

BEFORE THE KANSAS STATE BOARD OF EXAMINERS IN OPTOMETRY

In the Matter of)
)
THOMAS MCCARTHY, O.D.,) Case No. 2022-08
JASON EUBANK, O.D., and)
BRET D. WISE, O.D.)
)
Respondents.)

STIPULATION AND FINAL AGENCY ORDER

IT IS HEREBY STIPULATED AND AGREED by and between the Kansas Board of Examiners in Optometry (the "Board") and Thomas McCarthy, O.D., Jason Eubank, O.D., and Bret D. Wise, O.D. (the "Respondents") as follows:

1. The Board is represented herein by its attorneys, Timothy D. Resner of Frieden & Forbes, LLP 1414 SW Ashworth Place, Suite 201, Topeka, Kansas 66604. The Respondent is represented herein by his attorney N/A, or has been afforded the independent right of representation and examination, and acting upon the independent right of representation and examination voluntarily enters into this Stipulation and Final Agency Order.

2. The Board is a Kansas administrative agency vested with the authority, pursuant to K.S.A. 74-1501 and K.S.A. 74-1504, to carry out and enforce the provisions of the Kansas Optometry Act, K.S.A. 65-1501 *et seq.*, ("Optometry Law"), including conducting hearings and proceedings to revoke, suspend or otherwise discipline a Kansas license to practice optometry.

3. Respondent McCarthy became licensed to engage in the practice of optometry in the State of Kansas by virtue of the Board issuing license number 1285-3. Respondent Eubank became licensed to engage in the practice of optometry in the State of Kansas by virtue of the

Board issuing license number 1595. Respondent Wise became licensed to engage in the practice of optometry in the State of Kansas by virtue of the Board issuing license number 1831.

4. Respondents are the officers of Eye Care Associates of Wichita (the “practice”).

5. Respondent Eubank previously obtained approval of the trade name for the practice at its 321 S. Hillsdale, Wichita, KS location, and is therefore personally responsible for compliance with applicable trade name regulations pursuant to K.A.R. 65-9-5(g).

6. Kansas licensed optometrists Ryan McCarthy, O.D. and Dustin Martin, O.D. are also employed by the practice, but are not parties to this Stipulation and Final Agency Order.

7. The Board has received certain information, has investigated and has determined that there are reasonable grounds to believe that the Respondents have committed an act or acts that violate the Optometry Law.

8. Respondents hereby admit and waive any further proof in this proceeding before by the Board and the Board finds that:

A. The Board previously approved the trade name “Eye Care Associates of Wichita” at the 321 S. Hillsdale, Wichita, KS location. The Board’s letter of approval to Respondent Eubank stated that, “[a]ny approval is limited to the location(s) indicated on the application; use at any other location would require additional approval...”.

B. On or about November 17, 2021, Respondents McCarthy and Wise submitted a trade name application to the Board for approval of “Eye Care Associates of Wichita” at a new location, 3911 M Maize Rd., Wichita, KS. It was represented on the application that this new location began operations under the trade name “Eye Care Associates of Wichita” in 2019.

C. Upon further investigation it was also discovered that the practice's website <http://www.ecawichita.com/index.html> referenced the 3911 M Maize Rd., Wichita, KS location as being "now open" and providing services as "Eye^{Care}Associates of Wichita."

D. The Board has never approved use of the trade name "Eye^{Care}Associates of Wichita" at the 3911 M Maize Rd., Wichita, KS location.

E. Pursuant to K.S.A. 65-1522 and K.A.R. 65-9-1, a licensee may practice optometry in the State of Kansas using a trade or assumed name; however, a licensee is prohibited from practicing optometry under a trade name until an application to use a trade name at a specific location has been approved by the Board.

F. Respondents have been using the trade name 'Eye Care Associates of Wichita' without Board approval for approximately three (3) years at the Maize Road location.

9. The Board hereby finds and concludes that Respondents' conduct, as described above, violates K.A.R. 65-9-1, and therefore constitutes grounds for discipline pursuant to K.S.A. 65-1517(l) for violating a lawful regulation of the Board.

10. The Board hereby finds and the Respondents hereby agree that the following resolution is just and appropriate under the circumstances:

A. ADMINISTRATIVE FINE. Respondents agree, and the Board further orders Respondents to pay to the Board an administrative fine in the amount of Six Hundred Dollars (\$600.0) within ten (10) calendar days of the entry of this Stipulation and Final Agency Order. The fine is a joint and several obligation of Respondents.

