FEDERAL TRADE COMMISSION
RECEIVED DOCUMENTS
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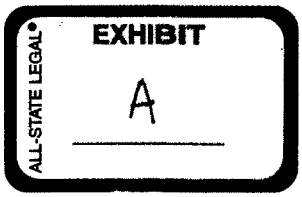
SECRETARY

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of	)	**PUBLIC**
THE NORTH CAROLINA [STATE] BOARD OF DENTAL EXAMINERS,	)	DOCKET NO. 9343
Respondent.	)	

RESPONDENT'S MOTION FOR AN ORDER COMPELLING DISCOVERY

EXHIBITS A-D



UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of	)	**PUBLIC**
THE NORTH CAROLINA [STATE] BOARD OF DENTAL EXAMINERS,	)	DOCKET NO. 9343
Respondent.	)	

RESPONDENT'S FIRST SET OF REQUESTS FOR ADMISSION TO COMPLAINANT FEDERAL TRADE COMMISSION

Pursuant to Rule 3.32 of the Federal Trade Commission's Rules of Practice, Respondent hereby requests that Complainant Federal Trade Commission ("FTC") admit the truth of the following statements or opinions of fact within 10 days from the date of service thereof.

1. Admit that the U.S. Supreme Court has never held that a state agency enforcing a clear articulated state statute regarding non-price restraints must prove active state supervision in order to qualify for state action immunity.

2. Admit that the market restrictions allegedly at issue in this case do not involve direct restrictions on commercial speech.

3. Admit that the market restrictions allegedly at issue in this case do not involve direct restrictions on pricing.

4. Admit that the restriction the North Carolina State Board of Dental Examiners ("Dental Board") is enforcing is a non-price restriction.

5. Admit that the FTC does not have express Congressional authority to regulate teeth whitening products or services.

6. Admit that a competitive alternative for consumers is to self administer over the counter teeth whitening products.

7. Admit that the Dental Board has not restricted the mere sale of over the counter teeth whitening products.

8. Admit that over the counter teeth whitening products are generally lower in price than the prices at which non-licensed teeth whitening service providers offer their products.

9. Admit that the FTC misnamed the Respondent in its Complaint.

10. Admit that the investigation which preceded the Complaint in this matter did not produce any direct evidence that the Dental Board had conspired to restrain trade.

11. Admit that efforts by a private trade association to influence Dental Board rules or policies constitute constitutionally protected speech under the Noerr-Pennington doctrine.

12. Admit that members of a state agency are presumed to be acting in good faith.

13. Admit that the North Carolina State Ethics Commission has ruled that the mere fact that a Board member is a licensee of the Board does not constitute a conflict of interest when participating in the enforcement decisions of the Board.

14. Admit that no current member of the Dental Board has teeth whitening business amounting to more than 5% of their business revenues.

15. Admit that teeth whitening businesses compare their services to services provided by dentists.

16. Admit that teeth whitening businesses promote their services as removing stains from teeth.

17. Admit that teeth whitening businesses promote their services as being more effective than self-administered over the counter teeth whitening products.

18. Admit that there are adequate public protection grounds for state regulation of the practice of dentistry.

19. Admit that the North Carolina statutes include the removal of stains from teeth as the practice of dentistry.

20. Admit that the North Carolina statutes include making impressions of teeth or gums in the definition of the practice of dentistry.

21. Admit that the North Carolina statutes include the offering as well as the rendering of dental services in the definition of the practice of dentistry.

22. Admit that the North Carolina statutes include operating a business providing dental services in the definition of the practice of dentistry.

23. Admit that the FTC's jurisdiction does not include oversight into the procedures by which a state agency enforces clearly articulated state statutes.

24. Admit that the investigation in this matter was managed, supervised or overseen by a Commissioner who had previously been recused from participation in an FTC case involving teeth whitening products or services.

INSTRUCTIONS

A. Provide separate and complete sworn responses for each Request for Admission ("Request").

B. The Request will be deemed admitted unless, within ten days of service of this request, the FTC serves a sworn written answer to the Request.

C. The FTC's answer should specifically admit or deny the Request or set forth in detail the reasons why it cannot truthfully admit or deny it after exercising due diligence to secure the information necessary to make full and complete answers, including a description of all efforts the FTC made to obtain the information necessary to answer the Request fully.

D. When good faith requires that the FTC qualify its answer or deny only a part of the matter of which an admission is requested, specify the portion that is true and qualify or deny the remainder.

E. If the FTC considers that a matter of which an admission has been requested presents a genuine issue for trial, it may not, on that ground alone, object to the request. Instead, the FTC must deny the matter or set forth reasons why it cannot admit or deny it.

F. Answer each Request fully and completely based on the information and knowledge currently available to the FTC, regardless of whether the FTC intends to supplement its response upon the completion of discovery.

G. The FTC's answers to any Request herein must include all information within its possession, custody or control, including information reasonably available to the FTC and its agents, attorneys, or representatives. The FTC may not give lack of information or knowledge as a reason for failure to admit or deny unless the FTC states that it has made reasonable inquiry and that the information known or readily obtainable by the FTC is insufficient to enable it to admit or deny the matter.

H. If in answering any of the Requests the FTC claims any ambiguity in either the Request or any applicable definition or instruction, identify in its response the language it considers ambiguous and state the interpretation the FTC is using in responding.

I. Each Request herein is continuing and requires prompt amendment of any prior response if the FTC learns, after acquiring additional information or otherwise, that the response is in some material respect incomplete or incorrect. *See* 16 C.F.R. § 3.31(e).

J. If the FTC objects to any Request or any portion of any Request on the ground that it requests information that is privileged (including the attorney-client privilege) or falls within the attorney work product doctrine, state the nature of the privilege or doctrine You claim and provide all other information as required by 16 C.F.R. § 3.38A.

K. For each natural person the FTC refers to in its answers, state (a) that person's full name; (b) the person's last known business address and business phone number, or where that person's business address and phone number is unavailable, that person's home address and home phone number; (c) the person's business affiliation and title during the time period of the matter at issue; and (d) the person's current business affiliation and title.

