



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 SEPARATE STATEMENT OF MATERIAL FACTS
AS TO WHICH THERE ARE AND ARE NOT GENUINE ISSUES**

Pursuant to Rule 3.24(a)(2) of the FTC’s Rule of Practice, and in support of its Opposition to Complaint Counsel’s Motion for Partial Summary Decision, Respondent North Carolina State Board of Dental Examiners (“State Board” or “Respondent”) submits this Separate Statement of Material Facts as to Which There Are and Are Not Genuine Issues (“Counter-Statement”), addressing and responding to Complaint Counsel’s FTC Rule 3.24 Separate Statement of Materials Facts to Which There Is No Genuine Issue (“Statement of Material Facts”).

Respondent, in compliance with FTC Rules 3.24(a)(2) and 3.24(a)(3), supports this Counter-Statement and the Material Facts set forth herein by providing depositions, declarations, and sworn certifications, all of which set forth such facts as would be admissible in evidence, and specific facts showing that there is a genuine issue of material fact for trial, which may or may not be disputed.

Respondent’s provision of a response to any material fact presented in the Statement of Material Facts shall not constitute a waiver of any applicable objection, privilege, or other right. Where required, in order to respond to the Statement of Material

Facts, Respondent represents that it has undertaken good faith efforts to identify the information that would allow it to admit or deny such matters presented as material facts. Respondent hereby reserves the right to supplement this Counter Statement in the event it becomes necessary to do so.

OBJECTION TO COMPREHENSIVE CHARACTERIZATION

As a threshold matter, Respondent generally disputes Complaint Counsel's comprehensive characterization of the "material facts" submitted with its Statement of Material Facts as "material facts as to which there is no genuine dispute." Respondent will separately address each numbered "material fact" submitted with such statement below. As noted in this Counter Statement, the evidence cited in the record in support of many of the "material facts" presented by Complaint Counsel does not support the assertion that they are undisputed. Further, and as noted herein, many of Complaint Counsel's statements presenting "material facts" are vague and ambiguous, incomplete, or lacking in context and/or mischaracterize the "material facts" they purport to state, thus rendering the statements presented meaningless and useless as "material facts." In some of their Statements of Fact Complaint Counsel has evidenced an appalling unwillingness to educate themselves with regard to the basic legal structure and processes of North Carolina state government-- including the basic concept of judicial review. (See, for example, Respondent's responses to Statements of Fact #68, #72 and #77.) Complaint Counsel has presented such statements as "material facts" not in dispute. Respondent herewith responds that such statements are meaningless and useless, and thus are in dispute, primarily as to their meaningfulness and usefulness and only secondarily as to their substance. In sum, Complaint Counsel's Statement of Material Facts creates

more disputed issues of fact than it resolves. As such, Respondent objects to Complaint Counsel's characterization of the "material facts" presented in its Statement of Material Facts as "material facts as to which there is no genuine dispute."

OBJECTION TO RELEVANCE AND MATERIALITY

It bears noting at the outset of this separate statement that a substantial number of the matters presented as material facts by Complaint Counsel are not relevant or material to the matter before the Commission – Complaint Counsel's Motion for Partial Summary Decision, which requests that the Commission rule as a matter of law. Respondent notes its objections on materiality and relevance grounds generally here, and reserves the right to object to such matters on that basis.

OBJECTION TO ABSENCE OF INDEPENDENT VERIFICATION

As another threshold matter, Respondent objects to the absence of independent verification as to the eighty matters presented by Complaint Counsel as "Material Facts" in the Statement of Material Facts. The Statement of Material Facts presents these eighty matters as standing for the truth of each matter asserted as undisputed, and, incidentally, true. The Statement of Material Facts, while supported by Complaint Counsel's Declaration, including a "certification" of exhibits as being "true and correct copies of documents," is not separately supported by any sworn affidavit, or any other independent third-party verification. The "certified" exhibits, while including items such as deposition testimony and statutory references, do not meet the Rule 3.24(a)(3) standard of providing "supporting affidavits" which must "set forth the specific facts showing that there is a genuine issue of material fact for trial." This absence of independent verification of material facts deprives Respondent of the ability to directly ascertain the

veracity of the matters presented and asserted, unless the party asserting veracity -- Complaint Counsel -- would choose to provide verification. The result of the absence of independent verification of asserted material and undisputed facts and the fact that Complaint Counsel has failed to provide the same (whether or not required by rule) is that Complaint Counsel has *ipso facto* attempted to appropriate the role of presumed arbiter of fact in this proceeding. Respondent objects to this. If accepted by the Commission, this would be violative of due process. Respondent, with this Counter Statement, is providing exhibits that do meet the Rule 3.24(a)(3) standard.

Based on the absence of independent verification, Respondent objects to the resulting assertion of each one of the eighty unverified Material Facts presented in Complaint Counsel's Statement of Material Facts as undisputed and standing for the truth of the matters asserted. In addition, Respondent notes that these objectionable flaws in Complaint Counsel's presentation of Material Facts in the Statement are replicated in its "Memorandum In Support" of the Motion for Partial Summary Decision, wherein many of the unverified and otherwise objectionable "Material Facts" presented in the Statement of Material Facts are referenced and wrongfully presented as undisputed and standing for the truth of the matters asserted.

GENERAL OBJECTIONS

The following general objections apply to each of Complaint Counsel's "Material Facts" as presented in the Statement of Material Facts and are in addition to specific objections, if applicable.

1. Respondent objects to Complaint Counsel's Statement of Material Facts to the extent that they call for the disclosure by Respondent of material protected by one or more of the following privileges:

- a. Attorney-client privilege;
- b. Work product privilege; and
- c. Deliberative process privilege.

2. To the extent that Respondent responds to specific statements of material fact to which it has objected, Respondent reserves the right to maintain such objections with respect to any additional information, and such objections are not waived by the furnishing of such information.

3. Respondent does not, by virtue of replying to any statement of material fact, admit to any legal or factual contention asserted in the text of any material statement, except as expressly stated.

4. Respondent objects to each statement of material fact to the extent that each calls for information that is not in the possession, custody, or control of Respondent.

5. To the extent that any statement of material fact 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, Respondent objects on grounds of hearsay.

6. Respondent objects generally because no definitions were provided for any terms referenced in the statements of material fact and many of the terms are open to widely different interpretations, making many of the statements of material fact inherently vague and ambiguous. Respondent, however, has made a good faith effort to respond to Complaint Counsel's Statement of Material Facts.

COUNTER STATEMENT

Therefore, Respondent submits the following Counter-Statement, demonstrating that there are many genuine issues in dispute; that Complaint Counsel's Motion for Partial Summary Decision should be denied; and, that Respondent's Motion to Dismiss should be granted. The statements below are numbered to correspond to Complaint Counsel's Statement of Material Facts. All exhibits referred to herein are attached to the Declaration of Alfred P. Carlton, Jr., which was filed separately this same date.

1. The North Carolina State Board of Dental Examiners ("Board") consists of six practicing dentists, a hygienist, and a consumer representative.

Respondent does not dispute Complaint Counsel's Statement of Material Fact #1.

2. Of the eight Board members, only the consumer representative is selected by North Carolina public officials.

Respondent does not dispute Complaint Counsel's Statement of Material Fact #2.

3. The dentist Board members are not elected by the citizens of North Carolina, they are elected by other dentists licensed in North Carolina.

Respondent does not dispute Complaint Counsel's Statement of Material Fact #3; however, Material Fact #3 is incomplete as to the fact asserted. The election of Board members is controlled by statute, N.C. Gen. Stat. § 90-22(b) & (c). See Tab 1, NCBOARD3483 (N.C. Dental Practice Act, Article 2).

4. The dentist members of the Board are elected for three year terms and can run for re-election. Several Board members have served two or more terms.

To the extent Complaint Counsel's Statement reflects the provisions of N.C. Gen. Stat. § 90-22, Respondent does not dispute this fact. However, N.C Gen. Stat. § 90-22(b) provides that "[n]o person shall be nominated, elected, or appointed to serve more than

two consecutive terms on said Board.” Tab 1, NCBOARD3483 (N.C. Dental Practice Act, Article 2).

5. Elections can be contested.

Respondent does not dispute Complaint Counsel’s Statement of Material Fact #5; however, Material Fact #5 is incomplete as to the fact asserted. *See* N.C. Gen. Stat. § 90-22(b) & (c) at Tab 1, NCBOARD3483 (N.C. Dental Practice Act, Article 2).

6. When this occurs, candidates may distribute letters and make speeches discussing their desire to serve North Carolina dentists. Candidates may also announce positions on issues that may come before the Board.

Respondent does not dispute Complaint Counsel’s Statement of Material Fact #6; however, Material Fact #6 contains a presupposition not subject to separate factual basis. Board members have testified that they did not campaign for a position on the Board by announcing any position on certain issues. Tab 11 [REDACTED] **REDACTED**

[REDACTED];

REDACTED Tab 14 [REDACTED]; Tab 13 [REDACTED] **REDACTED**

[REDACTED]
[REDACTED].

7. The operating budget for the Board comes from license fees paid by North Carolina dentists.

Respondent does not dispute Complaint Counsel’s Statement of Material Fact #7; however, Material Fact #7 is incomplete as to the fact asserted. *See* N.C. Gen. Stat. § 90-39 at Tab 1, NCBOARD33506 (N.C. Dental Practice Act, Article 2). The source of the Board’s operating budget comes from its licensees (both dentists and dental hygienists).

The mandatory fees paid by licensees can only be spent for public purposes. Tab 9 **REDACTED**

[REDACTED]

8. The Board election criteria and scope of authority is set forth in the Dental Practices Act.

Respondent disputes Complaint Counsel's Statement of Material Fact #8. This fact is vague and ambiguous, and contains a presupposition not subject to separate factual basis. Further, Respondent's Statement does not take into account the separate entity created by N.C. Gen. Stat. § 90-22(c)(3), that being the Board of Dental Elections. Tab 1, NCBOARD3484 (N.C. Dental Practice Act).

9. Under the Dental Act, the Board has the authority to license and take disciplinary actions against dentists practicing in North Carolina.

Respondent does not dispute Complaint Counsel's Statement of Material Fact #9; however, Material Fact #9 is incomplete as to the fact asserted. *See* N.C. Gen. Stat. §§ 90-29 through 90-38, 90-40, and 90-41.1. Tab 1, NCBOARD3490 (N.C. Dental Practice Act, Article 2).

10. The Dental Act also provides the Board with the authority to petition a North Carolina court, either on its own or with the assistance of a District Attorney, to stop violations of the Dental Act, including the unlicensed practice of dentistry.

