

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



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

**MOTION FOR LEAVE TO FILE FOR *IN CAMERA*/PROTECTED
TREATMENT OF RESPONDENT'S CONFIDENTIAL INFORMATION IN THE
RECORD AND COMPLAINT COUNSEL'S POST-TRIAL FILINGS**

Pursuant to FTC Rule 3.22(a), Respondent, the North Carolina State Board of Dental Examiners (the "State Board" or "Respondent"), hereby moves the Administrative Law Judge ("ALJ") for leave to file a motion for *in camera*/protected treatment of Respondent's Confidential information in the record and in Complaint Counsel's Post-Trial Filings in accordance with Rule 3.45(e). This Motion is filed in light of the ALJ's recent Orders of May 16, 2011 and June 3, 2011 regarding Respondent's Motion to Prevent Public Posting of Complaint Counsel's Post-Trial Filings on the Federal Trade Commission Website (the "Orders"). This Motion is also filed as a result of Respondent Counsel's discussions with Complaint Counsel regarding whether Respondent ever, in fact, received 3.45(b) notice regarding Complaint Counsel's intent to use material designated as confidential by Respondent (the "Confidential Materials") at the hearing and in its Post-Trial Filings.

1. Respondent respectfully submits this Motion because the ALJ's Orders, which limit the protections provided to Respondent's Confidential Materials to only

Sensitive Personal Information as defined by Rule 3.45(b), appear to rely in part on the representation made by Complaint Counsel in its Opposition to Respondent's original motion that Complaint Counsel provided Respondent with notice regarding Complaint Counsel's intent to use Respondent's Confidential Materials according to Rule 3.45(b) by December 21, 2010 in accordance with the Scheduling Order.

2. Respondent has conferred with Complaint Counsel on several occasions in an effort to resolve this matter. During these conferences, the parties discovered Respondent had not received its 3.45(b) notice that Complaint Counsel had made a good faith effort to serve on Respondent on December 21, 2011. Upon learning that Complaint Counsel had sent such a notice, Respondent's Counsel conducted a diligent and thorough search of its files and the Board's files and could not find a record of a Rule 3.45(b) notice being received. Respondent accepts Complaint Counsel's representation that Complaint Counsel sent a 3.45(b) notice to Respondent at Respondent Counsel's proper address for delivery on December 21, 2010. Complaint Counsel accepts Respondent's representation that Respondent did not receive Complaint Counsel's 3.45(b) notice. For the remainder of this motion, both representations will be deemed true.

3. In light of the circumstances, Complaint Counsel has agreed to not oppose Respondent's Motion for Leave to File for *in camera*/protected treatment of Respondent's Confidential information in the record and in Complaint Counsel's Post-Trial Filings provided that Respondent specifically identifies with brackets the material Respondent seeks to have redacted from the record and Complaint Counsel's Public Post-Trial Filings in any subsequent motion relating to this matter. However, Complaint

Counsel has specifically indicated that it may oppose Respondent's Motion for *in camera*/protected treatment of specific materials if leave to file such Motion is granted.

4. In support of this Motion, Respondent states as follows:

a. Respondent has attempted in good faith to comply with the FTC's Rules and the ALJ's Protective Order Governing Discovery Material ("Protective Order", attached hereto as Exhibit 1) by addressing the use and disclosure of confidential information; and by designating as confidential numerous documents provided to Complaint Counsel during discovery. As noted by Respondent in its original Motion to Prevent Public Posting of Complaint Counsel's Post-Trial Brief and Findings of Fact and Conclusions of Law Containing Confidential Information on the Federal Trade Commission's Website (the "Original Motion", which Respondent incorporates herein by reference), Respondent designated this information as confidential pursuant to its obligation under North Carolina law and in accordance with the Protective Order. Respondent raised the issue of confidentiality and privilege issues with respect to Board documents at least as far back as July 23, 2008. *See* Exhibit 2, Email from Noel Allen to Melissa Westman-Cherry ("The Board is concerned about not only traditional notions of privilege, but also their obligations under state laws making investigative files confidential."). When the Board first provided the Confidential Materials to Complaint Counsel, it detailed the specific statutory authority requiring that its law enforcement files remain confidential and requested that they be treated as such. *See* Exhibit 3, Letter from Noel Allen to Melissa Westman-Cherry dated March 31, 2009. That letter stated: "The second folder contains confidential documents produced for the first time today . . . [which are] subject to all of the rights and protections afforded by applicable North

