APPENDIX

TABLE OF APPENDICES

Appendix A

SUPREME JUDICIAL COURT OF MASSACHUSETTS
Suffolk

No. SJC-13236

RYAN J. WELTER,

Appellant,

v.

BOARD OF REGISTRATION IN MEDICINE,

Appellee.

Filed October 20, 2022

OPINION

Suffolk. September 7, 2022 – October 20, 2022.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker, & Wendlandt, JJ.

* * *[headnotes omitted]

Petition filed in the Supreme Judicial Court for the county of Suffolk on April 13, 2021.

The case was reported by *Lowy*, J.

Alycia M. Kennedy (*Paul Cirel* also present) for the petitioner.

Samuel Furgang, Assistant Attorney General, for the respondent.

WENDLANDT, J. "First, do no harm." While apocryphal, this storied quotation attributed to Hippocrates, the father of modern medicine, embodies a higher standard to which we often hold our physicians. See Travers, Primum Non Nocere: Origin of a Principle, 71 S.D. J. Med. 64, 65 (Feb. 2018), quoting Hippocrates, 1 Epidemics in Adams, The Genuine Works of Hippocrates (1849) ("to do good or to do no harm"). This case implicates that higher standard; it concerns the question whether due process requires that the Board of Registration in Medicine (board) find the common-law elements of fraud, including, inter alia, the elements of intent and reliance, before it may suspend a physician's license to practice medicine on the basis that the physician violated 243 Code Mass. Regs. § 2.07(11)(a)(1) (2012), prohibiting "[a]dvertising that is false, deceptive, or misleading," and 243 Code Mass. Regs. § 1.03(5)(a)(10) (2012), prohibiting "engaging in conduct which has the capacity to deceive or defraud." Because the board's regulations, which by their plain terms do not require proof of the common-law elements of fraud, are rationally related to the Commonwealth's legitimate interest in protecting public confidence in the integrity of the medical profession and thus have a rational tendency to promote the health and safety of the public, we conclude that the regulations do not offend due process. Further concluding that the board's findings that the petitioner physician violated these regulations were supported by substantial evidence and that neither the findings nor the sanction imposed were arbitrary or capricious, we affirm the board's decision.

1. Background. a. Facts. The following facts were found by the administrative magistrate for the Division of Administrative Law Appeals (DALA) and are generally undisputed.

The petitioner, Dr. Ryan J. Welter, was licensed to practice medicine in Massachusetts in 2000 and has a certification in family medicine from the American Board of Family Medicine. He is the founder and manager of Tristan Medical Enterprises, P.C., which does business as New England Center for Hair Restoration (New England Hair). In 2011, Welter received an employment inquiry from Clark Tan, who attended medical school in the Philippines but who was not licensed to practice in the United States.[1] Welter does not dispute that he knew Tan was not licensed to practice in the United States. Welter consulted with the Massachusetts Medical Society (MMS), however, and concluded that MMS regulations permitted him to delegate work to Tan as a nonlicensee. Welter hired Tan as a nonprofessional assistant, and Tan worked for New England Hair between January 2015 and November 1, 2017.

Welter maintained a website for New England Hair.[2] Although Welter was the only licensed physician who worked at New England Hair during the relevant time period, the website contained statements indicating that multiple doctors and surgeons worked at New England Hair, proclaiming

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[1] Tan was not eligible to be licensed to practice in the United States because he completed his medical residency abroad.

[2] The website was created by an outside consultant based on information Welter provided and with his approval.

under the heading "What Sets Us Apart" that "our surgeons" had been solving hair loss problems for years, that "Dr. Ryan Welter and Dr. Clark Tan [are] 'doctors' doctors,'" and that the center's "doctors" could correct other surgeons' work. Tan's website biography identified him as "Clark Tan, M.D.," and stated that "Dr. Tan received his medical degree from Far Eastern University Institute of Medicine" and was a diplomat at East Avenue Medical Center. The biography did not indicate that the institute and center are located outside the United States or that Tan was not a physician licensed to practice in the United States. Throughout the website, Welter and Tan were repeatedly referred to in tandem. For example, the website stated: "Dr. Ryan Welter and Dr. Clark Tan have gained recognition in the field of hair restoration for their surgical skills." The website also included Welter's biography, which stated, "Dr. Welter is board certified, trained and licensed to perform hair restoration procedures for men and women." The biography did not specify that his certification is in family medicine.

Consistent with the website's suggestions that Tan was a licensed physician, Tan introduced himself to staff and patients in the offices of New England Hair as "Dr. Tan," and staff referred to him as "Dr. Tan."[3] Welter permitted Tan to distribute business cards to patients identifying him as "Clark Tan, M.D." Consent forms drafted or approved by Welter included language that the signer would "authorize Dr. Ryan

[3] Welter explained that he referred to Tan as "Dr. Tan" because Tan was a medical school graduate.

Welter, his associate doctors and/or such assistants as may be selected by him" to perform procedures.[4]

Welter delegated initial consultations to Tan.[5] The consent form for these consultations stated that measurements of hair density "were taken by a doctor." Tan also sent an e-mail message to at least one patient considering New England Hair; the message touted the benefits of New England Hair over other clinics, stating that "[c]onsultation is done by a doctor and not by a salesperson as what typically happens in other centers."

In 2016, upon learning that Tan was not a licensed physician, two of New England Hair's patients—each of whom was a physician—complained to the board. After Welter learned about the complaints, he removed all references to Tan from New England Hair's website and changed Tan's position so that he would no longer conduct consultations, assist with procedures, or have contact with patients.

b. Procedural history. The board initiated a formal adjudicatory proceeding against Welter and referred the matter to DALA. After a review of the evidence and a multiday hearing, the administrative

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[4] Welter did not employ any licensed associate doctors.

[5] Initial consultations are handled by nonmedically trained salespeople in some other hair restoration practices; Welter reviewed Tan's assessments following initial consultations. Further, when Tan met with patients alone, Welter would review Tan's notes and schedule the patient for a follow up if he had any concerns. The hair procedures themselves were scheduled for times when Welter was physically present at New England Hair.

magistrate concluded that the board had met its burden of proving by a preponderance of the evidence its allegations with regard to false advertising on New England Hair's website and deceptive conduct that enabled Tan to present himself as a licensed physician from 2015 to 2017.[6]

The magistrate found that Welter had violated 243 Code Mass. Regs. § 2.07(11)(a), which prohibits "[a]dvertising that is false, deceptive, or misleading." The magistrate found the website statements referring to the plural "doctors," even if intended to be aspirational,[7] could falsely lead the reader to believe that there were multiple licensed physicians at New England Hair. The magistrate found that the use of the plural was compounded by Tan's biography, suggesting that Tan was a licensed physician. In placing Tan on the same level as Welter by repeatedly referring to the two in tandem, the website deceptively implied that Tan was a licensed physician, particularly given that it obscured that he was educated and trained in the Philippines. The magistrate found, "Although the description of Tan's qualifications may have been technically accurate, even a careful reader might conclude that the East Avenue Medical Center, with its generic English

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[6] The administrative magistrate also concluded that the board had not met its burden of proving its allegations related to improper delegation of medical services, fraudulent filing of license renewal applications, or the creation and maintenance of false medical records. The magistrate referred to the allegations of improper delegation as the "most serious allegation."

[7] Welter maintained that he referred to "doctors" because it had been his intent to hire additional doctors.

name, is in the United States." The failure to disclose where Tan studied and trained prevented readers from understanding that the references to "doctors" and "surgeons" could not include Tan.

The magistrate also found it misleading not to disclose that Welter's board certification was in family medicine. The magistrate explained, "Although each element of the sentence is true by itself—Dr. Welter is board certified, he is trained in hair restoration procedures, and he does possess the appropriate licensure to do those procedures—together the adjectives describing Dr. Welter convey the message that Dr. Welter is board-certified in hair restoration techniques, either as a surgeon or as a plastic surgeon."[8]

Welter argued that the false advertising regulation, 243 Code Mass. Regs. § 2.07(11)(a), required more than just an advertising claim that is false, deceptive, or misleading; he contended that case law required the consideration of the common-law fraud elements of knowledge and intent to deceive, materiality, and reliance to the other party's detriment. The magistrate concluded that there was no reason to "depart from the well-established rule of regulatory construction" that the clear meaning of the regulation's words should be applied unless doing so would lead to an illogical result, citing *Massachusetts Fine Wines & Spirits, LLC v. Alcoholic Beverages &*

[8] The board explained at oral argument that there is no board certification in hair restoration, but it takes the position that Welter's website would mislead readers because a reasonable reader might not know that there is no certification in hair restoration.

Control Comm'n, 482 Mass. 683, 687 (2019). The magistrate thus declined to import additional elements into the regulation's plain meaning.

The magistrate also found that Welter violated 243 Code Mass. Regs. § 1.03(5)(a)(10), which prohibits "[p]racticing medicine deceitfully, or engaging in conduct which has the capacity to deceive or defraud." The magistrate found that Welter's conduct facilitated the impression that Tan was a licensed physician, and thus had the capacity to deceive. Welter contended that Tan was, in fact, a doctor and therefore that Welter's conduct in referring to Tan as such was accurate, but the magistrate found that the business cards, consent forms, and conduct of office staff "created a false and misleading impression concerning Tan's licensure status."

The magistrate also found four mitigating factors: that Welter (1) changed his website after learning of the complaints, (2) changed Tan's position after learning that the board disagreed with his construction of the delegation regulation, (3) had no history of discipline, and (4) had a reputation for honesty and integrity in his church community.

The board, after considering the parties' objections, adopted the magistrate's findings of fact and conclusions of law. Following consideration of the parties' memoranda on disposition, the board issued an indefinite suspension of Welter's license to practice medicine, which it immediately stayed upon Welter's entering into a probation agreement pursuant to which Welter arranged and paid for monitoring of his credentialing applications, advertising, and media communications. The board indicated that Welter

could petition for termination of the suspension after two years of monitoring. In determining its sanction, the board noted that false and deceptive statements on a physician's website deprive those seeking medical care of the opportunity to make informed choices as consumers and that false and deceptive statements on a consent form bar patients from giving informed consent.

Welter filed a petition for review of the board's order in the county court, pursuant to G. L. c. 112, § 64, and a single justice reserved and reported the matter to the full court. Welter urges the court to reverse or revise the board's decision on several grounds: (1) the suspension of his medical license violates his substantive due process right to practice medicine, (2) the board's construction of its regulations is incorrect, (3) the board's decision was arbitrary or capricious as contrary to the evidence, and (4) the sanction was arbitrary or capricious as excessive. We address each in turn.

2. Discussion. a. Standard of review. A person whose license to practice medicine has been suspended, revoked, or cancelled by the board may petition this court to "enter a decree revising or reversing the decision of the board, in accordance with the standards for review provided in [G. L. c. 30A, § 14 (7)]." G. L. c. 112, § 64.[9] Section 14 (7), in turn,

[9] Welter's argument that we should review the board's decision pursuant to the certiorari statute, G. L. c. 249, § 4, misreads the holding of *Hoffer v. Board of Registration in Med.*, 461 Mass. 451 (2012). In *Hoffer*, the court conducted review under G. L. c. 249, § 4, rather than G. L. c. 112, § 64, because the petitioner did not challenge the decision suspending her license, but rather an

instructs us to set aside or modify the decision only if the substantial rights of a party may have been prejudiced because the agency decision is "(1) in violation of constitutional provisions; (2) in excess of the board's authority; (3) based on an error of law; (4) unsupported by substantial evidence; or (5) arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law." *Duggan v. Board of Registration in Nursing*, 456 Mass. 666, 673 (2010), citing G. L. c. 30A, § 14 (7). A plaintiff bears "a heavy burden," for we "give due weight to the [board's] expertise, as required by § 14 (7)." *Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban*, 434 Mass. 256, 263-264 (2001).

b. Substantive due process. "[T]he right to engage in any lawful occupation is an aspect of the liberty and property interests protected by the substantive reach of the due process clause of the Fourteenth Amendment to the United States Constitution and analogous provisions of our State Constitution." *Blue Hills Cemetery, Inc. v. Board of Registration in Embalming & Funeral Directing*, 379 Mass. 368, 372 (1979) (*Blue Hills Cemetery*). But "[t]he right to engage in a particular occupation is not a 'fundamental right infringement of which deserves strict judicial scrutiny.'" *Id.* at 371 n.6, quoting *Commonwealth v. Henry's Drywall Co.*, 366 Mass. 539, 542 (1974). For nonfundamental rights, such as the right at issue

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order denying a stay of her suspension, which the court analyzed as analogous to a denial of reinstatement of an already suspended or revoked license. *Id.* at 456. By contrast, Welter challenges the decision of suspension; accordingly, G. L. c. 30A, § 14, provides the correct standard of review. See G. L. c. 112, § 64.

here, "[t]he due process clause of the Fourteenth Amendment to the United States Constitution demands that a statute [or regulation] bear a 'reasonable relation to a permissible legislative objective.'" *Blue Hills Cemetery*, *supra* at 373, quoting *Pinnick v. Cleary*, 360 Mass. 1, 14 (1971). "Under the analogous provisions of our State Constitution, we must determine whether [the statute or regulation] 'bears a real and substantial relation to the public health, safety, morals, or some other phase of the general welfare.'" *Blue Hills Cemetery*, *supra*, quoting *Sperry & Hutchinson Co. v. Director of the Div. on the Necessaries of Life*, 307 Mass. 408, 418 (1940). Although "the State and Federal standards are phrased in virtually identical terms, we have noted that '[t]he Constitution of a State may guard more jealously against the exercise of the State's police power.'" *Blue Hills Cemetery*, *supra* at 373 n.8, quoting *Coffee-Rich, Inc. v. Commissioner of Pub. Health*, 348 Mass. 414, 421 (1965). Here, however, we have little difficulty in concluding that the challenged regulations bear a real and substantial relation to a permissible legislative objective related to the general welfare, satisfying both the Federal and State Constitutions.

Welter argues that the board deprived him of substantive due process by indefinitely suspending his license to practice medicine without first finding the elements of common-law fraud, specifically that he had an intent to deceive and that patients relied on any misleading statements to their detriment. See *Masingill v. EMC Corp.*, 449 Mass. 532, 540 (2007), quoting *Kilroy v. Barron*, 326 Mass. 464, 465 (1950) ("To recover for fraudulent misrepresentation, a

plaintiff 'must allege and prove that the defendant made a false representation of a material fact with knowledge of its falsity for the purpose of inducing the plaintiff to act thereon, and that the plaintiff relied upon the representation as true and acted upon it to [her] damage'"). See also Restatement (Second) of Torts § 525 (1977) ("One who fraudulently makes a misrepresentation of fact, opinion, intention or law for the purpose of inducing another to act or to refrain from action in reliance upon it, is subject to liability to the other in deceit for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation"). He asserts that suspending his license without these findings "in no way promotes or protects the public health and is not rationally related to that end." The board contends that its action was rationally related to public health and safety, in light of the board's "broad authority to 'protect the image of the medical profession,'" which "is not limited to disciplining conduct involving direct patient care, criminal activity, or deceit." *Sugarman v. Board of Registration in Med.*, 422 Mass. 338, 343 (1996), quoting R*aymond v. Board of Registration in Med.*, 387 Mass. 708, 713 (1982). We agree with the board.

