 578 (1982).

The Ohio Supreme Court has recognized that the General Assembly granted the Medical Board a broad measure of discretion. *Arlen v. State*, 61 Ohio St.2d 168, 174 (1980). In *Farrand v. State Med. Bd.*, 151 Ohio St. 222, 224 (1949), the Court stated:

The purpose of the General Assembly in providing for administrative hearings in particular fields was to facilitate such matters by placing the decision on facts with boards or commissions composed of men equipped with the necessary knowledge and experience pertaining to a particular field.

“[W]hen courts review a medical board order, they are obligated to accord due deference to the board’s interpretation of the technical and ethical requirements of the medical profession.” *Landefeld v. State Med. Bd.*, 10th Dist. No. 99AP-612, 2000 Ohio App. LEXIS 2556, p. 9.

IV. THE COURT’S FINDINGS AND CONCLUSIONS

On March 11, 2013, the Board filed a Motion to Strike exhibits to Appellant’s briefs that are not part of the certified record. Specifically, the Motion seeks to strike Exhibits A and B to Appellant’s brief and Exhibit 1 to Appellant’s reply brief.

R.C. 119.12 provides as follows:

Unless otherwise provided by law, in the hearing of the appeal, the court is confined to the record as certified to it by the agency. Unless otherwise provided by law, the court may grant a request for the admission of additional evidence when satisfied that the additional evidence is newly discovered and could not with reasonable diligence have been ascertained prior to the hearing before the agency.

In *Northfield Park Assoc. v. Ohio State Racing Commission*, 10th Dist. No. 05AP-749, 2006-Ohio-3446, at ¶57, the Court of Appeals held that “Certainly, pursuant to R.C. 119.12, the trial court has no discretion to admit additional evidence if it is not satisfied that the evidence is

newly discovered and could not with reasonable diligence have been ascertained prior to the hearing before the agency.”

Appellant has not asserted or established that any of the additional evidence he seeks to present constitutes newly discovered evidence that could not have been discovered with reasonable diligence prior to the administrative hearing. Accordingly, the exhibits submitted by Appellant that are not part of the certified record cannot be admitted. The Board’s Motion to Strike is granted.¹

Appellant’s first assignment of error asserts that the evidence does not establish that Patient 7 had a laser skin treatment performed by Ms. Mazur. Appellant further argues that the evidence does not establish that the medical equipment used by Ms. Mazur in the treatment of Patient 7 was a “light based medical device” under Ohio Admin. Code 4731-18-02.

Appellant’s second assignment of error is related, asserting that the evidence does not establish that the medical equipment used by Ms Mazur in the treatment of Patient 7 was not authorized under Ohio Admin. Code 4731-18-04(B).

Ohio Admin. Code 4731-18-02(C) provides that “Except as provided in rule 4731-18-03 and rule 4731-18-04 of the Administrative Code, no physician ... shall delegate the application of light based medical devices to the human body to any person not authorized to practice medicine and surgery....” Ohio Admin. Code 4731-18-02(A) defines a “light based medical device” as “any device that can be made to produce or amplify electromagnetic radiation at wavelengths equal to or greater than one hundred eighty nm but less than or equal to 1.0×10^6 nm”.

¹ Exhibits A and B to Appellant’s brief address the issue of whether Patient 7 had a condition that was within the exception in Ohio Admin. Code 4731-18-04(B). Because this issue is being remanded to the Board as set forth below, judicial notice of these exhibits is unnecessary for this additional reason. The Court further notes that Exhibit 1 to Appellant’s reply brief is unauthenticated.

nm and that is manufactured, designed, intended or promoted for in vivo irradiation of any part of the human body for the purpose of affecting the structure or function of the body.”

Ohio Admin. Code 4731-18-04(B) provides as follows:

A physician authorized pursuant to Chapter 4731. of the Revised Code to practice medicine and surgery or osteopathic medicine and surgery may delegate to any appropriate person the application of a light based medical device that is a fluorescent lamp phototherapy device for treatment of psoriasis and similar skin diseases. A fluorescent lamp phototherapy device is a device that emits ultraviolet light through the use of one or more fluorescent bulbs and is approved by the United States food and drug administration for phototherapy in the treatment of psoriasis or similar skin diseases.

Patient 7 testified that on June 2, 2008, Ms. Mazur performed a laser treatment on her “entire face,” using a “big laser machine.” (T. 240.) She stated that she was alone with Ms. Mazur during this treatment. (T. 235.) She stated that Dr. Khan “came in after with a different laser and he lasered a couple spots on the end of my nose.” (T. 241.) Patient 7 testified that the device used by Ms. Mazur was a laser with a rectangular object on the end of it about the size of a deck of cards. (T. 253-254.) She stated that the device used by Dr. Khan was smaller, pointed, “like a wand.” (T. 256.) She identified the consent form she signed for “Fraxional Non-Ablative Skin Resurfacing” (T. 236-237; Ex. 3) and her credit card statement showing payment for the date of the procedure. (T. 239-240.)

Dr. Khan testified that the device described by Patient 7 as having a rectangular end is a photofacial device. (T. 520-522.) He testified that the device described by Patient 7 as a “thin laser wand” is a fraxel laser. (T. 515.)

The Hearing Examiner concluded that in treating Patient 7, Ms. Mazur applied a photofacial laser skin treatment (as opposed to a fraxional laser treatment) for the treatment of “sun spots.” (R&R p. 44.) The Hearing Examiner added:

No evidence was presented concerning: (1) the nature of the photofacial light, or (2) whether sun spots are a condition related to psoriasis. However, the Hearing Examiner strongly suspects that photofacial light is not ultraviolet. It is common knowledge that ultraviolet light causes a person's skin to darken, and the evidence implied that the photofacial light that Ms. Mazur applied to Patient 7 has a bleaching effect. Moreover, the Hearing Examiner further suspects that psoriasis and conditions related to psoriasis are more serious than a sun spot, which the evidence suggests is skin discoloration resulting from sun exposure. Accordingly, the Hearing Examiner concludes that no exception applies to Dr. Khan's delegation of photofacial laser skin treatment to Ms. Mazur, and that his conduct violated R.C. 4731.22(B)(10). If the Board, as an expert panel, determines that the exception set forth in Rule 4731-18-04(B) applies to these facts, then it should modify this conclusion in a manner consistent with its determination. (*Id.*)

The minutes of the Board's September 12, 2012 meeting do not reflect discussion or consideration of whether the photofacial light used in treating Patient 7 was a "light based medical device" under Ohio Admin. Code 4731-18-02 or whether the exception in Ohio Admin. Code 4731-18-04(B) permitting delegation of a procedure applies to the treatment of Patient 7.

The Court concludes that there is evidence in the record that Ms. Mazur treated Patient 7's face using a medical device. However, the record does not establish whether the equipment used by Ms. Mazur in treating Patient 7 was a "light based medical device" as defined in Ohio Admin. Code 4731-18-02 and does not establish whether the exception in Ohio Admin. Code 4731-18-04(B) applies to Ms. Mazur's treatment of Patient 7. The Hearing Examiner's Report acknowledges that no evidence was presented concerning "the nature of the photofacial light" or whether Patient 7's condition is covered by Ohio Admin. Code 4731-18-04(B). While Appellee argues that the Board can determine these issues based upon its own expertise, the record does not reflect whether the Board used its expertise to determine these issues.

The Court's power to reverse or vacate a decision of the Board under R.C. 119.12 includes the power to remand the case to the administrative level for further proceedings. *Chapman v. Ohio State Dental Board*, 33 Ohio App.3d 324, 328 (1986). Under these

circumstances, the Court concludes that the appropriate course of action is to remand this matter for consideration of whether the equipment used by Ms. Mazur in treating Patient 7 was a “light based medical device” as defined in Ohio Admin. Code 4731-18-02 and whether the exception in Ohio Admin. Code 4731-18-04(B) applies to Ms. Mazur’s treatment of Patient 7.

Because this matter is being remanded on the above issues, it is unnecessary to address assignment of error three, which raises due process issues concerning the Board’s conclusion regarding the applicability of the exception in Ohio Admin. Code 4731-18-04(B).

Appellant’s fourth assignment of error asserts that the Board erred in finding that the Botox at issue was not FDA approved and that the exception in R.C. 2925.09(A)(3) did not apply.

R.C. 2925.09 provides as follows:

(A) No person shall administer, dispense, distribute, manufacture, possess, sell, or use any drug, other than a controlled substance, that is not approved by the United States food and drug administration, or the United States department of agriculture, unless one of the following applies:

...

(3) A licensed health professional authorized to prescribe drugs, other than a veterinarian, prescribes or combines two or more drugs as a single product for medical purposes;

Ms. Myers testified that while Botox that is approved by the FDA has a notation of FDA approval on the box, boxes of Botox found in Dr. Khan’s office did not have FDA approval on them. (T. 398.) Ms Myers stated that she contacted the Pharmacy Board and the FDA, and learned that it is a violation of federal law to receive non-FDA approved Botox from outside of the country. (*Id.*) The evidence also included a letter from Allergan to the Board dated March 1, 2010 stating that Botox found in Dr. Khan’s office was not “labeled or intended for use in the United States.” (Ex. 7, p. 46-47.) The Court concludes that the record contains reliable, probative, and substantial evidence that the Botox at issue was not approved by the FDA.

Appellant argues that the exception in R.C. 2925.09(A)(3) applies, because Dr. Khan combined two drugs, Botox and saline, as a single product. Dr. Khan testified that Botox is a powder that must be reconstituted with saline prior to use. (T. 507.)

R.C. 4729.01(E) defines “drug” as follows:

- (1) Any article recognized in the United States pharmacopoeia and national formulary, or any supplement to them, intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in humans or animals;
- (2) Any other article intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in humans or animals;
- (3) Any article, other than food, intended to affect the structure or any function of the body of humans or animals;
- (4) Any article intended for use as a component of any article specified in division (E)(1), (2), or (3) of this section; but does not include devices or their components, parts, or accessories.

The Board addressed this issue as follows:

Dr. Khan argued that saline solution can be used to rehydrate a person, which affects the person’s blood by increasing its fluid volume. However, as used by Dr. Khan, the saline solution does not constitute a drug under Section 4729.01(E)(3). The saline was used as a diluent to reconstitute a powder form of Botox so that it could be injected, not for the purpose of rehydrating the patient.

The R.C. 2925.09(A)(3) exception for a physician who ‘combines two or more drugs as a single product for medical purposes’ is also not applicable. As discussed above, saline that is used as a diluent to reconstitute a powder form of a drug does not itself constitute a drug. (September 12, 2012 Order, p. 2.)

In *Arlen v. State Medical Board*, 61 Ohio St.2d 168, 172-173 (1980), the Ohio Supreme Court held that the Board “is comprised of individuals fitted by training and expertise to perform the duties imposed upon it” and “is possessed of appropriate expertise and is capable of drawing its own conclusions and inferences.” The Court finds that the Board’s conclusion that the exception in R.C. 2925.09(A)(3) did not apply is supported by reliable, probative, and substantial evidence.

Appellant's fifth assignment of error is related, asserting that the Board erred in finding that use of the Botox violated 21 U.S.C. 331(a). That statute prohibits "[t]he introduction or delivery for introduction into interstate commerce of any ... drug ... that is adulterated or misbranded."

In *United States v. Patwardhan*, 422 Fed. Appx. 614, 2011 U.S. App. LEXIS 5666 (9th Cir. 2011), at 4, the Court found that a doctor could be convicted of violating 21 U.S.C. 331(a) for bringing non-FDA approved medicine into the United States for distribution to his patients.

Appellant asserts that the evidence shows that he believed the Botox he bought from Mr. Robinson was legitimate and FDA-approved.

As noted, the evidence at the hearing included the testimony of Ms. Myers that the boxes of Botox in Dr. Khan's office did not have FDA approval on them (T. 398) and had labels indicating that the contents were manufactured in Ireland. (Ex. 5B, 5D; T. 397.) The receipts for the Botox stated that "this charge may appear on your credit card statement under one of the following billing descriptors: 'Global Health Supplies,' 'Global Meds,' 'Canada Health,' or 'Canada Health Solutions'" and that the amount charged may fluctuate "due to a number of factors including daily changes in currency exchange rates." (Ex. 13 at 22, 51, 52.) Dr. Khan testified that he became suspicious about Mr. Robinson even before the Board's investigation and that he wanted to "be completely legal" so he "ordered from Allergan most of the time." (T. 489-92.) Ms. Mazur testified that Dr. Khan ordered from Mr. Robinson because it was cheaper than ordering from Allergan and that Dr. Khan would be at the office to receive an order from Mr. Robinson, when he did not always do so with orders from Allergan. (T. 115.)

After hearing the evidence, the Hearing Examiner concluded that Dr. Khan's assertions that he was unaware the Botox was not FDA-approved were "unconvincing" and "simply not

credible.” (R&R p. 39.) The Hearing Examiner stated that many factors “should have led Dr. Khan to realize that there was a problem with the product he received from Mr. Robinson. Moreover, Dr. Khan cannot excuse his conduct by claiming a lack of knowledge—willful blindness is not an excuse.” (*Id.*)

As noted above, the Court is to give due deference to the agency’s resolution of factual disputes regarding the evidence at the hearing because the fact finder had the opportunity to observe the witnesses and weigh their credibility. The Court is not to substitute its judgment for the Board’s on such factual disputes.

It is well-established that knowledge or intent need not be proven directly but can be inferred from the surrounding facts and circumstances. *State v. Teamer*, 82 Ohio St.3d 490, 492 (1998). A person is presumed to intend the natural, reasonable and probable consequences of his voluntary acts. *State v. Lott*, 51 Ohio St.3d 160, 168 (1990). In *Krain v. State Medical Board*, 10th Dist. No. 97APE08-981, 1998 Ohio App. LEXIS 5339, at 18, the court found that there was sufficient evidence of intent to deceive when an applicant failed to disclose prior disciplinary proceedings to the Board on his licensure application.

The Court concludes that the Board’s finding that Dr. Khan knowingly took delivery of non-FDA approved Botox is supported by reliable, probative, and substantial evidence.

Appellant’s sixth assignment of error asserts that the evidence does not establish that Dr. Khan reused a liner for Patient 6’s liposuction procedure.

Ms. Leatherman testified that a liner was reused during the procedure, with Dr. Khan’s knowledge and approval. (T. 297-299.) Appellant emphasizes Dr. Khan’s testimony that a new liner was used and that a photograph of the liner showed Patient 6’s initials on it. (T. 504-506; Ex. Y.)

After hearing the conflicting testimony, the Hearing Examiner found Ms. Leatherman's testimony regarding the incident to be "convincing" and consistent with her statement to Investigator Myers and noted that the photograph "shows only one angle and does not convincingly demonstrate that the liner did not have a second pair of initials on it." (R&R p. 41.) The Hearing Examiner was in the best position to judge the credibility of the witnesses. The Court concludes that the Board's finding that Dr. Khan reused a liner for Patient 6's liposuction procedure is supported by reliable, probative, and substantial evidence.

Appellant's seventh assignment of error does not raise new issues, as it asserts that because the alleged violations discussed in the remainder of the appeal are not supported by the evidence, they also do not constitute violations of the conditions in the Board's 2007 Order.

Appellant's eighth assignment of error asserts that the Board erred in finding that Dr. Khan made false statements in violation of R.C. 4731.22(B)(5) and tampered with records in violation of R.C. 2913.42.

These allegations involve two statements relating to Patient 4. The first statement at issue is a progress note made by Dr. Khan on March 18, 2008 stating that "all Tx done by me and nurse with direct supervision." (St. Ex. 2 at 4.) The second is a letter from Dr. Khan dated October 6, 2008 regarding Patient 4 stating that "all procedure[s] [were] done by me or under supervision." (St. Ex. 2 at 11.)

Patient 4 had two laser treatments at Dr. Kahn's office; she stated that she did not see Dr. Khan at either appointment. (T. 205-206.) Patient 4 testified that on the first occasion, November 23, 2007, Ms. Mazur explained the treatment to her and performed the laser treatment procedure. (T. 204-207.) Patient 4 testified that she was told she could not have Lidocaine "because Dr. Kahn wasn't there." (T. 205.) Ms. Mazur likewise testified that she performed the

laser treatment, using settings recommended by Dr. Khan. (T. 86-90, 182-183.) According to Ms. Myers, Ms. Mazur stated that during this procedure, Dr. Khan was “nearby ... and might have run an errand.” (T. 379.)

Patient 4 testified that when she went for the second procedure on December 14, 2007, Ms. Mazur again administered the treatment. (T. 207-208.) Patient 4 stated that she received a topical anesthetic prior to the procedure after Ms. Mazur left the treatment room to obtain Dr. Khan’s permission to use it. (*Id.*) Ms. Mazur testified that she performed this laser treatment as well. (T. 91.)

Dr. Khan testified that his statement in the March 18, 2008 progress note and the October 6, 2008 letter were accurate. When asked if the procedures were done by him or under his supervision, he answered “yes” and explained as follows:

Because they were done under supervision. I was supervising the nurse, Registered Nurse, in applying Lidocaine and discussing the imprint, different treatment options, different treatments, back and forth.

This is all treatment of a patient. It’s just not one isolated thing that someone uses a laser and that’s the treatment. The treatment starts from when the patient enters the Clinic ... (T. 538.)

Dr. Khan testified that he told Ms. Mazur what laser settings to use and approved the use of lidocaine cream in Patient 4’s treatment. (T. 541-543, 547-548.)

Dr. Khan stated that he does not have a specific recollection that he was in the office during the November 23, 2007 treatment, but that he believes he was there because he is “the one who does Botox.” (T. 544-546.) Dr. Khan testified that while Ms. Mazur was performing the second treatment, he was doing a tattoo treatment in a nearby room. (T. 548-550.)

The Hearing Examiner found Patient 4 “a highly credible witness” and concluded that “the evidence supports a finding that Patient 4’s first procedure occurred without Dr. Khan’s

supervision or presence at the office.” (R&R p. 40.) The Hearing Examiner found that Dr. Khan was never present in the room during Patient 4’s second treatment. (*Id.*) With respect to Dr. Khan’s claim that the procedures were done under his “supervision,” the Hearing Examiner stated that “Dr. Khan defined supervision in such a broad and self-serving way as to render it meaningless.” (*Id.*)

Appellant argues that the Board failed to prove that the statements at issue were false. The Hearing Examiner found that the credible evidence established that Dr. Khan was not in the office during Patient 4’s first treatment, and was not in the room during the second treatment. This supports the Board’s conclusion that Dr. Khan’s statement in Patient 4’s chart that all treatments were done with his “direct supervision” was false. The Board is also able to use its own medical expertise in determining whether Dr. Khan “supervised” the treatment.

Appellant argues that the Board failed to prove that Dr. Khan had intent to deceive as required for a violation of R.C. 4731.22(B)(5) and R.C. 2913.42.

As noted above, knowledge and intent need not be proven directly and can be inferred from the surrounding facts and circumstances. The Hearing Examiner concluded as follows: “Dr. Khan’s purpose to defraud may be inferred from the circumstances: Dr. Khan learned that his patient had suffered an injury related to a procedure performed in his office. He would logically have been concerned about a possible lawsuit and, because of his previous contact with the Board, future Board action as well.” (R&R, p. 46.)

The Court concludes that the Board’s findings that Dr. Khan made false statements in violation of R.C. 4731.22(B)(5) and tampered with records in violation of R.C. 2913.42 are supported by reliable, probative, and substantial evidence.

As set forth in detail above, the Court affirms the Board's Order, with the following exception. As to the findings in Conclusion of Law 3 of the Hearing Examiner's Report and Recommendation, this matter is remanded to the Board for consideration of whether the equipment used by Ms. Mazur in treating Patient 7 was a "light based medical device" as defined in Ohio Admin. Code 4731-18-02 and whether the exception in Ohio Admin. Code 4731-18-04(B) applies to Ms. Mazur's treatment of Patient 7.

The Board's October 30, 2012 Motion for Reconsideration of the Entry granting a stay of the Board's Order during the pendency of this appeal is rendered moot by the determination of this appeal.

This is a final, appealable Order. Costs to Appellant.

Franklin County Court of Common Pleas

Date: 04-02-2013
Case Title: ALI KHAN MD -VS- OHIO STATE MEDICAL BOARD
Case Number: 12CV012914
Type: DECISION/ENTRY

It Is So Ordered.

The image shows a handwritten signature in cursive that reads "Laurel Beatty". The signature is written over a circular official seal. The seal contains the text "FRANKLIN COUNTY OHIO" around the top and "CLERK OF COURTS" around the bottom. In the center of the seal, there is a smaller emblem with the text "THE COMMON PLEAS" and "1803".

/s/ Judge Laurel A. Beatty

Court Disposition

Case Number: 12CV012914

Case Style: ALI KHAN MD -VS- OHIO STATE MEDICAL BOARD

Case Terminated: 18 - Other Terminations

Final Appealable Order: Yes

Motion Tie Off Information:

1. Motion CMS Document Id: 12CV0129142013-03-1199980000
Document Title: 03-11-2013-MOTION TO STRIKE
Disposition: MOTION GRANTED
2. Motion CMS Document Id: 12CV0129142012-10-3099980000
Document Title: 10-30-2012-MOTION TO RECONSIDER
Disposition: MOTION IS MOOT

State Medical Board of Ohio

30 E. Broad Street, 3rd Floor, Columbus, OH 43215-6127

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EXCERPT FROM THE DRAFT MINUTES OF DECEMBER 11, 2013

REMAND IN THE MATTER OF ALI KHAN, M.D., Case No. 10-CRF-040

Dr. Steinbergh directed the Board's attention to the Remand in the Matter of Ali Khan, M.D. Dr. Steinbergh explained that on September 12, 2012, the Medical Board entered an Order permanently revoking Dr. Khan's license to practice medicine and surgery in Ohio. Dr. Khan appealed the Board's decision to the Franklin County Court of Common Pleas. On April 2, 2013, the Court affirmed the Board's Order in part, but remanded the matter back to the Board for consideration as to Conclusion of Law 3 and Finding of Fact 5 of the Hearing Examiner's Report and Recommendation on the question of whether the equipment used by the nurse in treating Patient 7 was a "light based medical device" as defined in Rule 4731-18-02, Ohio Administrative Code, and whether the exception provided in Rule 4731-18-04(B), Ohio Administrative Code, is applicable to the treatment of Patient 7.

Mr. Giacalone moved to reconsider Conclusion of Law 3 and Finding of Fact 5 of the Hearing Examiner's Report and Recommendation in Case No. 10-CRF-040 on the question of whether the equipment used by the nurse in treating Patient 7 was a "light based medical device" as defined in Rule 4731-18-02, Ohio Administrative Code, and whether the exception provided in Rule 4731-18-04(B), Ohio Administrative Code, is applicable to the treatment of Patient 7. Dr. Saferin seconded the motion. All members voted aye, except Dr. Strafford, Dr. Bechtel, and Dr. Talmage, who abstained. The motion to reconsider carried.

Dr. Steinbergh stated that she would now entertain discussion in the above matter.

Mr. Giacalone stated that after Dr. Khan filed his appeal, the Court stayed the Board's Order of permanent revocation pending a final resolution. The court has remanded this matter back to the Board to determine if the device used by Dr. Khan's nurse to treat Patient 7 was a light-based medical device and, if so, whether an exception which would allow the nurse to use the device was applicable to Patient 7's treatment. The Board must then issue a new Order, which may or may not be permanent revocation of Dr. Khan's medical license.

Mr. Giacalone reviewed the background and facts on which the Board had based its original decision. Since 2006, Dr. Khan had been CEO and medical director of Pure MD Lasers & Cosmetics [Pure MD]. The Board's Notice of Opportunity for Hearing included several allegations regarding Dr. Khan's practice, including that he had violated the Board's prior Order issued in December 2007. On September 10, 2012, the Board considered this case and issued an Order to permanently revoke Dr. Khan's medical license. The Board based its decision on several Findings, including that Dr. Khan did not personally supervise the laser skin treatment of Patient 7 and that he allowed a non-physician, specifically his nurse, to administer that treatment. Other Findings included that Dr. Khan had accepted delivery of Botox which had not been approved by the FDA and administered that Botox to a number of his patients; that Dr. Khan tampered with medical records and falsified information in those records; that Dr. Kahn violated the Board's Order of December 12, 2007; and that Dr. Khan had reused single-use medical equipment, specifically

liposuction canisters.

Mr. Giacalone outlined three options before the Board today:

- 1.) Find that there is insufficient evidence to determine whether the device used to treat Patient 7 was a light-based medical device, then issue an Order based on the other Findings.
- 2.) Relying on the Board's expertise, find that the device used to treat Patient 7 was a light-based medical device and that the exception on the use of that device by a non-physician does not apply, then reconsider the findings and issue an Order.
- 3.) Remand the matter back to the Hearing Examiner to analyze the issue of whether the device used on Patient 7 was a light-based medical device and, if so, whether the exception applies, then issue an Order based on the Hearing Examiner's subsequent Report and Recommendation.

Mr. Giacalone favored the first option, finding that there is insufficient evidence to determine whether the device in question was a light-based medical device. Mr. Giacalone also favored issuing an order, based on the remaining Findings, permanently revoking Dr. Khan's license to practice medicine and surgery in Ohio.

Mr. Giacalone moved to issue the following Order and Entry on Remand:

On September 12, 2012, the State Medical Board of Ohio issued its Findings and Order in the Matter of Ali Khan, M.D., whereby Dr. Khan's license to practice medicine and surgery in the State of Ohio was permanently revoked. A copy of the Findings and Order is attached hereto and incorporated herein.

Pursuant to Section 119.12, Ohio Revised Code, Dr. Khan appealed the Medical Board's Order to the Franklin County Court of Common Pleas. By Decision and Judgment Entry on April 2, 2013, the Franklin County Court of Common Pleas affirmed the Medical Board's Order in part, and remanded the matter for further proceedings concerning Conclusion of Law 3 and Finding of Fact 5 of the Hearing Examiner's Report and Recommendation on the question of whether the equipment used by the nurse in treating Patient 7 was a "light based medical device" as defined in Rule 4731-18-02, Ohio Administrative Code, and whether the exception provided in Rule 4731-18-04(B), Ohio Administrative Code, is applicable to the treatment of Patient 7.

WHEREFORE, pursuant to the instructions of the Franklin County Court of Common Pleas and upon consideration of the findings and conclusions made by this Board on September 12, 2012 and affirmed by the Franklin County Court of Common Pleas on April 2, 2013, and upon approval and confirmation by vote of the Medical Board on December 11, 2013, the following Order is hereby entered on the Journal of the State Medical Board of Ohio for that date.

RATIONALE FOR ORDER ON REMAND: The allegation concerning the treatment on Patient 7's face is dismissed for insufficient evidence.

It is hereby ORDERED that:

1. The allegation that on or about June 2, 2008, Dr. Khan permitted an unlicensed person to perform a laser skin treatment on Patient 7's face is hereby dismissed.
2. The certificate of Ali Khan, M.D., to practice medicine and surgery in the State of Ohio shall be PERMANENTLY REVOKED.

This Order shall become effective immediately upon the mailing of notification of approval by the Medical Board.

Dr. Sethi seconded the motion.

Dr. Steinbergh stated that she will now entertain discussion in the above matter.

Dr. Ramprasad stated that he agrees with Mr. Giacalone and supports the proposed Order and Entry on Remand. However, Dr. Ramprasad opined that the device in question was a light-based device. Dr. Ramprasad also noted Section 4731-18-02, Ohio Administrative Code, which specifies that a physician may not delegate the use of a light-based medical device in a procedure to a non-physician. Dr. Ramprasad further noted that Section 4731-18-04, Ohio Administrative Code, states that exceptions to Section 4731-18-02 are florescent lamp phototherapy devices for the treatment of psoriasis and similar skin diseases, which indicates more of an epithelial treatment rather than a deep treatment. Dr. Ramprasad stated that Patient 7 possibly did have moderately deep treatment because she developed violaceous changes in her skin. Dr. Ramprasad also observed that the September 2012 Report and Recommendation includes Dr. Khan's testimony that he had allowed his nurse to perform the procedures when he thought the law in this matter was vague, but that he did the procedures himself "as soon as it was black and white to us"; Dr. Ramprasad asked why Dr. Khan would have taken over the procedures if he did not think it was a deep laser treatment.

Dr. Steinbergh agreed with Dr. Ramprasad and stated that there was no question in her mind that Dr. Khan had been using a laser and that it did not fall outside the Board's rule. Mr. Giacalone opined that there is some question whether the direct supervision provision of the Board's rule applied to the use of the device in question. Dr. Steinbergh and Dr. Ramprasad agreed with Mr. Giacalone.

A vote was taken on Mr. Giacalone's motion:

ROLL CALL:	Dr. Strafford	- abstain
	Dr. Bechtel	- abstain

Dr. Saferin	- aye
Dr. Soin	- aye
Dr. Ramprasad	- aye
Dr. Steinbergh	- aye
Dr. Sethi	- aye
Dr. Talmage	- abstain
Mr. Kenney	- aye
Mr. Gonidakis	- aye
Mr. Giacalone	- aye

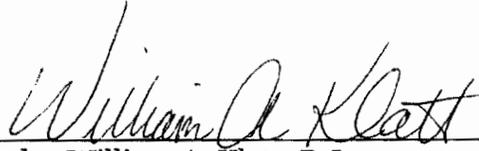
The motion carried.

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

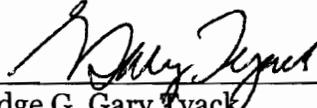
Ali Khan, M.D., :
Appellant-Appellant, :
v. : No. 13AP-368
State Medical Board of Ohio, : (REGULAR CALENDAR)
Appellee-Appellee. :

JOURNAL ENTRY OF DISMISSAL

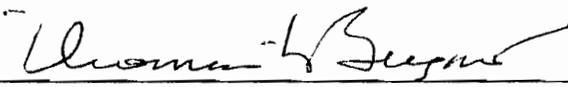
The order of the trial court remands the matter to the State Medical Board of Ohio for further findings. Accordingly, we find that the trial court judgment is not a final, appealable order and this appeal is sua sponte dismissed. Costs shall be assessed against appellant.



Judge William A. Klatt, P.J.



Judge G. Gary Tyack



Judge Thomas Bryant, retired of the Third Appellate District, assigned to active duty under the authority of Section 6(C), Article IV, Ohio Constitution.

DVF

cc: Clerk, Court of Appeals
State Medical Board of Ohio

Franklin County Ohio Court of Appeals Clerk of Courts- 2013 Nov 04 12:01 PM-13AP000368

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served by electronic mail and regular U.S. mail this 1st day of May, 2013 upon:

Heidi Dorn
Assistant Attorney General
Ohio Attorney General's Office
Health and Human Services
30 East Broad Street, 26th Floor
Columbus, Ohio 43215

/s/ Eric J. Plinke

Eric J. Plinke

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

ALI KHAN, M.D.,	:	
	:	
Appellant	:	CASE NO. 12CV-12914
	:	
vs.	:	JUDGE BEATTY
	:	
STATE MEDICAL BOARD OF OHIO,	:	
	:	
Appellee	:	

DECISION AND JUDGMENT ENTRY
AFFIRMING, IN PART, THE ORDER OF THE STATE MEDICAL BOARD OF OHIO,
REMANDING THIS MATTER FOR FURTHER PROCEEDINGS,
GRANTING THE MOTION TO STRIKE FILED MARCH 11, 2013, AND
FINDING THAT THE MOTION FOR RECONSIDERATION
FILED OCTOBER 30, 2012 IS MOOT
AND
NOTICE OF FINAL APPEALABLE ORDER

BEATTY, JUDGE

This is an appeal pursuant to R.C. 119.12 from a September 12, 2012, Order of the State Medical Board of Ohio (the “Board”) permanently revoking Appellant’s certificate to practice medicine and surgery in Ohio.

I. FACTS

On April 14, 2010, the Board issued a Notice of Opportunity for Hearing (the “Notice”) to Appellant Ali Khan, M.D. (Ex. 1-A.) The Notice stated that the Board proposed to take disciplinary action against Dr. Khan’s certificate to practice medicine and surgery in Ohio based on alleged violations that included allowing a registered nurse to perform laser skin procedures on two patients; taking delivery of and using non-FDA approved Botox on his patients; reusing single-use medical supplies; making false statements in and falsifying a patient’s chart; and violating his December, 2007 Board Order.

Dr. Khan requested an administrative hearing, which was held on November 14 and 15, 2011. During the hearing, the State presented the testimony of Dr. Khan, Sara Mazur (a Registered Nurse who worked in Dr. Khan's office), Patient 4, Patient 7, Allison Leatherman (a former employee of Dr. Khan's office), and Board Investigator Amy Myers. In his case, Dr. Khan testified. The evidence was as follows.

The State alleged that Dr. Khan allowed Ms. Mazur to perform laser skin treatments on Patient 4 and Patient 7.

Dr. Khan does not dispute that he violated the Medical Practice Act concerning the delegation of a laser procedure in regard to Patient 4. (Appellant's brief, p. 2.) Dr. Khan testified that he believed delegation of the laser procedure was allowed under Ohio law, and that as soon as he became aware delegation was not permitted, he began performing these procedures himself. (T. 553.) Patient 4 testified that the procedure left a scar on her face and that she filed a civil lawsuit against Dr. Khan and obtained a settlement of \$85,000.00. (T. 210-215.)

The allegations regarding Patient 7 are disputed. Patient 7 testified that Ms. Mazur performed a laser treatment on her "entire face," using a "big laser machine" and lasting "probably twenty minutes." (T. 240.) She stated that she was alone with Ms. Mazur during this treatment. (T. 235.) She stated that Dr. Khan "came in after with a different laser and he lasered a couple spots on the end of my nose." (T. 241.)

Dr. Khan and Ms. Mazur testified that Patient 7 was treated in the clinic, but that they had no recollection of performing laser procedures on Patient 7. (T. 516, 153.) Ms. Mazur testified that if a patient signed a consent form for fraxional laser skin treatment, as did Patient 7, Ms. Mazur "would think that [the patient] did receive fraxional treatments." (T. 103.) However, Ms.

Mazur stated that it was her practice to document her performance of treatments, and no such notation is contained in Patient 7's chart. (T. 149, 153.)

With respect to the allegation that Dr. Khan purchased and used non-FDA approved Botox on his patients, Dr. Khan testified that he usually purchased Botox directly from Allergan, the manufacturer. (T. 29-30, 488.) He also purchased Botox from a Jon Robinson. (*Id.*) Ms. Mazur testified that Dr. Khan ordered Botox from Mr. Robinson when purchasing large quantities, because it was cheaper than ordering it from Allergan. (T. 111-113.)

Investigator Myers testified that while Botox that is approved by the FDA has a notation of FDA approval on the box, boxes of Botox found in Dr. Khan's office did not have FDA approval on them. (T. 398.) Ms. Myers identified photographs of the boxes of Botox, which had labels indicating that the contents were manufactured in Ireland. (Ex. 5B, 5D; T. 397.) Ms. Myers stated that she contacted the Pharmacy Board and the FDA, and learned that it is a violation of federal law to receive non-FDA approved Botox from outside of the country. (T. 398.)

Dr. Khan testified that he did not know where the Botox ordered from Mr. Robinson was coming from, and that Mr. Robinson claimed to be based in the United States. (T. 484, 488.) Dr. Khan testified that information on the packaging and receipts did not alert him to the fact that the Botox was from a different country, and he was always charged in U.S. dollars. (T. 32-33, 489-490.)

The allegation that Dr. Khan reused single use medical supplies involves a disposable liner in a canister used to perform liposuction procedures. Ms. Leatherman testified that the office ran out of the liners prior to a scheduled liposuction procedure. (T. 297-299.) She stated that Dr. Khan told her to "figure out" the problem or she would lose her job. (T. 297.) She

stated that she dumped out the liner and gave it to Dr. Khan; she said that he was happy she did so and that he knew the liner was being reused because the initials were scribbled out to put the initials of another patient on the liner. (T. 298.) She stated that this procedure involved Patient 6. (T. 323.)

Dr. Khan testified that a new liner was used during Patient 6's procedure. (T. 505-506.) He testified that a photograph of the liner used during the procedure shows that it has Patient 6's initials on it. (Ex. Y; T. 504-505.)

The allegations that Dr. Khan made false statements in and falsified a patient's chart involve two statements relating to Patient 4. The first is a progress note made by Dr. Khan on March 18, 2008 stating that "all Tx done by me and nurse with direct supervision." (St. Ex. 2 at 4.) The second is a letter from Dr. Khan dated October 6, 2008 regarding Patient 4 stating that "all procedure[s] [were] done by me or under supervision." (St. Ex. 2 at 11.)

Patient 4 had two laser treatments at Dr. Kahn's office; she stated that she did not see Dr. Khan at either appointment. (T. 205-206.) Patient 4 testified that on the first occasion, November 23, 2007, Ms. Mazur explained the treatment to her and performed the laser treatment procedure. (T. 204-207.) Patient 4 testified that when she went for the second procedure on December 14, 2007, Ms. Mazur again administered the treatment. (T. 207-208.) Patient 4 stated that she received a topical anesthetic prior to the procedure after Ms. Mazur left the treatment room to obtain Dr. Khan's permission to use it. (*Id.*)

Dr. Khan testified that his statements in the March 18, 2008 progress note and the October 6, 2008 letter were accurate, because the procedures were done under his supervision. (T. 538.)

