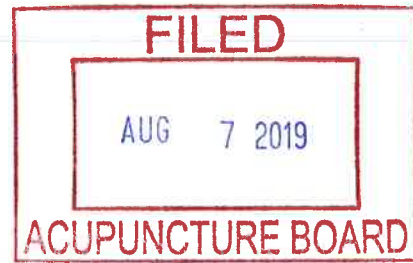


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9 **BEFORE THE**
10 **ACUPUNCTURE BOARD**
11 **DEPARTMENT OF CONSUMER AFFAIRS**
12 **STATE OF CALIFORNIA**

13 In the Matter of the Accusation Against:

Case No. 1A-2017-240

14 MATTHEW SCOTT SCHWARTZ, L.Ac.
4949 Cartwright Avenue
15 North Hollywood, CA 91601
Acupuncturist License No. AC 11109,

ACCUSATION

16 Respondent.
17

18 Complainant alleges:

19 **PARTIES**

20 1. Benjamin Bodea (Complainant) brings this Accusation solely in his official capacity
21 as the Executive Officer of the Acupuncture Board (Board), Department of Consumer Affairs.

22 2. On or about April 27, 2006, the Acupuncture Board issued Acupuncturist License
23 Number AC 11109 to Matthew Scott Schwartz, L.Ac. (Respondent). That license was in full
24 force and effect at all times relevant to the charges brought herein and will expire on November
25 30, 2019, unless renewed.

26 **JURISDICTION**

27 3. This Accusation is brought before the Board under the authority of the following
28 laws. All section references are to the Business and Professions Code (Code) unless otherwise

1 indicated.

2 STATUTORY PROVISIONS

3 4. Section 4928.1 of the Code states:

4 Protection of the public shall be the highest priority for the Acupuncture Board
5 in exercising its licensing, regulatory, and disciplinary functions. Whenever the
6 protection of the public is inconsistent with other interests sought to be promoted, the
7 protection of the public shall be paramount.

8 5. Section 4927 of the Code states, in pertinent part,

9 As used in this chapter, unless the context otherwise requires:

10 (a) – (c)

11 (d) ‘Acupuncture’ means the stimulation of a certain point or points on or near
12 the surface of the body by the insertion of needles to prevent or modify the perception
13 of pain or to normalize physiological functions, including pain control, treatment of
14 certain diseases or dysfunctions of the body and includes the techniques of
15 electroacupuncture, cupping, and moxibustion.

16 6. Section 4955 of the Code states:

17 The board may deny, suspend, or revoke, or impose probationary conditions
18 upon, the license of any acupuncturist who is guilty of unprofessional conduct.

19 Unprofessional conduct shall include, but not be limited to, the following:

20 (a) Using or possessing any controlled substance as defined in Division 10
21 (commencing with Section 11000) of the Health and Safety Code, or dangerous drug
22 or alcoholic beverage to an extent or in a manner dangerous the acupuncturist, or to
23 any other person, or to the public, and to an extent that the use impairs the
24 acupuncturist’s ability to engage in the practice of acupuncture with safety to the
25 public.

26 (b) Conviction of a crime substantially related to the qualifications, functions,
27 or duties of an acupuncturist, the record of conviction being conclusive evidence
28 thereof.

(c) False or misleading advertising.

(d) Aiding or abetting in, or violating or conspiring in, directly or indirectly, the
violation of the terms of this chapter or any regulation adopted by the board pursuant
to this chapter.

(e) Except for good cause, the knowing failure to protect patients by failing to
follow infection control guidelines of the board, thereby risking transmission of
blood-borne infectious diseases from licensee to patient, from patient to patient, and
from patient to licensee. In administering this subdivision, the board shall consider
referencing the standards, regulations, and guidelines of the State Department of
Health Services developed pursuant to Section 1250.11 of the Health and Safety Code
and the standards, regulations, and guidelines pursuant to the California Occupational
Safety and Health Act of 1973 (Part 1 (commencing with Section 6300) of Division 5

1 of the Labor Code) for preventing the transmission of HIV, hepatitis B, and other
2 blood-borne pathogens in health care settings. As necessary, the board shall consult
3 with healing arts boards within this division, including, but not limited to, the Medical
4 Board of California, the California Board of Podiatric Medicine, the Dental Board of
5 California, the Board of Registered Nursing, and the Board of Vocational Nursing
6 and Psychiatric Technicians, to encourage appropriate consistency in the
7 implementation of this subdivision.