DEFINITIONS

A. "Dental Board" shall mean the North Carolina State Board of Dental Examiners, including without limitation all of its locations, and all its predecessors, divisions, committees, subcommittees, councils, working groups, advisory groups, members, officers, employees, consultants, agents, representatives, and other acting on its behalf.

B. "Dental Board's Response" shall mean the Response to the Complaint filed by the North Carolina State Board of Dental Examiners on July 7, 2010.

C. "Concerning" means relating to, alluding to, referring to, constituting, describing, discussing, evidencing, or regarding.

D. "Each" means and includes "each and every," "all" means and includes "any and all," and "any" means and includes "any and all."

E. "North Carolina Dental Society" means the North Carolina Dental Society, its officers, directors, trustees, employees, attorneys, agents, consultants, members, representatives, committees, subcommittees, chapters, affiliates, subdivisions, councils, or other organizational units.

F. "North Carolina State Ethics Commission" including without limitation all of its locations, and all its predecessors, divisions, committees, subcommittees, councils, working groups, advisory groups, members, officers, employees, consultants, agents, representatives, and others acting on its behalf.

G. "Person" means and includes any natural person or any business, legal or governmental entity or association and the officers, directors, employees, agents, consultants and attorneys thereof.

H. "Regarding" means and includes affecting, concerning, constituting, dealing with, describing, embodying, evidencing, identifying, involving, providing a basis for, reflecting, relating to, respecting, stating, or in any manner whatsoever pertaining to that subject.

CERTIFICATION

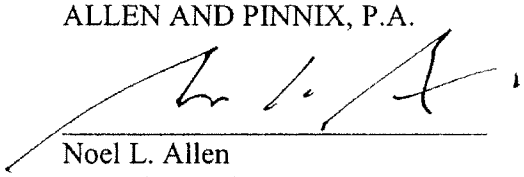
Pursuant to 28 U.S.C § 1736, I hereby certify under penalty of perjury that this response to the Requests for Admission has been prepared by me or under my personal supervision from records of the Federal Trade Commission, and is complete and correct to the best of my knowledge and belief.

Signature of Official	Title/Office Telephone Number
Printed Name of Official	Dated

This the 12th day of October, 2010.

Respectfully submitted,

ALLEN AND PINNIX, P.A.



Noel L. Allen
M. Jackson Nichols
Alfred P. Carlton, Jr.
Attorneys for Respondent
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Raleigh, North Carolina 27602
Telephone: 919-755-0505
Facsimile: 919-829-8098
Email: nallen@allen-pinnix.com

CERTIFICATE OF SERVICE

I hereby certify that on October 12, 2010, I electronically filed the foregoing with the Federal Trade Commission using the FTC E-file system, which will send notification of such filing to the following:

Richard C. Donohue, Acting Secretary
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Room H-159
Washington, D.C. 20580

I hereby certify that the undersigned has this date served copies of the foregoing upon all parties to this cause by electronic mail as follows:

William L. Lanning
Bureau of Competition
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Room NJ-6264
Washington, D.C. 20580
wlanning@ftc.gov

Steven L. Osnowitz
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Melissa Westman-Cherry
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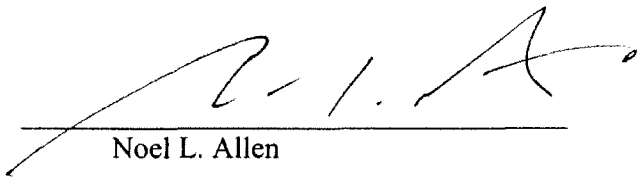
Richard B. Dagen
Bureau of Competition
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Room H-374
Washington, D.C. 20580
rdagen@ftc.gov

I also certify that I have sent courtesy copies of the document via Federal Express and electronic mail to:

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue N.W.
Room H-113
Washington, D.C. 20580
oalj@ftc.gov

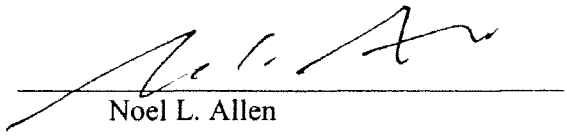
This the 12th day of October, 2010.



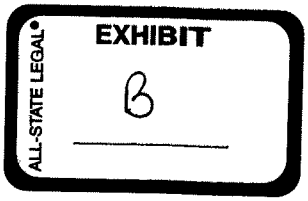
Noel L. Allen

CERTIFICATION FOR ELECTRONIC FILING

I further certify that the electronic copy sent to the Acting Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and by the adjudicator.



Noel L. Allen



UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of	)	
THE NORTH CAROLINA [STATE] BOARD OF DENTAL EXAMINERS,	)	DOCKET NO. 9343
Respondent.	)	

RESPONDENT'S FIRST SET OF INTERROGATORIES TO THE FEDERAL TRADE COMMISSION

Pursuant to the Federal Trade Commission's Rules of Practice, 16 C.F.R. § 3.35, Respondent North Carolina State Board of Dental Examiners ("the Board") requests that the Federal Trade Commission ("the Commission") answer the following interrogatories within 30 days. These Discovery Requests shall be continuing in nature until the date of trial, and you are required to serve supplemental answers as additional information may become available to you, as required by Rule 3.31(e) of the FTC's Rule of Practice.

1. Identify every act, omission, practice, instance, document, or communication relating to the grounds for each allegation asserted in your Complaint.

2. What was the total dollar volume of retail sales of over-the-counter teeth-whitening products each of the years 2000 through 2009 in the United States?

3. What was the total dollar volume of retail sales of over-the-counter teeth-whitening products each of the years 2000 through 2009 in North Carolina?

4. What was the total dollar volume of retail sales of teeth-whitening services provided by persons other than dentists or persons working under the direct supervision of a dentist for each of the years 2000 through 2009 in the United States?.

5. What was the total dollar volume of retail sales of teeth-whitening services provided by persons other than dentists or persons working under the direct supervision of a dentist for each of the years 2000 through 2009 in North Carolina?

6. Identify all of your sources for your answers to question 2 – 5, above.

7. Identify each dental practice expert you have contacted, interviewed or consulted regarding the teeth-whitening products or services.