Carolina statutes, including . . . 90-41(g) (confidentiality of the Board’s investigative files).” *See id.*

b. Although Complaint Counsel sent a Rule 3.45(b) notice to Respondent, and so represented in its Opposition to Respondent’s Original Motion, for reasons unknown Respondent did not receive the notice.

c. Absent such notice pursuant to the Scheduling Order, Respondent did not have the appropriate opportunity under the Scheduling Order to move for *in camera* treatment regarding confidentially designated documents Complaint Counsel intended to use at the hearing or in its Post-Trial Proposed Findings.

d. Respondent notes that it has attempted to comply in good faith with the ALJ’s Order of May 16, 2011 on this issue, and accordingly provided a letter to Complaint Counsel on May 20, 2011 with a courtesy copy to the ALJ generally describing which information Respondent considers to be confidential pursuant to North Carolina law and which should be redacted from Complaint Counsel’s Proposed Findings in accordance with Rule 3.45(e). A redacted copy of that letter is attached hereto as Exhibit 4.

WHEREFORE, Respondent requests that the ALJ permit Respondent to file a motion and make a showing in accordance with the procedures outlined in Rule 3.45(b) as to the specific documents for which Respondent seeks redacted treatment in the record and Complaint Counsel’s Post-Trial Filings.

This the 6th day of June, 2011.

ALLEN AND PINNIX, P.A.

/s/ M. Jackson Nichols

By: _____

Noel L. Allen
Alfred P. Carlton, Jr.
M. Jackson Nichols
Attorneys for Respondent
Post Office Drawer 1270
Raleigh, North Carolina 27602
Telephone: 919-755-0505
Facsimile: 919-829-8098
Email: mjn@allen-pinnix.com

CERTIFICATE OF SERVICE

I hereby certify that on June 6, 2011, 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:

Donald S. Clark, Secretary
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Room H-113
Washington, D.C. 20580

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

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

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Federal Trade Commission
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Michael J. Bloom
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Washington, DC 20580
lprice@ftc.gov

Michael Turner
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Room NJ-6264
Washington, DC 20580
mturner@ftc.gov

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

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue N.W.
Room H-110
Washington, D.C. 20580
oalj@ftc.gov

This the 6th day of June, 2011.

/s/ M. Jackson Nichols

M. Jackson Nichols

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.

/s/ M. Jackson Nichols

M. Jackson Nichols

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

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

PROPOSED ORDER ON MOTION FOR LEAVE TO FILE FOR *IN CAMERA*/PROTECTED TREATMENT OF RESPONDENT’S CONFIDENTIAL INFORMATION IN THE RECORD AND COMPLAINT COUNSEL’S POST-TRIAL FILINGS

Respondent has moved for leave to file a motion for *in camera*/protected treatment of Respondent’s confidential information in the record and in Complaint Counsel’s Post-Trial Filings in accordance with Rule 3.45(e). Respondent makes this motion in light of certain discussions with Complaint Counsel as to the non-receipt of Complaint Counsel’s Rule 3.45(b) notice by Respondent Counsel. Respondent asserts that in accordance with the Protective Order and pursuant to North Carolina law, certain documents are to be accorded confidential treatment on the record and in post-trial filings.