8 The board shall seek to ensure that licensees are informed of the responsibility
9 of licensees and others to follow infection control guidelines, and of the most recent
10 scientifically recognized safeguards for minimizing the risk of transmission of
11 blood-borne infectious diseases.

12 (f) The use of threats or harassment against any patient or licensee for providing
13 evidence in a disciplinary action, other legal action, or in an investigation
14 contemplating a disciplinary action or other legal action.

15 (g) Discharging an employee primarily for attempting to comply with the terms
16 of this chapter.

17 (h) Disciplinary action taken by any public agency for any act substantially
18 related to the qualifications, functions, or duties of an acupuncturist or any
19 professional health care licensee.

20 (i) Any action or conduct that would have warranted the denial of the
21 acupuncture license.

22 (j) The violation of any law or local ordinance on an acupuncturist's business
23 premises by an acupuncturist's employee or a person who is working under the
24 acupuncturist's professional license or business permit, that is substantially related to
25 the qualifications, functions, or duties of an acupuncturist. These violations shall
26 subject the acupuncturist who employed the individuals, or under whose
27 acupuncturist license the employee is working, to disciplinary action.

28 (k) The abandonment of a patient by the licensee without written notice to the
patient that treatment is to be discontinued and before the patient has had a reasonable
opportunity to secure the services of another practitioner.

(l) the failure to notify the board of the use of any false, assumed, or fictitious
name other than the name under which the licensee is licensed as an individual to
practice acupuncture.

7. Section 4955.1 of the Code states:

The board may deny, suspend, revoke, or impose probationary conditions upon
the license of any acupuncturist if he or she is guilty of committing a fraudulent act
including, but not be limited to, any of the following:

(a) Securing a license by fraud or deceit.

(b) Committing a fraudulent or dishonest act as an acupuncturist.

(c) Committing any act involving dishonesty or corruption with respect to the
qualifications, functions, or duties of an acupuncturist.

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1 (d) Altering or modifying the medical record of any person, with fraudulent
intent, or creating any false medical record.

2 (e) Failing to maintain adequate and accurate records relating to the provision
3 of services to their patients.

4 8. Section 4955.2 of the Code states:

5 The board may deny, suspend, revoke, or impose probationary conditions upon
6 the license of any acupuncturist if he or she is guilty of committing any one of the
following:

7 (a) Gross negligence.

8 (b) Repeated negligent acts.

9 (c) Incompetence.

10 **REGULATORY PROVISIONS**

11 9. California Code of Regulations, title 16, section 1399.451, states:

12 In treating a patient, an acupuncturist shall adhere to the following procedures:

13 (a) The acupuncturist's hands shall be brush-scrubbed with soap and warm
14 water immediately before examining patients or handling acupuncture needles and
other instruments, and between patients.

15 (b) All instruments shall be sterilized before and between uses in a manner
16 which will destroy all microorganisms. All needle trays which contain sterile needles
shall also be sterile. Each time instruments are sterilized, the acupuncturist shall use a
17 tape or strip indicator which shows that sterilization is complete.

18 (c) Acupuncture points, where needles are to be inserted, shall be cleaned with
an appropriate antiseptic before insertion of the needle.

19 (d) In the event an acupuncture needle inserted in a patient breaks
20 subcutaneously, the treating acupuncturist shall immediately consult a physician. An
acupuncturist shall not sever or penetrate the tissues in order to excise such a needle.

21 (e) Any complication, including but not limited to, hematoma, peritonitis or
22 pneumothorax arising out of acupuncture treatment shall be referred immediately to a
physician or dentist or podiatrist, if appropriate, if immediate medical treatment is
23 required.

