

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

COMMISSIONERS: **Jon Leibowitz, Chairman**
 J. Thomas Rosch
 Edith Ramirez
 Julie Brill

In the Matter of		Docket No. 9343
The North Carolina Board of Dental Examiners		

FINAL ORDER

The Commission has heard this matter upon the appeal of Respondent from the Initial Decision, and upon briefs and oral argument in support thereof and in opposition thereto. For the reasons stated in the accompanying Opinion of the Commission, the Commission has determined to sustain the Initial Decision with certain modifications:

IT IS ORDERED that the Initial Decision of the administrative law judge be, and it hereby is, adopted as the Findings of Fact and Conclusions of Law of the Commission, to the extent not inconsistent with the findings of fact and conclusions contained in the accompanying Opinion.

Other findings of fact and conclusions of law of the Commission are contained in the accompanying Opinion.

IT IS FURTHER ORDERED that the following Order to cease and desist be, and it hereby is, entered:

ORDER

I.

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

- A. “Board” means the North Carolina State Board of Dental Examiners (“NCSBDE”), its officers, directors, members, employees, agents, attorneys, representatives, successors, and assigns; and the subsidiaries, divisions, groups, and affiliates controlled by it; and the respective officers, directors, members, employees, agents, attorneys, representatives, successors, and assigns of each.
- B. “Communicate” or “Communicating” means exchanging, transferring, or disseminating any information, without regard to the manner or means by which it is accomplished.
- C. “Communication” means any information exchange, transfer, or dissemination, without regard to the means by which it is accomplished, including, without limitation, oral or written, in any manner, form, or transmission medium.
- D. “Dental Practice Act” means any legislation that is administered by the Board, including, North Carolina General Statutes, Chapter 90, Article 2 (Dentistry) (N.C. Gen. Stat. §§ 90-22 - 90-48.3 (2010)) and Article 16 (Dental Hygiene Act) (N.C. Gen. Stat. §§ 90-221 - 90-233.1 (2010)).
- E. “Dentist” means any individual holding a license, issued by the Board, to practice dentistry in North Carolina.
- F. “Direct” or “Directing” means to order, direct, command or instruct.
- G. “Non-Dentist Provider” means any Person other than a Dentist engaged in the provision, distribution or sale of any Teeth Whitening Goods or Teeth Whitening Services.
- H. “Person” means both natural persons and artificial persons, including, but not limited to, corporations, and unincorporated entities.
- I. “Principal Address” means either (i) primary business address, if there is a business address, or (ii) primary residential address, if there is no business address.
- J. “Teeth Whitening Goods” means any formulation containing a peroxide bleaching agent, whether or not used in conjunction with an LED light source, and any other ancillary products used in the provision of Teeth Whitening Services.
- K. “Teeth Whitening Services” means whitening teeth through the use of a formulation containing a peroxide bleaching agent, whether or not used in conjunction with an LED light source.

L. “Third Party” means any Person other than NCSBDE.

II.

IT IS FURTHER ORDERED that Respondent, directly or indirectly, or through any corporate or other device, in connection with the provision of Teeth Whitening Services in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, cease and desist from:

- A. Directing a Non-Dentist Provider to cease providing Teeth Whitening Goods or Teeth Whitening Services;
- B. Prohibiting, restricting, impeding, or discouraging the provision of Teeth Whitening Goods or Teeth Whitening Services by a Non-Dentist Provider;
- C. Communicating to a Non-Dentist Provider that: (i) such Non-Dentist Provider is violating, or has violated the Dental Practice Act by providing Teeth Whitening Goods or Teeth Whitening Services; or (ii) the provision of Teeth Whitening Goods or Teeth Whitening Services by a Non-Dentist Provider is a violation of the Dental Practice Act;
- D. Communicating to a prospective Non-Dentist Provider that: (i) a Non-Dentist Provider would violate the Dental Practice Act by providing Teeth Whitening Goods or Teeth Whitening Services; or (ii) the provision of Teeth Whitening Goods or Teeth Whitening Services by a Non-Dentist Provider would violate the Dental Practice Act;
- E. Communicating to a lessor of commercial property or any other Third Party that (i) the provision of Teeth Whitening Goods or Teeth Whitening Services by a Non-Dentist Provider is a violation of the Dental Practice Act, or (ii) that any Non-Dentist Provider is violating or has violated the Dental Practice Act by providing Teeth Whitening Goods or Teeth Whitening Services;
- F. Communicating to an actual or prospective manufacturer, distributor, or seller of Teeth Whitening Goods used by Non-Dentist Providers, or to any other Third Party that (i) the provision of Teeth Whitening Goods or Teeth Whitening Services by a Non-Dentist Provider is a violation of the Dental Practice Act, or (ii) that any Non-Dentist Provider is violating or has violated the Dental Practice Act by providing Teeth Whitening Goods or Teeth Whitening Services; and
- G. Inducing, urging, encouraging, assisting or attempting to induce, any Person to engage in any action that would violate Paragraphs II.A through II.F if such action were taken by Respondent;

