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7

8 **BEFORE THE ARIZONA STATE**
BOARD OF MASSAGE THERAPY
9

10 In the Matter of

11 **CALEB CHERRY, LMT**

12 Holder of License No. MT-18207
As a Massage Therapist
13 In the State of Arizona

Board Case No. 19-147

**MOTION TO DEEM ALLEGATIONS
ADMITTED**

14 The State of Arizona hereby requests that the Arizona State Board of Massage
15 Therapy vacate the hearing scheduled for April 26, 2019, and deem the allegations
16 contained in the Board's Complaint and Notice of Hearing admitted pursuant to A.R.S. §
17 32-4254(H). A copy of the Complaint and Notice of Hearing is attached as **Exhibit A**.

18 On March 25, 2019, the Board issued an Order of Summary Suspension in this
19 case. Respondent's license remains suspended.

20 The Complaint notified Respondent that A.R.S. § 32-4254(H) required
21 Respondent to prepare and file with the Board a written Answer to the allegations in the
22 Complaint within thirty days after service. It further notified Respondent that the Board
23 could consider Respondent's failure to timely respond within thirty days an admission by
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25
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1 default to the allegations stated in the Complaint, and that the Board could then take
2 disciplinary action without conducting a hearing.

3 The Board mailed the Complaint and Notice of Hearing by first-class and certified
4 mail on March 25, 2019, to Respondent's address of record with the Board. Notice of a
5 complaint and hearing is effective when it has been sent by certified mail to the licensee's
6 last known address if record. A.R.S. § 32-4254(N). Respondent's answer was therefore
7 due on or before April 24, 2019. As of April 26, 2019, Respondent has not filed an
8 answer to the Complaint.
9

10 On April 5, 2019, Respondent—through counsel—acknowledged receipt of the
11 Board's complaint, but he did not submit an Answer or otherwise deny or admit the
12 allegations in the Board's Complaint and Notice of Hearing. *See Exhibit B.* Respondent
13 stated that he did not plan to attend the hearing and had no intention of requesting a
14 hearing in the future. *Id.* He also stated that he had no intention of using his massage
15 therapy license in the future. The State does not consider this to be an Answer under
16 A.R.S. § 32-4254(H). Instead, the State considers this an express waiver of hearing.

17 Because Respondent has failed to file an Answer within the time permitted by
18 statute and has expressly waived his right to a hearing, the State requests that the Board
19 vacate the scheduled hearing and that the allegations contained in the Complaint and
20 Notice of Hearing be deemed admitted pursuant to A.R.S. § 32-4254(H).
21

22 RESPECTFULLY SUBMITTED this 26th day of April, 2019.

23 MARK BRNOVICH
24 Attorney General

25 /s/ Michael Raine
26 Assistant Attorney General

1 Original of the foregoing filed via e-mail
2 this 26th day of April, 2019, with:

3 Arizona Board of Massage Therapy
4 thomas.ugherton@massageboard.az.gov

5 Copy of the foregoing mailed and e-mailed
6 this 26th day of April, 2019, to:

7 Daniel Kaffana
8 c/o Brenda Sanchez
9 Lerner & Rowe Law Group
10 2701 E. Camelback Rd. Suite 185
11 Phoenix, AZ 85016
12 bsanchez@larlg.com

13 Elizabeth Campbell
14 Assistant Attorney General
15 Independent Advice Counsel
16 Elizabeth.Campbell@azag.gov

17 By: Jami White
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EXHIBIT A

BEFORE THE ARIZONA BOARD OF MASSAGE THERAPY

In the Matter of

CALEB CHERRY, LMT

Holder of License No. MT-18207
As a Massage Therapist
In the State of Arizona

Board Case No. 19-147

COMPLAINT AND NOTICE OF HEARING

(Summary Suspension)

I. NOTICE OF PUBLIC HEARING.

YOU ARE HEREBY NOTIFIED, the Arizona Board of Massage Therapy ("Board") will conduct an administrative hearing at the following place and time, to determine whether grounds exist to discipline Massage Therapist License No. MT-18207 held by Caleb Cherry ("Respondent"):

**Arizona Board of Massage Therapy
1740 W. Adams St.
Phoenix, Arizona 85007
On April 29, 2019, at 9:30 a.m.**

and continuing on successive days or Board meeting dates until concluding, concerning the matters set forth in this Complaint and Notice of Hearing, at which time and place, evidence, testimony and argument in support of the charges set forth in the Complaint will be presented. If you desire to make a defense to the charges at the hearing, you may appear at the hearing in person and may be represented by legal counsel and may at that time cross-examine the witnesses against you and present testimony of witnesses, evidence and argument in your own behalf.