The final allegations relate to the Board's December 12, 2007 Order. The 2007 Order was issued as a result of Dr. Khan's conviction of misdemeanor theft of a credit card of a nurse he worked with at a hospital. (St. Ex. 10 at 18.) The 2007 Order placed Dr. Khan on probation for two years and imposed terms and conditions in effect during that period. (*Id.* at 4.) The terms and conditions required Dr. Khan to obey all federal, state and local laws, and all rules governing the practice of medicine in Ohio. (*Id.*) Evidence was presented that at the time of the alleged violations discussed above, Dr. Khan was subject to the terms and conditions of the 2007 Order, and that the alleged violations also constitute violations of the 2007 Order.

II. FINDINGS OF THE BOARD

On August 2, 2012, the Hearing Examiner issued a 48-page Report and Recommendation. The Hearing Examiner found that Dr. Khan committed the above violations.

On September 12, 2012, the Board approved the Report and Recommendation and modified it by adding a conclusion that by purchasing and used non-FDA approved Botox, Dr. Khan also committed an act that constitutes a felony in violation of R.C. 4731.22(B)(10). The Board's Order permanently revoked Appellant's medical certificate. On October 11, 2012, Appellant filed this appeal from the Board's Order.

III. LAW

When considering an appeal from an order of the Medical Board, a common pleas court must uphold the order if it is supported by reliable, probative, and substantial evidence and is in accordance with law. R.C. 119.12; *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 621 (1993). The Court's scope of review of an agency's decision in an administrative appeal is limited. *Univ. of Cincinnati v. Conrad*, 63 Ohio St.2d 108, 110 (1980). The Court is to "give due deference to the administrative resolution of evidentiary conflicts" because the fact finder had

the opportunity to observe the witnesses and weigh their credibility. (*Id.*) The Court “will not substitute its judgment for the board’s where there is some evidence supporting the board’s order.” *Harris v. Lewis*, 69 Ohio St.2d 577, 578 (1982).

The Ohio Supreme Court has recognized that the General Assembly granted the Medical Board a broad measure of discretion. *Arlen v. State*, 61 Ohio St.2d 168, 174 (1980). In *Farrand v. State Med. Bd.*, 151 Ohio St. 222, 224 (1949), the Court stated:

The purpose of the General Assembly in providing for administrative hearings in particular fields was to facilitate such matters by placing the decision on facts with boards or commissions composed of men equipped with the necessary knowledge and experience pertaining to a particular field.

“[W]hen courts review a medical board order, they are obligated to accord due deference to the board’s interpretation of the technical and ethical requirements of the medical profession.”

Landefeld v. State Med. Bd., 10th Dist. No. 99AP-612, 2000 Ohio App. LEXIS 2556, p. 9.

IV. THE COURT’S FINDINGS AND CONCLUSIONS

On March 11, 2013, the Board filed a Motion to Strike exhibits to Appellant’s briefs that are not part of the certified record. Specifically, the Motion seeks to strike Exhibits A and B to Appellant’s brief and Exhibit 1 to Appellant’s reply brief.

R.C. 119.12 provides as follows:

Unless otherwise provided by law, in the hearing of the appeal, the court is confined to the record as certified to it by the agency. Unless otherwise provided by law, the court may grant a request for the admission of additional evidence when satisfied that the additional evidence is newly discovered and could not with reasonable diligence have been ascertained prior to the hearing before the agency.

In *Northfield Park Assoc. v. Ohio State Racing Commission*, 10th Dist. No. 05AP-749, 2006-Ohio-3446, at ¶57, the Court of Appeals held that “Certainly, pursuant to R.C. 119.12, the trial court has no discretion to admit additional evidence if it is not satisfied that the evidence is

newly discovered and could not with reasonable diligence have been ascertained prior to the hearing before the agency.”

Appellant has not asserted or established that any of the additional evidence he seeks to present constitutes newly discovered evidence that could not have been discovered with reasonable diligence prior to the administrative hearing. Accordingly, the exhibits submitted by Appellant that are not part of the certified record cannot be admitted. The Board’s Motion to Strike is granted.¹

Appellant’s first assignment of error asserts that the evidence does not establish that Patient 7 had a laser skin treatment performed by Ms. Mazur. Appellant further argues that the evidence does not establish that the medical equipment used by Ms. Mazur in the treatment of Patient 7 was a “light based medical device” under Ohio Admin. Code 4731-18-02.

Appellant’s second assignment of error is related, asserting that the evidence does not establish that the medical equipment used by Ms Mazur in the treatment of Patient 7 was not authorized under Ohio Admin. Code 4731-18-04(B).

Ohio Admin. Code 4731-18-02(C) provides that “Except as provided in rule 4731-18-03 and rule 4731-18-04 of the Administrative Code, no physician ... shall delegate the application of light based medical devices to the human body to any person not authorized to practice medicine and surgery....” Ohio Admin. Code 4731-18-02(A) defines a “light based medical device” as “any device that can be made to produce or amplify electromagnetic radiation at wavelengths equal to or greater than one hundred eighty nm but less than or equal to 1.0×10^6 [6]

¹ Exhibits A and B to Appellant’s brief address the issue of whether Patient 7 had a condition that was within the exception in Ohio Admin. Code 4731-18-04(B). Because this issue is being remanded to the Board as set forth below, judicial notice of these exhibits is unnecessary for this additional reason. The Court further notes that Exhibit 1 to Appellant’s reply brief is unauthenticated.

nm and that is manufactured, designed, intended or promoted for in vivo irradiation of any part of the human body for the purpose of affecting the structure or function of the body.”

Ohio Admin. Code 4731-18-04(B) provides as follows:

A physician authorized pursuant to Chapter 4731. of the Revised Code to practice medicine and surgery or osteopathic medicine and surgery may delegate to any appropriate person the application of a light based medical device that is a fluorescent lamp phototherapy device for treatment of psoriasis and similar skin diseases. A fluorescent lamp phototherapy device is a device that emits ultraviolet light through the use of one or more fluorescent bulbs and is approved by the United States food and drug administration for phototherapy in the treatment of psoriasis or similar skin diseases.

Patient 7 testified that on June 2, 2008, Ms. Mazur performed a laser treatment on her “entire face,” using a “big laser machine.” (T. 240.) She stated that she was alone with Ms. Mazur during this treatment. (T. 235.) She stated that Dr. Khan “came in after with a different laser and he lasered a couple spots on the end of my nose.” (T. 241.) Patient 7 testified that the device used by Ms. Mazur was a laser with a rectangular object on the end of it about the size of a deck of cards. (T. 253-254.) She stated that the device used by Dr. Khan was smaller, pointed, “like a wand.” (T. 256.) She identified the consent form she signed for “Fraxional Non-Ablative Skin Resurfacing” (T. 236-237; Ex. 3) and her credit card statement showing payment for the date of the procedure. (T. 239-240.)

Dr. Khan testified that the device described by Patient 7 as having a rectangular end is a photofacial device. (T. 520-522.) He testified that the device described by Patient 7 as a “thin laser wand” is a fraxel laser. (T. 515.)

The Hearing Examiner concluded that in treating Patient 7, Ms. Mazur applied a photofacial laser skin treatment (as opposed to a fraxional laser treatment) for the treatment of “sun spots.” (R&R p. 44.) The Hearing Examiner added:

No evidence was presented concerning: (1) the nature of the photofacial light, or (2) whether sun spots are a condition related to psoriasis. However, the Hearing Examiner strongly suspects that photofacial light is not ultraviolet. It is common knowledge that ultraviolet light causes a person's skin to darken, and the evidence implied that the photofacial light that Ms. Mazur applied to Patient 7 has a bleaching effect. Moreover, the Hearing Examiner further suspects that psoriasis and conditions related to psoriasis are more serious than a sun spot, which the evidence suggests is skin discoloration resulting from sun exposure. Accordingly, the Hearing Examiner concludes that no exception applies to Dr. Khan's delegation of photofacial laser skin treatment to Ms. Mazur, and that his conduct violated R.C. 4731.22(B)(10). If the Board, as an expert panel, determines that the exception set forth in Rule 4731-18-04(B) applies to these facts, then it should modify this conclusion in a manner consistent with its determination. (*Id.*)

The minutes of the Board's September 12, 2012 meeting do not reflect discussion or consideration of whether the photofacial light used in treating Patient 7 was a "light based medical device" under Ohio Admin. Code 4731-18-02 or whether the exception in Ohio Admin. Code 4731-18-04(B) permitting delegation of a procedure applies to the treatment of Patient 7.

The Court concludes that there is evidence in the record that Ms. Mazur treated Patient 7's face using a medical device. However, the record does not establish whether the equipment used by Ms. Mazur in treating Patient 7 was a "light based medical device" as defined in Ohio Admin. Code 4731-18-02 and does not establish whether the exception in Ohio Admin. Code 4731-18-04(B) applies to Ms. Mazur's treatment of Patient 7. The Hearing Examiner's Report acknowledges that no evidence was presented concerning "the nature of the photofacial light" or whether Patient 7's condition is covered by Ohio Admin. Code 4731-18-04(B). While Appellee argues that the Board can determine these issues based upon its own expertise, the record does not reflect whether the Board used its expertise to determine these issues.

The Court's power to reverse or vacate a decision of the Board under R.C. 119.12 includes the power to remand the case to the administrative level for further proceedings. *Chapman v. Ohio State Dental Board*, 33 Ohio App.3d 324, 328 (1986). Under these

circumstances, the Court concludes that the appropriate course of action is to remand this matter for consideration of whether the equipment used by Ms. Mazur in treating Patient 7 was a “light based medical device” as defined in Ohio Admin. Code 4731-18-02 and whether the exception in Ohio Admin. Code 4731-18-04(B) applies to Ms. Mazur’s treatment of Patient 7.

Because this matter is being remanded on the above issues, it is unnecessary to address assignment of error three, which raises due process issues concerning the Board’s conclusion regarding the applicability of the exception in Ohio Admin. Code 4731-18-04(B).

Appellant’s fourth assignment of error asserts that the Board erred in finding that the Botox at issue was not FDA approved and that the exception in R.C. 2925.09(A)(3) did not apply.

R.C. 2925.09 provides as follows:

(A) No person shall administer, dispense, distribute, manufacture, possess, sell, or use any drug, other than a controlled substance, that is not approved by the United States food and drug administration, or the United States department of agriculture, unless one of the following applies:

...

(3) A licensed health professional authorized to prescribe drugs, other than a veterinarian, prescribes or combines two or more drugs as a single product for medical purposes;

Ms. Myers testified that while Botox that is approved by the FDA has a notation of FDA approval on the box, boxes of Botox found in Dr. Khan’s office did not have FDA approval on them. (T. 398.) Ms Myers stated that she contacted the Pharmacy Board and the FDA, and learned that it is a violation of federal law to receive non-FDA approved Botox from outside of the country. (*Id.*) The evidence also included a letter from Allergan to the Board dated March 1, 2010 stating that Botox found in Dr. Khan’s office was not “labeled or intended for use in the United States.” (Ex. 7, p. 46-47.) The Court concludes that the record contains reliable, probative, and substantial evidence that the Botox at issue was not approved by the FDA.

Appellant argues that the exception in R.C. 2925.09(A)(3) applies, because Dr. Khan combined two drugs, Botox and saline, as a single product. Dr. Khan testified that Botox is a powder that must be reconstituted with saline prior to use. (T. 507.)

R.C. 4729.01(E) defines “drug” as follows:

- (1) Any article recognized in the United States pharmacopoeia and national formulary, or any supplement to them, intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in humans or animals;
- (2) Any other article intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in humans or animals;
- (3) Any article, other than food, intended to affect the structure or any function of the body of humans or animals;
- (4) Any article intended for use as a component of any article specified in division (E)(1), (2), or (3) of this section; but does not include devices or their components, parts, or accessories.

The Board addressed this issue as follows:

Dr. Khan argued that saline solution can be used to rehydrate a person, which affects the person’s blood by increasing its fluid volume. However, as used by Dr. Khan, the saline solution does not constitute a drug under Section 4729.01(E)(3). The saline was used as a diluent to reconstitute a powder form of Botox so that it could be injected, not for the purpose of rehydrating the patient.

The R.C. 2925.09(A)(3) exception for a physician who ‘combines two or more drugs as a single product for medical purposes’ is also not applicable. As discussed above, saline that is used as a diluent to reconstitute a powder form of a drug does not itself constitute a drug. (September 12, 2012 Order, p. 2.)

In *Arlen v. State Medical Board*, 61 Ohio St.2d 168, 172-173 (1980), the Ohio Supreme Court held that the Board “is comprised of individuals fitted by training and expertise to perform the duties imposed upon it” and “is possessed of appropriate expertise and is capable of drawing its own conclusions and inferences.” The Court finds that the Board’s conclusion that the exception in R.C. 2925.09(A)(3) did not apply is supported by reliable, probative, and substantial evidence.

Appellant's fifth assignment of error is related, asserting that the Board erred in finding that use of the Botox violated 21 U.S.C. 331(a). That statute prohibits "[t]he introduction or delivery for introduction into interstate commerce of any ... drug ... that is adulterated or misbranded."

In *United States v. Patwardhan*, 422 Fed. Appx. 614, 2011 U.S. App. LEXIS 5666 (9th Cir. 2011), at 4, the Court found that a doctor could be convicted of violating 21 U.S.C. 331(a) for bringing non-FDA approved medicine into the United States for distribution to his patients.

Appellant asserts that the evidence shows that he believed the Botox he bought from Mr. Robinson was legitimate and FDA-approved.

As noted, the evidence at the hearing included the testimony of Ms. Myers that the boxes of Botox in Dr. Khan's office did not have FDA approval on them (T. 398) and had labels indicating that the contents were manufactured in Ireland. (Ex. 5B, 5D; T. 397.) The receipts for the Botox stated that "this charge may appear on your credit card statement under one of the following billing descriptors: 'Global Health Supplies,' 'Global Meds,' 'Canada Health,' or 'Canada Health Solutions'" and that the amount charged may fluctuate "due to a number of factors including daily changes in currency exchange rates." (Ex. 13 at 22, 51, 52.) Dr. Khan testified that he became suspicious about Mr. Robinson even before the Board's investigation and that he wanted to "be completely legal" so he "ordered from Allergan most of the time." (T. 489-92.) Ms. Mazur testified that Dr. Khan ordered from Mr. Robinson because it was cheaper than ordering from Allergan and that Dr. Khan would be at the office to receive an order from Mr. Robinson, when he did not always do so with orders from Allergan. (T. 115.)

After hearing the evidence, the Hearing Examiner concluded that Dr. Khan's assertions that he was unaware the Botox was not FDA-approved were "unconvincing" and "simply not

credible.” (R&R p. 39.) The Hearing Examiner stated that many factors “should have led Dr. Khan to realize that there was a problem with the product he received from Mr. Robinson. Moreover, Dr. Khan cannot excuse his conduct by claiming a lack of knowledge—willful blindness is not an excuse.” (*Id.*)

As noted above, the Court is to give due deference to the agency’s resolution of factual disputes regarding the evidence at the hearing because the fact finder had the opportunity to observe the witnesses and weigh their credibility. The Court is not to substitute its judgment for the Board’s on such factual disputes.

It is well-established that knowledge or intent need not be proven directly but can be inferred from the surrounding facts and circumstances. *State v. Teamer*, 82 Ohio St.3d 490, 492 (1998). A person is presumed to intend the natural, reasonable and probable consequences of his voluntary acts. *State v. Lott*, 51 Ohio St.3d 160, 168 (1990). In *Krain v. State Medical Board*, 10th Dist. No. 97APE08-981, 1998 Ohio App. LEXIS 5339, at 18, the court found that there was sufficient evidence of intent to deceive when an applicant failed to disclose prior disciplinary proceedings to the Board on his licensure application.

The Court concludes that the Board’s finding that Dr. Khan knowingly took delivery of non-FDA approved Botox is supported by reliable, probative, and substantial evidence.

Appellant’s sixth assignment of error asserts that the evidence does not establish that Dr. Khan reused a liner for Patient 6’s liposuction procedure.

Ms. Leatherman testified that a liner was reused during the procedure, with Dr. Khan’s knowledge and approval. (T. 297-299.) Appellant emphasizes Dr. Khan’s testimony that a new liner was used and that a photograph of the liner showed Patient 6’s initials on it. (T. 504-506; Ex. Y.)

After hearing the conflicting testimony, the Hearing Examiner found Ms. Leatherman's testimony regarding the incident to be "convincing" and consistent with her statement to Investigator Myers and noted that the photograph "shows only one angle and does not convincingly demonstrate that the liner did not have a second pair of initials on it." (R&R p. 41.) The Hearing Examiner was in the best position to judge the credibility of the witnesses. The Court concludes that the Board's finding that Dr. Khan reused a liner for Patient 6's liposuction procedure is supported by reliable, probative, and substantial evidence.

Appellant's seventh assignment of error does not raise new issues, as it asserts that because the alleged violations discussed in the remainder of the appeal are not supported by the evidence, they also do not constitute violations of the conditions in the Board's 2007 Order.

Appellant's eighth assignment of error asserts that the Board erred in finding that Dr. Khan made false statements in violation of R.C. 4731.22(B)(5) and tampered with records in violation of R.C. 2913.42.

These allegations involve two statements relating to Patient 4. The first statement at issue is a progress note made by Dr. Khan on March 18, 2008 stating that "all Tx done by me and nurse with direct supervision." (St. Ex. 2 at 4.) The second is a letter from Dr. Khan dated October 6, 2008 regarding Patient 4 stating that "all procedure[s] [were] done by me or under supervision." (St. Ex. 2 at 11.)

Patient 4 had two laser treatments at Dr. Kahn's office; she stated that she did not see Dr. Khan at either appointment. (T. 205-206.) Patient 4 testified that on the first occasion, November 23, 2007, Ms. Mazur explained the treatment to her and performed the laser treatment procedure. (T. 204-207.) Patient 4 testified that she was told she could not have Lidocaine "because Dr. Kahn wasn't there." (T. 205.) Ms. Mazur likewise testified that she performed the

laser treatment, using settings recommended by Dr. Khan. (T. 86-90, 182-183.) According to Ms. Myers, Ms. Mazur stated that during this procedure, Dr. Khan was “nearby ... and might have run an errand.” (T. 379.)

Patient 4 testified that when she went for the second procedure on December 14, 2007, Ms. Mazur again administered the treatment. (T. 207-208.) Patient 4 stated that she received a topical anesthetic prior to the procedure after Ms. Mazur left the treatment room to obtain Dr. Khan’s permission to use it. (*Id.*) Ms. Mazur testified that she performed this laser treatment as well. (T. 91.)

Dr. Khan testified that his statement in the March 18, 2008 progress note and the October 6, 2008 letter were accurate. When asked if the procedures were done by him or under his supervision, he answered “yes” and explained as follows:

Because they were done under supervision. I was supervising the nurse, Registered Nurse, in applying Lidocaine and discussing the imprint, different treatment options, different treatments, back and forth.

This is all treatment of a patient. It’s just not one isolated thing that someone uses a laser and that’s the treatment. The treatment starts from when the patient enters the Clinic ... (T. 538.)

Dr. Khan testified that he told Ms. Mazur what laser settings to use and approved the use of lidocaine cream in Patient 4’s treatment. (T. 541-543, 547-548.)

Dr. Khan stated that he does not have a specific recollection that he was in the office during the November 23, 2007 treatment, but that he believes he was there because he is “the one who does Botox.” (T. 544-546.) Dr. Khan testified that while Ms. Mazur was performing the second treatment, he was doing a tattoo treatment in a nearby room. (T. 548-550.)

The Hearing Examiner found Patient 4 “a highly credible witness” and concluded that “the evidence supports a finding that Patient 4’s first procedure occurred without Dr. Khan’s

supervision or presence at the office.” (R&R p. 40.) The Hearing Examiner found that Dr. Khan was never present in the room during Patient 4’s second treatment. (*Id.*) With respect to Dr. Khan’s claim that the procedures were done under his “supervision,” the Hearing Examiner stated that “Dr. Khan defined supervision in such a broad and self-serving way as to render it meaningless.” (*Id.*)

Appellant argues that the Board failed to prove that the statements at issue were false. The Hearing Examiner found that the credible evidence established that Dr. Khan was not in the office during Patient 4’s first treatment, and was not in the room during the second treatment. This supports the Board’s conclusion that Dr. Khan’s statement in Patient 4’s chart that all treatments were done with his “direct supervision” was false. The Board is also able to use its own medical expertise in determining whether Dr. Khan “supervised” the treatment.

Appellant argues that the Board failed to prove that Dr. Khan had intent to deceive as required for a violation of R.C. 4731.22(B)(5) and R.C. 2913.42.

As noted above, knowledge and intent need not be proven directly and can be inferred from the surrounding facts and circumstances. The Hearing Examiner concluded as follows: “Dr. Khan’s purpose to defraud may be inferred from the circumstances: Dr. Khan learned that his patient had suffered an injury related to a procedure performed in his office. He would logically have been concerned about a possible lawsuit and, because of his previous contact with the Board, future Board action as well.” (R&R, p. 46.)

The Court concludes that the Board’s findings that Dr. Khan made false statements in violation of R.C. 4731.22(B)(5) and tampered with records in violation of R.C. 2913.42 are supported by reliable, probative, and substantial evidence.

As set forth in detail above, the Court affirms the Board's Order, with the following exception. As to the findings in Conclusion of Law 3 of the Hearing Examiner's Report and Recommendation, this matter is remanded to the Board for consideration of whether the equipment used by Ms. Mazur in treating Patient 7 was a "light based medical device" as defined in Ohio Admin. Code 4731-18-02 and whether the exception in Ohio Admin. Code 4731-18-04(B) applies to Ms. Mazur's treatment of Patient 7.

The Board's October 30, 2012 Motion for Reconsideration of the Entry granting a stay of the Board's Order during the pendency of this appeal is rendered moot by the determination of this appeal.

This is a final, appealable Order. Costs to Appellant.

Franklin County Court of Common Pleas

Date: 04-02-2013

Case Title: ALI KHAN MD -VS- OHIO STATE MEDICAL BOARD

Case Number: 12CV012914

Type: DECISION/ENTRY

It Is So Ordered.

The image shows a handwritten signature in black ink that reads "Laurel Beatty". The signature is written over a circular blue seal. The seal contains the text "COMMON PLEAS COURT" at the top, "FRANKLIN COUNTY" in the middle, and "ALL THINGS ARE POSSIBLE" at the bottom. The signature is written in a cursive style.

/s/ Judge Laurel A. Beatty

Court Disposition

Case Number: 12CV012914

Case Style: ALI KHAN MD -VS- OHIO STATE MEDICAL BOARD

Case Terminated: 18 - Other Terminations

Final Appealable Order: Yes

Motion Tie Off Information:

1. Motion CMS Document Id: 12CV0129142013-03-1199980000
Document Title: 03-11-2013-MOTION TO STRIKE
Disposition: MOTION GRANTED
2. Motion CMS Document Id: 12CV0129142012-10-3099980000
Document Title: 10-30-2012-MOTION TO RECONSIDER
Disposition: MOTION IS MOOT

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

ALI KHAN, M.D.,	:	
	:	
Appellant	:	CASE NO. 12CV-12914
	:	
vs.	:	JUDGE BEATTY
	:	
STATE MEDICAL BOARD OF OHIO,	:	
	:	
Appellee	:	

ENTRY GRANTING APPELLANT'S MOTION FOR SUSPENSION OF THE ORDER OF THE STATE MEDICAL BOARD PENDING APPEAL

This matter is before the Court on Appellant's Motion for Suspension of the Order of the State Medical Board of Ohio Pending Appeal filed October 12, 2012. The Motion is opposed by the State Medical Board (the "Board").

By letter dated April 14, 2010, the Board notified Appellant that it proposed to take disciplinary action against his certificate to practice medicine and surgery in Ohio based on alleged violations that included allowing a registered nurse to perform laser skin procedures on two patients; making false statements in and falsifying a patient's chart; taking delivery of and using non-FDA approved Botox on his patients; and reusing single-use medical supplies. A hearing was conducted on November 14 and 15, 2011. On September 12, 2012, the Board issued an Order permanently revoking Appellant's certificate to practice medicine and surgery in Ohio. On October 11, 2012, Appellant filed an appeal from the Board's Order, and now seeks a stay pending appeal.

R.C. 119.12 provides as follows:

The filing of a notice of appeal shall not automatically operate as a suspension of the order of an agency. ... In the case of an appeal from the state medical board ..., the court may grant a suspension and fix its terms if it appears to the court that an unusual hardship to the appellant will

result from the execution of the agency's order pending determination of the appeal and the health, safety, and welfare of the public will not be threatened by suspension of the order.

The first issue for consideration is whether Appellant has demonstrated “unusual hardship.” Appellant submitted an affidavit stating that if he is not permitted to continue practicing during the pendency of the appeal, he will lose his sole source of income and his reputation will be prejudicially affected in the medical community and with his patients. His affidavit states that “nothing will be able to compensate me for the damage that would result from the likely loss of my practice and harm to my reputation.” The Board argues that Appellant’s financial harm does not constitute unusual hardship.

At issue here, according to Appellant’s affidavit, is not simply a loss of income, but rather, the likely loss of Appellant’s practice. Appellant asserts that nothing will be able to compensate for this damage. The Court finds that this qualifies as an unusual hardship.

The second issue for consideration is whether the health, safety, and welfare of the public will be threatened by suspension of the Order. The Court notes that this disciplinary proceeding has been pending before the Board for over two years, during which time the Board did not impose a summary suspension of Appellant’s certificate under R.C. 4731.22(G) on the grounds that Appellant’s practice presents a “danger of immediate and serious harm to the public.” The only direct patient injury alleged to have been caused by Appellant consists of markings on a patient’s face that are correctable. (T. 242-243). Appellant’s affidavit states that as soon as he learned that laser procedures could not be delegated to a nurse and Botox could not be ordered from a source other than directly from the manufacturer, these issues were corrected and his practice presents

no threat to the residents of Ohio. The Court finds that the health, safety, and welfare of the public will not be threatened by suspension of the Order.

For the foregoing reasons, Appellant's Motion is GRANTED, and the Board's Order is hereby STAYED during the pendency of this administrative appeal.

IT IS SO ORDERED.

Franklin County Court of Common Pleas

Date: 10-24-2012
Case Title: ALI KHAN MD -VS- OHIO STATE MEDICAL BOARD
Case Number: 12CV012914
Type: DECISION/ENTRY

It Is So Ordered.

The image shows a handwritten signature in cursive that reads "Laurel Beatty". The signature is written over a circular official seal of the Franklin County Court of Common Pleas. The seal contains the text "FRANKLIN COUNTY OHIO" around the top and "CLERK OF COURTS" around the bottom, with a central emblem.

/s/ Judge Laurel A. Beatty

Court Disposition

Case Number: 12CV012914

Case Style: ALI KHAN MD -VS- OHIO STATE MEDICAL BOARD

Motion Tie Off Information:

1. Motion CMS Document Id: 12CV0129142012-10-1299980000

Document Title: 10-12-2012-MOTION TO STAY

Disposition: MOTION GRANTED

BEFORE THE STATE MEDICAL BOARD OF OHIO

ALI KAHN, M.D.
4145 Levis Commons Blvd.
Perrysburg, Ohio 43551

Appellant,

vs.

STATE MEDICAL BOARD OF OHIO
30 East Broad Street, 3rd Floor
Columbus, Ohio 43215

Appellee.

Case No. _____

Judge _____

**APPEAL FROM THE ENTRY
OF ORDER OF SEPTEMBER 12, 2012
MAILED OCTOBER 9, 2012**

NOTICE OF APPEAL

Appellant Ali Khan, M.D., by and through counsel, and pursuant to Ohio Revised Code § 119.12, timely submits this notice of appeal from the Entry of Order of Appellee, the State Medical Board of Ohio ("Board"), which permanently revoked Dr. Khan's certificate to practice medicine and surgery in the State of Ohio. The Board's Entry of Order is dated September 12, 2012, and was mailed on October 9, 2012. The Board's Entry of Order is not supported by reliable, probative, and substantial evidence and is not in accordance with law. A copy of the Board's Entry of Order is attached as "Exhibit A."

Respectfully submitted,

DINSMORE & SHOHL LLP



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Attorneys for Ali Khan, M.D.

STATE MEDICAL BOARD
2012 OCT 11 PM 3:53

2012 OCT 11 PM 3:53

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 11th day of October, 2012, the foregoing Notice of Appeal was filed via hand delivery with the State Medical Board of Ohio, and a copy filed with the Franklin County Court of Common Pleas, and with an additional copy served by regular U.S. mail upon the following:

Heidi Dorn, Esq.
Assistant Attorney General
Ohio Attorney General's Office
Health and Human Services
30 East Broad Street, 26th Floor
Columbus, Ohio 43215



Eric J. Plinke

675435v1

State Medical Board of Ohio

30 E. Broad Street, 3rd Floor, Columbus, OH 43215-6127

Richard A. Whitehouse, Esq.
Executive Director

(614) 466-3934
med.ohio.gov

September 12, 2012

Ali Khan, M.D.
4145 Lewis Commons Blvd.
Perrysburg, OH 43551

RE: Case No. 10-CRF-040

Dear Doctor Khan:

Please find enclosed certified copies of the Entry of Order; the Report and Recommendation of R. Gregory Porter, Esq., Attorney Hearing Examiner, State Medical Board of Ohio; and an excerpt of draft Minutes of the State Medical Board, meeting in regular session on September 12, 2012, including motions approving the Findings of Fact and Proposed Order, and modifying the Conclusions of the Hearing Examiner.

Section 119.12, Ohio Revised Code, may authorize an appeal from this Order. Such an appeal must be taken to the Franklin County Court of Common Pleas.

Such an appeal must be commenced by the filing of a Notice of Appeal with the State Medical Board and the Franklin County Court of Common Pleas. The Notice of Appeal must set forth the Order appealed from and state that the State Medical Board's Order is not supported by reliable, probative, and substantive evidence and is not in accordance with law. The Notice of Appeal may, but is not required to, set forth the specific grounds of the appeal. Any such appeal must be filed within fifteen (15) days after the mailing of this notice and in accordance with the requirements of Section 119.12, Ohio Revised Code.

THE STATE MEDICAL BOARD OF OHIO



J. Craig Stafford, M.D., M.P.H.
Secretary

JCS:jam
Enclosures

CERTIFIED MAIL NO. 91 7199 9991 7030 3379 7403
RETURN RECEIPT REQUESTED

Cc: Eric J. Plinke, Esq.
CERTIFIED MAIL NO. 91 7199 9991 7030 3379 7410
RETURN RECEIPT REQUESTED

Mailed 10-9-12

CERTIFICATION

I hereby certify that the attached copy of the Entry of Order of the State Medical Board of Ohio; Report and Recommendation of R. Gregory Porter, Esq., State Medical Board Attorney Hearing Examiner; and excerpt of the Minutes of the State Medical Board, meeting in regular session on September 12, 2012, including motions approving and confirming the Findings of Fact and Proposed Order, and modifying Conclusions of the Hearing Examiner; constitute a true and complete copy of the Findings and Order of the State Medical Board in the matter of Ali Khan, M.D., Case No. 10-CRF-040, as it appears in the Journal of the State Medical Board of Ohio.

This certification is made by authority of the State Medical Board of Ohio and in its behalf.



J. Craig Strafford, M.D., M.P.H.
Secretary

(SEAL)

September 12, 2012

Date

BEFORE THE STATE MEDICAL BOARD OF OHIO

IN THE MATTER OF

*

*

CASE NO. 10-CRF-040

ALI KHAN, M.D.

*

ENTRY OF ORDER

This matter came on for consideration before the State Medical Board of Ohio on September 12, 2012.

Upon the Report and Recommendation of R. Gregory Porter, Esq., State Medical Board Hearing Examiner, designated in this Matter pursuant to R.C. 4731.23, a true copy of which Report and Recommendation is attached hereto and incorporated within, and upon the modification, approval and confirmation by vote of the Board on the above date, the following Order is hereby entered on the Journal of the State Medical Board of Ohio for the above date.

RATIONALE FOR AMENDMENT: Saline does not meet the definition of “drug” in Section 2925.01, Ohio Revised Code, when it is used as a diluent to reconstitute a drug. An illegal drug is not made legal by the addition of saline.

AMENDED Conclusion of Law 7:

7. The evidence supports a conclusion that Dr. Khan’s acts, conduct, and/or omissions, as described in Finding of Fact 2, individually and/or collectively, constitute “[c]ommission of an act that constitutes a felony in this state, regardless of the jurisdiction in which the act was committed,” as that clause is used in R.C. 4731.22(B)(10), to wit: R.C. 2925.09, Unapproved Drugs.

R.C. 2925.09(A) states, in relevant part, that “[n]o person shall administer, dispense, * * * possess, * * * or use any drug * * * that is not approved by the United States food and drug administration,” unless certain enumerated exceptions apply. Dr. Khan argued that his use of non FDA approved Botox did not violate R.C. 2925.09 because it fell under one of the enumerated exceptions. Specifically, he argues that the exception enumerated in R.C. 2925.09(A)(3) is applicable.

R.C. 2925.09(A)(3) specifies that R.C. 2925.09(A) does not apply when “[a] licensed health professional authorized to prescribe drugs, other than a veterinarian, prescribes

or combines two or more drugs as a single product for medical purposes.” Dr. Khan argued that he falls under that exception because Botox is shipped dry and must be reconstituted by adding saline solution to the Botox vial. Dr. Khan further argued that, pursuant to the definition of “drug” as used in R.C. 2925.09, saline constitutes a drug. Accordingly, he argued, because Botox must be mixed with saline solution before it is injected, he had combined “two or more drugs as a single product for medical purposes” and that the exception applies.

R.C. 2925.01 defines the term “drug” as used in R.C. 2925.09, and simply refers to one of the statutes governing the Ohio State Board of Pharmacy; specifically, R.C. 4729.01. Subsection (E) of R.C. 4729.01, sets forth the following definition of “drug”:

- (1) Any article recognized in the United States pharmacopoeia and national formulary, or any supplement to them, intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in humans or animals;
- (2) Any other article intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in humans or animals;
- (3) Any article, other than food, intended to affect the structure or any function of the body of humans or animals;
- (4) Any article intended for use as a component of any article specified in division (E)(1), (2), or (3) of this section; but does not include devices or their components, parts, or accessories.

Dr. Khan argued that saline solution can be used to rehydrate a person, which affects the person’s blood by increasing its fluid volume. However, as used by Dr. Khan, the saline solution does not constitute a drug under Section 4729.01(E)(3). The saline was used as a diluent to reconstitute a powder form of Botox so that it could be injected, not for the purpose of rehydrating the patient.

The R.C. 2925(A)(3) exception for a physician who “combines two or more drugs as a single product for medical purposes” is also not applicable. As discussed above, saline that is used as a diluent to reconstitute a powder form of a drug does not itself constitute a drug. Moreover, by ordering and receiving the non-FDA approved powder form of Botox Dr. Khan violated Section 2925.09(A). Adding the legal saline to the illegal Botox powder does not somehow magically make the reconstituted Botox legal. Section 2925.09(A) cannot be read as providing a mechanism for making an illegal drug legal simply by adding saline.

It is concluded that the exception in Section 2925.09(A)(3) does not apply to this case. Therefore, Dr. Khan’s conduct as set forth in Finding of Fact 2 violated R.C. 4731.22(B)(10) based upon acts constituting violation of R.C. 2925.09.

It is hereby ORDERED that:

The certificate of Ali Khan, M.D., to practice medicine and surgery
in the State of Ohio shall be PERMANENTLY REVOKED.

This Order shall become effective immediately upon the mailing of the notification of
approval by the Board.



J. Craig Strafford, M.D., M.P.H.
Secretary

(SEAL)

September 12, 2012

Date

BEFORE THE STATE MEDICAL BOARD OF OHIO

In the Matter of	*	
	*	Case No. 10-CRF-040
Ali Khan, M.D.,	*	
	*	Hearing Examiner Porter
Respondent.	*	

REPORT AND RECOMMENDATION

Basis for Hearing and History of the Matter

By notice of opportunity for hearing dated April 14, 2010 (“Notice”), the State Medical Board of Ohio (“Board”) notified Ali Khan, M.D., that it had proposed to take disciplinary action against his certificate to practice medicine and surgery in Ohio. The Board based its proposed action on allegations concerning Dr. Khan’s care and treatment of seven patients identified on a confidential Patient Key, and on allegations that Dr. Khan: (a) had purchased and utilized Botox that was not approved by the U.S. Food and Drug Administration (“FDA”), (b) had permitted an unlicensed person to perform laser skin treatment on patients, (c) had inappropriately reused single-use medical supplies, and (d) had violated a December 2007 Board Order. The Board further alleged that Dr. Khan’s conduct constitutes violations of several sections of the Ohio Medical Practice Act. Accordingly, the Board advised Dr. Khan of his right to request a hearing, and received Dr. Khan’s written hearing request on May 10, 2010. (State’s Exhibits (“St. Exs.”) 1A, 1B, 1D)

Subsequently, by Entry of the Secretary and the Supervising Member of the Board dated May 10, 2011, the Board dismissed all allegations that concerned violations of the Board’s office-based surgery rules (Chapter 4731-25, Ohio Administrative Code) in light of the Board’s decision in another case, *In the Matter of David K. Zipfel* (Case No. 09-CRF-138), which was decided after Dr. Khan’s Notice had been issued. (St. Ex. 1D)

Following the May 10, 2011 Entry, the Board continued to allege through the remainder of the Notice that Dr. Khan’s conduct, including his care and treatment of three patients identified on a confidential Patient Key, violated the following sections of the Ohio Medical Practices Act:

- “Commission of an act that constitutes a felony in this state, regardless of the jurisdiction in which the act was committed,” as that clause is used in Ohio Revised Code Section (“R.C.”) 4731.22(B)(10), to wit:
 - R.C. 2925.09, Unapproved Drugs, and/or
 - R.C. 2923.03, Complicity, as applied to R.C. 4731.41, Practice of Medicine or Surgery without Certificate, based upon a violation of Ohio Administrative Code Rules (“Rules”) 4731-18-02 and/or 4731-18-03. Pursuant to R.C. 4731.99(A), a violation of R.C. 4731.41 constitutes a felony offense.

