CAUSE NO. D-1-GN-14-000355

TEXAS ASSOCIATION OF ACUPUNCTURE AND ORIENTAL MEDICINE, Plaintiff	§	**IN THE DISTRICT COURT OF**
v.	§	**TRAVIS COUNTY, TEXAS**
TEXAS BOARD OF CHIROPRACTIC EXAMINERS AND YVETTE YARBROUGH, EXECUTIVE DIRECTOR, IN HER OFFICIAL CAPACITY Defendants	§	**201ST JUDICIAL DISTRICT**

BOARD'S RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COME the Texas Board of Chiropractic Examiners and Yvette Yarbrough, Executive Director (collectively, the "Board"), and file their Response to Plaintiff Texas Association of Acupuncture and Oriental Medicine's ("TAAOM") Motion for Summary Judgment and ask that the Motion be denied.

SUMMARY OF ARGUMENT

The response to TAAOM's Motion for Summary Judgment requires a two-part analysis. First, the Court must determine whether chiropractors are exempt from the application of the Acupuncture Act. Tex. Occ. Code ch. 205. When section 205.003(a), the exemption for other licensed medical professional from the act, is read in conjunction with the definition of acupuncture, section 205.001(2), it is clear that the Acupuncture Act does not apply to chiropractors. TAAOM questions whether the addition of

"nonsurgical, nonincisive" to the Acupuncture Act's definition of acupuncture actually changed the law. Tex. Occ. Code § 205.001(2). TAAOM's interpretation of this act would render it meaningless, contrary to the rules of statutory construction. This act was intended to, and did in fact, create an exemption for chiropractors from the Acupuncture Act. This exemption allows chiropractors to perform all acupuncture procedures not prohibited as outside chiropractic scope of practice without being separately licensed by the Board of Acupuncture Examiners.

Second, the Court must determine whether the Chiropractic Act permits the practice of acupuncture by chiropractors. When all the actions of the Legislature on this subject are considered in proper context, it is clear that acupuncture is within the chiropractic scope of practice. The Board is required to determine scope of practice of chiropractic and has done so in the challenged rules. The meaning of "nonincisive" procedures in the Chiropractic Act is ambiguous, thus the Court should consider the legislative history of the act that added this language to the Acupuncture Act. It is clear from the statements of the sponsor of the bill and the bill analyses from the House and Senate that the intent of the change in the law was to exempt chiropractors from the requirements of the Acupuncture Act.

TAAOM's constitutional arguments also fail. The Texas Supreme Court has definitively stated that the practice of chiropractic does not constitute a "school of medicine" under Texas Constitution Art. XVI, § 31. *Schlichting v. Tex. St. Bd. of Med. Exam'rs*, 158 Tex. 279, 310 S.W.2d 557 (1958). Thus, the fact that chiropractic is not held to the same standard for licensing, training, and practice as licensed acupuncturists

(or allopathic physicians) under the Texas Medical Board does not create an invalid preference. Senate Bill 361 did not violate the requirement that each bill address a single subject in Texas Constitution Art. III, § 35 because creating an exemption from the Acupuncture Act is an essential part of the subject matter of the Sunset bill for the Texas State Board of Acupuncture Examiners. Accordingly, TAAOM's Motion for Summary Judgment should be denied.

ARGUMENT AND AUTHORITIES

I. ACUPUNCTURE IS PROPERLY WITHIN THE CHIROPRACTIC SCOPE OF PRACTICE AND THE BOARD'S RULES ARE VALID.

In its Motion for Summary Judgment, TAAOM seeks a declaration that several sections of the Board's Scope of Practice rule are invalid. TAAOM MSJ *passim*. In particular, TAAOM seeks to invalidate the parts of the rule allowing chiropractors to use needles other than to draw blood and the definition of "incision." 13 Tex. Admin. Code § 75.17(a)(3) & (b)(4). Section 75.17(a)(3) provides the following: "(3) Needles may be used in the practice of chiropractic under standards set forth by the Board but may not be used for procedures that are incisive or surgical." *Id*. Section 75.17(b)(4) provides as follows: "(4) Incision--a cut or a surgical wound; also, a division of the soft parts made with a knife or hot laser." TAAOM further seeks to invalidate the sections of the Board rules that specifically allow chiropractors to perform acupuncture, but the crux of its argument is that (1) acupuncture is an incisive procedure and (2) chiropractors are not allowed to perform incisive procedures. The Board will show that (1) acupuncture is not

an incisive procedure and (2) there is no statutory prohibition on the performance of acupuncture by chiropractors.