Upon Respondent’s unopposed motion, the undersigned hereby grants leave to Respondent to file a motion and to make a showing in accordance with the procedures outlined in Rule 3.45(b) as to the specific documents for which Respondent seeks redacted treatment in the record and in Complaint Counsel’s Post-Trial Filings provided that Respondent specifically identifies with brackets the material Respondent seeks to have redacted from the record and Complaint Counsel’s Public Post-Trial Filings.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Dated: June ____, 2011

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



In the Matter of)

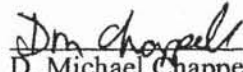
The North Carolina Board of)
Dental Examiners,)
Respondent.)

DOCKET NO. 9343

PROTECTIVE ORDER GOVERNING DISCOVERY MATERIAL

Commission Rule 3.31(d) states: "In order to protect the parties and third parties against improper use and disclosure of confidential information, the Administrative Law Judge shall issue a protective order as set forth in the appendix to this section." 16 C.F.R. § 3.31(d). Pursuant to Commission Rule 3.31(d), the protective order set forth in the appendix to that section is attached verbatim as Attachment A and is hereby issued.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: June 18, 2010



ATTACHMENT A

For the purpose of protecting the interests of the parties and third parties in the above-captioned matter against improper use and disclosure of confidential information submitted or produced in connection with this matter:

IT IS HEREBY ORDERED THAT this Protective Order Governing Confidential Material ("Protective Order") shall govern the handling of all Discovery Material, as hereafter defined.

1. As used in this Order, "confidential material" shall refer to any document or portion thereof that contains privileged, competitively sensitive information, or sensitive personal information. "Sensitive personal information" shall refer to, but shall not be limited to, an individual's Social Security number, taxpayer identification number, financial account number, credit card or debit card number, driver's license number, state-issued identification number, passport number, date of birth (other than year), and any sensitive health information identifiable by individual, such as an individual's medical records. "Document" shall refer to any discoverable writing, recording, transcript of oral testimony, or electronically stored information in the possession of a party or a third party. "Commission" shall refer to the Federal Trade Commission ("FTC"), or any of its employees, agents, attorneys, and all other persons acting on its behalf, excluding persons retained as consultants or experts for purposes of this proceeding.
2. Any document or portion thereof submitted by a respondent or a third party during a Federal Trade Commission investigation or during the course of this proceeding that is entitled to confidentiality under the Federal Trade Commission Act, or any regulation, interpretation, or precedent concerning documents in the possession of the Commission, as well as any information taken from any portion of such document, shall be treated as confidential material for purposes of this Order. The identity of a third party submitting such confidential material shall also be treated as confidential material for the purposes of this Order where the submitter has requested such confidential treatment.
3. The parties and any third parties, in complying with informal discovery requests, disclosure requirements, or discovery demands in this proceeding may designate any responsive document or portion thereof as confidential material, including documents obtained by them from third parties pursuant to discovery or as otherwise obtained.
4. The parties, in conducting discovery from third parties, shall provide to each third party a copy of this Order so as to inform each such third party of his, her, or its rights herein.
5. A designation of confidentiality shall constitute a representation in good faith and after careful determination that the material is not reasonably believed to be already in the public domain and that counsel believes the material so designated constitutes confidential material as defined in Paragraph 1 of this Order.

6. Material may be designated as confidential by placing on or affixing to the document containing such material (in such manner as will not interfere with the legibility thereof), or if an entire folder or box of documents is confidential by placing or affixing to that folder or box, the designation "CONFIDENTIAL-FTC Docket No. 9343" or any other appropriate notice that identifies this proceeding, together with an indication of the portion or portions of the document considered to be confidential material. Confidential information contained in electronic documents may also be designated as confidential by placing the designation "CONFIDENTIAL-FTC Docket No. 9343" or any other appropriate notice that identifies this proceeding, on the face of the CD or DVD or other medium on which the document is produced. Masked or otherwise redacted copies of documents may be produced where the portions deleted contain privileged matter, provided that the copy produced shall indicate at the appropriate point that portions have been deleted and the reasons therefor.