8. Which jurisdiction's bar ethics rules are binding upon the Commission's legal staff including Complaint Counsel?

9. Identify each person service with a subpoena duces tecum by you in this matter and each of your attorneys who spoke to each such person.

10. What is the basis in law and fact for your position that the Respondent is not an official or agency of the state of North Carolina?

11. Identify each instance in which the Board's actions deterred persons from other states from providing teeth whitening services in North Carolina.

12. Identify all sources, data, documents, expert opinion, and any other information, including dates, upon which you based your assertion in your Complaint that "Teeth whitening services performed by non-dentists are much less expensive than those performed by dentists. A non-dentist typically charges $100 to $200 per session, whereas dentists typically charge $300 to $700, with some procedures costing as much as $1,000."

13. Identify all sources, data, documents, expert opinion, and any other information, including dates, upon which you based your assertion in your Complaint that "Teeth whitening products (such as toothpaste and OTC whitening strips) are generally viewed by consumers as inadequate substitutes for teeth whitening services, due to differences in the nature of the product, quality, cost, and convenience."

14. Identify all sources, data, documents, expert opinion, and any other information, including dates, upon which you based your assertion in your Complaint that "The Dental Board's exclusion of the provision of teeth whitening services by non-dentists does not qualify for a state action defense nor is it reasonably related to any efficiencies or other benefits sufficient to justify its harmful effect on competition."

INSTRUCTIONS

A. Provide separate and complete sworn responses for each Interrogatory and subpart.

B. State if You are unable to answer any of the Interrogatories herein fully and completely after exercising due diligence to secure the information necessary to make full and complete answers. Specify the reason(s) for Your inability to answer any portion or aspect of such Interrogatory, including a description of all efforts You made to obtain the information necessary to answer the Interrogatory fully.

C. Answer each Interrogatory fully and completely based on the information and knowledge currently available to You, regardless of whether You intend to supplement Your response upon the completion of discovery. See North Texas Specialty Physicians, FTC Docket No. 9312 (April 11, 2002) (Complaint Counsel must provide "full and complete responses . . . with the information and facts it currently has available") (Chappell, A.L.J.).

D. If You object or otherwise decline to set forth in Your response any of the information requested by any Interrogatory, set forth the precise grounds upon which You rely with specificity so as to permit the Administrative Law Judge or other administrative or judicial entity to determine the legal sufficiency of Your objection or position, and provide the most responsive information You are willing to provide without an order.

E. Your answers to any Interrogatory herein must include all information within Your possession, custody or control, including information reasonably available to You and Your agents, attorneys or representatives.

F. If in answering any of the Interrogatories You claim any ambiguity in either the Interrogatory or any applicable definition or instruction, identify in Your response the language You consider ambiguous and state the interpretation You are using in responding.

G. Each Interrogatory herein is continuing and requires prompt amendment of any prior response if You learn, after acquiring additional information or otherwise, that the response is in some material respect incomplete or incorrect. See 16 C.F .R. § 3.31(e).

H. If You object to any Interrogatory or any portion of any Interrogatory on the ground that it requests information that is privileged (including the attorney-client privilege) or falls within the attorney work product doctrine, state the nature of the privilege or doctrine You claim and provide all other information as required by 16 C.F.R. § 3.38A.

I. The singular form of a word shall be interpreted as plural, and the plural form of a word shall be interpreted as singular, so as to bring within the scope of the Interrogatory that which might otherwise be excluded.

J. "And" and "or" are to be interpreted inclusively so as not to exclude any information otherwise within the scope of any request.

K. None of the Definitions or Interrogatories set forth herein shall be construed as an admission relating to the existence of any evidence, to the relevance or admissibility of any evidence, or to the truth or accuracy of any statement or characterization in the Definition or Interrogatory.

L. Whenever a verb is used in one tense it shall also be taken to include all other tenses, so as to bring within the scope of the Interrogatory that which might otherwise be excluded.

M. All words that are quoted from the Complaint filed in this matter have the same meaning as those used therein.

N. For each natural person You refer to in Your answers, state (1) that person's full name; (2) the person's last known business address and business phone number, or where that person's business address and phone number is unavailable, that person's home address and home phone number; (3) the person's business affiliation and title during the time period of the matter at issue; and (4) the person's current business affiliation and title.

DEFINITIONS

A. "Federal Trade Commission," "Commission,""You," or "Your" shall mean the Federal Trade Commission, including without limitation all of its locations, and all its predecessors, divisions, committees, subcommittees, councils, working groups, advisory groups, members, officers, employees, consultants, agents, representatives, Commissioners, Complaint Counsel, and others acting on its behalf.

B. For purposes of these Interrogatories, Respondent adopts by reference Your definitions B through P as used in your First Set of Interrogatories.

This the 12th day of October, 2010.

Respectfully submitted,

ALLEN AND PINNIX, P.A.

/s/Noel L. Allen

Noel L. Allen
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Alfred P. Carlton, Jr.
Attorney for Respondent
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Telephone: 919-755-0505
Facsimile: 919-829-8098
Email: nallen@allen-pinnix.com

CERTIFICATE OF SERVICE

I hereby certify that the undersigned has this date served copies of the foregoing upon all parties to this cause by electronic mail as follows:

William L. Lanning
Bureau of Competition
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Room NJ-6264
Washington, D.C. 20580
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Steven L. Osnowitz
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Richard B. Dagen
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600 Pennsylvania Avenue, N.W.
Room H-374
Washington, D.C. 20580
rdagen@ftc.gov

Dated: October 12, 2010

/s/Noel L. Allen

Noel L. Allen

CERTIFICATION

Pursuant to 28 U.S.C. § 1746, I hereby certify under penalty of perjury that this response to the Requests for Production of Documents has been prepared by me or under my personal supervision from records of the Federal Trade Commission, and is complete and correct to the best of my knowledge and belief.

Where copies rather than original documents have been submitted, the copies are true, correct, and complete copies of the original documents. If the North Carolina State Board of Dental Examiners uses such copies in any court or administrative proceeding, the Commission will not object based upon the Commission not offering the original document.

