

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT**

LISA MARTINEZ AND SENSATIONAL SMILES, LLC
D/B/A SMILE BRIGHT,

Plaintiffs,

v.

Civil Action No.

DR. JEWEL MULLEN, in her official capacity as
Commissioner of Public Health; and JEANNE P.
STRATHEARN, DDS; LANCE E. BANWELL, DDS;
ELLIOT S. BERMAN, DDS; PETER S. KATZ, DMD;
STEVEN G. REISS, DDS; BARBARA B. ULRICH;
AND MARTIN UNGAR, DMD, in their official
capacities as members of the Connecticut Dental
Commission,

Date: November 16, 2011

Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Introduction

1. This civil-rights lawsuit seeks to vindicate the constitutional right to earn an honest living free from government regulations that serve no legitimate governmental interest. Plaintiffs are teeth-whitening entrepreneurs who sell legal, over-the-counter teeth-whitening products and provide customers with a clean, comfortable environment in which to apply those products to their own teeth. It is perfectly legal to sell these products to customers who will use them at home without supervision or instruction. Nevertheless, the Connecticut Dental Commission has declared that if Plaintiffs permit their customers to use these products at a shopping mall or in a salon, Plaintiffs will be engaged in the unlicensed practice of dentistry, a felony offense punishable by up to five years in jail or \$25,000 in civil fines. These actions

deprive Plaintiffs of their right to pursue a lawful occupation, in violation of the Due Process, Equal Protection, and Privileges or Immunities Clauses of the Fourteenth Amendment to the United States Constitution.

Jurisdiction

2. Plaintiffs bring this civil-rights lawsuit pursuant to the Fourteenth Amendment to the U.S. Constitution; the Civil Rights Act of 1871, 42 U.S.C. § 1983; and the Declaratory Judgment Act, 28 U.S.C. §§ 2201–2202. Plaintiffs seek declaratory and injunctive relief against the enforcement of Conn. Gen. Stat. §§ 20-106, -114, -122, -123, and -126 as applied to teeth-whitening services like those offered by Plaintiffs, because those provisions, as applied by Defendants, violate Plaintiffs’ constitutional right to earn an honest living.

3. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1343.

Venue

4. Venue lies in this Court pursuant to 28 U.S.C. § 1391(b).

Parties

5. Plaintiff Lisa Martinez is a Connecticut resident who previously operated a teeth-whitening business out of the Crystal Mall in Waterford, Connecticut. Ms. Martinez closed her business in response to a declaratory ruling by the Connecticut Dental Commission that services like the ones she provided constitute the practice of dentistry. She wishes to reopen her business, but cannot do so without risking fines or jail time because she is not a licensed dentist.

6. Plaintiff Sensational Smiles, LLC, d/b/a Smile Bright (hereinafter Smile Bright), is a Connecticut limited-liability corporation co-owned by Connecticut residents Stephen Barraco and Tasos Kariofyllis. Before the Dental Commission’s declaratory ruling, Smile Bright

offered teeth-whitening services in shopping malls, spas, and salons. It wishes to resume doing so but cannot because Messrs. Barraco and Kariofyllis are not licensed dentists and because Smile Bright is not licensed as a professional-services corporation under Chapter 594a of the Connecticut Statutes.

7. Defendant Jewel Mullen, MD, is the Connecticut Commissioner of Public Health. As Commissioner of Public Health, Dr. Mullen is charged with the enforcement of Connecticut's Dental Practice Act, Conn. Gen. Stat. §§ 20-103 through 20-126e. Dr. Mullen is sued in her official capacity.

8. Defendants Jeanne P. Strathearn, DDS; Lance E. Banwell, DDS; Elliot S. Berman, DDS; Peter S. Katz, DMD; Steven G. Reiss, DDS; Barbara B. Ulrich; and Martin Ungar, DMD are members of the Connecticut Dental Commission. As members of the Connecticut Dental Commission, they are empowered to issue declaratory rulings interpreting the Dental Practice Act and to impose civil penalties for violations of the Dental Practice Act. They are sued in their official capacities.¹

Statement of Facts

What is Teeth Whitening?

9. Teeth whitening is a popular cosmetic practice in which stains or discoloration are removed from tooth enamel through the use of a whitening agent, typically hydrogen peroxide or the related chemical carbamide peroxide (which breaks down into hydrogen peroxide).

10. Teeth-whitening products are widely available for over-the-counter purchase in varying concentrations from supermarkets, drug stores, and on the Internet.