The board has "broad authority to regulate the conduct of the medical profession," and this authority "includes its ability to sanction physicians for conduct which undermines public confidence in the integrity of the medical profession" even where the physicians did not "engage in any wrongdoing" or "deceit." *Sugarman*, 422 Mass. at 342-343. Holding physicians to a high standard in their advertising and other conduct is rationally related to that end. See *Commonwealth v. Brown*, 302 Mass. 523, 527 (1939),

quoting *McMurdo v. Getter*, 298 Mass. 363, 367 (1937) ("Learned professions 'are characterized by . . . the adherence to a standard of ethics higher than that of the market place . . .").

It is instructive that the United States Supreme Court has recognized, at least as it pertains to the legal profession, which similarly is held to a higher standard than the general marketplace, that "advertising by the professions poses special risks of deception—'because the public lacks sophistication concerning legal services, misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising.'" *In re R.M.J.*, 455 U.S. 191, 200 (1982), quoting *Bates v. State Bar of Ariz.*, 433 U.S. 350, 383 (1977). The same concern for the public in connection with the selection of physicians permits the board to impose a high standard on physicians. Thus, the board may, consistent with due process, place the burden on physicians to ensure that their advertising not only is technically accurate, but also is not deceptive or misleading; similarly, the board may demand that physicians conduct themselves in a manner that does not have the capacity to deceive or defraud without offending the State or Federal Constitution.[10]

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[10] Notably, other jurisdictions hold physicians to similarly high standards. See, e.g., *Barnett v. Maryland State Bd. of Dental Examiners*, 293 Md. 361, 370-371 (1982) (upholding board's finding that advertising statements were "of a character tending to deceive or mislead the public" where reasonable person could be convinced there was "possibility" that lay person would make wrong conclusion); *Gale v. North Dakota Bd. of Podiatric Med.*, 1997 ND 83, ¶ 39 (upholding board's finding where "a reasoning mind could reasonably find [the doctor's] advertisement

c. Board's construction of regulations. Welter next contends that the board committed legal error by construing its regulations so as not to require proof of the common-law elements required to prove fraud. "We interpret a regulation in the same manner as a statute, and according to traditional rules of construction." *Massachusetts Fine Wines & Spirits, LLC*, 482 Mass. at 687, quoting *Warcewicz v. Department of Envtl. Protection*, 410 Mass. 548, 550 (1991). The first rule of construction is that "we look to the text of the regulation, and will apply the clear meaning of unambiguous words unless doing so would lead to an absurd result." *Massachusetts Fine Wines & Spirits, LLC*, *supra*. See *DeCosmo v. Blue Tarp Redev., LLC*, 487 Mass. 690, 699 (2021) ("If the regulation is plain and unambiguous, it should be interpreted according to its terms").

Fatal to Welter's claim is the fact that neither regulation expressly requires proof of fraud; instead, the regulations prohibit "[a]dvertising that is false, deceptive, or misleading," 243 Code Mass. Regs. § 2.07(11)(a)(1), and "engaging in conduct which has the capacity to deceive or defraud," 243 Code Mass. Regs. § 1.03(5)(a)(10). Whether something is

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contained representations that in reasonable probability would cause an ordinary, prudent person to misunderstand or be deceived"); *In re Campbell*, 19 Wash. 2d 300, 311 (1943) (upholding revocation of license even in absence of evidence that anyone was actually deceived where "the advertisements speak for themselves and reveal their own peculiar tendency to deceive the public"). We see nothing in either the Federal or State Constitution that would require the board to hold physicians licensed to practice medicine in the Commonwealth to a less exacting standard.

advertising "that is" deceptive or misleading and whether conduct "has the capacity to deceive" are objective inquiries that do not necessarily depend on intent, knowledge, materiality, or reliance.[11] Accordingly, we decline Welter's invitation to inject these elements from the common law where they are absent from the plain words of the regulations. See *Pyle v. School Comm. of S. Hadley*, 423 Mass. 283, 285 (1996) ("Where the language of a statute is clear and unambiguous, it is conclusive as to legislative intent"); *New England Med. Ctr. Hosp., Inc. v. Commissioner of Revenue*, 381 Mass. 748, 750 (1980) (where "statutory language . . . is sufficiently clear . . . we need not seek further enlightenment from other sources").

Our conclusion is further buttressed by neighboring provisions that expressly require intent or knowledge. See *Commonwealth v. Keefner*, 461 Mass. 507, 511 (2012), quoting *Wolfe v. Gormally*, 440 Mass. 699, 704 (2004) ("Significantly, a statute [or regulation] must be interpreted 'as a whole'; it is improper to confine interpretation to the single section to be construed"). For example, 243 Code Mass. Regs. § 1.03(5)(a)(1) (2012) expressly prohibits "*[f]raudulent* procurement of [a physician's] certificate of registration or its renewal" (emphasis added), and 243 Code Mass. Regs. § 1.03(5)(a)(6) (2012) expressly bars "*[k]nowingly* permitting, aiding or abetting an unlicensed person to perform activities requiring a license" (emphasis added). The absence of these

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[11] Given the disjunctive nature of the regulation, we need not reach the issue whether "conduct which has the capacity to . . . defraud" requires proof of the common-law elements. 243 Code Mass. Regs. § 1.03(5)(a)(10).

elements in the regulations in question is thus further indication that our construction is proper.

Our construction of G. L. c. 93A, § 2 *(a)*, which prohibits "deceptive acts or practices," is instructive. We have concluded that G. L. c. 93A, § 2 *(a)*, focuses on whether the advertising or conduct itself is objectively deceptive, not whether there was an intent to deceive or whether anyone was subjectively deceived. See *Aspinall v. Philip Morris Cos.*, 442 Mass. 381, 394 (2004) ("Whether conduct is deceptive is initially a question of fact, to be answered on an objective basis" and "does not require proof that a plaintiff relied on the representation, or that the defendant intended to deceive the plaintiff, or even knowledge on the part of the defendant that the representation was false" [citations omitted]). Accordingly, we have concluded that a practice is "deceptive" if it "could reasonably be found to have caused a person to act differently from the way he [or she] otherwise would have acted." *Id.*, quoting *Purity Supreme, Inc. v. Attorney Gen.*, 380 Mass. 762, 777 (1980).

Similarly, examining a regulation of the Board of Registration of Chiropractors "prohibit[ing] 'deceptive, confusing, misleading, or unfair' advertising," we rejected the argument that the regulation required showing that a consumer was actually deceived. See *Langlitz v. Board of Registration of Chiropractors*, 396 Mass. 374, 382 (1985) ("Advertisements which are inherently misleading or deceptive are prohibited by [233 Code Mass. Regs. § 4.11], irrespective of any resulting harm to the public"). Accordingly, we rejected the argument

that a violation of the regulation required testimony that a member of the public was actually deceived by an advertisement. *Id.*

Accordingly, we conclude that the challenged regulations are unambiguous—they do not require any showing as to the common-law elements of fraud, namely intent, knowledge, materiality, or reliance. Instead, they require only an objective assessment whether the advertisement is "deceptive" or "misleading," 243 Code Mass. Regs. § 2.07(11)(a)(1), and whether the conduct at issue has the "capacity to deceive," 243 Code Mass. Regs. § 1.03(5)(a)(10).

d. Whether the board's decision was arbitrary or capricious or contrary to the evidence. Welter further contends that his advertising was not deceptive and his conduct did not have the capacity to deceive. He maintains that the website and conduct were not deceptive because the references to "doctors" and "surgeons" were aspirational; it was not inaccurate to describe Tan, who was medically trained in the Philippines, as a doctor; and Welter is board certified.

The scope of our review under the Administrative Procedure Act, G. L. c. 30A, § 14, is limited: "we will uphold the [agency's] decision 'as long as the findings by the authority are supported by substantial evidence in the record considered as a whole.'" *Costello v. Department of Pub. Utils.*, 391 Mass. 527, 539 (1984), quoting *1001 Plays, Inc. v. Mayor of Boston*, 387 Mass. 879, 885 (1983). "'Substantial evidence' means such evidence as a reasonable mind might accept as adequate to support a conclusion." G. L. c. 30A, § 1(6). "[A]n agency's conclusion will fail judicial scrutiny if 'the evidence points to no felt or appreciable

probability of the conclusion or points to an overwhelming probability of the contrary.'" *Cobble v. Commissioner of the Dep't of Social Servs.*, 430 Mass. 385, 390-391 (1999), quoting *New Boston Garden Corp. v. Assessors of Boston*, 383 Mass. 456, 466 (1981).

Applying this standard, the record amply supports the board's finding. The website and conduct in question, even if technically accurate, reasonably could be found to have been deceptive or misleading, 243 Code Mass. Regs. § 2.07(11)(a)(1), and to have the capacity to deceive, 243 Code Mass. Regs. § 1.03(5)(a)(10). See *Aspinall*, 442 Mass. at 394-395 (in G. L. c. 93A context, "advertising need not be totally false in order to be deemed deceptive" because it "may consist of a half truth, or even may be true as a literal matter, but still create an over-all misleading impression through failure to disclose material information"). A reasonable prospective patient could reasonably read the website and believe that New England Hair employed multiple doctors, that Tan was licensed to practice in the United States, and that Welter was board certified in hair restoration. And a reasonable prospective patient could further be misled as to Tan's licensing status by the consent forms, the business cards, and the practice of calling Tan a doctor. Indeed, the two complaining patients, who themselves were physicians, were misled precisely in this manner.

e. Whether the board's sanction was arbitrary or capricious. As a sanction for Welter's conduct, the board indefinitely suspended his license but immediately stayed the suspension upon Welter's

entry into a two-year probationary agreement pursuant to which Welter arranged and paid for monitoring of his credentialing applications, advertising, and media communications.[12] On appeal, Welter maintains that the board's sanction was excessive and thus arbitrary or capricious. In particular, he contends that because the board did not prove its more serious allegations against him, see note 6, *supra*, the sanction was disproportionately harsh when compared to sanctions in other comparable cases.

A court cannot substitute its discretion for an agency's, "nor can the reviewing court interfere with the imposition of a penalty by an administrative tribunal because in the court's own evaluation of the circumstances the penalty appears to be too harsh." *Vaspourakan, Ltd. v. Alcoholic Beverages Control Comm'n*, 401 Mass. 347, 355 (1987), quoting *Levy v. Board of Registration & Discipline in Med.*, 378 Mass. 519, 529 (1979). "A court will interfere with the agency's discretion in this area 'only . . . in the most extraordinary of circumstances.'" *Vaspourakan*, *supra*, quoting *Levy*, *supra* at 528-529. In assessing whether the sanction is arbitrary or capricious, we search for comparable cases. See *Herridge v. Board of Registration in Med.*, 420 Mass. 154, 166-167 (1995), *S.C.*, 424 Mass. 201 (1997) (finding board did not abuse its discretion where "the sanction imposed was

[12] Given the probationary agreement, we do not address here whether imposition by the board of an indefinite suspension (absent an agreed-upon probationary period) for Welter's conduct would be excessive.

not disproportionate to sanctions imposed in other cases" of similar conduct).

In pressing his claim that the sanction imposed on him was excessive, Welter chiefly relies on Matter of Reynolds, Adjudicatory Case No. 89-11-ST (Aug. 16, 1989).[13] In that case, the physician employed an unlicensed medical school graduate and failed to disclose three malpractice suits on his license renewal; the physician received a reprimand and a fine. The Reynolds decision is distinguishable because the disciplined physician in that matter believed the graduate had a license; here, Welter knew that Tan was not a licensed physician but nonetheless presented Tan in a manner to suggest to the public that Tan was licensed in the United States.

Welter also relies on a decision of a single justice of this court, reversing a five-year revocation of a license by the board as being excessive, and thus arbitrary or capricious and an abuse of discretion. See Brockington *vs.* Massachusetts Bd. of Registration in Med., Supreme Judicial Ct., No. SJ-2012-0510 (Suffolk County Oct. 30, 2014). In that case, the board sanctioned the physician on the basis that his actions amounted to "gross misconduct" under G. L. c. 112, § 5, and 243 Code Mass. Regs. § 1.03(5) (2012). *Id.* at 3.

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[13] Welter also cites consent orders involving fraudulent conduct where the offending physician received a reprimand and a fine. See, e.g., Matter of Asis, Adjudicatory Case No. 2006-06-5 (Dec. 20, 2006) (insurance fraud); Matter of Prasad, Adjudicatory Case No. 2006-018 (Apr. 16, 2006) (altering patient medical records to conceal accidental administration of overdose and making misrepresentations concerning event to medical peer review committee).

But the board did not explain why it adopted a "gross misconduct" standard. *Id.* at 10. Moreover, the single justice determined that the five-year license revocation seemed "significantly inconsistent with prior sanctions," and thus arbitrary and an abuse of discretion "[i]n the absence of an adequate explanation of why the case warrant[ed] this level of discipline in comparison to other cases." *Id.* The single justice concluded, based on comparable cases, that the years of revocation should have been reduced, or else the board should have imposed the lesser sanction of license suspension. *Id.* at 12.[14] Here, we are not addressing a five-year revocation. Importantly, the board has explained both its reasoning in imposing the sanction based on a comparable case as well as the reasons for deviation from the cases upon which Welter relies, the most recent of which are from 2006.

More specifically, the board primarily relied on Matter of Bergus, Adjudicatory Case No. 2017-004 (June 27, 2019). In the Bergus case, as with the present case, the board imposed an indefinite suspension stayed upon entry into a probation agreement.[15] The physician misrepresented to a health care facility the circumstances surrounding the end of his residency program, incorrectly informed a health maintenance organization that he was board certified in a specialty when he was not, and

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[14] On remand, the board revoked the physician's license, but allowed him to petition for reinstatement after three years upon demonstration of his competency to practice medicine. Matter of Brockington, Adjudicatory Case No. 2008-017 (Apr. 16, 2015).

[15] The board in the Bergus case also imposed a $10,000 fine. Matter of Bergus, Adjudicatory Case No. 2017-004.

inaccurately claimed in an advertisement that he had received board certification in areas where he had not. The physician had already agreed with the Rhode Island Board of Medical Licensure and Discipline to pay a $10,000 administrative fee, receive a reprimand, and be placed on probation for two years during which time he attended an ethics course and retained and cooperated with monitors. Matter of Bergus, Adjudicatory Case No. RM-17-054 (Aug. 9, 2018).

In its decision, the board explained that Welter's statements and conduct deprived patients of the opportunity to make informed choices and to give informed consent. At oral argument, the board further explained its rationale for the sanction imposed on Welter, which it acknowledged deviated in severity from the earlier cases relied on by Welter; in particular, the board argued that the broader reach of, and the public's increasing reliance on, Internet advertising in connection with selecting a physician merited the sanction imposed on Welter.

Although we agree with Welter that the Bergus case is not squarely on all fours with the present case, given our highly deferential standard, we cannot say that the sanction here was arbitrary or capricious.[16]

3. Conclusion. For the reasons stated, we affirm the order of the board.

So ordered.

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[16] Contrary to Welter's contention, the board properly considered mitigating factors in determining its sanction.

Appendix B

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY

No. SJ-2021-0141

RYAN J. WELTER, M.D.
Petitioner,
v.
BOARD OF REGISTRATION IN MEDICINE,
Respondent.