24 (f) Acupuncture shall not be performed using hypodermic needles.

25 (g) All instruments to be discarded shall be disposed of safely.

26 (h) Needles shall be disposed of by placing them in a sealed, unbreakable
container marked "Hazardous Waste" and disposed of in accordance with state and
27 local law.

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1 10. California Code of Regulations, title 16, section 1399.453 states:

2 (a) An acupuncturist shall keep complete and accurate records on each patient
3 who is given acupuncture treatment, including but not limited to, treatments given
4 and progress made as a result of the acupuncture treatments.

5 **COST RECOVERY**

6 11. Section 4959 of the Code states:

7 (a) The board may request the administrative law judge, under his or her
8 proposed decision in resolution of a disciplinary proceeding before the board, to
9 direct any licensee found guilty of unprofessional conduct to pay to the board a sum
10 not to exceed actual and reasonable costs of the investigation and prosecution of the
11 case.

12 (b) The costs to be assessed shall be fixed by the administrative law judge and
13 shall not in any event be increased by the board. When the board does not adopt a
14 proposed decision and remands the case to an administrative law judge, the
15 administrative law judge shall not increase the amount of any costs assessed in the
16 proposed decision.

17 (c) When the payment directed in the board's order for payment of costs is not
18 made by the licensee, the board may enforce the order for payment in the superior
19 court in the county where the administrative hearing was held. This right of
20 enforcement shall be in addition to any other rights the board may have as to any
21 licensee directed to pay costs.

22 (d) In any judicial action for the recovery of costs, proof of the board's decision
23 shall be conclusive proof of the validity of the order of payment and the terms for
24 payment.

25 (e) All costs recovered under this section shall be considered a reimbursement
26 for costs incurred and shall be deposited in the Acupuncture Fund.

27 **DEFINITIONS**

28 12. Pneumothorax is a collapsed lung that occurs when air leaks into the space between
the lung and chest wall. The air pushes on the outside of the lung and makes it collapse. A
pneumothorax can be a complete lung collapse or a collapse of only a portion of the lung. A
pneumothorax can be caused by a blunt or penetrating chest injury, certain medical procedures, or
damage from underlying lung disease. Symptoms usually include sudden chest pain and
shortness of breath. A pneumothorax can be a life-threatening event. Treatment for a
pneumothorax usually involves inserting a needle or chest tube between the ribs to remove the
excess air.

13. The Heimlich chest tube is a small one-way valve used for chest drainage that

1 empties into a flexible collection device and prevents return of gases or fluids into the pleural
2 space. The Heimlich valve is less than 13 cm (5 inches) long and facilitates patient ambulation.
3 It can be used in many patients instead of a traditional water seal drainage system. The Heimlich
4 chest drainage valve was developed so that the process of draining the pleural cavity could be
5 accomplished in a safe, relatively simple, and efficient manner. This valve system has replaced
6 the cumbersome underwater drainage bottle system. The Heimlich valve system connects to
7 chest tubing and allows fluid and air to pass in one direction only. The valve drains into a plastic
8 bag that can be held at any level, allowing the patient undergoing chest drainage to be ambulatory
9 simply by carrying the bag.

10 FACTUAL ALLEGATIONS

11 14. Patient 1¹ was a 29 year old woman who saw Respondent for the first time for
12 acupuncture treatment on September 7, 2016.

13 15. Patient 1 filled in a pre-printed "New Patient Form" in which she documented
14 several physical complaints which included tension in her upper back and "time-to-time
15 migraines."

16 16. The "Policies" section of the "New Patient Form" Patient 1 signed discussed various
17 hazards of acupuncture treatment but did not mention pneumothorax in the list of possible
18 adverse effects.

