CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

State of New Jersey
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF LAW
PO Box 45029
NEWARK, NJ 07101

PAULA T. DOW
Attorney General

ROBERT M. HANNA
Director

October 8, 2010

New Jersey State Board of Medical Examiners
140 East Front Street - 2nd Floor
P.O. Box 187
Trenton, New Jersey 08625

Re: IMO Steven Chase Brigham, M.D.

Dear Honorable Members of the Board:

Please accept this letter brief in lieu of a more formal response to Respondent's pending Motion to Dismiss the Verified Complaint. Given that both parties rely on the extensive documents already provided to the Board, the Attorney General requests that this matter be considered at the oral arguments scheduled for October 13, 2010.

Preliminary Statement

In his Motion to Dismiss, Respondent seeks the dismissal of the Attorney General's Amended Verified Complaint premised upon his assertion that the 1996 Order of the Board and the November 8, 1999 Letter of the Board stand for the proposition that the insertion of laminaria is not controlled by the Board's regulation on the termination of pregnancy. N.J.A.C. 13:35-4.2. Therefore, he argues, having been once decided in his favor, this issue can not be revisited. In order to pursue this argument, Respondent must ignore many of the salient facts alleged by the Attorney General and must ignore the careful analysis of the ALJ and the Board in the 1996 case. Whether or not the earlier case stands for the proposition that the insertion of laminaria is not the termination of pregnancy, may properly be considered and decided by this Board. However, the Board must then move on to consider and apply its regulation to Respondent's conduct in this case and must also consider and apply its medical judgment to review the medical care Respondent provided his patients.

Whether or not the insertion of laminaria and/or the administration of digoxin or misoprostol falls within or without the regulation is clearly important. If the Board agrees with the Attorney General's assertion that those aspects of Respondent's care of his patient fall within the regulation, then the Board must proceed to consider whether Respondent violated the terms of the regulation as written. If, however, the Board determines that that medical care falls without the regulation, it then must consider whether or not Respondent's medical care deviated from accepted standards of good medical practice. In neither event should the Attorney General's application be dismissed.

The 1996 Order (Gross cert, Exh 2) applied to the patient care explored on the record before the Administrative Law Judge. It did not, and could not, establish a standard of care for decades to come. Like the Board's letter of November 1999, the 1996 Order expressed the Board's position in light of the known facts. The facts underlying the Order were elucidated in the Office of Administrative Law in the course of a lengthy hearing. The facts underlying the Board's letter of 1999 are elucidated in the letter of inquiries submitted by attorney Stewart Phillips. (Gross cert, Exh 10). Mr. Phillips assured the Board that his client contemplated the in-office insertion of laminaria in preparation for a hospital based abortion the following day. His letter expressed his client's awareness and consent to abide by the Board's requirement that second trimester abortions be performed in a hospital or LACF. Mr. Phillips represented that his client had no intention to perform any elective second trimester abortions, "except in a hospital or a licensed/approved facility." (Gross cert, Exh 10, page 2). Further, Mr. Phillips clearly described the insertion of laminaria <u>absent</u> the killing (in his words) of the fetus, unlike the facts before the Board.

The Attorney General strenuously argues that facts known to the Board in 1996 and 1999 are not the facts in 2010. For that reason, this Board is not collaterally estopped from exercising its jurisdictional authority over these facts in consideration of the pending application for immediate temporary suspension of Respondent's license to practice medicine.

1. <u>The 1996 Order of the Board does not accord Respondent free rein to engage in the violative acts alleged by the Attorney General.</u>

The Board's 1996 order brought to a close a long multi-complaint prosecution of Respondent. (Gross cert, Exh 3).

Ultimately, the Board adopted the ALJ's recommendation that Respondent had not been negligent in his care of certain patients. Respondent was merely cited for advertising violations. Respondent now points to patients J.K. and B.A. in that earlier case and claims that his exoneration in their care requires his exoneration here and, even before consideration of the allegations, the dismissal of this matter.

The B.A. matter is wholly irrelevant, since the misconduct at issue was the alleged alteration of her medical record. (Gross cert, Exh 3, page 64). In assessing the care provided J.K., however, the court reviewed a case specific clinical scenario far different from the treatment accorded the five patients in the case at bar. The 1996 finding did not address a treatment plan or treatment paradigm but solely the treatment of the patients at issue. Certainly, it does not address the scheme at work here, where Respondent has undertaken abortions that he cannot legally perform in his New Jersey office, and then covered his actions by completing them in Maryland.

