

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



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

**MOTION TO PREVENT PUBLIC POSTING OF  
COMPLAINT COUNSEL’S POST-TRIAL BRIEF AND  
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW  
CONTAINING CONFIDENTIAL INFORMATION  
ON THE FEDERAL TRADE COMMISSION’S WEBSITE**

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”) to issue an order preventing the posting of Complaint Counsel’s Post-Trial Brief and Complaint Counsel’s Proposed Findings of Fact and Conclusions of Law on the website of the Federal Trade Commission (“Commission”) until Complaint Counsel has produced a confidential version of said documents. Upon information and belief, Respondent requests expedited treatment of this motion because it appears Complaint Counsel has violated the ALJ’s Protective Order Governing Discovery Material (“Protective Order”, attached hereto as Exhibit 1) by including information in Complaint Counsel’s Proposed Findings of Fact that Respondent designated as confidential pursuant to the Protective Order. If this information is posted on the Commission’s website, then confidential information contained in Respondent’s pending

investigative files will be made public. In support of this Motion, Respondent states as follows:

1. The ALJ's Protective Order was issued June 18, 2010, and sought, pursuant to Rule 3.31(d), to "protect the parties and third parties against improper use and disclosure of confidential information . . . ." Exhibit 1 at ¶ 1. The Protective Order states 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.

*Id.* ¶ 2.

2. The Protective Order further provides that during discovery, parties and third parties "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." Exhibit 1 ¶ 3.

3. North Carolina General Statute 90-41(g) provides:

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 . . . .

4. Pursuant to N.C.G.S. 90-41(g) and in accordance with the ALJ's Protective Order, the Board designated certain documents as confidential when it produced these documents to Complaint Counsel and requested that the documents be treated as such. *See* Exhibit 2, Letter from Noel Allen to Melissa Westman-Cherry dated March 31, 2009. The letter stated as follows: "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).”

5. The Board made its best efforts to comply with the Commission’s Rules regarding the protection of confidential information (*see* Rules 3.45 and 3.46) and the ALJ’s Protective Order by designating confidential exhibits and the information therein as “*subject to protective order*” in Respondent’s Proposed Findings of Fact, including the enclosure of brackets and bolded font for confidential information. The Board also took the necessary steps to file a confidential version and will file a public version of its Proposed Findings of Fact.

6. Complaint Counsel did not file a confidential version of its Proposed Findings of Fact, and during the course of the Board’s review of these Proposed Findings of Fact, the Board has already discovered numerous instances of documents and information that had been designated as confidential pursuant to the Protective Order being discussed and cited. This appears to be a violation of the Protective Order.

7. For example, on page 41 the personally identifiable information of one of the cease and desist recipients is given, and there are numerous instances where documents that were clearly stamped as confidential when produced to the Commission in this matter are quoted and otherwise referenced in such a manner as to make public certain aspects of those confidential, pending investigative files.<sup>1</sup>

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<sup>1</sup> Although Respondent has not located any confidential information in the Complaint Counsel’s Post-Trial Brief, out of an abundance of caution, Respondent requests that the Post-Trial Brief not be publicly posted as well.

8. Should this information be posted on the Commission's website, it will be made public, which is contrary to N.C. Gen. Stat. § 90-41(g); CX19, and will cause irreparable harm to the Respondent's investigative process.

9. Complaint Counsel made no effort to consult with the Board regarding its intent to use documents and/or information designated as confidential in its Proposed Findings of Fact.

10. Accordingly, Respondent requests expedited treatment of its Motion to prevent public posting of Complaint Counsel's Proposed Findings of Fact and Post-Trial Brief in order to ensure that certain information designated as confidential is not made public.

11. Respondent also requests a hearing on May 11, 2011, the anticipated date of oral argument for post-trial briefing, or at a later date, for a ruling on whether Complaint Counsel has violated the Protective Order.

12. Respondent's Counsel has conferred with Complaint Counsel in a good-faith effort to resolve by agreement the issues raised by this motion, and Complaint Counsel declined to treat as confidential any of the contents of its Proposed Findings of Fact and Post-Trial Brief. Further, Complaint Counsel has indicated that they will oppose this motion.

13. Complaint Counsel has agreed, however, to join in a request to the Secretary's Office that neither Complaint Counsel's nor Respondent's Proposed Findings of Fact or Post-Trial Brief be posted on the Commission's website until such time as the ALJ has ruled on this motion.

WHEREFORE, Respondent requests that Complaint Counsel's Post-Trial Brief and Complaint Counsel's Proposed Findings of Fact and Conclusions of Law not be posted on the website of the Federal Trade Commission until Complaint Counsel has produced a confidential version of said documents.

This the 29th day of April, 2011.

ALLEN AND PINNIX, P.A.

/s/ M. Jackson Nichols

By: \_\_\_\_\_

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M. Jackson Nichols  
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## CERTIFICATE OF SERVICE

I hereby certify that on April 29, 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  
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Federal Trade Commission  
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Washington, D.C. 20580  
[wlanning@ftc.gov](mailto:wlanning@ftc.gov)

Melissa Westman-Cherry  
Bureau of Competition  
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Washington, D.C. 20580  
[westman@ftc.gov](mailto:westman@ftc.gov)

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Room NJ-6264  
Washington, DC 20580  
[mturner@ftc.gov](mailto: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](mailto:oalj@ftc.gov)

This the 29th day of April, 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

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M. Jackson Nichols

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

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

**PROPOSED ORDER ON MOTION TO PREVENT PUBLIC POSTING OF  
COMPLAINT COUNSEL’S POST-TRIAL BRIEF AND  
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW  
CONTAINING CONFIDENTIAL INFORMATION  
ON THE FEDERAL TRADE COMMISSION’S WEBSITE**

Upon the motion of the Respondent that Complaint Counsel’s Post-Trial Brief and Complaint Counsel’s Proposed Findings of Fact and Conclusions of Law not be posted on the website of the Federal Trade Commission until Complaint Counsel has produced a confidential version of said documents, and it being shown that posting of said pleadings on the website of the Federal Trade Commission would irreparably harm Respondent, it is hereby ORDERED that Complaint Counsel’s Post-Trial Brief and Complaint Counsel’s Proposed Findings of Fact and Conclusions of Law shall not be posted on the website of the Federal Trade Commission until Complaint Counsel has produced a confidential version of said documents. It is further ordered that a hearing on this matter shall take place on May 11, 2011 (or other date to be determined for oral argument), or at a later date, for a ruling on whether Complaint Counsel has violated the Protective Order.



ORDERED:

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D. Michael Chappell  
Chief Administrative Law Judge

Dated: April \_\_, 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.

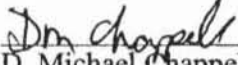
DOCKET NO. 9343



**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:

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**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.

# ALLEN AND PINNIX, P.A.

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March 31, 2009



Melissa Westman-Cherry  
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Federal Trade Commission  
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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).

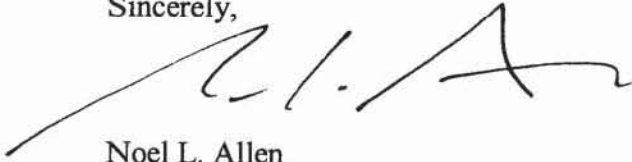
The Board's activities in this area are plainly pursuant to statutory authority found at N.C. Gen. Stat. §§ 90-40 and 90-40.1 (practicing dentistry without a license), 90-29 (defining the practice of dentistry), and 90-233 (defining the practice of dental hygiene). Similar actions under comparable state 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

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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