11. Because teeth-whitening products are regulated by the FDA as "cosmetics," no prescription is required for their purchase. Anyone may legally purchase teeth-whitening

¹ There are currently two vacancies on the Connecticut Dental Commission.

products in any commercially available concentration and apply them to their own teeth with no supervision or instruction.

12. As teeth whitening has become more popular, entrepreneurs have begun offering teeth-whitening services in shopping malls, spas, and salons.

13. While practices vary among businesses, teeth-whitening entrepreneurs typically sell a prepackaged teeth-whitening product to their customers and provide their customers with instructions on how to apply that product to their own teeth. These products generally come in the form of disposable plastic mouth trays, which are prefilled with a whitening agent.

14. These entrepreneurs also provide customers with a chair to sit in while they apply the product to their own teeth, just as they would at home. Some also provide customers with an LED “enhancing light,” which either the entrepreneur or the customer may position in front of the customer’s mouth. These lights are available for purchase without a prescription and may legally be used at home without supervision or instruction.

15. These entrepreneurs do not make diagnoses and do not place anything in their customers’ mouths.

16. The risks associated with teeth whitening are minimal, and consist primarily of temporary tooth or gum sensitivity.

17. Teeth whitening is safer than other oral cosmetic procedures—such as tongue piercing, which the American Dental Association advises can lead to infections or cracked teeth—that are not regulated as the practice of dentistry.

18. For identical, self-administered products, the risks of teeth whitening are the same whether a person applies the product to their own teeth at home, in a salon, or at a shopping mall.

19. Teeth-whitening entrepreneurs compete with dentists for customers seeking whitening services.

20. According to a 2008 Gallup poll, 80% of dentists offer teeth-whitening services. *In re N.C. Bd. Of Dental Exam'rs*, No. 9343, 29 (F.T.C. July 14, 2011) (Initial Decision), available at <http://www.ftc.gov/os/adjpro/d9343/110719ncb-decision.pdf>.

21. On information and belief, teeth-whitening entrepreneurs like those described above typically charge much less than dentists do for cosmetic teeth whitening.

Connecticut's Dental Practice Act and the Connecticut Dental Commission

22. Connecticut's Dental Practice Act is set forth in Conn. Gen. Stat. §§ 20-103 through 20-126e.

23. Under the Act, no person may engage in any activity that is considered to be the "practice of dentistry or dental medicine" unless that person is a fully licensed dentist. Conn. Gen. Stat. §§ 20-106, -123.

24. "The practice of dentistry or dental medicine" is defined as "the diagnosis, evaluation, prevention or treatment by surgical or other means, of an injury, deformity, disease or condition of the oral cavity or its contents, or the jaws or the associated structures of the jaws." Conn. Gen. Stat. § 20-123(a).

25. Additionally, "[n]o person, except a licensed and registered dentist, and no corporation, except a professional service corporation organized and existing under chapter 594a for the purpose of rendering professional dental services, and no institution shall own or operate a dental office, or an office, laboratory or operation or consultation room in which dental medicine, dental surgery or dental hygiene is carried on as a portion of its regular business." Conn. Gen. Stat. § 20-122(a).

26. Violation of any of these provisions is a felony offense punishable by a fine of \$500, five years in jail, or both. Conn. Gen. Stat. § 20-126. Further, under Conn. Gen. Stat. § 20-126, “each instance of patient contact or consultation” that is in violation of the prohibition on the unlicensed practice of dentistry “shall constitute a separate offense.”

27. The Connecticut Dental Commission is a nine-member body with the authority to issue declaratory rulings interpreting the Dental Practice Act and to impose civil penalties for violations of the Dental Practice Act. Conn. Gen. Stat. §§ 20-103a, -114.

28. By statute, six of the members of the Commission must be dental practitioners, while the remaining three must be “public members.” Conn. Gen. Stat. § 20-103a.

29. The Connecticut Dental Commission has authority to impose civil penalties of up to \$25,000 for any violation of the Dental Practice Act or for “the aiding or abetting in the practice of dentistry, dental medicine or dental hygiene of a person not licensed to practice dentistry, dental medicine or dental hygiene in this state.” Conn. Gen. Stat. §§ 19a-17(6), 20-114(a).

The Dental Commission’s Declaratory Ruling

30. On September 10, 2010, the Connecticut Dental Commission began a rulemaking proceeding to determine whether teeth-whitening services constituted the “practice of dentistry” as set forth in Conn. Gen. Stat. § 20-123.