Filed March 3, 2022

Board of Registration in Medicine
2019-0129 (RM-19-0282)

RESERVATION AND REPORT

This case came before the Court, Lowy, J., on a petition pursuant to G. L. c. 112, § 64, seeking review of a Board of Registration in Medicine order indefinitely suspending the petitioner's license to practice medicine and staying the suspension upon the petitioner's entering into a probation agreement with the Board. The Board adopted an administrative magistrate's finding that the petitioner held out one of his employees as a licensed physician even though the employee, who had completed medical school abroad, was not licensed to practice medicine in the United States. The Board agreed with the administrative

magistrate that the petitioner violated 243 Code Mass. Regs. § 2.07(11)(a)(1), which prohibits "[a]dvertising that is false, deceptive, or misleading," and 243 Code Mass. Regs. § 1.03(5)(a)(10), which prohibits "[p]racticing medicine deceitfully, or engaging in conduct which has the capacity to deceive or defraud." The parties dispute, among other issues, whether these regulations incorporate the common law fraud requirements of knowledge, intent, materiality, and reliance. See, e.g., *Cumis Ins. Soc'y, Inc. v. BJ's Wholesale Club, Inc.*, 455 Mass. 458, 471 (2009).

This issue is sufficiently novel and important to be resolved by the full court at this time. Accordingly, it is hereby ORDERED that this petition be reported to the full court. In their briefs before the full court, the parties should expand upon the arguments they presented to the single justice about whether the applicable regulations incorporate the elements of common law fraud.

The record before the full court shall include:

- all the papers filed in No. SJ-2021-0141,
- the docket sheet in No. SJ-2021-0141, and
- this Reservation and Report.

The petitioner shall be the appellant. The parties shall prepare and file in the full court a statement of agreed facts, to be included in the record appendix.

By the court,

/s/ David A. Lowy
David A. Lowy
Associate Justice

Entered: March 3, 2022

Appendix C

COMMONWEALTH OF MASSACHUSETTS
BOARD OF REGISTRATION IN MEDICINE
Middlesex

Adjudicatory Case No. 2019-029

IN THE MATTER OF
RYAN J. WELTER, M.D.
Petitioner.

Filed March 11, 2021

Adjudicatory Case No. 2019-029
(RM-19-0282)

FINAL DECISION AND ORDER

This matter came before the Board for disposition on the basis of the Board of Registration in Medicine's January 28, 2021 Partial Final Decision and Order as to Findings of Fact and Conclusions of Law Only (Partial Decision), incorporating the Administrative Magistrate's October 20, 2020 Recommended Decision. After full consideration of the Partial Decision, which is attached hereto and incorporated by reference, the Parties' Memoranda on Disposition, and any Victim Impact Statement, the Board adds the following:

Sanction

As a function of this Board's obligation to protect the public health, safety, and welfare, it is proper for

the Board to discipline the Respondent. *See Levy v. Board of Registration in Medicine*, 378 Mass. 519 (1979).

The record reflects that the Respondent, who is board-certified in family medicine, included false and deceptive statements on the website for his hair restoration practice, with respect to his training and with respect to the training and licensure of a physician-employee, not licensed in the United States. The record reflects, too, that the Respondent engaged in conduct having the capacity to deceive or defraud by the nomenclature used by staff to refer to the unlicensed physician, by the content of the business cards the Respondent allowed the unlicensed physician to disseminate, and in the wording used on the Respondent's consent forms.

When a physician uses false and deceptive statements with respect to his training and that of his employee, the physician deprives those seeking medical care of the opportunity to make informed choices as consumers. When a physician makes a false and deceptive statement on a consent form, a patient is barred from obtaining informed consent.

There is a range of discipline the Board has imposed in cases where physicians have misstated their credentials. At one end of the spectrum, the Board has imposed censure as a sanction. *See In the Matter of Gloria Johnson-Powell, MD.*, Board of Registration in Medicine, Adjudicatory Case No. 99-05-XX (Consent Order, March 3, 1999) (The physician testified, in multiple court proceedings, that she was board-certified when she was not. The Board identified mitigating factors: i. the lack of evidence

that the physician misrepresented her credentials to the Board or any medical facility; and ii. the physician's entry into a voluntary agreement with the American Board of Psychiatry and Neurology pledging never to represent herself as board-certified.)

At the other end of the spectrum, the Board has imposed an indefinite suspension and $10,000 fine, and required community service as the sanction and allowed the physician to petition to end the suspension upon payment of the fine, amendment of answers, and completion of community service. *See In the Matter of Michael G. Ciborski, M.D.*, Board of Registration in Medicine, Adjudicatory Case No. 99-18-XX (Consent Order, August 25, 1999) (The physician: i) falsely indicated on five license renewal applications, a health care facility reappointment application, and a health care provider insurance network application that he was certified by the American Board of Surgery; and ii) forged a board-certification certificate.)

In the middle of the spectrum are cases in which the Board has imposed a reprimand and fine. *See In the Matter of Tushar C. Patel, MD.*, Board of Registration in Medicine, Adjudicatory Case No. 2008-042 (Consent Order, November 19, 2008) (The Board imposed a reprimand and $2,500 fine for misrepresenting board certifications on multiple renewal applications. The Board determined that the physician had undermined the integrity of the medical profession.).

In a recent case where the Board imposed reciprocal discipline on a physician who disseminated information that had the potential to mislead consumers about the credentials of their provider, the

Board fined the physician $10,000 and imposed an indefinite suspension of his medical license with the suspension stayed upon his entry into a Probation Agreement with monitoring of his license applications and advertising by a Board-approved entity. The Board also required that the physician provide documentation of his completion of CPEP's Professional/Problem Based Ethics (PROBE) course. In that case, the physician misrepresented to a health care facility the circumstances surrounding the end of his residency program; incorrectly informed a health maintenance organization that he was board-certified in a specialty when he was not; and inaccurately claimed in an advertisement that he had received fellowship training board-certification in areas where he had not. *See In the Matter of Boris Bergus, M.D.*, Board of Registration in Medicine, Adjudicatory Case No. 2017-004 (Final Decision and Order, June 27, 2019).

In the pending case, the Board acknowledges, as mitigating circumstances, that the Respondent: i) took measures to remediate his website and conduct, with respect to the unlicensed physician employee, prior to the Board's issuing the Statement of Allegations commencing this matter; and ii) entered a Voluntary Agreement Not to Practice in May of 2019.

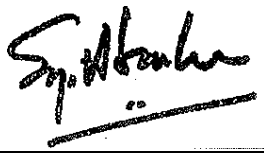
The Board hereby terminates the Respondent's Voluntary Agreement Not to Practice and INDEFINITELY SUSPENDS the Respondent's license to practice medicine. The Board immediately stays the indefinite suspension of the Respondent's license upon his entering into a Board Probation Agreement that also requires the Respondent to

arrange for, and pay the costs associated with, monitoring of his credentialing applications, advertising, and media communications under his control by a Board-approved entity, such as Affiliated Monitors, Inc. The Probation Agreement shall allow the Respondent to petition for termination after two years of documented monitoring. The sanction is imposed for each violation of the law, and not a combination of any or all of them.

The Respondent shall provide a complete copy of this Final Decision and Order with all exhibits and attachments, within ten (10) days by certified mail, return receipt requested, or by hand delivery to the following designated entities: any in- or out-of-state hospital, nursing home, clinic, other licensed facility, or municipal, state, or federal facility at which he practices medicine; any in- or out-of-state health maintenance organization with whom he has privileges or any other kind of association; any state agency, in- or out-of-state, with which he has a provider contract; any in- or out-of-state medical employer, whether or not he practices medicine there; and the state licensing boards of all states in which he has any kind of license. The Respondent shall also provide this notification to any such designated entities with which he becomes associated during the period of his suspension and probation. The Respondent is further directed to certify to the Board within ten (10) days that he has complied with this directive.

The Board expressly reserves the authority to independently notify, at any time, any of the entities designated above, or any other affected entity, of any

action it has taken. The Respondent has the right to appeal this Final Decision and Order within (30) days, pursuant to G.L. c. 30A, §§14 and 15, and G.L. c.112, §64.



Date:
March 11, 2021

George Abraham, M.D., M.D.
Board Chair
Board of Registration in Medicine

Appendix D

COMMONWEALTH OF MASSACHUSETTS
Division of Administrative Law Appeals
Middlesex

Docket No. RM-19-0282

BOARD OF REGISTRATION IN MEDICINE
Petitioner,
v.
RYAN J. WELTER, M.D.,
Respondent.

Filed October 20, 2020

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* * *

[Counsel block omitted]

SUMMARY OF RECOMMENDED DECISION

The Board alleged that Respondent engaged in conduct in the practice of medicine that had the capacity to deceive or defraud by engaging in false advertising, fraudulently renewing his license, enabling an unlicensed associate to present himself as a licensed physician, and creating and maintaining false medical records. The Board also alleged that Respondent improperly delegated medical services to an unlicensed graduate of a foreign medical school. Following a hearing, the Board sustained its burden of proving that Respondent engaged in false advertising on his website and deceived his patients by enabling his associate to present himself as a licensed

physician. The Board did not sustain its burden of proving that Respondent improperly delegated medical services to his associate, fraudulently renewed his license, or created and maintained false medical records.

RECOMMENDED DECISION

On May 30, 2019, the Board of Registration in Medicine (Board) issued a Statement of Allegations concerning Ryan J. Welter, M.D. (Respondent). The Statement alleged that Dr. Welter had engaged in conduct that had the capacity to deceive or defraud in the practice of medicine by engaging in false advertising, by omitting information or providing false information on his license renewal applications, by allowing an associate to present himself as a licensed physician when he was not, and by creating and maintaining false medical records. The Board also alleged that Dr. Welter improperly delegated medical services to his associate, an unlicensed graduate of a foreign medical school. Specifically, the Board alleged that Dr. Welter's website for his business, New England Center for Hair Restoration (New England Hair), misrepresented the area of Dr. Welter's board certification and falsely implied that his unlicensed associate, Clark Tan, was a licensed physician; that Dr. Welter reinforced that impression by permitting Clark Tan to present himself as a physician at New England Hair; that Dr. Welter improperly delegated medical services to Clark Tan during procedures on three patients (Patients A, B, and C); that Dr. Welter created and maintained false medical records, and that Dr. Welter fraudulently renewed his license by omitting information or providing false information on

his renewal applications. The Board does not allege that Dr. Welter violated any standard of care in the treatment of his patients. The Board seeks to discipline Dr. Welter for violations of 243 Code Mass. Regs. §§ 1.03(5)(a)3, 1.03(5)(a)6, 1.03(5)(a)10, 1.03(5)(a)11, 1.03(5)(a)18, 2.07(11)(a), and 2.07(13)(a), and for lacking good moral character and engaging in conduct that has the capacity to undermine public confidence in the integrity of the medical profession. *See Levy v. Board of Registration in Medicine*, 378 Mass. 519 (1979).

The Board referred the matter to the Division of Administrative Law Appeals (DALA) for a hearing on the allegations. Dr. Welter filed an answer to the Board's Statement of Allegations. On August 16, 2019, I held a prehearing conference at DALA's offices at 14 Summer Street, Malden, Massachusetts. At the conference, the Board moved to compel Dr. Welter to supplement his answer to the Statement of Allegations. Dr. Welter moved for a more definite statement of the Board's allegations concerning Dr. Welter's website. I granted both motions. The Board provided a more definite statement on August 29, 2019. Dr. Welter filed his supplemental answer to the original Statement of Allegations on August 30, 2019, and filed a further answer to the Board's more definite statement on September 13, 2019.

On October 15, 2019, the Board moved for partial summary decision on three of the 59 allegations in its Statement of Allegations that concerned Dr. Welter's license renewal applications. I denied that motion on November 7, 2019 because the Board failed to show

that it was undisputed that the Respondent knowingly made false statements.

On November 16, 2019, the parties filed a joint prehearing conference memorandum that included a stipulation of facts, 23 agreed-to exhibits and seven disputed exhibits. I marked this document Pleading A. I held a hearing at the DALA's offices on December 9-11, 2019 and January 28, 2020. The hearing was transcribed by a stenographer. At the hearing, I admitted the 23 agreed-to exhibits, two of the disputed exhibits, and five additional exhibits that were offered during the hearing for a total of 30 exhibits (H-1 to H-30). Under an Order of Impoundment from the Board, three potential witnesses were identified by pseudonyms as Patients A, B, and C. The Board presented the testimony of Patient A and Patient B (both former patients of Dr. Welter), Jacqueline DesJardins Pennie (a physician assistant formerly employed by Dr. Welter), Carol Purmort (the Acting Director of the Board's Licensing Division), and Susan Dye (an Investigator for the Board). Patient C did not testify. Dr. Welter testified on his own behalf and presented testimony from Chanelle Sae-Eaw (the office manager for Dr. Welter's North Attleboro medical practice), Jenny Moore (a medical assistant formerly employed by Dr. Welter at New England Hair, now a traveling hair technician), and Father David Costa (a priest formerly of Dr. Welter's church). The parties waived closing statements in favor of submitting post-hearing briefs which were filed on June 23, 2020. I marked the Board's post-hearing brief Pleading B, and Dr. Welter's post-hearing brief Pleading C. The transcript for the final day of hearing

was filed on August 4, 2020 and the record closed at that time.

Findings of Fact

Based on the pleadings, the testimonial and documentary evidence and reasonable inferences drawn therefrom, and my assessment of the credibility of the witnesses, I make the following findings of fact.

I. Background

1. Ryan J. Welter graduated from the University Of Oklahoma College Of Medicine in 1999. He was initially licensed to practice medicine in Massachusetts in 2000. He is certified by the American Board of Family Medicine. (Pleading A Stipulated Facts.)

2. Dr. Welter founded and managed several medical corporations including Tristan Medical Enterprises, P.C., which also does business as New England Center for Hair Restoration (New England Hair), and Regeneris Medical. Dr. Welter's practice encompasses primary care as well as hair restoration. (Pleading A Stipulated Facts.)

3. Prior to this current proceeding, Dr. Welter has never been disciplined by any hospital, academic institution, or licensing board. (Welter testimony.)

4. From January 2015 through November 1, 2017, Dr. Welter employed various assistants at New England Hair as well as Clark Tan, also known as Clark Tanner. Clark Tan attended medical school in the Philippines but is not licensed to practice medicine in the United States. Dr. Welter hired

Dr. Gurmander Kohli, a licensed physician and board-certified plastic surgeon, to work at Regeneris Medical in July 2015. (Pleading A Stipulated Facts.)

II. Website Advertising

5. Dr. Welter maintained a website for New England Hair. The website was initially set up by an outside consultant based on information that Dr. Welter provided. The website's blog was periodically updated. Dr. Welter reviewed and approved the content of the website before it was published. (Pleading A Stipulated Facts, Welter testimony.)

6. Between January 2015 and November 1, 2017, New England Hair's website contained statements indicating that multiple doctors and surgeons worked at New England Hair. Under the heading What Sets Us Apart, the website stated that "our surgeons" had been solving hair loss problems for years, that medical professionals referred to "Dr. Ryan Welter and Dr. Clark Tan as 'doctors' doctors,'" and that NE Hair's "doctors" could correct other surgeons' work. Throughout the website, Dr. Welter and Dr. Clark were repeatedly referred to in tandem, as in the following statements: "Dr. Ryan Welter and Dr. Clark Tan have gained recognition in the field of hair restoration for their surgical skills…" and "Dr. Welter and Dr. Tan believe that all of their patients deserve to look and feel their best…" and "Dr. Ryan Welter and Dr. Clark Tan have an eye for detail and esthetics that is evident in their outstanding results in many satisfied

patients."(Pleading A Stipulated Facts, Exhibit H-8, Welter testimony.)