Signature of Official	Title/Office Telephone Number
Printed Name of Official	Dated

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of	)	
THE NORTH CAROLINA [STATE] BOARD OF DENTAL EXAMINERS,	)	DOCKET NO. 9343
Respondent.	)	

RESPONDENT'S FIRST SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS TO THE FEDERAL TRADE COMMISSION

Pursuant to the Federal Trade Commission's Rules of Practice, 16 C.F.R. § 3.37, Respondent North Carolina State Board of Dental Examiners ("the Board") requests that the Federal Trade Commission ("the Commission") produce the following documents within 30 days. These Discovery Requests shall be continuing in nature until the date of trial, and you are required to serve supplemental answers as additional information may become available to you, as required by Rule 3.31(e) of the FTC's Rule of Practice.

INSTRUCTIONS

1. These instructions and definitions should be construed to require responses based upon the information available to complaint counsel as well as your attorneys, representatives, investigators, and others acting on your behalf.

2. If you are unable to produce a document or property requested, state in writing why you cannot produce the document or the property and, if your inability to produce the document or the property is because it is not in your possession or the possession of a person from whom you could obtain it, state the name, address, and telephone number of any person you believe may have the original or a copy of any such document or property.

3. If you object to a portion or an aspect of any Request, state the grounds of your objection with specificity and respond to the remainder of the Request.

4. If, in answering these Requests, you encounter any ambiguities when construing a request, instruction, or definition, your response shall set forth the matter deemed ambiguous and the construction used in responding. Where a claim of privilege is asserted in responding or objecting to any discovery requested in these Requests and information is not provided on the basis of such assertion, you shall, in your response or objection, identify the nature of the privilege (including work product) which is being

claimed. When any privilege is claimed, you shall indicate, as to the information requested, whether (a) any documents exist, or (b) any communications took place, and (c) also provide the following information for each such document in a "privileged documents log" or similar format:

(a) the type of document;

(b) the general subject matter of the document;

(c) the date of the document;

(d) the author(s) of the document;

(e) the addressee(s) and any other recipient(s) of the document; and

(f) the custodian of the document, where applicable.

5. If the requested documents are maintained in a file, the file folder is included in the request for production of those documents.

DEFINITIONS

Unless otherwise indicated, the following definitions shall be applicable to these Discovery Requests:

1. As used herein, the terms "document" and "documents" shall mean the original and all drafts of any kind of written or graphic matter, however produced or reproduced, of any kind or description, whether sent or received or neither, and all copies thereof, whether or not different in any way from the original and including, without limitation: any drawings, files (see definition), plans, specifications, paper, book, account, correspondence (see definition), financial statements, receipts, canceled checks, photograph, facsimile, agreement, contract, memoranda, advertising material, letter, E-mail (however saved), computer stored information, computer software, disk stored information, internet-stored information, WEB page and internet listing, telegram, object, report, record, transcript, study, notation, working paper, intra-office or inter-office communication, chart, minutes, index sheet, check, check stub, delivery ticket, bill of sale, invoice, telephone bill, credit card or other bill, any recording of telephone or other conversation(s), including Voicemail, interviews, conferences or any written, recorded, transcribed, punched, taped or filmed or other graphic matter or data compilations, however produced or reproduced, to which you have or have had access or of which you have knowledge. Further, each request for identification of documents shall be deemed to include documents, which in whole or in part, may contain the information specified in said request.

2. The term "correspondence" includes all letters, telegrams, notices, messages, e-mail or other written and/or electronically stored or recorded communications, data, or memoranda, whether printed and/or actually sent to the named recipient or merely stored on a computer, disk or on the internet, including photocopies, facsimiles, magnetic tapes, computer diskettes, drawings, and photographs of such communications or memoranda.

3. The term "communication" means any exchange, transfer, or dissemination of information, regardless of the means, including telephone, by which it is accomplished.

4. The terms "relating to," "relates to," and "in relation to" mean constituting, comprising, containing, consisting of, setting forth, analyzing, evidencing, proposing, showing, disclosing, describing, discussing, explaining, summarizing, concerning, reflecting, authorizing, supporting, referring to, or pertaining to, either directly or indirectly, in whole or in part.

5. "Person" or "Persons" includes all natural persons, all corporate forms and organizations, limited liability corporations (LLCs), partnerships, firms or associations, all private or government organizations, departments, divisions and subdivisions, and all other entities and the representatives of each such organization.

6. The words "and" or "or" shall be both conjunctive and disjunctive.

7. "Board" shall mean the North Carolina State Board of Dental Examiners, including without limitation all of its locations, predecessors, divisions, committees, subcommittees, councils, working groups, advisory groups, members, officers, employees, consultants, agents, representatives, and others acting or purporting to act on its behalf.

8. The terms "Commission," "You" and "Your" shall all mean and refer to Federal Trade Commission, including without limitation all of its locations, predecessors, divisions, committees, subcommittees, councils, working groups, advisory groups, members, officers, employees, consultants, agents, representatives, and others acting or purporting to act on its behalf.

9. "Over the Counter Dental Product" shall mean any non-prescription product allied to the mouth, teeth, or gums, other than a Relevant Product.

10. "Relevant Product" means any teeth whitening product containing hydrogen peroxide or carbamide peroxide.

11. "Relevant Service" means any teeth whitening service involving hydrogen peroxide or carbamide peroxide. "Relevant Service" includes without limitation, the sale, manufacture, or marketing of any Relevant Product.

12. "Third Party" means any Person other than the Board as herein defined.

REQUESTS FOR PRODUCTION

1. All documents relating to any internal Commission communications relating to any Relevant Product or Relevant Service.

2. All documents relating to any communications between or among the Commission and any Person employed by, or unit of, the State of North Carolina, its counties, municipalities, or other political subdivisions, relating to any Relevant Product or Relevant Service.

3. All documents relating to any communications between or among the Commission and any Third Party or Person relating to any Relevant Product or Relevant Service.

4. All documents relating to any Commission investigations or proceedings that relate to any Relevant Product or Relevant Service including without limitation all minutes, agendas, presentations, calendars, recordings, notes, and drafts of, and comments pertaining to, any such document.

