IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

SENSATIONAL SMILES LLC,
D/B/A SMILE BRIGHT,

Plaintiff,

Civil Action No.
3:11-CV-01787-MPS

v.

Date: May 16, 2013

DR. JEWEL MULLEN, ET AL.,

Defendants.

LOCAL RULE 56(a)(2) RESPONSE TO DEFENDANTS' STATEMENT OF UNDISPUTED FACTS

As required by Local Civil Rule 56(a)(2), Plaintiff submits the following response to Defendants' statement of undisputed facts.

General Objections Regarding Inadmissible Hearsay, Inadmissible Expert Opinion Testimony, and Improper Conclusions of Law

To avoid needless duplication, Plaintiff here summarizes the legal basis for objections that will be made repeatedly in responding to Defendants' statement of undisputed facts.

First, the bulk of Defendants' proposed statement of material facts consists of a summary of statements made or documents submitted during a hearing of the Dental Commission on December 8-9, 2010, and of a declaratory ruling that the Commission issued on June 8, 2011. As a general proposition, Plaintiff concedes the *fact* of these statements and this ruling—that is, it concedes that they were actually made.[1] To the extent they are offered only for that purpose—to

[1] Plaintiff concedes that these documents may be used for the non-hearsay purpose of proving, for example, that Defendants followed normal procedures and therefore has not moved to strike them. *Cf., e.g.*, *Mugavero v. Arms Acres, Inc.*, No. 03 Civ. 05724, 2009 U.S. Dist. LEXIS 56214, at *12 (S.D.N.Y. July 1, 2009) (finding that disputed documents "might also be offered for non-hearsay purposes").

prove that the Commission held a hearing and followed certain procedures—Plaintiff has admitted them below.

To the extent, however, Defendants offer any of these statements for the truth of the matter asserted, there are two problems. First, all of these out-of-court statements are hearsay and cannot be taken for the truth of the matter asserted. *See* Fed. R. Evid. 801(c), 802; *cf. Delaney v. Bank of Am. Corp.*, No. 11-civ-8151, 2012 U.S. Dist. LEXIS 175746, at *15 (S.D.N.Y. Dec. 11, 2012) (describing "an out of court statement which [a party] proposes to offer for the truth of the matter asserted" as "classic hearsay"). This Court cannot consider hearsay evidence in deciding this motion. *Feingold v. New York*, 366 F.3d 138, 155 n.17 (2d Cir. 2004) (noting that courts may not consider hearsay on summary judgment).

Second, even if these statements were not hearsay, many of them would still be impermissible as they purport to offer the opinion testimony of particular individuals who have not been disclosed as experts in this case. *See* Fed. R. Evid. 702; Fed. R. Civ. P. 26(a)(2). Because these individuals purport to be dentists offering their understanding of a scientific issue, their opinions are expert testimony under Federal Rule of Evidence 702. Under Federal Rule of Civil Procedure 26(a)(2), a party must disclose an expert witness and provide a written report summarizing his conclusions and the facts considered in reaching those conclusions. The opposing party is then permitted to depose the designated expert. Fed. R. Civ. P. 26(b)(4). Per this Court's June 11, 2012 scheduling order (Dkt. 33), expert witnesses were required to be disclosed no later than October 1, 2012, and were to be deposed no later than October 30, 2012. In this case, Defendants made no expert disclosures and there were no expert depositions.

Federal Rule of Civil Procedure 37(c) prohibits parties from relying on evidence that does not meet the disclosure requirements of Rule 26 unless the failure to do so was substantially justified or harmless. Courts in this Circuit consider four factors in determining whether evidence

must be excluded for failure to comply with Rule 26: (1) the delinquent party's explanation for its failure to disclose; (2) the importance of the undisclosed expert testimony; (3) the prejudice suffered by the other party as a result of having to prepare to meet the new testimony; and (4) the possibility of a continuance. *Softel, Inc. v. Dragon Med. & Scientific Commc'ns, Inc.*, 118 F.3d 955, 961 (2d Cir 1997). Here, Defendants have offered no explanation that would justify considering undisclosed expert testimony, and there is no reasonable possibility either for a continuance or for Plaintiff's expert to draft a full response because the parties are already in the midst of briefing summary judgment. *Cf. Atlantis Info. Tech. v. CA, Inc.*, No. 06-cv-3921, 2011 U.S Dist. LEXIS 111085, at *36-37 (E.D.N.Y. Sept. 28, 2011) (excluding undisclosed expert testimony where expert report had not been disclosed prior to summary judgment).