7. Dr. Welter was the only licensed physician who worked at New England Hair between January 2015 and November 1, 2017. New England Hair did not employ multiple physicians and/or surgeons. (Pleading A Stipulated Facts, Welter testimony.)

8. Tan's biography as Clark Tan, M.D. was listed on the website under the heading Our Hair Restoration Consultant. The biography stated: "Dr. Tan received his medical degree from Far Eastern University Institute of Medicine. He is a diplomat in both General Surgery and Aesthetic Cancer Surgery at East Avenue Medical Center with a sub-specialty in Aesthetic Plastic Surgery at Makati Medical Center…. Dr. Tan has been doing hair restoration for more than 14 years in New York and is a staff member of the New England Center for Hair Restoration." The website did not reveal that the East Avenue Medical Center and the Makati Medical Center are not in the United States, that Tan had not done a residency in the United States and was thus not eligible to be licensed to practice medicine in the United States, or that Tan was not a physician licensed to practice anywhere in the United States. (Pleading A Stipulated Facts, Exhibit H-8, Welter Testimony.)

9. Dr. Welter's biography on the website was found under the heading Our Hair Restoration Surgeon and stated "As founder and chief surgeon of The New England Center for Hair Restoration, Dr.

Welter is board certified, trained and licensed to perform hair restoration procedures for men and women." Dr. Welter was board certified in family medicine. He was not at any relevant time and is not now board certified in surgery or plastic surgery. The website did not disclose that Dr. Welter's board certification was in family medicine. (Pleading A Stipulated Facts, Welter testimony, Exhibit H-8.)

10. Patient A is a licensed physician. She chose New England Hair because the location of the practice was convenient, she liked the patient reviews and the pictures on the website, she wanted to have her procedure done by a physician, and she believed that the physicians at New England Hair were board certified. (Patient A testimony.)

11. Patient A had not heard of Tan until she received an email from the office that Dr. Tan would be doing her procedure. She looked on the website and saw that Tan was listed and concluded that Tan was a licensed physician, on the same level as Dr. Welter or supervised by him. (Patient A testimony.)

12. Patient B is a licensed physician. He chose New England Hair based on its affiliations, the training of the personnel, and the recommendation of Patient A. Patient B is married to Patient A. (Patient B testimony.)

13. Patient B believed that Dr. Welter and Tan were the physicians referred to by New England Hair's website. (Patient B testimony.)

III. Representations made in the conduct of New England Hair's practice

14. The staff in New England Hair's office was aware that Clark Tan was a doctor who had gone to medical school in the Philippines but was not licensed to practice in Massachusetts. (Sae-Eaw Testimony, Pennie testimony, Moore testimony.)

15. Dr. Welter did not direct the staff to tell patients anything about Tan's training or licensure status. (Sae-Eaw testimony.)

16. Clark Tan introduced himself to staff and patients as Dr. Tan. (Sae-Eaw testimony.)

17. The staff in the office referred to Tan as Dr. Tan. (Patient A testimony, Sae-Eaw testimony, Moore testimony.)

18. Dr. Welter also referred to Tan as Dr. Tan. Dr. Welter testified that he did so because Tan was a medical school graduate. (Welter testimony.)

19. During the course of Tan's employment, Dr. Welter allowed Tan to disseminate business cards to patients and prospective patients that read Clark Tan, M.D. without an explanation that Tan was not licensed to practice medicine in the United States. (Pleading A Stipulated Facts, Exhibit H-7, Welter testimony.)

20. At his consult with Tan, Patient B picked up Tan's business card. Patient B assumed from the card's notation Clark Tan, M.D. that Tan was a licensed physician and one of the surgeons at the practice. (Patient B testimony.)

21. Patient A, Patient B, and Patient C all signed New England Hair's consent forms for their hair procedures. The consent forms were drafted or approved by Dr. Welter. All forms included the following language: I, _____, do hereby authorize Dr. Ryan Welter, his associate doctors and/or such assistants as may be selected by him to perform [selected procedure] on me. (Exhibit H-1, Exhibit H-3, Exhibit H-5, Testimony of Patient A, Testimony of Patient B, Testimony of Welter.)

22. At the time of Patient A's, Patient B's, and Patient C's treatments, Dr. Welter had no associate doctors who were licensed to practice medicine on staff at New England Hair. (Welter testimony.)

23. The consent form signed by Patient B stated that measurements of hair density "were taken by a doctor." (Exhibit H-3.)

24. Tan sent Patient B an email when Patient B was considering treating with New England Hair that included this statement: Consultation is done by a doctor and not by a salesperson as what typically happens in other centers. The email was signed Clark Tan, M.D. (Exhibit H-4.)

25. Patient B assumed from the emails, the business card, and the consent form that Tan was a licensed physician. (Patient B testimony.)

26. Patient A assumed from the website, emails, and the conduct of the practice that Tan was a licensed physician. (Patient A testimony.)

IV. Delegation of services to Clark Tan

27. In 2011, Clark Tan contacted Dr. Welter to inquire about employment. (Welter testimony.)

28. Tan had worked for many years in New York for Dr. Unger, a well-known hair restoration surgeon. Tan had recently moved to Rhode Island and was looking for work. (Welter testimony.)

29. Tan told Dr. Welter that he was from the Philippines and had received his medical training there. Dr. Welter asked Tan if he had done a medical residency in the United States. Tan replied that he had not and Dr. Welter understood that Tan was thus not eligible to be licensed to practice medicine in the United States. (Welter testimony.)

30. Dr. Welter called Dr. Unger to speak with him about Tan's work. Dr. Welter also obtained Tan's certificates of all of his university training. After speaking with Dr. Unger, Dr. Welter was interested in hiring Tan. (Welter testimony.)

31. Dr. Welter called the Massachusetts Medical Society (MMS) to find out if he would be able to hire Tan as a foreign medical graduate even though Tan was not licensed to practice medicine in Massachusetts. He spoke with someone who told him that there was a rule that governed delegation. (Welter testimony.)

32. Dr. Welter obtained the delegation regulation and reviewed its language. He consulted with an attorney recommended by the MMS about the regulation. Dr. Welter concluded that the

regulation allowed him to delegate work to a non-licensee as long as that person had the proper skills. Dr. Welter concluded that Tan had the proper skill set to assist in hair restoration work. Dr. Welter hired Tan as a non-professional assistant in 2011. (Welter testimony.)

33. Dr. Welter delegated initial consultations to Tan. At these consults, Tan would meet with prospective patients, hear their concerns, explain to them what treatment options were available, discuss pricing, and take photos. If indicated by the patient's interest in a particular procedure, Tan would analyze the density of the areas where hair could be taken from (the donor area) and where hair would be placed (the recipient area). (Welter testimony.)

34. New England Hair did not charge for initial consultations. Many of the people who seek hair consults are comparison shopping for services. Prospective patients who came for consultations at New England Hair often did not return for treatment. (Sae-Eaw testimony, Welter testimony.)

35. In some hair restoration practices, consultations are handled by a salesperson who is not medically trained. (Welter testimony, Moore testimony.)

36. Tan would pass his consultation notes for each prospective patient on to Dr. Welter for review. If Dr. Welter agreed with Tan's assessment, he would sign off on the note. If he did not, Dr. Welter would discuss the case with Tan. (Welter testimony.)

37. New England Hair handled consultations with female patients differently from consultations with male patients because hair loss in females can be caused by many different underlying medical conditions. Male pattern hair loss, on the other hand, is readily recognizable. Female patients at New England Hair were medically evaluated by Dr. Welter or by a physician assistant to rule out medical issues. Tan did not do these evaluations. (Welter testimony.)

38. Hair procedures were always scheduled for times when Dr. Welter was physically present at New England Hair's offices. (Sae-Eaw testimony.)

39. At the time that Patient A and Patient B came to New England Hair for their procedures, Tan had been working for Dr. Welter for about four years and they had performed many procedures together. (Exhibit H-1, Exhibit H-3, Welter testimony.)

40. Patient A is female. She consulted with Dr. Welter on March 11, 2015 because she was concerned with her thinning hair. During the consultation, Dr. Welter evaluated Patient A for underlying medical issues. He conducted a brief physical examination. Dr. Welter and Patient A discussed the various treatment options, including drug treatment options. Dr. Welter judged that Patient A was a good candidate for medication treatment and he reviewed with her the use of minoxidil (a/k/a Rogaine)—an over-the-counter topical solution—and finasteride, a prescription medicine that is available in both topical and oral form.

(Exhibit H-1, Patient A testimony, Welter testimony.)

41. At that time, Patient A was not interested in drug treatment options. Patient A wanted to schedule a treatment procedure called Platelet Rich Plasma, or PRP. Accordingly, Dr. Welter reviewed the PRP procedure and the consent form used for that procedure with Patient A. Dr. Welter pre-authorized a prescription for finasteride for Patient A and told her that if she changed her mind she could call the office and they would authorize a prescription for her. (Patient A testimony, Welter testimony.)

42. Patient A decided to have the lab work required for the PRP hair procedure drawn at the same time as upcoming annual blood tests she had previously scheduled at her primary care physician's office. She intended to think over her treatment options while the lab work was pending, but she had more or less decided to go ahead with the PRP by the time she left Dr. Welter's office. Dr. Welter ordered the lab work to be done at the same time as the tests that Patient A's PCP was ordering. (Exhibit H-1, Patient A testimony, Welter testimony.)

43. PRP involves drawing blood from the patient, spinning the blood in a centrifuge to separate the red blood cells from the platelets which are located in the plasma, numbing the recipient areas on the patient's scalp either topically or by injection, and finally injecting the platelet solution into the scalp at a very shallow depth. (Welter testimony.)

44. Dr. Welter's office, like many medical offices, uses medical assistants to draw blood and give injections. (Welter testimony.)

45. Dr. Welter determined that all of the components of the PRP procedure were within Tan's skill set. Dr. Welter delegated some, but not all, PRP procedures to Tan. (Welter testimony.)

46. Tan performed the PRP procedure on Patient A on June 15, 2015 with the help of Jackie DesJardins. Patient A's medical record reflects that the PRP blood draw was done by physician assistant Jackie DesJardins and Tan, and that DesJardins entered the PRP patient encounter note into Athena, the medical records software used by Dr. Welter's office. (Exhibit H-1, Welter testimony, Patient A testimony.)

47. Each staff person at Dr. Welter's office has her own credentials to enable her to log in to the Athena Medical Records system. Users must log in to enter encounter notes. Security procedures in effect at Dr. Welter's office forbid sharing of user names and passwords and require each user to log out of their computer when they leave their station. (Sae-Eaw testimony.)

48. As a physician assistant, Ms. Pennie is qualified to supervise medical assistants who, in turn, are permitted to draw blood and administer injections. (Pennie testimony.)

49. Dr. Welter was not present in any significant way for Patient A's PRP procedure although he was in the office that day. Patient A's PRP operative record reflects that Tan performed each step of

the procedure with Ms. Pennie assisting in the blood draw. Dr. Welter signed the bottom of the operative record as the surgeon. Tan signed the form as the "first assist." (Exhibit H-1, Welter testimony.)

50. Patient A signed a consent form for the PRP procedure on the day of her PRP procedure. She reviewed it that day with Tan. She did not go over the paperwork at that time with Dr. Welter although he reviewed it with her at her March consult. (Patient A testimony, Welter testimony.)

51. Dr. Welter also signed Patient A's consent form on the day of her procedure and attested to the fact that he had "explained and disclosed all relevant information" on the form to Patient A. Dr. Welter felt comfortable signing the form because he had reviewed the consent form and the procedure with Patient A in March. He considered the fact that Patient A was a physician herself, that the PRP procedure involved only a blood draw and shallow injections of topical anesthetic and plasma, and that he had discussed PRP extensively with Patient A at her consult. Under the circumstances, he felt no further review was necessary. Dr. Welter did not speak with Patient A before her procedure started. (Welter testimony.)

52. After the PRP procedure was over, Patient A told Tan that she was interested in a prescription for finasteride. Dr. Welter's staff passed the message that Patient A now wanted the prescription to Dr. Welter. Dr. Welter authorized the prescription in the Athena system; the prescriptions were in Dr.

Welter's name. Tan did not authorize a prescription for finasteride for Patient A. Tan did not have the ability to authorize prescriptions in Athena. (Welter testimony, Sae-Eaw testimony.)

53. Patient A developed a rash about ten days after starting the finasteride. Patient A sought care at an urgent care clinic for her rash, she did not seek care at New England Hair. She stopped taking the drug and the reaction subsided. She later telephoned Dr. Welter's office and spoke with Tan to report the reaction. No further action was needed as the allergic reaction had resolved. (Exhibit H-1, Welter testimony, Patient A testimony.)

54. Patient A had three follow-up appointments with Tan in September 2015, February 2016, and May 2016. The consult notes reflect that at those appointments Tan and Patient A discussed the results of the PRP and discussed products that she was using for her hair growth. At the second of these appointments, Tan noted that Patient A would try the finasteride again. At the third appointment, Tan noted that Patient A claimed to have a reaction to finasteride when she was exposed to sunlight. Dr. Welter reviewed the notes of each of these appointments and signed off on them. (Exhibit H-1, Welter testimony.)

55. Dr. Welter's practice was to either review Tan's notes or to discuss a patient with Tan. If there were any concerns, the office would schedule the patient for a medical follow up. If there were no concerns, Dr. Welter would sign the notes and the

notes would be filed in the patient's chart. (Welter testimony.)

56. Patient A was satisfied with her PRP procedure. She thought Tan was responsive, knowledgeable, and easy to talk to. She recommended Dr. Welter's practice to her husband, Patient B. (Patient A testimony.)

57. Patient B is male. Patient B was unhappy with the sparseness of his beard on his face and neck. (Exhibit H-3, Patient B testimony).

58. Patient B had an initial consultation with Tan on December 11, 2015. The consultation took place in Tan's office. Tan reviewed treatment options, assessed the density of Patient B's beard during the consult, took photographs, and drew diagrams. He reviewed Patient B's medical history with him. (Patient B testimony.)

59. In his consult notes, Tan wrote that Patient B's beard had always been sparse and that it had not changed over the years. Dr. Welter understood this note to mean that Patient B's sparse beard was not symptomatic of an underlying medical condition. He concluded from this that Patient B did not need an additional medical evaluation appointment. Tan indicated that Patient B was interested in full beard surgery, including his neck. Tan noted that there were no other health issues. Dr. Welter reviewed the note, wrote "agree" on it, and signed it. (Exhibit H-3, Welter testimony.)

60. Patient B was interested in undergoing Follicular Unit Extraction (FUE) surgery. FUE is a process

in which hair follicles from a densely-growing donor area (often the back of the head) are removed and transplanted to a sparser recipient area. Hair follicles on the scalp can sprout multiple hairs, but beard follicles contain one hair each. In order to transplant hair follicles from the scalp to the beard, each follicle from the scalp must be removed, examined under a microscope, separated into single hairs in a manner that retains the correct amount of tissue, and re-implanted in the donor area. FUE can involve thousands of grafts. The process generally takes 8 to 10 hours. Because of the amount of time and work involved, Dr. Welter used a team of people to complete FUE procedures. (Welter testimony, Moore testimony.)