31. On June 8, 2011, the Dental Commission issued a declaratory ruling—attached as Exhibit A—concluding that teeth-whitening services constitute the practice of dentistry when they include:

- (1) assessing and diagnosing the causes of discoloration;
- (2) making recommendations of how to perform teeth whitening;
- (3) customizing treatment;
- (4) utilizing instruments and apparatus such as enhancing lights
- (5) selecting or advising individuals on the use of trays;
- (6) preparing or making customized trays for individuals;
- (7) applying teeth

whitening products to the teeth of a customer; (8) instructing a customer on teeth whitening procedures or methods; or, (9) other activities as discussed in [the] declaratory ruling.

32. This definition of the “practice of dentistry” encompasses teeth-whitening services like those described in paragraphs 13 through 15, above, because they involve “making recommendations of how to perform teeth whitening,” using “instruments and apparatus such as enhancing lights,” and “instructing [] customer[s] on teeth whitening procedures or methods.”

33. At the time the Dental Commission issued its declaratory ruling, two of the public-member positions on the Commission were vacant.

34. On information and belief, at least five of the dental-practitioner members of the Dental Commission offer teeth-whitening services in their practices.

35. Following the declaratory ruling, the Connecticut Department of Public Health prepared a letter—dated July 11, 2011, and attached as Exhibit B—instructing Stephen Barraco, co-owner of Smile Bright, to “voluntarily cease the practice of offering teeth whitening services” and threatening legal action if he did not. The letter cited as authority the Dental Commission’s declaratory ruling.

36. The Connecticut Department of Public Health prepared another letter—dated July 19, 2011, and attached as Exhibit C—instructing Plaintiff Lisa Martinez to “voluntarily cease the practice of offering teeth whitening services” and threatening legal action if she did not. The letter cited as authority the Dental Commission’s declaratory ruling.

37. Connecticut’s prohibition on non-dentist teeth whitening harms consumers by reducing competition and driving up prices.

38. There is no evidence that Connecticut’s prohibition on non-dentist teeth whitening protects consumers or advances any other legitimate governmental interest. Rather, the Dental

Commission adopted its declaratory ruling to protect dentists who offer teeth-whitening services from competition.

Plaintiffs and Their Businesses

Plaintiff Lisa Martinez

39. Plaintiff Lisa Martinez is a teeth-whitening entrepreneur who resides in Ledyard, Connecticut.

40. In November 2008, Ms. Martinez began operating Connecticut White Smile from a storefront in the Crystal Mall in Waterford, Connecticut, where she offered teeth-whitening services.

41. Ms. Martinez's services consisted of selling customers a prepackaged teeth-whitening product; instructing customers on how to apply the product to their own teeth; providing customers with a comfortable chair to sit in while using the product; and providing customers with an enhancing light, which the customers positioned in front of their own mouths.

42. Ms. Martinez charged between \$109 and \$139 (and sometimes less for repeat customers), depending on the length of the service.

43. The products Ms. Martinez sold had a 9 to 12% concentration of hydrogen peroxide. There are many commercially available teeth-whitening products with hydrogen-peroxide concentrations of 35% or higher, which anyone may purchase and apply to their own teeth with no supervision or instruction.

44. Some of Ms. Martinez's clients were referred to her by dentists.

45. Ms. Martinez's business was successful, but she closed her business in response to the Dental Commission's declaratory ruling because she was unwilling to risk having to pay tens of thousands of dollars in fines or going to jail.

46. Ms. Martinez still has the equipment from her business, including whitening products, chairs, and lights. She would immediately begin taking steps to reestablish her business if it were legal for her to do so.

47. Ms. Martinez is not a licensed dentist and is not eligible to become a licensed dentist without spending many years and tens of thousands of dollars on additional education.

Plaintiff Sensational Smiles, LLC, d/b/a Smile Bright

48. Plaintiff Sensational Smiles, LLC, d/b/a Smile Bright is a Connecticut limited-liability corporation formed in 2007 by Connecticut entrepreneurs Tasos Kariofyllis and Stephen Barraco.

49. Before the Dental Commission's declaratory ruling, Smile Bright sold custom-branded teeth-whitening products for use in spas and salons. Smile Bright co-owner Stephen Barraco would also take appointments to perform teeth-whitening services at a salon in Hamden, Connecticut.