Whether or not you intend to appear at the hearing, pursuant to A.R.S. § 32-4254(H), YOU ARE REQUIRED to prepare and file a written Answer to the

1 **allegations alleged in the above Complaint with the Board within 30 days after**
2 **service of this Complaint and Notice of Hearing.** Your Answer must be in writing and
3 filed with the Board within thirty (30) days after service of the Complaint. *Id.* **THE**
4 **BOARD MAY CONSIDER YOUR FAILURE TO RESPOND WITHIN THIS TIME**
5 **AS YOUR ADMISSION BY DEFAULT TO THE ALLEGATIONS STATED IN**
6 **THE COMPLAINT.** *Id.* The Board may then take disciplinary action without
7 conducting a hearing. If you Answer and fail to appear for the hearing, the Board may
8 proceed in your absence. If you desire to waive a hearing and not contest the facts herein
9 alleged, you may file an Answer consisting of a declaration that the material allegations
10 of the Complaint are admitted.

11 After the hearing, if the Board determines that you have committed unprofessional
12 conduct, or otherwise violated the Board's statutes and rules, the Board may revoke or
13 suspend your license, impose a civil penalty of up to \$10,000 for each violation, issue a
14 decree of censure, impose probation, order the payment of restitution, and/or take other
15 disciplinary action. A.R.S. § 32-4254. If the Board determines that you have violated the
16 Board's statutes or rules, it may also charge you the costs of the formal hearing. A.R.S. §
17 32-4254(K).

18 In accordance with Title II of the Americans with Disabilities Act (ADA), the
19 Board does not discriminate on the basis of disability in admission to and participation in
20 hearings. Should you, or anyone you call as a witness need special accommodations,
21 please contact the Board office at (602) 542-8225 at least three working days before the
22 hearing.

23 If you require the services of an interpreter, you are responsible for paying the cost
24 of that interpreter. The interpreter must be certified to perform interpretation services in
25 legal proceedings in Arizona.

1 Pursuant to A.R.S. § 32-3206, you have the right to request a copy of the
2 following information from the Board:

- 3 1. Any review conducted by an expert or consultant providing
4 an evaluation of or opinion on the allegations.
- 5 2. Any records on the patient obtained by the board from other
6 health care providers.
- 7 3. The results of any evaluations or tests of the health
8 professional conducted at the board's direction.
- 9 4. Any other factual information that the board will use in
10 making its determination.

11 Pursuant to A.R.S. § 41-1092.06, Respondent has the right to request an informal
12 settlement conference by filing a written request with the Board, no later than twenty (20)
13 days before the scheduled hearing. The conference will be held within fifteen (15) days
14 after receipt of your written request. A.R.S. § 41-1092.06(A). Respondent waives any
15 right to object to the participation of the Board's representative in the final administrative
16 decision of the matter if it is not settled at the conference.

17 Please be advised that if you obtain the above-referenced information from the
18 Board, you may not release it to any other person or entity or use it in any proceeding or
19 action except the administrative proceeding or appeals related to the administrative
20 proceeding. Violation of this restriction constitutes an act of unprofessional conduct per
21 A.R.S. § 32-3206(B). Also, please be advised that pursuant to A.R.S. § 32-3206(C), you
22 or your attorney may be charged for the cost of providing the information received up to
23 the fee for making a copy of each page as prescribed by A.R.S. § 12-284(A).

24 **PARTIES AND JURISDICTION**

25 1. The Board is the duly constituted authority for licensing and regulating the
26 practice of massage therapy in the State of Arizona.

2. Respondent is the holder of license number MT-18207, which allows
Respondent to practice as a massage therapist in the State of Arizona.

3. On March 25, 2019, the Board summarily suspended Respondent's license pending a formal hearing pursuant to A.R.S. § 32-4254(E).

4. Under A.R.S. § 32-4201, *et seq.*, the Board possess jurisdiction over the subject matter and over Respondent as a licensee of the Board.

FACTUAL ALLEGATIONS

1. Board staff initiated case 19-147 after it received notification from Massage Envy in Scottsdale, AZ, regarding complaints that it had received from three clients: CB, JM, and NW.

2. The Board also received a complaint from CB on or about March 13, 2019 and a complaint from NW on February 26, 2019. CB also made a police report to the Scottsdale Police Department (19-03675).

3. During a massage at Massage Envy, Respondent touched CB's bare genitals with his bare hand and exposed CB's bare breasts. Scottsdale PD's report indicates that Respondent admitted that he had touched CB's genitals, although he stated that it was accidental.

4. During a massage at Massage Envy, Respondent exposed JM's bare buttocks and massaged JM's upper thigh in a manner that made her uncomfortable because she perceived that Respondent had sexual intentions.

5. During a massage at Massage Envy, Respondent repeatedly pressed his clothed penis against NW.

6. During initial investigation, it was determined that Respondent has three outstanding arrest warrants for unrelated issues.