- “Commission of an act in the course of practice that constitutes a misdemeanor in this state, regardless of the jurisdiction in which the act was committed,” as that clause is used in R.C. 4731.22(B)(12), to wit: 21 U.S.C. 331(a), Prohibited Acts, and/or R.C. 2913.42, Tampering with Records.
- “Making a false, fraudulent, deceptive, or misleading statement in the solicitation of or advertising for patients; in relation to the practice of medicine and surgery, osteopathic medicine and surgery, podiatric medicine and surgery, or a limited branch of medicine; or in securing or attempting to secure any certificate to practice or certificate of registration issued by the board,” as that clause is used in R.C. 4731.22(B)(5).
- “[V]iolating or attempting to violate, directly or indirectly, or assisting in or abetting the violation of, or conspiring to violate, any provisions of this chapter or any rule promulgated by the board,” as that clause is used in R.C. 4731.22(B)(20), to wit: Rule 4731-17-04(G). Pursuant to Rule 4731-17-07, a violation of Rule 4731-17-04 also violates R.C. 4731.22 (B)(6), (B)(20), and (B)(29).
- “Violation of the conditions of limitation placed by the board upon a certificate to practice,” as that clause is used in R.C. 4731.22(B)(15).

(St. Ex. 1A)

Appearances

Mike DeWine, Attorney General, and Heidi W. Dorn, Assistant Attorney General, for the State of Ohio. Eric J. Plinke and Nicole M. Loucks, Esqs., on behalf of Dr. Khan.

Hearing Dates: November 14 and 15, 2011

PROCEDURAL MATTERS

1. Pursuant to discussions at hearing, the hearing record was held open in order to give the parties an opportunity to file written closing arguments. The parties timely filed their closing arguments. The Hearing Examiner marked the State’s Closing Argument as State’s Exhibit 16 and the Respondent’s Closing Argument as Respondent’s Exhibit BB and admitted them to the hearing record. The hearing record closed on January 9, 2012.
2. Subsequently, the hearing record was briefly reopened to admit State’s Exhibit 9 over the objection of the Respondent as expressed at hearing. The record closed on July 12, 2012. (Hearing Transcript (“Tr.”) at 468-470, 623)
3. With the agreement of the parties, the Notice (St. Ex. 1A), court documents (St. Exs. 8A, 8B), and a patient key (St. Ex. 14A) were redacted to reflect the dismissal of allegations

pursuant to the Board's May 10, 2011, Entry. (Tr. at 457-463, 473-474; St. Ex. 1D) In addition, State's Exhibits 9 and 14A were sealed to protect patient confidentiality.

3. The Hearing Examiner paginated State's Exhibit 13 and Respondent's Exhibit P post-hearing.

SUMMARY OF THE EVIDENCE

All exhibits and the transcript, even if not specifically mentioned, were thoroughly reviewed and considered by the Hearing Examiner prior to preparing this Report and Recommendation.

Background Information

1. Ali Khan, M.D., obtained his medical degree in 1996 from the Allama Iqbal Medical College in Lahore, Pakistan. From 1996 through 2000, Dr. Khan practiced as a medical officer of internal medicine at Mustafa Ali Hospital in Lahore. In July 2001, Dr. Khan entered a family medicine residency at St. Vincent Mercy Hospital in Toledo, Ohio, which he completed in July 2004. He was first licensed to practice medicine and surgery in Ohio in 2003 and is also licensed in Florida. He is board-certified in family medicine. (Tr. at 25; Respondent's Exhibit ("Resp. Ex.") A)
2. Dr. Khan has practiced in emergency room and urgent care settings since November 2003. He currently practices at Alexis Medical Center in Toledo, Ohio, which he described as a "fast-track" urgent care center. In addition, since 2006, Dr. Khan has been the CEO and Medical Director of Pure M.D. Lasers and Cosmetics, ("Pure MD") in Toledo and Dayton, Ohio. The allegations at issue in this matter exclusively concern Dr. Khan's practice at Pure MD. (Tr. at 25-26; Resp. Ex. A)

Dr. Khan's December 2007 Board Order

3. On December 12, 2007, the Board issued an Order that permanently revoked Dr. Khan's license, but stayed the permanent revocation subject to suspension for 30 days and subsequent probationary terms, conditions, and limitations for at least two years. The Board based its Order on Dr. Khan having pled guilty to one misdemeanor count of Theft of a credit card from a nurse while he was working in an emergency department.¹ Dr. Khan currently remains subject to the terms, conditions, and limitations of that Board Order. (Tr. at 26-29; St. Ex. 10)
4. Paragraph B.1 of the Order states as follows: "Dr. Khan shall obey all federal, state, and local laws, and all rules governing the practice of medicine and surgery in Ohio." (St. Ex. 10 at 4)

¹ The misdemeanor conviction that formed the basis of the 2007 Board Order was expunged by the Seneca County Common Pleas Court in August 2011. (Tr. at 572; Resp. Ex. K)

5. The Order became effective on February 3, 2008, thirty days following the date of mailing of the Board's notification of approval of the Order. (St. Ex. 10 at 2, 6)

Witnesses

6. In addition to Dr. Khan and two of his former patients, Patients 4 and 7, the following witnesses testified in this matter:

- Sara Mazur, R.N., testified that she graduated in 1992 from Bowling Green State University with a Bachelor's of Science degree in Nursing. Prior to working for Dr. Khan at Pure MD, she had worked in oncology at the Medical College of Ohio, in home health care for Hospice of Northwest Ohio, and in labor and delivery at Toledo Hospital. She then worked at Pure MD for about two years. Ms. Mazur was unable to recall the year she began working at Pure MD. (Tr. at 67-71)

Ms. Mazur testified that her duties at Pure MD included patient care and occasionally assisting with scheduling and ordering supplies. Ms. Mazur testified that, during the time she worked at Pure MD, she had been the only nurse in the office. (Tr. at 70, 73)

- Allison Leatherman testified that she had worked for Pure MD from May 2008 through March 2010. She testified that she had started at Pure MD as a receptionist but eventually was given the job title of clinic manager. Ms. Leatherman further testified that she had worked both part-time and full-time for Pure MD depending on her school schedule. (Tr. at 271-273)

Ms. Leatherman and Patient 7 are friends. Ms. Leatherman referred Patient 7 to Dr. Khan for laser skin treatment in 2008. (Tr. at 234-235, 249, 330)

- Amy Myers is an Enforcement Investigator for the Board, and has held that position since 2008. She testified that her job duties include interviewing complainants, licensees, and other witnesses, and reviewing documents. In connection with those duties, she investigated Dr. Khan's practice at Pure MD. (Tr. at 358-359)

Allegation: "In or about 2009, [Dr. Khan] unlawfully purchased and took delivery of multiple 100-unit vials of Botox that were not FDA approved, and utilized some of the Botox in [his] practice."

7. Dr. Khan testified that he performs Botox injections in his practice at Pure MD. Dr. Khan further testified that he usually purchased Botox from Allergan, the manufacturer of Botox, but that he had also purchased Botox from another seller, "Jon Robinson." (Tr. at 29-30, 488)

Dr. Khan testified that he had learned of Jon Robinson during his residency when he attended CME-accredited courses to learn about Botox. Dr. Khan stated that the physician

who did the training, Dr. Goodman, had been appointed by Allergan to train other physicians in the use of Botox. Moreover, Dr. Khan testified “he gave Jon Robinson’s card to about, like, 50 plus or a hundred plus or so attendees who were physicians from all over the country and he says he orders from Jon Robinson on a regular basis and that he supplies Botox.” (Tr. at 485)

8. Dr. Khan testified that he had contacted Mr. Robinson in 2006 to obtain information and introduce himself. He testified that Mr. Robinson told him that he carries a lot of things that Dr. Khan had been ordering from McKesson,² including Botox, and tried to convince Dr. Khan to buy all of his supplies from him. Dr. Khan further testified that Mr. Robinson called him frequently to get him to buy products. (Tr. at 486-488)

Dr. Khan explained why he decided to buy Botox from Mr. Robinson:

I don’t recall what were the exact circumstances. As I said, he used to call me once a month so during the period of these years I told him, I said, yeah, why don’t I try the Botox ordered through you, which he claimed is an Allergan-made Botox.

He claimed that he’s based in the United States, in Boston, and I tried it because of his constant calling, like, and he said apart from me there are hundreds of doctors all over the country who he’s supplying not only Botox but fillers and injectables and other stuff, too.

(Tr. at 488)

9. The State presented a number of Dr. Khan’s receipts for purchases of Botox. The receipts include approximately 45 receipts for purchases of Botox from Allergan³ and three email receipts from “Jon Robinson (robijon@gmail.com)” for purchases of Botox from Jon Robinson. (St. Ex. 13)

The Allergan receipts indicate that Dr. Khan paid \$525 per 100-Unit vial from Allergan. Also, the majority of his receipts from Allergan concern small orders of one vial of Botox each. (St. Ex. 13) (Emphasis omitted) The receipts from Jon Robinson concerned the following shipments of Botox:

- 7/14/09 – ten vials of Botox at \$410 each. (St. Ex. 13 at 22)
- 7/27/09 – five vials of Botox at \$410 each. (St. Ex. 13 at 51)
- 10/29/09 – 12 vials of Botox at \$410 each. (St. Ex. 13 at 52)

10. A note that appears on Mr. Robinson’s receipts states: “Please note that if you are paying by credit card this charge may appear on your credit card statement under one of the

² McKesson is a company that sells medical supplies. (Tr. at 493)

³ The Allergan receipts also reflect Dr. Khan’s purchases of other products from Allergan, such as Juvederm, that are not relevant to this matter. (St. Ex. 13)

following billing descriptors: 'Global Health Supplies', 'Global Meds', 'Canada Health', or 'Canada Health Solutions.'" Another note states:

Depending on the type of credit card used for this transaction, you may experience a fluctuation in the actual amount billed to your credit card compared to the amount shown on your invoice. This fluctuation can be due to a number of factors including daily changes in currency exchange rates and credit card company service fees.

(St. Ex. 13 at 22, 51, 52)

Testimony of Investigator Myers

11. On November 10, 2009, Investigator Myers and an agent from the FDA went to Pure MD with a Board subpoena for "[a]ll Botox stocks and records relating to the purchase and administration of Botox." Pursuant to the subpoena, Investigator Myers found nine boxes of Botox, eight of which were unopened. Investigator Myers testified that she brought the stock back to the Board's offices in Columbus. She photographed them sometime later. At hearing, she identified State's Exhibits 5A through 5D as copies of the photographs she took.⁴ (Tr. at 395-396; St. Ex. 13 at 1)

State's Exhibit 5B is a photograph of an opened Botox box that indicates that the contents were manufactured by Allergan Pharmaceuticals Ireland in Westport, County Mayo, Ireland. State's Exhibit 5D is a photograph of eight unopened Botox boxes and the label on each box also indicates that the contents were manufactured by Allergan Pharmaceuticals Ireland in Westport. An expiration date of December 2011 is discernible on the opened and unopened Botox in State's Exhibits 5A and 5C. (Tr. at 397; St. Exs. 5A-5D)

Investigator Myers testified that the boxes of Botox that she obtained from Pure MD did not include information concerning FDA approval. Moreover, Investigator Myers testified that the package insert from the opened box also says nothing about FDA approval and includes the word "colourless," a non-U.S. spelling. (Tr. at 399-400; St. Ex. 4 at 1)

12. Investigator Myers testified that, during a November 10, 2009 interview, she questioned Dr. Khan about the Botox invoices from Mr. Robinson, specifically concerning the statements on the invoices concerning billing and references to Canada Health, Global Health, et cetera, and currency exchange rates. Dr. Khan replied that he had not paid any attention to that information. (Tr. at 403-404; St. Ex. 13 at 22, 51, 52)

Investigator Myers further testified that, during the interview, Dr. Khan advised her that he had ordered Botox from Mr. Robinson when he needed multiple vials because Mr. Robinson gave him a discounted price. Dr. Khan also told Investigator Myers that he

⁴ Investigator Myers noted that the date on the photographs, March 30, 2008, was imprinted by the camera she used and is not the correct date that the photographs were taken. Investigator Myers testified that she had actually taken the photographs sometime in 2010. (Tr. at 413-414; St. Exs. 5A-5D)

had assumed that the medication sent to him by Mr. Robinson had come from California. Further, Dr. Khan told Investigator Myers that he had never paid any attention to the packaging that the Botox came in and that he just threw the packaging out. Investigator Myers testified that, at the time she interviewed Dr. Khan, she pointed out to Dr. Khan the label where it said, "UK." Dr. Khan replied to her that he does not look at the labeling and that he did not know where it had come from. (Tr. at 391-393)

Testimony of Dr. Khan

13. At hearing, Dr. Khan denied that he had engaged in illegal activity by purchasing Botox from Mr. Robinson because he had not known from where the Botox he ordered had originated. Dr. Khan further testified that he had had no reason to be suspicious concerning the Botox he received from Mr. Robinson because the orders had arrived the day after the order was placed and because it was shipped via Federal Express from an address in New Jersey or Boston,. Dr. Khan added that Mr. Robinson had told Dr. Khan that he worked in Boston. Dr. Khan added that the shipment looked the same as the Botox he had ordered from Allergan except "the color of the box was maybe slightly lighter than the one that comes from Allergan, but [he] didn't think too much of it if it's a little dark pink and a little light pink." Moreover, Dr. Khan testified that his credit card was always charged in U.S. dollars, and that he was never charged in Canadian dollars. Finally, Dr. Khan testified that the information on the receipts did not alert him that he may have been billed from another country. (Tr. at 32-33, 483-484, 489-490)
14. However, Dr. Khan testified that he later became suspicious of Mr. Robinson sometime shortly before Investigator Myers contacted him. Dr. Khan testified that a patient had presented him with a coupon for \$50 or \$100 off Botox if Dr. Khan signed it and sent it to Allergan. Dr. Khan testified that he contacted Mr. Robinson about the coupon, and that Mr. Robinson told Dr. Khan that he could not honor the coupon. (Tr. at 489-490, 494)
Dr. Khan testified:

So I said, why can't you do that, like, it's an Allergan product. You apparently work with or for Allergan, just send this to Allergan so my patient could get a refund.

He didn't have a very clear cut answer at that time so I think I called [Dr.] Goodman after that because from his voice, the way he was talking to me, I just didn't have a good feeling. So I called Dr. Goodman who trained me four, five years ago that, you know, where is he physically located, you know, because I'd like to know where is he actually sitting, is he sitting in Maryland, Boston, or somewhere else.

Dr. Goodman didn't give me a clear cut answer, either, so in a nutshell I kind of then called Jon Robinson and I confronted him. I called, I think, the Allergan rep from Michigan and she said, well, why didn't you ask Jon Robinson.

So I called him and he said he supplies about 200 doctors all over the United States and, like, Botox is not a drug, it's—he was using some legal terms, so obviously I'm very cognizant of the fact that I was—at that time I had a prior experience with the Board so everything I do should be completely legal so I just stopped, like, you know, ordering or using him. So that's why I ordered from Allergan most of the time.

(Tr. at 491-492)

15. Dr. Khan testified that he did not do any further business with Mr. Robinson after Investigator Myers visited him in November 2009. (Tr. at 496)

Testimony of Ms. Mazur

16. Ms. Mazur testified that she had ordered Botox for the office on occasion. She further testified that Botox was ordered on an as-needed basis. When a patient came in for a consult and paid for a Botox treatment, Dr. Khan asked Ms. Mazur to order a vial. She testified that she had ordered Botox from Allergan only. (Tr. at 110, 113)
17. Ms. Mazur testified that Botox was ordered in bulk when Dr. Khan offered specials on the price of Botox injections. Ms. Mazur testified that, ordinarily, Dr. Khan charged \$11 per unit of Botox. When he offered a special, Ms. Mazur testified, he would lower the price to perhaps \$9 per unit. (Tr. at 117-118)

Ms. Mazur further testified that Dr. Khan offered “Botox parties” during which he reduced the price of Botox. Ms. Mazur testified that these would be held at the office in the evening. Refreshments would be served, and patients would be taken back to a treatment room one at a time and receive Botox injections. Ms. Mazur testified that it was an incentive to get a lot of patients in for Botox treatments. (Tr. at 118, 120-121)

18. Ms. Mazur further testified that she is familiar with the name Jon Robinson. She testified that she had heard Dr. Khan mention his name, and that Dr. Khan had ordered Botox from Mr. Robinson when ordering large quantities because it was cheaper than ordering it from Allergan. (Tr. at 111-113)

Testimony of Ms. Leatherman

19. In contrast to Ms. Mazur's testimony, Ms. Leatherman testified that a Botox party was not a one-time event but stretched over a two-week period. During this time Botox injections were offered at a discounted price. Ms. Leatherman testified that Dr. Khan offered these discounts about every three or four months because that is how long the effects of Botox treatment last. She added, “I always thought it was just to kind of keep 'em on board with Botox * * *.” (Tr. at 288-289)

20. Ms. Leatherman further testified that Botox vials came packed individually in small boxes. Moreover, she testified that the Botox boxes from Allergan had a hologram, and the boxes from Jon Robinson did not. (Tr. at 285-286)

Allegation: Dr. Khan permitted a person who was not licensed to practice medicine to perform laser skin treatments – Background Information

21. Ms. Mazur testified that she had performed light-based procedures at Pure MD, primarily laser hair removal and “photofacials.” In addition, Ms. Mazur testified that when the practice obtained a new laser, she had performed fractional laser procedures. Ms. Mazur testified that laser hair removal, photofacials, and fractional laser procedures were performed using the same laser machine but with different handpieces. Ms. Mazur testified that she had performed approximately eight procedures per day. (Tr. at 73-75, 105)
22. Dr. Khan testified that he utilizes a Palomar Lux1540 laser handpiece (“Lux1540”) at Pure MD to perform fractional laser treatment.⁵ Dr. Khan also offers light-based hair removal, photofacials, and tattoo removal using different handpieces. (Tr. at 35-36, 517-523; Resp. Ex. Z, AA)
23. Dr. Khan acknowledged that he had allowed Ms. Mazur to utilize the Lux1540 to perform fractional laser treatments on patients. (Tr. at 34-35)
24. Dr. Khan testified that he had been trained by Palomar in the use of his laser, and that a nurse had done the training. Dr. Khan further testified that Palomar had told him “that in the State of Ohio nurses could use light-based laser treatments.” Dr. Khan further testified that he is now aware that, except for light-based hair removal, that is not correct. However, he testified:

At that time, from my understanding from the rules, some rules or reports or—I don’t know how I exactly got to that. I thought that the area is gray, or the laws are vague, so on those bases I was letting Sara do these treatments on Patient 4 under my supervision.

* * *

And we stopped it as soon as it was black and white to us, which has been now three, three-and-a-half years. Now I do the treatments myself, personally.

(Tr. at 550-553)

⁵ The name of the laser handpiece and the procedure at issue is spelled differently by different sources, either as “fraxional” or “fractional.” “Fractional” is used in the Report and Recommendation because that is the spelling used by Palomar Medical Technologies, Inc., which manufactures the laser equipment. (St. Ex. 12) However, the spelling “fractional” and another synonymous term, “fraxel,” are used in this report occasionally when quoting documents and the Hearing Transcript. (See, for example, Tr. at 196-197)

25. Similarly, Ms. Mazur testified that she too had been trained at Pure MD concerning the use of the Lux1540 by a nurse who worked for Palomar. Ms. Mazur testified that she had received a certificate from the Palomar nurse following her training. Ms. Mazur assumed that the Palomar nurse had been aware that Ms. Mazur was also a nurse. (Tr. at 157-159)

Ms. Mazur testified that it had been her understanding that nurses can use laser devices for hair removal. Ms. Mazur further testified that she had assumed that nurses could also use the Lux1540 as well, based on the fact that a nurse trained her on the device. (Tr. at 160)

26. Dr. Khan's and Ms. Mazur's November 26, 2007, certificates of training in the use of the Lux1540 were signed by a Palomar representative who signed her name with the suffix: "BSN." (Resp. Exs. F, T)
27. Ms. Mazur testified that the Lux1540 was used only for fractional laser procedures. Ms. Mazur further testified that the fractional laser procedure "would stimulate collagen to fill in skin imperfections such as lines or scars." (Tr. at 74-76)
28. Ms. Mazur testified that she never performed laser tattoo removal; that procedure was only performed by Dr. Khan. (Tr. at 81-82)

Allegation: Dr. Khan permitted a person who was not licensed to practice medicine to perform laser skin treatments on Patient 4's face and made false statements in Patient 4's medical record

29. Patient 4 is a female born in 1978. She first visited Pure MD on November 12, 2007, for a consultation. Patient 4 testified that she had originally decided to see Dr. Khan because she wanted a "facial." However, she had seen an advertisement for fractional laser treatment and discussed that procedure with Dr. Khan and Ms. Mazur during her consultation. She testified that she had learned that fractional laser treatment would help with a scar on her forehead, along with fine lines and wrinkles. She decided to go forward with a series of five procedures. (Tr. at 195-197, 211; St. Ex. 2 at 1, 4)
30. Patient 4 testified that she had assumed during her consultation visit that Dr. Khan would perform the procedure. However, she subsequently called Ms. Mazur to learn more about the procedure, and, during that conversation, Ms. Mazur told her that "most people feel comfortable with [Ms. Mazur] doing it." Patient 4 further testified:

I said, well, whatever is normal there. I mean, I had no idea what's right or wrong so I just said, that's fine, and I came in that day and Sara actually performed the laser on me.

(Tr. at 200-201)

31. Patient 4 testified that she went to Pure MD for her first treatment on November 23, 2007, and was taken back to a treatment room. She signed a consent form, and Ms. Mazur explained the treatment to her, including that the treatment “will get a little stronger” the next time and that it might hurt. Patient 4 testified: “I asked if I could have any, like, numbing topical—Lidocaine, numbing treatments, and she said no, that she couldn’t because Dr. Khan wasn’t there.” (Tr. at 204-205)
32. The November 23, 2007 progress note was written and initialed by Ms. Mazur. Ms. Mazur testified that she had performed the procedure with the Lux1540 fractional laser handpiece using the settings that Dr. Khan had recommended. The chart indicates that the settings used were 50 joules / 15 milliseconds / 10 millimeters. Ms. Mazur testified that Dr. Khan had given her the settings to use. (Tr. at 86-90, 182-183; St. Ex. 2 at 4)
33. Patient 4 testified that the first procedure “really hurt and it was red.” However, she further testified that Ms. Mazur “was very nice” and “explained everything well.” Ms. Mazur gave Patient 4 an ice pack following the treatment. Patient 4 testified that, after the treatment, her face remained red for a while, as Ms. Mazur had told her. Patient 4 testified: “I was kind of nervous to get another one ’cause it hurt so bad, so I waited about a month before I got my second procedure.” (Tr. at 206-207)
34. On December 14, 2007, Patient 4 returned to Pure MD for her second procedure. Ms. Mazur testified that she performed the second procedure that day using the Lux1540 handpiece. The chart indicates that the laser settings used were 60 joules / 15 milliseconds / 10 millimeters. Dr. Khan testified that he had given Ms. Mazur the laser settings to use. The chart indicates that lidocaine cream was applied to Patient 4’s face prior to the procedure with Dr. Khan’s approval. Ms. Mazur was unable to recall whether Dr. Khan had been present in the room with her when she performed Patient 4’s December 14, 2007 procedure. (Tr. at 90-92, 189-190, 547-548; St. Ex. 2 at 4)
35. Patient 4 testified that, when she went to Pure MD for her second procedure, Ms. Mazur again administered the treatment. Patient 4 noted that she had received a topical anesthetic prior to the second procedure after Ms. Mazur left the treatment room and obtained Dr. Khan’s permission to use it. However, Patient 4 testified that the anesthetic did not help and that the procedure was again painful. Patient 4 testified that Ms. Mazur informed her that she had increased the strength of the laser a little bit for the second procedure. Patient 4 further testified that the post-procedure course was the same as before. (Tr. at 207-208)
36. Patient 4 testified that she waited to schedule the next procedure because she became pregnant and could not submit to such procedures during her pregnancy. Patient 4 further testified that she did not notice any benefit from the first two procedures. However, she testified that she had noticed that a waffle-like pattern on her face developed during her pregnancy. She called Pure MD and was asked to come in. (Tr. at 208-210)
37. Patient 4 went to Pure MD on March 11, 2008. Ms. Mazur examined her (and probably Dr. Khan as well) and saw the marks that Patient 4 complained of. Patient 4 was very

concerned and told Ms. Mazur that she believed the marks had been caused by the fractional laser treatment. Photographs were taken of Patient 4's marks but are not included in State's Exhibit 2.⁶ (Tr. at 92-95, 98-99, 209-210; St. Ex. 2 at 4)

38. Patient 4 testified that she never saw Dr. Khan after the initial consult until she went in to have pictures taken of her face after the treatments. (Tr. at 205-206)

39. Ms. Mazur contacted a Palomar representative to find out what could be done about the marks on Patient 4's face. A printout of an email exchange included in Patient 4's chart states, in pertinent part:

- From Ms. Mazur on March 11, 2008:

We have a patient who was last treated on 12/14/07 with her second lux 1540 treatment. Since then, she has not been treated because she has become pregnant. However, since the last treatment, she is left with waffle marks on her face. What can we do for this? This is the only patient that has been left with this type of mark for a long period of time. Please respond asap.

- Response from Palomar representative dated March 11, 2008:

Unfortunately, due to her pregnancy, there is not much you can do at this point. The "waffle" marks will probably subside during her pregnancy. If she were not pregnant, I would recommend the G HP to remove or HQ 4% or higher. Do not treat at this time however. Encourage strict sun avoidance.
Have you noticed that "waffling" with other patients? Was she over treated? Had she had sun?

- From Ms. Mazur on March 12, 2008:

Jan, What is G HP? Dr. Khan does not know what this is. The HQ I know is for "bleaching" but her problem is more of the waffle texture which was left. I believe this occurred before we received our new handpiece. The old one we sent back because they said it needed repair.

- Response from Palomar representative dated March 12, 2008:

"G HP" is our Green handpiece for photofacials, pigmented lesions, vascular lesions. You may also try microdermabrasion or a gentle exfoliant! Hope this helps!

(St. Ex. 2 at 6-7)

⁶ Ms. Mazur testified that photographs at Pure MD are usually stored on a computer or in the camera. (Tr. at 94)

40. On March 12, 2008, Ms. Mazur contacted Patient 4. An entry in the chart evidently written by Ms. Mazur describes their conversation:

Spoke c̄ pt today regarding concern of waffle like marks on face.⁷ (Note correspondence c̄ Palomar.) Pt told nothing recommended until p̄ pregnancy. Offered tx of photofacials at that time after delivery of her baby. Pt states that she wishes to be refunded. Pt notified we would get back to her tomorrow.

(St. Ex. 2 at 4) A note written below Ms. Mazur's note by Dr. Khan states, "I agree c̄ [illegible]." (St. Ex. 2 at 4)

41. A March 18, 2008 progress note concerning a conversation between Dr. Khan and Patient 4 states that Dr. Khan and Patient 4 had had a detailed discussion. Dr. Khan's note indicates that he offered her different options but that she wanted a refund. Dr. Khan further wrote, "all Tx done by me and nurse with direct supervision." The progress note further references a letter that he gave or sent to Patient 4 that indicates that any further treatment she received at Pure MD would be performed for free. In addition, Dr. Khan documented that Patient 4's marks can be fixed but that any further treatment would have to wait until after her pregnancy. (St. Ex. 2 at 4, 10)

With respect to that progress note, Dr. Khan testified that he had made an effort to document a discussion that he had had with the patient that day. Dr. Khan opined that it is good medical practice. (Tr. at 43-45, 529-532; St. Ex. 2 at 4) When asked what he had meant by the phrase, "All [treatment] done by me and nurse with direct supervision," Dr. Khan testified:

That means I was telling the nurse what to do regarding the settings, applying Lidocaine, correspondence between the Clinic and Palomar, the manufacturer of the laser, the consult.

All these treatments from start to finish were done either by me or under my supervision.

(Tr. at 534; St. Ex. 2 at 4) When asked why he had written that particular statement in the chart, Dr. Khan replied:

There's no reason why I'm putting it there. I think, like, she was questioning who was supervising the treatments and I had to just write it down. But there's no specific reason, like we were discussing these things, like different options, refund, who did the treatments, are my treatments gonna be free, is it okay to do it under pregnancy. So it's part of the whole story here.

⁷ The symbol c̄ is a common medical symbol for "with." The symbol p̄ is a common medical symbol for "after." The abbreviation tx is a common medical abbreviation for "treatment."

(Tr. at 535)

42. Dr. Khan further testified concerning his understanding of the phrase, “direct supervision”: “To tell someone or to direct someone to do a procedure or a treatment. Like telling the nurse to start an IV, telling the nurse to do a laser treatment with hair or fraxel. That’s called direct supervision.” (Tr. at 536)
43. Patient 4 testified that she had talked to Dr. Khan about possibly doing something about the waffle marks following her pregnancy. However, she testified that, after a while, she became “leery of having something else wrong happen” and requested a refund for the remaining three procedures for which she had prepaid. She testified that Dr. Khan had been reluctant to refund her money and offered to do anything he could to fix it. However, Patient 4 testified that she declined because she did not feel comfortable. She just wanted her money back. (Tr. at 210-212)
44. Dr. Khan testified that, on October 6, 2008, Patient 4’s husband came to Pure MD to pick up Patient 4’s chart.⁸ Dr. Khan further testified that Patient 4’s husband had asked Dr. Khan to write “on a piece of paper that if we get further treatment they’ll be free and they were done under my supervision.” (Tr. at 41-42) The October 6, 2008, letter states, in part:

[R]egarding [Patient 4] all procedure[s] [were] done by me or under supervision. Pt will be offered full refund if she wants. * * * I still stand by future treatments to be free.

(St. Ex. 2 at 11) (Emphasis in original)

Dr. Khan testified that he had written the letter at the request of Patient 4’s husband and had written it in front of him while he was in the office. Dr. Khan stated: “He just wanted, like, some sort of a receipt written and say that if she gets more treatment they’ll be free * * *.” (Tr. at 42, 537-540)

45. Dr. Khan further testified that his statements in his March 18, 2008 progress note and in the October 6, 2008 letter had been accurate. Dr. Khan further testified:

Because they were done under supervision. I was supervising the nurse, Registered Nurse, in applying Lidocaine and discussing the imprint, different treatment options, different treatments, back and forth.

This is all treatment of a patient. It’s just not one isolated thing that someone uses a laser and that’s the treatment. The treatment starts from when the

⁸ A progress note written by someone other than Dr. Khan indicates that this occurred on October 7 rather than October 6. The progress note is in error. (Tr. at 606; St. Ex. 2 at 4, 6)

patient enters the Clinic till her husband took her chart away, took this letter on the last day of the—when she—when he took the chart, you know.

(St. Ex. 538)

46. Patient 4 testified that she waited awhile and then consulted with a plastic surgeon. Patient 4 further testified that, following an examination, the plastic surgeon told her that it appeared to be “a permanent scar.” Patient 4 testified that he told her he could try dermabrasion, but that that is a drastic procedure that “could leave a big scab on [her] face” and might not be effective. Moreover, Patient 4 testified that he told her that only a physician is supposed to perform the procedure that Ms. Mazur had performed. Patient 4 testified, “[F]rom there, I contacted a lawyer.” The lawyer had her examined by two additional plastic surgeons who concurred that the waffle-like marks were a scar. (Tr. at 212-213)
47. Patient 4 filed a lawsuit against Dr. Khan, Ms. Mazur, and Pure MD, which ultimately settled for \$85,000. (Tr. at 214-215; St. Exs. 8A, 8B, 9)
48. Patient 4 testified that, as of the date of the hearing, the waffle-like marks on her face remain. She testified that she had seen a dermatologist five times during the preceding five months. Moreover, Patient 4 testified that the recommended treatment with Retin-A has so far proven ineffective and has resulted in unpleasant and unsightly side effects. (Tr. at 215)
49. Patient 4 testified that the marks that she received as a result of the procedures performed at Pure MD have substantially affected her physical appearance and are extremely upsetting to her. She further testified that she is never going to allow anyone to treat her face again because she “doesn’t trust anything anymore, laser or anything.” She never realized that that sort of thing could happen to her. (Tr. at 221-222)

Additional Evidence Concerning the Supervision Issue

50. Ms. Mazur recalled that she had performed the November and December 2007 procedures on Patient 4 under supervision, but could not recall whether Dr. Khan had been in the room with her during either procedure. She testified that he had not been in the room with her during at least one of the procedures “[a]nd/or not at the office.” (Tr. at 86-87, 90-92, 177-179)
51. Dr. Khan testified concerning the Board’s allegation that, on November 23, 2007: “[Y]ou allowed an unlicensed person to perform a laser skin treatment on Patient 4 at your office without your presence and/or supervision.” Dr. Khan testified that Ms. Mazur is a licensed nurse, that he was present in his office at the time of the procedure, and that Ms. Mazur performed the procedure under his supervision. With respect to his testimony that he had been present in the office when Patient 4’s first procedure was performed, Dr. Khan referred to the first page of Respondent’s Exhibit E, which he testified is a copy of Pure MD’s schedule for November 23, 2007, as support for that statement. (Tr. at 543-544; St. Ex. 1A; Resp. Ex. E)

The November 23, 2007, appointment schedule indicates that Patient 4's appointment had been scheduled for 10:15 a.m. Dr. Khan was asked how he knows he was there from looking at that page. Dr. Khan replied: "Well, I was there. I'm the one who does Botox,⁹ and I could just say I was there. Like, that's my routine. I'm usually there at 8:45, 9:00, and I leave at 6:00, 6:30." Dr. Khan acknowledged that he does not have any specific recollection of being in the office at 10:15 a.m. on November 23, 2007, but that he knows he had been there because he had told Ms. Mazur which laser settings to use. (Tr. at 544-546; Resp. Ex. E at 1)

52. With respect to the supervision issue, Dr. Khan acknowledged that he had not personally performed Patient 4's first laser procedure; however, he testified that Ms. Mazur performed the procedure under his supervision. He testified that he knows that to be true because "[i]t's written on the schedule book [he] was there in the Clinic." Dr. Khan further testified that he recalls that Ms. Mazur asked him what settings to use and he told her to "go low, use 50 joules or 55 joules" along with "the spot size, ten millimeter, and the speed, 15 milliseconds." Dr. Khan added that Ms. Mazur "would never know these things by herself." (Tr. at 541-543)
53. The Board alleged concerning Patient 4's second laser procedure: "[O]n or about December 14, 2007, you allowed an unlicensed person to perform a laser skin treatment on Patient 4 at your office and you were never in the room during the treatment." Dr. Khan noted that the chart entry for December 14, 2007, states, among other things, that lidocaine cream was applied to Patient 4's face prior to treatment with Dr. Khan's permission. Dr. Khan further testified that Ms. Mazur increased the laser energy to 60 joules, which would have required Dr. Khan's permission. In addition, Dr. Khan testified that he recalls talking with Ms. Mazur concerning increasing the laser energy during the same conversation in which they talked about lidocaine. (Tr. at 547-548; St. Ex. 1A)

Moreover, Dr. Khan testified that the Pure MD schedule for December 14, 2007, indicates that he was present in the office. That page indicates that two appointments had been scheduled for 1:00 p.m. that day: Patient 4 was scheduled for a Lux1540 treatment and another patient was scheduled for tattoo removal. Several other tattoo treatments and consults were scheduled throughout the day. Dr. Khan testified: "Sara was doing the light treatment, light-based treatment Lux1540 on Patient 4 and I was doing a tattoo treatment at the same time." Dr. Khan testified that the procedures were performed in two different rooms that are next to each other, and that he was only four or five steps away from where Ms. Mazur was treating Patient 4. (Tr. at 548-550; Resp. Ex. E at 2)

54. When asked if he could have given Ms. Mazur the laser settings for Patient 4's treatment at an earlier date during the consult, Dr. Khan acknowledged that he sometimes does that. However, he testified that he typically waits until the day of the procedure because, for example, the patient may have been to a tanning booth during the interim. Dr. Khan

⁹ The page shows one appointment for Botox injections on November 23, 2007, scheduled for 1:00 p.m. (Resp. Ex. E)

testified that if a patient had been to a tanning booth it would be necessary to use a lower setting to avoid burning the patient. (Tr. at 586)

55. Dr. Khan testified that it was not until around the time that Patient 4 filed her lawsuit that he discovered that it was improper for Ms. Mazur to have performed fractional laser treatments. (Tr. at 563)
56. Sometime after Patient 4 filed her lawsuit, Ms. Mazur left Pure MD. Ms. Mazur explained the reason she left Pure MD: "I left because I was feeling uncomfortable about working for Dr. Khan and we had been served a civil suit, served papers of a civil suit, and he asked me to lie in court about the civil suit so I just couldn't stay there." She testified that Dr. Khan had asked her to say that he had performed Patient 4's laser treatment, and not her. Ms. Mazur testified that she did not testify in court and was never deposed. (Tr. at 71-72, 95-97)
57. Dr. Khan testified vehemently that he had never asked Ms. Mazur to lie in connection with Patient 4's lawsuit. Dr. Khan further testified that Ms. Mazur was lying when she stated that Dr. Khan told her to lie in connection with Patient 4's lawsuit. Dr. Khan testified that, during the pendency of that lawsuit, it was known to Dr. Khan, Ms. Mazur, and other people in the office that Ms. Mazur had performed the laser procedures. It was also known to Patient 4. Moreover, Dr. Khan testified that one could have simply reviewed the chart and discovered that Ms. Mazur had performed the procedures, and Patient 4's husband had been provided with Patient 4's chart in October 2008 prior to the lawsuit being filed. Furthermore, Dr. Khan testified that, during the lawsuit, he and Ms. Mazur admitted in answers to Patient 4's request for admissions that Ms. Mazur had performed the procedures.¹⁰ (Tr. at 558-567, 580; St. Ex. 8B)

Dr. Khan testified that he and Ms. Mazur had provided those answers to Patient 4 and her husband on February 9, 2009, approximately two months after the lawsuit had been filed. Dr. Khan further testified that it made no sense to ask someone to lie after admitting to the court and everyone else that Ms. Mazur had performed the procedures. (Tr. at 566-567; St. Exs. 8A, 8B)

58. Investigator Myers, who had been present throughout the hearing, testified that Ms. Mazur's testimony was "[s]omewhat" consistent with what she had said to Investigator Myers during the investigation. Investigator Myers explained:

In my discussion with her about her fallout with Dr. Kahn she advised me that it was because he wanted her to say in Court that he was present for the procedures, and he wasn't.