7. Confidential material shall be disclosed only to: (a) the Administrative Law Judge presiding over this proceeding, personnel assisting the Administrative Law Judge, the Commission and its employees, and personnel retained by the Commission as experts or consultants for this proceeding; (b) judges and other court personnel of any court having jurisdiction over any appellate proceedings involving this matter; (c) outside counsel of record for any respondent, their associated attorneys and other employees of their law firm(s), provided they are not employees of a respondent; (d) anyone retained to assist outside counsel in the preparation or hearing of this proceeding including consultants, provided they are not affiliated in any way with a respondent and have signed an agreement to abide by the terms of the protective order; and (e) any witness or deponent who may have authored or received the information in question.

8. Disclosure of confidential material to any person described in Paragraph 7 of this Order shall be only for the purposes of the preparation and hearing of this proceeding, or any appeal therefrom, and for no other purpose whatsoever, provided, however, that the Commission may, subject to taking appropriate steps to preserve the confidentiality of such material, use or disclose confidential material as provided by its Rules of Practice; sections 6(f) and 21 of the Federal Trade Commission Act; or any other legal obligation imposed upon the Commission.

9. In the event that any confidential material is contained in any pleading, motion, exhibit or other paper filed or to be filed with the Secretary of the Commission, the Secretary shall be so informed by the Party filing such papers, and such papers shall be filed *in camera*. To the extent that such material was originally submitted by a third party, the party including the materials in its papers shall immediately notify the submitter of such inclusion. Confidential material contained in the papers shall continue to have *in camera* treatment until further order of the Administrative Law Judge, provided, however, that such papers may be furnished to persons or entities who may receive confidential material pursuant to Paragraphs 7 or 8. Upon or after filing any paper containing confidential material, the filing party shall file on the public record a duplicate copy of the paper that does not reveal confidential material. Further, if the protection for any such material expires, a party may file on the public record a duplicate copy which also contains the formerly protected material.

10. If counsel plans to introduce into evidence at the hearing any document or transcript containing confidential material produced by another party or by a third party, they shall provide advance notice to the other party or third party for purposes of allowing that party to seek an order that the document or transcript be granted *in camera* treatment. If that party wishes *in camera* treatment for the document or transcript, the party shall file an appropriate motion with the Administrative Law Judge within 5 days after it receives such notice. Except where such an order is granted, all documents and transcripts shall be part of the public record. Where *in camera* treatment is granted, a duplicate copy of such document or transcript with the confidential material deleted therefrom may be placed on the public record.

11. If any party receives a discovery request in any investigation or in any other proceeding or matter that may require the disclosure of confidential material submitted by another party or third party, the recipient of the discovery request shall promptly notify the submitter of receipt of such request. Unless a shorter time is mandated by an order of a court, such notification shall be in writing and be received by the submitter at least 10 business days before production, and shall include a copy of this Protective Order and a cover letter that will apprise the submitter of its rights hereunder. Nothing herein shall be construed as requiring the recipient of the discovery request or anyone else covered by this Order to challenge or appeal any order requiring production of confidential material, to subject itself to any penalties for non-compliance with any such order, or to seek any relief from the Administrative Law Judge or the Commission. The recipient shall not oppose the submitter's efforts to challenge the disclosure of confidential material. In addition, nothing herein shall limit the applicability of Rule 4.11(e) of the Commission's Rules of Practice, 16 CFR 4.11(e), to discovery requests in another proceeding that are directed to the Commission.

12. At the time that any consultant or other person retained to assist counsel in the preparation of this action concludes participation in the action, such person shall return to counsel all copies of documents or portions thereof designated confidential that are in the possession of such person, together with all notes, memoranda or other papers containing confidential information. At the conclusion of this proceeding, including the exhaustion of judicial review, the parties shall return documents obtained in this action to their submitters, provided, however, that the Commission's obligation to return documents shall be governed by the provisions of Rule 4.12 of the Rules of Practice, 16 CFR 4.12.

13. The provisions of this Protective Order, insofar as they restrict the communication and use of confidential discovery material, shall, without written permission of the submitter or further order of the Commission, continue to be binding after the conclusion of this proceeding.