To the extent Complaint Counsel's Statement accurately reflects the provisions of N.C. Gen. Stat. § 90-40 and 90-40.1(a), Respondent does not dispute this fact; however, Respondent disputes this fact to the extent that it contains a presupposition subject to separate factual basis. Pursuant to N.C. Gen. Stat. § 90-22(a), the North Carolina General Assembly has given the State Board the authority to "liberally construe" the Dental Practice Act to protect the public and to enforce the unauthorized practice provision. Tab 1, NCBOARD3483 (N.C. Dental Practice Act, Article 2). Respondent also disputes this fact to the extent it references the "unlicensed practice" of dentistry, which is nowhere referenced in the N.C. Dental Practice Act.

11. Under the Dental Act, the Board's only recourse against the unlawful practice of dentistry is to seek relief in a North Carolina court.

Respondent disputes Complaint Counsel's Statement of Material Fact #11. It is incorrect and misrepresents the Board's actual enforcement authority pursuant to N.C. Gen. Stat. §§ 90-40 and 40.1(a) and the N.C. Dental Practice Act generally. The North Carolina General Assembly has given the State Board the authority under N.C. Gen. Stat. § 90-22(a) to "liberally construe" the Dental Practice Act to protect the public and to enforce the unauthorized practice provision. Tab 1, NCBOARD3483 (N.C. Dental Practice Act, Article 2).

12. The Board has sought civil and criminal relief in North Carolina courts under the Dental Act.

Respondent does not dispute Complaint Counsel's Statement of Material Fact #12 as to certain actions taken by the State Board to enforce the N.C. Dental Practice Act.

13. Hydrogen or carbamide peroxide is the primary whitening agent used in the whitening of teeth. In a water based solution, carbamide peroxide breaks down into hydrogen peroxide and urea, with hydrogen peroxide being the active bleaching agent. Carbamide peroxide contains 35% hydrogen peroxide.

Respondent does not dispute Complaint Counsel's Statement of Material Fact #13. Respondent does not dispute that hydrogen peroxide and carbamide peroxide are currently the most commonly used teeth whitening agents in the United States. Respondent does not dispute that carbamide peroxide breaks down into hydrogen peroxide and urea during the teeth whitening process. Respondent does not dispute that carbamide peroxide contains approximately 35% hydrogen peroxide.

14. Hydrogen and carbamide peroxide have been used as mouth-rinses to reduce plaque in individuals with gingivitis and for treatment of periodontal diseases.

Respondent does not dispute Complaint Counsel's Statement of Material Fact #14.

However, this fact contains a presupposition subject to separate factual basis because it does not mention the percentages of either hydrogen or carbamide peroxide used for rinsing purposes. One of the dentist deponents in this matter has testified that the strength of hydrogen peroxide for the treatment of periodontal disease is approximately two percent. Tab 18 [REDACTED].

REDACTED

15. A survey conducted by Discus Dental, a manufacturer of dentist teeth whitening products, revealed that 85% of dental patients want "whiter, brighter smiles." A study by the American Academy of Cosmetic Dentistry ("AACD") found that 99.7% adult American respondents believed that a smile is an important social asset, and 74% believed an unattractive smile could hurt a person's chances for career success.

Respondent disputes Statement of Material Fact #15 as irrelevant and immaterial and to the extent the surveys were not specific to North Carolina, not relevant to the proceeding. Further, Respondent disputes this fact to the extent that it is posed to indicate an overwhelming consumer desire for teeth whitening products and services. A marketing survey conducted on behalf of the major supplier of OTC teeth whitening products concluded that interest in teeth whitening had declined in recent years. Tab 22

REDACTED

[REDACTED]
[REDACTED]
[REDACTED] Further, the same survey indicated that although consumers may view whiter teeth as desirable, most of them never purchase a whitening product. Tab 22, [REDACTED]

REDACTED

16 Currently, there are four broad categories of teeth whitening services available in North Carolina: (1) dentist in-office teeth whitening services; (2) dentist take-home teeth whitening products; (3) non-dentist teeth whitening services in salons, retail stores, and mall kiosks; and (4) over-the-counter ("OTC") teeth whitening products.

Respondent disputes Complaint Counsel's Statement of Material Fact #16.

Material Fact #16 is vague and ambiguous and contains a presupposition not subject to separate factual basis. Non-dentist teeth whitening services offered in such locations as salons, retail stores, and mall kiosks may violate the N.C. Dental Practice Act pursuant to N.C. Gen. Stat. § 90-29. Tab 1, NCBOARD3490 (N.C. Dental Practice Act, Article 2).

17. Dentist in-office teeth whitening products use a relatively high concentration of hydrogen peroxide, between 15%-50%. Because of this high concentration, dentists usually first apply an isolation dam to the gums to prevent burning. The peroxide solution is thereafter painted directly on the teeth, and a curing light is often placed in front of the teeth to activate the bleaching gel or expedite the whitening effect.

Respondent disputes Complaint Counsel's Statement of Material Fact #17. This fact is vague and ambiguous, and contains a presupposition subject to separate factual basis.

Respondent also disputes Complaint Counsel's statement to the extent that it describes the "usual" process of in-office teeth whitening. See Tab 21 [REDACTED]

REDACTED

[REDACTED]

[REDACTED]

Respondent does not dispute that the teeth whitening products used by dentists for in-office teeth whitening generally have a higher concentration of the active ingredient than that typically available in non-dentist teeth whitening.

18. Dentist in-office teeth whitening provides results in one to three hours.

Respondent disputes Complaint Counsel's Statement of Material Fact #18. This fact is vague and ambiguous as to the phrase "provides results," and contains a presupposition subject to separate factual basis. Dentists take far greater precautions when performing teeth whitening procedures on patients than those provided by unauthorized teeth whiteners in examining and interviewing the patient, as well as the actual preparations for

the procedure. See Tab 28 [CX0392-005 Tooth Whitening/Bleaching: Treatment Considerations for Dentists and Their Patients, Sept. 2009 (describing dental exam prior to teeth whitening); Tab 21 [REDACTED]

REDACTED

19. Dentist teeth whitening costs \$300 or more.

Respondent disputes Complaint Counsel's Statement of Material Fact #19. Material Fact #19 also contains a presupposition subject to separate factual basis. This statement does not differentiate between dentists who perform in-office teeth whitening and whitening via take-home products from a dentist. Dentists who offer take-home products for teeth whitening may charge less than the \$300 cited by Complaint Counsel. Tab 11 [REDACTED]

REDACTED

[REDACTED]; Tab 8

REDACTED

Further, dentists' teeth whitening fees are tied to "office overhead," which can be substantial. Tab 14 [REDACTED]

REDACTED

Also, the prescription strength teeth whitening materials are a considerable up-front expense. Tab 13 [REDACTED]

REDACTED

20. Two of the more popular in-office products are Zoom and Bright Smile, both made by Discus.

Respondent disputes Complaint Counsel's Statement of Material Fact #20. The phrase "more popular" is vague and ambiguous. The statement also contains a presupposition subject to separate factual basis. Respondent does not dispute that Zoom and Bright Smile are products used by dentists for in-office teeth whitening procedures.

21. Take-home kits provided by dentists can either be used as a follow-up to the inoffice treatment or as the sole whitening service. When used by themselves, take-home products can take days to whiten teeth, and requires the consumer to repeatedly apply peroxide on the teeth.

Respondent does not dispute Complaint Counsel's Statement of Material Fact

#21. However, the statement engages in presupposition as to the course of treatment.

22. Take-home kits typically cost hundreds of dollars in part because the dentist charges to fabricate the custom tray, provide instruction on use, and supply the whitening product and kit.

Respondent disputes Complaint Counsel's Statement of Material Fact #22. The statement is vague and ambiguous as to the use of the phrase "hundreds of dollars" and contains a presupposition subject to separate factual basis. In addition to the services mentioned by Complaint Counsel, dentists take far greater precautions when performing teeth whitening procedures on patients than that provided by unauthorized teeth whiteners. See Tab 28 [CX0392-005 Tooth Whitening/Bleaching: Treatment Considerations for Dentists and Their Patients, Sept. 2009 (describing dental exam prior to teeth whitening)]. In addition, the process involves at least two visits to the dentist – one for the exam and taking impressions for the custom tray, the other for delivery of the tray and instructions to the patients for use of the tray and whitening materials at home.

Tab 13

REDACTED

23. Entrepreneurs offer teeth whitening services in salons, retail stores, and mall kiosks. Typically a non-dentist provider will follow a protocol provided by a teeth whitening manufacturer or distributor. While each protocol is slightly different, all require the operator to provide the customer with literature and answer questions before the procedure begins. Some non-dentist teeth whiteners will have the customer sign a consent form. The provider will thereafter: (1) place a bib around the client's neck; (2) don protective gloves; (3) take a tray from a sealed package, which is either pre-filled with peroxide solution or which the operator fills with the peroxide solution, and hand it to the customer, who places the tray into his or her mouth; (4) have the client sit in a "comfortable chair"; (5) adjust the whitening light; and (6) start the timer. At the end of

the procedure, the customer will remove the tray and hand to the provider, who disposes it.

Respondent disputes Complaint Counsel's Statement of Material Fact #23 first and foremost because it is not a statement of fact. It is an overstatement on Complaint Counsel's part to refer to the protocol followed by all non-dentist teeth whiteners as providing literature and answering questions before the procedure, as well as following the numbered procedures (1) – (6). Statement of Fact #23 also contains a presupposition subject to separate factual basis and is premised solely on information provided by manufacturers/suppliers of three teeth whitening products/systems. The evidence from investigations conducted by Board staff is very different as to how some non-dentist purveyors of teeth whitening conduct their operations. Tab 22 (collecting investigative memorandums) [REDACTED]

REDACTED

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

REDACTED

24. Non-dentist teeth whitening provides the consumer results in one hour or less.

Respondent disputes Complaint Counsel's Statement of Material Fact #24. This statement contains a presupposition subject to separate factual basis and is vague and ambiguous as to the phrase "customer results." A teeth whitening procedure performed in a dentist's office is subject to a professional standard of care as opposed to retail establishments offering teeth whitening services that may violate the N.C. Dental Practice Act. *See* Tab 13 [REDACTED]

REDACTED

[REDACTED]

[REDACTED]. Respondent does not dispute that some non-dentist teeth whiteners advertise that they will whiten a customer's teeth in less than one hour.

25. Non-dentist teeth whitening costs substantially less than dentist teeth whitening.

Respondent disputes Complaint Counsel's Statement of Material Fact #25. This statement is vague and ambiguous as to the phrase "substantially less," and contains a presupposition subject to separate factual basis.