B. CONDITIONAL APPROVAL. Respondents agree, and the Board further orders that upon signing this Stipulation and Final Agency Order, Respondents shall obtain

conditional approval of the trade name "Eye Care Associates of Wichita" for the 3911 N. Maize Rd, Wichita, KS location from November 17, 2021 through July 22, 2022. In the event the Board approves the trade name application, then its approval of the trade name shall become final and without condition.

C. OTHER REQUIREMENTS. Respondents hereby acknowledge and agree that as a condition of this Stipulation and Final Agency Order, they must:

- i. Comply fully with this Stipulation and Final Agency Order; and
- ii. Comply fully with the Kansas Optometry Act, the Board's rules and regulations and all state and federal laws relating to Kansas optometrists.

11. Respondents hereby agree that all information in the possession of the Board's Investigation Member, its staff, its investigators and its attorney regarding the investigation, which led to this disciplinary action, and all information discovered during the pendency of the disciplinary action may be disclosed to and considered by the Board as part of the presentation and consideration of the proposal of settlement in the form of this Stipulation and Final Agency Order and the Final Order provided for herein, with or without the presence of the Respondents or their attorney. In the event that this Stipulation and Final Agency Order and the Final Order provided for herein are not accepted and approved by the Board, the Respondents further waive any objection to the Board members' consideration of this Stipulation and Final Agency Order or the information mentioned in the preceding sentence and further agree to waive any claim of due process violation or the right to seek the disqualification of any Board member as a result of the Board member's consideration of said document and information.

12. The stipulations contained herein shall not become effective and/or binding until this Stipulation and Final Agency Action is approved by the Board and the Final Order provided for herein is entered by the Board. The Respondents acknowledge that the approval of the Board's attorney shall not constitute the approval of the Board or bind the Board to approve this Stipulation and Final Agency Action or the Final Order provided for herein.

13. The Respondents agree that this Stipulation and Final Agency Order is in conformance with Kansas and federal law and the Board has jurisdiction to enter into it and enter the Final Order provided for herein. The Respondents further agree that the Kansas Optometry Act, K.S.A. 65-1501, *et seq.*, is constitutional on its face and as applied in this case.

14. This stipulation constitutes the entire agreement of the parties and may only be modified by a subsequent writing signed by them. The agreement shall be interpreted in accordance with the laws of the State of Kansas.

15. The Respondents acknowledge that they have the following rights:

- A. To have formal notice of charges served upon them;
- B. To file a response to the charges;
- C. To have notice of and participate in a formal adjudicative hearing with the Board making specific findings of facts and conclusions of law based only upon evidence admitted at such hearing.
- D. To take advantage of all applicable provisions of the Kansas Administrative Procedures Act and the Kansas Judicial Review Act.

16. The Respondents freely waive these foregoing rights and acknowledge that the said waiver is made voluntarily and in consideration of the Board's limiting the disciplinary

action taken against them to those provided for herein. The Respondents further waive the right to seek reconsideration or appeal or otherwise contest this Stipulation and Final Agency Order and the Final Order provided for herein.

17. The Respondents acknowledge that they enter into this Stipulation and Final Agency Order freely and voluntarily after consultation with counsel of his choosing or after having had the opportunity to do so. The Respondents further acknowledge that they have read this Stipulation and Final Agency order in its entirety, that they understand its legal consequences and that they agree that none of its terms are unconscionable, arbitrary or capricious.

18. Time is of the essence to this Stipulation and Final Agency Order. Respondents acknowledge and agree that any violation of this Stipulation and Final Agency Order shall constitute a willful violation of a lawful Board order and grounds for further disciplinary action against them. The pendency of any disciplinary action arising out of an alleged violation of this Stipulation and Final Agency Order shall not affect the obligation of Respondents to comply with all terms and conditions of this Stipulation and Final Agency Order.

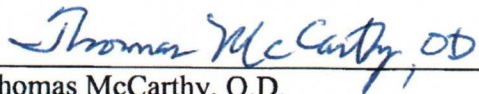
19. This Stipulation and Final Agency Order constitutes the entire and final agreement of the parties. In the event any provision of this Stipulation and Final Agency Order is deemed invalid or unenforceable by a court of competent jurisdiction, it shall be severed and the remaining provisions of this Stipulation and Final Agency Order shall be given full force and effect.