TAAOM further contends that nothing in the Acupuncture Act, Texas Occupations Code ch. 205, can be read to modify the Chiropractic Act, Texas Occupations Code ch. 201, to allow chiropractors to practice acupuncture. Such a reading is erroneous because it would distort the actual wording of the law and thwart the intent of the Legislature.

A. The Unambiguous Language of the Acupuncture Act Creates an Exemption for Chiropractors.

The Acupuncture Act exempts from its application other licensed health care professionals practicing within the scope of their licenses:

> Sec. 205.003. Exemption; Limitation. (a) This chapter does not apply to a health care professional licensed under another statute of this state and acting within the scope of the license.

Tex. Occ. Code § 205.003(a).

A valid function of the Acupuncture Act is to define who is exempt from its application as well as who is subject to it. Both of these professions are within the overall scope of the practice of medicine, as evidenced by their respective limitations that show intent not to allow the professions to engage in the unauthorized practice of medicine. Tex. Occ. Code §§ 151.052(3); 205.003(b)(2). Thus, each profession is limited to its individual scope of practice. This does not mean that there may be no overlap in the respective practices. By declaring in the definition of acupuncture that it is a "nonsurgical nonincisive" procedure, the Legislature has clarified the exemption of

other health care professions to ensure that chiropractors are exempt from the Acupuncture Act. Tex. Occ. Code § 205.001(2)(A).

A significant case to be considered on this issue is *Rogers v. Texas State Board of Architectural Examiners*. 390 S.W.3d 377 (Tex. App.—Austin 2011, no pet.). In that case, the Board of Architectural Examiners sought to discipline three engineers for what it considered to be the practice of architecture without a license. The architect's licensing act contains an exemption for engineers practicing within the scope of their license, much as the Acupuncture Act exempts chiropractors. Tex. Occ. Code § 1051.601(a). The court noted, "This case is further complicated because the Architecture and Engineering Practice Acts each cross-reference each other so that the interpretation of one statute necessarily involves interpretation of the other." *Rogers*, 390 S.W.3d at 384. Thus, it is not only proper, but necessary for the Court to construe these two acts together. The addition of "nonsurgical, nonincisive" to the definition of acupuncture serves the valid purpose of defining the exemption of chiropractic from the Acupuncture Act. Tex. Occ. Code § 205.001(2)(A).

TAAOM contends that the two statutes regulating acupuncture and chiropractic should be considered separately rather than construed together in harmony. TAAOM MSJ at 6-7. As *Rogers* instructs us, when there is cross-referencing in the creation of an exemption of one practice from the other, the proper approach is to construe the statutes consistently and in harmony. By defining acupuncture as a "nonincisive, nonsurgical" procedure, the Legislature has related the exemption for other health care professions

directly to the practice of chiropractic. Chiropractors are exempt from the Acupuncture Act so long as they are practicing within their scope of practice.

B. The Board Rules Properly Allow Chiropractors to Perform Acupuncture.

In addition to establishing that the Acupuncture Act provides an exemption for chiropractors, to prevail the Board must establish that the Chiropractic Act does not prohibit the practice of acupuncture, as TAAOM contends.

1. The Meaning of "Incisive" Is Ambiguous.

TAAOM relies on the language of Texas Occupations Code § 201.002(3) to limit the definition of "incisive." That statute provides as follows:

> (3) "Incisive or surgical procedure" includes making an incision into any tissue, cavity, or organ by any person or implement. The term does not include the use of a needle for the purpose of drawing blood for diagnostic testing.