The presupposition unsupported by fact contained in this statement is the fees charged by dentists for performing teeth whitening services are somehow affected by the alleged competition from unauthorized providers of teeth whitening services. Dentists have offered testimony as to dentist colleagues never having expressed a concern over how their profits would be affected by the activities of non-dentist teeth whiteners or sales of

OTC products. Tab 14 [REDACTED]; Tab 10 [REDACTED]

REDACTED

[REDACTED]

REDACTED

[REDACTED]. Also see Tab 11 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]. In fact,

REDACTED

dentists have been known to recommend OTC teeth whitening products such as Crest Whitestrips to patients whom they have determined to be appropriate candidates. Tab 15

[REDACTED].

REDACTED

26. Products sold by non-dentists fall under many brand names, including White Smile USA, Brite White, Beyond White Spa, Beyond Dental & Health, Brite White, SpaWhite.

Respondent does not dispute Complaint Counsel’s Statement of Material Fact #26; however, Complaint Counsel has asserted this statement without any support.

27. Available OTC products include gels, rinses, chewing gums, trays, and strips. In a 2006 report, NBC’s Today show correspondent Janice Li[e]berman reported that in 2005, the U.S. market for OTC products was \$41.4 billion.

Respondent does not dispute Complaint Counsel’s Statement of Material Fact #27.

28. OTC strips take many days to whiten the teeth, and requires the consumer to use the product on a daily basis. This is because OTC products use less peroxide than dentist or non-dentist teeth whitening products.

Respondent disputes the use of the ambiguous phrase “many days” in Complaint Counsel’s Statement of Material Fact #28. This statement also contains a presupposition subject to separate factual basis. Further, this statement overlooks the fact that certain over-the-counter products such as Crest Whitestrips Supreme contain a higher percentage of peroxide than that contained in the products used by non-dentist teeth whiteners. Tab

23

[REDACTED]

REDACTED

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]; Tab 24 [REDACTED]

REDACTED

[REDACTED]

[REDACTED]

[REDACTED].

29. OTC strips or trays typically can cost between \$15-\$75, depending on the brand, quantity, and concentration.

Respondent does not dispute Complaint Counsel’s Statement of Material Fact #29;

however, it also contains a presupposition subject to separate factual basis. In actuality, consumers of some non-dentist teeth whitening services may spend more money to have an over-the-counter strength teeth whitening product applied to their teeth than they

would have if they had purchased and self-administered an over-the-counter kit. Tab 25

[REDACTED]

REDACTED

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

30. Non-dentist teeth whiteners in North Carolina advertise themselves as a lower cost substitute for dentist teeth whitening.

Respondent disputes Complaint Counsel's Statement of Material Fact #30 as vague and ambiguous in respect to the phrase "lower cost substitute." A teeth whitening procedure performed in a dentist's office is subject to a professional standard of care as opposed to retail establishments offering teeth whitening services that may violate the N.C. Dental Practice Act. See Tab 13 [REDACTED]; Tab 73 [collecting Declarations of current and former State Board members Stanley L. Allen, DDS; Benjamin W. Brown, DDS; Joseph S. Burnham, DDS; Clifford O. Feingold, DDS; Willis Stanton Hardesty, Jr., DDS; Charles Wayne Holland, DDS; Brad C. Morgan DDS; Ronald K. Owens, DDS; Millard W. Wester III, DDS (hereinafter "Board Member Declarations") ¶ 15].

REDACTED

Respondent does not dispute that certain teeth non-dentist whiteners have compared the costs of their services to those purported to be charged by a licensed dentist.

31. Non-dentist teeth whiteners also distinguish themselves in terms of time and convenience.

Respondent disputes Complaint Counsel's Statement of Material Fact #31 as vague and ambiguous in respect to the phrase "time and convenience." It is also vague and ambiguous as to the term "distinguish" since it does not specify from what they are being distinguished.

32. Manufacturers and distributors of non-dentist teeth whitening kits promote their products to salons, retail stores, and mall kiosks, by claiming the same, or nearly the same results as dentist teeth whitening products for a lower cost.

Respondent disputes Complaint Counsel's Statement of Material Fact #32. It is vague and ambiguous, especially in regards to the phrase "the same, or nearly the same results."

33. Dentists differentiate themselves from non-dentist teeth whiteners in terms of training, privacy, and professional ethics.

Respondent disputes Complaint Counsel’s Statement of Material Fact #33. Dentists do not advertise that they do teeth whitening and are different than teeth whiteners. They are distinguished from other providers by virtue of being licensed dentists. Further, the qualities Complaint Counsel ascribe to dentists versus non-dentists as they relate to teeth whitening are only part of the picture. The source material cited by Complaint Counsel in support of this fact contains an additional distinction that went unmentioned by Complaint Counsel – that being safety. Tab 25 [REDACTED]

[REDACTED]

REDACTED

[REDACTED]; Tab 26

REDACTED

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]; Tab 73 [Board Member Declarations at ¶16].

34. Dentist and non-dentist teeth whitening services provide near immediate results, whereas OTC products can take days or weeks to whiten teeth.

Respondent disputes Complaint Counsel’s Statement of Material Fact #34. This fact is vague and ambiguous, especially as to the use of the phrase “near immediate results,” and contains a presupposition subject to separate factual basis.

35. In-office dentist and non-dentist teeth whitening services are more convenient than OTC products because results can usually be achieved in a single session.

Respondent disputes Complaint Counsel’s Statement of Material Fact #35. The statement is vague and ambiguous as it relates to the use of the phrase “more convenient” and the term “results.” In addition, the statement pre-supposes that the results obtained by dentist in-office and non-dentist teeth whitening procedures are equal or the same, and

that is not necessarily the case. *See, e.g.*, Tab 15 [REDACTED]

REDACTED

[REDACTED]

[REDACTED]

[REDACTED]. Further, there is some “conflicting evidence” as to the dehydrating effects of bleaching lights in the teeth whitening process and whether any whitening

obtained will last. Tab 28 [CX0392-005 Tooth Whitening/Bleaching: Treatment

Considerations for Dentists and Their Patients, Sept. 2009 (“Actual color change will not be evident until 20 to 6 weeks after bleaching treatment.”)].

36. Dentist and non-dentist services provide a chair, operators to provide instruction, awareness of risks and potential results, screening (*e.g.*, no children and pregnant women), assistance in getting the peroxide to the teeth, disposing of the products, and often use of a light.

Respondent disputes Complaint Counsel’s Statement of Material Fact #36. This fact is vague and ambiguous, and contains a presupposition subject to separate factual basis.

Such general characteristics that dentists and non-dentists may have in common as they relate to teeth whitening services do not take into account the professional knowledge, skill, sanitation procedures, and numerous other benefits that patients of dentists receive

as opposed to customers of non-dentist teeth whiteners. *See* Tab 15 [REDACTED]

REDACTED

[REDACTED]

[REDACTED]; Tab 13 [REDACTED]

REDACTED

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]; Tab 28 [CX0392-005 Tooth Whitening/Bleaching: Treatment

Considerations for Dentists and Their Patients, Sept. 2009 (describing general considerations for dentists prior to teeth whitening)].

37. Teeth whitening or bleaching is the number one requested cosmetic dentistry procedure, and has become a lucrative market for dentists.

Respondent disputes Complaint Counsel's Statement of Material Fact #37. This is not one, but two separate statements and is not limited to North Carolina. This purported fact is vague and ambiguous, especially as it uses the phrase "lucrative market," and contains a presupposition subject to separate factual basis. Complaint Counsel cited a press release from the American Academy of Cosmetic Dentistry (AACD) in support of this statement. However, the AACD reported in 2005 that although teeth whitening was the most "commonly requested procedure," it only accounted for "6.5% of procedures performed in the cosmetic dental practice"). Tab 27 [NCBOARD9314, AACD, Groundbreaking Survey Provides Insight into the Incredible Growth in Cosmetic Dentistry, 5/2/05]. Further, one of the exhibits used by Complaint Counsel to support this fact actually says something different. Tab 28 [ADA003273 Tooth Whitening/Bleaching: Treatment Considerations for Dentists and Their Patients, Sept. 2009 ("Over the past two decades, tooth whitening or bleaching has become one of the most popular esthetic dental treatments." – Not the number one.)].

38. In 2007, the AACD reported that dentist teeth whitening procedures had increased more than 300% in the previous 5 years.

Respondent disputes Complaint Counsel's Statement of Material Fact #38. This fact contains a presupposition subject to separate factual basis. It is not relevant to North Carolina. Further, the press release upon which Complaint Counsel based this fact differs substantially from Complaint Counsel's statement. The press release is dated June 22,

2006. It states that whitening treatments provided by dentists “have increased more than 300% since 1996.” Tab 29 [CX0397-001, First It Was Atkins, Then It Was South Beach, Now It’s the White Smile Diet, 6/22/06]. According to the representations made by the AACD, the 300% increase came over a ten year period – not a five year period as stated by Complaint Counsel – and the increase occurred from a point in time when teeth whitening was not as prevalent as it may have been in 2001 or 2002. Tab 29, *Id.*

39. For 2006, AACD dentists reported performing an average of 70 teeth whitening procedures and revenues were \$25,000 on average (total of \$138.8 million). Procter & Gamble states that with proper marketing, dentists can earn \$100,000 to \$200,000 per year by performing teeth whitening services: “Your esthetic practice could explode overnight.”

Respondent disputes Complaint Counsel’s Statement of Material Fact #39. This fact contains a presupposition subject to separate factual basis. It is not relevant to North Carolina or the general practice of dentistry because it relates to the subspecialty of cosmetic dentistry.

Another press release issued by the AACD cites the same figures as those cited by Complaint Counsel; however, the survey results indicate that teeth whitening is still a small percentage of the practices of those who specialize as cosmetic dentists. Although these cosmetic dentists did report performing an average of 70 teeth whitening procedures in 2006, which earned them \$25,000 in revenue, the bulk of their revenues came from other procedures. Tab 30 [CX0383, American Academy of Cosmetic Dentistry, Cosmetic Dentistry Continues to Surge – Market Estimated at \$2.75 Billion]. The cosmetic dentists reported an average of 1,325 other procedures performed in 2006, for \$483,000. Tab 30, *Id.* Even among these cosmetic dentistry specialists, the

percentage of their revenue generated from teeth whitening in the year 2006 was roughly 4.8% -- hardly "lucrative." Tab 30, *Id.*

40. Some of the dentists who complained about non-dentist teeth whitening in North Carolina earned substantial revenues from teeth whitening.