20. Upon execution by all parties, this Stipulation and Final Agency Order shall be a public record in the custody of the Board.

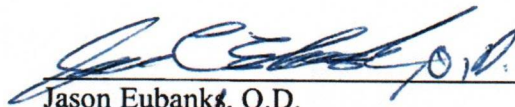
21. This Stipulation and Final Agency Order shall become effective on the day it is approved, accepted and made an order of the Board by way of signature of the Board's authorized representative.

22. The Respondents acknowledge that they have been advised by the Board that they would have the right within fifteen (15) days after service of the Final Order provided for herein to file a petition for reconsideration with the Board and the right within thirty (30) days after service of the Final Order provided for herein to file a petition for judicial review in the District Court of Shawnee County, Kansas, in accordance with the Kansas Act for Judicial Review and Civil Enforcement of Agency Actions, K.S.A. 77-601, *et seq.*, and to serve such a petition for judicial review on the Kansas Board of Examiners in Optometry by serving Jan Murray at 3109 West 6th Street, Suite B, Lawrence, Kansas 66049. The Respondents hereby waive those rights.

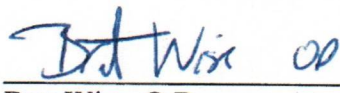
AGREED AND ACCEPTED BY:


Thomas McCarthy, O.D.

7/11/22
Date

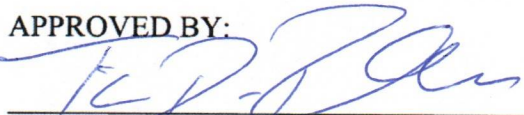

Jason Eubank, O.D.

7/11/22
Date


Bret Wise, O.D.

7/11/22
Date

APPROVED BY:


Timothy D. Resner, #25064
FRIEDEN & FORBES, LLP
1414 SW Ashworth Place, Suite 201
Topeka, KS 66604
785.354.1100
785.354.1113 facsimile
Attorneys for Kansas State Board of Examiners In Optometry

7.18.2022
Date

BEFORE THE KANSAS STATE BOARD OF EXAMINERS IN OPTOMETRY

In the Matter of)
)
THOMAS MCCARTHY, O.D.,) Case No. 2022-08
JASON EUBANK, O.D., and)
BRET D. WISE, O.D.)
)
Respondents.)

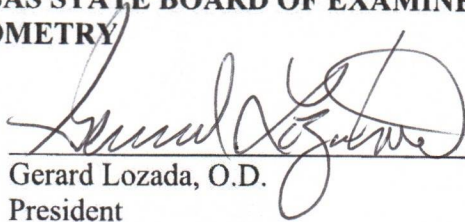
FINAL ORDER

Upon motion duly made, seconded and passed, the Kansas Board of Examiners in Optometry (the "Board") hereby approves and accepts the within Stipulation and Final Agency Order and incorporates the provisions thereof as the Final Order of the Board.

ENTERED AND EFFECTIVE this the 22 day of July, 2022.

**KANSAS STATE BOARD OF EXAMINERS IN
OPTOMETRY**

By:



Gerard Lozada, O.D.
President

CERTIFICATE OF SERVICE

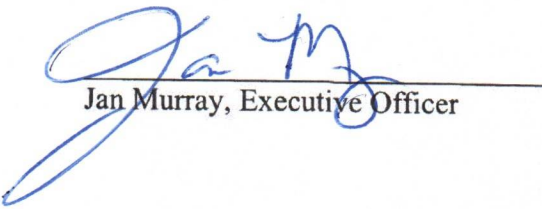
The undersigned hereby certifies that a copy of the foregoing STIPULATION AND FINAL AGENCY ORDER was served by depositing same in the United States mail, postage prepaid, on this the 25 day of July, 2022 addressed to:

Thomas McCarthy, O.D.
321 S. Hillsdale
Wichita, KS 67211
Respondent

Jason Eubank, O.D.
321 S. Hillsdale
Wichita, KS 67211
Respondent

Bret Wise, O.D.
321 S. Hillsdale
Wichita, KS 67211
Respondent

Timothy D. Resner
FRIEDEN & FORBES, LLP
1414 SW Ashworth Place, Suite 201
Topeka, KS 66604
Attorneys for Kansas State Board of Examiners In Optometry


Jan Murray, Executive Officer