Provided, however, that nothing in this Order prohibits the Board from:

- (i) investigating a Non-Dentist Provider for suspected violations of the Dental Practice Act;
- (ii) filing, or causing to be filed, a court action against a Non-Dentist Provider for an alleged violation of the Dental Practice Act pursuant to N.C. Gen. Stat. §§ 90-40, 90-40.1, or 90-233.1; or
- (iii) pursuing any administrative remedies against a Dentist pursuant to and in accordance with the North Carolina Annotated Code;

Provided further, that nothing in this Order prohibits the Board from Communicating to a Third Party:

- (i) notice of its belief or opinion regarding whether a particular method of providing Teeth Whitening Goods or Teeth Whitening Services may violate the Dental Practice Act;
- (ii) factual information regarding legislation and court proceedings concerning Teeth Whitening Goods or Teeth Whitening Services provided by Non-Dentist Providers;
- (iii) notice of its bona fide intention to file a court action against that Person for a suspected violation of the Dental Practice Act with regard to Teeth Whitening Goods or Teeth Whitening Services; or
- (iii) notice of its bona fide intention to pursue administrative remedies with regard to Teeth Whitening Goods or Teeth Whitening Services,

so long as such Communication includes, with equal prominence, the paragraph included in Appendix A to this Order.

III.

IT IS FURTHER ORDERED that Respondent shall:

- A. Within thirty (30) days from the date this Order becomes final, send a copy of this Order and the Complaint by first-class mail with delivery confirmation or electronic mail with return confirmation to:
 - 1. each Board member; and
 - 2. each officer, director, manager, representative, agent, attorney, and employee of the Board;

- B. Distribute by first-class mail, return receipt requested, a copy of this Order and the Complaint to each individual who becomes a Board member, or an officer, director, manager, attorney, representative, agent or employee of Board, and who did not previously receive a copy of this Order and the Complaint from Respondent, within ten (10) days of the time that he or she assumes such position;
- C. Within thirty (30) days from the date this Order becomes final, send a copy of the letter, on the Board's official letterhead, with the text included in Appendix B to this Order, by first-class mail with delivery confirmation or electronic mail with return confirmation to:
1. each Person, including without limitation actual or prospective Non-Dentist Providers, manufacturers of goods and services used by Non-Dentists Providers, or any other Third Party, to whom the Board Communicated a cease-and-desist order, letter, or other similar Communication;
 2. each Person, including without limitation actual or prospective lessors of commercial property or any other Third Party, to whom the Board Communicated (i) that the provision of Teeth Whitening Goods or Teeth Whitening Services by a Non-Dentist Provider is a violation of the Dental Practice Act, or (ii) that any Non-Dentist Provider is violating, has violated, or may be violating the Dental Practice Act by providing Teeth Whitening Goods or Teeth Whitening Services; and
 3. any other Third Party to whom, or with whom, the Board Communicated substantially the same information set forth in C.1 and C.2 of this Paragraph III;
- D. Within sixty (60) days from the date this Order becomes final, Respondent shall arrange with the North Carolina Board of Cosmetic Art Examiners for the notice included as Appendix C to this Order to appear on the website of that Board for a period of six (6) months;

Provided, however, should Respondent be unable within sixty (60) days to arrange with the North Carolina Board of Cosmetic Art Examiners for such notice to appear on that Board's website, Respondent shall within ninety (90) days from the date this Order becomes final: (1) obtain from the North Carolina Board of Cosmetic Art Examiners its most current list of licensees; and (2) send the Appendix C notification by first-class mail with delivery confirmation or electronic mail with return confirmation to each licensee on that current list;

IV.

IT IS FURTHER ORDERED that Respondent shall file verified written reports within sixty (60) days from the date this Order becomes final, annually thereafter for three (3) years on the anniversary of the date this Order becomes final, and at such other times as the Commission may by written notice require. Each report shall include, among other information that may be necessary:

- A. The identity, including address and telephone number, of each Non-Dentist Provider, and any other Third Party, that the Board Communicated with during the relevant reporting period regarding Teeth Whitening Goods or Teeth Whitening Services;
- B. Copies of all Communications with any Non-Dentist Provider, and any other Third Party regarding the provision of Teeth Whitening Goods or Teeth Whitening Services;
- C. Copies of the delivery confirmations or electronic mail with return confirmations required by Paragraph III. A and B; and
- D. A detailed description of the manner and form in which Respondent has complied, and is complying, with this Order.

V.

IT IS FURTHER ORDERED that Respondent shall notify the Commission of any change in its principal address within twenty (20) days of such change in address.

VI.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and upon five (5) days' notice to NCSBDE, that NCSBDE shall, without restraint or interference, permit any duly authorized representative of the Commission:

- A. Access, during office hours of NCSBDE and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and all other records and documents in the possession, or under the control, of NCSBDE relating to compliance with this Order, which copying services shall be provided by NCSBDE at its expense; and
- B. To interview officers, directors, or employees of NCSBDE, who may have counsel present, regarding such matters.

VII.

IT IS FURTHER ORDERED that this Order shall terminate on December 2, 2031.