In [her hearing] testimony she said that it was due to him wanting her to say he performed them when he didn't, so there was a little conflict there.

(Tr. at 449-450)

¹⁰ See the answers to requests for admissions number 1, 2, and 3. (St. Ex. 8B)

Allegation: Dr. Khan permitted a person who was not licensed to practice medicine to perform laser skin treatments on Patient 7's face

59. Patient 7 is a female born in 1982. Her chart indicates that she had visited Pure MD on June 2, 2008, concerning fractional laser treatment. Dr. Khan testified that a hand-drawn diagram in the chart had been made by him during an explanation to Patient 7 concerning how fractional laser treatment works. Further, Patient 7's chart includes a Consent for Fraxional Non-Ablative Skin Resurfacing that Patient 7 signed on June 2, 2008. However, the chart did not contain any progress note describing Patient 7's consultation visit or of any fractional laser treatment being provided. The only progress notes included in the chart concern two sets of Botox injections provided on October 2 and 10, 2008.¹¹ (Tr. at 557; St. Ex. 3 at 1, 1A, 3, 4)

Testimony of Patient 7

60. Patient 7 testified that she had been referred to Dr. Khan by her friend, Ms. Leatherman. Patient 7 testified that she had originally seen Dr. Khan in June 2008 to have some "sun spots" removed from her forehead and her nose and that Ms. Leatherman had told her that Dr. Khan could do that. (Tr. at 233-235, 252-253)

Patient 7 testified that it is a bit difficult to remember the sequence of events that occurred three years earlier, but that she believes she was treated at her first visit. She does not recall having a consultation visit beforehand. Patient 7 did recall being in the treatment room alone with Ms. Mazur who performed the laser treatment of her face. Patient 7 also testified that "Dr. Khan came in at the very end and lasered [her] nose." (Tr. at 234-235)

Patient 7 identified her signature on a patient intake form dated June 2, 2008, that is included in her chart, and she identified her signature on a June 2, 2008 Consent for Fraxional Non-Ablative Skin Resurfacing. (Tr. at 236-237; St. Ex. 3 at 1, 3)

61. With respect to the procedure itself, Patient 7 testified that she had lain down in a chair and Ms. Mazur had "had this big laser machine and she told me that it was gonna sting a little bit, kind of like a bee sting or a sunburn, and that my face would be red and probably swollen. She went ahead and did my entire face, and it took probably 20 minutes." Patient 7 further testified, "Dr. Khan came in after with a different laser and he lasered a couple spots on the end of my nose that had some dark spots." Patient 7 received discharge instructions and left. (Tr. at 240-242)

62. Patient 7 testified that the laser Ms. Mazur used had had a rectangular protuberance at the end of it that was roughly the size of a deck of cards. When Dr. Khan came into the room to treat her nose, he brought with him a different laser that was smaller and "[k]ind of like a wand * * *." (Tr. at 253-256)

¹¹ Patient 7's Botox injections are not addressed in the Notice and are therefore irrelevant to this matter.

63. Patient 7 testified that she had paid for the laser treatment by credit card on the day it was performed. She identified State's Exhibit 11 as her credit card statement from June 2008. The statement reflects a payment of \$618 to "MD Laser & Cosmetics L Perrysburg OH." The transaction date is June 2, 2008. (Tr. at 239-240; St. Ex. 11) (Emphasis omitted)
64. Patient 7 testified that, a couple months after the laser procedure, she noticed that she had a pattern on her face. She testified: "You can see it when I'm not wearing makeup. It's like these tiny little squares." Patient 7 further testified that she had thought that they would go away on their own, but they did not. She went to a plastic surgeon. Patient 7 testified: "I found out that if I had more fraxel, if I had fraxel surgery several times, that it should take care of the pattern." However, Patient 7 testified that she has not had any further laser skin treatment. (Tr. at 242-243)
- Patient 7 testified that she never spoke with Dr. Khan concerning the marks on her face. However, she did go back to Dr. Khan in October 2008 for Botox treatment. (Tr. at 244, 246; St. Ex. 3 at 4)
65. Patient 7 testified that she had nothing to gain by coming to the Board hearing to testify. She further testified that she missed a class to come to the hearing. (Tr. at 265-266)
66. Patient 7 acknowledged telling Ms. Leatherman the following during a Facebook chat: "Allie, don't quit. Let him fire you. That way if you can't find a job right away you can at least get unemployment till you can get back on your feet." (Tr. at 263-265; Resp. Ex. L)

Testimony of Ms. Mazur

67. Ms. Mazur recalled that Patient 7 had come to Pure MD for Botox injections. Ms. Mazur did not recall that Patient 7 had come in for any other purpose or that she had performed a laser procedure on Patient 7. (Tr. at 101-103, 153)

However, Ms. Mazur testified that a patient typically signed a consent form for a procedure right before the procedure was performed. Therefore, if a patient signed a consent form for fractional laser skin treatment, Ms. Mazur testified that she "would think that [the patient] did receive fractional treatments." (Tr. at 103)

Testimony of Dr. Khan

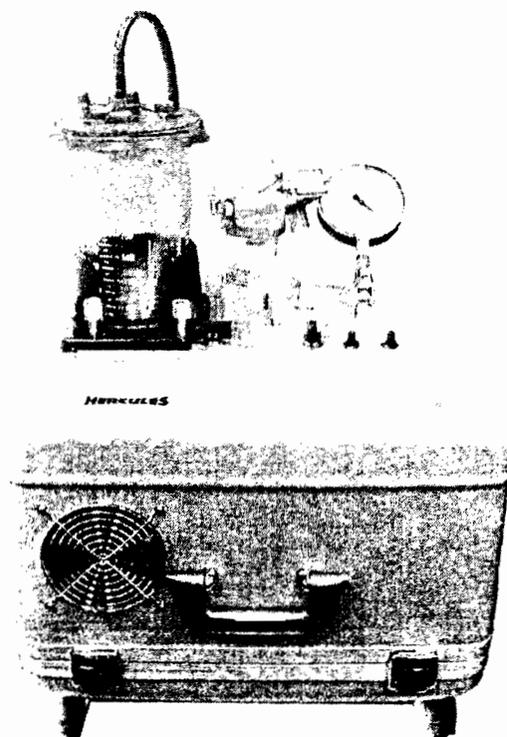
68. Dr. Khan testified that he had discussed the fractional laser process with Patient 7, but that he has no recollection of performing laser skin treatment on Patient 7. Dr. Khan further testified that he cannot explain the credit card payments evidenced by State's Exhibit 11. He acknowledged that, if the procedures were performed as Patient 7 testified, then he does not have documentation of having performed those procedures. However, Dr. Khan testified that it is usually his custom to make progress notes concerning his procedures. (Tr. at 48-50, 515-516, 523-525)
69. Dr. Khan testified that the wand-like device described by Patient 7 that he had used to treat Patient 7's nose describes the appearance of a Lux1540 fractional laser handpiece. Dr. Khan's

fractional laser handpiece, the Lux1540, is pictured in Respondent's Exhibit AA. Dr. Khan further testified that the type of laser used to treat the "sun spots" that Patient 7 referred to in her testimony describes a photofacial laser, which is a lower-level laser. Dr. Khan's photofacial laser handpiece is pictured in Respondent's Exhibit Z. In addition, Dr. Khan testified that he did not use a fractional laser for sun spots and that the less-intense photofacial laser would be more appropriate to treat that condition. (Tr. at 514-523; Resp. Exs. Z, AA)

70. With respect to Patient 7 and the Board's allegation that Dr. Khan had allowed an unlicensed person to perform laser skin treatment on her face on June 2, 2008, Dr. Khan testified that Ms. Mazur is a licensed, registered nurse. Dr. Khan further testified that the drawing that he made that is included in Patient 7's chart demonstrates that he had been in the room with Patient 7 doing a consult with her and describing to her how the fractional laser treatment works. (Tr. at 550-553, 557; St. Ex. 1A; St. Ex. 3 at 1A)

Liposuction – In General

71. Dr. Khan testified that he performs a liposuction procedure in his office called "SmartLipo." (Tr. at 38-39)
72. During his testimony, Dr. Khan referred to a picture of the SmartLipo aspiration pump that he uses in his office to remove liposuction fluid from patients, which is reproduced below:



(Resp. Ex. P)

73. Dr. Khan identified the canister as the large, cylindrical-shaped object pictured on top of the machine. Dr. Khan testified that a liner is placed in the vacuum canister for SmartLipo procedures. The liner, which is used to hold the aspirated fluid, can then be removed from the canister following a procedure and discarded. Dr. Khan compared the two items to a trash can and a trash bag. The canister is like the trash can, and the liner is analogous to a trash bag that is placed in the trash can. Dr. Khan testified that the canister can be used multiple times and is not a sterile item.¹² Dr. Khan testified that the liner that is placed into the canister for procedures is a single-use item. However, he testified that the liners do not come into contact with the patients, that they do not come packed in sterile packaging, and that they are not sterile or required to be sterile. Their purpose is simply to collect the aspirated fluid that is removed from the patient during the liposuction procedure. He presented a photograph of an unused liner which was marked as Respondent's Exhibit S. The liner appears to be a roughly cylindrical piece of plastic with one opening at the top. There is a red plastic seal around the opening. (Tr. at 51-57, 63-65; Resp. Ex. P at 1; Resp. Ex. S)
74. Ms. Mazur corroborated Dr. Khan's testimony that the canister liners are not sterile. (Tr. at 164-164)

Allegation: Dr. Khan inappropriately reused single-use medical supplies that had become contaminated by blood or other bodily fluids – Evidence concerning liposuction aspiration tubing

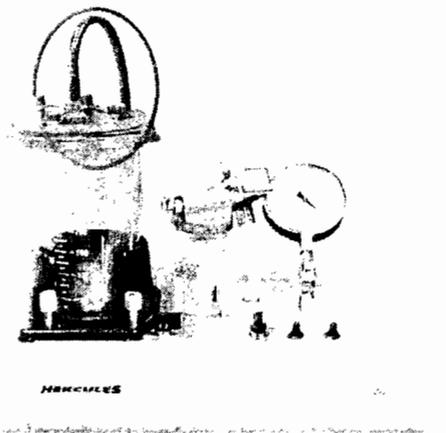
75. Dr. Khan testified that the infiltration tubing and aspiration tubing that are used during SmartLipo are sterile, single-use items and come packed in sterile packaging. He presented pictures of infiltration tubing (Respondent's Exhibit Q) and aspiration tubing (Respondent's Exhibit R) from his office in sterile packaging. Dr. Khan testified that, following use, these items must be discarded in a biohazard container. Dr. Khan testified that he has never reused either type of tubing. (Tr. at 58-59; Resp. Exs. Q, R)

Testimony of Ms. Mazur

76. Ms. Mazur testified that it had been her responsibility when assisting Dr. Khan to set up the aspiration machine. She testified that she inserted the liner into the canister and placed the lid on top of the liner and the canister, which formed a seal. She removed the aspiration tubing from its package and inserted the tube in the canister lid. The cannula that the doctor used to suction out the aspirate from the patient is attached to the other end of the aspiration tubing. (Tr. at 166-168)

¹² Dr. Khan testified that he has an autoclave in his office that is used to sterilize instruments, and that the canister can be run through the autoclave. However, he does not do that because there is no requirement that the canister be sterile. (Tr. at 56)

77. Ms. Mazur testified that, on one occasion when Dr. Khan was performing liposuction procedures and she was assisting, the office ran out of aspiration tubing before the procedure had been performed on the last patient for that day. Ms. Mazur testified that Dr. Khan told her to reuse the tubing from the previous patient.¹³ Ms. Mazur testified that she had questioned Dr. Khan about that, and that she thinks he was afraid that the patient would not go through with the procedure or ask for a refund. Ms. Mazur further testified that Dr. Khan performed the last procedure that day with the reused tubing. (Tr. at 129-130, 164)
78. Ms. Mazur testified that the tubing that Dr. Khan had reused was the aspiration tubing that is attached to the canister lid on the aspiration machine. The tubing she identified is circled below:



(Tr. at 163-164; Resp. Ex. P)

Testimony of Dr. Khan

79. Dr. Khan testified that the tubing that Ms. Mazur had identified in the photograph is actually a permanent part of the canister. Dr. Khan indicated that her testimony that that tubing had been reused was accurate, but that the tubing she is referring to is not a single-use item. Dr. Khan further testified that no blood or body fluids pass through that tubing. (Tr. at 607-608)

Information from the Aspiration Machine User's Manual

80. The set-up instructions for the aspiration pump using the canister system pictured states, in part:
1. Place canister on top panel of the Hercules™ inside canister holder.
 2. Snap the red liner lid onto a soft-shell liner. Insert the hard-shell canister.
 3. Plug the red hose on the canister into the top of the liner lid on the port marked **Vacuum**.

¹³ Ms. Mazur testified that the liner may also have been reused, but she was unsure. (Tr. at 129)

4. Attach the 9" piece of silicon tubing from the overflow trap to the red spout on the side of the canister.
 5. The sterile aspiration tubing will connect to the port labeled: **Patient**
- THE CANISTER SYSTEM IS NOW READY FOR OPERATION.

(Resp. Ex. P at 7) (Emphasis in original)

Testimony of Investigator Myers

81. With respect to her interview with Ms. Mazur, Investigator Myers testified that Ms. Mazur told her that Dr. Khan had reused liposuction tubing, but she did not tell Investigator Myers that he had reused a liposuction canister liner. (Tr. at 380-381, 434-436)

Allegation: On or about March 31, 2009, Dr. Khan performed a liposuction procedure on Patient 6. During this procedure, Dr. Khan reused a lining from a prior liposuction procedure.

Testimony of Ms. Leatherman

82. Ms. Leatherman testified that her job duties had included ordering supplies for SmartLipo procedures. Ms. Leatherman recalled an occasion when, due to a delay in the parcel delivery process, the office ran out of canister liners. (Tr. at 282-283, 297) The following exchange took place concerning that occurrence:

A. [by Ms. Leatherman] Dr. Khan told me if I didn't figure it out I was gonna lose my job, so I went into the Biohazard and I poured the fat out of the thing and gave it to him.

Q. [by Ms. Dorn] What did you give him?

A. The fat canister, the empty fat canister. I took it out of the Biohazard box and poured it down the toilet and gave it to Dr. Khan.

Q. Was it actually a canister or a liner?

A. Liner, canister, I use those [terms] interchangeably. I suppose it was the liner that held the fat. I think the technical term is a liner.

Q. Okay.

And is that what you would reorder?

A. Yes.

Q. Okay.

And do you recall anything more about that?

A. He was very happy that I did that. He was happy that I figured out how to accommodate the situation, that I figured it out.

Q. Did he know what you did?

A. He had to have, because there is initials on the canisters and so those initials were scribbled out in order for the new initials to be placed on the canister.

* * *

Q. Did you bring this to Dr. Khan's attention after the procedure?

A. Yeah. He knew, yeah. I said, yeah, I had to get that out, and he was just—I'm pretty sure he gave me a high five and I'm almost 80 percent sure he gave me a fifty dollar bill that day.

(Tr. at 297-299)

83. Ms. Leatherman later modified her testimony that she and Dr. Khan may not have literally done a "high five" after she handed him the liner, but testified that he was very happy and applauded her quick thinking. She also stated that she is "about 80 percent sure" that Dr. Khan gave her \$50 that day. (Tr. at 329)
84. Ms. Leatherman could not recall the date of that procedure but recalled that Ms. Mazur had not been present because "she wasn't working there then." Moreover, Ms. Leatherman recalled that that procedure "was the one where the power went out * * *." In addition, Ms. Leatherman recalled the name of the patient, which was the name listed on the Patient Key as Patient 6. (Tr. at 320-324; St. Ex. 14A)
85. Ms. Leatherman testified that she had washed out the liner with soap. Ms. Leatherman then handed the liner to Dr. Khan. Ms. Leatherman added that the previous patient's initials had been written on the liner. However, Ms. Leatherman testified that she did not tell Dr. Khan that she had just reached into the biohazard bag and dumped the contents of the liner out. (Tr. at 324-325, 328)

Testimony of Dr. Khan

86. Dr. Khan was asked if he had ever reused a canister liner. He replied:

Not that I'm aware of. These things are set up by the girls, like, the nurses and the staff. They come in in a box with brown paper stuffed in it, so obviously they're not sterile.

They come in, I don't see that box, but I've seen it initially years ago, and the brown paper is thrown away and these things are, like, shoved under a stand and then the nurses come in and then they use this and they set up the room.

(Tr. at 57)

Dr. Khan was then asked if he had ever been made aware following a procedure that a staff member had reused a canister liner. Dr. Khan replied that that had happened on one occasion. (Tr. at 57)

87. Dr. Khan testified that his office takes photographs of a liposuction patient prior to the procedure so that they have a "before" picture, and also of the canister liner with the patient's initials on it. Dr. Khan identified Respondent's Exhibit Y as a photograph of the canister liner used during Patient 6's March 31, 2009 chin-liposuction procedure that has the patient's initials written on the liner. Dr. Khan testified that he can tell it was from a chin-liposuction procedure because of the relatively small amount of aspirate that can be seen in the liner. Dr. Khan added that Patient 6 had had only one liposuction procedure performed. Dr. Khan further testified that the photograph had been included in Patient 6's medical records that were provided to the Board pursuant to a subpoena. (Tr. at 499, 504-505; Resp. Ex. Y)

Dr. Khan testified that the liner that he had used during Patient 6's liposuction procedure had been new, and that Ms. Leatherman had not handed him a used liner. Dr. Khan further testified that it is clear from the photograph that the liner had not been reused:

It's common sense. There's no other initials of anyone else, which Miss Allie Leatherman has been claiming yesterday. Like, you only—you don't need four different views of a canister to look at the canister. It's very obvious that no one tampered with it. It's brand new. * * * How could you erase markings from this and put [Patient 6's initials] on it and then picture it within 15 minutes of the surgery.

(Tr. at 505-506)

88. Dr. Khan testified that Ms. Leatherman had been lying when she stated that she had reused a liner from a previous procedure. (Tr. at 579-580; Resp. Ex. Y)
89. Patient 6's liposuction procedure took place on March 31, 2009. (Tr. at 505)

Testimony of Investigator Myers

90. Investigator Myers testified that Ms. Leatherman's description at hearing of Dr. Khan reusing a canister liner was similar to what Ms. Leatherman had told her during the investigation. (Tr. at 436-437)

Allegation: Dr. Khan inappropriately reused single-use medical supplies that had become contaminated by blood or other bodily fluids – Evidence concerning Botox syringes

Testimony of Dr. Khan

91. Dr. Khan testified that the process for reconstituting Botox and injecting the solution into the patient requires two syringes of different sizes. Dr. Khan testified that a 5 cc syringe is used to insert 4 ml of saline solution into the Botox vial. The Botox is reconstituted by gently swirling the vial to dissolve the Botox into the saline. The reconstituted solution is then drawn into 1 cc syringes for injecting the patient. Dr. Khan further testified that a different needle is placed on the end of the syringe prior to injecting the patient because the needle used to draw the Botox solution may have become contaminated when it was inserted into the vial. The old needle is discarded into a sharps container. (Tr. at 506-509)
92. Dr. Khan testified that he likes to perform his preparation of the Botox solution and the filling of syringes in front of the patient:

So I just start in front of the patient. We don't even touch the Botox. We bring it from the freezer in front of them and I kind of—when I'm administering Botox I'm actually explaining to the patient that this is a hundred units, this is one syringe.

I mix it up, swirl it gently, look at the powder and I take out the needle. I change the needle, and I show it. I'm giving you this needle now, this is 25 units, and this is how much it will cost. And that's what it is.

Is that okay? Do I have your permission? And then I go and proceed, and that's with every patient.

(Tr. at 510-511)

Dr. Khan testified that, if there is Botox solution left in a vial after treating a patient, the remaining solution can be used to treat additional patients. However, he testified that a fresh needle is used to draw the solution and then replaced with a fresh needle prior to injecting the patient. Dr. Khan noted that the reconstituted Botox must be used within 72 hours. (Tr. at 510-513)

Testimony of Ms. Mazur

93. Ms. Mazur testified that she had witnessed Dr. Khan reusing syringes during Botox procedures, although she is not certain that he reused the needles. Ms. Mazur testified that the syringes are single-use items. Ms. Mazur further testified that she had seen this occur with multiple patients. (Tr. at 131-132, 135) The following exchange took place:

Q. [By Mr. Plinke] So the way Botox was administered, then, is you would be in the room, present?

A. [By Ms. Mazur] Not every single patient that he treated Botox with –

Q. Okay.

A. —but, yes.

Q. I'm talking about the ones you witnessed.

But you saw –

A. There was a time that I saw multiple patients, more than one patient, be in a room—I never left the room—and I saw the same syringe being used.

Q. On multiple patients?

A. More than one patient.

Q. And when did that occur?

A. I don't know a date.

THE EXAMINER: Would that have been at one of these Botox parties?

THE WITNESS: Possibly.

BY MR. PLINKE:

Q. When you say “possibly” it suggests to me that maybe your recollection isn't clear.

A. No. It was sometime during my employment with Pure MD Lasers that I was in a room and I saw a syringe being reused for more than one patient for the treatment of Botox.

Q. So the patient—and there was usually only one patient in the room at a time, correct?

A. In a treatment room?

Q. Yes.

A. Yes.

Q. Okay.

And that's where this would take place –

A. Yes.

Q. —in a treatment room?

A. Yes.

Q. So the patient would come in, you'd observe the procedure, the patient would leave, another patient would come in, and you'd still be in the room the whole time?

A. Sure. Possibly, yeah. Or maybe we would step out and I would get the cleaning solution just to wipe off the treatment table, you know. Possibly he would step out.

The next patient would come in, the syringe would be on the counter and, you know, it would be the same syringe. I would not see another syringe being unwrapped.

Q. Okay.

But you may not have been in the room the whole time?

A. May not have.

Q. Okay.

And you can't specify a date?

A. No.

Q. And you can't even specify whether it was at a Botox party or at a normal day in the office?

A. No, but I don't know why that would make a difference. It was just a patient, whatever time of day, whatever day, you know. It could have been a regular work day and not a Botox party day.

Q. Okay.

Were there other staff involved in the administration of Botox?

A. No.

Q. So if you weren't doing the administering what was your role in being in the room?

A. Just sometimes to support the patient, if it was painful or if they were nervous.

(Tr. at 134-137)

94. Ms. Mazur testified that there had been occasions when she had drawn up saline solution into the first syringe and injected the saline into a bottle of dry Botox to reconstitute it, although this process was usually done by Dr. Khan: "[H]e was very specific he wanted to do that himself, usually, the reconstituting." Moreover, Ms. Mazur testified that Dr. Khan always drew the Botox solution into the second syringe and injected the patient himself. (Tr. at 118, 138-140)

95. When asked if she had handled the second syringe after it had been used to draw up the reconstituted Botox solution, Ms. Mazur indicated that she may have disposed of it after the patient left following the procedure. She noted that her job duties had included cleaning the room and setting it up for the next patient. (Tr. at 140-141) Whereupon the following exchange took place:

Q. [By Mr. Plinke] So what you're saying you observed was a Botox procedure would be done and you wouldn't prepare the next Botox for the next patient.

Is that what you're saying?

A. [By Ms. Mazur] I seem to remember that, yes.

Q. Okay.

And why wasn't that done?

A. Maybe it was during, like, a Botox party, to go back to that, just because maybe, like, a multiple—you know, that the patient would just sit down, have the treatment of Botox, you know, and then the next person would sit down.

Q. Okay.

But you don't actually know whether it was at a Botox party or a regular patient visit, do you?

A. A Botox party or a regular –

Q. Yeah, a Botox party or a regular patient.

A. No, no.

Q. Okay.

So if it's not at a Botox party can you explain why—if part of your duty was to dispose of the syringe –

A. Uh-huh.

Q. – and sort of get the room ready for the next procedure, why you wouldn't have done that?

A. Maybe just a busy day, multiple patients coming, you know.

Q. Okay.

A. Maybe.

Q. Because Dr. Khan leaves the room, correct?

A. Not every time, but possibly, just like I would.

Q. What about on the occasion you were testifying to that you witnessed where the same syringe was used more than once on the same patient, did he leave the room on that occasion?

A. I can't remember.

Q. Okay.

And I think from your testimony before you can't remember if you left the room?

A. Correct.

Q. Okay.

But you must remember that you didn't tear the room down, so to speak. In other words, throw away the syringe, get a new one out and prepare it for the next case.

A. Yes.

Q. Okay.

Do you know why you didn't do that?

A. Not exactly. Like, what are the—one of the circumstances I mentioned, just waiting patients and, you know, treating maybe one right after another, possibly, at a Botox party.

Q. Okay.

But you don't recall which it was, whether it was a Botox party or –

* * *

A. No.

(Tr. at 141-144)

96. Ms. Mazur testified that she had never seen a syringe being reused prior to working for Dr. Khan. (Tr. at 173)

Additional Testimony of Dr. Khan

97. Dr. Khan denied that he had ever reused a syringe during Botox procedures. Dr. Khan further testified that Ms. Mazur was lying when she testified that she saw him reuse a Botox syringe. (Tr. at 506, 580)

Testimony of Investigator Myers

98. Investigator Myers testified that, when she had interviewed Ms. Mazur as part of her investigation, Ms. Mazur had been unable to recall any patients or dates when Dr. Khan had reused syringes. (Tr. at 434-435)

Additional Testimony of Ms. Leatherman

99. When asked if she was aware of any occasion when Dr. Khan altered a patient chart, Ms. Leatherman recalled that on one occasion following a SmartLipo procedure, after the patient left, Dr. Khan asked the nurse, another employee, and Ms. Leatherman to note in the chart how inappropriate the patient's behavior had been. Ms. Leatherman testified that the patient had made a number of inappropriate, suggestive comments that caused Dr. Khan to feel uncomfortable. However, Ms. Leatherman felt that it had been unfair "that we were doing that without her being present or that she wasn't, like, made aware that she created an uncomfortable situation."¹⁴ (Tr. at 304-305, 316-319)

¹⁴ Ms. Leatherman's concerns notwithstanding, this addition to the chart seems to have been appropriate.

Ms. Leatherman further recalled that: “before that procedure happened there was a power outage in the room so the power was, like, back up and running. So I think he was just kind of—he wanted to make sure that everything was notated.”¹⁵ (Tr. at 305)

100. Ms. Leatherman testified that her working relationship with Dr. Khan varied. She stated that Dr. Khan was always understanding about her school schedule and worked around it, and he included her in some of his discussions concerning the business side of his practice. However, she testified that he could be short with her and sometimes told her she was stupid. Ms. Leatherman testified that he fired her on March 3, 2010, after Ms. Leatherman evidently failed to contact a patient to reschedule an appointment. (Tr. at 305-309)

On November 9, 2009, Ms. Leatherman presented a letter to Dr. Khan indicating that “it has been mutually decided that [she] should be laid off.” Ms. Leatherman testified that she had written this letter with the hope that Dr. Khan would agree to lay her off after learning from a co-worker that Dr. Khan had said some unkind things about her, and because she had felt that her job was in jeopardy because of the Board investigation. However, she continued working for Dr. Khan until March 2010. Ms. Leatherman testified that he fired her on March 3, 2010, after she failed to contact a patient to reschedule an appointment. (Tr. at 309-311; Resp. Ex. U)

101. Dr. Khan presented a document that Ms. Leatherman identified as a printout of a Facebook chat among Ms. Leatherman, Patient 7, and other parties. Ms. Leatherman testified that this chat took place on November 9, 2009, the same day she wrote the letter described above. (Tr. at 333-334; Resp. Ex. L) During that chat, Ms. Leatherman had evidently expressed a desire to quit Dr. Khan’s employ. As stated earlier in this report, Patient 7 advised Ms. Leatherman: “allie, don’t quit . . . let him FIRE you . . . that way if you can’t find a job right away you can at least get unemployment till you can get back on your feet * * *.” (Resp. Ex. L) During the chat, Ms. Leatherman replied:

Oh, yeah, I’m not quitting, no way in hell. He’s going to fire me, but still, . . . I guess there’s an issue with my getting unemployment since I had to cut work hours down because of school, so I don’t know what the fuck is going to happen, I’m scared and clueless and pissed off, and it’s becoming a dangerous combination as I have a fucking midterm in 2 hours and have no clue what the hell is on it, I can’t read, I can’t focus, I’m shaking livid. Fuck him. OMG fuck him.

(Resp. Ex. L) Ms. Leatherman subsequently wrote: “I hope he has fun with his state medical board invesetigations, [sic] too, stupid asshole.” (Resp. Ex. L)

¹⁵ It is unclear whether this patient had been treated the same day as Patient 6 whom Ms. Leatherman also recalled had been treated when there was a power outage, whether this patient *was* Patient 6, or whether there had been more than one power outage. Patient 6’s chart was not presented at hearing.

Additional Testimony of Investigator Myers

102. Investigator Myers testified that Dr. Khan had been cooperative when she visited his office on November 10, 2009, and that he had complied with the subpoena that she served that day. (Tr. at 412-413)
103. Investigator Myers testified that the hearing testimony of Patient 4, Patient 7, and Ms. Leatherman was consistent with what they had told her during the investigation. (Tr. at 448-451)

Additional Testimony of Ms. Mazur

104. Ms. Mazur believes that, aside from some pay-related disputes, she and Dr. Khan had had a good working relationship. (Tr. at 127-128)
105. Ms. Mazur testified that she had felt comfortable asking Dr. Khan questions that arose during procedures. (Tr. at 128)

Additional Testimony of Dr. Khan

106. Dr. Khan noted that he has been subject to probation pursuant to the Board's Order since March 2008. (Tr. at 480-483)
107. Dr. Khan testified that both Ms. Mazur and Ms. Leatherman are disgruntled former employees "and they are unreliable witnesses and they can lie * * *." Dr. Khan further testified that his own credibility should not be questioned based on a misdemeanor conviction from five years earlier. (Tr. at 582)

RELEVANT STATUTES AND RULES

21 U.S.C. 331(a), Prohibited acts, states:

The following acts and the causing thereof are prohibited:

- (a) The introduction or delivery for introduction into interstate commerce of any food, drug, device, tobacco product, or cosmetic that is adulterated or misbranded.

R.C. 2913.42, Tampering with records, states in relevant part:

- (A) No person, knowing the person has no privilege to do so, and with purpose to defraud or knowing that the person is facilitating a fraud, shall do any of the following:

- (1) Falsify, destroy, remove, conceal, alter, deface, or mutilate any writing, computer software, data, or record;

* * *

- (B)
 - (1) Whoever violates this section is guilty of tampering with records.
 - (2) Except as provided in division (B)(4) of this section, if the offense does not involve data or computer software, tampering with records is whichever of the following is applicable:
 - (a) If division (B)(2)(b) of this section does not apply, a misdemeanor of the first degree;

* * *

R.C. 2923.03, Complicity, states in relevant part:

- (A) No person, acting with the kind of culpability required for the commission of an offense, shall do any of the following:
 - (1) Solicit or procure another to commit the offense;
 - (2) Aid or abet another in committing the offense;
 - (3) Conspire with another to commit the offense in violation of section 2923.01 of the Revised Code;
 - (4) Cause an innocent or irresponsible person to commit the offense.

* * *

- (F) Whoever violates this section is guilty of complicity in the commission of an offense, and shall be prosecuted and punished as if he were a principal offender. A charge of complicity may be stated in terms of this section, or in terms of the principal offense.

R.C. 2925.09, Unapproved drugs - dangerous drug offenses involving livestock, states:

- (A) No person shall administer, dispense, distribute, manufacture, possess, sell, or use any drug,¹⁶ other than a controlled substance, that is not approved by the United

¹⁶ Pursuant to R.C. 2925.01, the term "drug" as used in R.C. 2925.09(A) is defined in R.C. 4729.01(E), which states:

- (E) "Drug" means:
 - (1) Any article recognized in the United States pharmacopoeia and national formulary, or any supplement to them, intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in humans or animals;
 - (2) Any other article intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in humans or animals;

States food and drug administration, or the United States department of agriculture, unless one of the following applies:

- (1) The United States food and drug administration has approved an application for investigational use in accordance with the “Federal Food, Drug, and Cosmetic Act,” 52 Stat. 1040 (1938), 21 U.S.C.A. 301, as amended, and the drug is used only for the approved investigational use;
 - (2) The United States department of agriculture has approved an application for investigational use in accordance with the federal “Virus-Serum-Toxin Act,” 37 Stat. 832 (1913), 21 U.S.C.A. 151, as amended, and the drug is used only for the approved investigational use;
 - (3) A licensed health professional authorized to prescribe drugs, other than a veterinarian, prescribes or combines two or more drugs as a single product for medical purposes;
 - (4) A pharmacist, pursuant to a prescription, compounds and dispenses two or more drugs as a single product for medical purposes.
- (B) (1) As used in this division, “dangerous drug,” “prescription,” “sale at retail,” “wholesale distributor of dangerous drugs,” and “terminal distributor of dangerous drugs,” have the same meanings as in section 4729.01 of the Revised Code.
- (2) Except as provided in division (B)(3) of this section, no person shall administer, dispense, distribute, manufacture, possess, sell, or use any dangerous drug to or for livestock or any animal that is generally used for food or in the production of food, unless the drug is prescribed by a licensed veterinarian by prescription or other written order and the drug is used in accordance with the veterinarian’s order or direction.
- (3) Division (B)(2) of this section does not apply to a registered wholesale distributor of dangerous drugs, a licensed terminal distributor of dangerous drugs, or a person who possesses, possesses for sale, or sells, at retail, a drug in accordance with Chapters 3719., 4729., or 4741. of the Revised Code.
- (C) Whoever violates division (A) or (B)(2) of this section is guilty of a felony of the fifth degree on a first offense and of a felony of the fourth degree on each subsequent offense.

R.C. 4731.41, Practicing medicine without certificate, states:

No person shall practice medicine and surgery, or any of its branches, without the appropriate certificate from the state medical board to engage in the practice. No person shall advertise or claim to the public to be a practitioner of medicine and surgery, or

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- (3) Any article, other than food, intended to affect the structure or any function of the body of humans or animals;
 - (4) Any article intended for use as a component of any article specified in division (E)(1), (2), or (3) of this section; but does not include devices or their components, parts, or accessories.

any of its branches, without a certificate from the board. No person shall open or conduct an office or other place for such practice without a certificate from the board. No person shall conduct an office in the name of some person who has a certificate to practice medicine and surgery, or any of its branches. No person shall practice medicine and surgery, or any of its branches, after the person's certificate has been revoked, or, if suspended, during the time of such suspension. A certificate signed by the secretary of the board to which is affixed the official seal of the board to the effect that it appears from the records of the board that no such certificate to practice medicine and surgery, or any of its branches, in this state has been issued to the person specified therein, or that a certificate to practice, if issued, has been revoked or suspended, shall be received as prima-facie evidence of the record of the board in any court or before any officer of the state.