19 17. Respondent's progress note dated September 7, 2016, regarding the acupuncture
20 treatment he rendered to Patient 1 on that date states, "Chief complaint: tension in the upper back
21 and migraines[.] Patient complains of chronic upper back tension and migraines from time to
22 time Shoulders are rotated anteriorly slightly[.] With a winged scapula on the rt shoulder blade[.]
23 Rhomboids muscles are in a tight elongated stated with tension on the anterior scalines. Shortened
24 pectorals minor on both sides[.] No history of accidents reported[.] Pain is chronicc [sic] but
25 manageable[.] Patients stress she is going through a lot of changes in life and would like to find a
26 way to release pent up tension. Acupuncture. points used: Du 20, Gb20,21, Sj15, Ub12, 13, 14,
27

28 ¹ The names of the patient and/or witnesses are anonymized to protect their privacy rights. The names will be provided to Respondent upon written request for discovery.

1 18,23, 58,60, Si11 Pc4[.] Infra red heat was applied for the duration of the needle retention[.]
2 5min [sic] Tui-Na massage was preformed after the needles were pulled.”

3 18. Respondent’s progress note dated September 7, 2016, regarding the acupuncture
4 treatment he rendered to Patient 1 does not state any communication he had with Patient 1, the
5 length of the needles used, or the depth or the angles of insertion of the needles into Patient 1’s
6 chest during the acupuncture treatment.

7 19. On September 8, 2016, Patient 1 called Respondent and said she felt that something
8 was wrong with her lungs, complained of shortness of breath and difficulty breathing, and of pain
9 in her ribs which had disrupted her sleep.

10 20. In response to Patient 1 Respondent stated that nothing he did could have hurt Patient
11 1. Respondent told Patient 1 her pain probably was just soreness from the treatment and
12 suggested Patient 1 roll on a foam roller to help her pain.

13 21. Respondent failed to chart the September 8, 2016, conversation with Patient 1, nor
14 did he chart any post-treatment recommendation(s), or referral of Patient 1 to a physician for
15 follow-up based on Patient 1’s post acupuncture treatment complaints to him.

16 22. On September 9, 2016, Patient 1 went to Urgent Care where she was examined by a
17 physician and had x-rays taken of her lungs. The physician’s review of Patient 1’s x-rays
18 revealed Patient 1 had a 20 % pneumothorax in her right lung. The physician treated Patient 1’s
19 pain and allowed her to return home. The physician directed Patient 1 to return to the hospital for
20 further treatment the next day if her pain did not improve.

21 23. On September 10, 2016, Patient 1 returned to the hospital where x-rays reveled that
22 Patient 1’s pneumothorax had increased to 50%. A Heimlich chest tube was used to re-expand
23 Patient 1’s lung. Patient 1 was discharged from the hospital on September 12, 2016.

24 24. The standard of care requires that the acupuncturist obtain an informed consent which
25 discloses the risks in the performance of the acupuncture treatment.

26 25. The standard of care requires that the acupuncturist who is using acupuncture points
27 which are in close proximity to the lungs should use the proper length needle to avoid causing a
28 pneumothorax.

1 26. The standard of care requires that the acupuncturist who is using acupuncture points
2 which are in close proximity to the lungs should insert the needle to the proper needle depth to
3 avoid causing a pneumothorax.

4 27. The standard of care requires that the acupuncturist insert the acupuncture needle at
5 an appropriate needling angle to avoid causing a pneumothorax.

6 28. The standard of care requires that the acupuncturist provide an immediate referral to a
7 physician when a patient experiences a complication following acupuncture treatment.

8 29. The standard of care requires the acupuncturist to keep complete, detailed and
9 accurate records for each acupuncture treatment which should include the length of the needle
10 used, the depth to which the needle(s) was inserted, and the angle at which the needle was
11 inserted.

12 30. The standard of care requires the acupuncturist to keep complete, detailed and
13 accurate records of any communications between the acupuncturist and the patient of any
14 complaints after the acupuncture treatment.