61. During an FUE at New England Hair, the donor follicles are removed from the patient, placed on ice in a petri dish, and taken to a different room where they are examined under a microscope and split. Each donor follicle is examined separately. (Exhibit H-27, Welter testimony, Sae-Eaw testimony, Moore testimony.)

62. The split grafts are then placed in a special solution and returned to the room where the patient is waiting for implantation. (Exhibit H-27, Welter testimony.)

63. FUE procedures were staffed by Dr. Welter, Tan, and usually two medical assistants. Occasionally, only one medical assistant would be available, resulting in a longer day for everyone. (Sae-Eaw testimony, Moore testimony.)

64. During Patient B's consult, Tan discussed with Patient B the number of grafts that Patient B was going to need in order to achieve his desired result. The number of grafts needed determines the amount of work to be done and thus the price of the procedure. After the consult Tan made specific calculations based on his assessment of Patient B's hair density. (Exhibit H-3, Patient B testimony, Welter testimony.)

65. Dr. Welter reviewed Tan's notes and calculations and signed off on them. (Welter testimony.)

66. Tan concluded that Patient B would need about 1,200 grafts to achieve the desired results. Patient B questioned Tan's calculation because doctors he had spoken with had placed the number at 2,000 or more. Tan told Patient B that he believed that 1,200 would be adequate. Despite his decision to go ahead, Patient B continued to harbor doubts about the number. (Patient B testimony.)

67. Patient B did not have any appointments with a licensed physician between his consultation with Tan and the FUE surgery. (Welter testimony.)

68. Dr. Welter met Patient B on March 7, 2016, the day of Patient B's FUE procedure. Tan went over the paperwork, including the consent form, with Patient B. While assistant Zach Brock shaved the donor area on Patient B's head, Dr. Welter reviewed the procedure with Patient B and briefly assessed Patient B's health. (Patient B testimony, Welter testimony.)

69. Tan, Dr. Welter, and assistant Brock performed Patient B's FUE procedure. Tan administered

most of the local anesthetic to Patient B. Dr. Welter assisted. Patient B was positioned face down for a good portion of the procedure while hair follicles were being extracted from the back of his head. As follicles were extracted, Dr. Welter and Brock carried them in iced petri dishes to a separate room to work under microscopes dissecting and cleaning the follicles for re-implantation. When all of the follicles were ready for re-implantation, the team began the process of implanting the new hair into Patient B's beard. (Welter testimony, Patient B testimony.)

70. Dr. Welter participated in the entirety of Patient B's FUE procedure. Although Patient B recalled that Dr. Welter was present in the room with him for about two hours of the ten hour procedure, Patient B was unable to see who was in the room for much of that time because he was positioned face-down. Patient B was unaware that work to prepare the grafts was proceeding at the same time in a different room. (Welter testimony, Patient B testimony.)

71. During Patient B's FUE procedure, Tan participated in administering topical anesthesia, extracting Patient B's hair follicles, and in re-implanting follicles in the donor area. Dr. Welter judged that Tan had the expertise and skill to perform this work. (Welter testimony.)

72. In Massachusetts, extraction and re-implantation of hair follicles is work that is typically performed by medical assistants. (Welter testimony, Moore testimony.)

73. Tan gave Patient B post-procedure instructions and provided him with both Tan's phone number and Dr. Welter's phone number in the event Patient B had a question or a problem. (Patient B testimony.)

74. Patient B returned the next day for a follow-up appointment with Tan. Tan washed out the scalp graft sites and looked over the facial grafts. Patient B never again returned to New England Hair. (Patient B testimony.)

75. Dr. Welter's office's standard procedure in FUE cases was to schedule follow-up appointments at three, six, and twelve months after the procedure. These appointments are scheduled on the day of the FUE procedure. Their purpose is to assess the patient's progress and see if additional grafts are needed. The consent form for the FUE procedure that Patient B signed specifies that multiple sessions may be necessary to achieve the desired result, and that the number of grafts required may be more or less than the quoted number. (Exhibit H-3, Patient B testimony, Welter testimony, Sae-Eaw testimony.)

76. Patient B was scheduled for follow-up appointments. (Welter testimony, Patient B testimony.)

77. Patient B did not keep his three-month follow-up appointment in June 2016 because he had to work. At that time, Patient B was concerned that he had not seen any results. He contacted Tan who told Patient B that his experience was not

unusual and that he should give it more time. (Patient B testimony.)

78. Patient B contacted Tan in early September 2016 because Patient B still had not seen any progress in his beard growth. On September 9, 2016, Tan told Patient B that he would do a revision for free if that was needed, but Patient B needed to come in for a follow-up appointment so they could assess him. Patient B conceded that Tan's desire to see his transplant was reasonable, but Patient B did not go see him. (Exhibit H-4, Testimony of Patient B.)

79. Patient B had misgivings about his FUE treatment. He continued to wonder if Tan had done enough grafts, and he was dissatisfied with the hair growth in his beard. Patient B attempted to look up Tan's license on the Board's website but was unable to find a listing for Tan. On September 12, 2016, Patient B contacted Tan to ask about his licensure status. (Patient B testimony, Exhibit H-4.)

80. On September 13, 2016, Dr. Welter responded to Patient B's inquiry about Tan's license and explained that Tan was not a licensed physician, but was a surgeon trained in the Philippines. Dr. Welter stated that Tan was authorized in Massachusetts to work as a technician and consultant under Dr. Welter's direct supervision. Patient B replied that he believed it was improper that Tan had participated in his care. (Exhibit H-4.)

81. The exchange of emails that took place on that day culminated in Patient B demanding a refund of the full amount that both he and Patient A had paid for their procedures. Dr. Welter told Patient B that he was willing to consider a refund but asked Patient B to return for a follow-up appointment so Dr. Welter could evaluate the results of the procedure. Patient B never returned for a follow-up appointment. (Exhibit H-4, Welter testimony, Patient B testimony.)

82. Dr. Welter was surprised by Patient B's complaints. Dr. Welter called the Board to see if his understanding of the delegation regulation was correct. He did not get an answer from the Board. (Welter testimony.)

83. Dr. Welter next called the Massachusetts Medical Society (MMS) and spoke with Brett Bauer on or about September 16, 2016. Mr. Bauer referred Dr. Welter to a division of the MMS called the Physician Practice Resource Center (PPRC). Dr. Welter spoke with David Wasserman of the PPRC. Based on his conversation with Mr. Wasserman, Dr. Welter believed that his understanding of the regulation was correct and that he was permitted to delegate tasks to Tan. Mr. Wasserman referred Dr. Welter to an attorney in Connecticut whom Dr. Welter understood was an expert in delegation law. He spoke with this attorney but does not remember her name. Based on that conversation, Dr. Welter continued to believe that he had not violated the delegation regulation in his working relationship with Tan. (Exhibit H-28, Welter testimony.)

84. Patient B was angry and believed he had been duped by Dr. Welter. Patient B no longer trusted Dr. Welter or New England Hair and did not want to return for any additional care. Patient B filed complaints with the Better Business Bureau and the Board shortly after his September 13, 2016 email exchange with Dr. Welter. In his Board complaint, Patient B told the Board that he wanted to get the money back that he and his wife (Patient A) had paid for their procedures. (Patient B testimony.)

85. On November 2, 2016, Dr. Welter received notification that Patient A had filed a complaint against him with the Board's Consumer Protection Unit.[1] In the complaint, Patient A stated that she never would have consented to have her procedure done by an unlicensed physician had she known. As a remedy, Patient A stated that she wanted a refund for both her and her husband's procedures. (Exhibit H-1, Exhibit H-9, Patient A testimony.)

86. Like her husband, Patient A was upset when she learned that Tan was not a licensed physician because she felt that his status had been misrepresented to her. However, and contrary to her Board complaint, Patient A testified that had she known from the beginning that Tan was an unlicensed assistant, she would still have gone

[1] From the record it is clear that Patient B also filed a complaint, but the parties did not include Patient B's complaint as an exhibit and no witness testified to the particulars of his complaint.

through with the PRP and probably would have been comfortable with having Tan do the procedure. (Patient A testimony.)

87. After Patient A and Patient B complained to the Better Business Bureau and the Board, Patient B and Dr. Welter engaged in discussions about settling the outstanding complaints. Dr. Welter stated that he was willing to refund the money that Patient A and Patient B had paid in exchange for their withdrawing their complaints. Patient B was successful in closing the complaint with the Better Business Bureau by informing it that the dispute had been resolved. The complaint to the Board could not be withdrawn, although Patient B informed the Board that he believed that he and Patient A had reached a fair resolution with Dr. Welter. (Exhibit H-4, Patient B testimony.)

88. On November 30, 2016, Dr. Welter replied to the Board's inquiry about Tan. Dr. Welter explained the role that Tan played in his practice and stated that he believed that his delegation of tasks to Tan was permitted by the delegation regulation, 243 Code Mass. Regs. § 2.07(4), which he cited. He based his reply on information he had received during his conversation with the attorney he had been referred to by the MMS. (Exhibit H-10, Welter testimony.)

89. In 2017, the Board transferred the consumer complaint filed by Patients A and B to the Board's enforcement division. Dr. Welter heard nothing further from the Board until March 2017 when he received a subpoena for Patient A's records. He subsequently learned that Inspector Susan Dye

was assigned to the case. (Exhibit H-1, Welter testimony, Dye testimony.)

90. In 2018, Dr. Welter refunded $12,500 to Patients A and B. This amount represented the money they had paid to New England Hair for their procedures. Once Patient B received the money, he considered the matter settled but was surprised to later learn from Investigator Dye that the Board was still pursuing the case. He told Ms. Dye that he and Patient A had no plans to pursue the matter further. (Patient B testimony.)

91. In the early fall of 2017, Dr. Welter called Coverys, his malpractice carrier, for advice on what to do about the Board investigation. The company gave him a list of attorneys he could contact. Dr. Welter hired an attorney to represent him. (Welter testimony.)

92. Through his Coverys-recommended attorney, Dr. Welter learned that the Board had concerns about his website, in particular the reference to doctors in the plural and the description of Tan. In the fall of 2017, Dr. Welter responded to the Board's concerns by eliminating from New England Hair's website all references to Tan and by changing Tan's job so that Tan no longer had contact with patients. Thereafter, Tan no longer conducted consults or assisted with procedures. Dr. Welter's description of his own qualifications on the website remained unchanged. (Exhibit H-23, Welter testimony.)

93. On October 12, 2017, Patient C consulted with Dr. Welter about Patient C's hair loss. Patient C had

a noticeable scar on his abdomen. Dr. Welter and Patient C discussed the scar, and Dr. Welter referred Patient C to Dr. Kohli for a consultation on a liposuction contouring procedure (Vaser) to improve the appearance of his abdomen. Dr. Welter texted Dr. Kohli's address at Regeneris Medical to Patient C that same day. (Exhibit H-5, Exhibit H-6, Welter testimony.)

94. Patient C ultimately elected to pursue two hair procedures and the liposuction contouring procedure. (Exhibit H-5, Exhibit H-6, Welter testimony.)

95. On October 19, 2017, Patient C texted Dr. Welter about the cost of the hair procedure. In that text, Patient C revealed that he worked at Dr. Welter's malpractice carrier (Coverys). Patient C did not handle Dr. Welter's malpractice account. Nonetheless, he told Dr. Welter that he had accessed Dr. Welter's account and discovered that Dr. Welter would be receiving a refund for a premium overpayment. (Exhibit H-6, Dye testimony.)

96. On November 1, 2017, Patient C underwent three different procedures with Dr. Welter and Dr. Kohli at New England Hair's offices. These included PRP, Stromal Vascular Fraction (SVF) (a process by which progenitor fat cells are extracted from fatty tissue and injected into the scalp), and Vaser Liposuction for abdomen contouring. Dr. Welter and Dr. Kohli performed the SVF and Vaser procedures together, and Dr. Welter performed the PRP with assistant Devin Fortier. Tan had no involvement in Patient C's care. Tan's

role was limited to setting up the room for the SVF and Vaser procedures and scribing the PRP procedure. (Exhibit H-5; Welter testimony.)

97. On January 18, 2018, Patient C texted Dr. Welter and said that his hair was falling out. He asked for a refund. In subsequent text messages, Patient C continued to press for a refund but agreed to attend a follow-up appointment with Dr. Welter. (Exhibit H-6.)

98. On February 6, 2018, Patient C returned for a follow-up appointment with Dr. Welter. Dr. Welter concluded that Patient C was experiencing shock loss. (Exhibit H-5, Welter testimony.)

99. Shock loss occurs because hair follicles are disturbed in the hair restoration process, and the follicles shed hair as a result of that disturbance. The hair loss is temporary because the hair follicle retains its structure and the hair will grow back. In hair transplant surgery, shock loss is typically at its worst at about three months after the procedure, and the hair grows back after an additional three months. (Welter testimony.)

100. At the February 6, 2018 follow-up appointment, Dr. Welter reassured Patient C that the shock loss was a temporary condition and that his hair would grow back in another three months. (Exhibit H-5, Welter testimony.)

101. On February 21, 2018, Patient C texted Dr. Welter that he had been doing research and discovered that there were complaints against New England Hair and Tan at a local police department, the Attorney General's office, and the

Board. He wrote that Tan had "[put] holes in my scalp." Patient C mentioned that he had consulted malpractice attorneys and that he had a case. He also stated that he also was friendly with individuals at Channel 7 news who could "do investigations on this type of stuff" unless Dr. Welter refunded his money. (Exhibit H-6.)

102. At the time of Patient's C's February 21, 2018 text, there was a confidential investigation pending at the Board. (Dye Testimony.)

103. Patient C contacted the Board claiming that he had had several procedures done at New England Hair, and that one of these procedures was completed by Tan. (Dye testimony.)

104. Investigator Dye interviewed Patient C by telephone on February 27, 2018. The interview was brief. Patient C refused to attend an in-person interview. (Dye testimony.)

105. Patient C told Inspector Dye that an Indian doctor whom he had never met before conducted most of the liposuction and was assisted in that procedure by Dr. Welter. Patient C also stated that Tan had performed another procedure on him in a separate room that involved transplanting hair. (Dye testimony.)

106. On March 7, 2018, Board counsel requested that Dr. Welter provide Patient C's medical record from Tristan Medical (d/b/a New England Hair) to the Board. Dr. Welter did so on April 6, 2018. That medical record reflected that Patient C had undergone PRP, SVF, and Vaser at New England Hair; contained Dr. Welter's note that Patient C

was interested in Vaser Liposuction; and included results of lab tests that had been ordered by Dr. Kohli at Regeneris Medical in Raynham. Later, but before the Statement of Allegations issued, Dr. Welter provided to the Board Patient C's records from Regeneris Medical. Those records documented Patient C's consult with Dr. Kohli at Regeneris prior to the Vaser procedure at New England Hair. (Exhibit H-5, Exhibit H-12, Exhibit H-21, Dye testimony, Welter testimony.)