Respondent disputes Complaint Counsel's Statement of Material Fact #40. This fact is vague and ambiguous as to the phrase "substantial revenues," and contains a presupposition subject to separate factual basis. Furthermore, the manner in which Complaint Counsel has presented its supportive examples is misleading. *See* Tab 31

[REDACTED]

REDACTED

To the contrary, the majority of the responses of the complainant dentists' responses to Complaint Counsel's Subpoena Duces Tecum illustrate that these dentists earn very little of their annual revenues from teeth whitening services. Most responded that teeth whitening comprised only one or two percent of their total practice revenues. Several did not perform any teeth whitening at all. Tab 31 [Charts from collected responses by complainant dentists and Board members to the Complaint Counsel Subpoenas Duces Tecum]. *Also see* Tab 11 [REDACTED]

REDACTED

[REDACTED]; Tab 73, Board Member

Declarations, ¶14.

41. Non-dentist teeth whitening services have quickly grown in popularity in North Carolina since 2005.

Respondent disputes Complaint Counsel's Material Statement of Fact #41. This purported fact is vague and ambiguous, especially as it uses the term "popularity," and contains a presupposition subject to separate factual basis. The documents cited by Complaint Counsel in support of their statement make no mention of the word "popularity" – they simply indicate an increase in the numbers of establishments offering and performing non-dentist teeth whitening.

42. The definition of what constitutes unlawful teeth whitening varied over time and among Board members.

Respondent disputes Complaint Counsel's Material Statement of Fact #42. The definition of the unlawful practice of dentistry as it relates to teeth whitening has remained the same as enacted by the N.C. Legislature in N.C. Gen. Stat. § 90-29:

(a) No person shall engage in the practice of dentistry in this State, or offer or attempt to do so, unless such person is the holder of a valid license or certificate of renewal of license duly issued by the North Carolina State Board of Dental Examiners.

(b) A person shall be deemed to be practicing dentistry in this State who does, undertakes or attempts to do, or claims the ability to do any one or more of the following acts or things which, for the purposes of this Article, constitute the practice of dentistry:

(2) Removes stains, accretions or deposits from the human teeth;

(7) Takes or makes an impression of the human teeth, gums or jaws;

(11) Owns, manages, supervises, controls or conducts, either himself or by and through another person or other persons, any enterprise wherein any

one or more of the acts or practices set forth in subdivisions (1) through (10) above are done, attempted to be done, or represented to be done;

(13) Represents to the public, by any advertisement or announcement, by or through any media, the ability or qualification to do or perform any of the acts or practices set forth in subdivisions (1) through (10) above.

Tab 1, NCBOARD3490 (N.C. Dental Practice Act, Article 2). Further, pursuant to N.C. Gen. Stat. § 9-22(a), [the North Carolina Dental Practice Act] “shall be liberally construed to carry out these objects and purposes [public health, safety, and welfare].”

Tab 1, NCBOARD3483 (N.C. Dental Practice Act, Article 2).

In addition, this fact is not supported by deposition testimony. One of the deposed Board members described the Board’s constant reference to the Dental Practice Act in its deliberations. Tab 13 [REDACTED]

REDACTED

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]. Also, the State Board’s interpretation of the statute was based on the Board’s public protection duties as they relate to the unauthorized practice of dentistry.

Tab 73, Board Member Declarations, ¶¶ 6, 15, 18, 20 and 21. The State Board formally adopted an interpretive statement incorporating its definition of the unauthorized practice of dentistry on January 9, 2010. Tab 32, NCBOARD7260, Unauthorized Practice of Dentistry.

43. Instead, the Board has chosen to “investigate[] these [non-dentist teeth whitening] matters on a case-by-case basis.”

Respondent disputes Complaint Counsel’s Statement of Material Fact #43 as being vague and ambiguous as to the term “instead.” It also contains a presupposition subject to separate factual basis. Respondent does not dispute Complaint Counsel’s Statement of Material Fact #43 as it relates to the investigation of the unauthorized practice of dentistry, including teeth whitening by non-dentists, by examining the facts and evidence relevant to that particular case. Board members and staff have offered testimony as to this approach. Tab 13 [REDACTED]

[REDACTED] **REDACTED**

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]; Tab

11 [REDACTED] **REDACTED**

[REDACTED]; Tab

19 [REDACTED] **REDACTED**

[REDACTED]

[REDACTED]

[REDACTED]; Tab 9 [REDACTED] **REDACTED**

[REDACTED].

44. The Board expressed specific concerns about the safety of non-dentist teeth whitening as compared to dentist teeth whitening and OTC teeth whitening, but has not provided evidence to support these claims.

Respondent disputes Complaint Counsel’s Statement of Material Fact #44. First and foremost, an individual who was injured as result of teeth whitening procedure conducted

at a mall kiosk has been deposed in this matter. Tab 17 [REDACTED] **REDACTED**

[REDACTED]. Also, the dentist who evaluated the individual at the request of the State Board offered testimony as to the permanent nature of the individual's injuries and the cause of the damage. Tab 18 [REDACTED] **REDACTED**

[REDACTED]
[REDACTED]
[REDACTED].

Three other individuals have reported injuries related to teeth whitening experiences at a mall kiosk and a tanning salon. Tab 33 [REDACTED] **REDACTED**

[REDACTED]
[REDACTED]; Tab 34 [REDACTED] **REDACTED**

[REDACTED]
[REDACTED]; Tab 35 [REDACTED] **REDACTED**

[REDACTED]; Tab 12 [REDACTED] **REDACTED**
[REDACTED]
[REDACTED].

Other testimony has been offered as to the difference between the safety of teeth whitening at a mall kiosk versus that provided in-office by a licensed dentist or under his/her supervision. Tab 19 [REDACTED] **REDACTED**

[REDACTED]
[REDACTED]
[REDACTED].

Finally, Respondent has provided Complaint Counsel with numerous articles to support its concerns over the safety of unauthorized teeth whitening. Some of those articles are itemized below.

- Sarah Albrecht, *What Are the Dangers of Teeth Whitening?*, eHow (Sept. 10, 2009). Albrecht's article notes that over whitening can dissolve tooth enamel and lead to increased sensitivity; going on to emphasize the potential for dangerous addiction. Tab 36, NCBOARD4917-4918.
- Juli Auclair, *Special Report: Hidden Dangers of Teeth Whitening*, WHDH News 7, NBC, Boston (Mar. 8, 2005). This news report warns against the dangers of prolonged use of hydrogen and uses personal interviews to reinforce the potential addictiveness of teeth whitening. Tab 37, NCBOARD4921-4922.
- David Chandler, *Dangers of Tooth Whitening Chemicals and Treatments*, ArticleAlley.com (Jan. 30, 2006). This article mentions that laser teeth whitening can be even more dangerous than the direct application of hydrogen peroxide, because it causes the peroxide to penetrate more deeply into the tooth. Chandler also recommends being sure that one's teeth are taken care of by a dentist prior to whitening. Tab 38, NCBOARD4919.
- Council on Clinical Affairs, American Academy of Pediatric Dentistry, *Policy on the Use of Dental Bleaching for Child and Adolescent Patients* (2009). Upon recognition of an increase in tooth whitening among children, the AAPD released this article as a review of scholarly information on the subject matter. In a policy statement, they encouraged the following: (1) the judicious use of bleaching for vital and nonvital teeth; (2) patients to consult their dentists to determine appropriate methods for and the timing of dental whitening within the context of an individualized, comprehensive, and sequenced treatment plan; (3) dental professionals and consumers to consider side effects when contemplating dental bleaching for child and adolescent patients; and (4) further research of dental whitening agents in children. Tab 39, NCBOARD4949-4951.
- *The Dangers of Teeth Whitening*, Teethwhiteninghelp.net. This article notes that there are very few risks involved in teeth whitening when "a professionally competent dentist implements a whitening procedure, and he or she follows the right process using the right combinations of chemicals, lasers, cleaning and other procedures." The author goes on to say that if used incorrectly whitening chemicals can have a number of negative and dangerous side effects. Tab 40, NCBOARD4930-4931.
- Laurel Naverson Geraghty, *The Dangers of Teeth Whitening: Getting a Brighter Smile Can Come at a Painful Price*, Prevention.com (May 10, 2006). Article highlights the problems associated with excessive teeth whitening, which can be a

“slippery slope” due to the temporary nature of bleaching solutions. Geraghty mentions the importance of consulting with one’s dentist prior to whitening, mostly because “the ADA hasn’t granted its seal of acceptance to any OTC bleaching method in part because if the mouth isn’t healthy when bleach is introduced, serious problems can result.” Tab 41, NCBOARD4925-4929.

- Michel Goldberg, Frédéric Bohin, Eric Bonnet, Anne Claisse-Crinquette, Jérôme Dartigues & Jean-Jacques Louis, *Tooth Bleaching Treatments: A Review*, ADF Medical Services Commission (2007). This review chronicles the various risks associated with tooth bleaching, concluding, “[i]t is therefore indispensable that tooth bleaching be undertaken as a result of a treatment decision made by a qualified dentist, who will provide careful supervision and proper follow-up.” Tab 42, NCBOARD4962-5011.
- Michel Goldberg, Martin Grootveld & Edward Lynch, *Undesirable and Adverse Effects of Tooth-Whitening Products: A Review*, Clin Oral Invest (June 20, 2009). This scholarly article, based strictly on scientific study, details specific dangerous effects related to the use and (potential) ingestion of the peroxide solution used in teeth whitening. After detailing numerous other proven negative effects of bleaching, the authors explicitly conclude, “[t]he informed decision to administer or not and the control of bleaching effects should stand in the hand of dental surgeons...” Tab 43, NCBOARD4952-4961.
- *How Safe Is a Bright Smile?*, GreenFacts (Apr. 4, 2007). Notes serious risks to the public regarding unregulated teeth whitening. Tab 44, NCBOARD4945-4946.
- Elisabeth Leamy & Vanessa Weber, *Teeth Whitening Kiosks at the Mall*, ABCNews.com (May 21, 2008). Focusing on Cincinnati’s Eastgate Mall, this news report gives an example of a whitening kiosk employee incorrectly identifying the chemicals used in the whitening process, and also notes the guise of professionalism in these mall kiosks. Tab 45, NCBOARD3904-3907.
- C.D.N. Morris, *Tooth Whiteners – The Legal Position*, British Dental Journal (Apr. 12, 2003). Report discusses serious risks to humans regarding the use of concentrations routinely used by illegal teeth whitening service providers. Tab 46, NCBOARD4947-4948.
- Scientific Committee on Consumer Products, Health & Consumer Protection Directorate-General, *Opinion on Hydrogen Peroxide, in Its Free Form or When Released, in Oral Hygiene Products and Tooth Whitening Products* (Dec. 18, 2007). Report describes the unacceptable dangers from teeth whitening procedures that are illegal in Europe. Tab 47, NCBOARD5012-5118.
- *Teeth Whitening at the Mall. Unsafe, But Is It Illegal?*, Teethwhiteningreviews.com (Aug. 11, 2008). This author notes that mall teeth whitening kiosks attempt to fool the consumer by dressing their non-dentist or

dental professional workers in white lab coats. The author stresses that these types of whitening procedures should always be done under the supervision of a DDS, and notes the various mall whitening stations nationwide that have been forced to shut down. Tab 48, NCBOARD3911-4008.