Rule 4731-17-04(G), Disinfection and sterilization, states in relevant part:

Instruments and other reusable equipment used by licensees who perform or participate in invasive procedures shall be appropriately disinfected and sterilized according to acceptable and prevailing standards for disinfection and sterilization which shall include at least the following:

* * *

- (G) Single use items used in treating a patient, which have become contaminated by blood or other body fluids, shall be discarded and not reused. Unless sterilized and reused in accordance with current guidelines established by the FDA. [Sentence fragment sic] Single use items being reused in treating a patient shall be adequately cleaned and sterilized. Single use items shall not be reused if the items' physical characteristics and quality have been adversely affected or if the items are incapable of being reused safely and effectively for their intended use.

Rule 4731-18-02, Use of light based medical devices, states:

- (A) For purposes of this rule, light based medical device shall mean any device that can be made to produce or amplify electromagnetic radiation at wavelengths equal to or greater than one hundred eighty nm but less than or equal to 1.0×10^6 nm [ten to the sixth power]¹⁷ and that is manufactured, designed, intended or promoted for in vivo irradiation of any part of the human body for the purpose of affecting the structure or function of the body.

¹⁷ This bracketed information is included in the rule.

- (B) *The application of light based medical devices to the human body is the practice of medicine and surgery, osteopathic medicine and surgery and podiatric medicine and surgery.* [Emphasis added]
- (C) *Except as provided in rule 4731-18-03 and rule 4731-18-04 of the Administrative Code, no physician licensed pursuant to Chapter 4731. of the Revised Code shall delegate the application of light based medical devices to the human body to any person not authorized to practice medicine and surgery, osteopathic medicine and surgery or podiatric medicine and surgery pursuant to Chapter 4731. of the Revised Code.* [Emphasis added]
- (D) A violation of paragraph (C) of this rule shall constitute “a departure from, or the failure to conform to, minimal standards of care of similar practitioners under the same or similar circumstances, whether or not actual injury to a patient is established,” as that clause is used in division (B)(6) of section 4731.22 of the Revised Code and “violating or attempting to violate, directly or indirectly, or assisting in or abetting the violation of, or conspiring to violate, any provisions of this chapter or any rule promulgated by the board,” as that clause is used in division (B)(20) of section 4731.22 of the Revised Code, to wit: section 4731.41 of the Revised Code.

Rule 4731-18-03, Delegation of the use of light based medical devices, states in relevant part:

- (A) *A physician licensed pursuant to Chapter 4731. of the Revised Code may delegate the application of light based medical devices only for the purpose of hair removal and only if all the following conditions are met:* [All emphases added]
- (1) The light based medical device has been specifically approved by the United States food and drug administration for the removal of hair from the human body; and
 - (2) The use of the light based medical device for the purpose of hair removal is within the physician’s normal course of practice and expertise; and
 - (3) The physician has seen and personally evaluated the patient to determine whether the proposed application of a light based medical device is appropriate; and,
 - (4) The physician has seen and personally evaluated the patient following the initial application of a light based medical device, but prior to any continuation of treatment in order to determine that the patient responded well to that initial application; and,
 - (5) *The person to whom the delegation is made is one of the following:*
 - (a) A physician assistant registered pursuant to Chapter 4730. of the Revised Code and the physician has a board approved supplemental utilization plan allowing such delegation; or,
 - (b) A cosmetic therapist licensed pursuant to Chapter 4731. of the Revised Code; or,

- (c) *A registered nurse or licensed practical nurse licensed pursuant to Chapter 4723. of the Revised Code; and,*
- (6) The person to whom the delegation is made has received adequate education and training to provide the level of skill and care required; and,
- (7) *The physician provides on-site supervision at all times the person to whom the delegation is made is applying the light based medical device; and,*
- (8) The physician supervises no more than two persons pursuant to this rule at the same time.

* * *

- (D) *For purposes of this rule, on-site supervision requires the physical presence of the supervising physician in the same location (i.e., the physician's office suite) as the cosmetic therapist, physician assistant, registered nurse or licensed practical nurse, but does not require his or her presence in the same room.*

* * *

- (F) A violation of paragraph (A) (B) or (C) of this rule by a physician shall constitute "a departure from, or the failure to conform to, minimal standards of care of similar practitioners under the same or similar circumstances, whether or not actual injury to a patient is established," as that clause is used in division (B)(6) of section 4731.22 of the Revised Code. A violation of division (A)(5) of this rule shall constitute "violating or attempting to violate, directly or indirectly, or assisting in or abetting the violation of, or conspiring to violate, any provisions of this chapter or any rule promulgated by the board," as that clause is used in division (B)(20) of section 4731.22 of the Revised Code, to wit: section 4731.41 of the Revised Code.

Rule 4731-18-04, Delegation of the use of light based medical devices; Exceptions, states:

- (A) A physician authorized pursuant to Chapter 4731. of the Revised Code to practice medicine and surgery or osteopathic medicine and surgery may delegate to any appropriate person the application of light based medical devices approved by the United States food and drug administration for phototherapy in treatment of hyperbilirubinemia in neonates.
- (B) A physician authorized pursuant to Chapter 4731. of the Revised Code to practice medicine and surgery or osteopathic medicine and surgery may delegate to any appropriate person the application of a light based medical device that is a fluorescent lamp phototherapy device for treatment of psoriasis and similar skin diseases. A fluorescent lamp phototherapy device is a device that emits ultraviolet light through the use of one or more fluorescent bulbs and is approved by the

United States food and drug administration for phototherapy in the treatment of psoriasis or similar skin diseases.

FINDINGS OF FACT

1. On December 12, 2007, the Board issued to Ali Khan, M.D., an Order that imposed the permanent revocation of his medical license, stayed the revocation subject to suspension for 30 days, and established subsequent probationary terms, conditions, and limitations for at least two years. The Order was based on Dr. Khan having pled guilty to one misdemeanor count of Theft of a credit card from a nurse while he was working in an emergency department. The Order became effective on February 3, 2008. Dr. Khan currently remains subject to the terms, conditions, and limitations of the Order.
 - a. Pursuant to paragraph B.1 of the Order, Dr. Khan is required to obey all federal, state, and local laws, and all rules governing the practice of medicine and surgery in Ohio.
2. In 2009, Dr. Khan purchased and took delivery of multiple 100-unit vials of Botox that were not FDA-approved. Further, although not proven directly at hearing, it is reasonable to find that Dr. Khan utilized some of the non FDA-approved Botox in his practice. It is very unlikely that he purchased the Botox and then disposed of it some other way. Moreover, Dr. Khan did not deny or contest whether he had used some of the non FDA-approved Botox in his practice.

Dr. Khan asserted that he had been unaware that the Botox that he had purchased from Jon Robinson was not FDA-approved, but these assertions are unconvincing. First, according to Ms. Leatherman, the individual boxes purchased from Jon Robinson lacked a hologram that was always present on the boxes that came from Allergan. Second, Dr. Khan himself testified that the boxes from Jon Robinson were a slightly different color than the boxes he received from Allergan. Third, the boxes were clearly labeled as having been manufactured in Ireland, and there was no information on the boxes concerning FDA approval. Dr. Khan's statement to Investigator Myers that he never read the labels on the boxes is not credible. Fourth, the email receipts he received from Mr. Robinson informed Dr. Khan that his credit card could be billed by entities with names such as "Global Health Supplies," "Global Meds," and "Canada Health Solutions," and that the amount charged could vary depending on factors such as "daily changes in currency exchange rates * * *." Again, Dr. Khan's statement to Investigator Myers that he never read or paid any attention to that information is simply not credible.

Any or all of these factors should have led Dr. Khan to realize that there was a problem with the product he received from Mr. Robinson. Moreover, Dr. Khan cannot excuse his conduct by claiming a lack of knowledge—willful blindness is not an excuse. Accordingly, Dr. Khan's assertion that he had been unaware that the Botox was not FDA-approved is not accepted.

3. From 2007 to 2009, Dr. Khan provided care in the routine course of his practice to Patients 4, 6, and 7, as identified on a confidential Patient Key.
4. On November 23, 2007, and December 14, 2007, Dr. Khan permitted a person not licensed to practice medicine and surgery (“non-physician”)¹⁸ to perform laser skin treatments on Patient 4. In an entry dated March 18, 2008, Dr. Khan indicated in a progress note in Patient 4’s chart that “all Tx done by me and nurse with direct supervision.” Further, on October 6, 2008, Dr. Khan generated a letter regarding Patient 4 in which he stated: “regarding [Patient 4] all procedure[s] [were] done by me or under supervision.”

In fact, Dr. Khan did not personally perform nor did he supervise the laser skin treatment procedure that Patient 4 received on November 23, 2007. Rather, Dr. Khan allowed a non-physician to perform a laser skin treatment on Patient 4 at his office. Moreover, Patient 4 testified that she had been told by Ms. Mazur that day that she could not receive lidocaine prior to the procedure because Dr. Khan was not at the office. The Hearing Examiner believes that Patient 4 is a highly credible witness. In addition, Dr. Khan’s appointment schedule for November 23, 2007, does not prove that he had been present in the office during Patient 4’s first procedure because Dr. Khan was not scheduled for a procedure until later in the day. Further, Dr. Khan was unable to recall with certainty that he had been in the office at the time Patient 4 underwent her procedure. Accordingly, the evidence supports a finding that Patient 4’s first procedure occurred without Dr. Khan’s supervision or presence at the office.

In addition, the evidence supports a finding that on December 14, 2007, Dr. Khan allowed a non-physician to perform a laser skin treatment on Patient 4 at his office and was never present in the room during the treatment. Dr. Khan and/or his insurer subsequently paid \$85,000.00 to Patient 4 and her husband in settlement of Patient 4’s claims against him related to these events.

Dr. Khan asserted that, at the time Patient 4’s procedures were performed, he had believed that nurses in Ohio were allowed to perform the laser skin procedure that Ms. Mazur performed on Patient 4. Dr. Khan and Ms. Mazur both testified that a nurse had trained them on how to use the Lux1540 fractional laser handpiece. Their testimony was corroborated to a large extent by Dr. Khan’s and Ms. Mazur’s certificates of training which were indeed signed by a nurse. Dr. Khan asserted that that had led him to believe that nurses are allowed to use that device.

With respect to his statements in Patient 4’s chart that he had either performed or supervised both procedures, Dr. Khan defined supervision in such a broad and self-serving way as to render it meaningless. It is at odds with the Board’s rules, which requires “on-site” supervision over nurses performing light-based therapy. Moreover, it is undisputed that Dr. Khan did not personally perform either procedure.

¹⁸ The Notice referred to “a person not licensed to perform medicine and surgery” as an “unlicensed person.” (St. Ex. 1A)

5. Evidence presented by the State, including Patient 7's chart, Patient 7's credit card receipt, and the testimony of Patient 7, establishes that on June 2, 2008, Dr. Khan permitted a non-physician to perform a "photofacial" laser skin treatment on Patient 7's face.
6. The evidence supports a finding that Dr. Khan reused a liner from a prior liposuction procedure during a March 31, 2009 liposuction procedure on Patient 6. The Hearing Examiner found Ms. Leatherman's testimony regarding that incident to be convincing. Moreover, her testimony was consistent with the statement she had made to Investigator Myers during Investigator Myers' investigation.

Dr. Khan asserted that a photograph of the liner used in Patient 6's procedure shows that it had been a new liner. However, the photograph shows only one angle and does not convincingly demonstrate that the liner did not have a second pair of initials on it. Moreover, the Hearing Examiner does not believe Dr. Khan's assertion that Ms. Leatherman is lying because she is a disgruntled ex-employee. It is clear from the printout of a Facebook chat that Ms. Leatherman had been very angry with him in November 2009; however, the chat preceded her testimony by about two years. The Hearing Examiner does not believe that Ms. Leatherman lied under oath at hearing to get revenge on Dr. Khan. Aside from the revenge issue, there is no evidence that Ms. Leatherman had anything to gain by lying about Dr. Khan reusing a canister liner. Accordingly, Dr. Khan's assertions are not persuasive.

- 7.a. The evidence is insufficient to find that Dr. Khan inappropriately reused single use medical supplies with respect to Botox syringes. Ms. Mazur testified that this had occurred; however, her recollection concerning these events seemed very uncertain, particularly during cross-examination. If this occurred, it appears that Ms. Mazur's memory with respect to this issue has faded to the point of being unreliable. Therefore, the State did not prove by a preponderance of the evidence that Dr. Khan reused Botox syringes.
- 7.b. For the reasons set forth below, the evidence is insufficient to find that, on one occasion, Dr. Khan inappropriately reused a single-use item, liposuction aspiration tubing, that had become contaminated by blood and other bodily fluids.

Ms. Mazur testified that her job duties included assisting Dr. Khan during liposuction procedures. According to Ms. Mazur, on one occasion, Pure MD had run out of aspiration tubing prior to the last procedure of the day, and Dr. Khan told her to reuse aspiration tubing that had been used during a previous patient's procedure. Dr. Khan then performed the last procedure of the day with the reused tubing. The evidence establishes that aspiration tubing is a single-use, sterile item that must be discarded following use.

Ms. Mazur testified that, when she assisted Dr. Khan with liposuction procedures, her duties included setting up the aspiration machine. Setting up the machine included attaching the aspiration tubing to the canister lid. When presented with a photograph of the aspiration machine, however, Ms. Mazur misidentified the vacuum tube as the aspiration tube. The evidence establishes that vacuum tubing is part of the canister, and is reusable.

Ms. Mazur's misidentification of the vacuum tubing does not necessarily diminish her reliability as a witness. The photograph of the aspiration machine shows only one piece of tubing attached to the canister lid, which may not be the way the machine would appear when set up for a procedure. During a procedure, there must be two pieces of tubing attached to the lid: the vacuum tubing that creates suction and the aspiration tubing which uses the suction to draw fat and other fluid out of the patient and deposit it into the canister liner. Accordingly, this misidentification, by itself, does not necessarily diminish her reliability as a witness.

Nevertheless, Ms. Mazur made other statements during the hearing that caused the Hearing Examiner to question her reliability as a witness. First, she was unable to recall what year she began working for Dr. Khan. This seemed odd because it was not that long ago, possibly around 2006. Second, Ms. Mazur testified that Dr. Khan had asked her to state during court proceedings that Dr. Khan had performed the laser skin procedures on Patient 4, and not her. However, this statement contradicts the statement that she had originally made to Investigator Myers during the investigation. At that time, Ms. Mazur told Investigator Myers that Dr. Khan asked her to state that he had been present during Patient 4's laser skin procedures, which significantly differs from her testimony at hearing.¹⁹ Third, Ms. Mazur's recollection and testimony concerning Dr. Khan's reuse of Botox syringes was uncertain and confusing.

Dr. Khan argued that Ms. Mazur is a disgruntled ex-employee who might have lied during her testimony. However, the Hearing Examiner does not believe that Ms. Mazur was untruthful. There was no evidence produced that Ms. Mazur had anything to gain by testifying falsely about Dr. Khan. In fact, her testimony may have been offered against her own interest as a nurse to any extent that she admitted participating in the reuse of a single-use item. Moreover, if she was simply lying about the alleged incident, there would have been no reason for her to express uncertainty whether a liner had also been reused during the same procedure, as she did at the hearing. Accordingly, the Hearing Examiner believes Ms. Mazur to be a truthful witness. However, witness reliability requires both truthfulness and an ability to recall events accurately. Based upon the evidence presented, the Hearing Examiner finds Ms. Mazur's testimony with regard to this issue to be unreliable based on her inability to recall events accurately. Accordingly, the evidence is insufficient to support a finding that Dr. Khan reused aspiration tubing that had become contaminated by blood and other bodily fluids.

CONCLUSIONS OF LAW

1. For the reasons set forth below, Dr. Khan's acts, conduct, and/or omissions as described in Finding of Fact 4, individually and/or collectively, constitute "[m]aking a false, fraudulent, deceptive, or misleading statement in the solicitation of or advertising for patients; in

¹⁹ Dr. Khan was not charged with asking Ms. Mazur to make false statements during a court proceeding, nor does the evidence establish that that actually occurred. This testimony was offered and evaluated only for the limited purpose of assessing witness credibility.

relation to the practice of medicine and surgery, osteopathic medicine and surgery, podiatric medicine and surgery, or a limited branch of medicine; or in securing or attempting to secure any certificate to practice or certificate of registration issued by the board,” as that clause is used in R.C. 4731.22(B)(5).

As set forth in Finding of Fact 4, Patient 4 received her first treatment on November 23, 2007, which was performed by Ms. Mazur. The evidence establishes that Dr. Khan was not in the office at the time of the procedure. Patient 4 received her second treatment on December 14, 2007, also performed by Ms. Mazur. The evidence establishes that Dr. Khan had been present in the office at the time of the second procedure.

With respect to R.C. 4731.22(B)(5), the conduct at issue concerns two statements made by Dr. Khan that are included in Patient 4’s chart. Each of these statements concerns both of the aforementioned procedures. The first statement is included in a March 18, 2008 progress note that documents a telephone conversation that occurred that day between Dr. Khan and Patient 4. It states that the procedures had been performed by Dr. Khan and a nurse with direct supervision. The second statement is included in a letter dated October 6, 2008, that Dr. Khan wrote for Patient 4’s husband. It states that all procedures had been performed by Dr. Khan *or* under supervision.

Both statements are clearly false with respect to the first procedure. Dr. Khan did not perform that procedure nor was he even present in the office when the procedure was performed. Further, the March 18, 2008 progress note is also clearly false with respect to the second procedure. In it, Dr. Khan stated that he had actually been involved in performing the procedure and provided “direct supervision,” which he did not. Moreover, the evidence is sufficient to conclude that the October 6, 2008 statement concerning the second procedure was also false because it suggested that Dr. Khan *might* have performed the procedure, and Dr. Khan knew or should have known that he did not. Dr. Khan himself testified that it should have been obvious to anyone who reviewed the chart that both procedures had been performed by Ms. Mazur, and Patient 4’s chart was available to Dr. Khan. Accordingly, the evidence is sufficient to find that Dr. Khan violated R.C. 4731.22(B)(5).

2. For the reasons that follow, Dr. Khan’s acts, conduct, and/or omissions as described in Finding of Fact 4, individually and/or collectively, constitute “[c]ommission of an act that constitutes a felony in this state, regardless of the jurisdiction in which the act was committed,” as that clause is used in R.C. 4731.22(B)(10), to wit: R.C. 2923.03, Complicity, as applied to R.C. 4731.41, Practice of Medicine or Surgery without Certificate, based upon violations of Rules 4731-18-02 and 4731-18-03. Pursuant to R.C. 4731.99(A), violation of R.C. 4731.41 constitutes a felony offense.

As set forth in Rule 4731-18-02(B), the application of light-based medical devices to the human body constitutes the practice of medicine. However, Rule 4731-18-02(C) provides that, under exceptions set forth in to Rules 4731-18-03 and 4731-18-04, physicians may delegate the application of light-based medical devices to non-physicians. However, none

of these exceptions apply to Finding of Fact 4. The evidence establishes that Dr. Khan delegated to a non-physician the application of fractional laser treatment to Patient 4. In so doing, Dr. Khan was complicit in the offense of practicing medicine without a certificate, in violation of R.C. 4731.41.

Dr. Khan asserted that he had believed that nurses were allowed to perform fractional laser procedures because he and Ms. Mazur had been trained by a nurse to use the fractional laser handpiece. Therefore, he implied, it had been reasonable for him to believe that nurses could perform fractional laser treatment and to allow Ms. Mazur to perform such treatment on patients. The Hearing Examiner believes Dr. Khan's assertion that he and Ms. Mazur were trained by a nurse; however, the Hearing Examiner does not believe that it was reasonable for Dr. Khan to therefore allow Ms. Mazur to perform fractional laser procedures. Physicians are required to be familiar with the laws and rules that govern their profession. This is especially necessary with respect to laws and rules that have direct patient-safety ramifications, as do the Board's rules concerning the delegation of light-based treatment.²⁰ Moreover, with respect to acts constituting a crime, the State is not required to prove that the licensee actually intended to commit a crime. The State must simply prove that the licensee intended to commit the acts that constitute a crime. Accordingly, the evidence is sufficient to support a conclusion that Dr. Khan violated R.C. 4731.22(B)(10).

3. For the reasons that follow, the evidence is sufficient to find that Dr. Khan's acts, conduct, and/or omissions as described in Finding of Fact 5, individually and/or collectively, constitute "[c]ommission of an act that constitutes a felony in this state, regardless of the jurisdiction in which the act was committed," as that clause is used in R.C. 4731.22(B)(10), to wit: R.C. 2923.03, Complicity, as applied to R.C. 4731.41, Practice of Medicine or Surgery without Certificate, based upon violations of Rules 4731-18-02 and 4731-18-03. Pursuant to R.C. 4731.99(A), violation of R.C. 4731.41 constitutes a felony offense.

Rule 4731-18-04(B) authorizes physicians to delegate to any appropriate person the application of fluorescent lamp phototherapy that emits ultraviolet light to a patient to treat psoriasis and similar skin diseases. With respect to Finding of Fact 5, Dr. Khan delegated to Ms. Mazur the task of applying photofacial laser skin treatment to Patient 7's face for the treatment of "sun spots." No evidence was presented concerning: (1) the nature of the photofacial light, or (2) whether sun spots are a condition related to psoriasis. However, the Hearing Examiner strongly suspects that photofacial light is not ultraviolet. It is common knowledge that ultraviolet light causes a person's skin to darken, and the evidence implied that the photofacial light that Ms. Mazur applied to Patient 7 has a bleaching effect. Moreover, the Hearing Examiner further suspects that psoriasis and conditions related to psoriasis are more serious than a sun spot, which the evidence suggests is skin discoloration resulting from sun exposure. Accordingly, the Hearing Examiner concludes that no exception applies to Dr. Khan's delegation of photofacial laser skin treatment to

²⁰ In making this statement, the Hearing Examiner is not suggesting, nor should the Board conclude, that Patient 4 was injured as a result of Dr. Khan's delegation of her treatment to Ms. Mazur. The statement simply reflects that the rules concerning light-based treatment directly relate to patient safety.

Ms. Mazur, and that his conduct violated R.C. 4731.22(B)(10). If the Board, as an expert panel, determines that the exception set forth in Rule 4731-18-04(B) applies to these facts, then it should modify this conclusion in a manner consistent with its determination.

4. For the reasons that follow, Dr. Khan's acts, conduct, and/or omissions as described in Finding of Fact 2, individually and/or collectively, constitute "[c]ommission of an act in the course of practice that constitutes a misdemeanor in this state, regardless of the jurisdiction in which the act was committed," as that clause is used in R.C. 4731.22(B)(12), to wit: 21 U.S.C. 331(a), Prohibited Acts. That statute prohibits "[t]he introduction or delivery for introduction into interstate commerce of any * * * drug * * * that is adulterated or misbranded."

Botox is a drug that has been approved by the FDA and is legally available in the United States. However, on occasion, Dr. Khan purchased cheaper, foreign-made Botox that was not FDA-approved and injected it into patients. There is no evidence that Dr. Khan advised his patients that they were receiving unapproved Botox; in fact, that would be contrary to Dr. Khan's claim that he had been unaware that the Botox he purchased from Jon Robinson was not FDA-approved.

The State argued that Dr. Khan's conduct in purchasing non FDA-approved Botox and administering it to his patients would violate 21 U.S.C. 331(a). In support of its argument, the State relied on *U.S. v. Patwardhan*, 2011 U.S. App. LEXIS 5666 (9th Cir. 2011). The case underlying that appeal, *U.S. v. Patwardhan*, 2009 U.S. Dist. LEXIS 66051 (C.D.Ca 2009), concerned Dr. Patwardhan's motion for acquittal and/or new trial. The district court noted that Dr. Patwardhan had been convicted of several violations of federal law, including 21 U.S.C. 331(a), based upon, among other things, distributing foreign, non FDA-approved drugs to his patients. In affirming the district court's decision to deny Dr. Patwardhan's motion, the appeals court found that Dr. Patwardhan's conviction had been supported by findings including that Dr. Patwardhan "never informed his patients that the drugs administered to them during in-office treatments were not FDA-approved." *U.S. v. Patwardhan*, 2011 U.S. App. LEXIS 5666 at 5.²¹

The facts of the *Patwardhan* case are much more complex than in Dr. Khan's case. However, they are similar with respect to importing foreign, non FDA-approved drugs and administering them to patients without advising the patients that they are not FDA-approved. Like Dr. Patwardhan, Dr. Khan effectively provided to his patients a misbranded drug. Accordingly, Dr. Khan's conduct violated R.C. 4731.22(B)(12) based upon violation of 21 U.S.C. 331(a).

5. For the reasons set forth below, the evidence is sufficient to conclude that Dr. Khan's acts, conduct, and/or omissions as set forth in Finding of Fact 4, individually and/or collectively, constitute "[c]ommission of an act in the course of practice that constitutes a misdemeanor in this state, regardless of the jurisdiction in which the act was committed," as that clause is used in R.C. 4731.22(B)(12), to wit: R.C.2913.42, Tampering with Records.

²¹ The appeals court decision is appended to the State's written closing argument. (St. Ex. 16)

R.C. 2913.42, makes it illegal for anyone who has no privilege to do so to “[f]alsify * * * any writing, computer software, data, or record” with purpose to defraud or knowing that he or she is facilitating a fraud. The question is whether a false statement in a medical record, by itself, constitutes “falsifying” a medical record. The Hearing Examiner believes that it does because physicians have a duty to maintain accurate medical records. Moreover, Dr. Khan’s purpose to defraud may be inferred from the circumstances: Dr. Khan learned that his patient had suffered an injury related to a procedure performed in his office. He would logically have been concerned about a possible lawsuit and, because of his previous contact with the Board, future Board action as well. Further, the fact that he later acknowledged in a court filing that Ms. Mazur had performed the procedures is not exonerating. What matters is his mental state at the time he recorded the false statements in Patient 4’s chart. Accordingly, the evidence is sufficient to support a conclusion that Dr. Khan violated R.C. 4731.22(B)(12) based upon violation of R.C. 2913.42.

6. Dr. Khan’s acts, conduct, and/or omissions as described in Findings of Fact 1 through 6, individually and/or collectively, that occurred on or after February 3, 2008, the effective date of the Board Order, constitute a “[v]iolation of the conditions of limitation placed by the board upon a certificate to practice,” as that clause is used in R.C. 4731.22(B)(15).

Moreover, Dr. Khan’s conduct in delegating Patient 4’s light-based treatment to Ms. Mazur, as described in Finding of Fact 4, does not support violation of R.C. 4731.22(B)(15) because both of Patient 4’s procedures occurred prior to the effective date of the Board Order.

7. The evidence does not support a conclusion that Dr. Khan’s acts, conduct, and/or omissions, as described in Finding of Fact 2, individually and/or collectively, constitute “[c]ommission of an act that constitutes a felony in this state, regardless of the jurisdiction in which the act was committed,” as that clause is used in R.C. 4731.22(B)(10), to wit: R.C. 2925.09, Unapproved Drugs.

R.C. 2925.09(A) states, in relevant part, that “[n]o person shall administer, dispense, * * * possess, * * * or use any drug * * * that is not approved by the United States food and drug administration,” unless certain enumerated exceptions apply. Dr. Khan argued that his use of non FDA-approved Botox did not violate R.C. 2925.09 because it fell under one of the enumerated exceptions. Specifically, he argues that the exception enumerated in R.C. 2925.09(A)(3) is applicable.

R.C. 2925.09(A)(3) specifies that R.C. 2925.09(A) does not apply when “[a] licensed health professional authorized to prescribe drugs, other than a veterinarian, prescribes or combines two or more drugs as a single product for medical purposes.” Dr. Khan argued that he falls under that exception because Botox is shipped dry and must be reconstituted by adding saline solution to the Botox vial. Dr. Khan further argued that, pursuant to the definition of “drug” as used in R.C. 2925.09, saline constitutes a drug. Accordingly, he argued, because Botox must be mixed with saline solution before it is injected, he had combined “two or more drugs as a single product for medical purposes” and that the exception applies.

R.C. 2925.01 defines the term “drug” as used in R.C. 2925.09, and simply refers to one of the statutes governing the Ohio State Board of Pharmacy; specifically, R.C. 4729.01. Subsection (E) of R.C. 4729.01, sets forth the following definition of “drug”:

- (1) Any article recognized in the United States pharmacopoeia and national formulary, or any supplement to them, intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in humans or animals;
- (2) Any other article intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in humans or animals;
- (3) Any article, other than food, intended to affect the structure or any function of the body of humans or animals;
- (4) Any article intended for use as a component of any article specified in division (E)(1), (2), or (3) of this section; but does not include devices or their components, parts, or accessories.

Dr. Khan argued that saline solution can be used to rehydrate a person, which affects the person’s blood by increasing its fluid volume. The Hearing Examiner agrees that, under the broad definition of “drug” set forth in R.C. 4729.01(E), saline solution constitutes a drug. Moreover, R.C. 2925(A)(3) provides an exception for a physician who “combines two or more drugs as a single product for medical purposes.” No other qualifiers or requirements are set forth. Accordingly, the Hearing Examiner finds Dr. Khan’s argument to be persuasive and concludes that the exception listed in R.C. 2925.09(A)(3) applies to this case. Therefore, Dr. Khan’s conduct as set forth in Finding of Fact 2 did not violate R.C. 4731.22(B)(10) based upon acts constituting violation of R.C. 2925.09.

8. The evidence is insufficient to support a conclusion that Dr. Khan’s acts, conduct, and/or omissions as described in Findings of Fact 7.a and 7.b, individually and/or collectively, constitute “violating or attempting to violate, directly or indirectly, or assisting in or abetting the violation of, or conspiring to violate, any provisions of this chapter or any rule promulgated by the board,” as that clause is used in R.C. 4731.22(B)(20), to wit: Rule 4731-17-04(G).

RATIONALE FOR THE PROPOSED ORDER

The evidence establishes that:

- Dr. Khan obtained Botox that was not FDA-approved and used some of it in his practice,
- Dr. Khan allowed a non-physician to perform fractional laser treatment twice on a patient and subsequently made false statements in that patient’s medical record,
- Dr. Khan allowed a non-physician to perform light-based photofacial treatment on another patient, and
- Dr. Khan reused a canister liner during a liposuction procedure on another patient.

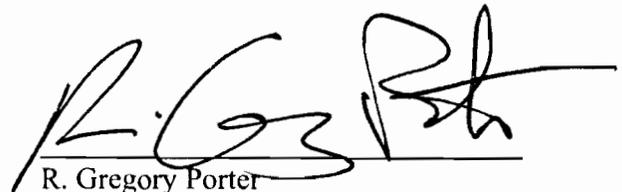
Dr. Khan’s violations of the Ohio Medical Practices Act merit the severest sanction, particularly in light of the Board’s previous stayed permanent revocation.

PROPOSED ORDER

It is hereby ORDERED that:

The certificate of Ali Khan, M.D., to practice medicine and surgery in the State of Ohio shall be PERMANENTLY REVOKED.

This Order shall become effective immediately upon the mailing of the notification of approval by the Board.



R. Gregory Porter
Hearing Examiner



State Medical Board of Ohio

30 E. Broad Street, 3rd Floor, Columbus, OH 43215-6127

Richard A. Whitehouse, Esq.
Executive Director

(614) 466-3934
med.ohio.gov

EXCERPT FROM THE DRAFT MINUTES OF SEPTEMBER 12, 2012

REPORTS AND RECOMMENDATIONS AND PROPOSED FINDINGS AND PROPOSED ORDERS

Dr. Mahajan announced that the Board would now consider the Reports and Recommendations, and the Proposed Findings and Proposed Order appearing on its agenda.

Dr. Mahajan asked whether each member of the Board had received, read and considered the hearing records; the Findings of Fact, Conclusions of Law, Proposed Orders, and any objections filed in the matters of: Jose Villavicencio, M.D.; Samuel J. Christian, M.D.; Terry Alan Dragash, D.O.; Yemi M. Fasakin, M.D.; Tumannya Nikol Jones, P.A.; Ali Khan, M.D.; Charmaine Nicole Reese; and Ernesto Compendio Tan, M.D.

A roll call was taken:

ROLL CALL:	Dr. Strafford	- aye
	Dr. Bechtel	- aye
	Mr. Hairston	- aye
	Dr. Suppan	- aye
	Dr. Steinbergh	- aye
	Dr. Mahajan	- aye
	Dr. Madia	- aye
	Dr. Talmage	- aye
	Ms. Elsass	- aye
	Mr. Kenney	- aye
	Dr. Ramprasad	- aye

Dr. Mahajan asked whether each member of the Board understands that the disciplinary guidelines do not limit any sanction to be imposed, and that the range of sanctions available in each matter runs from dismissal to permanent revocation. A roll call was taken:

ROLL CALL:	Dr. Strafford	- aye
	Dr. Bechtel	- aye
	Mr. Hairston	- aye
	Dr. Suppan	- aye
	Dr. Steinbergh	- aye
	Dr. Mahajan	- aye
	Dr. Madia	- aye
	Dr. Talmage	- aye
	Ms. Elsass	- aye
	Mr. Kenney	- aye
	Dr. Ramprasad	- aye

Dr. Mahajan noted that, in accordance with the provision in section 4731.22(F)(2), Ohio Revised Code, specifying that no member of the Board who supervises the investigation of a case shall participate in further adjudication of the case, the Secretary and Supervising Member must abstain from further participation in the adjudication of any disciplinary matters. In the matter before the Board today, Dr. Strafford served as Secretary, Dr. Bechtel served as Supervising Member, and Dr. Talmage served as Secretary and/or Acting Supervising Member.

Dr. Mahajan reminded all parties that no oral motions may be made during these proceedings.

The original Reports and Recommendations shall be maintained in the exhibits section of this Journal.

.....
ALI KHAN, M.D., Case No. 10-CRF-040
.....

Dr. Steinbergh moved to approve and confirm Mr. Porter’s Findings of Fact, Conclusions of Law, and Proposed Order in the matter of Ali Khan, M.D. Mr. Hairston seconded the motion.

.....
Dr. Steinbergh moved to amend Conclusion of Law #7 to read as follows:

7. The evidence supports a conclusion that Dr. Khan’s acts, conduct, and/or omissions, as described in Finding of Fact 2, individually and/or collectively, constitute “[c]ommission of an act that constitutes a felony in this state, regardless of the jurisdiction in which the act was committed,” as that clause is used in R.C. 4731.22(B)(10), to wit: R.C. 2925.09, Unapproved Drugs.

R.C. 2925.09(A) states, in relevant part, that “[n]o person shall administer, dispense, * * * possess, * * * or use any drug * * * that is not approved by the United States food and drug administration,” unless certain enumerated exceptions apply. Dr. Khan argued that his use of non FDA approved Botox did not violate R.C. 2925.09 because it fell under one of the enumerated exceptions. Specifically, he argues that the exception enumerated in R.C. 2925.09(A)(3) is applicable.

R.C. 2925.09(A)(3) specifies that R.C. 2925.09(A) does not apply when “[a] licensed health professional authorized to prescribe drugs, other than a veterinarian, prescribes or combines two or more drugs as a single product for medical purposes.” Dr. Khan argued that he falls under that exception because Botox is shipped dry and must be reconstituted

by adding saline solution to the Botox vial. Dr. Khan further argued that, pursuant to the definition of “drug” as used in R.C. 2925.09, saline constitutes a drug. Accordingly, he argued, because Botox must be mixed with saline solution before it is injected, he had combined “two or more drugs as a single product for medical purposes” and that the exception applies.

R.C. 2925.01 defines the term “drug” as used in R.C. 2925.09, and simply refers to one of the statutes governing the Ohio State Board of Pharmacy; specifically, R.C. 4729.01. Subsection (E) of R.C. 4729.01, sets forth the following definition of “drug”:

- (1) Any article recognized in the United States pharmacopoeia and national formulary, or any supplement to them, intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in humans or animals;
- (2) Any other article intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in humans or animals;
- (3) Any article, other than food, intended to affect the structure or any function of the body of humans or animals;
- (4) Any article intended for use as a component of any article specified in division (E)(1), (2), or (3) of this section; but does not include devices or their components, parts, or accessories.

Dr. Khan argued that saline solution can be used to rehydrate a person, which affects the person’s blood by increasing its fluid volume. However, as used by Dr. Khan, the saline solution does not constitute a drug under Section 4729.01(E)(3). The saline was used as a diluent to reconstitute a powder form of Botox so that it could be injected, not for the purpose of rehydrating the patient.

The R.C. 2925(A)(3) exception for a physician who “combines two or more drugs as a single product for medical purposes” is also not applicable. As discussed above, saline that is used as a diluent to reconstitute a powder form of a drug does not itself constitute a drug. Moreover, by ordering and receiving the non-FDA approved powder form of Botox Dr. Khan violated Section 2925.09(A). Adding the legal saline to the illegal Botox powder does not somehow magically make the reconstituted Botox legal. Section 2925.09(A) cannot be read as providing a mechanism for making an illegal drug legal simply by adding saline.

It is concluded that the exception in Section 2925.09(A)(3) does not apply to this case. Therefore, Dr. Khan’s conduct as set forth in Finding of Fact 2 violated R.C. 4731.22(B)(10) based upon acts constituting violation of R.C. 2925.09.

Dr. Madia seconded the motion.