50. Like Ms. Martinez, Smile Bright's teeth-whitening services were limited to providing customers a prepackaged teeth-whitening product; instructions on how to apply the product to their own teeth; a chair to sit in while using the product; and an enhancing light.

51. In response to the Dental Commission's declaratory ruling, Smile Bright stopped selling products for use in spas and salons and stopped providing teeth-whitening services because Messrs. Kariofyllis and Barraco were unwilling to risk having to pay tens of thousands of dollars in fines or going to jail.

52. The product Smile Bright sold for salon use had a carbamide peroxide concentration of 35%, which is the equivalent of approximately 9 to 10% hydrogen peroxide.

53. Smile Bright continues to sell teeth-whitening products for home use. These products are identical to the products Smile Bright sold for use in salons.

54. Smile Bright still has the equipment from its business, including whitening products, chairs, and lights. Smile Bright would immediately begin taking steps to reestablish its business if it were legal for it to do so.

55. Smile Bright is not licensed as a professional-services corporation as required under Chapter 594a of the Connecticut Statutes for corporations that offer services that constitute the practice of dentistry, and is not eligible to become licensed as a professional-services corporation.

56. Messrs. Kariofyllis and Barraco are not licensed dentists and are not eligible to become licensed dentists without spending many years and tens of thousands of dollars on additional education.

Injury to Plaintiffs

Plaintiff Lisa Martinez

57. Plaintiff Lisa Martinez closed her successful teeth-whitening business in response to the Connecticut Dental Commission's ruling that services like hers constitute the unlicensed practice of dentistry.

58. Ms. Martinez's business was her primary source of income. Being her own boss also allowed her to have a flexible schedule and spend time with her young children.

59. Since closing her business, Ms. Martinez has had to take a job as a flight attendant to help support her family. This job not only does not pay as well as did her teeth-whitening business, it also requires her to spend a significant amount of time away from her family.

60. But for Connecticut's prohibition on non-dentist teeth whitening, Ms. Martinez would immediately reopen her business and begin offering teeth-whitening services. As explained more fully below, Ms. Martinez has been denied her right to earn an honest living as protected by the Due Process and Privileges or Immunities Clauses of the Fourteenth Amendment, and her right to equal protection of the law as protected by the Equal Protection Clause of the Fourteenth Amendment.

Plaintiff Sensational Smiles, LLC, d/b/a Smile Bright

61. Plaintiff Sensational Smiles, LLC, d/b/a Smile Bright, stopped offering teeth-whitening services in spas and salons in response to the Connecticut Dental Commission's ruling that services like theirs constitute the unlicensed practice of dentistry.

62. In response to the Dental Commission's declaratory ruling, Smile Bright also stopped selling teeth-whitening products for use in spas and salons, because they do not want to risk tens of thousands of dollars in fines for aiding or abetting violations of the Dental Practice Act.

63. But for Connecticut's prohibition on non-dentist teeth whitening, Smile Bright would immediately resume selling teeth-whitening products for use in spas and salons and would immediately resume offering whitening services in salons. Smile Bright would also immediately begin taking steps to expand their business by opening a location in a Connecticut shopping mall. As explained more fully below, Smile Bright has been denied the right to earn an honest living as protected by the Due Process and Privileges or Immunities Clauses of the Fourteenth Amendment, and the right to equal protection of the law as protected by the Equal Protection Clause of the Fourteenth Amendment.

Constitutional Violations

Count One
Equal Protection

64. Plaintiffs incorporate and reallege the allegations of Paragraphs 1 through 63 as if fully set forth herein.

65. Count One is brought pursuant to the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution and 42 U.S.C. § 1983.

66. The Connecticut Dental Practice Act provides that only licensed dentists are authorized to provide services that constitute the practice of dentistry. Conn. Gen. Stat. § 20-123. The Act also prohibits corporations, “except [] professional service corporation[s] organized and existing under chapter 594a” of the Connecticut Statutes, from operating a “dental office.” Conn. Gen. Stat. § 20-122.

67. The Connecticut Dental Commission interprets the “practice of dentistry” within the meaning of Conn. Gen. Stat. § 20-123 to include teeth-whitening services like those formerly offered by Plaintiffs. Ex. A.

68. Plaintiff Lisa Martinez is not a licensed dentist and is not eligible to become a licensed dentist. Therefore, she cannot offer teeth-whitening services.