- *Teeth Whitening Dangers?*, Teethwhiteningreviews.com (Aug. 10, 2006). Article draws attention to the dangers of “prolonged whitening” and recommends that teeth whitening should be “done under the supervision of an expert.” The author highlights the various precautions that are taken in a dental office, but not elsewhere. Tab 49, NCBOARD4923-4924.
- Julia Temple, *Dangers of Tooth Whitening*, Associated Content (May 5, 2007). Temple highlights the potential of hydrogen peroxide to cause damage to one’s teeth. Temple’s solution to this problem: “Having the procedure done by a dentist will provide the correct method to whiten and keep your teeth and gums healthy.” The article also warns that if people continue to use peroxide after experiencing sensitivity, permanent nerve damage and loss of enamel can occur. Tab 50, NCBOARD4920.
- Susan Wornick, *Mall Teeth Whitening: Is it Safe?*, WCVBTV 5, Boston, TheBostonChannel.com (Nov. 23, 2009). This article highlights the complete lack of dental training seen in whitening kiosk employees, as well as the lack of overall regulation. Wornick also notes the fact that dentist offices mention all of the risks involved in the procedure, while whitening kiosks do not. Tab 51, NCBOARD4915-4916.

45. Non-dentist teeth whitening services are safe for 90% of users. While the remaining 10% may experience some sensitivity, less than 1% would experience a serious side effect, such as an allergic reaction. Such a reaction could also occur during an in-office dentist teeth whitening.

Respondent disputes Complaint Counsel’s Statement of Material Fact #45. The percentages referenced in this Statement are a misrepresentation of the deposition testimony cited in support of Complaint Counsel’s Statement #45. Tab 16 [REDACTED]

[REDACTED]

REDACTED

[REDACTED]; Tab 16 [REDACTED]

REDACTED

[REDACTED]. A quotation cited by

Complaint Counsel was also taken out of context and is incomplete as to the intent of the author. Tab 52 [REDACTED]

REDACTED

[REDACTED]. Finally, Complaint Counsel's reference to allergic reactions that might occur during teeth whitening is actually additional support for the performance of teeth procedures by or under the supervision of a licensed dentist. *See* Tab 28 [CX0392-008 Tooth Whitening/Bleaching: Treatment Considerations for Dentists and Their Patients, Sept. 2009 (personnel performing teeth whitening in non-dental teeth facilities "may not be prepared to provide emergency care for allergic reactions")].

46. The Board did not bring the public safety issue regarding non-dentist teeth whitening before any regulatory authority in North Carolina.

Respondent disputes Complaint Counsel's Material Statement of Fact #46. Pursuant to N.C. Gen. Stat. § 90-22, the Board is the authority charged by the N.C. General Assembly as the state agency regulating the practice of dentistry as it affects the public health, safety, and welfare of the citizens of North Carolina. Tab 1, NCBOARD3483 (N.C. Dental Practice Act, Article 2); Tab 73, Board Member Declarations, ¶ 5, 6 and 20.

As a matter of fact, the existence of a local teeth whitening kiosk was brought to the State Board's attention by the Dental Director of the Division of Medical Assistance of North Carolina's Department of Health and Human Services. Tab 53 [NCBOARD52, email from Mark Casey to Bobby White, 2/18/08 ("I know that due to potential effects on the gingival leading to cervical sensitivity that application by a licensee is critical.")]. Mr.

White also had an email exchange with Dr. Rebecca King, Section Chief of the Oral Health Section of the N.C. Department of Health and Human Services that was generally supportive of the State Board's efforts in the unauthorized practice issue. Tab 54 [NCBOARD953, email from Rebecca King to Bobby White, 3/17/08]. Mr. White recalled that Dr. King may have also reported one of the mall kiosks to the Board. Tab 19 [REDACTED]. There was also contact by Board Counsel with at least one local public health department. Tab 9 [REDACTED]

REDACTED

REDACTED

47. In or around 2004, the Board began receiving complaints from dentists and hygienists (who work for dentists and may perform teeth whitening under the supervision of a dentist) about non-dentist teeth whitening providers.

Respondent does not dispute Complaint Counsel's Material Statement of Fact #47.

However, Respondent received complaints about unauthorized teeth whitening providers from injured consumers of those services and other non-dentists as well. *See, e.g.*, Tab

55 [REDACTED]; Tab 33 [REDACTED]

REDACTED

REDACTED

48. Dentists are eligible voters in Board elections.

Respondent does not dispute Complaint Counsel's Statement of Material Fact #48 as it relates to the election of dentist Board members by North Carolina's licensed dentists. However, pursuant to N. C. Gen. Stat. § 90-22(b), the state's licensed dental

hygienists elect the dental hygienist member of the Board. Tab 1, NCBOARD3483 (N.C. Dental Practice Act, Section 2).

49. In January 2005, the District Attorney entered into a plea bargain with a salon owner that permitted her to continue whitening teeth. The Board viewed this dismissal as evidence that the District Attorney believed that “whitening in and of itself wasn’t violating the Dental Practice Act.” In March 2005, the Board received an adverse ruling involving another section of the Dental Act. As a result, the Board believed that courts would be “narrowly interpreting the Dental Act for noninvasive techniques such as teeth whitening.”

Respondent disputes the entire contents of Complaint Counsel’s Material Statement of Fact #49 to the extent that it is factually inaccurate, is comprised of multiple statements, and is conclusory in nature. This statement references the Hollywood Smiles/Brandi Temple case, No. 04-188. The salon owner made impressions of the customers’ teeth and provided them with custom made trays along with a teeth whitening kit containing a 22% carbamide peroxide solution. No tooth whitening was done on the premises. Tab 56 [REDACTED]

There was no plea bargain; the matter was corrected via an affidavit by Ms. Temple, in which she swore not to engage in the making of impressions in connection with the sale and distribution of teeth whitening kits. Tab 56 [REDACTED]

There was nothing in Ms. Temple’s affidavit about teeth whitening because she was not charged with the section of N.C. Gen. Stat. § 90-29 prohibiting the removal of stains from teeth; she was charged under the part of the statute prohibiting the making of impressions. Tab 56 [REDACTED].

Nevertheless, the DA’s cover letter states: “Enclosed please find Brandi Temple's Affidavit stating that she will no longer engage in teeth whitening as part of her spa business. As we discussed, I have taken a voluntary dismissal in the above referenced [case] after

REDACTED

REDACTED

REDACTED

receiving her Affidavit.”)]. Tab 56 [REDACTED]

[REDACTED].

REDACTED

Further, the Board did not receive an adverse ruling in the *Brunson* case. Among other matters ordered, the judge ordered that the defendant was “permanently enjoined from engaging in the practice of dentistry in North Carolina by making or taking an impression of human teeth, gums or jaws” and taxed the costs of the entire action against him. Tab 57 [NCBOARD5201, Order and Judgment, filed 3/7/05]. Finally, the Board did not come to a conclusion or belief as a result of the *Brunson* decision about how the courts

would interpret the Dental Practice Act. Tab 14 [REDACTED]

REDACTED

[REDACTED]

[REDACTED].

50. To avoid issues where the Board lacks “sufficient evidence,” a Board investigator suggested that the Board use cease and desist orders to “modify” the behavior of nonlicensed persons suspect[ed] of violating the Dental Act.

Respondent disputes Complaint Counsel’s Material Statement of Fact #50. Respondent also disputes this fact to the extent it utilizes the phrase “nonlicensed persons,” which is nowhere referenced in the N.C. Dental Practice Act. Further, the Board investigator did not suggest such use of cease and desist orders as stated in this Statement of Fact, which mischaracterizes Mr. Dempsey’s testimony. See Tab 58 [REDACTED]

[REDACTED]

REDACTED

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

REDACTED

51. The Board could have drafted an administrative rule with respect to nondentist teeth whitening, but this would have brought it under the purview of the North Carolina Rules Review Commission.

Respondent disputes Complaint Counsel’s Material Statement of Fact #51 as a statement of fact. It is vague and ambiguous and calls for a supposition or assumption of a separate fact. In actuality, the State Board did not see any necessity to promulgate a rule on the unauthorized practice of teeth whitening. Tab 13 [REDACTED]

REDACTED

[REDACTED]; Tab 14

[REDACTED]

REDACTED

[REDACTED].

52. The Board believed there was a “risk” associated with proposing such a rule change because the Legislature could alter the scope of the Board’s authority.

Respondent disputes Complaint Counsel’s Material Statement of Fact #52. It is vague and ambiguous, calls for a supposition or assumption of a separate fact, and is solely based upon one deponent’s testimony, which was based upon belief and information and not fact. Further, Complaint Counsel’s statement of fact reflects a basic lack of knowledge about the administrative rule making process in the state of North Carolina.

Tab 9 [REDACTED]

REDACTED

[REDACTED]

[REDACTED].

As stated above, the State Board did not see any necessity to promulgate a rule on the unauthorized practice of teeth whitening. Tab 13 [REDACTED]

REDACTED

[REDACTED]

[REDACTED]; Tab 14 [REDACTED]

[REDACTED]

REDACTED

[REDACTED].

53. The Board never proposed a rule to the North Carolina Legislature about the unauthorized practice of dentistry.

Respondent disputes Complaint Counsel’s Material Statement of Fact #53. It is irrelevant because the Board does not “propose rules to the North Carolina Legislature.”

Again, Complaint Counsel’s statement of fact reflects a basic lack of knowledge about the legislative and the administrative rule making processes in the state of North

Carolina. Tab 9 [REDACTED]

REDACTED

[REDACTED].

54. The Board has issued cease and desist orders as a first step against parties suspected of engaging in the unlawful practice of dentistry.