5. All documents relating to the effects or potential effects of the marketing and sale by non-dentists of the Relevant Product or Relevant Service on the marketing and sale by dentists of any Relevant Product or Relevant Service, or any other product or service provided by dentists, including, but not limited to, the effects or potential effects on the variables identified in items (a) through (f) below. Such documents shall include, but are not limited to, forecasts, surveys, studies and analyses, including without limitation analyses and comparisons of markets before and after entry or exit of non-dentist providers of the Relevant Product or Relevant Service, and analyses and comparisons of markets in which non-dentists do or do not provide the Relevant Product or Relevant Service.

a. Customer perception of the absolute or relative quality of the provision by dentists of the Relevant Product or Relevant Service or any other product or service;

b. customer perception of the absolute or relative value of the provision by dentists of the Relevant Product or Relevant Service or any other product or service;

c. the amount, value, kind, or content of advertising by dentists of the provision of the Relevant Product or Relevant Service or any other product or service;

d. the prices dentists charge for the Relevant Product or Relevant Service or any other product or service;

e. the demand for the provision by dentists of the Relevant Product or Relevant Service, including, but not limited to dollar sales and number of patients treated;

f. the demand for the provision by dentists of products and services other than the Relevant Product and Relevant Service, including but not limited to dollar sales.

6. All documents relating to the health effects, safety or efficacy of any Relevant Product or Relevant Service and any other Over the Counter Dental Product available to consumers.

7. All communications between and among the Commission and anyone identified by the Commission in its initial and supplemental disclosures re: the Relevant Product and Service.

8. All communications between and among the Commission and the media regarding the Relevant Product and Service.

9. All documents relating to consumer protection cases and investigations initiated by the Commission and pertaining to the Relevant Product or Service, including but not limited to *In the Matter of the Proctor & Gamble Company and the Gillette Company*, File No. 0510115, Docket No. C-4151; *Federal Trade Commission v. Conversion Marketing, Inc.*, FTC File No. 042-3079, Civil Action No. SACV 04-1264; and *In the Matter of Johnson & Johnson and Pfizer, Inc.*, File No. 061 0220, Docket No. C-4180.

10. All documents relating to merger or competition cases and investigations initiated by the Commission and pertaining to the Relevant Product or Service, including but not limited to *In the Matter of the Proctor & Gamble Company and the Gillette Company*, File No. 0510115, Docket No. C-4151; *Federal Trade Commission v. Conversion Marketing, Inc.*, FTC File No. 042-3079, Civil Action No. SACV 04-1264; and *In the Matter of Johnson & Johnson and Pfizer, Inc.*, File No. 061 0220, Docket No. C-4180.

11. All communications between and among the Commission and any present or former members or staff of the Board.

12. All documents in the Commission's possession prior to June 17, 2010 that evidenced a collusion to restrain trade or an illegal conspiracy participated in or committed by any dentist formerly or currently licensed in North Carolina relative to the Relevant Product or Service.

13. All internal communications of the Commission relating to former Commissioner Pamela Jones Harbour's role in managing the investigation of this case prior to the service of the Complaint.

14. All Commission records relating to former Commissioner Harbour's recusal in *In the Matter of The Procter and Gamble Co.*, Docket No. C-4151.

15. All documents relating to Commissioner Harbour's recusal from participation in any investigation or proceeding regarding the Relevant Products or Services.

16. All Commission records relating to Commissioner Brill's recusal in this matter.

17. All communications between and among the Commission and any Third Parties with claimed expertise in the Relevant Product or Service.

18. All records relating to investigations into regulation of the Relevant Product or Service in any other U.S. jurisdiction or any other country.

19. All documents constituting direct evidence that the Board conspired to restrain trade rather than enforce North Carolina's Dental Practice Act.

This the 12th day of October, 2010.

Respectfully submitted,

ALLEN AND PINNIX, P.A.

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CERTIFICATE OF SERVICE

I hereby certify that the undersigned has this date served copies of the foregoing upon all parties to this cause by electronic mail as follows:

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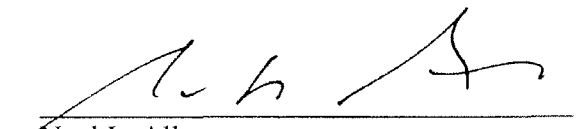
Dated: October 12, 2010



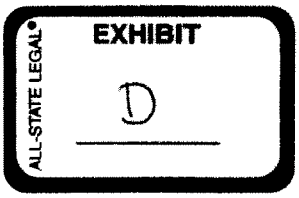
Noel L. Allen

CERTIFICATION

Pursuant to 28 U.S.C. § 1746, I hereby certify under penalty of perjury that this response to the Requests for Production of Documents has been prepared by me or under my personal supervision from records of the Federal Trade Commission, and is complete and correct to the best of my knowledge and belief.

Where copies rather than original documents have been submitted, the copies are true, correct, and complete copies of the original documents. If the North Carolina State Board of Dental Examiners uses such copies in any court or administrative proceeding, the Commission will not object based upon the Commission not offering the original document.

Signature of Official	Title/Office Telephone Number
Printed Name of Official	Dated



UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS, Respondent.	**PUBLIC** Docket No. 9343

COMPLAINT COUNSEL'S OBJECTIONS AND RESPONSES TO RESPONDENT'S FIRST SET OF REQUESTS FOR ADMISSION

Pursuant to Rule 3.32 of the Federal Trade Commission's Rules of Practice, Complaint Counsel hereby responds to Respondent North Carolina State Board of Dental Examiners' ("Dental Board's") Requests for Admission. Complaint Counsel reserves the right to supplement its responses to Respondent's Requests for Admission after the close of discovery, especially insofar as Respondent has yet to certify compliance with Complaint Counsel's First Set of Requests for Production of Documents served on June 29, 2010 and may produce additional documents, the review of which, may alter Complaint Counsel's responses to these Requests for Admission.