The Occupations Code further defines surgical procedure as "a procedure described in the surgery section of the common procedure coding system as adopted by the Centers for Medicare and Medicaid Services of the United States Department of Health and Human Services." Tex. Occ. Code § 201.002(4). The statute, however, does not further define incisive procedure. According to TAAOM's interpretation, incisive procedure should be defined to include every invasive procedure except the use of needles to draw blood. TAAOM MSJ at 16-17. Yet, the mere exclusion of the use of needles for drawing blood does not define the meaning of the words "incisive" or "incision" in the law. As TAAOM notes, "The legislature is presumed to choose its words carefully and include or exclude particular words purposefully. *Tex. Lottery*

Comm'n v. First State Bank of DeQueen, 325 S.W.3d 628, 635 (Tex. 2010)." TAAOM MSJ at 17. In this case, the use of the word incisive was carefully chosen because it is not as restrictive as "invasive." *See* Letter from D.R. "Tom" Uher to Dan Morales, February 3, 1997, Appendix Tab 26. Representative Uher further explained that the example of use of needles to draw blood was intended to be illustrative and not limiting. *Id*., *but cf*. Tex. Att'y Gen. Op. No. DM-472 (discussing the legislative history of the choice of "incisive" over "invasive").

Justice Pemberton's discussion of the meaning of "incisive" illustrates the ambiguity associated with this term. *Tex. Bd. of Chiropractic Exam'rs v. Tex. Med. Ass'n*, 375 S.W.3d 464, 480-81 (Tex. App.—Austin 2012, pet. denied). He contrasts the ordinary meaning of the term, which would include piercing, with the technical meaning, which would include cutting but not piercing. *Id*. He concludes that the Board's rule, section 75.17(b)(4), uses the technical definition of "incisive." *Id*. This rule was not challenged in the former case, but nevertheless, the court was faced with application of the rule to determine whether needle EMG was a prohibited incisive procedure. The court considered the evidence presented in that case distinguishing the type of needles used in needle EMG with the much smaller needles used in acupuncture. *Id.* at 479. Ultimately, the court concluded that the definition of "incisive" was not broad enough to include the type of needles used in needle EMG, but left for another day the consideration of whether the use of an acupuncture needle was an incisive procedure. *Id*. That day is here.

2. Legislative History Should Be Considered in Interpreting This Law.

The legislative history of Senate Bill 361 demonstrates an intent to allow chiropractors to practice acupuncture. Whether or not the statutes at issue here are ambiguous, it is proper for the Court to consider legislative history to discover intent. The above case regarding the dispute between the engineers and Architecture Board is relevant on this point. *Rogers*, 390 S.W.3d 377. After concluding that the statutes at issue were not ambiguous, the *Rogers* court further notes, "Although we look principally to statutory text, the origins of that text are illuminating in this case." *Id.* at 385. Accordingly, it is not improper for the Court to consider the legislative history of the law at issue here, particularly when it is so clearly compelling of a single result: chiropractors may practice acupuncture. The legislative history of Senate Bill 361 is thoroughly discussed in the Board's Motion for Summary Judgment. It is not necessary to repeat these arguments here, other than to reiterate that every comment on the intent of the legislation was to allow chiropractors to practice acupuncture.

The Board would add a response to TAAOM's contention that no reference to the Acupuncture Act is to be allowed in construing the Chiropractic Act. In *Texas Association of Psychological Associates v. Texas State Board of Examiners of Psychologists*, the court considered the impact of a separate statute dealing with the same subject on the licensing statute for psychologists. 439 S.W.3d 597 (Tex. App.—Austin 2014, no pet.). The Texas State Board of Examiners of Psychologists (TSBEP) passed a rule requiring that licensees with a master's degree, a "psychological associate" must practice under the supervision of a licensed psychologist, a person required to have a

doctorate degree. *Id.* at 600. The Psychologists' Licensing Act had at one time contained specific language regarding the supervision of psychological associates. *Id.* at 601. Following repeal of this language, the organization of psychological associates sued to have the rule requiring supervision invalidated. *Id*., 439 S.W.3d at 602. The court considered the history of the act, but also considered another, seemingly unrelated statute on the same subject in upholding the validity of the TSBEP rule. The Texas Insurance Code contains a definition that defines "psychological associate" as an "individual licensed as a psychological associate by the [Board] who practices solely under the supervision of a licensed psychologist." *Id*., 439 S.W.3d at 606; Tex. Ins. Code § 1451.001(18). The court opined that this law was persuasive and referenced Texas Government Code § 311.023, thus considering this provision *in pari materia* with the Psychologists Licensing Act.