107. Patient C made statements to Inspector Dye that were inconsistent with the medical records that the Board received. Patient C told Inspector Dye that he had never met Dr. Kohli before the procedure, but Kohli's name was on lab tests ordered as seen in Patient C's New England Hair medical record, and the Regeneris records detail Patient C's initial consultation with Dr. Kohli. Patient C told Inspector Dye that Tan injected his head, but the medical record reflects otherwise. Patient C told Inspector Dye that his hair had fallen out and left her with the impression that the hair loss was permanent, but the record reflected that the condition was temporary. Inspector Dye testified that she was unaware that shock loss is a temporary condition. (Exhibit H-5, Exhibit H-21, Testimony of Dye.)

108. The Board did not investigate how Patient C had come to know that an investigation was pending at the Board or where he got the idea that an investigation was pending at a local police department. Inspector Dye did not question Patient C about whether it was appropriate for

him to access Dr. Welter's malpractice file at Coverys. (Dye testimony.)

V. Medical Records

109. The operative record for Patient A's PRP procedure lists Dr. Welter as the surgeon, and Clark Tan as the first assist. Dr. Welter did not conduct Patient A's PRP procedure. Dr. Welter signed the record as the supervising surgeon. (Exhibit H-1, Welter testimony.)

110. There are parts of Patient A's and Patient B's medical records that contain notes that do not bear the signature of the writer. Some of these notes are undated. (Exhibit H-1, Exhibit H-3.)

111. The operative record for Patient B's FUE procedure lists a surgical team comprised of Dr. Welter as the surgeon, and Tan and Brock as assistants. All three are identified as having prepared and transplanted the grafts. (Exhibit H-3.)

112. The medical records for Patient A and B reflect that Dr. Welter countersigned the consent forms on the day of each procedure, attesting that he had "explained and disclosed all relevant information as identified on this form." Dr. Welter reviewed the consent forms with Patient A several months prior to the procedure; Tan reviewed it with her on the date of her procedure. Both Dr. Welter and Tan reviewed the procedure and paperwork with Patient B on the date of his procedure. (Exhibit H-1, Exhibit H-3, Welter testimony, Patient A testimony, Patient B testimony.)

VI. License Renewal Applications

113. After their initial licensure by the Board, physicians are required to file license renewal applications every two years coincident with their birthdays. (Purmont testimony.)

114. The renewal application can be completed on-line or on paper. There are separate instructions for filling out the renewal applications which are available to physicians for both on-line applications and paper applications. The instructions are not embedded in the renewal forms. The Board also maintains a call center to assist physicians in properly filling out their applications. (Exhibit H-19, Exhibit H-25, Purmont testimony.)

115. Dr. Welter completed and submitted his renewal applications through the Board's on-line portal. (Exhibit H-14, Exhibit H-16, Exhibit H-17.)

116. Physicians are required to fill out the application fully and truthfully, and to attest under the pains and penalties of perjury that the information they have provided is true. On-line applications must be electronically signed before they can be submitted. (Exhibit H-19, Exhibit H-25, Purmont testimony.)

117. The application asks physicians to list their Massachusetts work sites. The application provides a drop-down menu of Massachusetts Hospitals. Physicians can also add additional Massachusetts work sites. Answers from a previous application prepopulate this field. (Exhibit H-19, Exhibit H-25, Purmont testimony.)

118. The separate application instructions state that a physician should list all work sites in Massachusetts, including private offices and clinics. (Exhibit H-19.)

119. The application asks physicians if they perform surgery in their Massachusetts office. If the physician checks the yes box, another screen appears which refers the physician to the Massachusetts Medical Society Office Based Surgery Guidelines and the instructions for completing the application form. A link to the Guidelines is provided in the instructions. Physicians are then required to indicate on the application whether the surgery they perform is classified as Level I, II, or III. If a physician checks the no box indicating that they do not perform surgery in his office, this additional screen does not appear. (Exhibit H-19, Exhibit H-25, Purmont testimony.)

120. MMS's Office Based Surgery Guidelines provide definitions for surgery, office-based surgery, major surgery, and minor surgery. The Guidelines classify office based surgery in three levels by level of complexity, ranging from Level III—the most complex and involving significant anesthesia or other pain-blocking techniques—to Level I, which generally encompasses minor surgical procedures performed under topical or local anesthesia. (Exhibit H-20, Purmont testimony.)

121. The renewal application also asks physicians if they have been the subject of an investigation by any governmental authority, including the Board

or any other state's medical board, or a health care facility, group practice, employer or professional association. If a physician answers yes to this question, they are required to submit an explanation. (Exhibit H-19, Exhibit H-25, Purmont testimony.)

122. Some of the fields in the on-line application are prepopulated with information supplied by physicians in their previous applications. Fields that are prepopulated include addresses, specialties, board certifications, drug registration numbers, out-of-state licenses, and previously-reported work sites. The questions regarding office-based surgery and the existence of investigations are not pre-populated. (Purmont testimony.)

123. Physicians do sometimes make errors in filling out their applications. Any error made prior to signing and submitting the application can be corrected easily. Once an application has been signed and submitted, it cannot be amended on-line. (Purmont testimony.)

124. When an application is completed and submitted on-line, the physician's license is automatically renewed overnight. (Purmont testimony.)

125. Sometimes physicians answer no to a question about whether there have been any investigations of them when the answer should be yes. The Board has an automated process for checking a physician's answers against its database. (Purmont testimony.)

126. If a physician answers no to the question concerning investigations and the Board is aware that there was or is an investigation, the Board will contact the physician, provide the information it has on hand, and ask the physician to correct the form. If the complaint is current and outstanding, a paralegal at the Board checks with the Board's enforcement division to see if the physician knows about the investigation and, if not, nothing further is done with regard to the application at that time. If the enforcement division indicates that the physician does know about the complaint, the licensing paralegal contacts the physician. When the Board contacts the physician to request a correction, the Board lists the open complaint, provides a copy of the licensing application that the physician has already completed, and asks that the physician fill out a Form R which asks for additional information regarding the claim. The physician would then typically correct the license application, initial and date the changes, fill out the Form R, and return all of the forms to the Board. (Exhibit H-14, Purmont testimony.)

127. On July 29, 2013, Dr. Welter submitted a license renewal application. He incorrectly answered no to the question about investigations. A complaint against him had been filed with the Board in 2012 but was unsubstantiated and closed. The complaint was unrelated to Dr. Welter's hair restoration practice. The Board sent Dr. Welter a letter the next day, on July 30, 2013, asking him to correct his answer and fill out the Form R. He

complied. (Exhibit H-14, Exhibit H-15, Welter testimony.)

128. On July 18, 2017, Dr. Welter also answered "no" on his renewal application when asked if he was the subject of an investigation. The answer to the question should have been "yes." The Board notified Dr. Welter about the complaint from Patient A in 2016, and he had received a request for patient records that spring. The Board did not send Dr. Welter a letter as it did in 2013 offering him the opportunity to correct his 2017 misstatement about complaints filed. (Exhibit H-1, Exhibit H-9, Exhibit H-17, Welter testimony, Purmont testimony, Dye testimony.)

129. Dr. Welter testified that he didn't know why the Board would ask him for information on an investigation that it already possessed, and pointed out that he could not have been trying to hide the investigation from the Board because the Board was the entity conducting the inquiry. He did acknowledge that the answer to the question about investigations should have been yes, and stated that although he is sure he would have reviewed the application before he signed it, he believes that it would be easy for him to miss something and that is what he thought had happened. (Welter testimony.)

130. In his 2013 license renewal application, Dr. Welter listed Morton Hospital and Medical Center as his work site. Dr. Welter was also working at the time at another Tristan Medical office in Raynham. Dr. Welter listed the Raynham office as his business address on the renewal application.

Tristan Medical was headquartered at that time in Raynham. (Exhibit H-14, Welter testimony.)

131. In his July 2015 license renewal application. Dr. Welter again listed Morton Hospital and Medical Center as his work site although he was now working at two additional Tristan Medical locations: Raynham and North Attleboro. Dr. Welter continued to list the Raynham location as his business address. The 2015 renewal application made no reference to North Attleboro. (Exhibit H-16, Welter testimony.)

132. In his July 2017 license renewal application, Dr. Welter again listed Morton Hospital and Medical Center as his work site although he was also working at the North Attleboro office of Tristan Medical. Dr. Welter changed his business address from Raynham to North Attleboro because this was the new headquarters address. He was no longer regularly working in the Raynham office. (Exhibit H-17, Welter testimony.)

133. Despite not listing all of his work locations in the appropriate fields on his renewal applications, Dr. Welter did not attempt to hide his work locations from the Board. On his July 2013 renewal application, Dr. Welter listed his Raynham work location as his business address. In September of 2013, Dr. Welter wrote to the Board to offer to be a workplace monitor for a doctor in a probation agreement. Dr. Welter offered the North Attleboro office as the location for this work and the letterhead address reflected Dr. Welter's Raynham office. On the next renewal application in 2015, Dr. Welter left his answers about work

locations unchanged from 2013, despite his letter to the Board offering to monitor a physician at his North Attleboro office. In 2017, he changed his business address to North Attleboro, which reflected the fact that he was working in North Attleboro although he continued to list only Morton Hospital and Medical Center as his work location. Dr. Welter testified that because the application question regarding work sites had a drop down menu for hospitals but not for anything else, he assumed that he was supposed to report his hospital affiliation worksites. He stated that he did not intentionally disregard the separate application instructions which clarified that the question was asking doctors to report all work locations. (Exhibit H-14, Exhibit H-16, Exhibit H-17, Exhibit H-19, Exhibit H-25, Exhibit H-26, Welter testimony.)

134. In his 2013 license renewal application, Dr. Welter answered yes to the question asking if he was performing in-office surgery. On the 2015 renewal application, Dr. Welter changed his answer to that question to no. He also answered the office surgery question no on his 2017 renewal application. (Exhibit H-14, Exhibit H-16, Exhibit H-17.)

135. At the time of his 2015 and 2017 applications, Dr. Welter's hair restoration practice had changed considerably from his practice in 2013. Dr. Welter had moved away from doing strip surgery which requires a scalpel, a long incision, and two layers of sutures to reattach the hair strip. Dr. Welter's practice had largely transitioned to the FUE

procedure which entails shallow scoring of the scalp. Dr. Welter did not regard FUE as surgery because it is so minimally invasive. Dr. Welter testified that the question on the application asked if he was performing surgery, and he answered the question no because he believed that the FUE procedure was not really surgical. Because he answered the question no, no further screen appeared which referenced the MMS guidelines. Dr. Welter distinguished between the definition of surgery, which he did not believe included FUE, and the MMS definitions applicable to Levels I, II, and III office-based surgery which focus on the level of anesthesia used in surgical procedures. He stated that he was not trying to hide what he was doing from the Board. He conceded that at a 2019 hearing before the Board, he analogized the FUE extraction procedure to a punch biopsy, but explained that he was trying to explain the hair procedure in terms that the doctors on the Board would understand. He did not agree that the two were equivalent. (Exhibit H-16, Exhibit H-17, Exhibit H-20, Exhibit H-24, Welter testimony.)

VII. Reputation in the Community

136. Father David Costa, a Catholic priest, has known Dr. Welter for approximately 14 years. Father Costa was the director of the school that many of Dr. Welter's children attended. He also served as a priest at Dr. Welter's parish. Dr. Welter was a regular participant in the life of the church. He also was active as a parent volunteer at the school through coaching sports, attending social

activities, and helping with fundraising. Dr. Welter also participated in efforts to establish a foundation to serve the needs of people of few means. Father Costa regards Dr. Welter as a truthful individual and believes that Dr. Welter has a reputation in the church community for honesty. (Costa testimony.)

Discussion

In this proceeding the Board has the burden of proving, by a preponderance of evidence, the allegations set forth in its Statement of Allegations. *Craven v. State Ethics Committee*, 390 Mass. 191, 454 N.E.2d 471 (1983). After a thorough review of all of the evidence in this case, including an assessment of the credibility of all of the witnesses, I have concluded that the Board has met its burden of proving by a preponderance of the evidence its allegations with regard to false advertising on New England Hair's website and deceptive conduct of New England Hair's practice that enabled Tan to present himself as a licensed physician, but has not met its burden of proving the allegations related to improper delegation of medical services to Tan, fraudulent filing of license renewal applications, or creation and maintenance of false medical records.

I. Allegations of False Advertising on New England Hair's Website

The Board charges that Dr. Welter made false and deceptive statements on New England Hair's website in violation of 243 Code Mass. Regs. § 2.07(11)(a). That regulation provides:

> A full licensee engaged in the practice of medicine may advertise for patients by means which are in the public interest. Advertising that is not in the public interest includes the following:
> 1. Advertising that is false, deceptive, or misleading …

The parties disagree over how this regulation should be interpreted. The Board urges that the regulation is plain on its face, that a physician may not include in advertising statements that are false, i.e. untrue; deceptive, i.e., tending to cause someone to accept as true what is false; or misleading, i.e., leading in a wrong direction or into a mistaken action. Dr. Welter, on the other hand, argues that the test for evaluating whether a claim is false, deceptive, or misleading requires more than an analysis of whether the claims are, indeed, false, deceptive, or misleading. He argues that case law requires the consideration of other elements, namely an analysis of whether he acted with knowledge and intent to deceive, whether the false statement was material, whether that statement induced another party to rely on it, and whether the reliance was to the party's detriment. As support for his argument, Dr. Welter cites *Reisman v. KPMG Peat Marwick LLP*, 57 Mass. App. Ct. 100, 108, 787 N.E.2d. 1060, 1066 (2003); *Von Schonau-Riedweg v. Rothschild Bank AG*, 95 Mass. App. Ct. 471, 497, 128 N.E.3d 96, 118 (2019); and *Bern Unlimited Inc. v. Burton Corp.*, 25 F. Supp. 3d 170 (D. Mass. 2019).

The appropriate standard for interpreting a regulation is to apply the clear meaning of the regulation's words unless doing so would lead to an

illogical result. *Massachusetts Fine Wine & Spirits, LLC v. Alcoholic Beverages Control Commission*, 482 Mass. 683, 687, 126 N.E.3d 970, 975 (2019). The case law cited by Dr. Welter is inapposite: these cases address claims of common law fraud or claims brought under other statutes.[2] Dr. Welter has given no reason why I should depart from the well-established rule of regulatory construction, nor has he provided any support for his claim that additional elements, not present in the regulatory language, should be imported into the regulation's meaning. Accordingly, I analyze the language of New England Hair's website against the regulatory requirement that it not be false, deceptive or misleading. 243 Code Mass. Regs. § 2.07(11)(a).

New England Hair's website repeatedly used the terms doctors and surgeons throughout. New England Hair had only one licensed doctor or surgeon on staff, Dr. Welter. The recurrent use of the plural—which would lead the reader to believe that there were multiple licensed physicians at New England Hair when there was, in actuality, only one—was, at best, misleading. Dr. Welter attempted to justify his decision to use the plural by testifying that it had always been his intent to hire additional doctors, and his website language merely reflected his future intent. I did not find his testimony on this point convincing. Although I do believe that Dr. Welter had

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[2] Reisman (claims for fraud, negligent misrepresentation, and violations of G.L. c. 93A); *Von Schonau-Riedweg* (claims for common law fraud, violations of Massachusetts securities laws, and violations of G.L. c. 93A,); *Bern Unlimited Inc.* (claims for violations of the Lanham Act, 15 U.S.C. §1125(a)).

aspirations to build a larger business, he did not hire additional licensed physicians to work at New England Hair for many years after he started the business and the website went live, and there was no evidence that he attempted to do so.