Respondent disputes Complaint Counsel’s Material Statement of Fact #54. In particular,

Respondent objects to the vague and ambiguous phrase “first step.” In every instance, and certainly in every case cited by Complaint Counsel in support of this fact, the Notice and Order to Cease and Desist was sent by the State Board only when there was *prima*

facie evidence from a credible source of a violation. See Tab 59 [REDACTED]

REDACTED

[REDACTED]

[REDACTED]; Tab 59 [REDACTED]

REDACTED

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]; Tab 59 [REDACTED]

REDACTED

REDACTED

REDACTED

[REDACTED]; Tab 59 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

55. The Board has sent at least 40 cease and desist orders to non-dentist teeth whiteners. Most orders have a bold, all capitals heading: “**NOTICE AND ORDER TO CEASE AND DESIST**” or “**NOTICE TO CEASE AND DESIST.**”

Respondent does not dispute Complaint Counsel’s Material Statement of Fact #55. However, the statement is incomplete as to the fact asserted, and Respondent wishes to respond. Some, but not all, of the letters were styled as cease and desist orders. Others were styled as cease and desist notices. Pursuant to N.C. Gen. Stat. § 90-40.1(a), the State Board is authorized to seek injunctions for the unauthorized practice of dentistry, and pursuant to N.C. Gen. Stat. § 90-40 is authorized to seek criminal prosecution for the unauthorized practice of dentistry. Further, pursuant to N.C. Gen. Stat. § 9-22(a), [the North Carolina Dental Practice Act] “shall be liberally construed to carry out these objects and purposes [public health, safety, and welfare].” Tab 1, NCBOARD3483 (N.C. Dental Practice Act, Article 2).

To further supplement its responses to Statement #55, Respondent offers its own statement of material facts relating to the cease and desist orders and letters issued by the Board:

A. The North Carolina State Board of Dental Examiners is an agency of the State of North Carolina pursuant to N.C. Gen. Stat. § 90-22(b). Tab 1, NCBOARD3483 (N.C. Dental Practice Act, Article 2).

- B. The State Board is authorized and empowered by the Legislature of North Carolina to enforce the provisions of the Dental Practice Act. Tab 1, NCBOARD3483 (N.C. Dental Practice Act, Article 2).
- C. Individual members of the State Board are sworn officers of the State of North Carolina. Tab 73, Board Member Declarations, ¶ 5.
- D. Individual members of the State Board, as sworn officials of the State of North Carolina, have as their duty the obligation to enforce the provisions of the Dental Practice Act. Tab 1, NCBOARD3483 (N.C. Dental Practice Act, Article 2); Tab 73, Board Member Declarations, ¶6.
- E. The State Board and its members have the authority to enforce the provisions of the Dental Practice Act by seeking recourse to the courts of North Carolina. N.C. Gen. Stat. §§ 90-40 & 90-40.1 at Tab 1, NCBOARD3507 (N.C. Dental Practice Act, Article 2).
- F. The State Board is not prohibited or proscribed by any statute, rule or regulation, or by any other authority, from ordering that any person or entity cease and desist from violating provisions of the Dental Practice Act. Generally, Tab 1, NCBOARD3483 (N.C. Dental Practice Act, Article 2).
- G. The State Board is authorized by the Dental Practice Act and North Carolina law to communicate its determination that any person or entity may be violating the provisions of the Dental Practice Act to that person or entity. N.C. Gen. Stat. §§ 90-22(a), 90-40 & 90-40.1 at Tab 1, NCBOARD3483 and 3507(N.C. Dental Practice Act, Article 2).

H. The State Board is authorized by the Dental Practice Act and North Carolina law to order any person or entity suspected of violating the provisions of the Dental Practice Act to cease and desist violating the provisions of the Act. N.C. Gen. Stat. §§ 90-22(a), 90-40 & 90-40.1 at Tab 1, NCBOARD3483 and 3507 (N.C. Dental Practice Act, Article 2).

I. The State Board does not have the statutory authority to independently enforce an order to any person or entity that they cease or desist violating the provisions of the Act. Generally, Tab 1, NCBOARD3483 (N.C. Dental Practice Act, Article 2).

J. The general form of “cease and desist” letters or orders utilized by the State Board is a time honored, customary, and widely accepted method of enforcing prohibitions on unauthorized practice across a broad variety of professions in North Carolina and in a large number of states. The North Carolina Board of Massage & Bodywork, which has a similar enforcement statute, N.C. Gen. Stat. § 90-634, to that of the Respondent, has made it a practice of sending cease and desist orders to unauthorized practitioners of that licensed profession. *See* Tab 60 [collecting Newsletters of the North Carolina Board of Massage & Bodywork Therapy for June 2006, Winter 2007 and Winter 2008 that mention cease and desist orders sent to unlicensed individuals and businesses, NCBOARD9326-9339]. *Also see* Tab 61 [NCBOARD9340, Newsletter of the Kansas Dental Board, Oct. 2009]; Tab 62 [REDACTED]

REDACTED

K. Several states, including North Carolina, received inquiries from a Joshua Granson, Vice President, Beyond White Spa Select, in late 2009 regarding their

enforcement activities against non-dentist teeth whiteners for the unauthorized practice of dentistry. The replies of the states of Hawaii, Pennsylvania, and North Carolina are pertinent statements. Tab 63 [REDACTED]

REDACTED

L. Many of the cease and desist letters state only that the recipient is to cease and desist "any and all activity constituting the practice of dentistry or dental hygiene" and then provide the verbatim part of the statute. *See* Complaint Counsel's Exhibit 62 (collected cease and desist letters) in support of Motion for Partial Summary Decision, filed 11/2/10.

M. Any person or entity ordered by the Dental Board to cease and desist any activity may disregard such an order. Generally, Tab 1, NCBOARD3483 (N.C. Dental Practice Act, Article 2; Tab 15 [REDACTED]

REDACTED

[REDACTED]; Tab 19 [REDACTED]

REDACTED

N. Any person or entity ordered by the State Board to cease and desist an activity and is aggrieved by such order, may seek judicial review of the order in the courts of North Carolina. Tab 7 [NCBOARD9309, N.C. Constitutional provisions collectively (Article I, § 18, Courts shall be open; Article I, § 19, Law of the land, equal protection of the laws; Article IV, § 13, Forms of action rules of procedure); Tab 6 [NCBOARD9277, N.C. Gen. Stat. § 7A-3, Judicial power, transition provisions].

O. In some instances, the recipient of a cease and desist letter made an informal showing that what they were doing was not barred by statute (notwithstanding their marketing material or what a witnesses reported), and the State Board closed their file with no further action. See Tab 64 [REDACTED]

[REDACTED]

REDACTED

[REDACTED]

[REDACTED]

P. In the event a person or entity disregards an order to cease and desist any activity issued by the State Board, the Board is authorized by the Dental Practice Act to seek enforcement of that order in the courts of North Carolina by injunctive relief. N.C. Gen. Stat. § 90-40.1 at Tab 1, NCBOARD3507 (N.C. Dental Practice Act, Article 2).

Q. Complaint Counsel has cited no legal authority that such a cease and desist letter that orders people to stop violating the Dental Practice Act is an *ultra vires* act of the State Board, a violation of any antitrust statute or, for that matter, a violation of any state or federal law. Complaint Counsel has made no presentation of fact that any such cease and desist letter has restrained any lawful activity. Complaint Counsel's Motion for Partial Summary Decision and Memorandum in Support, filed 11/2/10.

56. After learning that Georgia-based White Science, a manufacturer of non-dentist teeth whitening kits, was "assisting clients to accelerate the whitening process with an LED," the Board sent an order with the cease and desist heading. The order continued: "The Board hereby directs your company to cease its activities unless they are performed or supervised by a properly licensed North Carolina dentist."

Respondent disputes Complaint Counsel’s Material Statement of Fact #56. The letter in question was captioned “Notice to Cease and Desist.” It was not styled as an order. The letter also advised that the Board would seek enforcement via the court system. Tab 65

[REDACTED]

REDACTED

[REDACTED]

[REDACTED]

[REDACTED]; Tab 9 [REDACTED]

REDACTED

[REDACTED].

57. Testimony of Board members and Board staff confirm that these cease and desist orders were intended as orders from a state agency to stop teeth whitening activities.

Respondent disputes Complaint Counsel’s Material Statement of Fact #57. The letters styled as orders were intended to warn the recipient that what they were doing was potentially illegal and requested that they stop. See Tab 19 [REDACTED]

REDACTED

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

REDACTED

[REDACTED]

[REDACTED]; Tab 15 [REDACTED]

REDACTED

[REDACTED]

[REDACTED]

[REDACTED] Tab 13 [REDACTED]

REDACTED

[REDACTED]

[REDACTED]

[REDACTED].

58. Recipients of the cease and desist orders also believed it was an order from a state agency to stop teeth whitening activities. The owner of Modern Enhancement salon stated that she would “no longer perform this service as per your order to stop and will no longer perform teeth whitening services unless told otherwise by the NC Board of Dental Examiners.”

Respondent disputes Complaint Counsel’s Material Statement of Fact #58 as incomplete, and it presupposes a separate fact as to the belief of the recipients of the letters. The owner’s letter also informed the Board of misrepresentations that the product manufacturer had made to her about the legality of using their teeth whitening system.

Tab 24 [REDACTED]

REDACTED

[REDACTED]

[REDACTED]

[REDACTED].

59. Pamela Weaver, owner of Amazing Grace Spa, received a cease and desist order that was sent on March 21, 2007. On March 27, 2007, Ms. Weaver responded stating that she had received the order and “immediately removed it [teeth whitening machine] from the salon where I rent and have not used it since that time.”

Respondent disputes Complaint Counsel’s Material Statement of Fact #59 as it contains inaccuracies. Ms. Weaver was not the owner of establishment. Tab 66 [REDACTED]

REDACTED

[REDACTED]

REDACTED

[REDACTED]. Further, Ms. Weaver had already ceased use of the Brite

White machine prior to the receipt of the Board’s letter. Tab 66 [REDACTED]

REDACTED

[REDACTED]

[REDACTED]

[REDACTED]

60. Contemporaneous emails, letters, and reports drafted by Board members and Board staff confirm that the documents sent were cease and desist orders.

Respondent does not dispute Complaint Counsel’s Statement of Material Fact #60 that a number of the documents were styled as cease and desist orders and that they were referred to by Board members and staff as cease and desist orders.

61. The Board sent orders to mall operators stating that non-dentist teeth whitening was unlawful, and asked them not to lease space to these businesses.

Respondent disputes Counsel’s Material Statement of Fact #61. The term “order” appears nowhere on the letters in question. See Tab 7 of Exhibits to Complaint Counsel’s Rule 3.24 Separate Statement of Material Facts to Which There Is No Genuine Issue (collecting orders). The letters correctly stated that the unauthorized practice of dentistry was a misdemeanor pursuant to N.C. Gen. Stat. § 90-40. The letters did not ask the mall operators not to lease space to teeth whitening businesses operated by non-dentists. Further, the letters stated that “[t]he Dental Board would be most grateful if your company would assist us in ensuring that property owned or managed by your company is not being used for improper activity that could create a risk to the public health and safety.” Tab 9 [REDACTED]

[REDACTED]

REDACTED

[REDACTED]

REDACTED

[REDACTED]

[REDACTED]

[REDACTED] See also Tab 11 [REDACTED]

REDACTED

[REDACTED]; Tab 10 [REDACTED]

REDACTED

[REDACTED]

Similar letters have been sent by other North Carolina licensing boards. For example, the North Carolina Board of Massage & Bodywork Therapy sent “informational letters” to all major shopping malls and all major airports in the state apprizing them of the requirement that persons providing massage and bodywork therapy in those locations be licensed. Tab 60 [NCBOARD9320, Board newsletter, Winter 2007 and NCBOARD9324, Board newsletter, Winter 2008].