> *See* Tex. Gov't Code § 311.023 (in construing statute, court may consider laws on same or similar subjects); *Acker*, 790 S.W.2d at 301 (statute presumed to have been enacted by Legislature with complete knowledge of the existing law and with reference to it).

Id. at 606

TAAOM's assertion that the addition of "nonsurgical, nonincisive" to the Acupuncture Act, language found only in that act and the Chiropractic Act, was not intended to relate to the practice of chiropractic is simply not credible. The Legislature is properly presumed to have "complete knowledge of the existing law and with reference to it." This definition was intended to relate to the Chiropractic Act and in fact does.

D. The Issue Of Whether Chiropractors Are Adequately Trained To Perform Acupuncture Safely Is A Fact Issue Not Susceptible To Summary Judgment.

TAAOM spends a considerable amount of time in its Motion for Summary Judgment discussing the relative training received by licensed acupuncturists as opposed to chiropractors who meet the Board's requirements for the practice of acupuncture. Their contention is that "absent adequate training, the very lives and safety of the public are at stake," implying that the practice of acupuncture by chiropractors endangers the public. TAAOM MSJ at 2. TAAOM has not provided the Court with any evidence to support its assertions. The question of whether chiropractors receive adequate training to perform acupuncture in a safe and effective manner is a question of fact that is not susceptible to a decision on summary judgment. The Board offers the opinion of its designated expert witness, Dr. Kenneth Thomas, D.C., on this subject, disputing TAAOM's assertions and creating a fact issue that will preclude any consideration of the relative safety and efficacy of acupuncture performed by chiropractors in the determination of TAAOM's Motion for Summary Judgment. Affidavit of Kenneth Thomas, D.C., Exhibit 1.

E. The Behavior Of The Chiropractic Board In Defining The Scope Of Practice In Previous Cases Is Irrelevant To This Case.

TAAOM complains at length about alleged past transgressions of the Board in defining the scope of practice of chiropractic. *See* TAAOM MSJ at 10-14. TAAOM complains that the Board issued opinions concerning the scope of practice of chiropractic rather than a comprehensive rule defining that scope. TAAOM MSJ at 11. TAAOM ignores the fact that the issuance of such opinions was specifically sanctioned by the

Legislature: "The Board shall issue all opinions [on scope of practice] based on a vote of a majority of the Board at a regular or called meeting." Act of May 28, 1995, 74th Tex. Leg. R.S., ch. 965, § 20, 1995 Tex. Gen. Laws 4802. TAAOM alleges that the Board maintains the definition of "incisive" in contravention of the Court's decision in *Texas Board of Chiropractic Examiners v. Texas Medical Association.* TAAOM MSJ at 14. Yet, this rule was not challenged by the litigants in that case. Tex. Bd. 375 S.W.3d at 476. The Board could as easily point out that other elements of the medical establishment engaged in an organized conspiracy in violation of the Sherman Antitrust Act to eliminate the practice of chiropractic in the United States. *Wilk v. Amer, Med. Ass'n*, 895 F.2d 352 (7th Cir. 1990). Such protestations are irrelevant to the determination of the merits of this case. The Board can only conclude that TAAOM raises this issue in an effort to prejudice this Court against the Board and the chiropractic profession as a whole. The Court should disregard all such arguments.