The inappropriateness of using the plural was compounded by the presence of Clark Tan's name and biography on the website. It is possible that a website might not be misleading if it referred to doctors and surgeons in the plural but listed only one individual who could possibly fill that role. That was not the case here. New England Hair's website set the stage for multiple physicians by using the plural throughout, and then populated its cast with Dr. Welter and Clark Tan. Tan was repeatedly referred to as Dr. Tan, and he and Dr. Welter were paired together throughout the website as the doctors whom New England Hair employed. The website placed "Dr. Tan" on the same level as Dr. Welter and implied that he was a licensed physician. This was false and deceptive. Further, the website obscured the fact that Tan was trained only in the Philippines and not in the United States. Although the description of Tan's qualifications may have been technically accurate, even a careful reader might conclude that the East Avenue Medical Center, with its generic English name, is in the United States. Overseas training is not, in itself objectionable: there are many foreign-trained physicians who are licensed to practice medicine in Massachusetts. In Tan's case, however, he had *no* medical training in the United States, and because of this Tan was not eligible to be licensed in Massachusetts. Concealing or obfuscating the fact that Tan lacked U.S. training prevented readers from understanding that the reference to

"doctors" and "surgeons" could not include Tan. The failure to make this disclosure, coupled with the repeated references to Tan as a doctor in tandem with Dr. Welter, was deceptive and misleading.

The website's misdirection was not limited to the number of physicians and the status of Clark Tan. It also falsely implied that Dr. Welter was board-certified in surgery or plastic surgery by stating that Dr. Welter was, as New England Hair's founder and chief surgeon, "board certified, trained and licensed to perform hair restoration procedures…" Dr. Welter is board certified, but that certification is in family medicine; the website did not disclose this fact. (Finding 9.) Dr. Welter attempted to justify the sentence by resorting to a grammatical argument. He claimed that the use of a comma after the words board certified disconnected them from the remaining sentence. Although each element of the sentence is true by itself—Dr. Welter is board certified, he is trained in hair restoration procedures, and he does possess the appropriate licensure to do those procedures—together the adjectives describing Dr. Welter convey the message that Dr. Welter is board-certified in hair restoration techniques, either as a surgeon or as a plastic surgeon. This is false, misleading, and deceptive.

I conclude that Dr. Welter violated 243 Code Mass. Regs. § 2.07(11)(a) by publishing on New England Hair's website references to multiple doctors and surgeons, by misrepresenting the role and qualifications of Clark Tan, and by misrepresenting Dr. Welter's own qualifications to imply that he was board-certified in an area that he was not. Upon

learning that the Board believed his website to be deceptive, Dr. Welter did remove all references to Clark Tan. He did not change his own biography, but the record does not reveal whether, prior to the issuance of the Statement of Allegations, he knew that the Board had concluded that the reference to his board certification was misleading.

II. Allegations of Engaging in Conduct Having the Capacity to Deceive or Defraud

The Board charges that Dr. Welter engaged in conduct at his medical practice that had the capacity to deceive or defraud in violation of 243 Code Mass. Regs. § 1.03(5)(a)10. In the Statement of Allegations, the Board states that Dr. Welter facilitated the impression that Tan was a licensed physician, deceiving patients by permitting Tan to disseminate business cards displaying the words Clark Tan, M.D. and using consent forms that referred to associate doctors when there were no associate doctors and contained the statement that hair density measurements were taken by a doctor. The Board further alleged that Patients A and B were misled by Tan's email signature as Clark Tan, M.D. and by Tan's email statements that consultations were done by a doctor.

The Board presented no evidence that Dr. Welter knew or approved of the content of Tan's email. On the other hand, the evidence is plain that Dr. Welter knew that Tan possessed business cards imprinted with Clark Tan, M.D. and that Tan gave them to prospective patients. Had Dr. Welter made clear to his patients that Tan was not practicing at New England Hair as a physician but was instead employed as a

non-professional assistant, the existence of these business cards would be less troubling. Tan had graduated from medical school and had a rightful claim to the degree of Medical Doctor. Unfortunately, rather than clarifying, Dr. Welter further contributed to the misperception by publicly calling Tan "Dr. Tan" and allowing his staff to do so as well. Dr. Welter also permitted consent forms to be used at New England Hair that stated that hair density measurements were taken by a doctor (a task performed by Tan), and that associate doctors might assist Dr. Welter in the procedures. Taken together, the practice of calling Tan "Dr. Tan," the language in the consent forms, and Tan's business cards all created the false impression that Tan was a licensed physician.

Dr. Welter maintained at the hearing that there was no deception because Tan was actually a doctor. In so arguing, he persisted in his approach that statements should be analyzed literally and without context. This is a facile argument. Patients A and B both concluded erroneously that Tan was employed at New England Hair as a licensed physician. They reached this conclusion based on information they found on the website and on the way in which Tan was presented to them at the practice. As medical doctors, Patients A and B were more sophisticated than the average patient in the types of providers that populate medical practices. Nevertheless, they believed that Tan was an associate doctor of Dr. Welter's who was licensed to practice in Massachusetts.

I conclude, based on the evidence adduced concerning Tan's business card, the consent forms, and the conduct of the office staff, that Dr. Welter's

actions created a false and misleading impression concerning Tan's licensure status and that Dr. Welter was practicing medicine in a fashion that had the capacity to deceive his patients in violation of 243 Code Mass. Regs. §1.03(5)(a)10.

III. Allegations of Improper Delegation of Medical Services to Tan

The Board's most serious allegation against Dr. Welter is that he improperly delegated medical services to Tan in the treatment of patients A, B, and C, and that Dr. Welter permitted, aided, and abetted Tan, as an unlicensed person, to perform activities that required a license to practice medicine.

The hair restoration procedures for Patients A, B, and C took place in 2015, 2016, and 2017, respectively. Then, as now, the Board's regulations defined the practice of medicine as including the action of an individual who presents himself to the public with the initials M.D. connected with his name, and who also "assumes responsibility for another person's physical or mental wellbeing…" 243 Code Mass. Regs. § 2.01(4). Then, but not now, the Board's regulations permitted a physician to delegate certain medical services to an unlicensed person.[3] Prior to 2019, 243 Code Mass. Regs. § 2.07(4) provided as follows:

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[3] The Board amended the regulation in 2019 to forbid any delegation of medical services. The new, amended regulation reads: "Delegation of Medical Services: There shall be no delegation of medical services to an individual who is not licensed to perform those services in Massachusetts. Nothing in 243 CMR 2.07(4) shall be construed as permitting an unauthorized person to perform activities requiring a license to practice medicine. A full licensee who knowingly permits, aids or abets the unlawful

> Delegation of Medical Services: A full licensee may permit a skilled professional or non-professional assistant to perform services in a manner consistent with accepted medical standards and appropriate to the assistant's skill. The full licensee is responsible for the medical services delegated to a skilled professional or non-professional assistant. Nothing in 243 CMR 2.07(4) shall be construed as permitting an unauthorized person to perform activities requiring a license to practice medicine. A full licensee shall not knowingly permit, aid or abet the unlawful practice of medicine by an unauthorized person pursuant to M.G.L. c. 112, § 9A, M.G.L. c. 112, § 61 and 243 CMR 1.05(6).

The Board acknowledges that the above-quoted regulation, which was in effect when Patient A, B, and C were treated by New England Hair, is controlling in this case and that the later-amended regulation, set out in the footnote, does not apply. The question thus presented by Dr. Welter's and Tan's relationship is whether Dr. Welter's delegation of services to Tan with regard to Patients A, B, and C was permissible under the delegation regulation or conversely whether Tan impermissibly engaged in the practice of medicine.

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practice of medicine by an unauthorized person is subject to discipline pursuant to M.G.L. c. 112, s. 5, and 243 CMR 1.05(6)."

Patient A

Patient A was seen by Dr. Welter for her initial consultation. He performed a physical examination and documented it in her medical record. They discussed various treatment options, including the medication options. At the time of her consultation, Patient A told Dr. Welter that she was not interested in medication, and he told her that he would preauthorize a prescription for her so that she could have the medication if she changed her mind. Patient A chose to proceed with the PRP procedure.

The PRP procedure involved three components: a blood draw, spinning of that blood in a centrifuge to separate out various components, and a series of injections just below the surface of the skin to numb the area and to place the enriched plasma. Although Dr. Welter was present in the office when Patient A returned for her PRP procedure, Tan handled all of it, assisted by physician assistant DesJardins Pennie. As a physician assistant, Pennie was qualified to supervise injections and blood draws. The Board attempted to cast doubt on Pennie's participation in the procedure. Pennie testified that she could not have done the PRP blood draw because she has never drawn blood. However, Pennie agreed that she did observe some PRP procedures and although she did not remember Patient A, she conceded that her failure to remember Patient A did not mean that she did not observe or assist in Patient A's procedure. There is no evidence in the record that Pennie's encounter note reflecting that she was present at Patient A's procedure was improperly or fraudulently entered into Athena, and I credit the medical record over Pennie's

memory. I also credit Patient A's specific memory that Tan and a female health provider performed her PRP procedure.

After the procedure, Patient A told Tan that she had changed her mind and wanted to try finasteride, the medication that she and Dr. Welter had previously discussed at her consult in March. Tan or other members of Dr. Welter's staff let him know, and Dr. Welter authorized the prescription through Athena.

Several days after Patient A began taking the finasteride, she developed a rash. She did not seek treatment at New England Hair but went instead to an urgent care clinic. She was advised to stop taking the drug and her rash subsided. At some point thereafter, Patient A called New England Hair to advise the practice that she had developed a rash and that she had stopped taking finasteride. There is no record that she received any treatment or medical advice from anyone at New England Hair about what may or may not have been a drug reaction.

Patient A returned for three follow-up visits with Tan during which they discussed the results of her PRP procedure and the products she was using to support hair growth. There is no evidence in the record that Tan ever performed a physical examination on Patient A. At the second follow-up appointment, Tan noted that Patient A "will try oral finasteride again." At the third appointment, Tan wrote that Patient A thought she had a reaction to the finasteride when she was exposed to sunlight. There is no evidence in the record that Patient A received any treatment or sought medical advice from anyone at New England Hair about what may or may not have been a second

reaction to finasteride. Dr. Welter reviewed all of Tan's notes and signed off on them.

The evidence in the record supports the conclusion that Dr. Welter, not Tan, medically evaluated Patient A and authorized any prescriptions. Dr. Welter testified without rebuttal from any witness or other evidence in the record that Tan possessed the training and skill to perform Patient A's PRP procedure. Dr. Welter's testimony was based on his years of experience observing Tan assisting and conducting PRP procedures, and Dr. Welter's testimony was credible on this point. The Board produced no evidence that drawing blood, spinning blood, and giving injections requires a license to practice medicine; to the contrary, the testimony from the medical witnesses indicated that these tasks are routinely delegated to medical assistants. Additionally, the presence of DesJardins Pennie during this procedure places a physician assistant, qualified to supervise blood draws and injections, in the room. Finally, the Board made much in its post-hearing brief of Tan's note from the second follow-up appointment that Patient A would try finasteride again. The Board argued that this note established that Tan had strayed into practicing medicine by counseling Patient A with regard to medications. This one sentence fragment is too slender a thread to support this allegation. The Board has no evidence that Tan was affirmatively advising Patient A to take certain medications. Patient A did not testify that Tan did so, and the medical record does not establish this. Even if Tan did suggest that Patient A might again try finasteride, the Board has produced no evidence that he did so without the supervision of Dr. Welter.

The Board has the burden of proving by a preponderance of the evidence that Dr. Welter improperly delegated medical services to Tan in the care of Patient A and that he allowed Tan to assume responsibility for Patient A's physical wellbeing. It has not done so.

Patient B

Patient B's experience at New England Hair was in some ways the reverse of Patient A's. Patient B's consult took place with Tan, not Dr. Welter, but his procedure was done by both Dr. Welter and Tan.

Dr. Welter testified without contradiction that hair loss in male patients differs from hair loss in female patients and, consequently, a physical examination to rule out medical reasons for hair loss is necessary for females but usually unnecessary for males. Patient B's consult with Tan did not involve a physical examination. Tan reviewed Patient's B's concerns about his beard and verified that the sparseness that Patient B disliked was not of recent vintage but had always been present. Dr. Welter testified that understanding the history of a male patient's complaint allowed him to judge whether medical follow-up was necessary. In Patient B's case, Tan's note that the problem had persisted throughout Patient B's adult life indicated to Dr. Welter that an underlying medical problem did not exist.

During the consult, Tan reviewed the treatment options that New England Hair could provide to Patient B, assessed the density of Patient B's beard and hair, took pictures, and did some preliminary calculations to arrive at a cost estimate. Dr. Welter

and medical assistant Jenny Moore both testified that these sorts of consultations are handled in other hair restoration practices by salespeople who have no formal medical training. The Board produced no evidence to the contrary.

When Patient B returned for his procedure, Tan reviewed the consent form with Patient B first, and Dr. Welter reviewed the procedure again with Patient B while Dr. Welter's assistant shaved the donor areas on Patient B's head. Dr. Welter also briefly assessed Patient B's physical health prior to the start of the procedure. Over the next ten hours, Dr. Welter and Tan worked together, assisted by a medical assistant Brock, to perform Patient B's procedure. Patient B's lack of familiarity with the various tasks required during his FUE procedure led him to conclude, erroneously, that Dr. Welter was involved in his procedure only during the time that Dr. Welter was physically present in the room. However, the weight of the evidence is that Dr. Welter divided his time during the ten-hour procedure between being present in the room with Patient B and splitting and preparing hair follicles in a nearby procedure room.

Dr. Welter testified without rebuttal from any witness or other evidence in the record that Tan possessed the training and skill to perform the extractions and implantations during Patient B's procedure. Dr. Welter's testimony was based on his experience observing Tan assisting and conducting these procedures, and Dr. Welter's testimony was credible on this point. Dr. Welter also testified, as did medical assistant Jenny Moore, that hair extraction

and re-implantations in Massachusetts are tasks typically performed by medical assistants.

The Board produced no evidence that Tan's work during Patient B's consult required a license to practice medicine, and the testimony from other witnesses established that these consults are frequently performed by non-medical salespeople in other hair restoration practices. Additionally, the Board produced no evidence that the activities performed by Tan during Patient B's FUE procedure require a license to practice medicine; to the contrary, the testimony from the medical witnesses indicated that these tasks are routinely performed by medical assistants.

Finally, Dr. Welter was involved with the entirety of Patient B's FUE procedure and available to provide whatever supervision may have been needed.

The Board had the burden of proving by a preponderance of the evidence that Dr. Welter improperly delegated medical services to Tan in the care of Patient B and that Tan assumed responsibility for Patient B's physical wellbeing. It has not done so.

Patient C

Patient C first consulted Dr. Welter regarding hair loss concerns in October 2017. Following that consult and a consultation with plastic surgeon Dr. Kohli at Regeneris Medical, Patient C decided to undergo two hair treatment procedures (PRP and SVF) and one body contouring procedure (Vaser Liposuction) on the same day at New England Hair's offices.