Next, Respondent points to this Board's correspondence of November 8, 1999, where the Board advises that "there would be no problem with regard to the insertion of laminaria prefatory to a termination of pregnancy, whether in an office setting or in a licensed ambulatory care facility." (Gross cert, Exh 11). Again, Respondent argues that this letter mandates dismissal. But nothing in the Board's letter addresses the conduct here, where the laminaria are inserted in an office setting in combination with the administration of digoxin or misoprostol and prefatory to a termination in an unapproved setting, not a hospital, not a LACF. A termination performed by a licensee who cannot qualify for New Jersey Board approval to perform the abortion. It is the logical and unspoken assumption of the Board that its letter of advice would be brought to bear in the rendering of medical care that otherwise adheres to the regulations in New Jersey.

Respondent's attempt to claim that he has been exonerated of any blame for his negligent and dangerous pattern of conduct is disingenuous at best. It is ludicrous to believe that in its past careful assessment of the recommendations of the ALJ or consideration and approval of in-office insertion of laminaria,

this Board intended to abandon oversight of the medical care provided to New Jersey citizens and its obligation to regulate the safe practice of medicine. Those earlier actions did not relieve Respondent of the burden of exercising good medical judgment or the obligation to play by the rules. Carried to its logical conclusion Respondent favors a "one strike" rule. Once cleared of an allegation that he violated a regulation, he can never again be prosecuted for future violations of that same regulation.

The patients at issue in the 2010 complaint are not the same patients at issue in 1996. If anything, those earlier actions drew a line in the sand, they demonstrated what conduct would be countenanced under the law. Respondent has stepped over, far over, the Board's line and his conduct poses a clear and imminent danger to the public.

2. <u>There is no support for Respondent's claim of harassment and bad faith.</u>

Contrary to Respondent's statement at the outset of his Brief, this matter has <u>no</u> connection to any earlier investigations of Respondent's medical practice. The issues in the earlier prosecution, which resulted in the Board's 1996 order were wholly different and patient specific. The sole similarity is that the patients in both cases sought safe and legal medical care from respondent and were initially treated with laminaria. Aside from that, the care of each patient is specific to that patient.

The genesis of the instant matter is Respondent's dangerous and irresponsible treatment of his patients which came to light when the Board was notified that patient D.B. suffered serious complications necessitating emergency surgery. D.B. came under Respondent's care in New Jersey, where, as alleged in the Verified Complaint, respondent inserted laminaria on August 12, 2010 and administered cytotec on August 13, 2010. D.B. traveled with two other patients and Respondent in a caravan of cars, to an unknown destination, which turned out to be Respondent's Elkton, Maryland office. Her abortion was completed by Dr. Nicola Riley, in Respondent's presence. When complications were encountered, the chart reflects D.B. was "sent to OR via POV [privately owned vehicle]". It was Respondent who drove the POV that delivered

D.B. to the local hospital. Her medical treatment, and Respondent's treatment of the other patients in the Verified Complaint, are emblematic of Respondent's attempts to craft a scheme whereby he provides sub-standard medical care to New Jersey women while attempting to skirt the requirements of New Jersey law and to hide behind dupes that are employed as independent contractors in his practice.

The Tissue Log and the Recovery Room Log from the Elkton, Maryland office were provided to the Attorney General by the Maryland Board of Physicians. Review of those logs raised additional questions about the care provided to Respondent's New Jersey patients. Investigation quickly revealed that neither Dr. Shepard nor Dr. Walker had performed any abortions in the Elkton, Maryland office, despite their names (or poorly spelled versions thereof) appearing on the logs (some of which pre-dated Dr. Riley's licensure and employment in Maryland). This gave rise to the spectre that procedures reflected on the face of the logs may have been begun by Respondent in New Jersey and completed by him in his office in Maryland, where he is admittedly unlicensed.

Subpoenas issued for the records of patients reflected in the Maryland tissue log for the date of D.B.'s procedure revealed two additional New Jersey women, N.C. and S.D., who were Respondent's patients and who were treated in the same manner as D.B. Investigative interviews with D.B. and her mother C.B. yielded information that correlated with the assumption that N.C. and S.D. were also in the caravan from Voorhees to Maryland.

One of the few other patients who could be fully identified from the Maryland records was M.L. and her records were obtained by both subpoena and search warrant. M.L. was also treated by Respondent in New Jersey and her abortion was completed in Maryland, on a day when, according to her sworn testimony, Dr. Riley was not present in the clinic.