II. TAAOM'S CONSTITUTIONAL ARGUMENTS ARE WITHOUT MERIT.

A. Chiropractic Is Not A School Of Medicine Within The Meaning Of Texas Constitution Article XVI, Section 31.

TAAOM claims that the Legislature has created an unconstitutional preference for chiropractic by allowing chiropractors to practice acupuncture "with significantly less education and training in acupuncture than licensed acupuncturists." TAAOM MSJ at 38. Incredibly, TAAOM then misstates the standards established by the Texas Supreme Court in *Schlichting* concerning what constitutes a "school of medicine," and relies on *Ex parte Halstead*, which held a previous version of legislation regulating chiropractic to be

unconstitutional, as support for its claim. *Schlichting*, 310 S.W.2d 557; *Ex parte Halsted*, 182 S.W.2d 479 (Tex. Crim. App. 1944).

While still a valid part of the Texas Constitution, Art. XVI, § 31 is, to some extent, a historical anomaly. When the provision was added to the Constitution of 1876, medicine was a very different field. The Legislature in 1901 passed a law creating separate boards for allopathic, homeopathic, and eclectic schools of medicine. Act of February 22, 1901, 27th Leg., R.S., ch. 12, 1901 Tex. Gen. Laws 12. This law was upheld as not violating Art. XVI, § 31. *Stone v. State*, 86 S.W. 1029 (Tex. Crim. App. 1905). The purpose of the provision was to prevent quackery and incompetence, and it was used over the years to limit practice by osteopaths, naturopaths, chiropractors, chiropodists (now podiatrists), and optometrists. The first interpretation of what was a "school of medicine" came in *Dowdell v. McBride*. 92 Tex. 239, 47 S.W. 524 (1898). The case considered whether a requirement that all members of the new Board of Medical Examiners must be graduates of a school approved by the American Medical Association ("AMA") was constitutional. The AMA only approved schools of allopathic medicine, and thus all members of the board were allopathic physicians. The court upheld the statute, holding that because the members of the board were allopathic physicians did not mean that they would not approve licensees who were trained in other schools of medicine. *Id*. The applicants were required, however, to meet the same qualifications and pass the same examination as allopathic physicians in order to practice medicine. *Johnson v. State*, 267 S.W. 1057, 1061 (Tex. Civ. App.—Dallas 1924, writ refused). This regulatory framework led to litigation holding that certain types of healing

arts were the practice of medicine and required to be licensed by the Board of Medical Examiners. *Ex parte Collins*, 121 S.W. 501 (Tex. Crim. App. 1909) aff'd sub nom., *Collins v. Tex.*, 223 U.S. 288 (1912) (osteopaths are practicing medicine); *Wilson v. St. Bd. of Naturopathic Examiners*, 298 S.W. 946 (Tex. Civ. App.—Austin 1957, writ ref'd n.r.e.) (statute establishing different licensing requirements for naturopaths was unconstitutional). The Legislature finally met success in allowing a health profession to be licensed separately from doctors of medicine with the passage of the Optometry Act. Act of August 27, 1921, 37th Leg., 1st C.S., ch. 51, 1921 Tex. Gen. Laws 159. The act was passed while the prosecution of one Fred R. Baker for practicing medicine without a license was pending. *Baker v. State*, 240 S.W. 924 (Tex. Crim. App. 1921). The court considered the effect of this act and determined that the legislature had successfully defined the practice of optometry as other than the practice of medicine. *Id.* at 930. The court determined that the Legislature could define the powers and duties of a profession as distinct from the practice of medicine. *Id*.

The attempts to bring chiropractic into Texas met with similar difficulties. The first litigation on the subject of chiropractic was a criminal prosecution for practicing medicine without a license. *Teem v. State*, 183 S.W.1144 (Tex. Crim. App. 1916). The court examined testimony concerning the nature of chiropractic and determined that it was the practice of medicine and required licensure to be practiced in Texas. In 1943, the Legislature passed an act authorizing and licensing the practice of chiropractic in Texas. Act of May 5, 1943, 48th Leg., R.S., ch. 359, 1943 Tex. Gen. Laws 627. It attempted to establish a distinction for chiropractic to allow it to have its own licensing board and

requirements for licensure. *Id*. This was quickly ruled unconstitutional as violative of Article XVI, § 31. *Ex parte Halsted*, 182 S.W.2d 479 (Tex. Crim. App. 1944). The current Chiropractic Act was passed in 1949, and has survived without challenge under this section of the Texas Constitution, until now. Act of April 21, 1949, 51st Leg., R.S., ch. 94, 1949 Tex. Gen. Laws 160.