.....
A vote was taken on Dr. Steinbergh's motion to amend:

ROLL CALL:	Dr. Strafford	- abstain
	Dr. Bechtel	- abstain
	Mr. Hairston	- aye
	Dr. Suppan	- aye
	Dr. Steinbergh	- aye
	Dr. Mahajan	- aye
	Dr. Madia	- aye
	Dr. Talmage	- abstain
	Ms. Elsass	- aye
	Mr. Kenney	- aye
	Dr. Ramprasad	- aye

The motion to amend carried.

Dr. Steinbergh moved to approve and confirm Mr. Porter's Findings of Fact, Conclusions of Law, and Proposed Order, as amended, in the matter of Ali Khan, M.D. Mr. Hairston seconded the motion.

.....
A vote was taken on Dr. Steinbergh's motion to approve:

ROLL CALL:	Dr. Strafford	- abstain
	Dr. Bechtel	- abstain
	Mr. Hairston	- aye
	Dr. Suppan	- aye
	Dr. Steinbergh	- aye
	Dr. Mahajan	- aye
	Dr. Madia	- aye
	Dr. Talmage	- abstain
	Ms. Elsass	- aye
	Mr. Kenney	- aye
	Dr. Ramprasad	- aye

The motion to approve carried.

THE STATE MEDICAL BOARD OF OHIO

ATTN: Case Control Office
30 E. Broad Street, 3rd Floor
Columbus, Ohio 43215

In the Matter of

ALI KHAN, M.D.

Hearing Examiner : Porter

Case No. 10-CRF-040

ORDER AND ENTRY

On April 14, 2010, the State Medical Board of Ohio, issued a Notice of Opportunity for Hearing to Ali Khan, M.D., based on allegations including that Dr. Khan failed to adhere to the required rules for office based surgery, as set forth in Ohio Administrative Code Chapter 4731-25, in his treatment of Patients 1, 2, 3, 5 and 6 (identified in the Confidential Patient Key appended to the April 14, 2010 Notice of Opportunity for Hearing). Furthermore, Dr. Khan is alleged to have violated Ohio Administrative Code Sections 4731-17-04 (disinfection and sterilization); 4731-18-02 (use of light based medical devices); 4731-18-03 (delegation of the use of light based medical devices); Ohio Revised Code Section 4731.22(B)(10) (actions constituting a felony); Ohio Revised Code Section 4731.22(B)(12) (actions constituting a misdemeanor); and Ohio Revised Code Section 4731.22(B)(15) (actions in violations of the conditions of limitations placed by the board upon a certificate to practice).

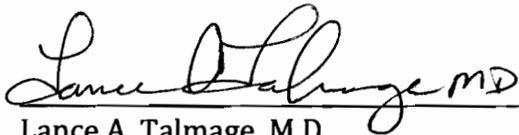
Thereafter, the State Medical Board of Ohio issued its order *In the matter of David Zipfel, M.D.*, (Case No. 09-CRF-138) wherein the Board dismissed similar charges against Dr. Zipfel related to the applicability of Ohio Administrative Code Chapter 4731-25, resulting in the Board determining that it would administratively inefficient to pursue such charges at

the time. In light of the Board's decision in Zipfel and to promote equal application of the law, further pursuit of the allegations against Dr. Khan pertaining to any violations of 4731-25 as charged in the April 14, 2010, Notice of Opportunity for Hearing should be dismissed.

It is hereby ORDERED that the charges contained in paragraphs 3, 6, 6(a), 6(b), 7, 7(a), 7(b), 8, 8(a), 8(b), 9, 9(a), 10, 10(a), and 10(b) specifically based upon alleged violations of Ohio Administrative Code Chapter 4731-25, in the Notice of Opportunity for Hearing be and are hereby DISMISSED WITHOUT PREJUDICE to future action. All other allegations contained in the Notice of Opportunity for hearing shall be unaffected and will proceed to hearing as previously scheduled.

This Order is entered by the State Medical Board of Ohio and on its behalf.

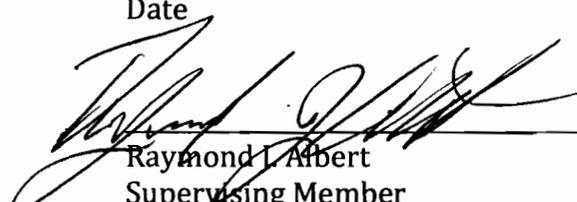
So ORDERED this 10th day of May, 2011.



Lance A. Talmage, M.D.
Secretary

5-10-11

Date



Raymond L. Albert
Supervising Member

5/10/11

Date

cc: Eric Plinke
Dinsmore & Shohl LLP
191 W. Nationwide Blvd., Suite 300
Columbus, Ohio 43215
Certified Mail No.: 91 7108 2133 3936 3073 8058
Return Receipt Requested


State Medical Board of Ohio
30 E. Broad Street, Columbus, OH 43215-6127

Richard A. Whitehouse, Esq.
Executive Director

(614) 466-3934
med.ohio.gov

April 14, 2010

Case number: 10-CRF- 040

Ali Khan, M.D.
4145 Levis Commons Boulevard
Perrysburg, OH 43551

Dear Doctor Khan:

In accordance with Chapter 119., Ohio Revised Code, you are hereby notified that the State Medical Board of Ohio [Board] intends to determine whether or not to limit, revoke, permanently revoke, suspend, refuse to register or reinstate your certificate to practice medicine and surgery, or to reprimand you or place you on probation for one or more of the following reasons:

- (1) On or about December 12, 2007, the Board issued an Order [Order] that set forth the permanent revocation of your medical license, stayed the revocation subject to suspension for thirty days; and established subsequent probationary terms, conditions, and limitations for at least two years. The Order was based on your having pled guilty to one misdemeanor count of Theft of a credit card from a nurse while you were working in an Emergency Department. You currently remain subject to the terms, conditions and limitations of the Order.
- (2) In or about 2009, you unlawfully purchased and took delivery of multiple 100-unit vials of Botox that were not FDA approved, and utilized some of the Botox in your practice.
- (3) During the time period from in or around 2007 to in or around 2009, you provided care in the routine course of your practice to Patients 1 through 7, as identified in the attached Patient Key. (Key is confidential and shall be withheld from public disclosure.)
- (4) On or about November 23, 2007, and December 14, 2007, you permitted a person not licensed to practice medicine and surgery [unlicensed person] to perform laser skin treatments on Patient 4. On or about March 18, 2008, you

Mailed 4-15-10

indicated in a progress note in Patient 4's chart that "all Tx done by me and nurse with direct supervision." Further, on or about October 6, 2008, you generated a letter regarding Patient 4 in which you falsely stated that "regarding all procedure [sic] where [sic] done by me or under supervision[".]"

In fact, you did not personally perform nor did you supervise a laser skin treatment procedure on Patient 4 that was done on or about November 23, 2007. Rather, you allowed an unlicensed person to perform a laser skin treatment on Patient 4 at your office without your presence and/or supervision. In addition, on or about December 14, 2007, you allowed an unlicensed person to perform a laser skin treatment on Patient 4 at your office and you were never in the room during the treatment. You and/or your insurer subsequently paid Patient 4 \$85,000.00 in settlement of Patient 4's claims related to these events.

- (5) On or about June 2, 2008, you permitted an unlicensed person to perform a laser skin treatment on Patient 7's face.
- (6) On or about November 17, 2008, December 15, 2008, and March 30, 2009, you performed office-based surgeries on Patient 1, including a liposuction procedure, but failed to comply with the administrative rules regarding such procedures:
 - (a) Despite the fact that your records reflect your having withdrawn at least 3800 cc, 2000 cc and 2100 cc of total aspirate, respectively, you failed to maintain and/or document intravenous access and/or an intravenous line.
 - (b) You failed to provide the patient with written discharge instructions with specific information concerning the period of time during which symptoms of lidocaine toxicity might appear and specific instructions for the patient to follow should the patient experience such symptoms.
- (7) On or about June 5, 2009, and September 26, 2009, you performed office-based surgeries on Patient 2, including a liposuction procedure, but failed to comply with the administrative rules regarding such procedures:
 - (a) Despite the fact that your records reflect your having withdrawn at least 725 cc and 25 cc of total aspirate, respectively, you failed to maintain and/or document intravenous access and/or an intravenous line.
 - (b) You failed to provide the patient with written discharge instructions with specific information concerning the period of time during which symptoms of lidocaine toxicity might appear and specific instructions for the patient to follow should the patient experience such symptoms.

- (8) On or about June 20, 2008, September 12, 2008, and February 23, 2009, you performed office-based surgeries on Patient 3, including a liposuction procedure, but failed to comply with the administrative rules regarding such procedures:
 - (a) Despite the fact that your records reflect your having withdrawn at least 800 cc, 2525 cc and 2500 cc of total aspirate, respectively, you failed to maintain and/or document intravenous access and/or an intravenous line.
 - (b) You failed to provide the patient with written discharge instructions with specific information concerning the period of time during which symptoms of lidocaine toxicity might appear and specific instructions for the patient to follow should the patient experience such symptoms.
- (9) On or about August 28, 2008, you performed an office-based surgery on Patient 5, including a liposuction procedure, but failed to comply with the administrative rules regarding such procedures:
 - (a) You failed to provide the patient with written discharge instructions with specific information concerning the period of time during which symptoms of lidocaine toxicity might appear and specific instructions for the patient to follow should the patient experience such symptoms.
- (10) On or about March 31, 2009, you performed an office-based surgery on Patient 6, including a liposuction procedure, but failed to comply with the administrative rules regarding such procedures:
 - (a) Despite the fact that your records reflect your having withdrawn at least 250 cc of total aspirate, you failed to maintain and/or document intravenous access and/or an intravenous line.
 - (b) You failed to provide the patient with written discharge instructions with specific information concerning the period of time during which symptoms of lidocaine toxicity might appear and specific instructions for the patient to follow should the patient experience such symptoms.
 - (c) You reused a lining from a prior liposuction procedure during your March 31, 2009 liposuction procedure on Patient 6.
- (11) You inappropriately reused single use medical supplies that had become contaminated by blood or other body fluids.

- (12) Pursuant to paragraph B.1. of the Order, you are required to obey all federal, state, and local laws, and all rules governing the practice of medicine and surgery in Ohio.

Your acts, conduct, and/or omissions as alleged in paragraph (2) above, individually and/or collectively, constitute “[c]ommission of an act that constitutes a felony in this state, regardless of the jurisdiction in which the act was committed,” as that clause is used in Section 4731.22(B)(10), Ohio Revised Code, to wit: Section 2925.09, Ohio Revised Code, Unapproved Drugs.

Further, your acts, conduct, and/or omissions as alleged in paragraph (2) above, individually and/or collectively, constitute “[c]ommission of an act in the course of practice that constitutes a misdemeanor in this state, regardless of the jurisdiction in which the act was committed,” as that clause is used in Section 4731.22(B)(12), Ohio Revised Code, to wit: Title 21, U.S.C. Section 331(a), Prohibited Acts.

Further, your acts, conduct, and/or omissions as alleged in paragraph (4) above, individually and/or collectively, constitute “[c]ommission of an act in the course of practice that constitutes a misdemeanor in this state, regardless of the jurisdiction in which the act was committed,” as that clause is used in Section 4731.22(B)(12), Ohio Revised Code, to wit: 2913.42, Ohio Revised Code, Tampering with Records.

Further, your acts, conduct, and/or omissions as alleged in paragraphs (4) and (5) above, individually and/or collectively, constitute “[c]ommission of an act that constitutes a felony in this state, regardless of the jurisdiction in which the act was committed,” as that clause is used in Section 4731.22(B)(10), Ohio Revised Code, to wit: Section 2923.03, Ohio Revised Code, Complicity, to wit: Section 4731.41, Ohio Revised Code, Practice of Medicine or Surgery without Certificate, to wit: Rules 4731-18-02 and/or 4731-18-03, Ohio Administrative Code. Pursuant to Section 4731.99(A), Ohio Revised Code, violation of Section 4731.41, Ohio Revised Code, constitutes a felony offense.

Further, your acts, conduct, and/or omissions as alleged in paragraph (4) above, individually and/or collectively, constitute “[m]aking a false, fraudulent, deceptive, or misleading statement in the solicitation of or advertising for patients; in relation to the practice of medicine and surgery, osteopathic medicine and surgery, podiatric medicine and surgery, or a limited branch of medicine; or in securing or attempting to secure any certificate to practice or certificate of registration issued by the board,” as that clause is used in Section 4731.22(B)(5), Ohio Revised Code.

Further, your acts, conduct, and/or omissions as alleged in paragraphs (3), (6)(a), (7)(a), (8)(a), and (10)(a) above, individually and/or collectively, constitute “violating or attempting to violate, directly or indirectly, or assisting in or abetting the violation of, or conspiring to violate, any provisions of this chapter or any rule promulgated by the

board,” as that clause is used in Section 4731.22(B)(20), Ohio Revised Code, to wit: Rules 4731-25-05(B)(4) and/or (B)(5) Ohio Administrative Code. Pursuant to Rule 4731-25-05(G), Ohio Administrative Code, a violation of Rules 4731-25-05(B)(4) and/or (B)(5), Ohio Administrative Code, also violates Section 4731.22(B)(6), Ohio Revised Code.

Further, your acts, conduct, and/or omissions as alleged in paragraphs (3), (6)(b), (7)(b), (8)(b), (9)(a), and (10)(b) above, individually and/or collectively, constitute “violating or attempting to violate, directly or indirectly, or assisting in or abetting the violation of, or conspiring to violate, any provisions of this chapter or any rule promulgated by the board,” as that clause is used in Section 4731.22(B)(20), Ohio Revised Code, to wit: Rule 4731-25-05(E) Ohio Administrative Code. Pursuant to Rule 4731-25-05(G), Ohio Administrative Code, a violation of Rule 4731-25-05(E), Ohio Administrative Code, also violates Section 4731.22(B)(6), Ohio Revised Code.

Further, your acts, conduct, and/or omissions as alleged in paragraph (11) above, individually and/or collectively, constitute “violating or attempting to violate, directly or indirectly, or assisting in or abetting the violation of, or conspiring to violate, any provisions of this chapter or any rule promulgated by the board,” as that clause is used in Section 4731.22(B)(20), Ohio Revised Code, to wit: Rule 4731-17-04(G), Ohio Administrative Code. Pursuant to Rule 4731-17-07, Ohio Administrative Code, a violation of Rule 4731-17-04, Ohio Administrative Code, also violates Sections 4731.22 (B)(6), (B)(20) and (B)(29), Ohio Revised Code.

Further, your acts, conduct, and/or omissions as alleged in paragraphs (1) through (12) above, individually and/or collectively, that occurred on or after the effective date of the Order, constitute a “[v]iolation of the conditions of limitation placed by the board upon a certificate to practice,” as that clause is used in Section 4731.22(B)(15), Ohio Revised Code.

Pursuant to Chapter 119., Ohio Revised Code, you are hereby advised that you are entitled to a hearing in this matter. If you wish to request such hearing, the request must be made in writing and must be received in the offices of the State Medical Board within thirty days of the time of mailing of this notice.

You are further advised that, if you timely request a hearing, you are entitled to appear at such hearing in person, or by your attorney, or by such other representative as is permitted to practice before this agency, or you may present your position, arguments, or contentions in writing, and that at the hearing you may present evidence and examine witnesses appearing for or against you.

In the event that there is no request for such hearing received within thirty days of the time of mailing of this notice, the State Medical Board may, in your absence and upon

consideration of this matter, determine whether or not to limit, revoke, permanently revoke, suspend, refuse to register or reinstate your certificate to practice medicine and surgery or to reprimand you or place you on probation.

Please note that, whether or not you request a hearing, Section 4731.22(L), Ohio Revised Code, provides that “[w]hen the board refuses to grant a certificate to an applicant, revokes an individual’s certificate to practice, refuses to register an applicant, or refuses to reinstate an individual’s certificate to practice, the board may specify that its action is permanent. An individual subject to a permanent action taken by the board is forever thereafter ineligible to hold a certificate to practice and the board shall not accept an application for reinstatement of the certificate or for issuance of a new certificate.”

Copies of the applicable sections are enclosed for your information.

Very truly yours,



Lance A. Talmage, M.D.
Secretary

LAT/DPK/flb
Enclosures

CERTIFIED MAIL #91 7108 2133 3936 3067 6749
RETURN RECEIPT REQUESTED

cc: Eric Plinke, Esq.
Dinsmore & Shohl, LLP
191 W Nationwide Boulevard
Suite 300
Columbus, OH 43215-8120

CERTIFIED MAIL #91 7108 2133 3936 3067 6732
RETURN RECEIPT REQUESTED

FILED
COMMON PLEAS COURT
FRANKLIN CO. OHIO

TERMINATION NO. 18
BY FM 2/23/09

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

ALI KHAN, M. D.

Appellant,

vs.

STATE MEDICAL BOARD OF OHIO

Appellee,

CLERK OF COURTS

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:

CASE NO. 08 CVF-01-00880

JUDGE TIMOTHY S. HORTON

FILED
COMMON PLEAS COURT
FRANKLIN CO. OHIO
2009 FEB 27 PM 4:25
CLERK OF COURTS

FINAL APPEALABLE ORDER

DECISION AND ENTRY

AFFIRMING APPELLEE STATE MEDICAL BOARD OF OHIO'S DECEMBER 12, 2007 ORDER ON THE MERITS OF REVISED CODE 119.12

Dated this 12th day of February, 2009

This matter is before the Court on the appeal of Appellant of Appellee's Order dated December 12, 2007, wherein Appellee permanently revoked Appellant's medical license. The Order stayed the permanent revocation and imposed a 30 day suspension of Appellant's medical license followed by probationary terms.

From that Order, Appellant filed a timely appeal with Appellee on January 16, 2008. Appellant contends that the Order was not supported by reliable, probative, and substantial evidence and was not in accordance with law. As set forth below, this Court **AFFIRMS** Appellee's December 12, 2007 Order.

Factual and Procedural History

On June 19, 2006, Appellant was on duty as an E.R. physician at Mercy Hospital in Tiffin, Ohio. Appellant claimed that he found a credit card on the hospital floor while working. Appellant testified that he picked up the card and put it in his pocket. (Tr. P. 34, Lines 10-22) During a break, Appellant testified that he exited the hospital recognizing that the credit card did not belong to him and considered what to do with the card. (Tr. P. 35, Lines 2-20) Appellant testified that he did not look at the card to see to

**HEALTH & HUMAN
MAR 04 2009
SERVICES SECTION**

whom it belonged because he was busy but acknowledged that sometimes the E.R. would get slow and he would go out and return. (Tr. P. 36, Lines 1-6)

However, Appellant's statement to the Tiffin Police varied from his testimony. He told the Police that he put the credit card in his bag and then went out and smoked a cigarette. On the way home, Appellant realized that the card was in his bag. Appellant then used the credit card to purchase gasoline. (Tiffin Police Report, P. 7)

At the hearing, Appellant testified that he found credit card in the same pocket with his own credit cards, money and driver's license. (Tr. P. 38, Lines 13-21) Appellant testified that he did not look at the card when he used it to purchase gasoline and then drove home. (Tr. P. 40, Line 23 – Tr. P. 41, Line 1) Appellant explained that he realized that he had done something wrong after he arrived home and emptied his things on the table. (Tr. P. 38 Lines 19-20)

In response to the Hearing Officer's questioning, Appellant testified that at the time he used the credit card he did not realize or know that he had used a credit card belonging to his co-worker, Lori Myers. (Tr. P. 123, Lines 19-22) Appellant claimed he first looked at the name on the card and realized it belonged to a co-worker after he arrived home. Appellant testified that he attempted to contact the co-worker and left a message for her because he would not be back to work for three or four days. The co-worker testified that she never received any message that Appellant attempted to contact her.

Appellant testified that upon his return to work days later after he admittedly used his co-worker's card, he was vacillating whether to return the card to its rightful owner or put it back on the floor. (Tr. P. 39, Lines 3-4) However, there was not any testimony that Appellant considered repaying the victim, now known to him as his co-worker, Lori Myers, the \$50.27 charged to her credit card. Such actions are not

consistent with correcting an innocent mistake of inadvertently using another person's credit card as Appellant claimed. Such actions are also not consistent with a renunciation of criminal intent.

Appellant was arrested upon his return to the E.R. and subsequently released on bail. Appellant was indicted for a felony, which was resolved with a plea of guilt to theft as a misdemeanor of the first degree.

Standard of Review

Review by this Court of an administrative agency, such as the Appellee, is governed by R.C. 119.12 and the multitude of cases addressing that section. The most often cited case is that of *Univ. of Cincinnati v. Conrad* (1980), 63 Ohio St.2d 108. The *Conrad* decision states that in an administrative appeal filed pursuant to R.C. § 119.12, the trial court must review the agency's order to determine whether it is supported by reliable, probative and substantial evidence and is in accordance with law. The Court stated at pages 111 and 112 that:

In undertaking this hybrid form of review, the Court of Common Pleas must give due deference to the administrative resolution of evidentiary conflicts. For example, when the evidence before the court consists of conflicting testimony of approximately equal weight, the court should defer to the determination of the administrative body, which, as the fact-finder, had the opportunity to observe the demeanor of the witnesses and weigh their credibility. However, the findings of the agency are by no means conclusive.

Where the court, in its appraisal of the evidence, determines that there exist legally significant reasons for discrediting certain evidence relied upon by the administrative body, and necessary to its determination, the court may reverse, vacate or modify the administrative order. Thus, where a witness' testimony is internally inconsistent, or is impeached by evidence of a prior inconsistent statement, the court may properly decide that such testimony should be given no weight. Likewise, where it appears that the administrative determination rests upon inferences improperly drawn from the evidence adduced, the court may reverse the administrative order.

Although review is *de novo*, a reviewing court should defer to the agency's factual findings. See *VFW Post 8586 v. Ohio Liquor Control Comm.* (1998), 83 Ohio St.3d 79.

Quality of proof was articulated by the Ohio Supreme Court in *Our Place, Inc. v. Liquor Control Comm.* (1992), 63 Ohio St.3d 570, 571 as follows:

“Reliable” evidence is dependable; that is, it can be confidently trusted. In order to be reliable, there must be a reasonable probability that the evidence is true. (2) “Probative” evidence is evidence that tends to prove the issue in question; it must be relevant in determining the issue. (3) “Substantial” evidence is evidence with some weight; it must have importance and value.

Based on this authority, the Court will proceed to review this appeal on the merits.

Appellant contends that the Board's finding that Appellant's petty theft conviction was a misdemeanor committed “in the course of practice” as found and used in R.C. § 4731.22(B)(11) is contrary to law and not supported by substantial, reliable and probative evidence in the record. Appellant does not dispute that he was convicted of misdemeanor theft under R.C. § 2913.02(A)(1). Appellant argues that the theft did not occur until after he left work and used a co-worker's credit card to purchase gasoline. Appellant would have the Court to disregard the fact that Appellant knowingly left work with his co-worker's credit card. Appellant submits that he inadvertently used the credit card to purchase gasoline and only later realized that he had done so.

The Board's decision considered and rejected Appellant's argument. The Board explained, “However, the evidence demonstrates that he took Ms. Myer's credit card while on duty at Mercy Hospital and without her consent. Dr. Kahn may not have used the credit card until after he completed his work shift that day, but the stolen property involved in the theft conviction was the credit card *itself* (sic) and the theft occurred

while Dr. Khan was on duty practicing medicine at Mercy Hospital.” (Hearing Officer’s Report, P. 13).

The record supports the Hearing Officer’s findings. By his own admission, Appellant recognized that the credit card he used to purchase gasoline on his way home from work was not his own. Appellant first obtained control over the card while at work and retained control of the card. Appellant told Police that he put the card in his bag at work, then went out on a cigarette break and considered what to do with the card. Appellant told Police that on the way home he realized the card was in the bag and that he stopped and used the card to purchase gasoline. Appellant told the Police that even though he needed more gas later, he decided not to use the card a second time because he felt remorseful. The Hearing Officer was within her discretion to believe or disbelieve this version of events which would support a finding of taking the card while on duty in a manner consistent with a criminal purpose, namely to hide the card for later use.

Applying the test of reasonableness with the common experience of humankind, the Hearing Officer found that Appellant’s explanation for not examining the credit card was not credible. Appellant explained he was too busy but then testified that he had time for a cigarette break.

Further, the Hearing Officer was within her discretion to disbelieve Appellant when he denied knowingly using the credit card at the gas station. The Hearing Officer had two versions of events offered by Appellant. The version Appellant told the Police upon arrest and the version offered at the hearing. The statement given to Police would lead to the conclusion reached by the Hearing Officer; that Appellant knowingly took control of this credit card while at work and on duty practicing medicine and that he knew that the card was not his own, concealed this taking, consciously used the card to

purchase gas, and intended to conceal that use by planning to cover up the crime, i.e. by placing the credit card back on the floor of the E.R. or from where he had taken it.

The Hearing Officer determined that such actions were consistent with committing a theft at work. That inference is permitted when supported, as in the case sub judice, by reliable, probative and substantial evidence in the record. This Court defers to the trier of fact in her determination of credibility.

Appellant argues that even though the theft occurred at the Hospital while he was at work as an E.R. physician, the theft did not occur "in the course of the practice of medicine." Appellant relies on *Davidson v. State Medical Board* (May 7, 1988), 10th Dist. No. 97 AP08-1036 to support of his contention. *Davidson* involved podiatrist's medical billing and documentation deception resulting in a misdemeanor conviction. The *Davidson* court found a sufficient nexus from criminal activity relating to the podiatrist's separating of patient billing records from their medical records (which were the subject of an investigation for fraud) to constitute a crime that occurred "in the course of the practice of medicine." The *Davidson* court examined R.C. § 4731.51, which defined the practice of podiatry and determined that the billing deception was within the course of the practice of podiatry because the misdemeanor involved deception to obtain compensation and the practice of podiatry included the receipt of compensation in exchange for podiatric services.

The Hearing Officer found that the credit card was taken by Appellant while on duty and therefore Appellant committed theft while on duty practicing medicine as an E.R. physician at Mercy Hospital in Tiffin, Ohio. As part of Appellant's duties at the hospital that day and during the time of the theft, Appellant was practicing medicine. (Tr. P. 41, Lines 2-10). Appellant held himself out as a medical doctor and used the hospital facilities to commit the theft. The Hearing Officer's finding that Appellant

committed theft while on duty as an E.R. physician is supported by probative, reliable and substantial evidence.

Additionally, it is undisputed that the theft distracted Appellant from his E.R. duties and Appellant also took time away from his duties to commit and conceal the theft. The Hearing Officer's determination that the theft took place during the course of practicing medicine is supported by the evidence and in accordance with the law. Appellant used his status as a physician to commit the theft.

Appellant also argues that the law does not support a finding that his conduct involved moral turpitude. Appellant submits that his guilty plea to a first degree misdemeanor theft charge did not involve moral turpitude. The Hearing Officer found that Appellant's conduct demonstrated a lack of decency, honesty, and good morals. In light of the case law, she determined that Appellant's conduct involved moral turpitude.

Appellant relies on *Rossiter v. Ohio State Medical Board*, Franklin App. No. 01A-1252, 2002 Ohio 2017. *Rossiter* instructed that:

Acts of moral turpitude, although not subject to an exact definition are characterized by baseness, vileness, or the depravity in private and social duties which man owes to his fellow man, or to society in general. This court has found that moral turpitude is generally defined as an "act or behavior that gravely violates moral sentiment or accepted moral standards of [the] community and is a morally culpable quality held to be present in some criminal offenses as distinguished from others. Such acts must be measured against the accepted standards of morality, honesty, and justice prevailing upon the community's collective conscience, as distilled by a similarly principled judiciary. Proof of a criminal conviction is generally not conclusive of this issue of moral turpitude, which requires consideration of all the circumstances surrounding the illegal conduct. Rather, where moral turpitude is disputed, an independent review of the circumstances underlying criminal convictions is necessary to determine if they manifest the requisite lack of social conscience and depravity beyond an established criminal intent.

Id. at 7-9 (citations omitted).

Rossiter involved a medical doctor who failed to file a single quarterly withholding form for his employees. The *Rossiter* court found that although Dr. Rossiter made a grave mistake in his attempt to resolve a tax matter without competent professional advice, he did not intend to defraud the government nor permanently avoid his tax obligations. There was no indication that the bills and office records maintained by Dr. Rossiter were either inadequate or deceptive.

In contrast to Dr. Rossiter's conduct, Appellant's conduct demonstrated an intention to defraud a co-worker for his own financial interest. Appellant also attempted to permanently avoid paying his co-worker for the use of her credit card and demonstrated his intention to conceal his crime by planning to replace the credit card in the hospital from where he had taken it. However, Appellant's plan was thwarted upon his arrest outside the hospital when he returned to work.

Appellant's conduct was deceptive in that he knowingly used the credit card for his personal purchase. Moreover, Appellant's conduct does not demonstrate any remorse. Appellant failed to repay his co-worker until ordered to do so by the court after his guilty plea. Appellant also told a different version of events to the Hearing Officer than he did to the Tiffin Police upon arrest. Remorse requires complete honesty, not obfuscation.

Appellant fails to offer any authority or factual distinction to the case law relied upon by the Hearing Officer. Based on this Court's independent and thorough review of the record and law, Appellee's Order is supported by reliable, probative and substantial evidence and in accordance with law.

Columbus Bar Association v. Tarmey (1983), 4 Ohio St.3d 81, involved an attorney who was convicted of taking clothing worth \$33.00. *Akron Bar Association v. Carter* (2007), 115 Ohio St. 3d 18, involved felony misuse of a credit card. *Cincinnati*

Bar Association v. Zins (2007), 2007 Ohio 5263, involved an attorney who used customer account information from the bank where he was employed to steal money. *State v. Williams*, (1992) 82 Ohio App. 3d 70, involved misdemeanor theft, the court noted the theft was directly related to the defendant's character for truthfulness. The dominant theme in these cases is that a person took what did not belong to him for personal gain and such conduct involved dishonesty. This Court finds Appellant's conduct was consistent with engaging in dishonest conduct solely for personal financial gain. Appellant took a credit card that he knew was not his own, knowingly used the same, and then hatched a plan to cover-up the misuse. This Court finds that such conduct involves dishonesty for personal financial gain and moral turpitude.

Appellee seeks to have the Court establish a bright-line rule that all theft crimes involve moral turpitude. This Court is disinclined to do so, based on *Rossiter*, supra. Having considered all the facts and circumstances surrounding Appellant's petty theft conviction, the Court affirms Appellee's Order that found Appellant's guilty plea to misdemeanor theft constitutes a misdemeanor involving moral turpitude as set forth in R.C. § 4731.22(B)(13). The Court further finds the Order is supported by reliable, probative, and substantial evidence and is not contrary to law.

Appellant offers that the Order is contrary to law and not supported by substantial, reliable and probative evidence because the Board exceeded its discretion when it imposed probationary terms and conditions restricting Appellant's interstate travel. Appellant argues that because R.C. § 4731 does not explicitly give Appellee authority to restrict travel, such restriction is unlawful. Appellee argues that Appellee has the right to monitor its probationers. The Court agrees that absent monitoring, probation terms are of no effect. The probation condition at issue is procedural.

Because the substantive terms of probation are not challenged, Appellant concedes that they are supported by reliable, probative, and substantial evidence and in accordance with the law. Therefore, the mechanism to assure compliance with the substantive conditions is likewise supported by reliable, probative, and substantial evidence. The Order is narrowly tailored to assure compliance with the substantive conditions precedent to Appellant's readmission to the practice of medicine. The provision does not preclude interstate travel; rather it is essentially a notification requirement by the physician to the Board to assure that probationary monitoring is otherwise being performed.

The Court finds this condition of probation is a lawful and reasonable exercise of Appellee's statutory powers supported by reliable, probative, and substantial evidence. Accordingly, this Court is not free to modify this term of the order. See *Henry's Café, Inc. v. Bd. of Liquor Control* (1959), 170 Ohio St. 233.

Appellant contends that Appellee's Order is not supported by law and is not supported by reliable, probative and substantial evidence because it is an ultra vires act that violates the power of the United States to regulate commerce among the states. Appellant argues that a requirement for him to "obtain permission from the Board for departures or absences from Ohio" violates dormant commerce clause power reserved to the federal government under the United States Constitution.

Appellant is not a supplier or seller of goods. He is an individual whose right to travel may be monitored. If Appellant chooses to remain in Ohio, there would be no effect on interstate commerce. If he chooses to travel out of Ohio, he merely has to obtain permission and provide notification to Appellee to accomplish its legitimate monitoring activity. Appellant has demonstrated no impact on interstate commerce, and the Court can not imagine any significant interstate commercial impact.

The parties agree that if interstate commerce is impacted by this probation condition, the "Pike" test is invoked. That test provides: "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.* (1970), 397 U.S. 137, 142.

Here, the effect of the notification, permission-seeking requirement imposed on Appellant has only an incidental, indirect burden, if any, on interstate commerce. The burden arises out of a statute regulating the practice of medicine, not the movement of goods in commerce. The statute is being applied even-handedly to effectuate a legitimate local interest, namely to monitor appellant's conduct as a condition of his return to the practice of medicine within the State of Ohio. Significantly, the State of Ohio is not prohibiting Appellant from practice in any other State of the Union. The local benefit is to ensure the citizens of Ohio that those who practice medicine in this State do so in accordance with the minimal standards.

The Court, having overruled all four assignments of error offered by Appellant, hereby **AFFIRMS** Appellee's December 12, 2007 Order, which permanently revoked Appellant's medical license, stayed that revocation, and imposed a suspension followed by probationary terms. The Court finds that the Appellee's Order is supported by reliable, probative and substantial evidence and in accordance with law.

IT IS SO ORDERED.



Timothy S. Horton, Judge

COPIES TO:

Eric Plinke, Esq.
191 West Nationwide Boulevard, Suite 300
Columbus, Ohio 43215
Counsel for Appellant

Case No. 08 CV 880

Page 12

Kyle Wilcox, Esq.
30 East Broad Street, 26th Floor
Columbus, Ohio 43215
Counsel for Appellee

BEFORE THE STATE MEDICAL BOARD OF OHIO

FILED
COMMON PLEAS COURT
FRANKLIN CO. OHIO

2008 JAN 16 PM 2: 51

CLERK OF COURTS

ALI KHAN, M.D.
4262 Champlin Drive
Perrysburg, OH 43551,
Appellant,

Case No. 08CVF01-00880

vs.

Judge _____

STATE MEDICAL BOARD OF OHIO
30 East Broad Street, 3rd Floor
Columbus, Ohio 43215
Appellee

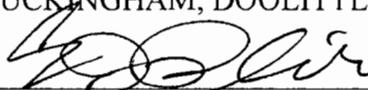
APPEAL FROM THE ENTRY
OF ORDER OF DECEMBER 12, 2007
MAILED JANUARY 4, 2008

APPELLANT'S NOTICE OF APPEAL

Now comes Appellant, Ali Khan, M.D., by and through counsel, and pursuant to O.R.C. § 119.12, hereby gives notice of his appeal of the Entry of Order of the Appellee, State Medical Board of Ohio ("Board"), which permanently revokes his medical license, stays that permanent revocation, and imposes a suspension followed by probationary terms. The Entry of Order is dated December 12, 2007, and was mailed on January 4, 2008 (copy attached hereto as Exhibit A). The basis of the Appellant's Appeal is that the Board's Entry of Order is not supported by substantial, probative, and reliable evidence nor is it in accordance with law.

Respectfully submitted,

BUCKINGHAM, DOOLITTLE & BURROUGHS, LLP



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E-Mail: eplinke@bdblaw.com
Attorneys for Appellant, Ali Khan, M.D.

STATE MEDICAL BOARD
OF OHIO

2008 JAN 16 P 2:34

STATE MEDICAL BOARD
OF OHIO
2008 JAN 31 A 11: 57

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of January, 2008, the foregoing Notice of Appeal was filed via hand delivery with the State Medical Board of Ohio, was filed via hand delivery with the Court of Common Pleas of Franklin County, Ohio, and that a copy was served via ordinary U.S. mail, postage prepaid, upon the following:

Kyle Wilcox
Assistant Attorney General
Ohio Attorney General's Office
Health and Human Services
30 East Broad Street, 26th Floor
Columbus, Ohio 43215



Eric J. Plinke

STATE MEDICAL BOARD
OF OHIO
2008 JAN 16 P 2:34

STATE MEDICAL BOARD
OF OHIO
2008 JAN 31 A 11:57

State Medical Board of Ohio

30 E. Broad Street, Columbus, OH 43215-6127

Richard A. Whitehouse, Esq.
Executive Director

(614) 466-3934
med.ohio.gov



December 12, 2007

Ali Khan, M.D.
4262 Champlin Drive
Perrysburg, OH 43551

Dear Doctor Khan:

Please find enclosed certified copies of the Entry of Order; the Report and Recommendation of Gretchen L. Petrucci, Attorney Hearing Examiner, State Medical Board of Ohio; and an excerpt of draft Minutes of the State Medical Board, meeting in regular session on December 12, 2007, including motions approving and confirming the Findings of Fact and Conclusions of the Hearing Examiner, and adopting an amended Order.

Section 119.12, Ohio Revised Code, may authorize an appeal from this Order. Such an appeal must be taken to the Franklin County Court of Common Pleas.