Finally, many of Defendant's other purported assertions of material fact are simply legal conclusions and characterizations of Connecticut law. An opposing party need not deny a legal conclusion masquerading as an assertion of fact, and a court need not take such a legal conclusion as true. *See, e.g., Wojcik v. 42nd St. Dev. Proj., Inc.*, 386 F. Supp. 2d 442, 448 n.5 (S.D.N.Y. 2005).

Responses to Specific Proposed Findings of Fact[2]

1. On September 8, 2010, the Connecticut State Dental Commission ("Commission") began a declaratory ruling proceeding regarding whether teeth whitening practices constitute the practice of dentistry as set forth in Conn. Gen. Stat. § 20-123 and what teeth whitening practices or procedures must be performed only by a licensed dentist or person legally authorized to work under the supervision of a licensed dentist. Document 28, Rule 26(f) Joint Report of Parties' Planning Meeting, § IV(1).

[2] For ease of comparison, Plaintiff has reproduced each of Defendants' proposed statements of undisputed fact below, followed by Plaintiff's response.

Response: Admitted.

2. A Notice of Hearing was published on November 16, 2010 in the Connecticut Law Journal scheduling a hearing for December 8 and 9, 2010. Document 28, Rule 26(f) Joint Report of Parties' Planning Meeting, § IV (2).

Response: Admitted.

3. Notice was also sent to the Connecticut State Dental Association, the Connecticut Hygienist Association, the Connecticut Dental Assistants Association, the American Dental Association, the Connecticut Department of Public Health, the Connecticut Department of Consumer Protection and the Council for Cosmetic Teeth Whitening. Document 28, Rule 26(f) Joint Report of Parties' Planning Meeting, § IV (2).

Response: Admitted.

4. On June 8, 2011, the Commission made findings of fact and issued a declaratory ruling 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 discussed in the declaratory ruling. Document 28, Rule 26(f) Joint Report of Parties' Planning Meeting, § IV (3).

Response: Admitted.

5. On or about November 16, 2011, more than five months after the final decision of the Commission, plaintiffs Lisa Martinez and Sensational Smiles, LLC d/b/a ("Smile Bright") filed a complaint for declaratory and injunctive relief ("complaint"). Document 1, Complaint, p. 1.

Response: Admitted.

6. Smile Bright is a Connecticut limited-liability corporation co-owned by Connecticut residents Stephen Barraco and Tasos Kariofyllis. Document 1, Complaint, ¶ 6.

Response: Admitted.

7. Defendant Jewel Mullen, M.D. is the Connecticut Commissioner of Public Health ("Commissioner"). Document 1, Complaint, ¶ 7.

Response: Admitted.

8. Commissioner Jewel Mullen, M.D. is sued in her official capacity only. Document 1, Complaint, ¶ 7.

Response: Admitted.

9. All remaining defendants (members of the Commission) are sued in their official capacities as members of the Commission. Document 1, Complaint, ¶ 8.

Response: Admitted.

10. The Commission is created by statute and is composed of a majority of licensed dentists. Conn. Gen. Stat. § 20-103a(a).

Response: Admitted.

11. Members of the Commission are empowered to issue declaratory rulings interpreting the statutes related to dentistry. Document 1, Complaint, ¶ 8.

Response: Admitted.

12. Plaintiffs are not challenging the declaratory ruling process and are making no procedural due process claims regarding the declaratory ruling process. Document 28, Rule 26(f) Joint Report of Parties' Planning Meeting, § III (A).

Response: Admitted.

13. Plaintiff Lisa Martinez is no longer a party to this action as this Court approved the Stipulation of Dismissal on December 17, 2012. Document 37, Stipulation of Dismissal; Document 38, Order approving Stipulation of Dismissal.

Response: Admitted.

14. Plaintiff's claim is that the application of the Dental Practice Act to plaintiff's business violates "the Due Process, Equal Protection, and Privileges or Immunities Clauses of the Fourteenth Amendment." Document 28, Rule 26(f) Joint Report of Parties' Planning Meeting, § III (A).

Response: Admitted.

