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FILED

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ACUPUNCTURE BOARD

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

11 In the Matter of the Accusation Against:

Case No. 1A-2012-151

12 **FRANK SHYU, L.Ac.**
13 **2162 S. Garfield Avenue**
14 **Monterey Park, CA 91754**
Acupuncturist License No. AC850,

A C C U S A T I O N

15 Respondent.

16
17 Complainant alleges:

18 **PARTIES**

19 1. Terri Thorfinnson (Complainant) brings this Accusation solely in her official capacity
20 as the Executive Officer of the Acupuncture Board, Department of Consumer Affairs.

21 2. On or about August 21, 1978, the Acupuncture Board issued Acupuncturist License
22 Number AC850 to Frank Shyu, L.Ac. (Respondent). The Acupuncturist License was in full force
23 and effect at all times relevant to the charges brought herein and will expire on April 30, 2016,
24 unless renewed.

25 **JURISDICTION**

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

1 4. Section 4928.1 of the Code states:

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

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

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

8 “...
9 “(d)

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

14 6. Section 4937 of the Code states:

15 “An acupuncturist’s license authorizes the holder thereof:

16 “(a) To engage in the practice of acupuncture.

17 “(b) To perform or prescribe the use of Asian massage, acupressure, breathing techniques,
18 exercise, heat, cold, magnets, nutrition, diet, herbs, plant, animal, and mineral products, and
19 dietary supplements to promote, maintain, and restore health. Nothing in this section prohibits
20 any person who does not possess an acupuncturist’s license or another license as a healing arts
21 practitioner from performing, or prescribing the use of any modality listed in this subdivision.

22 “(c) For purposes of this section, a ‘magnet’ means a mineral or metal that produces a
23 magnetic field without the application of an electric current.

24 “(d) For purposes of this section, ‘plant, animal, and mineral products’ means naturally
25 occurring substances of plant, animal, or mineral origin, except that it does not include synthetic
26 compounds, controlled substances or dangerous drugs as defined in Sections 4021 and 4022, or a
27 controlled substance listed in Chapter 2 (commencing with Section 11053) of Division 10 of the
28 Health and Safety Code.

1 “(e) For purposes of this section, ‘dietary supplement’ has the same meaning as defined in
2 subsection (ff) of Section 321 of Title 21 of the United States Code, except that dietary
3 supplement does not include controlled substances or dangerous drugs as defined in Section 4021
4 or 4022, or a controlled substances listed in Chapter 2 (commencing with Section 11053) of
5 Division 10 of the Health and Safety Code. ”

6 7. Section 4955 of the Code states, in pertinent part:

7 “The board may deny, suspend, or revoke, or impose probationary conditions upon, the
8 license of any acupuncturist if he or she is guilty of unprofessional conduct.

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

10 “. . .

11 “(c) False or misleading advertising.

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

15 “. . .

16 “(i) Any action or conduct that would have warranted the denial of the
17 acupuncture license.

18 “. . .”

19 8. Section 4955.1 of the Code states, in pertinent part:

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

23 “. . .

24 “(e) Failing to maintain adequate and accurate records relating to the provision
25 of services to their patients.”

26 9. Section 4955.2 of the Code states:

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

1 “(a) Gross negligence.

2 “(b) Repeated negligent acts.

3 “(c) Incompetence.”

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

5 “An acupuncturist shall keep complete and accurate records on each patient who is given
6 acupuncture treatment, including but not limited to, treatments given and progress made as a
7 result of the acupuncture treatments.”

8 11. California Code of Regulations, title 16, section 1399.455, states, in pertinent part:

9 “. . .

10 “(b) It is improper advertising as provided in Section 4955 of the code to disseminate any
11 advertising which represents in any manner that the acupuncturist can cure any type of disease,
12 condition or symptom.

13 “(c) It is improper advertising as provided in Section 4955 of the code to disseminate any
14 advertising of a practice, technique or procedure which is not within the scope of the practice of
15 acupuncture as defined in Sections 4927 and 4937 of the code and which is the unlawful practice
16 of medicine.”

17 **COSTS**

18 12. Section 4959 of the Code states:

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

23 “(b) The costs to be assessed shall be fixed by the administrative law judge and shall not in
24 any event be increased by the board. When the board does not adopt a proposed decision and
25 remands the case to an administrative law judge, the administrative law judge shall not increase
26 the amount of any costs assessed in the proposed decision.

27 “(c) When the payment directed in the board's order for payment of costs is not made by
28 the licensee, the board may enforce the order for payment in the superior court in the county

1 where the administrative hearing was held. This right of enforcement shall be in addition to any
2 other rights the board may have as to any licensee directed to pay costs.

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

5 “(e) All costs recovered under this section shall be considered a reimbursement for costs
6 incurred and shall be deposited in the Acupuncture Fund.”