Such an appeal setting forth the Order appealed from and the grounds of the appeal must be commenced by the filing of an original Notice of Appeal with the State Medical Board of Ohio and a copy of the Notice of Appeal with the Franklin County Court of Common Pleas. Any such appeal must be filed within fifteen (15) days after the mailing of this notice and in accordance with the requirements of Section 119.12, Ohio Revised Code.

THE STATE MEDICAL BOARD OF OHIO

Lance A. Talmage MD
Lance A. Talmage, M.D. *RW*
Secretary

LAT:jam
Enclosures

CERTIFIED MAIL NO. 91 7108 2133 3931 8317 8707
RETURN RECEIPT REQUESTED

Cc: Eric J. Plinke, Esq.
CERTIFIED MAIL NO. 91 7108 2133 3931 8317 8714
RETURN RECEIPT REQUESTED

Mailed 1-04-08

To protect and enhance the health and safety of the public through effective medical regulation



CERTIFICATION

I hereby certify that the attached copy of the Entry of Order of the State Medical Board of Ohio; Report and Recommendation of Gretchen L. Petrucci, State Medical Board Attorney Hearing Examiner; and excerpt of draft Minutes of the State Medical Board, meeting in regular session on December 12, 2007, including motions approving and confirming the Findings of Fact and Conclusions of the Hearing Examiner, and adopting an amended Order; constitute a true and complete copy of the Findings and Order of the State Medical Board in the matter of Ali Khan, M.D., as it appears in the Journal of the State Medical Board of Ohio.

This certification is made by authority of the State Medical Board of Ohio and in its behalf.

Lance A. Talmage MD

Lance A. Talmage, M.D. RW
Secretary

(SEAL)

December 12, 2007

Date

BEFORE THE STATE MEDICAL BOARD OF OHIO

IN THE MATTER OF

*

*

ALI KHAN, M.D.

*

ENTRY OF ORDER

This matter came on for consideration before the State Medical Board of Ohio on December 12, 2007.

Upon the Report and Recommendation of Gretchen L. Petrucci, State Medical Board Attorney Hearing Examiner, designated in this Matter pursuant to R.C. 4731.23, a true copy of which Report and Recommendation is attached hereto and incorporated herein, and upon the modification, approval and confirmation by vote of the Board on the above date, the following Order is hereby entered on the Journal of the State Medical Board of Ohio for the above date.

It is hereby ORDERED that:

- A. **PERMANENT REVOCATION, STAYED; SUSPENSION:** The certificate of Ali Khan, M.D., to practice medicine and surgery in the State of Ohio shall be PERMANENTLY REVOKED. Such revocation is STAYED, and Dr. Khan's certificate shall be SUSPENDED for a period of thirty days.
- B. **PROBATION:** Upon reinstatement or restoration, Dr. Khan's certificate shall be subject to the following PROBATIONARY terms, conditions, and limitations for a period of at least two years:
 1. **Obey the Law:** Dr. Khan shall obey all federal, state, and local laws, and all rules governing the practice of medicine and surgery in Ohio.
 2. **Declarations of Compliance:** Dr. Khan shall submit quarterly declarations under penalty of Board disciplinary action and/or criminal prosecution, stating whether there has been compliance with all the conditions of this Order. The first quarterly declaration must be received in the Board's offices on or before the first day of the third month following the month in which Dr. Khan's

certificate is restored or reinstated. Subsequent quarterly declarations must be received in the Board's offices on or before the first day of every third month.

3. **Personal Appearances**: Dr. Khan shall appear in person for an interview before the full Board or its designated representative during the third month following the month in which Dr. Khan's certificate is restored or reinstated or as otherwise directed by the Board. Dr. Khan shall also appear upon his request for termination of the probationary period, and/or as otherwise requested by the Board.
 4. **Personal Ethics Course(s)**: Before the end of the first year of probation, or as otherwise approved by the Board, Dr. Khan shall provide acceptable documentation of successful completion of a course or courses dealing with personal ethics. The exact number of hours and the specific content of the course or courses shall be subject to the prior approval of the Board of its designee. Any courses taken in compliance with this provision shall be in addition to the Continuing Medical Education requirements for relicensure for the Continuing Medical Education period(s) in which they are completed.
 5. **Absence from Ohio**: Dr. Khan shall obtain permission from the Board for departures or absences from Ohio. Such periods of absence shall not reduce the probationary term, unless otherwise determined by motion of the Board for absences of three months or longer, or by the Secretary or the Supervising Member of the Board for absences of less than three months, in instances where the Board can be assured that probationary monitoring is otherwise being performed.
 6. **Noncompliance Will Not Reduce Probationary Period**: In the event Dr. Khan is found by the Secretary of the Board to have failed to comply with any provision of this Order, and is so notified of that deficiency in writing, such period(s) of noncompliance will not apply to the reduction of the probationary period under this Order.
- C. **TERMINATION OF PROBATION**: Upon successful completion of probation, as evidenced by a written release from the Board, Dr. Khan's certificate will be fully restored.
- D. **REQUIRED REPORTING TO EMPLOYERS AND HOSPITALS**: Within 30 days of the effective date of this Order, or as otherwise determined by the Board, Dr. Khan shall provide a copy of this Order to all employers or entities with which he is under contract to provide health care services or is receiving training; and the Chief of Staff at each hospital where he has privileges or appointments. Further, Dr. Khan shall provide a copy of this Order to all employers or entities with which he contracts to provide health care services, or applies for or receives training, and the Chief of Staff at each hospital where he applies for or obtains privileges or

appointments. This requirement shall continue until Dr. Khan receives from the Board written notification of the reinstatement or restoration of his certificate to practice medicine and surgery in Ohio.

E. **REQUIRED REPORTING TO OTHER STATE LICENSING**

AUTHORITIES: Within 30 days of the effective date of this Order, or as otherwise determined by the Board, Dr. Khan shall provide a copy of this Order by certified mail, return receipt requested, to the proper licensing authority of any state or jurisdiction in which he currently holds any professional license. Dr. Khan shall also provide a copy of this Order by certified mail, return receipt requested, at the time of application to the proper licensing authority of any state in which he applies for any professional license or reinstatement or restoration of any professional license. Further, Dr. Khan shall provide this Board with a copy of the return receipt as proof of notification within 30 days of receiving that return receipt, unless otherwise determined by the Board. This requirement shall continue until Dr. Khan receives from the Board written notification of the reinstatement or restoration of his certificate to practice medicine and surgery in Ohio.

EFFECTIVE DATE OF ORDER; IMMEDIATE RESTRICTIONS: This Order shall become effective 30 days from the date of the mailing of notification of approval by the Board, except that Dr. Khan shall not undertake the care of any patient not already under his care in the 30-day interim.

(SEAL)

Lance A. Talmage MD

Lance A. Talmage, M.D. RW
Secretary

December 12, 2007

Date

2007 NOV 15 A 11: 53

**REPORT AND RECOMMENDATION
IN THE MATTER OF ALI KHAN, M.D.**

The Matter of Ali Khan, M.D., was heard by Gretchen L. Petrucci, Hearing Examiner for the State Medical Board of Ohio, on October 12, 2007.

INTRODUCTION

I. Basis for Hearing

By letter dated April 12, 2007, the State Medical Board of Ohio [Board] notified Ali Khan, M.D., that it had proposed to take disciplinary action against his certificate to practice medicine and surgery in Ohio. The Board based its proposed action on an allegation that Dr. Khan had pleaded guilty of one misdemeanor count of Theft in violation of Section 2913.02(A)(1), Ohio Revised Code.

The Board alleged that Dr. Khan's plea of guilty constituted: (1) "[a] plea of guilty to, a judicial finding of guilt of, or a judicial finding of eligibility for intervention in lieu of conviction for, a misdemeanor committed in the course of practice," as set forth in Section 4731.22(B)(11), Ohio Revised Code; and/or (2) "[a] plea of guilty to, a judicial finding of guilt of, or a judicial finding of eligibility for intervention in lieu of conviction for, a misdemeanor involving moral turpitude," as set forth in Section 4731.22(B)(13), Ohio Revised Code. Accordingly, the Board advised Dr. Khan of his right to request a hearing in this matter. (State's Exhibit 1A)

On April 23, 2007, Eric J. Plinke and Timothy J. Cahill, Esqs., requested a hearing on behalf of Dr. Khan. (State's Exhibit 1B)

II. Appearances at the Hearing

On behalf of the State of Ohio: Marc Dann, Attorney General, by Kyle C. Wilcox, Assistant Attorney General.

On behalf of Dr. Khan: Eric J. Plinke, Esq.

EVIDENCE EXAMINED

I. Testimony Heard

Ali Khan, M.D.
Lori A. Myers
Lieutenant David G. Hartsel

II. Exhibits Examined

A. Presented by the State

State's Exhibits 1A through 1R: Procedural exhibits. [Redacted in part.]

State's Exhibit 2: Indictment in the Court of Common Pleas, Seneca County, Ohio, in *State of Ohio v. Ali Khan*, Case No. 06 CR 0182. [Redacted in part and admitted under seal.]

State's Exhibit 2A: Indictment in *State v. Khan*, Case No. 06 CR 0182, *supra*. [Further redacted copy of State's Exhibit 2]

State's Exhibit 3: Letter from Lieutenant David G. Hartsel to the Board, along with enclosures.

State's Exhibit 4: Guilty Plea in *State v. Khan*, Case No. 06 CR 0182.

State's Exhibit 5: Judgment Entry of Sentence in *State v. Khan*, Case No. 06 CR 0182.

State's Exhibit 6: Documents maintained by the City of Tiffin Police Department in its investigation of Report Number 06-7989. [Redacted in part.]

State's Exhibit 7: VISA credit card of Lori Myers and evidence bag.

B. Presented by the Respondent

Respondent's Exhibit A: August 10, 2007, letter from Dr. Khan's parents to the Board.

Respondent's Exhibit B: Letter from Dr. Khan's brother to the Board.

Respondent's Exhibit C: January 5, 2006, summary of patients' evaluations of Dr. Khan.

Respondent's Exhibit D: Note from two nurses to Dr. Khan.

Respondent's Exhibit E: April 14, 2005, letter from Dr. Khan to the Office of Admissions at the University of Toledo's College of Law.

Respondent's Exhibit F: January 20, 2004, letter of recommendation from John DesMarais, M.D.

Respondent's Exhibit G: September 8, 2003, letter of recommendation from Susan J. Hulsemann, M.D.

Respondent's Exhibit H: September 2, 2003, letter of recommendation from Imran A. Andrabi, M.D.

Respondent's Exhibit I: September 7, 2007, news article from the Toledo Free Press.

Respondent's Exhibit J: August 3, 2007, news article from WTOL-TV's website.

Respondent's Exhibit K: July 19, 2006, statement from Dr. Khan to the Board.

Respondent's Exhibit L: Compact disc containing a portion of the WTOL-TV news report at 5:00 p.m., on August 9, 2007.

C. Joint Exhibits

Joint Exhibit 1: Dr. Khan's diagram of a portion of the Emergency Department at Mercy Hospital in Tiffin, Ohio.

Joint Exhibit 2: Lori Myers' diagram of a portion of the Emergency Department at Mercy Hospital in Tiffin, Ohio.

SUMMARY OF THE EVIDENCE

All exhibits and the transcript, even if not specifically mentioned, were thoroughly reviewed and considered by the Hearing Examiner prior to preparing this Report and Recommendation.

Background Information

1. Ali Khan, M.D., earned his undergraduate degree from Government College in Pakistan. He graduated in 1996 from Allama Iqbal Medical College in Pakistan. Afterward, he chose to complete another year of training in Pakistan (called a "house job"), and then he worked for a period of time as a medical officer in a hospital in Pakistan. (Hearing Transcript [Tr.] at 16-17, 106)

Dr. Khan came to the United States in 2001. For several months, he worked as a dishwasher in a restaurant in Virginia. Then, in the summer of 2001, Dr. Khan began the Mercy Health Partners Family Practice Residency at St. Vincent Mercy Medical Center in Toledo, Ohio. He completed that residency program in 2004. (Tr. at 18, 106; Respondent's Exhibit [Resp. Ex.] F)

2. The Board issued a certificate to Dr. Khan to practice medicine and surgery in Ohio in 2003, while he was a third-year resident. He holds no other medical licenses. (Tr. at 15, 18)
3. When he received his certificate from the Board in 2003, Dr. Khan began “moonlighting” at several hospitals in the northwest Ohio area. More specifically, Dr. Khan would participate in his residency during the day and, then, work the night shifts at the following four hospitals in northwest Ohio: (1) Mercy Hospital of Tiffin, (2) Wyandot Memorial Hospital in Upper Sandusky, (3) Community Memorial Hospital in Hicksville, and (4) Henry County Hospital in Napoleon. After completing his residency, Dr. Khan continued to work at Mercy Hospital of Tiffin, working 8:00 a.m. to 7:30 p.m. as an attending physician in the Emergency Department. (Tr. at 18-21, 110)
4. Currently, he has his own cosmetic procedures practice in Perrysburg, Ohio, and works in the Emergency Department at Hardin Memorial Hospital, in Kenton, Ohio. (Tr. at 14-15)

Emergency Department at Mercy Hospital of Tiffin in June 2006

5. Dr. Khan described Mercy Hospital as a busy hospital that, in June 2006, averaged 14 to 15 patients per 11-hour shift in the Emergency Department. He noted that, during his shifts, he would be the only attending physician on duty in that department. He also noted that there were approximately four to five nurses on the nursing staff. (Tr. at 21-22)

In June 2006, Lori Ann Myers was the manager of the Emergency Department and manager of the Outpatient Services Department. She was also the supervisor of the nursing staff and a nurse herself. She worked the hospital’s day shift, starting at 7:00 a.m. (Tr. at 21, 54-55)

6. Ms. Myers had an office in the Emergency Department, which also was used as a storage area for the nursing staff’s personal belongings and as a staff common room for keeping/eating snacks or lunches. Ms. Myers noted that the nurses, physicians, and patient-care technicians had access to her office. (Tr. at 25-27, 58-59, 69, 73)

Either just inside the doorway to Ms. Myers’ office or just outside Ms. Myers’ office, there is a sink that is used by the hospital staff. (Tr. at 29, 65, 70, 74-75; Joint Exhibits [Jt. Exs.] 1, 2) Although Dr. Khan and Ms. Myers described the location of the sink differently, they agree that a sink is located adjacent to Ms. Myers’ office area.

Dr. Khan’s Activities on June 19, 2006

7. Dr. Khan testified that, while on duty at Mercy Hospital on June 19, 2006, he found some papers, a business card, and one credit card¹ on the floor near the sink area in the Emergency Department. The credit card was Ms. Myers’ VISA credit card, issued by Marriott Rewards. It was silver in color and had the yellow and blue VISA logo. Dr. Khan described the papers

¹Dr. Khan denied finding a second credit card that day. (Tr. at 44; see also State’s Exhibit [St. Ex.] 6 at 5, 7, 13)

as small bits of paper, scrunched up. Dr. Khan described the area in which the items were found as an area that only the staff uses. He picked the items up. (Tr. at 28-32, 41, 62, 122; St. Ex. 7; Jt. Ex. 1)

8. Dr. Khan acknowledged that, when he picked up the credit card, he knew it was a credit card but he stated that he did not read the name on the credit card. Also, Dr. Khan acknowledged that he knew the credit card was not his credit card. Moreover, he stated that he did not look at the business card. (Tr. at 31, 33, 34-35, 41, 44, 123)
9. Dr. Khan testified that, after he had picked up the credit card and papers, he put them in his back pocket and kept them there until the end of his shift. (Tr. at 34, 36, 122)
10. Dr. Khan noted that the Emergency Department had been busy that day and, after putting the credit card and other papers in this pocket, he had begun seeing patients again. (Tr. at 28, 34, 36)
11. Dr. Khan testified that he had thought about the credit card later that day:

Q. [By Mr. Wilcox] Did you tell the police you went out for a cigarette, smoked a cigarette and came back, and was thinking I should put [the credit card] back or keep it in the back?

A. [By Dr. Khan] Yes, I went out for a cigarette, and I was thinking, should I put it back or should I just wait. That's what I did, yes.

Q. And where were you going to put it back, Doctor?

A. I was thinking to put it back where I found it or just – I didn't have a plan at that time who to give it to or just inform – I don't know who to inform, but I was thinking to tell someone or put it back or inform someone how to do it, I didn't know that.

Q. And why were those thoughts going through your head?

A. To give it back or inform –

Q. Yes.

A. Because I know it wasn't my card.

Q. Had you looked at the card at that point to see whose it was?

A. No.

Q. Did you want to find out whose card it was, Doctor?

A. Yes, I wanted to – we were very busy. I was busy with the shift and –

Q. So you were busy while you were smoking your cigarette?

A. No. Sometimes it will get slow, and I'll go out and come back, and that's how the day was going.

(Tr. at 35-36)

12. Dr. Khan explained that, after his shift had ended, he had driven home in his car, a Mercedes Benz. On the way, he stopped to purchase gasoline at the Citgo Gas Station in Woodville, Ohio, where he had previously regularly purchased gasoline. Dr. Khan stated that, on June 19, 2006, he had purchased gasoline in the amount of \$50.27 and, to pay for the gasoline, he had used the credit card he had found earlier on the floor at the hospital. (Tr. at 37-38, 121; St. Ex. 3 at 3-9)
13. Dr. Khan testified that, although he had used Ms. Meyer's credit card, he still had not known to whom it belonged. He stated that he kept his own credit cards and money in the same pocket, and he had just pulled out the credit card that he had found earlier. Dr. Khan explained that, it was not until he had emptied his pockets at home later on June 19, 2006, that he had realized to whom the card belonged and that he had "done something wrong." He also stated that it was not until then that he had also read the name on the business card, and thrown away the other papers. (Tr. at 38, 44, 45, 122-123)

Ms. Myers' Activities on June 19, 2006

14. Ms. Myers explained that she typically brings only her "debit card" and "gas cards" with her to work. However, she specifically put her VISA credit card in her purse on June 19, 2006, because she had planned to check the amount due on that card that day in order to pay it off. (Tr. at 60-61, 63, 68)
15. Ms. Myers stated that, because the Emergency Department was so busy that day, she did not get a chance to pay off the balance on her VISA card. She noted that she did not access her purse at all during the time that she was at the hospital. Ms. Meyers stated that she had seen Dr. Khan going in and out of her office on June 19, 2006, and she had not given him permission to access her purse. (Tr. at 63-65, 74)
16. While at home that evening, Ms. Myers could not locate her VISA credit card. Ms. Meyers explained that she contacted the credit card company to report that her card may have been stolen, and the company reported that it was being used "right now" at the Citgo Gasoline Station in Woodville, Ohio. Ms. Myers also noted that a Marathon Oil "gas card" was also missing. It was never recovered. (Tr. at 63-64, 69)

Ms. Myers also explained that she had contacted the Mercy Hospital Emergency Department that evening to inform the hospital of the theft and to have her coworkers check their belongings. (Tr. at 64)

Events of June 20, 2006

17. On June 20, 2006, Ms. Myers contacted the Tiffin Police Department. She indicated that she had suspected that a paramedic student may have been the person responsible because he was a new person in the Emergency Department the previous day. (Tr. at 75, 79-80) The police report indicates that Ms. Myers also had mentioned that Dr. Khan could have been responsible because she had seen him going in and out of her office on the day of the incident. (St. Ex. 6 at 2)
18. Dr. Khan testified that he had called the Emergency Department on June 20, 2006, to speak with Ms. Myers about her VISA card. He explained that he had left a message with a secretary, asking Ms. Myers to call him. Dr. Khan testified that he did not take the credit card back to Ms. Myers on June 20 because the hospital was more than an hour away from his home and because he knew he would be there a day later. He stated that, instead, he had put the credit card in his bag so that it would not get misplaced. (Tr. at 39, 46, 123-124)

Ms. Myers testified that she did not receive a message that Dr. Khan had called to speak with her. (Tr. at 76, 78)

19. Also, on June 20, 2006, the Tiffin Police Department obtained a surveillance video and transaction information from the Citgo Gasoline Station in Woodville, Ohio. From that video, the police were able to identify Dr. Khan as the person who had purchased gasoline with Ms. Myers' credit card. Additionally, the police department filed a theft complaint in the Tiffin Municipal Court and obtained an arrest warrant. (St. Ex. 3 at 9; St. Ex. 6, at 2-3, 11).

Events of June 21, 2006

20. On June 21, 2006, Dr. Khan went to Mercy Hospital to work. He was stopped outside the hospital by two City of Tiffin detectives, including Lieutenant David G. Hartsel. They questioned Dr. Khan, searched his bag and car, and placed him under arrest. The police recovered Ms. Meyer's VISA card from Dr. Khan's bag. (Tr. 41-43, 83, 87, 97; St. Ex. 6 at 5-8)
21. During the initial and subsequent questioning by the police, Dr. Khan told the police that he had found Ms. Meyer's VISA card on the floor near the sink in the Emergency Department of the hospital. He also stated that he had known it was not his credit card. Additionally, Dr. Khan stated that he had "knowingly used [the credit card] to obtain gasoline" and had done so "knowing that it was wrong." Lieutenant Hartsel included in his report that Dr. Khan had also said that he had felt badly about what he had done, and he was intending to drop the

credit card somewhere in the Emergency Department so that someone else could find it and such action would take any suspicion away from him. (St. Ex. 6 at 6, 8, 13, 16, 17)

Additionally, during the hearing, Lieutenant Hartsel described what Dr. Khan had admitted during the questioning by the police:

Q. [By Mr. Wilcox] Earlier today [Dr. Khan] testified that he never looked at the name on the credit card when he picked it up at the hospital, and he even told us that he didn't look at the name on the card when he used it to purchase gasoline, and that he didn't realize at that time he was using a credit card that didn't belong to him. Is that your recollection of what he told you back in June?

A. [By Lt. Hartsel] No, sir.

Q. What did he tell you back in June?

A. He knew it was Lori [Myers'] card. He knew it was wrong to use it, and he was going to try to put it back or drop it on the floor because he felt bad about using it.

* * *

Q. [By Mr. Plinke] Isn't it true, though, based on this transcript, that Dr. Khan did tell you when you interviewed him that he didn't look at the card?

A. Initially, yes. He knew whose card it was later.

(Tr. at 89-92)

22. Dr. Khan did not tell the police that he had found a business card at the same time he had found the credit card. (Tr. at 29, 31, 43)

Criminal Charges and Conviction in 2006

23. In July 2006, in a two-count Indictment filed in the Court of Common Pleas of Seneca County of Ohio, the State charged Dr. Khan with, among other things, one felony count of Theft in violation of Section 2913.02, Ohio Revised Code. *State of Ohio v. Ali Khan*, Case No. 06 CR 0182 [*State v. Khan*]. The State alleged that Dr. Khan "with purpose to deprive the owner, namely Lorie [sic] Myers, of property * * * did knowingly obtain or exert control over [a VISA credit card] without the consent of the owner or a person authorized to give consent, namely Lorie [sic] Myers." (St. Ex. 2 at 1; St. Ex. 2A at 1)

24. In November 2006, a plea agreement was filed in *State v. Khan*. Dr. Khan agreed to plead guilty to one misdemeanor count of Theft. In the plea agreement, the parties agreed upon the following:

If [Dr. Khan] enters a plea of Guilty to the lesser included offense to Count One of the indictment and stipulates to no longer practice medicine in Seneca County, Ohio, the Parties will jointly recommend to the Court that [Dr. Khan] be sentenced to serve sixty (60) days in the Seneca County Jail with credit for two (2) days already served. [Dr. Khan] further to pay restitution in the amount of \$50.27 payable to Mariot [sic] VISA Card Company and pay court costs at the time of sentence. The State of Ohio will dismiss Count Two at the time of sentencing. [Dr. Khan] further to pay a One Thousand Dollar (\$1,000.00) fine. The Parties otherwise reserve the right to speak at sentencing.

(St. Ex. 4)

25. On November 27, 2006, Dr. Khan pleaded guilty. Dr. Khan was sentenced to 60 days of incarceration, but entitled to receive “work credit” for each day in the Seneca County Jail’s work program. Additionally, Dr. Khan was required to pay: (a) restitution of \$50.27; (b) the costs of prosecution; (c) a fine of \$1,000; and (d) court costs. The Court further ordered that Dr. Khan is no longer permitted to practice medicine in Seneca County, Ohio. (St. Ex. 5)
26. Dr. Khan explained that he had served only 30 days in the Seneca County Jail, and was released early because of his good behavior and his participation in the jail’s work program. Also, Dr. Khan testified that he has discharged all of his responsibilities under the plea agreement, including the restitution and the fine. (Tr. at 51, 114, 119)

Additional Information Regarding Dr. Khan in 2006

27. In June 2006, Dr. Khan owned a VISA card sponsored by National City Bank, a credit card sponsored by MBNA, and a Discover card. One of these was green, a second was blue, and the third was either black and orange, or silver. (Tr. at 39-40, 123)
28. Dr. Khan testified that he did not have a good relationship with the nurses at Mercy Hospital while he was employed there. He stated that the nurses “picked on” him because of his religion and his cultural background. Dr. Khan testified that he had complained to Ms. Myers “quite a bit” about her and the other nurses asking him personal and religious questions. (Tr. at 22-23, 125-126)

Ms. Myers testified that she had liked Dr. Khan, had enjoyed speaking with him, and had trusted him prior to the incident. (Tr. at 60)

29. Dr. Khan testified that he had submitted a notice of resignation in March 2006. His last day on the job at Mercy Hospital was scheduled to be June 2006. (Tr. at 23, 125)

Dr. Khan's Support of Others

30. Dr. Khan financially supports several members of his immediate family: his brother who is in school at the Lee Strasberg Theatre and Film Institute in New York City, a sister who is in school at Oxford in the United Kingdom, and his parents who reside in Pakistan. (Tr. at 107-108; Resp. Exs. A, B)

His parents and brother wrote letters in support of Dr. Khan. The State did not have the opportunity to question the authors of these letters. His parents and brother requested that the Board not suspend Dr. Khan's certificate because a suspension would impact the entire family. (Resp. Exs. A, B)

31. Dr. Khan also financially supports a close friend, by paying for her living expenses while she attends the University of Toledo's College of Law. (Tr. at 110; Resp. Ex. E)
32. Dr. Khan also recently donated his time and professional services to a marine who wishes to go into active service again. The marine is not permitted to engage in active duty because of several tattoos on his neck. Dr. Khan has agreed to remove them for free and has already begun the removal process. (Resp. Exs. I, J, L; Tr. at 111-112)

Dr. Khan's Performance as a Physician

33. Dr. Khan presented a January 2006 summary of patients' evaluations indicating how his patients rated his performance while they were treated at Mercy Hospital. The survey indicates the following about his performance from the preceding five or six months:

Courtesy	rated "very good" by 70 percent
Took time to listen	rated "very good" by 62.5 percent
Informative regarding treatment	rated "very good" by 75 percent
Concern for comfort	rated "very good" by 62.5 percent

(Resp. Ex. C; Tr. at 127-128)

34. Dr. Khan also presented a copy of a note that he had received from two nurses at Mercy Hospital. The State did not have the opportunity to question the authors of this note. Dr. Khan explained that he had been passing through the medical/surgical floor of the hospital, when two nurses needed help with a "deteriorating patient." They requested assistance and Dr. Khan stayed to help them. The two nurses thanked Dr. Khan for responding so quickly and for staying to help them. (Res. Ex. D; Tr. at 109, 128)

Letters of Recommendation

35. Dr. Khan presented three letters of recommendations that were written in 2003 and 2004. The State did not have the opportunity to question the authors of these letters. One letter was written by Dr. Susan J. Mulsemann, the Mercy Health Partners Family Practice Residency Program Director, and another was written by Dr. Imran A. Andrabi, that residency program's Vice President and Chief Academic Officer. They both stated that, during the residency, Dr. Khan was very dedicated and enthusiastic. They both stated that he has a good work ethic and recommended him for future endeavors. (Resp. Exs. G. H)

The third letter of recommendation was written by John DesMarais, M.D., who was the Medical Director at Henry County Hospital in Napoleon, Ohio. He had worked with Dr. Khan for roughly four months. Dr. DesMarais noted that Dr. Khan had seen a variety of emergency patients and "performed admirably," including his ability to get along with staff. He also stated that Dr. Khan has a positive attitude and a willingness to work and improve. (Resp. Ex. F)

Dr. Khan's Position, Explanation and Request

36. Dr. Khan testified that there is no explanation for his theft. He called it a "stupid mistake" and a "lapse of judgment." He stated that he has already paid emotionally, financially, and legally because he has been disgraced, lost jobs, and was in prison. Dr. Khan noted that he had self-reported the incident to the Board the day after his arrest, and that he had worked cooperatively with the Tiffin Police Department and the Board. (Tr. at 112, 113, 120)
37. When asked how the Board can be assured that he would not act similarly in the future, Dr. Khan stated the following:

This happened a year and a half ago. It's never happened before. I've never done anything like this before. The practice which I have right now specifically doesn't take insurance. It just takes credit cards and cash or checks. We don't take insurance. There's not been a single discrepancy from June when I started this practice. It's been a year and a half. Everything has been up to date, up to order. It's not the first time, and I'm talking about 300, 400 thousand dollars worth of credit cards being swiped in the last year and a half, and everything has been up to the penny.

Not once – a lot of times people have sometimes left credit cards there. They have been returned by me and my staff. A lot of times by mistake the receptionist didn't know what to charge; and after reviewing the patient charts, I found that they had charged her extra because we were running a special that week, and I had called the patients personally and told them, and then I handwritten checks to them that you were charged extra because we were running a special but the girl didn't know that up front, and this has happened multiple times.

* * *

It was just a one-time error, lapse of judgment, and I'm not contesting that fact. I'm here to say I'm sorry. I just don't think that I should be suspended for this, because of my, like – because of the nature. It's the first time, and I've done so much good and so many people are dependent on me; three, four employees, ten, eleven family members * * *. My brother will be kicked out of school since he cannot work. My sister will be kicked out of school since she cannot work either. My parent's health and their medicines will be stopped, and I'll be forced to file bankruptcy. I don't think it's fair for a crime a year and a half ago when I've said sorry not once, one hundred times, that my license should be suspended or taken away for that.

(Tr. at 115-116) Additionally, Dr. Khan stated that he would be compliant with any terms or conditions ordered by the Board. (Resp. Ex. K)

FINDINGS OF FACT

1. On November 27, 2006, Ali Khan, M.D., pleaded guilty of one misdemeanor count of Theft in violation of Section 2913.02(A)(1), Ohio Revised Code. *State of Ohio v. Ali Khan*, Case No. 06 CR 0182.
2. The facts underlying Dr. Khan's guilty plea involve him taking the credit card of a nurse in the Emergency Department at Mercy Hospital of Tiffin and using said credit card to purchase gasoline for his automobile.
3. In November 2006, Dr. Khan was sentenced to 60 days of incarceration, with credit for two days already serviced and entitled to receive "work credit" for each day in the Seneca County Jail's work program. Additionally, Dr. Khan was ordered to pay: (a) restitution of \$50.27; (b) the costs of prosecution; (c) a fine of \$1,000; and (d) court costs. Furthermore, the Court prohibited Dr. Khan from practicing medicine in Seneca County, Ohio.

CONCLUSIONS OF LAW

1. The plea of guilty and subsequent conviction of Ali Khan, M.D., as set forth in Findings of Fact 1 through 3, constitutes a "plea of guilty to, a judicial finding of guilt of, or a judicial finding of eligibility for intervention in lieu of conviction for, a misdemeanor committed in the course of practice" as used in Section 4731.22(B)(11), Ohio Revised Code.
2. The plea of guilty and subsequent conviction of Dr. Khan, as set forth in Findings of Fact 1 through 3, constitutes "[a] plea of guilty to, a judicial finding of guilt of, or a judicial finding

of eligibility for intervention in lieu of conviction for, a misdemeanor involving moral turpitude,” as set forth in Section 4731.22(B)(13), Ohio Revised Code.

* * * * *

Dr. Khan argues that the theft did not occur “in the course of the practice of medicine.” However, the evidence demonstrates that he took Ms. Meyer’s credit card while on duty at Mercy Hospital and without her consent. Dr. Khan may not have used the credit card until after he completed his work shift that day, but the stolen property involved in the theft conviction was the credit card *itself* and the theft occurred while Dr. Khan was on duty practicing medicine at Mercy Hospital. In the Hearing Examiner’s opinion, the misdemeanor occurred in the course of practice.

Dr. Khan also argues that his plea of guilty to a theft misdemeanor does not constitute a “misdemeanor involving moral turpitude” as set forth in Section 4731.22(B)(13), Ohio Revised Code. In Ohio, theft and theft-related offenses have been found by the courts to constitute conduct involving moral turpitude.² In this case, Dr. Khan’s acts demonstrate a lack of decency, honesty and good morals. In the Hearing Examiner’s opinion, this misdemeanor involved moral turpitude.

PROPOSED ORDER

It is hereby ORDERED, that:

- A. **PERMANENT REVOCATION, STAYED; SUSPENSION:** The certificate of Ali Khan, M.D., to practice medicine and surgery in the State of Ohio shall be PERMANENTLY REVOKED. Such revocation is STAYED, and Dr. Khan’s certificate shall be SUSPENDED for an indefinite period of time, but not less than one year.

²For instance, in *Columbus Bar Association v. Tarmey* (1983), 4 Ohio St. 3d 81, an attorney was convicted of petit theft of clothing valued at \$33, and the Ohio Supreme Court found that he had engaged in illegal conduct involving moral turpitude. In that case, the court noted that the evidence also indicated a continuing course of conduct. In *Akron Bar Association v. Carter* (2007), 115 Ohio St. 3d 18, an attorney was convicted of felony theft and misuse of a credit card when he took a company credit card without permission and used it for several months. This conduct was found to be illegal conduct involving moral turpitude and the Ohio Supreme Court disciplined the attorney. In *Cincinnati Bar Association v. Zins* (2007), 2007-Ohio-5263, an attorney was convicted of identity theft for using customer information at the bank where he had worked. Again, this conduct was found to be illegal conduct involving moral turpitude for disciplinary purposes. Moreover, in *State v. Williams* (1992), 82 Ohio App. 3d 70, the Court of Appeals found that a defendant’s plea of guilty to a misdemeanor theft involved moral turpitude. Additionally, that Court stated that the crime “related directly to the defendant’s character for truthfulness” and bore a “direct and substantial relationship to defendant’s ability to hold public office and act in accordance with the public trust.”

B. **CONDITIONS FOR REINSTATEMENT OR RESTORATION:** The Board shall not consider reinstatement or restoration of Dr. Khan's certificate to practice medicine and surgery in Ohio until all of the following conditions have been met:

1. **Application for Reinstatement or Restoration:** Dr. Khan shall submit an application for reinstatement or restoration, accompanied by appropriate fees, if any.
2. **Obey the Law:** Dr. Khan shall obey all federal, state, and local laws, and all rules governing the practice of medicine and surgery in Ohio.
3. **Evidence of Unrestricted Licensure in Other States:** At the time he submits his application for reinstatement or restoration, Dr. Khan shall provide written documentation acceptable to the Board verifying that Dr. Khan otherwise holds a full and unrestricted license to practice medicine and surgery in all other states in which he is licensed at the time of application or has been in the past licensed, or that he would be entitled to such license but for the nonpayment of renewal fees.
4. **Personal Ethics Course(s):** At the time he submits his application for reinstatement or restoration, Dr. Khan shall provide acceptable documentation of successful completion of a course or courses dealing with personal ethics. The exact number of hours and the specific content of the course or courses shall be subject to the prior approval of the Board or its designee. Any courses taken in compliance with this provision shall be in addition to the Continuing Medical Education requirements for relicensure for the Continuing Medical Education period(s) in which they are completed.

In addition, at the time Dr. Khan submits the documentation of successful completion of the course or courses dealing with personal ethics, he shall also submit to the Board a written report describing the course, setting forth what he learned from the course, and identifying with specificity how he will apply what he has learned to his practice of medicine in the future.

5. **Additional Evidence of Fitness To Resume Practice:** In the event that Dr. Khan has not been engaged in the active practice of medicine and surgery for a period in excess of two years prior to application for reinstatement or restoration, the Board may exercise its discretion under Section 4731.222, Ohio Revised Code, to require additional evidence of his fitness to resume practice.

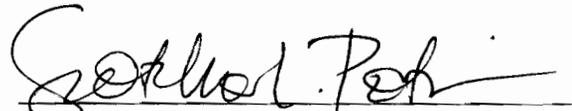
C. **PROBATION:** Upon reinstatement or restoration, Dr. Khan's certificate shall be subject to the following PROBATIONARY terms, conditions, and limitations for a period of at least five years:

1. **Obey the Law:** Dr. Khan shall obey all federal, state, and local laws, and all rules governing the practice of medicine and surgery in Ohio.