Kathy Gloden

From: Noel Allen
Sent: Wednesday, July 23, 2008 4:16 PM
To: Westman-Cherry, Melissa
Subject: RE: North Carolina Board of Dental Examiners Document Production
Importance: High
Sensitivity: Confidential

Melissa -

I wanted to update you on the status of the North Carolina Board of Dental Examiners' response to the FTC's document production request. I had a meeting yesterday with Carolin Bakewell, Esq., the Board's in-house attorney, and Board Chief Operations Officer Bobby White, Esq. We discussed the status of the document production request, in particular the confidential and privileged documents. Ms. Bakewell and Mr. White will be reviewing documents that we have preliminarily identified as confidential and privileged, with an eye toward identifying any additional documents that can be released at this time. We expect to have a substantial additional batch of documents e-mailed to you in the next week.

Regarding your question about health information, the few instances where this, alone, was a concern have already been redacted.

In the meantime, could you provide any suggestions as to how we might deal with privileged documents (including work-product) entwined in ongoing public protection litigation from being shared with opposing parties in those pending disputes? What restrictions could the FTC accept in that regard since simply taking the documents out of the "public records" category might not accomplish that? The Board is concerned about not only traditional notions of privilege, but also their obligations under state laws making investigative files confidential.

Thank you.

Noel

From: Westman-Cherry, Melissa [mailto:MWESTMAN@ftc.gov]
Sent: Mon 7/7/2008 12:57 PM
To: Kathy Gloden
Cc: Noel Allen
Subject: RE: North Carolina Board of Dental Examiners Document Production

I apologize if I am missing something, but I don't understand how the descriptions of the documents identify what type of confidential information the documents may contain. That being said, would permission to redact any health information that may identify an individual person solve the issue?



7/24/2008

ALLEN AND PINNIX, P.A.

ATTORNEYS AT LAW

P. O. DRAWER 1270

RALEIGH, NORTH CAROLINA 27602

FILE 60

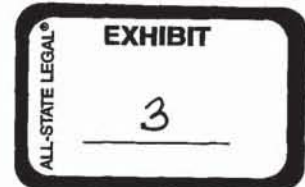
NOEL LEE ALLEN
C. LYNN CALDER
ALFRED P. CARLTON, JR.
ANNA BAIRD CHOI
M. JACKSON NICHOLS
JOHN LAWRENCE PINNIX

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SUITE 1200
RALEIGH, NORTH CAROLINA 27601

TELEPHONE: (919) 785-0808
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www.allen-pinnix.com

March 31, 2009



Melissa Westman-Cherry
Bureau of Competition
Federal Trade Commission
601 New Jersey Avenue NW
Room 6255
Washington, DC 20001

VIA HAND DELIVERY

Re: North Carolina Board of Dental Examiners
FTC File No. 0810137

Dear Melissa:

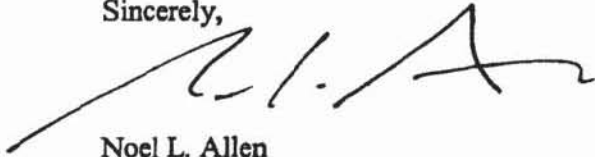
We are herewith producing on behalf of the North Carolina Board of Dental Examiners (the Board) the requested documents pursuant to the Federal Trade Commission's letter request of March 6, 2008 and subpoena of February 24, 2009. You will find enclosed a CD-Rom containing two folders. The first folder contains all non-confidential and non-privileged documents produced to date. The second folder contains confidential documents produced for the first time today. Also enclosed are responses to both sets of specifications, as well as the master index and privilege log. These documents are being produced subject to the protections of 15 U.S.C. §§ 46(f) and 57b-2, 16 C.F.R. § 4.10(d), and applicable provisions of the Federal Rule of Evidence 502. This document production is also subject to all of the rights and protections afforded by applicable North Carolina statutes, including N.C. Gen. Stat. §§ 132-1.1 (confidential communications by legal counsel to a public board or agency), 132-1.2(1) (confidential information), and 90-41(g) (confidentiality of the Board's investigative files).