Complaint Counsel has endeavored to offer a good faith response to each of Respondent's Requests for Admission. Nevertheless, many of Respondent's requests are improper, unintelligible, vague and ambiguous, or otherwise unanswerable. In fact, many of Respondent's Requests do not narrow the issues for trial because the admission requested does not relate to "essentially undisputed or peripheral issues of fact." Further, "[r]equests for admission should not be employed 'to establish facts which are obviously in dispute or to answer

questions of law.'" *In re Basic Research*, 2004 FTC LEXIS 225, *5 (Nov. 30, 2004) (citation omitted). As a result, Respondent's Requests that seek admissions of contested legal and factual issues central to the case are improper. In addition, some of Respondent's Requests seek legal conclusions or irrelevant matter that is beyond the proper scope of requests for admission in this matter under Rule 3.32. In several of these instances, the Requests specify broadly-worded and potentially inaccurate legal propositions that Complaint Counsel has no obligation to research and correct. In other cases, the Respondent's Requests seek an improper admission based on Respondent's restatement or paraphrase of statutory provisions when the full text of the statutes is equally available to all parties and a proper subject for judicial notice.

Subject to the General and Specific Objections below, Complaint Counsel answers as follows:

REQUEST NO. 1: *Admit that the U.S. Supreme Court has never held that a state agency enforcing a clear articulated state statute regarding non-price restraints must prove active state supervision in order to qualify for state action immunity.*

RESPONSE: Complaint Counsel incorporates its General Objections in its response to this Request for Admission.

Complaint Counsel specifically objects to this Request and states that no response is required inasmuch as it calls for a legal conclusion beyond the proper scope of requests for admission in this matter under Rule 3.32.

REQUEST NO. 2: *Admit that the market restrictions allegedly at issue in this case do not involve direct restrictions on commercial speech.*

RESPONSE: Complaint Counsel incorporates its General Objections in its response to this Request for Admission.

Complaint Counsel specifically objects to the use of the undefined phrase "direct

restrictions" as vague and ambiguous.

Subject to these objections and qualifications, to the extent that "direct restrictions" means an express restriction that regulates only the advertising of teeth whitening products (e.g., a letter stating "You are hereby ordered to Cease and Desist advertising your teeth whitening services"), and does not include any effects on commercial speech caused by restrictions on the provision of teeth whitening services, Complaint Counsel admits this Request.

REQUEST NO. 3: *Admit that the market restrictions allegedly at issue in this case do not involve direct restrictions on pricing.*

RESPONSE: Complaint Counsel incorporates its General Objections in its response to this Request for Admission.

Complaint Counsel specifically objects to the use of the undefined phrase "direct restrictions" as vague and ambiguous.

Subject to these objections and qualifications, to the extent that "direct restrictions" refers to setting or fixing the price of teeth whitening services, and does not include any non-direct effects on prices caused by the Board's conduct, Complaint Counsel admits that the Dental Board's conduct in this case does not involve direct restrictions on pricing.

REQUEST NO. 4: *Admit that the restriction the North Carolina State Board of Dental Examiners ("Dental Board") is enforcing is a non-price restriction.*

RESPONSE: Complaint Counsel incorporates its General Objections in its response to this Request for Admission.

Complaint Counsel specifically objects that the phrase "the restriction the North Carolina State Board of Dental Examiners ("Dental Board") is enforcing" is vague, ambiguous, and misleading.

Subject to these objections and qualifications, to the extent that non-price restriction is used as typically used in antitrust as a reference to a vertical restraint between different levels of the distribution chain, Complaint Counsel denies this request. To the extent that the request only relates to whether the Board has colluded on price or otherwise directly set prices, Complaint Counsel admits this request.

***REQUEST NO. 5**: Admit that the FTC does not have express Congressional authority to regulate teeth whitening products or services.*

RESPONSE: Complaint Counsel incorporates its General Objections in its response to this Request for Admission.

Complaint Counsel specifically objects to the phrase "express Congressional authority to regulate" as vague and ambiguous.

Subject to these objections and qualifications, Complaint Counsel states that Congress has expressly empowered and directed the Federal Trade Commission to prevent persons, partnerships, or corporations from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce. To the extent that "regulate" refers to efforts to prevent persons, partnerships, or corporations from using "unfair methods of competition" and "unfair or deceptive acts or practices" in the sale of tooth whitening products or services "in or affecting commerce," this Request is specifically denied. To the extent that "express Congressional authority to regulate" means that the phrase "teeth whitening products and services" is contained in the F.T.C. Act, Complaint Counsel admits that the F.T.C. Act does not contain the phrase "teeth whitening products and services."

***REQUEST NO. 6:** Admit that a competitive alternative for consumers is to self administer over the counter teeth whitening products.*

RESPONSE: Complaint Counsel incorporates its General Objections in its response to this Request for Admission.

Complaint Counsel specifically objects to the use of the term "competitive alternative for consumers" as vague and ambiguous because this Request asks about "a competitive alternative" without specifying competitive alternative to what. Complaint Counsel further specifically objects to this Request as unintelligible and unanswerable and states that no response is required. To the extent that "competitive alternative for consumers" means that consumers may use different types of services and products to whiten their teeth, including but not limited to, over-the-counter teeth whitening products such as Crest White Strips sold in grocery stores and pharmacies, Complaint Counsel admits this request.

REQUEST NO. 7: *Admit that the Dental Board has not restricted the mere sale of over the counter teeth whitening products.*

RESPONSE: Complaint Counsel incorporates its General Objections in its response to this Request for Admission.

Complaint Counsel specifically objects to the use of the word "mere" as vague and ambiguous. Subject to these objections and qualifications, to the extent that "mere" means an express restriction on sale of over-the-counter teeth whitening products when such sale is unaccompanied by any other product or service component, and that "mere" excludes the adverse effect on sale of over-the-counter teeth whitening products that other restrictions may cause, Complaint Counsel admits that the Dental Board has not restricted the mere sale of branded over-the-counter teeth whitening products such as Crest White Strips through such retail outlets such as grocery stores and pharmacies.

REQUEST NO. 8: *Admit that over the counter teeth whitening products are generally lower in*

price than the prices at which non-licensed teeth whitening service providers offer their products.

RESPONSE: Complaint Counsel incorporates its General Objections in its response to this Request for Admission.