7 **Facts**

8 13. On or about August 24, 2012, the California Acupuncture Board (Board)
9 received a complaint from YS¹ regarding Respondent’s treatment of her mother, who lives in
10 China. The Board initiated an investigation of the events underlying this report through the
11 Department of Consumer Affairs, Division of Investigation (DOI). The DOI investigator
12 conducted interviews regarding the events and prepared a report for the Board.

13 14. YS told the DOI investigator she heard an advertisement for Respondent on a Chinese
14 radio station which stated Respondent guaranteed he could cure urinary incontinence, also known
15 as “weak bladder.”

16 15. YS called Respondent’s acupuncture office and told Respondent that her 77 year old
17 mother, SD, who lived in China, had suffered from “weak bladder” for many years. Respondent
18 assured YS that he could treat SD even though she lived in China and asked YS to see him at his
19 acupuncture office.

20 16. YS met with Respondent in his office where Respondent showed YS a TENS² unit
21 and explained that YS could purchase the TENS unit for SD to use to treat her urinary
22 incontinence per Respondent’s instructions.

23 17. Respondent assured YS that it was no problem to treat SD even though she lived in
24 China.

25 ¹ The names of the patients and/or witnesses are abbreviated to protect their privacy rights. The names will
26 be provided to Respondent upon written request for discovery.

27 ² A TENS unit is a small, portable, battery-powered device used to treat pain. The TENS unit uses mild,
28 safe electrical signals to help control pain. The TENS unit sends painless electrical signals through the electrodes to
the nerves under the skin.

1 18. In addition to telling YS to purchase the TENS unit Respondent also told YS she
2 should purchase medicine from Respondent for SD to take to treat her urinary incontinence.

3 19. During the conversation with YS Respondent did not ask if SD had any health issues
4 other than urinary incontinence nor did he ask any questions about SD's family's health history.

5 20. Respondent did not provide any information about what substance(s) were in the two
6 (2) bottles of capsules he sold to YS for SD to treat her urinary incontinence.

7 21. Respondent charged YS \$260 for the TENS unit and two (2) bottles of medication,
8 and provided YS with instructions for the TENS unit, but did not provide YS with a receipt for
9 the \$260 that she paid Respondent for those items.

10 22. YS mailed the TENS unit, the instructions, and two bottles of medication to China for
11 SD's use.

12 23. After SD used the TENS unit and medication for three months her urinary
13 incontinence had not improved. YS called Respondent and told him there had been no
14 improvement in her mother's physical condition.

15 24. Respondent told YS to tell SD to increase the duration and frequency of the TENS
16 unit usage.

17 25. YS gave SD Respondent's updated instructions. However, after following
18 Respondent's revised instructions for one month SD experienced no improvement in her urinary
19 incontinence, and returned the TENS unit to YS.

20 26. When YS called Respondent and told him there had been no improvement in SD's
21 physical condition he told YS to have SD increase the frequency and duration of the TENS unit
22 treatments. YS said SD did not want to continue using the TENS unit.

23 27. YS told Respondent she wanted her money returned for the TENS unit because of
24 Respondent's guarantee that the TENS unit would help people with "weak bladder." Respondent
25 denied making guarantees regarding the efficacy of TENS unit treatment for urinary incontinence.

26 28. On or about March 16, 2015, the DOI investigator interviewed Respondent at his
27 office and Respondent verified he has practiced acupuncture since 1980.

28 29. Respondent stated he previously shredded his records regarding SD, but remembered

1 her.

2 30. Respondent stated he did not perform a physical on SD.

3 31. Respondent stated he knew he was selling YS the TENS unit and herbal medicine for
4 SD's use.

5 32. Respondent stated he was aware that a licensed acupuncturist must first perform a
6 physical examination and determine a diagnosis prior to treating a patient.

7 33. Respondent stated he routinely determines patient treatment by reviewing medical
8 information the patient brings from a primary care physician, as well as the patient's health
9 questionnaire which the patient completes at Respondent's office, and then performing a physical
10 on the patient.

11 34. Respondent stated he prescribed the TENS unit and herbal medication for SD despite
12 his lack of physical examination because YS gave him SD's diagnosis.

13 35. Respondent stated he was wrong to prescribe the TENS unit and herbal medication to
14 SD when he had not met her.

15 36. Respondent said he used poor judgment when he prescribe the TENS unit and herbal
16 medication to SD when he had not met her.

17 37. The standard of care requires an acupuncturist to disseminate advertising which
18 represents the acupuncturist can treat, as opposed to cure, any type of disease, condition, or
19 symptom.

20 38. An acupuncturist's dissemination of advertising material which declares that the
21 acupuncturist can cure any type of disease, condition, or symptom is a departure from the
22 standard of care.