62. The Board has acknowledged that it did not believe that commercial property owners would be violating the law by leasing space to non-dentist teeth whiteners.

Respondent does not dispute Complaint Counsel’s Statement of Material Fact #62.

Board Counsel testified that the Board has no intention of taking any action against mall owners. Tab 9 [REDACTED]

REDACTED

63. Mall operators were reluctant to lease space to non-dentist teeth whitening operations.

Respondent disputes Complaint Counsel’s Material Statement of Fact #63. There is no evidence that the letters had more than a transitory effect on the leasing policies of those companies that received them. One of the mall management companies that received a letter currently has teeth whitening tenants at two of its three North Carolina malls. Tab

67 [REDACTED]

REDACTED

[REDACTED]

REDACTED

[REDACTED]

64. The Board also contacted the North Carolina Cosmetology Board to enlist its assistance. Respondent informed the Cosmetology Board that non-dentist teeth whitening was unlawful. At the Respondent's request, the Cosmetology Board posted a statement in its newsletter and on its website that non-dentist teeth whitening was unlawful.

Respondent does not dispute Complaint Counsel's Material Statement of Fact #64 to the extent that it initiated contact with the North Carolina Board of Cosmetic Arts Examiners about the subject of non-dentist teeth whitening. Tab 11 [REDACTED]

REDACTED

[REDACTED]

[REDACTED]

Board Counsel has also cited several distressed telephone calls that the State Board received from cosmetologists as a motivating factor behind the communication with the Board of Cosmetic Arts Examiners. Tab 9 [REDACTED]

REDACTED

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Respondent disputes Statement of Fact #64 to the extent that it requested the Board of Cosmetic Art Examiners to post a statement on its website. See Tab 68 [NCBOARD1187, email from Carolin Bakewell to Mr. Van Essen, 2/7/07 (requesting a notice to be posted in the Board's newsletter)]. Respondent also submits that co-operation between licensing boards in the same state where there might be an overlap of enforcement authority is not uncommon. See, e.g., Tab 69 [NCBOARD9316, Minutes of

the N.C. Board of Massage & Bodywork Therapy (“Committee discussed the authority of the Board to send a cease and desist order to a licensee of another profession who is practicing or advertising massage or bodywork therapy.”)].

65. The Cosmetology Board also informed cosmetologists that they were not permitted to practice teeth whitening because of the Respondent’s position.

Respondent disputes Complaint Counsel’s Statement of Material Fact #65 to the extent that the N.C. Board of Cosmetic Arts Examiners informed cosmetologists that they were not permitted to practice teeth whitening because of the State Board’s position. The proposed text of the newsletter cited the provisions of N.C. Gen. Stat. ¶ 90-29 as the reason why “[o]nly a licensed dentist or dental hygienist acting under the supervision of a licensed dentist may provide these services.” Tab 68 [NCBOARD1189, text of proposed newsletter article]. See Tab 66 [REDACTED]

REDACTED

66. Consumers were deprived of a less expensive alternative to dentist teeth whitening, as well as competition between the two means of service.

Respondent disputes Complaint Counsel’s unsupported Material Statement of Fact #66 to the extent that it contains a conclusion unsupported by the narrative contained in the statement itself. Consumers may avail themselves of many brands of over-the-counter teeth whitening products that are often less expensive alternatives to the teeth whitening services and products offered by licensed dentists, as well as those offered by non-dentists. See Tab 70 [Complaint Counsel’s Exhibits CX0381 (Crest White Strips for \$65; CX0382, Crest 3D White Whitestrips for \$43.97; CX0394, Aquafresh White Trays Kit for \$26.99)].

Further, in order for competition to exist, there must be a legal means of competing. There is an assumption in Statement #66 that there is competition between two means of service that are equal. If one of the means of service is illegal as it violates the Dental Practice Act, it is not a means of competing. If one means of service involves licensed dentists and the other does not involve licensed dentists, then it does not involve competing.

67. The Dental Act grants the Board authority to address non-dentist teeth whitening only through petitioning the courts.

Respondent disputes Complaint Counsel's Statement of Material Fact #67. The North Carolina General Assembly has given the State Board the authority to "liberally construe" the Dental Practice Act to protect the public and to enforce the unauthorized practice provision." N.C. Gen. Stat. § 90-22(a). Tab 1, NCBOARD3483 (N.C. Dental Practice Act, Article 2). Under the operation of N.C. Gen. Stat. §§ 90-40 (making the unauthorized practice of dentistry a misdemeanor) and 90-40.1 (enjoining unlawful acts), the Board has clearly been granted the authority to notify prospective defendants in advance of initiating a judicial proceeding. Tab 1, NCBOARD3507 (N.C. Dental Practice Act, Article 2). Also, any person or entity receiving a cease and desist letter could initiate a declaratory ruling proceeding pursuant to N.C. Gen. Stat. § 150B-4. Tab 5, NCBOARD3416 (Chapter 150B, Administrative Procedure Act). Further, any person or entity receiving a cease and desist letter has the ability to pursue relief in the courts of the State of North Carolina if they feel they have been aggrieved. Tab 7 [NCBOARD9309, N.C. Constitutional provisions collectively (Article I, § 18, Courts shall be open; Article I, § 19, Law of the land, equal protection of the laws; Article IV, §

13, Forms of action; rules of procedure)]; Tab 6 [NCBOARD9277, N.C. Gen. Stat. § 7A-3, Judicial power, transition provisions].

68. The North Carolina legislature sought to provide anyone accused of the unlawful practice of dentistry with due process and other attendant guarantees of fairness by an unbiased court.

Respondent does not dispute Complaint Counsel's Statement of Material Fact #68. However, this statement is incomplete and limiting as to the fact asserted. It does not, but should comprehend the principle of judicial review. The North Carolina Constitution guarantees, and the North Carolina General Assembly has provided the means for any aggrieved person to independently access the state's courts, though not necessarily pursuant to the provisions of the Dental Practice Act. Tab 6 [NCBOARD9309, N.C. Constitutional provisions collectively (Article I, § 18, Courts shall be open; Article I, § 19, Law of the land, equal protection of the laws; Article IV, § 13, Forms of action; rules of procedure)]; Tab 6 [NCBOARD9277, N.C. Gen. Stat. § 7A-3, Judicial power, transition provisions].

69. Neither the Dental Act nor the Board's rules reference authority to issue cease and desist orders.

Respondent disputes Complaint Counsel's Statement of Material Fact #69. N.C. Gen. Stat. § 90-22(a) provides that: "The practice of dentistry in the State of North Carolina is hereby declared to affect the public health, safety and welfare and to be subject to regulation and control in the public interest. It is further declared to be a matter of public interest and concern that the dental profession merit and receive the confidence of the public and that only qualified persons be permitted to practice dentistry in the State of North Carolina. This Article shall be liberally construed to carry out these objects and purposes." Tab 1, NCBOARD3483 (N.C. Dental Practice Act, Article 2).

Under the operation of N.C. Gen. Stat. §§ 90-40 (making the unauthorized practice of dentistry a misdemeanor) and 90-40.1 (enjoining unlawful acts), the Board has clearly been granted the authority to notify prospective defendants in advance of initiating a judicial proceeding. Tab 1, NCBOARD3507 (N.C. Dental Practice Act, Article 2). Respondent also incorporates by reference its proffer of Material Statements of Fact at its response to Material Fact #55 and #67.

70. The Board admits in its Response that it lacks authority to order someone to cease the unlicensed practice of dentistry.

Respondent disputes Complaint Counsel's Statement of Material Fact #70. Respondent also disputes this fact to the extent it references the "unlicensed practice" of dentistry, which is nowhere referenced in the N.C. Dental Practice Act. The State Board was not prohibited in any way from sending cease and desist letters to those persons and entities engaged in the unauthorized practice of dentistry. Testimony has been offered by Board staff and Board members that the cease and desist letters were in the nature of a request and not an order. Tab 19 [REDACTED]

REDACTED

[REDACTED]

[REDACTED]

[REDACTED]; Tab 15 [REDACTED]

REDACTED

[REDACTED]; Tab 13 [REDACTED]

REDACTED

[REDACTED]

[REDACTED]

[REDACTED]

If a recipient chose to ignore the cease and desist letter, the State Board's only recourse was to enforce its order was to seek judicial enforcement. Hence, the Board's

Response to the Complaint that “no kiosk, spa or other provider of teeth whitening services by a nondentist could actually be forced to stop operations unless the Board obtained either a court order or the cooperation of a district attorney in a criminal conviction and a court judgment.” Tab 71, State Board’s Response to Complaint, 7/6/10, ¶19.

Respondent also incorporates by reference its response to Complaint Counsel’s Material Statements of Fact #55, including its own statement of facts contained therein.

71. Individual Board members acknowledge that the North Carolina Legislature never contemplated that the Board would issue cease and desist orders of its own accord.

Respondent disputes Complaint Counsel’s Statement of Material Fact #71. There is no support in the deposition testimony, any evidentiary matters produced in discovery, or otherwise, to support of this statement. The deposition excerpts offered by Complaint Counsel speak to the Board’s general authority to enforce the Dental Practice Act and not to the intent of the North Carolina General Assembly.

72. The Board claims it is supervised by the North Carolina Governor, Secretary of State, Attorney General and Ethics Commission, and the courts. As shown below, none of these entities actively supervises the Board.