Appendix A

The Federal Trade Commission issued a Final Order on December 2, 2011, which requires the Dental Board to provide you with the following Notice. The Dental Board hereby notifies you that the opinion of the Dental Board expressed in this communication is not a legal determination. The Dental Board does not have the authority to order you to discontinue providing Teeth Whitening Goods or Teeth Whitening Services. Only a court may determine that you have violated, or are violating, any law, and, if appropriate, impose a remedy or penalty for such violation.

Further, pursuant to 21 N.C.A.C. 16N .0400 and N.C. Gen. Stat. § 150B-4, you may have the right, prior to the initiation of any court action by the Dental Board, to request a declaratory ruling regarding whether your method of providing teeth whitening goods or services is lawful.

You are further notified that any right to a declaratory ruling from the Dental Board supplements any other legal rights that you may already have to establish the legality of your teeth whitening goods or services. Complete copies of the Federal Trade Commission's Complaint and Final Order are available on the Commission's website at <http://www.ftc.gov>.

Appendix B

(Letterhead of NCSBDE)

(Name and Address of the Recipient)

Dear (Recipient):

As you may know, the Federal Trade Commission issued an Administrative Complaint in 2010 against the Dental Board challenging the legality of the Dental Board's attempts to restrict the provision of teeth whitening services by non-dentists in North Carolina. At the conclusion of that administrative proceeding, the Commission issued a Final Order requiring the Dental Board, among other things, to cease and desist from certain activities involving teeth whitening by non-dentists and to take certain remedial actions, of which this letter is one part. Complete copies of the Federal Trade Commission's Complaint and Final Order are available on the Commission's website at <http://www.ftc.gov>.

You are receiving this letter because you previously received from the Dental Board either: (1) a letter directing or ordering you to cease and desist the unlicensed provision of dental teeth whitening services, or selling dental teeth whitening goods or services to non-dentist teeth whiteners, in violation of the Dental Practice Act, N.C. Gen. Stat. §§ 90-29(b)(2), 90-40, and/or 90-40.1; or (2) a letter advising you (i) that a non-dentist would or might violate the Dental Practice Act by providing teeth whitening goods or services; or (ii) that the provision of teeth whitening goods or services by a non-dentist would or might violate the Dental Practice Act, N.C. Gen. Stat. §§ 90-29(b)(2), 90-40, and/or 90-40.1.

The Dental Board hereby notifies you that the prior letter you received from the Dental Board only expressed the opinion of the Dental Board, and that such opinion is not a legal determination. The Dental Board does not have the authority to order you to discontinue providing Teeth Whitening Goods or Teeth Whitening Services. Only a court may determine that you are violating, or have violated, any law and, if appropriate, impose a remedy or penalty for such violation. Further, you may have the right to request a declaratory ruling from the Dental Board, pursuant to 21 N.C.A.C. 16N .0400 and N.C. Gen. Stat. § 150B-4, regarding whether a particular method of providing teeth whitening goods or services is lawful. You are further notified that any right to a declaratory ruling from the Dental Board supplements any other legal rights that you may already have to establish the legality of any particular method of providing teeth whitening goods or services.

Appendix C

Teeth Whitening Notice

As you may know, the Federal Trade Commission issued an Administrative Complaint in 2010 against the Dental Board challenging the legality of the Dental Board's attempts to restrict the provision of teeth whitening services by non-dentists in North Carolina. At the conclusion of that administrative proceeding, the Commission issued a Final Order requiring the Dental Board, among other things, to cease and desist from certain activities involving teeth whitening by non-dentists and to take certain remedial actions, of which this Notice is one part. Complete copies of the Federal Trade Commission's Complaint and Final Order are available on the Commission's website at <http://www.ftc.gov>.

In 2007, the Cosmetology Board, at the request of the Dental Board, displayed a "Teeth Whitening Bulletin" on the Cosmetology Board's website advising cosmetologists and estheticians "that any process that 'removes stains, accretions or deposits from human teeth' constitutes the practice of dentistry Taking impressions for bleaching trays also constitutes the practice of dentistry" That Bulletin further advised that it was a misdemeanor for anyone other than a licensed dentist to provide those services.

The Dental Board hereby notifies you that the prior Bulletin, described above, only expressed the opinion of the Dental Board, and that such opinion is not a legal determination. The Dental Board does not have the authority to order you to discontinue providing Teeth Whitening Goods or Teeth Whitening Services. Only a court may determine that you have violated, or are violating, any law and, if appropriate, to impose a remedy or penalty for such violation. Further, you may have the right to request a declaratory ruling from the Dental Board, pursuant to 21 N.C.A.C. 16N .0400 and N.C. Gen. Stat. § 150B-4, regarding whether a particular method of providing teeth whitening goods or services is lawful. You are further notified that any right to a declaratory ruling from the Dental Board supplements any other legal rights that you may already have to establish the legality of any particular method of providing teeth whitening goods or services.

By the Commission, Commissioner Brill recused.

Donald S. Clark
Secretary

ISSUED: December 2, 2011