23 39. The standard of care requires an acupuncturist to inform the patient about the
24 contents, risks, adverse outcomes, and contradictions of any medication provided to or prescribed
25 for a patient.

26 40. An acupuncturist's failure to inform the patient about the contents, risks, adverse
27 outcomes, and contradictions of any medication provided to or prescribed for a patient is a
28 departure from the standard of care.

1 patient's condition by performing a standard physical examination and assessment of the patient;
2 and to evaluate the findings and determine a diagnosis based on all of this information before
3 prescribing treatment for the patient is an extreme departure from the standard of care.

4 50. Respondent's care and treatment of patient SD as set forth above includes the
5 following acts and/or omissions which constitute extreme departures from the standard of care:

- 6 A. Respondent failed to see patient SD in person.
- 7 B. Respondent failed to obtain information from SD regarding SD's health.
- 8 C. Respondent failed to obtain information from SD regarding SD's family health
9 history.
- 10 D. Respondent failed to obtain information from SD regarding SD's chief complaint.
- 11 E. Respondent failed to assess SD's condition by performing a standard physical
12 examination and assessment of SD.

13 F. Respondent failed to evaluate findings from a standard physical examination and
14 assessment of SD.

15 G. Respondent failed to determine a diagnosis for SD based on information obtained
16 from the performance of a standard physical examination and assessment of SD.

17 H. Respondent prematurely provided treatment for SD.

18 51. Respondent's acts and/or omissions as set forth in paragraph 50 above, whether
19 proven individually, jointly, or in any combination thereof, constitute gross negligence pursuant
20 to section 4955.2, subdivision (a), of the Code and therefore cause for discipline exists.

21 **SECOND CAUSE FOR DISCIPLINE**

22 (Repeated Acts of Negligence)

23 52. Respondent is subject to disciplinary action under section 4955.2, subdivision (b), of
24 the Code, in that he has committed repeated acts of negligence in the practice of acupuncture.

25 The circumstances are as follows:

26 53. Complainant refers to and by reference incorporates herein paragraphs 50 above.

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1 **THIRD CAUSE FOR DISCIPLINE**

2 (Failure to Maintain Adequate and Accurate Records)

3 54. Respondent is subject to disciplinary action under section 4955, as defined by section
4 4955.1, subdivision (e), in that he failed to maintain adequate and accurate records relating to the
5 services he provided to SD. The circumstances are as follows:

6 55. Complainant refers to and by reference incorporates herein paragraphs 3 through 46,
7 and 48 through 50, inclusive, above.

8 56. Respondent committed unprofessional conduct by failing to maintain adequate and
9 accurate records relating to the services he provided to SD as follows:

10 A. Respondent failed to prepare and maintain adequate and accurate records of
11 information obtained from SD regarding SD's health.

12 B. Respondent failed to prepare and maintain adequate and accurate records of
13 information obtained from SD regarding SD's family health history.

14 C. Respondent failed to prepare and maintain adequate and accurate records of
15 information obtained from SD regarding SD's chief complaint.

16 D. Respondent failed to prepare and maintain adequate and accurate records of
17 information obtained from his performance of a standard physical examination and assessment of
18 SD.

19 E. Respondent failed to prepare and maintain adequate and accurate records of
20 information obtained from an evaluation of findings from his performance of a standard physical
21 examination and assessment of SD.

22 F. Respondent failed to prepare and maintain adequate and accurate records of
23 information obtained from his determination of the diagnosis for SD based on information
24 obtained from his performance of a standard physical examination and assessment of SD.

25 G. Respondent failed to prepare and maintain adequate and accurate records of his
26 modification of treatment for SD.

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28 //

1 **FOURTH CAUSE FOR DISCIPLINE**

2 (Unprofessional Conduct)

3 57. Respondent is subject to disciplinary action under section 4955.1 subdivision (e) of
4 the Code, and California Code of Regulations, title 16, section 1399.453, in that he committed
5 unprofessional conduct in his care and treatment of SD. The circumstances are as follows:

6 58. The facts and circumstances in paragraphs 13 through 56, inclusive, above are
7 incorporated by reference as if set forth in full herein.

8 **PRAYER**

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

11 1. Revoking or suspending Acupuncturist License Number AC850, issued to Frank
12 Shyu, L.Ac.;

13 2. Ordering Frank Shyu, L.Ac. to pay the Acupuncture Board the reasonable costs of the
14 investigation and enforcement of this case, pursuant to Business and Professions Code section
15 4959;

16 3. If placed on probation, ordering him to pay to the Acupuncture Board the costs of
17 probation monitoring; and

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

19
20
21
22 DATED: NOV 09 2015



23 TERRI THORFINNISON
24 Executive Officer
25 Acupuncture Board
26 Department of Consumer Affairs
27 State of California
28 *Complainant*

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