69. Plaintiff Smile Bright is not a professional-service corporation and is not eligible to become a professional-service corporation. Its owners are not licensed dentists, they are not eligible to become licensed, and they employ no licensed dentists. Therefore, Smile Bright cannot offer teeth-whitening services.

70. Products identical to those sold by Plaintiffs are available for purchase in supermarkets, drug stores, and online. Instructions for use of those products are widely available, either provided with the products themselves or online.

71. Enhancing lights identical to those used by Plaintiffs are available for purchase and home use without a prescription.

72. The Equal Protection Clause of the Fourteenth Amendment does not allow government to treat similarly situated persons differently unless the reason bears a rational relationship to a legitimate government interest.

73. Plaintiffs have been denied equal protection of the law because there is no rational reason for the distinction between persons who sell customers a product that they will apply to their own teeth at home, who are not regulated under the Dental Practice Act, and persons who sell customers an identical product that they will apply to their own teeth in a shopping mall or at a salon, whom Connecticut considers to be engaged in the practice of dentistry.

74. Plaintiffs have also been denied equal protection of the law because there is no rational reason for the distinction between persons who sell customers teeth-whitening products that the customers will apply to their own teeth, whom Connecticut considers to be engaged in the practice of dentistry, and persons who perform procedures like tongue piercing, who are not regulated under the Dental Practice Act.

75. Plaintiffs have also been denied equal protection of the law because there is no rational reason for the distinction between Plaintiffs' provision of in-person instruction to customers on how to apply teeth-whitening products to their own teeth, which Connecticut considers to be the practice of dentistry, and the provision of written instructions online or packaged with identical teeth-whitening products, which is not regulated under the Dental Practice Act.

76. Unless Defendants are enjoined from committing the above-described violations of the Fourteenth Amendment, Plaintiffs will continue to suffer great and irreparable harm.

Count Two
Due Process

77. Plaintiffs incorporate and reallege the allegations of Paragraphs 1 through 63 as if fully set forth herein.

78. Count Two is brought pursuant to the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution and 42 U.S.C. § 1983. The Due Process Clause protects the right to earn an honest living in the occupation of one's choice, subject only to regulations that are rationally related to a legitimate governmental interest.

79. There is no legitimate governmental interest for the application of the Dental Practice Act to teeth-whitening services like those offered by Plaintiffs.

80. The application of the Dental Practice Act to teeth-whitening services like those offered by Plaintiffs is not rationally related to any legitimate governmental interest that Defendants purport to have.

81. Connecticut's Dental Practice Act, as applied to Plaintiffs, deprives Plaintiffs of their right to earn an honest living in the occupation of their choice by imposing restrictions on the offering of teeth-whitening services that are not rationally related to any legitimate governmental interest.

82. Unless Defendants are enjoined from committing the above-described violations of the Fourteenth Amendment, Plaintiffs will continue to suffer great and irreparable harm.

Count Three
Privileges or Immunities

83. Plaintiffs incorporate and reallege the allegations of Paragraphs 1 through 63 as if fully set forth herein.

84. Count Three is brought pursuant to the Privileges or Immunities Clause of the Fourteenth Amendment to the U.S. Constitution and 42 U.S.C. § 1983. The Privileges or Immunities Clause protects the right to earn an honest living.

85. Connecticut's Dental Practice Act, as applied to Plaintiffs, deprives Plaintiffs of the privileges or immunities of citizenship by imposing arbitrary and unreasonable restrictions on the offering of teeth-whitening services.

86. Unless Defendants are enjoined from committing the above-described violations of the Fourteenth Amendment, Plaintiffs will continue to suffer great and irreparable harm.

Prayer for Relief

WHEREFORE, Plaintiffs respectfully request relief as follows:

For entry of judgment declaring that Conn. Gen. Stat. §§ 20-106, -114, -122, -123, and -126, as applied to teeth-whitening services like Plaintiffs', violate the Equal Protection, Due Process, and Privileges or Immunities Clauses of the Fourteenth Amendment to the U.S. Constitution;

For a permanent injunction forbidding future enforcement of Conn. Gen. Stat. §§ 20-106, -114, -122, -123, and -126 against Plaintiffs and persons providing teeth-whitening services like Plaintiffs';

For an award of attorneys' fees, costs, and expenses in this action pursuant to 42 U.S.C. § 1988; and

For such further legal and equitable relief as the Court may deem just and proper.

Respectfully submitted,

INSTITUTE FOR JUSTICE

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