Subject to these objections and qualifications, Complaint Counsel admits this Request.

REQUEST NO. 9: *Admit that the FTC misnamed the Respondent in its Complaint.*

RESPONSE: Complaint Counsel incorporates its General Objections in its response to this Request for Admission.

Complaint Counsel specifically objects to this Request and states that no response is required inasmuch as it is irrelevant and beyond the proper scope of requests for admission in this matter under Rule 3.32.

REQUEST NO. 10: *Admit that the investigation which preceded the Complaint in this matter did not produce any direct evidence that the Dental Board had conspired to restrain trade.*

RESPONSE: Complaint Counsel incorporates its General Objections in its response to this Request for Admission.

Complaint Counsel specifically objects to this Request because the undefined phrase "direct evidence" is ambiguous and vague. Complaint Counsel further specifically objects to this Request and states that no response is required inasmuch as it is irrelevant and beyond the proper scope of requests for admission in this matter under Rule 3.32.

REQUEST NO. 11: *Admit that efforts by a private trade association to influence Dental Board rules or policies constitute constitutionally protected speech under the Noerr-Pennington doctrine.*

RESPONSE: Complaint Counsel incorporates its General Objections in its response to this Request for Admission.

Complaint Counsel specifically objects to this Request and states that no response is required inasmuch as it calls for a legal conclusion beyond the proper scope of requests for admission in this matter under Rule 3.32.

REQUEST NO. 12: *Admit that members of a state agency are presumed to be acting in good faith.*

RESPONSE: Complaint Counsel incorporates its General Objections in its response to this Request for Admission.

Complaint Counsel specifically objects to this Request and states that no response is required inasmuch as it calls for a legal conclusion beyond the proper scope of requests for admission in this matter under Rule 3.32.

REQUEST NO. 13: *Admit that the North Carolina State Ethics Commission has ruled that the mere fact that a Board member is a licensee of the Board does not constitute a conflict of interest when participating in the enforcement decisions of the Board.*

RESPONSE: Complaint Counsel incorporates its General Objections in its response to this Request for Admission.

Complaint Counsel specifically objects to the use of the word "mere" as vague and ambiguous. Complaint Counsel specifically objects to this Request and states that no response is required inasmuch as it calls for a legal conclusion beyond the proper scope of requests for admission in this matter under Rule 3.32.

REQUEST NO. 14: *Admit that no current member of the Dental Board has teeth whitening business amounting to more than 5% of their business revenues.*

RESPONSE: Complaint Counsel incorporates its General Objections in its response to this Request for Admission.

Complaint Counsel specifically objects to this Request because the phrase "business

revenues" is ambiguous and vague. Complaint Counsel further specifically objects to this Request because the phrase "their business revenues" is not defined or specified in any way in the Requests for Admission such as whether "their (current board members) business revenues" are derived from investments, non-dental businesses, or the practice of dentistry.

Subject to these objections and qualifications, Complaint Counsel admits this Request with respect to current Board members Owens, Holland, Wester, and Morgan. Complaint Counsel cannot truthfully admit or deny this Request with regard to current Board members Sadler, Howdy, and Sheppard.

REQUEST NO. 15: *Admit that teeth whitening businesses compare their services to services provided by dentists.*

RESPONSE: Complaint Counsel incorporates its General Objections in its response to this Request for Admission.

Complaint Counsel specifically objects to this Request because the undefined phrases "teeth whitening businesses," and "their services" are ambiguous and vague. For instance, dentists themselves as part of their dental practices have teeth whitening businesses, some of which are substantial.

Subject to these objections and qualifications, to the extent that this Request asks whether non-dentist providers of teeth whitening services have compared their services to competing teeth whitening services provided by dentists, Complaint Counsel admits this Request.

REQUEST NO. 16: *Admit that teeth whitening businesses promote their services as removing stains from teeth.*

RESPONSE: Complaint Counsel incorporates its General Objections in its response to this Request for Admission.

Complaint Counsel specifically objects to this Request because the phrases "teeth whitening businesses," and "their services" are ambiguous and vague. For instance, dentists themselves as part of their dental practices have teeth whitening businesses, some of which are substantial.

Subject to these objections and qualifications, Complaint Counsel admits that some dentists and non-dentists providing teeth whitening services promote their teeth whitening services as removing stains from teeth.

REQUEST NO. 17: *Admit that teeth whitening businesses promote their services as being more effective than self-administered over the counter teeth whitening products.*

RESPONSE: Complaint Counsel incorporates its General Objections in its response to this Request for Admission.

Complaint Counsel specifically objects to this Request because the phrases "teeth whitening businesses," and "more effective" are vague and ambiguous. For instance, dentists themselves as part of their dental practices have teeth whitening businesses, some of which are substantial. Complaint Counsel further objects that the Request compares a teeth whitening service to a teeth whitening product, and over-the-counter teeth whitening products such as Crest White Strips sold in grocery stores or pharmacies lack service components.

Subject to these objections and qualifications, to the extent "more effective" includes characteristics such as the amount of time required to complete the whitening process, Complaint Counsel admits that some dentists and non-dentists providing teeth whitening services promote their teeth whitening services as generating more effective results than over- the-counter teeth whitening products such as Crest White Strips sold in grocery stores and pharmacies.

REQUEST NO. 18: *Admit that there are adequate public protection grounds for state*

regulation of the practice of dentistry.

RESPONSE: Complaint Counsel incorporates its General Objections in its response to this Request for Admission.

Complaint Counsel specifically objects to the use of the word "adequate" and the phrase "public protection grounds" in this Request as ambiguous and vague.

Complaint Counsel specifically objects to this Request and states that no response is required inasmuch as it calls for a legal conclusion beyond the proper scope of requests for admission in this matter under Rule 3.32.

REQUEST NO. 19: *Admit that the North Carolina statutes include the removal of stains from teeth as the practice of dentistry.*

RESPONSE: Complaint Counsel incorporates its General Objections in its response to this Request for Admission.