15 **FIRST CAUSE FOR DISCIPLINE**

16 (Gross Negligence)

17 31. Respondent is subject to disciplinary action under 4955.2, subsection (a), of the Code
18 in that he was grossly negligent in her care and treatment of Patient 1. The circumstances are as
19 follows:

20 32. Respondent's care and treatment of Patient 1 as set forth above in paragraphs 12
21 through 30 includes the following acts and/or omissions which constitute extreme departures
22 from the standard of care:

23 A. Respondent's failure to obtain an informed consent which discloses the risks in the
24 performance of the acupuncture treatment.

25 B. Respondent's failure to use the proper length needle when he performed acupuncture
26 in close proximity to Patient 1's lungs to avoid causing a pneumothorax.

27 C. Respondent's failure to insert the needle to the appropriate depth when he performed
28 acupuncture in close proximity to Patient 1's lungs to avoid causing a pneumothorax.

1 D. Respondent's failure to insert the needle at an appropriate needling angle to avoid
2 causing a pneumothorax.

3 E. Respondent's failure to provide an immediate referral to a physician when Patient 1
4 experienced a complication following acupuncture treatment.

5 **SECOND CAUSE FOR DISCIPLINE**

6 (Repeated Negligent Acts)

7 33. Respondent is subject to disciplinary action under section 4955.2, subdivision (b), of
8 the Code, in that he has committed repeated acts of negligence in the practice of acupuncture.
9 The circumstances are as follows:

10 34. Complainant refers to, and by reference incorporates herein paragraphs 12 through
11 23, inclusive, above.

12 35. Respondent's care and treatment of Patient 1 as set forth above includes the following
13 acts and/or omissions which constitute departures from the standard of care:

14 A. Respondent's failure to obtain an informed consent which discloses the risks in the
15 performance of the acupuncture treatment.

16 B. Respondent's failure to use the proper length needle when he performed acupuncture
17 in close proximity to Patient 1's lungs to avoid causing a pneumothorax.

18 C. Respondent's failure to insert the needle to the appropriate depth when he performed
19 acupuncture in close proximity to Patient 1's lungs to avoid causing a pneumothorax.

20 D. Respondent's failure to insert the needle at an appropriate needling angle to avoid
21 causing a pneumothorax.

22 E. Respondent's failure to provide an immediate referral to a physician when Patient 1
23 experienced a complication following acupuncture treatment.

24 F. Respondent's failure to keep complete, detailed and accurate records for Patient 1's
25 acupuncture treatment and reporting of post treatment complications.

26 G. Respondent's failure to keep complete, detailed and accurate records for Patient 1's
27 acupuncture treatment and reporting of post treatment complications are each a simple departure
28 from the standard of care.

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THIRD CAUSE FOR DISCIPLINE

(Failure to Maintain Adequate and Accurate Records)

36. Respondent is subject to disciplinary action under section 4955, as defined by section 4955.1, subdivision (e), in that he failed to maintain adequate and accurate records relating to the services he provided to Patient 1. The circumstances are as follows:

37. Complainant refers to, and by reference incorporates herein paragraphs 12 through 30, inclusive, above.

FOURTH CAUSE FOR DISCIPLINE

(Unprofessional Conduct)

38. Respondent is subject to disciplinary action under section 4955.1, subdivision (e), of the Code, and California Code of Regulations, title 16, section 1399.451, subdivision (e), and 1399.453, in that he committed unprofessional conduct in his care and treatment of Patient 1.

The circumstances are as follows:

39. Complainant refers to, and by reference incorporates herein paragraphs 12 through 37, inclusive, above.

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PRAYER

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

1. Revoking or suspending Acupuncturist License Number AC 11109, issued to Matthew Scott Schwartz, L.Ac.;
2. Ordering Matthew Scott Schwartz, L.Ac. to pay the Acupuncture Board the reasonable costs of the investigation and enforcement of this case, pursuant to Business and Professions Code section 4959;
3. If placed on probation, ordering him to pay to the Acupuncture Board the costs of probation monitoring; and
4. Taking such other and further action as deemed necessary and proper.

DATED: **AUG 07 2019**


BENJAMIN BODEA
Executive Officer
Acupuncture Board
Department of Consumer Affairs
State of California
Complainant

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