ALLEGED VIOLATIONS

1. The conduct and circumstances described above constitute grounds for discipline pursuant to A.R.S. § 32-4253(A)(6) (engaging in any act or practice in

1 violation of this chapter or any board rule), as it relates to any alleged statute or rule
2 violation asserted below.

3 2. The conduct and circumstances described in above constitute grounds for
4 discipline pursuant to A.R.S. § 32-4253(A)(10) (engaging in conduct that could harm the
5 public).

6 3. The conduct and circumstances described above constitute grounds for
7 discipline pursuant to A.R.S. § 32-4253(A)(14) (engaging in substandard care due to
8 deliberate or negligent conduct, whether or not it results in actual injury to a client).

9 4. The conduct and circumstances described above constitute grounds for
10 discipline pursuant to A.R.S. § 32-4253(A)(16) ("Failing to adhere to the recognized
11 standards and ethics of the massage therapy profession.") as it relates to the ethical
12 standards set forth in A.A.C. R4-15-103(c) ("Provide massage therapy only when the
13 licensee believes that it will be advantageous to the client) and (e) ("Provide draping that
14 ensures the safety, comfort, and privacy of the client").

15
16 DATED this 25th day of March, 2019.

17
18 ARIZONA BOARD OF MASSAGE
THERAPY

19
20 By: 
Thomas Augherton
Executive Director

21
22 ORIGINAL OF THE FORGOING FILED
23 this 25th day of March, 2019, with:

24 Arizona Board of Massage Therapy
25 1740 W. Adams St., Suite 3401
26 Phoenix, Arizona 85004

1 COPY OF THE FOREGOING MAILED
2 BY CERTIFIED & REGULAR FIRST-CLASS MAIL
3 this 25th day of March, 2019, to:

4 Caleb Cherry
5 1221 E Monroe Street
6 Phoenix, Arizona 85034
7 c.cherry235@gmail.com
8 Respondent

9 COPY OF THE FOREGOING E-MAILED
10 this 25th day of March, 2019, to:

11 Michael D. Raine
12 Assistant Attorney General
13 Michael.Raine@azag.gov
14 Attorney for the State

15 By:
16 #7757519

Robert Beucler, Esq.*
Andrew Nemeth, Esq.*
Daniel J. Kaffana, Esq.
Scott H. Zeitler, Esq.
Sean R. Forrester, Esq.♦

EXHIBIT B
LERNER & ROWE
LAW GROUP
CRIMINAL • BANKRUPTCY

Larry Magid, Esq.
Alan R. Hock, Esq. •
Richard Zielinski, Esq.

Managing Bankruptcy Attorney*
Board Certified Bankruptcy Specialist*
Managing Criminal Attorney♦
Board Certified Criminal Law Specialist•

DANIEL KAFFANA, Attorney

April 5, 2019

Thomas Augherston, Executive Director
Arizona Board of Massage Therapy
1740 W. Adams St.
Phoenix, Arizona 85007

RECEIVED
APR 08 2019
AZ MASSAGE BOARD

RE: Matter of Caleb Cherry, LMT, Holder of License No. MT-18207, Board Case No. 19-147

To Whom It May Concern,

Mr. Cherry is in receipt of the Notice of Public Hearing and has asked for me to respond on his behalf, as this law firm is representing him in the criminal matter arising out of the same date of allegation, March 13, 2019. As the Board should be aware, the matter is set in Maricopa County Superior Court, case number CR2019-107820-001. The matter is set for an Initial Pretrial Conference on April 18, 2019, and a Comprehensive Pretrial Conference on May 20, 2019. The State of Arizona is still disclosing evidence to counsel undersigned.

Mr. Cherry will not be appearing for a hearing before the Arizona Board of Massage Therapy on April 29, 2019, as the criminal matter prevents him from being able to discuss anything regarding this matter on the record.

Mr. Cherry is no longer employed by Massage Envy, he is not employed as a massage therapist in any capacity, and he has no intentions of renewing or using his license again. At this time, however, Mr. Cherry cannot and will not be able to "surrender" his license to the Board under any of the prescribed bases set forth in A.R.S. § 32-4254.

Accordingly, Mr. Cherry is asking that the matter either (i) be vacated and reset to another date (past May 20, 2019) or (ii) to hold the matter in abeyance until the criminal case is resolved. Regardless of the outcome of the criminal matter, Mr. Cherry has no intentions of

using his License (MT-18207) ever again or asking the Board to hold a hearing on this matter.
This is something that can be easily resolved following the conclusion of the criminal matter.

Please advice as to the Board's position on this matter and please feel free to contact me
directly to discuss this matter further.

Best Regards,



Daniel Kaffana