J.P.'s patient records had been obtained by the administrative office of the Board in its compilation of documents pertaining to a complaint received from the police. Since J.P.'s records show another of Respondent's patients who, if not for an untimely complication, was also scheduled to be transported to Maryland,

she was included in the complaint under the Entire Controversy Doctrine.

Clearly, no aspect of this investigation pre-dates 2010, and this investigation was conducted in good faith, in response to reports from the Maryland Board of Physicians, the Elkton, Maryland police and a New Jersey police department. The allegations are supported by solid competent proofs and the resulting danger to the public is apparent on the face of the documents as confirmed by the expert report of Dr. Gary Brickner.

3. The doctrine of Collateral Estoppel does not apply where, as here, there is no unity of facts.

The true issues in this case are whether in each instance of patient care Respondent rendered medical care that conforms to the regulatory requirements of New Jersey and whether he provided negligent or grossly negligent medical care. Clearly any such assessment requires the application of the regulation, and the standard of care, to the facts of each patient's care. Collateral Estoppel does not control because although, in part, the same regulation is at issue as was at issue in 1996, the application of the regulation, to those facts, is the sole responsibility of the Board.

Respondent mistakenly argues that the 1996 application of the regulation to the facts in that case bars the Board's consideration of that regulation to new facts. But the arbiter of acceptable medical care is the Board, which is duty bound to bring to bear its own expertise and that brought to it by the parties. To the extent a regulation is unclear, it must be interpreted by the Board. It is the Board that will tell the parties whether the facts are so identical to the 1996 facts that Respondent should prevail, or whether the Attorney General has presented different or additional facts which militate a different result.

Respondent's version of the application of Collateral Estoppel requires unacceptable tunnel vision by this Board. He argues that in the wake of its own 1996 decision the Board cannot now legally question the insertion of laminaria after 14 weeks in an office setting, or the plan to transport a patient a great distance for

the completion of an abortion. He would like the Board to consider these facts in a vacuum, absent the particulars faced in each patient's care, in the same way that the Board was asked for its 1999 "advisory opinion".

But this Board must view the totality of the circumstances and not solely the facts on which Respondent is focused. Among the many other relevant issues in this prosecution is the regulation's requirement that D and E procedures after 14 weeks LMP must be performed in a hospital or LACF. Respondent had no intention of the procedures occurring in either approved setting. The regulation requires that procedures after 18 weeks can only be performed by licensees with appropriate credentials on file. Respondent lacks those credentials.

Even more importantly, the regulation guides the practitioner but does not relieve him of the obligation to adhere to accepted standards of practice. Respondent advanced the procedures beyond the insertion of laminaria. He administered misoprostol to some patients and digoxin to others. The Attorney General maintains that these steps commenced the abortion. Respondent transported his patients out of state to avoid the regulations in place for their safety, and he engaged in dishonest and deceptive conduct in completing their treatment. Whether or not the Board determines that the earlier case stands for the proposition that the insertion of laminaria is prefatory to, but not part of a termination of pregnancy, collateral estoppel in no way bars the Board's consideration of all of the allegations in the Amended Verified Complaint, which are specific to the facts of this case.

The fallacy of the Collateral Estoppel claim is illustrated by Respondent's argument that in the 1996 case he testified, essentially, that if he thought the insertion of laminaria in patient J.K. violated the Board's regulation, he wouldn't have done it. (Gross Cert, Ex 3, page 17). In 1996 that testimony was found to be credible, in the context of the care rendered that patient and the remaining testimony in that case. Essentially, Respondent was given the benefit of the doubt by the ALJ.

The Attorney General has now alleged multiple violations of the Board's regulation and multiple deviations from accepted standards of good medical care, in the context of alleged acts of dishonesty and deception. The Board cannot and should not be stopped from considering whether Respondent's latest conduct was violative of the law. The fact that once before he credibly claimed that he would not engage in an intentional violation of law and once before the Board accepted that claim, does not prevent the Board from exercising its lawful obligation to once again assess Respondent's conduct

Respectfully submitted,

PAULA T. DOW
ATTORNEY GENERAL OF NEW JERSEY

By: Jeri L. Warhaftig
Jeri L. Warhaftig
Deputy Attorney General

JLW/naz
cc: Joseph Gorrell, Esq.
Steven Flanzman, DAG, Counseling Section