The Board's activities in this area are plainly pursuant to statutory authority found at N.C. Gen. Stat. §§ 90-40 and 90-40.1 (practicing dentistry without a license), 90-29 (defining the practice of dentistry), and 90-233 (defining the practice of dental hygiene). Similar actions under comparable state statutes have been upheld in cases such as the one recently addressed by the Circuit Court of Montgomery County in Alabama. *See White Smile USA, Inc. v. Board of Dental Examiners of Alabama*, No. CV 2008-153 (Cir. Ct.

Melissa Westman-Cherry
March 31, 2009
page two

Montgomery County Feb. 10, 2009) (copy enclosed). Of course, we respectfully note that the Board is also afforded state action exemption from federal antitrust liability pursuant to *Parker v. Brown*, 317 U.S. 341 (1943) for its efforts to protect the citizens of North Carolina as authorized by state statutes.

Sincerely,

A handwritten signature in black ink, appearing to read "N.L. Allen", with a long horizontal stroke extending to the left.

Noel L. Allen

NLA/kg

Enclosures a/s

cc: Carolin Bakewell
Bobby D. White

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*OF COUNSEL

May 20, 2011

BY EMAIL

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Michael J. Bloom
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CONTAINS CONFIDENTIAL INFORMATION

Re: *In the Matter of North Carolina [State] Board of Dental Examiners*, Federal Trade
Commission Docket No. 9343

Dear Complaint Counsel,

This letter is being sent to you pursuant to the Administrative Law Judge's ("ALJ") Order on Respondent's Motion to Prevent Public Posting of Complaint Counsel's Post-Trial Filings on the Federal Trade Commission's Website (the "Order").



Confidential Materials Containing Sensitive Personal Information

The attached letter dated March 31, 2009 and attached hereto as Exhibit A describes materials that Respondent provided and designated as confidential in accordance with the Protective Order in this matter. The letter also outlines the statutory authority for the designation of such information.

Pursuant to North Carolina law, the North Carolina State Board of Dental Examiners has designated the following documents as confidential: (1) documents in open case files, including the cease and desist letters but not including documents filed with a court (detailed below); (2) the Board's Investigations Manual (CX527); (3) memorandums produced by Terry Friddle regarding open cases and those proposed to be closed (CX130, CX160, CX234, CX235, CX303, CX315, CX316, CX317, CX318, CX319, CX320, CX321, CX368, CX439, CX462, CX478, CX479, CX480, CX481, CX482, CX483, CX530, CX622, CX623, CX624, CX625, CX656, CX658, CX659, CX660); and (4) closed session Board minutes from within the past three years (CX131, CX132, CX471, such minutes becoming public record after three years).

North Carolina General Statute 90-41(g) provides that "Records, papers, and other documents containing information collected or compiled by the Board, or its members or employees, as a result of investigations, inquiries, or interviews conducted in connection with a licensing or disciplinary matter, shall not be considered public records within the meaning of Chapter 132 of the General Statutes"

The Protective Order provides that [a]ny document or portion thereof submitted by a respondent or a third party during a Federal Trade Commission investigation or during the course of this proceeding that is entitled to confidentiality under the Federal Trade Commission Act, or any regulation, interpretation, or precedent concerning documents in the possession of the Commission, as well as any information taken from any portion of such document, shall be treated as confidential material for purposes of this order (emphasis added).

16 C.F.R. 3.45(b) states that Sensitive Personal Information "shall include, but shall not be limited to, an individual's Social Security number, taxpayer identification number, financial account number, credit card or debit card number, driver's license number, state-issued identification number, passport number, date of birth (other than year), and any sensitive health information identifiable by individual, such as an individual's medical records" (emphasis added). Further, the Protective Order provides that "confidential material" can include any document that contains "privileged [or] competitively sensitive information."