From the statement of allegations and the testimony of its witness Susan Dye, it is apparent that the Board believed that the SVF procedure and the Vaser Liposuction procedure were one and the same. The Board alleged that Dr. Welter told Patient C that he and his staff were highly experienced in performing SVF. Dr. Welter replied in his answer, and affirmed in his testimony, that he and his staff were, in fact, highly experienced in that procedure. There is no evidence to the contrary in the record. Dr. Welter explained that although he had some experience with Vaser Liposuction, it was a technique that he was acquiring expertise in, and for that reason he hired Dr. Kohli to offer this service.

The Board also alleged that Tan injected stem cells that had been harvested via liposuction into Patient C's scalp. Dr. Welter denied this allegation.

The Board did not present Patient C as a witness and offered Susan Dye's testimony of what Patient C had told her about his procedures at New England Hair during her one telephone interview with him. I allowed Inspector Dye to testify to those portions of her conversation with Patient C that were corroborated by Patient C's medical record, but not to any other portions of the conversation that were offered for the truth of the matter asserted. Although hearsay evidence can be admissible in adjudicatory proceedings, the Board here attempted to use one witness to establish facts asserted by another witness whose credibility or recall could not be challenged. The facts that the Board sought to establish through Dye's testimony were central to its allegations against Dr. Welter regarding the care of Patient C. Dye's

testimony about what Patient C said in a telephone interview, unverified and not subject to any kind of credibility testing, is not the sort of evidence on which reasonable people would rely in the conduct of serious affairs. G.L. c. 30A, § 11. Accordingly, this testimony was excluded from evidence.

Inspector Dye was confused about what sort of hair procedures Patient C had undergone. She testified that she did not have any familiarity with PRP or SVF, and at one point stated that she believed that Patient C had undergone some kind of a hair transplant. She later conceded that the procedures that Patient C's medical record reflected—PRP and SVF—and which she had heard described at the hearing, did not involve transplanting any hair. I did not find Inspector Dye's testimony to be probative on the question of what Patient C experienced at New England Hair.

Additionally, Patient C's credibility appears doubtful, given his refusal to come to the Board's offices for an interview, his refusal to testify at this proceeding, his ability to access confidential malpractice insurance information which should have been kept from him, and the threats he made to Dr. Welter about malpractice actions and media exposure. There is nothing in the record to substantiate Patient C's text message that an investigation was pending at a local police department and at the Attorney General's office, and Inspector Dye testified that she had no knowledge of any such inquiry. Statements that Patient C made to Inspector Dye in their brief interview were contradicted by the medical records; the Board should have taken notice of these

inconsistencies and should have proceeded with more caution. I am troubled by the Board's reliance on this witness and the Board's attempt to introduce his unsworn and unreliable narrative through Investigator Dye.

Patient C's medical record reflects that he did undergo three procedures at New England Hair. The SVF and Vaser contouring were done by Dr. Welter and Dr. Kohli, and the PRP was done by Dr. Welter, assisted by Devin Fortier. The medical record lists Tan along with two other individuals as assistants in the Vaser and SVF procedure, but Dr. Welter credibly testified that Tan's role was limited to setting up the room. There was no evidence to the contrary other than Patient C's unsworn and unsubstantiated statement which I do not credit. Patient C's medical record for the PRP procedure lists Dr. Welter and Devin Fortier as the surgical team. There is no mention of Tan. Dr. Welter testified that Tan scribed this procedure, but did not participate in it. Again, I found Dr. Welter credible on this point, and there was no evidence to the contrary.

It was the Board's burden to establish that Dr. Welter improperly delegated medical services to Tan. The Board did not establish that Tan provided any medical services to Patient C. Accordingly, the Board has not carried its burden of proving that Dr. Welter improperly delegated medical services to Tan in the care of Patient C or that Tan assumed responsibility for Patient C's physical well-being.

IV. Allegations of False Statements in Medical Records

The Board's regulations provide, at 243 Code Mass. Regs. § 2.07(13)(a), that a licensed physician shall "maintain a medical record for each patient that is complete, timely, legible, and adequate to enable the licensee or any other health care provider to provide proper diagnosis and treatment." In the Statement of Allegations, the Board identified two medical record entries for New England Hair's records that it viewed as false and failing to meet this standard. In Patient A's medical record, Dr. Welter is identified as the surgeon for Patient A's PRP procedure and Tan as the "first assist," and in Patient B's medical record, Dr. Welter is identified as the surgeon for Patient B's FUE procedure and Tan as an assistant. During the hearing, the Board took issue with the fact that some of the notes in Patient A's and Patient B's medical records were undated and unsigned. After the hearing, the Board in its post-hearing brief also challenged Dr. Welter's signature on Patient A's and Patient B's consent forms. Regarding Patient A's consent form, the Board argued that Dr. Welter should not have signed the form on the day of Patient A's procedure because he did not review the form with her on that date. Regarding Patient B's consent form, the Board challenged Dr. Welter's testimony that he had reviewed the form at all with Patient B.

There is no dispute that Patient A's medical records do identify Dr. Welter as the surgeon for the PRP procedure, and there is further no dispute that Dr. Welter did not participate in any significant way in that procedure. Dr. Welter testified that he signed

the record as the surgeon who was responsible for supervising Tan's work. The Board offered no evidence that this practice violated accepted medical practice or record-keeping standards.

There is also no dispute that Patient B's medical records identify Dr. Welter as the surgeon for the FUE procedure, and that Tan and Brock are identified as assistants. Dr. Welter, Tan, and Brock all participated in Patient B's procedure. The Board offered no evidence that these notations were inaccurate or violated accepted medical practice or record-keeping standards.

The medical records of Patients A and B each contain some entries that are undated and unsigned. The Board offered no evidence that this practice violated accepted medical practice or record-keeping standards.

Dr. Welter admits that he signed the consent form for Patient A on the date of her procedure. The evidence established that he reviewed the form and the procedure with her three months prior at her consultation. Dr. Welter's signature on the consent form attested to the fact that he had explained and reviewed its relevant information to Patient A. The Board offered no evidence that Dr. Welter's signing this form, three months after he had explained and reviewed its contents with Patient A, violated accepted medical practice or record-keeping standards.

I have found that Dr. Welter reviewed the consent form with Patient B on the date of his procedure. Dr. Welter's signing it on that date is thus unremarkable.

The Board has not carried its burden of proving that Dr. Welter created false records or that Patient A and Patient B's medical records were not maintained in accordance with 243 Code Mass. Regs. § 2.07(13)(a).

V. Allegations of Fraud in Dr. Welter's Renewal of Medical Licenses

Lastly, the Board charges that Dr. Welter committed fraud in his license renewal applications. It was the Board's burden to prove not only that Dr. Welter submitted incorrect information, but that in so doing he acted with intent to defraud. The Board charges that Dr. Welter committed fraud in three areas: failure to disclose all of his work locations, failure to disclose a pending Board investigation, and failure to reveal that he was performing office-based surgery.

There is no factual dispute that Dr. Welter failed to disclose all of his work locations, listing only his original office at the Morton Hospital Medical Center on his 2013, 2015, and 2017 renewal applications. Dr. Welter also conceded that he failed to disclose, on his 2017 renewal application, the investigation that is the subject of this appeal.

With regard to the Board's claim that Dr. Welter should have stated that he was performing office-based surgery on his 2015 and 2017 renewal applications, Dr. Welter testified that he did not believe that FUE fell within the definition of surgery. The Board offered no expert testimony to the contrary. Although the Board placed in evidence MMS's guidelines that contain its definition of surgery, the Board did not provide this forum with an expert

competent to interpret those guidelines and counter Dr. Welter's testimony. Accordingly, the Board did not prove that Dr. Welter's negative answer to the question about office-based surgery was false.

The Board argues that the fact that Dr. Welter made errors in submitting his application is enough to establish that Dr. Welter acted with intent to defraud, citing *Fisch v. Board of Registration in Medicine*, 437 Mass. 128, 139, 769 N.E.2d 1221, 1230 (2002) ("[f]raudulent intent may be shown by proof that a party knowingly made a false statement and that the subject of that statement was susceptible of actual knowledge…No further proof of actual intent to deceive is required."). But while fraudulent intent may be shown by evidence of a false statement, it does not follow that proof of a false statement necessitates a conclusion of fraudulent intent.

Here, the weight of the evidence is that Dr. Welter did not intend to deceive the Board regarding his work locations or the existence of a pending investigation. With regard to work locations, Dr. Welter testified that he thought that the question was asking him for his hospital affiliations because only hospitals appear in the drop-down menu. It is true that the separate application instructions state that a physician is to list all of his work locations, but the question on the face of the application does not make this clear. Dr. Welter's testimony on this point is bolstered by the evidence that he listed his primary work location as his business address on his renewal applications, and that he corresponded with the Board to offer his services as a workplace monitor in a probation agreement at his North Attleboro office. Had he been

attempting to hide his work locations from the Board, he would not have engaged in this behavior. With regard to his failure to answer affirmatively the question about investigations, it is illogical to conclude that Dr. Welter was trying to deceive the Board about the existence of an investigation that he knew the Board was conducting. It is more probable than not that Dr. Welter's explanation reflects the truth, that he simply made a mistake and did not catch it when he reviewed his document.

The Board has not met its burden of proving that Dr. Welter committed fraud in his license renewal applications for 2013, 2015, and 2017.

Conclusion

The Board carried its burden of proof that Dr. Welter engaged in false, misleading, and deceptive advertising on his website for New England Hair from 2015 to 2017 in violation of 243 Code Mass. Regs. § 2.07(11)(a).

The Board carried its burden of proof that Dr. Welter was practicing medicine in a fashion that had the capacity to deceive his patients by creating a false and misleading impression concerning Tan's licensure status from 2015 to 2017 in violation of 243 Code Mass. Regs. § 1.03(5)(a)10.

The Board has not carried its burden of proving that Dr. Welter improperly delegated medical services to Tan or aided and abetted Tan in the unlicensed practice of medicine in the care of Patients A, B, or C.

The Board has not carried its burden of proving that Dr. Welter maintained improper medical records for Patients A or B.

The Board has not carried its burden of proving that Dr. Welter engaged in fraud when he renewed his medical license in Massachusetts in 2013, 2015, or 2017.

Mitigating Factors

The following factors may mitigate against sanctions the Board may seek to impose on Dr. Welter for his false advertising and the misleading conduct of his practice:

1. When the Board's concerns became known to Dr. Welter regarding New England Hair's website and before the Statement of Allegations issued, Dr. Welter changed the website to delete all references to Tan and changed all the plural descriptors of doctors and surgeons to single descriptors.

2. In 2017, when Dr. Welter became aware that the Board disagreed with his interpretation of the delegation regulation, Dr. Welter changed Tan's job so that Tan would no longer have direct contact with patients. In so doing, he eliminated the possibility that patients would be misled by the practice that Tan was an associate licensed physician. He made this change prior to the issuance of the Statement of Allegations.

3. Dr. Welter has no history of being disciplined by any academic institution, hospital, or licensing board.

4. Dr. Welter has a reputation for honesty and integrity in his church community.

Recommendation

I recommend that the Board, after considering the mitigating factors set out above, impose appropriate discipline against Dr. Welter for false advertising and for practicing medicine in a fashion that had the capacity to mislead his patients regarding Tan's licensure status.

DIVISION OF ADMINISTRATIVE LAW APPEALS

Signed by Kristin M. Palace
Kristin M. Palace
Administrative Magistrate

Dated: October 20, 2020

Appendix E

Administrative Record excerpt filed with the Massachusetts Supreme Judicial Court No. SJC-13236 (July 20, 2022), RA000023

COMMONWEALTH OF MASSACHUSETTS
BOARD OF REGISTRATION IN MEDICINE
Middlesex

Docket Nos. 16-405; 18-053

IN THE MATTER OF
RYAN J. WELTER, M.D.
Registration No. 206588
Petitioner.

VOLUNTARY AGREEMENT NOT TO PRACTICE MEDICINE

1. I agree to cease my practice of medicine in the Commonwealth of Massachusetts effective immediately.

2. This Agreement will remain in effect until the Board of Registration in Medicine (Board) determines that this Agreement should be modified or terminated; or until the Board takes other action against my license to practice medicine; or until the Board takes final action on the above referenced matter.

3. I am entering this Agreement voluntarily.

4. I understand that this Agreement is a public document and may be subject to a press release.

5. I understand that this action is non-disciplinary but will be reported by the Board to the appropriate federal data banks and national reporting organizations, including the National Practitioner Data Bank and the Federation of State Medical Boards.

6. Any violation of this Agreement shall be prima facie evidence for immediate summary suspension of my license to practice medicine.

7. I understand that by voluntarily agreeing not to practice medicine in the Commonwealth of Massachusetts pursuant to this Agreement, I do not waive my right to contest any allegations brought against me by the Board and my signature to this Agreement does not constitute any admissions on my part. Nothing contained in this Agreement shall be construed as an admission or acknowledgment by me as to wrongdoing of any kind in the practice of medicine or otherwise.

8. I agree to provide a complete copy of this Agreement, within twenty-four (24) hours of notification of the Board's acceptance of this Agreement, by certified mail, return receipt requested, or by hand delivery to the following designated entities: any in-state or out-of-state hospital, nursing home, clinic, other licensed facility, or municipal, state, or federal facility at which I practice medicine; any in-state or out-of-state health maintenance organization, with which I have privileges or any other kind of association; any state agency, in-or-out-of state, with which I have a provider contract; any in-state or out-of-state medical employer, whether or not I practice medicine there;

the Drug Enforcement Administration Boston Diversion Group; Massachusetts Department of Public Health Drug Control Program; and the state licensing boards of all states in which I have any kind of license to practice medicine. I will certify to the Board within seven (7) days that I have complied with this directive. The Board expressly reserves the authority to independently notify, at any time, any of the entities designated above or any other affected entity, of any action it has taken.

9. This Agreement represents the entire agreement between the parties at this time.

s/[handwritten signature]	*5/2/19*
Ryan J. Welter, M.D. Licensee	Date
s/[handwritten signature]	*5/2/19*
Paul Cirel, Esq. Attorney for Licensee	Date

Accepted by the Board of Registration in Medicine this *2* day of *May*, 2019.

s/[handwritten signature]
Board Chair or Designee

Ratified by vote of the Board of Registration in Medicine this _____ day of _____, 2019.

_____
Board Chair or Board Member

Appendix F

Relevant Constitutional Provisions & Statutes

U.S. Const., amend. XIV, § 1

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

243 Code Mass. Regs. § 2.07(11)(a)

(11) Advertising and Professional Notices by a Full Licensee.

(a) A full licensee engaged in the practice of medicine may advertise for patients by means which are in the public interest. Advertising that is not in the public interest includes the following:

1. Advertising that is false, deceptive, or misleading;
2. Advertising that has the effect of intimidating or exerting undue pressure;
3. Advertising that guarantees a cure; or
4. Advertising that makes claims of professional superiority which a licensee cannot substantiate

243 Code Mass. Regs. § 1.03(5)(a)(10).

5) Grounds for Complaint.

(a) Specific Grounds for Complaints Against Physicians. A complaint against a physician must allege that a licensee is practicing medicine in violation of law, regulations, or good and accepted medical practice and may be founded on any of the following:

* * *

10. Practicing medicine deceitfully, or engaging in conduct which has the capacity to deceive or defraud.

* * *