Respondent disputes Complaint Counsel’s Statement of Material Fact #72. Statements numbers 72-80 demonstrate a lack of knowledge regarding North Carolina law and the structure and processes of North Carolina State government generally and the Dental Practice Act in particular. Complaint Counsel offers no evidentiary support for the first sentence of statement #72. As shown below, the Board is actively supervised by many agencies and officials of the State of North Carolina. Government supervision, state oversight, legislative oversight and supervision, statutory transparency, and

accountability over, and limitations on, the activities of the State Board are demonstrated by the following provisions of the North Carolina General Statutes and Constitution:

- N.C. Gen. Stat. § 6-19.1. Attorney's fees to parties appealing or defending against agency decision. Tab 6, NCBOARD9276.
- N.C. Gen. Stat. § 7A-3. Judicial power, transition provisions Tab 6, NCBOARD9277.
- N.C. Gen. Stat. § 50-13.12(a)(1). Forfeiture of licensing privileges for failure to pay child support or for failure to comply with subpoena issued pursuant to child support or paternity establishment proceedings. Tab 6, NCBOARD9278.
- N.C. Gen. Stat. § 55B-2(3). Definitions [re Professional Corporations]. Tab 6, NCBOARD9280.
- N.C. Gen. Stat. § 66-58(a) & (e). Sale of merchandise or services by governmental units. Tab 6, NCBOARD9282.
- N.C. Gen. Stat. § 66-68(a) & (e). Certificate to be filed; contents; exemption of certain partnerships and limited liability companies engaged in rendering professional services; withdrawal or transfer of assumed name. Tab 6, NCBOARD9291.
- N.C. General Statutes, Chapter 90, Article 2, Dentistry. Tab 1, NCBOARD3483.
- N.C. General Statutes, Chapter 93B, Occupational Licensing Boards, Tab 2, NCBOARD3405.
- N.C. Gen. Stat. § 114-8.2. Charges for legal services. Tab 6, NCBOARD9294.
- N.C. Gen. Stat. § 115C-457.1. Creation of [Civil Penalty and Forfeiture] Fund; administration. Tab 6, NCBOARD9295.
- N.C. Gen. Stat. § 115D-89. State Board of Community Colleges to administer Article; issuance of diplomas by schools; investigation and inspection; rules. Tab 6, NCBOARD9296.
- N.C. Gen. Stat. § 120-70.101. Purpose and powers of Legislative Administrative Procedure Oversight Committee. Tab 6, NCBOARD9297.
- N.C. General Statutes Chapter 132, Public Records. Tab 3, NCBOARD3464.

- N.C. Gen. Stat. § 138-5. Per diem and allowances of State boards, etc. Tab 6, NCBOARD9298.
- N.C. General Statutes, Chapter 143, Article 33C, Meetings of Public Bodies, Tab 4, NCBOARD3456.
- N.C. Gen. Stat. § 143B-8. Unassigned functions. Tab 6, NCBOARD9300.
- N.C. Gen. Stat. § 147-64.6(c)(7). Auditor's duties and responsibilities. Tab 6, NCBOARD9305.
- N.C. Gen. Stat. § 147-69.3. Administration of State Treasurer's investment programs. Tab 6, NCBOARD9305.
- N.C. General Statutes, Chapter 150B, Administrative Procedure Act. Tab 5, NCBOARD3411.
- N.C. Gen. Stat. § 153A-134. Regulating and licensing businesses, trades, etc. [counties]. Tab 6, NCBOARD9307.
- N.C. Gen. Stat. § 160A-194. Regulating and licensing businesses, trades, etc. [cities]. Tab 6, NCBOARD9308.

The applicable North Carolina Constitutional provisions include:

- Article I, § 18. Courts shall be open.
- Article I, § 19. Law of the land, equal protection of the laws.
- Article I, § 32. Exclusive emoluments.
- Article I, § 34. Perpetuities and monopolies.
- Article IV, § 13. Forms of action; rules of procedure.

Tab 7 [NCBOARD9309-9313, collected N.C. Constitutional provisions].

73. — The Board files audited financial statements with the Secretary of State. The statement includes an auditor's report, balance sheet, cash flow statement, and notes about key changes to the Board's profile such as changes in general fixed assets. This report provides no information about actions against non-dentist teeth whiteners. As a result, the Secretary of State does not provide any supervision, let alone a prior pointed reexamination, of Board decisions or how to apply the Dental Act.

Respondent disputes Complaint Counsel's Statement of Material Fact #73.

Statement #73 contains a conclusion unsupported by the narrative contained in the statement itself. As such, it is not a statement of fact. Government supervision over the activities of the State Board is demonstrated by the provisions of the North Carolina General Statutes as listed, *supra*, in Respondent's response to Statement #72.

74. The Board also files an Annual Report to the Governor, Secretary of State, Attorney General, and Joint Legislative Administrative Oversight Committee. The report includes information about the Board's meetings, examinations, hearings, investigations, and accomplishments. However, the report provides no information about actions against non-dentist teeth whiteners. As a result, these entities do not provide any supervision, let alone a prior pointed reexamination, of Board decisions or how to apply the Dental Act.

Respondent disputes Complaint Counsel's Statement of Material Fact #74.

Statement #74 contains a conclusion unsupported by the narrative contained in the statement itself. As such, it is not a statement of fact. Government supervision over the activities of the State Board is demonstrated by the provisions of the North Carolina General Statutes as listed, *supra*, in Respondent's response to Statement #72.

75. Board members file statements of economics interest ("SEIs") with the North Carolina State Ethics Commission ("N.C. Ethics Commission").

Respondent does not dispute Complaint Counsel's Statement of Material Fact

#75. Tab 73, Board Member Declarations, ¶¶ 11 and 17 (members had no financial interest in the restraint of non-dentist teeth whitening).

76. The Board claims that the N.C. Ethics Commission has "direct oversight" over the Board. Perry Newson, Executive Director of the N.C. Ethics Commission, declares this position "too broad." The Ethics Act regulates conduct related to the Ethics Act and Lobbying Law, and does not cover substantive acts taken by the Board. The Act does not even require members of the Board to identify income from dentist teeth whitening services. As a result, the N.C. Ethics Commission does not provide any supervision, let alone a prior pointed reexamination, of Board decisions or how to apply the Dental Act.

Respondent disputes Complaint Counsel’s Statement of Material Fact #76. A review of Mr. Newson’s Declaration reveals that his statement was not responsive as to whether or not the N.C. Ethics Commission “has ‘direct oversight’ over the Board.” Mr. Newson did respond that the Ethics Commission “regulates the Dental Board’s conduct as it pertains to compliance with the Ethics Act and Lobbying Law.” Tab 72, Declaration of Perry Newson, date, § 15. *See also* Tab 6 [NCBOARD9299, N.C. Gen. Stat. § 138A-39(a) (“Within 30 days of notice of the Commission’s determination that a public servant has a disqualifying conflict of interest, the public servant shall eliminate the interest that constitutes the disqualifying conflict of interest or resign from the public position.”)]; Tab 73, Board Member Declarations, ¶¶ 10, 11, 12, 13, 17, and 19.

Additionally, Statement #76 contains a conclusion unsupported by the narrative contained in the statement itself. As such, it is not a statement of fact. Government supervision over the activities of the State Board is demonstrated by the provisions of the North Carolina General Statutes as listed, *supra*, in Respondent’s response to Statement #72.

77. The Board also claims it is actively supervised because notes or minutes about “enforcement actions” are publicly available. Tab 2, ¶19 (Board Response). However, by the Board’s own admission, “enforcement actions regarding the unauthorized practice of dentistry are . . . addressed by the Board in closed session.” Accordingly, the Open Records Act does not provide a mechanism by which any entity can provide supervision, let alone a prior pointed reexamination, of Board decisions or how to apply the Dental Act.

Respondent disputes Complaint Counsel’s Statement of Material Fact #77. This statement of fact demonstrates a lack of knowledge regarding North Carolina law generally and the Dental Practice Act in particular. For example, Respondent assumes that the North Carolina Act referenced in the last sentence of Statement #77 is either the

North Carolina Public Records Act or the North Carolina Open Meetings Law – not the “Open Records Act” because there is no such Act. Statement #77 contains a conclusion unsupported by the narrative contained in the statement itself. As such, it is not a statement of fact. In addition, reference to both the North Carolina Public Records Act and the North Carolina Open Meetings Law will demonstrate that Statement #77 is erroneous. Government supervision over the activities of the State Board is demonstrated by the provisions of the North Carolina General Statutes as listed, *supra*, in Respondent’s response to Statement #72.

78. Former Board Counsel Bakewell explained in her deposition that the Joint Legislative Administrative Oversight Committee [REDACTED]

REDACTED

Respondent does not dispute that this is an accurate representation of Ms. Bakewell’s testimony in Complaint Counsel Material Statement of Fact #78. However, Ms.

Bakewell also testified: [REDACTED]

REDACTED

[REDACTED] Tab 9 [REDACTED]
[REDACTED]

REDACTED

79. Neither the Governor’s office nor the Attorney General’s office provides supervision of Board decisions or how to apply the Dental Act. As a result, there is currently no mechanism to review Board decisions to issue cease and desist orders to non-dentist teeth whitening operators before or after they are issued.

Respondent disputes Complaint Counsel’s Statement of Material Fact #79. Statement #79 contains a conclusion unsupported by the narrative contained in the statement itself. As such, it is not a statement of fact. Government supervision over the activities of the State Board is demonstrated by the provisions of the North Carolina General Statutes as listed, *supra*, in Respondent’s response to Statement #72.

Respondent also incorporates by reference herein its proffer of Material Statements of Fact at its response to Material Statements of Fact #55, and its responses to Material Facts #68 and #69.

80. As a result, there is currently no mechanism to review Board decisions to issue cease and desist orders to non-dentist teeth whitening operators before or after they are issued.

Respondent disputes Complaint Counsel's Statement of Material Fact #80. Statement #80 contains a conclusion unsupported by the narrative contained in the statement itself. As such, it is not a statement of fact. Government supervision over the activities of the State Board is demonstrated by the provisions of the North Carolina Respondent also incorporates by reference herein its proffer of Material Statements of Fact at its response to Material Statements of Fact #55, and its responses to Material Facts #68 and #69.

This the 17th day of December, 2010.

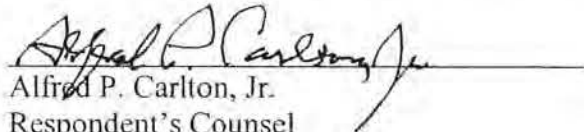
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CERTIFICATION

I state under penalty of perjury that Respondent's Separate Statement of Material Facts as to Which There Are and Are Not Genuine Issues was prepared and assembled under my supervision, and that the information contained therein, to the best of my knowledge and belief, is true and correct.


Alfred P. Carlton, Jr.
Respondent's Counsel
919-755-0505

CERTIFICATE OF SERVICE

I hereby certify that on December 17, 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. I further certify that I have also deposited an original and two copies of the foregoing with the Federal Express delivery service for next day delivery to the following address:

Donald S. Clark, Secretary
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Room H-135
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:

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

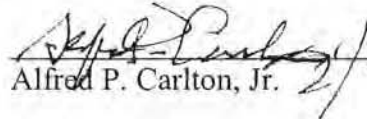
The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue N.W.
Room H-113
Washington, D.C. 20580

This the 17th day of December, 2010.


Alfred P. Carlton, Jr.

CERTIFICATION FOR ELECTRONIC FILING

I further 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 by the adjudicator.


Alfred P. Carlton, Jr.