Complaint Counsel specifically objects to this Request and states that no response is required inasmuch as it calls for a legal conclusion beyond the proper scope of requests for admission in this matter under Rule 3.32. Complaint Counsel further specifically objects to this Request inasmuch as the full text of the North Carolina Statute, as opposed to the Dental Board's restatement of the statute in the form of a legal conclusion, is a proper subject of judicial notice by the Court.

REQUEST NO. 20: *Admit that the North Carolina statutes include making impressions of teeth or gums in the definition of the practice of dentistry.*

RESPONSE: Complaint Counsel incorporates its General Objections in its response to this Request for Admission.

Complaint Counsel specifically objects to this Request and states that no response is

required inasmuch as it calls for a legal conclusion beyond the proper scope of requests for admission in this matter under Rule 3.32. Complaint Counsel further specifically objects to this Request inasmuch as the full text of the North Carolina Statute, as opposed to the Dental Board's restatement of the statute in the form of a legal conclusion, is a proper subject of judicial notice by the Court.

REQUEST NO. 21: *Admit that the North Carolina statutes include the offering as well as the rendering of dental services in the definition of the practice of dentistry.*

RESPONSE: Complaint Counsel incorporates its General Objections in its response to this Request for Admission.

Complaint Counsel specifically objects to this Request and states that no response is required inasmuch as it calls for a legal conclusion beyond the proper scope of requests for admission in this matter under Rule 3.32. Complaint Counsel further specifically objects to this Request inasmuch as the full text of the North Carolina Statute, as opposed to the Dental Board's restatement of the statute in the form of a legal conclusion, is a proper subject of judicial notice by the Court.

REQUEST NO. 22: *Admit that the North Carolina statutes include operating a business providing dental services in the definition of the practice of dentistry.*

RESPONSE: Complaint Counsel incorporates its General Objections in its response to this Request for Admission.

Complaint Counsel specifically objects to this Request and states that no response is required inasmuch as it calls for a legal conclusion beyond the proper scope of requests for admission in this matter under Rule 3.32. Complaint Counsel further specifically objects to this Request inasmuch as the full text of the North Carolina Statute, as opposed to the Dental Board's

restatement of the statute in the form of a legal conclusion, is a proper subject of judicial notice by the Court.

REQUEST NO. 23: *Admit that the FTC's jurisdiction does not include oversight into the procedures by which a state agency enforces clearly articulated state statutes.*

RESPONSE: Complaint Counsel incorporates its General Objections in its response to this request for Admission.

Complaint Counsel specifically objects to this Request and states that no response is required inasmuch as it calls for a legal conclusion beyond the proper scope of requests for admission in this matter under Rule 3.32.

REQUEST NO. 24*: Admit that the investigation in this matter was managed, supervised or overseen by a Commissioner who had previously been recused from participation in an FTC case involving teeth whitening products or services.*

RESPONSE: Complaint Counsel incorporates its General Objections in its response to this request for Admission.

Complaint Counsel specifically objects to this Request and states that no response is required inasmuch as it is irrelevant and beyond the proper scope of requests for admission in this matter under Rule 3.32.

General Objections

The following General Objections apply to all of Respondent's Requests for Admission and are incorporated by reference into each response. The assertion of the same, similar, or additional objections or the provision of partial answers in response to an individual request for admission does not waive any of Complaint Counsel's general objections as to the other Requests for Admission.

1. Complaint Counsel objects to Respondent's Requests for Admission to the extent that

they seek information that relates to issues that may be the subject of expert testimony in this case.

2. Complaint Counsel objects to Respondent's Requests for Admission to the extent that they are overly broad, vague, ambiguous, unduly burdensome, oppressive, and are not reasonably calculated to lead to the discovery of admissible evidence.

3. Complaint Counsel objects to Respondent's Requests for Admission to the extent that they call for information previously provided to Respondent or information that may be less onerously obtained through other means.

4. Complaint Counsel objects to Respondent's Requests for Admission to the extent that they seek information protected by deliberative process privilege, law enforcement investigative privilege, informant's privilege, or attorney work product doctrine.

5. Complaint Counsel objects to Respondent's Requests for Admission to the extent they do not relate to statements or opinions of fact or of the application of law to fact, and thereby exceed the scope of Rule 3.32, governing admissions.

6. Complaint Counsel objects to Respondent's Requests for Admission to the extent that any Request quotes from a document or references a statement and solicits an admission that the quote or statement is evidence of the truth of the matter asserted.

7. Complaint Counsel reserves all of its evidentiary objections or other objections to the introduction or use of any response at the hearing in this action and does not, by any response to any request for information, waive any objection to that request for admission, stated or unstated.

8. Complaint Counsel does not, by any response to any Request, admit to the validity of any

legal or factual contention asserted or assumed in the text of any Request for Admission.

9. Complaint Counsel's discovery and investigation in this matter are continuing. Complaint Counsel reserves the right to assert additional objections to Respondent's First Set of Requests for Admission, and to amend or supplement these objections and its responses as necessary.

10. Complaint Counsel objects to Respondent's First Set of Requests for Admission to the extent that they are directed to the Federal Trade Commission rather than to Complaint Counsel.

I state under penalty of perjury that the above Complaint Counsel's Objections and Responses to Respondent's First Set of Requests For Admission was prepared and assembled under my supervision, and that the information contained herein is, to the best of my knowledge, true and correct.

Dated: October 22, 2010

Respectfully submitted,

s/ Melissa Westman-Cherry
Richard B. Dagen
William L. Lanning
Melissa Westman-Cherry
Counsel Supporting the Complaint
Bureau of Competition
Federal Trade Commission
601 New Jersey Avenue NW
Washington, DC 20580

CERTIFICATE OF SERVICE

I hereby certify that on October 22, 2010, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-159
Washington, DC 20580

I also certify that I delivered via electronic mail and hand delivery a copy of the foregoing document to:

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., NW
Washington, DC 20580

I further certify that I delivered via electronic mail a copy of the foregoing document to:

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nla@Allen-Pinnix.com

Counsel for Respondent
North Carolina State Board of Dental Examiners

CERTIFICATE FOR ELECTRONIC FILING

I certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator.

October 22, 2010

By: s/ Melissa Westman-Cherry
Melissa Westman-Cherry