A degree of order in the interpretation of this constitutional provision was finally established with the case of *Schlichting v. Tex. St. Bd. of Med. Exam'rs*. In an action seeking to enjoin a naturopath from practicing medicine without a license, the court draws a distinction between naturopathy, which was defined as diagnosing and treating "human ills of all kinds," and healing arts treating limited portions of the human anatomy, such as dentistry, chiropody, and chiropractic. *Id*., 158 Tex. at 289, 310 S.W.2d at 564. The continuing viability of *Schlichting's* interpretation of this constitutional provision was recognized in *Texas Board of Chiropractic Examiners v. Texas Medical Association*. 375 S.W.3d at 466. Plaintiff erroneously asserts that chiropractic and acupuncture are "schools of medicine" within the meaning of Art. XVI, § 31. Thus, in the very authority TAAOM cites, the court held that the practice of chiropractic is not a school of medicine under Art. XVI, § 31, precisely because their practitioners are limited to a specific part of the body. If chiropractic does not constitute a school of medicine, as the Texas Supreme Court held, the distinction in requirements for training in acupuncture cannot constitute a preference to one school of medicine. TAAOM's argument under Texas Constitution Art. XVI, § 31 fails.

B. Senate Bill 361 Was Not Invalid As Violating the One-Subject Rule in Texas Constitution Article III, Section 35(a).

This issue was thoroughly discussed in the Board's Motion for Summary Judgment, and in interest of brevity, the Board will incorporate that argument by reference rather than repetition. *See* Board's Motion for Summary Judgment at 19. There are some additional points the Board will make in response to TAAOM's argument on this issue. The threshold for determining that a bill does not violate the one-subject rule is quite low. *See, e.g., Ex parte Jimenez*, 159 Tex. 183, 188, 317 S.W.2d 189, 194 (1958) (bill will be upheld on single-subject rule "if [a provision] has any logical relationship to the general subject"). The Board agrees that amendments to the Chiropractic Act which would have specifically authorized chiropractors to practice acupuncture were stricken from S.B. 361 on points of order. Yet, what was added to the Acupuncture Act was not an amendment that changed the scope of practice of chiropractic, it was a provision that defined the exemption for chiropractors from the requirements to be licensed under that Act in order to practice acupuncture. That exemption existed, and continues to be in force, as Texas Occupations Code § 205.003(a). This amendment to the Acupuncture Act does not violate Texas Constitution Art. III, § 35(a).

III. NO INJUNCTION SHOULD BE GRANTED AGAINST THE BOARD.

TAAOM has alleged that the elements required to grant an injunction have been met. Those elements are (1) the existence of a wrongful act, (2) the existence of imminent harm, (3) the existence of irreparable injury, and (4) the absence of an adequate

remedy at law. In fact, none of the elements have been met, because, while the elements are alleged, TAAOM has offered no proof of any of the elements. Proof of the elements of an injunction may not be made by affidavit, but actual proof must be presented to the Court. *Millwrights Local Union No. 2484 v. Rust Eng'g Co.*, 433 S.W.2d 683, 686 (Tex. 1968). TAAOM has made no offer of proof, and indeed, even if it had offered affidavits, they would be inadequate to meet the standard in *Millwrights*. In addition, the Board has offered a controverting affidavit concerning the issue of whether the practice of acupuncture by chiropractors constitutes a danger to the public. *See* Exhibit 1. Because fact issues are involved, summary judgment on this issue is precluded.

Further, no injunction may be granted unless the plaintiff's petition is verified by affidavit. Tex. R. Civ. P. 682. TAAOM's Second Amended Petition in this action is not a sworn petition verified by affidavit. Accordingly, the Court may not grant an injunction in this matter.

IV. TAAOM IS NOT ENTITLED TO ATTORNEYS' FEES.

Attorneys' fees are allowable in Texas only when a statute or contract allows such a claim. *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 313 (Tex. 2006). There is no provision in Tex. Gov't Code ch. 2001 which allows attorney's fees, and the claim for attorneys' fees with respect to TAAOM's claims under Texas Government Code § 2001.038 is without merit.