2. **Declarations of Compliance:** Dr. Khan shall submit quarterly declarations under penalty of Board disciplinary action and/or criminal prosecution, stating whether there has been compliance with all the conditions of this Order. The first quarterly declaration must be received in the Board's offices on or before the first day of the third month following the month in which Dr. Khan's certificate is restored or reinstated. Subsequent quarterly declarations must be received in the Board's offices on or before the first day of every third month.
 3. **Personal Appearances:** Dr. Khan shall appear in person for an interview before the full Board or its designated representative during the third month following the month in which Dr. Khan's certificate is restored or reinstated or as otherwise directed by the Board. Dr. Khan shall also appear upon his request for termination of the probationary period, and/or as otherwise requested by the Board.
 4. **Absence from Ohio:** Dr. Khan shall obtain permission from the Board for departures or absences from Ohio. Such periods of absence shall not reduce the probationary term, unless otherwise determined by motion of the Board for absences of three months or longer, or by the Secretary or the Supervising Member of the Board for absences of less than three months, in instances where the Board can be assured that probationary monitoring is otherwise being performed.
 5. **Noncompliance Will Not Reduce Probationary Period:** In the event Dr. Khan is found by the Secretary of the Board to have failed to comply with any provision of this Order, and is so notified of that deficiency in writing, such period(s) of noncompliance will not apply to the reduction of the probationary period under this Order.
- D. **TERMINATION OF PROBATION:** Upon successful completion of probation, as evidenced by a written release from the Board, Dr. Khan's certificate will be fully restored.
- E. **REQUIRED REPORTING TO EMPLOYERS AND HOSPITALS:** Within 30 days of the effective date of this Order, or as otherwise determined by the Board, Dr. Khan shall provide a copy of this Order to all employers or entities with which he is under contract to provide health care services or is receiving training; and the Chief of Staff at each hospital where he has privileges or appointments. Further, Dr. Khan shall provide a copy of this Order to all employers or entities with which he contracts to provide health care services, or applies for or receives training, and the Chief of Staff at each hospital where he applies for or obtains privileges or appointments. This requirement shall continue until Dr. Khan receives from the Board written notification of the reinstatement or restoration of his certificate to practice medicine and surgery in Ohio.
- F. **REQUIRED REPORTING TO OTHER STATE LICENSING AUTHORITIES:** Within 30 days of the effective date of this Order, or as otherwise determined by the Board, Dr. Khan shall provide a copy of this Order by certified mail, return receipt requested, to the proper licensing authority of any state or jurisdiction in which he currently holds any professional

license. Dr. Khan shall also provide a copy of this Order by certified mail, return receipt requested, at the time of application to the proper licensing authority of any state in which he applies for any professional license or reinstatement or restoration of any professional license. Further, Dr. Khan shall provide this Board with a copy of the return receipt as proof of notification within 30 days of receiving that return receipt, unless otherwise determined by the Board. This requirement shall continue until Dr. Khan receives from the Board written notification of the reinstatement or restoration of his certificate to practice medicine and surgery in Ohio.

- G. **EFFECTIVE DATE OF ORDER; IMMEDIATE RESTRICTIONS:** This Order shall become effective 30 days from the date of the mailing of notification of approval by the Board, except that Dr. Khan shall not undertake the care of any patient not already under his care in the 30-day interim.


Gretchen L. Petrucci
Hearing Examiner

State Medical Board of Ohio

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EXCERPT FROM THE DRAFT MINUTES OF DECEMBER 12, 2007

REPORTS AND RECOMMENDATIONS

Dr. Kumar announced that the Board would now consider the Reports and Recommendations appearing on its agenda. He asked whether each member of the Board had received, read, and considered the hearing records, the proposed findings of fact, conclusions of law, and orders, and any objections filed in the matters of: Kimberli Jo Burbach; Michael Shane Gainey, M.D.; Russell L. Gaudett; Cynthia Joan Johnson, P.A.; Kandhasamy Kannapiran, MD.; Ali Khan, M.D.; Robert M. Moore, M.T.; Kolli Mohan Prasad, M.D.; Willie Calvin Rabb, Jr., D.P.M.; Mary Ellen Ratcliff; and Robert Rowan Summers, D.O. A roll call was taken:

ROLL CALL:	Mr. Albert	- aye
	Dr. Egner	- aye
	Dr. Talmage	- aye
	Dr. Varyani	- aye
	Dr. Buchan	- aye
	Dr. Madia	- aye
	Mr. Browning	- aye
	Mr. Hairston	- aye
	Dr. Amato	- aye
	Dr. Steinbergh	- aye
	Dr. Kumar	- aye

Dr. Kumar asked whether each member of the Board understands that the disciplinary guidelines do not limit any sanction to be imposed, and that the range of sanctions available in each matter runs from dismissal to permanent revocation. A roll call was taken:

ROLL CALL:	Mr. Albert	- aye
	Dr. Egner	- aye
	Dr. Talmage	- aye
	Dr. Varyani	- aye
	Dr. Buchan	- aye
	Dr. Madia	- aye

Mr. Browning	- aye
Mr. Hairston	- aye
Dr. Amato	- aye
Dr. Steinbergh	- aye
Dr. Kumar	- aye

Dr. Kumar noted that, in accordance with the provision in Section 4731.22(F)(2), Revised Code, specifying that no member of the Board who supervises the investigation of a case shall participate in further adjudication of the case, the Secretary and Supervising Member must abstain from further participation in the adjudication of these matters. In the matters before the Board today, Dr. Talmage served as Secretary and Mr. Albert served as Supervising Member.

The original Reports and Recommendations shall be maintained in the exhibits section of this Journal.

.....
ALI KHAN, M.D.

Dr. Kumar directed the Board's attention to the matter of Ali Khan, M.D. He advised that objections were filed to Hearing Examiner Petrucci's Report and Recommendation and were previously distributed to Board members.

Dr. Kumar continued that a request to address the Board has been timely filed on behalf of Dr. Khan. Five minutes would be allowed for that address.

Dr. Khan was accompanied by his attorney, Eric J. Plinke. Mr. Plinke stated that he filed objections, which he's sure the Board members have read. He stated that this case is not one where there are factual disputes. Rather, what he is stressing are the mitigating circumstances that were presented in this case: the physician self-reporting his bad conduct, his lack of any professional disciplinary history, and his demonstration of remorse for his wrongdoing.

Mr. Plinke stated that the remainder of his objections were dedicated to the issue of whether the proposed discipline in this case is similar to the discipline taken by this Board in other cases. He stated that he struggled in finding a case of similar factual nature. He could not find any record of other petty theft misdemeanor convictions that have come before the Board. What he was forced to demonstrate were cases where the circumstances underlying the misdemeanors were much more aggravated and the physician had received much less discipline.

Mr. Plinke asked that, after examining the mitigating circumstances presented by Dr. Khan and comparing this case to the other cases that were even more aggravated, the Board stay the suspension so that the discipline is, at a minimum, consistent with even more aggravated cases.

Dr. Khan stated that he's not here to contest the facts. He's just asking for leniency. What he did was wrong, but he self-reported it to the Board the next day. He also called the nurse the next day. Dr. Khan asked for leniency, stating that a suspension would lead him to bankruptcy. His brother and his sisters are on student visas and cannot work. They will be forced to abandon their education.

Dr. Khan stated that for the past year and a half, his practice has been based only on credit cards and checks. There has never been a single discrepancy. He protects the public and he can be trusted. He stated that he knows that the laws are the laws, but he's begging the Board to look at the spirit of the law to give him a second chance. Dr. Khan stated that he is sorry.

Mr. Plinke stated that he thinks the record before the Board demonstrates that Dr. Khan is not a bad person. He did a bad act. He reported it to the Board. He admitted it to the police upon their inquiry. He pled guilty to the petty theft, he paid a fine and he paid restitution. Dr. Khan spent 30 days in jail for this petty theft conviction. Mr. Plinke stated that he's not saying that the Board shouldn't discipline Dr. Khan. He stated that putting Dr. Khan on probation and staying the proposed suspension would be consistent with what has been done previously. Mr. Plinke stated that if Dr. Khan is suspended, he would lose his position with the emergency room group and he would lose his private practice. There's no way he could shut it down for a year and bring it back up again. Mr. Plinke stated that, in light of the circumstances, and not to understate Dr. Khan's bad conduct, he felt that the Proposed Order would be an undue hardship in comparison to some of the other Board Orders.

Dr. Kumar asked whether the Assistant Attorney General wished to respond.

Mr. Wilcox stated that he has had a chance to review the Report and Recommendation, and he also had a chance to review the objections filed on behalf of Dr. Khan. He stated that he has a few comments regarding this case.

Mr. Wilcox stated that he believes in this matter that at hearing, if you look at the record, it's pretty evident that Dr. Khan tried to minimize his behavior as a petty theft offense that occurred away from his workplace, when he filled up his Mercedes with gasoline at that gas station in Woodville, Ohio. Mr. Wilcox stated that he thinks that the facts in the record show that Dr. Khan committed this theft offense at Tiffin Mercy Hospital in the emergency room, when he was on duty. He stole the Visa credit card from the nursing supervisor who worked with him in that hospital. Ms. Myers was a co-worker who trusted Dr. Khan implicitly up until that date. Mr. Wilcox stated that this certainly qualifies as an act of moral turpitude, and he thinks that that is unquestioned.

Mr. Wilcox stated that the theft offense to which Dr. Khan pled guilty stated that he knowingly obtained or exerted control over the property without the consent of the owner or the person authorized to consent. In this case, that was Ms. Myers. Mr. Wilcox stated that, in this case, you have to look at where Dr. Khan exerted control over the property, and that was at the hospital. It's when he picked it up in the emergency department, right outside Ms. Myers' office. Mr. Wilcox stated that he doesn't think that there's any question that this offense occurred while on duty in the hospital. Mr. Wilcox stated that it certainly fits

within the definition of committing a misdemeanor in the course of practice.

Mr. Wilcox at this time referred to the Judgment Entry in this case. The Honorable Steve C. Shuff of the Seneca County Common Pleas Court explained in his Judgment Entry that the defendant, Dr. Khan, is no longer permitted to practice medicine in Seneca County, Ohio. Mr. Wilcox stated that it's pretty obvious from that Order that the Judge in this case felt that this clearly implicated his ability to safely practice medicine in the State of Ohio.

Mr. Wilcox stated that he believes that the Recommendation of the Hearing Examiner in this case is appropriate.

DR. STEINBERGH MOVED TO APPROVE AND CONFIRM MS. PETRUCCI'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND PROPOSED ORDER IN THE MATTER OF ALI KHAN, M.D. DR. MADIA SECONDED THE MOTION.

Dr. Kumar stated that he would now entertain discussion in the above matter.

Dr. Egner stated that she does not agree with the Report and Recommendation in this case, adding that she does not find this an act of moral turpitude, but does find it the most incredibly stupid act. Dr. Egner stated that she doesn't know that, had Dr. Khan not been caught, he wouldn't have used that credit card time and time again. She stated that she doesn't know the answer to that. Dr. Khan got caught on camera, putting gas in his car. Dr. Egner stated that she doesn't think that Dr. Khan will do something like this again. He was cooperative with the police, he notified the Board, and those things mean something to her. Dr. Egner stated that she thinks that Mr. Plinke's objections are pretty commanding, when the Board looks at other cases it has had that involve incredibly questionable and bad behavior on the part of a physician.

Dr. Egner stated that, for her, it doesn't become a question of whether or not this was in the course of practice, it was the wrong thing to do. He knows it was the wrong thing to do. Dr. Egner stated that she thinks that the Court punished Dr. Khan pretty severely, and she's not sure why that is. There's nothing in the record that says that there was a particular reason that this occurred. Dr. Egner stated that she looks at the previous cases cited where the Board reprimanded with probationary terms, and she thinks that the Board should do the same in this case and that Dr. Khan should also take an ethics course.

Dr. Steinbergh stated that she does feel that this was an act of moral turpitude during the course of practice. Dr. Khan found a credit card that belonged to one of his colleagues in the emergency room. He did not return it. Dr. Steinbergh stated that she found Dr. Khan's argument in court to be inappropriate. He stated that he did not look at the name on the credit card, but used it not knowing whose credit card it was. Dr. Steinbergh stated that she does think that this act was in the course of practice, even though it did not involve patient care. He was practicing medicine at the time this occurred. Dr. Steinbergh stated that she doesn't think that people with a good moral standard or ethical standard do this. On the other hand, what he did was a very foolish thing. She feels that the Court appropriately handled Dr. Khan's case. Dr. Steinbergh added that she disagrees with the Proposed Order because she does think that the Court has

handled it somewhat and that the Board could be a little more lenient. She stated that she has an alternative Order she would like to submit.

DR. STEINBERGH MOVED TO AMEND THE PROPOSED ORDER IN THE MATTER OF ALI KHAN, M.D., BY SUBSTITUTING THE FOLLOWING:

It is hereby ORDERED that:

- A. **PERMANENT REVOCATION, STAYED; SUSPENSION:** The certificate of Ali Khan, M.D., to practice medicine and surgery in the State of Ohio shall be PERMANENTLY REVOKED. Such revocation is STAYED, and Dr. Khan's certificate shall be SUSPENDED for a period of thirty days.
- B. **PROBATION:** Upon reinstatement, Dr. Khan's certificate shall be subject to the following PROBATIONARY terms, conditions, and limitations for a period of at least two years:
 1. **Obey the Law:** Dr. Khan shall obey all federal, state, and local laws, and all rules governing the practice of medicine and surgery in Ohio.
 2. **Declarations of Compliance:** Dr. Khan shall submit quarterly declarations under penalty of Board disciplinary action and/or criminal prosecution, stating whether there has been compliance with all the conditions of this Order. The first quarterly declaration must be received in the Board's offices on or before the first day of the third month following the month in which Dr. Khan's certificate is reinstated. Subsequent quarterly declarations must be received in the Board's offices on or before the first day of every third month.
 3. **Personal Appearances:** Dr. Khan shall appear in person for an interview before the full Board or its designated representative during the third month following the month in which Dr. Khan's certificate is reinstated or as otherwise directed by the Board. Dr. Khan shall also appear upon his request for termination of the probationary period, and/or as otherwise requested by the Board or its designated representative.
 4. **Personal Ethics Course(s):** Before the end of the first year of probation, or as otherwise approved by the Board, Dr. Khan shall provide acceptable documentation of successful completion of a course or courses dealing with personal ethics. The exact number of hours and the specific content of the course or courses shall be subject to the prior approval of the Board or its designee. Any courses taken in compliance with this provision shall be in addition to the Continuing Medical Education requirements for relicensure for

the Continuing Medical Education period(s) in which they are completed.

In addition, at the time Dr. Khan submits the documentation of successful completion of the course or courses dealing with personal ethics, he shall also submit to the Board a written report describing the course, setting forth what he learned from the course, and identifying with specificity how he will apply what he has learned to his practice of medicine in the future.

5. **Absence from Ohio:** Dr. Khan shall obtain permission from the Board for departures or absences from Ohio. Such periods of absence shall not reduce the probationary term, unless otherwise determined by motion of the Board for absences of three months or longer, or by the Secretary or the Supervising Member of the Board for absences of less than three months, in instances where the Board can be assured that probationary monitoring is otherwise being performed.
 6. **Noncompliance Will Not Reduce Probationary Period:** In the event Dr. Khan is found by the Secretary of the Board to have failed to comply with any provision of this Order, and is so notified of that deficiency in writing, such period(s) of noncompliance will not apply to the reduction of the probationary period under this Order.
- C. **TERMINATION OF PROBATION:** Upon successful completion of probation, as evidenced by a written release from the Board, Dr. Khan's certificate will be fully restored.
- D. **REQUIRED REPORTING TO EMPLOYERS AND HOSPITALS:** Within 30 days of the effective date of this Order, or as otherwise determined by the Board, Dr. Khan shall provide a copy of this Order to all employers or entities with which he is under contract to provide health care services or is receiving training; and the Chief of Staff at each hospital where he has privileges or appointments. Further, Dr. Khan shall provide a copy of this Order to all employers or entities with which he contracts to provide health care services, or applies for or receives training, and the Chief of Staff at each hospital where he applies for or obtains privileges or appointments. This requirement shall continue until Dr. Khan receives from the Board written notification of his successful completion of probation.
- E. **REQUIRED REPORTING TO OTHER STATE LICENSING AUTHORITIES:** Within 30 days of the effective date of this Order, or as otherwise determined by the Board, Dr. Khan shall provide a copy of this Order by certified mail, return receipt requested, to the proper licensing authority of any state or jurisdiction in which he currently holds any professional license. Dr. Khan shall

also provide a copy of this Order by certified mail, return receipt requested, at the time of application to the proper licensing authority of any state in which he applies for any professional license or reinstatement or restoration of any professional license. Further, Dr. Khan shall provide this Board with a copy of the return receipt as proof of notification within 30 days of receiving that return receipt, unless otherwise determined by the Board. This requirement shall continue until Dr. Khan receives from the Board written notification of his successful completion of probation.

EFFECTIVE DATE OF ORDER; IMMEDIATE RESTRICTIONS: This Order shall become effective 30 days from the date of the mailing of notification of approval by the Board, except that Dr. Khan shall not undertake the care of any patient not already under his care in the 30-day interim.

Dr. Steinbergh stated that she doesn't think that a reprimand is enough in this case. She thinks that it's an immoral act to steal from someone, to use the credit card and pretend that he didn't know what he was doing. Dr. Steinbergh stated that she finds that very offensive. Dr. Steinbergh stated that she does feel that her alternative order is lenient, noting that it does fall below the minimum guidelines, but she also thinks that it is fair.

Dr. Varyani stated that he knows that Dr. Khan has paid his dues a little bit. He stated that when he read the case, he felt that the Proposed Order was light, but he was going to agree with it. As things have unfolded, after reading the case again, he finds that there is a question as to whether Dr. Khan really found the credit card or took it from the purse. He stated that that bothered him. He was also disturbed by Dr. Khan's statement in Court that he didn't know whether he was using the nurse's card or his own. Dr. Varyani stated that he finds that to be incredible. Then Dr. Khan said that he called it in, but there was no message on the nurse's phone that he called in. Everything happened once he got caught. He was smart enough to self-report to the Board. Dr. Varyani stated that he finds it very disturbing that an emergency room physician would take the nurse supervisor's credit card, go ahead and make purchases with it, not report it, and only report it after he was caught by the police. Dr. Varyani again stated that he finds it offensive that a physician took a nurse's credit card, and Dr. Varyani added that he knows that Dr. Khan did this knowingly, and held it for the whole day without returning it. He stated that he cannot understand how Dr. Khan could not have given the card back to the nurse.

Dr. Varyani stated that he struggled with everything, and felt that the initial Proposed Order was light. He stated that he cannot agree to a 30-day suspension.

Dr. Madia stated that he agrees with what Dr. Varyani has said. He stated that there is one thing he cannot comprehend. He doesn't understand how the Judge could say that Dr. Khan is not fit to practice medicine in Seneca County. If you're not fit to practice in one county, why would you be fit to practice in a different county? Dr. Madia stated that he agrees with Dr. Varyani's disbelief that Dr. Khan didn't know he had the nurse's card. Dr. Madia stated that he believes that Dr. Khan purposely took the card to use, which he did.

Once he was caught, he found all these excuses. At the same time, he will agree with Dr. Steinbergh's amendment.

Dr. Amato stated that he agrees with Dr. Egner that what the Board sees here is a crime of incredible stupidity. He also agrees with Dr. Steinbergh that Dr. Khan has been punished by the court system for the criminal part and if, in fact, he served 30 days in jail, Dr. Khan's license was suspended for 30 days. Dr. Amato commented that he doesn't believe that Dr. Khan could have practiced in jail. Dr. Amato stated that Dr. Steinbergh's resolution of adding another 30 days' suspension is a pretty severe punishment for his stupidity. Dr. Amato added that he agrees with Dr. Steinbergh that stealing is an act of moral turpitude, whether it happened in the course of practice or not.

Dr. Kumar asked whether there was a second to Dr. Steinbergh's motion.

DR. MADIA SECONDED THE MOTION.

Dr. Kumar asked whether there was further discussion on the amendment.

Dr. Buchan stated that, aside from the fact that the Board members all agree that this was a very stupid act, at issue with him is the character of this physician and whether or not the Board should trust him to practice another day, much less another 30 days. Dr. Buchan stated that there's no question that Dr. Khan stole the credit card, and that it happened in the course of practice. Dr. Buchan stated that Dr. Khan's argument that it wasn't in the course of practice because he used it a half an hour later is a ridiculous argument. Dr. Buchan stated that he will go along with the proposed amendment, but he feels that this was beyond stupidity on Dr. Khan's part. He stated that, to him, this is at one's core. Dr. Buchan stated that Dr. Khan needs at least 30 days out of practice to think about that core.

Dr. Talmage left the room during the previous discussion.

A vote was taken on Dr. Steinbergh's motion to amend:

ROLL CALL:	Mr. Albert	- abstain
	Dr. Egner	- aye
	Dr. Varyani	- aye
	Dr. Buchan	- aye
	Dr. Madia	- aye
	Mr. Browning	- aye
	Mr. Hairston	- abstain
	Dr. Amato	- aye
	Dr. Steinbergh	- aye

The motion carried.

DR. STEINBERGH MOVED TO APPROVE AND CONFIRM MS. PETRUCCI'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND PROPOSED ORDER, AS AMENDED, IN THE MATTER OF ALI KHAN, M.D. DR. VARYANI SECONDED THE MOTION. A vote was taken:

ROLL CALL:	Mr. Albert	- abstain
	Dr. Egner	- aye
	Dr. Varyani	- aye
	Dr. Buchan	- aye
	Dr. Madia	- aye
	Mr. Browning	- aye
	Mr. Hairston	- abstain
	Dr. Amato	- aye
	Dr. Steinbergh	- aye

The motion carried.



State Medical Board of Ohio

77 S. High St., 17th Floor • Columbus, OH 43215-6127 • (614) 466-3934 • Website: www.med.ohio.gov

April 12, 2007

Ali Khan, M.D.
4262 Champlin Drive
Perrysburg, OH 43551

Dear Doctor Khan:

In accordance with Chapter 119., Ohio Revised Code, you are hereby notified that the State Medical Board of Ohio [Board] intends to determine whether or not to limit, revoke, permanently revoke, suspend, refuse to register or reinstate your certificate to practice medicine and surgery, or to reprimand you or place you on probation for one or more of the following reasons:

- (1) On or about November 27, 2006, in the Court of Common Pleas of Seneca County, Ohio, you pled guilty to one misdemeanor count of Theft in violation of Section 2913.02(A)(1), Ohio Revised Code. The facts underlying your plea involved your having taken the credit card of a nurse in the Emergency Room at Tiffin Mercy Hospital and used said credit card to purchase gasoline for your Mercedes Benz automobile. You were subsequently sentenced to sixty days confinement in jail with credit for two days already served. You were also ordered to pay restitution in the amount of \$50.27 to the victim, pay for the costs of prosecution and a \$1,000 fine, and prohibited from practicing medicine in Seneca County, Ohio. Copies of the Indictment, Guilty Plea and Judgment Entry of Sentence are attached hereto and incorporated herein.

Your plea of guilty or the judicial finding of guilt as alleged in paragraph (1) above, individually and/or collectively, constitutes “[a] plea of guilty to, a judicial finding of guilt of, or a judicial finding of eligibility for intervention in lieu of conviction for, a misdemeanor committed in the course of practice,” as that clause is used in Section 4731.22(B)(11), Ohio Revised Code.

Further, your plea of guilty or the judicial finding of guilt as alleged in paragraph (1) above, individually and/or collectively, constitutes “[a] plea of guilty to, a judicial finding of guilt of, or a judicial finding of eligibility for intervention in lieu of conviction for, a misdemeanor involving moral turpitude,” as that clause is used in Section 4731.22(B)(13), Ohio Revised Code.

Pursuant to Chapter 119., Ohio Revised Code, you are hereby advised that you are entitled to a hearing in this matter. If you wish to request such hearing, the request must be made in writing and must be received in the offices of the State Medical Board within thirty days of the time of mailing of this notice.

Mailed 4-12-07

Ali Khan, M.D.

Page 2

You are further advised that, if you timely request a hearing, you are entitled to appear at such hearing in person, or by your attorney, or by such other representative as is permitted to practice before this agency, or you may present your position, arguments, or contentions in writing, and that at the hearing you may present evidence and examine witnesses appearing for or against you.

In the event that there is no request for such hearing received within thirty days of the time of mailing of this notice, the State Medical Board may, in your absence and upon consideration of this matter, determine whether or not to limit, revoke, permanently revoke, suspend, refuse to register or reinstate your certificate to practice medicine and surgery or to reprimand you or place you on probation.

Please note that, whether or not you request a hearing, Section 4731.22(L), Ohio Revised Code, provides that "[w]hen the board refuses to grant a certificate to an applicant, revokes an individual's certificate to practice, refuses to register an applicant, or refuses to reinstate an individual's certificate to practice, the board may specify that its action is permanent. An individual subject to a permanent action taken by the board is forever thereafter ineligible to hold a certificate to practice and the board shall not accept an application for reinstatement of the certificate or for issuance of a new certificate."

Copies of the applicable sections are enclosed for your information.

Very truly yours,



Lance A. Talmage, M.D.
Secretary

LAT/DPK/flb

Enclosures

CERTIFIED MAIL #91 7108 2133 3933 8841 3825
RETURN RECEIPT REQUESTED

cc: Eric Plinke, Esq.
Porter, Wright, Morris & Arthur
41 S. High St.
Columbus, OH 43215-6194

CERTIFIED MAIL # 91 7108 2133 3933 8841 3832
RETURN RECEIPT REQUESTED

khan.ind

IN THE COURT OF COMMON PLEAS OF SENECA COUNTY, OHIO

State of Ohio

Plaintiff,

-vs-

Ali Khan

SSN: [REDACTED]
DOB: [REDACTED]

Defendant.

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Case # 06 CR 0182

Criminal

Judge Steve C. Shuff

FILED
COMMON PLEAS COURT
SENECA COUNTY, OHIO
2006 JUL -6 AM 8:44
MARY K. WARD
CLERK

TWO COUNT INDICTMENT

The Jurors of the Grand Jury for the County of Seneca and the State of Ohio, on their oaths, in the name and by the authority of the State of Ohio, do find and present that:

COUNT ONE

On or about the 19th day of June, 2006, in Seneca County, Ohio, ALI KHAN did, with purpose to deprive the owner, namely Lorie Myers, of property, namely a VISA credit card ending in 2600, a credit card as listed in R.C. Section 2913.71, did knowingly obtain or exert control over said property without the consent of the owner or a person authorized to give consent, namely Lorie Myers.

This being in violation of R.C. Section 2913.02(A)(1),(B)(2) and 2913.71(A) and against the peace and dignity of the State of Ohio.

THEFT- A Felony of the Fifth Degree

PENALTY: The penalty for this offense is a sentence of not less than six (6), seven (7), eight (8), nine (9), ten (10), or eleven (11) months nor more than twelve (12) months and/or a fine of up to \$2,500.00.

COUNT TWO

On or about the 21st day of June, 2006, in Seneca County, Ohio, ALI KHAN did receive, retain, or dispose of certain property of another, namely a VISA credit card ending in 2600, a credit card as listed in R.C. Section 2913.71, belonging to Lorie Myers, the said ALI KHAN knowing or having reasonable cause to believe that the property had

been obtained through the commission of a theft offense as defined in R.C. Section 2913.02.

This being in violation of R.C. Section 2913.51(A),(C) and 2913.71(A) and against the peace and dignity of the State of Ohio.

RECEIVING STOLEN PROPERTY - A Felony of the Fifth Degree

PENALTY: The penalty for this offense is a sentence of not less than six (6), seven (7), eight (8), nine (9), ten (10), or eleven (11) months nor more than twelve (12) months and/or a fine of up to \$2,500.00.

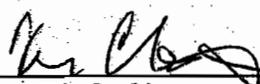
NOTICE TO DEFENDANT

You are notified that you are under indictment for a charge or charges which may place you under a weapons disability pursuant to R.C. Section 2923.13, which prohibits a person under indictment from knowingly acquiring, having, carrying, or using any firearm or dangerous ordinance during the pendency of this case OR upon conviction of the charged offense(s) or lesser offense(s). If you violate R.C. Section 2923.13(A) while under indictment, you may be charged with Having a Weapon While under Disability, a felony of the fifth degree.

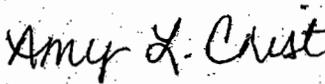
THIS TRUE BILL OF INDICTMENT RETURNED ON JULY 5, 2006.

KEN EGBERT, JR.
PROSECUTING ATTORNEY

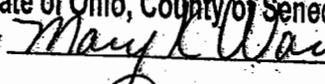
BY:


Kenneth C. Clason
Assistant Prosecuting Attorney
Reg. #0080199

A TRUE BILL:



Foreperson of the Grand Jury

I hereby certify this is a true copy of the original pleading now on file in my office this 4th day of July 2006.
Mary K. Ward, Clerk, Common Pleas Court
State of Ohio, County of Seneca, Tiffin, Ohio
by  Deputy Clerk.

0182.GP2

IN THE COURT OF COMMON PLEAS OF SENECA COUNTY, OHIO

State of Ohio

Plaintiff,

-vs-

Ali Khan

Defendant.

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Case #06CR0182

Criminal

Judge Steve C. Shuff

MARY K. VARD
CLERK

2006 NOV 27 PM 4: 22

FILED
COMMON PLEAS COURT
SENECA COUNTY, OHIO

GUILTY PLEA
(LESSER INCLUDED OFFENSE)

I, Ali Khan, acknowledge I have been fully informed by my counsel and by the Court of the charge against me and the penalty provided by law if found guilty thereof, of my right to jury trial, my right to confront witnesses, my right to have compulsory process for obtaining witnesses and/or any papers in my favor, my right to require the State to prove my guilt beyond a reasonable doubt at a trial at which I cannot be compelled to testify against myself, and of the fact the Court, upon acceptance of this plea, may proceed with judgment and sentence in open Court. Understanding these rights I do hereby waive trial by jury, and I enter a plea of Guilty to the lesser included offense of Theft in violation of R.C. Section 2913.02(A)(1), being a misdemeanor of the first degree.

The penalty for this offense is a sentence of ^{UP TO 180} 180 days jail and/or a fine of up to \$1,000.00.

SENTENCE RECOMMENDATION

If the Defendant enters a plea of Guilty to the lesser included offense to Count One of the indictment and stipulates to no longer practice medicine in Seneca County, Ohio, the Parties will jointly recommend to the Court that the Defendant be sentenced to serve sixty (60) days in the Seneca County Jail with credit for two (2) days already served. The Defendant further to pay restitution in the amount of \$50.27 payable to Mariot VISA Card

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Company and pay court costs at the time of sentence. The State of Ohio will dismiss Count Two at the time of sentencing. The Defendant further to pay a One Thousand Dollar (\$1,000.00) fine. The Parties otherwise reserve the right to speak at sentencing.

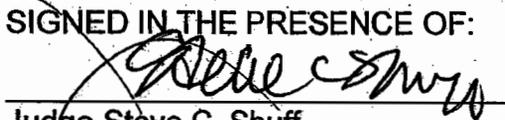
I understand that the Court does not take part in any Sentence Recommendations and may impose the maximum sentence.

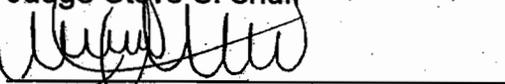
I also understand that if I have been charged with having violated or have been found guilty of having violated any law: local, state, or federal subsequent to accepting the Sentence Recommendation within this Plea of Guilty and prior to sentencing, or if I have not completed any terms of the sentence recommendation required to be completed prior to sentencing, or if I fail to appear for any subsequent hearing in this case, including but not limited to a sentencing hearing, the Prosecutor is released from and will not be required to make the Recommendation at sentencing. That decision will be left solely to the discretion of the Prosecuting Attorney.

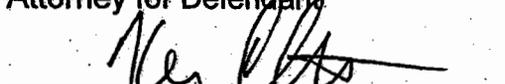
I acknowledge no promises, other than recited in the Sentence Recommendation above have been made to me, nor have any threats been made to me by anyone to secure my plea. Again, I enter this plea voluntarily.

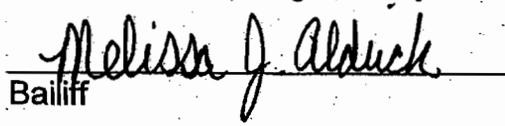
Dated this 27th day of November, 2006.

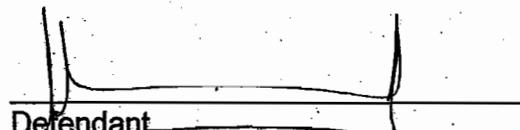
SIGNED IN THE PRESENCE OF:

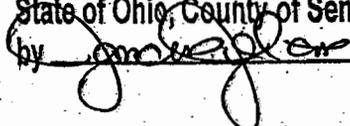

Judge Steve C. Shuff


Attorney for Defendant


Assistant Prosecuting Attorney


Bailiff


Defendant

I hereby certify this is a true copy of the original pleading now on file in my office this 12 day of Dec 2006.
Mary K. Ward, Clerk, Common Pleas Court
State of Ohio, County of Seneca, Tiffin, Ohio
by  Deputy Clerk.

khan.sen

IN THE COMMON PLEAS COURT OF SENECA COUNTY, OHIO

STATE OF OHIO

Plaintiff

CASE NO. 06 CR 0182

vs.

JUDGE STEVE C. SHUFF

ALI KHAN

Defendant

FILED
COMMON PLEAS COURT
SENECA COUNTY, OHIO
2006 NOV 27 PM 4: 22
MARY K. WARD
CLERK

JUDGMENT ENTRY OF SENTENCE

On November 27, 2006, defendant's sentencing hearing was held pursuant to Ohio Revised Code Section 2929.19. Defendant was present in open court and represented by his Attorney, Donald S. Bennett. The State of Ohio was represented by Ken C. Clason, Seneca County Assistant Prosecuting Attorney. The Victim's Advocate, Libra Martin, was also present.

The Court inquired into the competency of the defendant, found defendant to be competent, and all of defendant's rights were explained.

Defendant was afforded all rights pursuant to Criminal Rule 32. The Court has considered the record, oral statements, victim impact statement and the sentence recommendation, as well as the overriding purposes of misdemeanor sentencing under Ohio Revised Code Section 2929.21, and

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has reviewed the considerations under Ohio Revised Code Section 2929.22.

Whereupon, the defendant entered a plea of guilty to the Lesser Included Offense and entered a written negotiated plea of guilty knowingly and understandably under no promise of favor from the Court or anybody else to the Lesser Included Offense to the charge contained in the indictment, to-wit: Theft, in violation of R.C. Section 2913.02(A)(1), being a misdemeanor of the First Degree, to all of which the Court consented.

Whereupon, the Court made a finding of guilty to the Lesser Included Offense of Theft. The Court proceeded directly to sentencing.

The Court asked the defendant personally if defendant wished to make a statement on his own behalf or present any information in mitigation of punishment. Defendant did speak. The Court then inquired of defendant's counsel if he desired to speak on behalf of the defendant. Defendant's counsel did speak. The Court reviewed the victim impact statement.

The Court finds that the defendant was convicted of Theft, in violation of Revised Code Section 2913.02(A)(1), being a misdemeanor of the First Degree. The penalty for this offense is a jail sentence of up to one hundred eighty (180) days and/or a fine of up to \$1,000.00.

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It is ORDERED, ADJUDGED and DECREED that defendant be confined at the Seneca County Jail, for the charge of Theft, a violation of Revised Code Section 2913.02(A)(1), a misdemeanor of the First Degree, for a term of **60 days**, with credit for 2 days already served. Defendant is eligible to receive "work credit" for each day in the Seneca County Jail's work program.

The defendant shall pay restitution in the amount of \$50.27 to the victim in this matter being Marriot VISA Card. Restitution shall be paid by money order or cashiers check, through the Seneca County Common Pleas Court, 117 E. Market St., Suite 4204, Tiffin, Ohio, 44883, in equal monthly installments, with the first being due and payable within thirty (30) days from the date of this Sentencing Judgment Entry, and each month thereafter until paid in full.

The costs of prosecution shall be paid by the defendant and a judgment is rendered against the defendant for such costs pursuant to Revised Code Section 2947.23.

Defendant is further ordered to pay a fine in the amount of \$1,000.00 as a penalty for this offense.

Defendant is further ORDERED to pay court costs within one (1) year. Court costs are to be paid to the Seneca County Clerk of Courts, in equal

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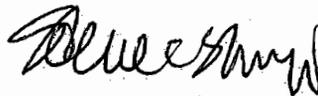
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monthly installments, with the first being due and payable within thirty (30) days from the date of the Sentencing Judgment Entry, and each month thereafter, until paid in full.

It is further ORDERED that Defendant is no longer permitted to practice medicine in Seneca County, Ohio.

It is further ORDERED that the Defendant shall report to the Seneca County Jail on Friday, December 1, 2006 at 9:00 a.m.

It is so ORDERED.



JUDGE STEVE C. SHUFF

FILED
COMMON PLEAS COURT
SENECA COUNTY, OHIO
2006 NOV 27 PM 4:22
MARY K. WARD
CLERK

TO THE CLERK:

You are instructed to serve a copy of the foregoing upon the Prosecutor, Attorney Donald S. Bennett, Adult Parole Authority, Victims Advocate and Seneca County Sheriff.

I hereby certify this is a true copy of the original pleading now on file in my office this 2 day of Dec 2006
Mary K. Ward, Clerk, Common Pleas Court
State of Ohio, County of Seneca, Tiffin, Ohio
by [Signature] Deputy Clerk.

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