Pursuant to the North Carolina statute and the Protective Order's mandate that "any document . . . that is entitled to confidentiality under . . . a regulation, interpretation or precedent . . . shall be treated as confidential", Respondent has designated the list of numbered proposed findings appearing in Complaint Counsel's Proposed Findings of Fact as subject to the Protective Order.

Pursuant to the above and the Protective Order’s non-exclusive allowance for other items that could constitute Sensitive Personal Information under 16 C.F.R. 3.45(b), Respondent has designated the list of numbered proposed findings appearing in Complaint Counsel’s Proposed Findings of Fact as Sensitive Personal Information. These findings constitute Sensitive Personal Information because they contain confidential information regarding the personal identities of individuals that are part of civil and/or criminal investigations regarding the unlicensed practice of dentistry. The findings are also privileged under the law enforcement investigatory privilege because they concern civil and/or criminal investigatory files, and if the contents were divulged then the subject of the investigation would be able to obtain premature discovery of the law enforcement actions that may be taken against him.¹

The following numbered proposed findings from Complaint Counsel’s Proposed Findings of Fact contain information subject to the above-described protections because they constitute currently open case files of the State Board:

- 218 – REDACTED 07-208 (identification of complainant and substance of complaint)
- 219 – 08-029 (identification of complainant) REDACTED
- REDACTED • 220 – 08-029 (identification of complainant and substance of complaint)
- REDACTED • 221 – 08-029 (identification of complainant and substance of complaint)
- 274 – Various cases (names of open cases)
- REDACTED • 278 – REDACTED 08-243 (details of case; cease and desist recipient’s name and address);
REDACTED ; 09-049 (name of complainant)
- 303 – REDACTED , 07-208 (communications about investigation)
- REDACTED • 305 – , 07-020 (details about investigator’s activities from investigative memo)
- REDACTED • 312 – , 08-029 (identifies recipient of cease and desist letter by name and quotes from her response to the Board)
- 361 – REDACTED 08-083 (identifies company as recipient of cease and desist letter)


¹ *Lykken v. Brady*, No. 07-4020-KES, 2008 WL 2077937, at *5 (D.S.D. May 14, 2008). “[T]he primary concern over disclosure of law enforcement reports is to prevent a party who is himself the subject of a criminal investigation from obtaining premature discovery of law enforcement actions that may be taken against him.” *Id.* (citing 3 WEINSTEN’S FED. EVIDENCE § 509.24[2][a]).

- 632 – REDACTED 08-029 (identifies recipient of cease and desist letter by name and quotes from her response to the Board)
- 633 – REDACTED 08-195 (identifies company as receiving a cease and desist letter)
- 639 – REDACTED 09-049 (identifies person at company who responded to cease and desist letter)
- 660 – REDACTED , 08-195 (identifies company as receiving a cease and desist letter)
- 1178, 1179 & 1180 – REDACTED 08-132 (discusses complainants as Mr. Y and Mrs. Y)
- 1282 – REDACTED 07-208; REDACTED 07-017 (talks about communications with complainants)
- 1286 -- REDACTED 07-017 (talks about communications with complainant)
- 1388c & d – REDACTED 08-029 (identifies recipients of cease and desist letter by name)
- 1388i & j -- REDACTED 07-017 (identifies recipient of cease and desist letter)

Further, Respondent also notes that there are a couple of instances where the teeth whitening revenues of former or current Board members are divulged. One of these Board members, Dr. Owens, was to Respondent's knowledge never provided with any notice under 3.45(b) by Complaint Counsel that the revenues from his practice would be divulged, despite him requesting that such information be treated as confidential. This information is included in Proposed Findings Nos. 155 and 1290.

All of the above information should be treated as confidential pursuant to Rule 3.45 (and in accordance with the redaction guidelines in 3.45(e)) and the Protective Order. Please feel free to contact me to discuss the contents of this letter.

Sincerely,

M. Jackson Nichols 

M. Jackson Nichols
Counsel for the North Carolina State Board of Dental Examiners

Attachment a/s

Cc:

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
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Room H-110
Washington, D.C. 20580
oyalj@ftc.gov