TAAOM alleges that some portion of its claim is brought under the Uniform Declaratory Judgments Act ("UDJA"). Tex. Civ. Prac. & Rem. Code § 37.001, *et seq*. *See* TAAOM MSJ at 43. While that statute allows for attorneys fee, a claim for

attorneys' fees under the UDJA is not allowed when that statute duplicates the remedy available through § 2001.038. *Texas Mun. Power Agency v. Public Util. Comm'n*, 253 S.W.3d 184, 200 (Tex. 2007); *Howell v. Tex. Workers' Comp. Comm'n*, 143 S.W.3d 416, Tex. App.—Austin 2004, pet. denied). TAAOM is challenging a rule of the Board, and the UDJA remedy would be duplicative. Thus, the UDJA does not provide a basis for an award of attorneys' fees.

To the extent that the Court considers TAAOM's claims under the Texas Constitution as a UDJA claim, they are without merit, and judgment should be granted to the Board pursuant to its Motion for Summary Judgment. Accordingly, equity and justice would not allow for an award of attorneys' fees to TAAOM.

PRAYER

WHEREFORE, for these reasons, the Board and Ms. Yarbrough respectfully request that the court enter judgment that Plaintiff takes nothing; assess costs and attorneys' fees against Plaintiff; and award the Board and Ms. Yarbrough all other and further relief to which they may be justly entitled.

Respectfully submitted,

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Attorney General of Texas

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Defendant's Response to Plaintiff's Motion for Summary Judgment was sent as described below on this the 21st day of November, 2014, to the following:

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Attorney for Plaintiff Texas Association of Acupuncture and Oriental Medicine

Via electronic service and email

Copies to the following:
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/s/Joe H. Thrash
JOE H. THRASH

CAUSE NO. D-1-GN-14-000355

TEXAS ASSOCIATION OF ACUPUNCTURE AND ORIENTAL MEDICINE, *Plaintiff,*	§	**IN THE DISTRICT COURT OF**
v.	§	**TRAVIS COUNTY, TEXAS**
TEXAS BOARD OF CHIROPRACTIC EXAMINERS and YVETTE YARBROUGH, EXECUTIVE DIRECTOR, IN HER OFFICIAL CAPACITY *Defendants.*	§	**201ST JUDICIAL DISTRICT**

AFFIDAVIT

STATE OF TEXAS §
§
COUNTY OF TRAVIS §

Before me, the under signed notary public on this day personally appeared Kenneth Thomas, known to me to be the person whose name is subscribed to this affidavit and acknowledged to me that (s)he executed the same for the purposes and consideration therein expressed and being by me duly sworn on his/her oath states:

1. I am a licensed chiropractor in the State of Texas, and am currently in good standing with the Board.

2. I am currently the Vice President for External Affairs at Parker University College of Chiropractic and have taught courses at Parker University for a period of twenty eight years.

3. I have met the current requirements of the Texas Board of Chiropractic Examiners ("Board") to perform acupuncture as a part of my chiropractic practice.

4. The practice of acupuncture by duly authorized chiropractors in the State of Texas is safe and effective when performed in accordance with the requirements of the Board and the required training each chiropractor licensed in Texas receives.

5. The practice of acupuncture by duly authorized chiropractors in the State of Texas does not create a public safety or health issue.

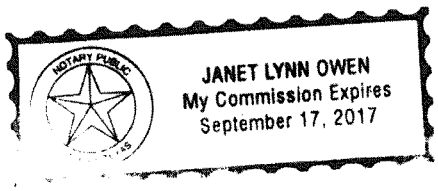
6. that he is over 21 years of age and fully competent to make this statement;

7. that he is duly authorized to make this affidavit; and

8. that the matters contained in this affidavit are based on personal knowledge and are true and correct.

Kenneth Thoms, AFFIANT

SUBSCRIBED AND SWORN to before me on this the 14th day of November, 2014.



Janet L Owen
Notary Public in and for the
State of Texas