15. Any person may petition an agency, or an agency on its own motion initiate a proceeding for a declaratory ruling as to the validity of any regulation or the applicability to specified circumstances of a provision of the general statutes. Conn. Gen. Stat. § 4-176(a).

Response: Admitted.

16. A declaratory ruling shall have the same status and binding effect as an order issued in a contested [sic] and shall be a final decision for purposes of appeal. Conn. Gen. Stat. § 4-176(h).

Response: Admitted.

17. The Commission may, in its discretion, issue an appropriate order to any person found to be violating an applicable statute or regulation including the practice of dentistry without a license, providing for the immediate discontinuance of the violation. Conn. Gen. Stat. § 19a-11.

Response: Admitted.

18. The Commission may, through the Attorney General, petition the superior court for the enforcement of any order issued by it and for appropriate temporary relief or a restraining order. Conn. Gen. Stat. § 19a-11.

Response: Admitted.

19. The Connecticut Department of Public Health ("Department") was established pursuant to state statute. Conn. Gen. Stat. § 19a-1a(a).

Response: Admitted.

20. The Commissioner of the Department is required to employ the most efficient and practical means for the prevention and suppression of disease and shall administer all laws under the jurisdiction of the Department. Conn. Gen. Stat. § 19a-2a.

Response: Admitted.

21. The Department is responsible for conducting investigations regarding possible violations of statutes and regulations and is responsible for disciplinary matters. Conn. Gen. Stat. § 19a-14(a)(10).

Response: Admitted

22. Plaintiffs are seeking declaratory and injunctive relief against the enforcement of the statutes related to dentistry as applied to teeth whitening services "like those offered by" plaintiffs. Document 1, Complaint, ¶ 2.

Response: Admitted.

23. Plaintiffs allege that the application of the statutes related to dentistry to plaintiff violates plaintiff's "constitutional right to earn an honest living." Document 1, Complaint, ¶ 2.

Response: Admitted.

24. No person shall engage in the practice of dentistry or dental medicine unless such person has first obtained a license from the Department. Conn. Gen. Stat. § 20-106.

Response: This is a legal conclusion for which no admission or denial is necessary. Section 20-106 speaks for itself.

25. The Commission is one of the entities responsible for protecting the public with respect to dental care as it has authority to take disciplinary action against dentists based upon incompetence, negligence or indecent conduct toward patients. Conn. Gen. Stat. § 20-114(a)(2).

Response: Admitted.

26. The Commission can also discipline a dentist for 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. § 20-114(a)(6).

Response: Admitted.

27. The practice of dentistry is 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).

Response: This is a legal conclusion for which no admission or denial is necessary. Section 20-123(a), which is only partially quoted (without quotation marks) in this paragraph, speaks for itself.

28. In order to be licensed as a dentist in Connecticut, an individual must graduate from a reputable dental college or from a department of dentistry of a medical college conferring a dental degree unless the individual is licensed in another state which has requirements similar to or higher than the requirements in Connecticut. Conn. Gen. Stat. § 20-107(a).

Response: Admitted.

29. The Declaratory Ruling was based entirely on the record. Document 1-1, Declaratory Ruling page 3 of 7, ¶ 4.

Response: Admitted

30. The Commission relied on its own expertise in evaluating the evidence. Document 1-1, Declaratory Ruling page 3 of 7, ¶ 4.

Response: Plaintiff objects to Paragraph 29 in that it cites only to inadmissible hearsay evidence. Plaintiff admits that the Declaratory Ruling *asserts* that the Commission relied on its own expertise in evaluating the evidence before it; they object to Paragraph 30's request that this assertion be taken for its truth.

31. After considering all of the written evidence and oral testimony, the Commission found in its findings of fact that: Jon Davis, DMD, provided reliable and credible verbal and pre-filed testimony. Document 1-1, Declaratory Ruling page 4 of 7, Findings of Fact ("FOF") ¶ 1.

Response: Plaintiff admits only that the Commission made the finding. The finding itself—the assertion that the testimony of Jon Davis, DMD, was reliable and credible—is inadmissible hearsay and cannot be taken for the truth of the matter asserted.

32. After considering all of the written evidence and oral testimony, the Commission found in its findings of fact that: Jonathan C. Meiers, DMD, is an expert in the field of dentistry, and he has expertise in the field of teeth whitening. Document 1-1, Declaratory Ruling page 4 of 7, FOF ¶ 2.

Response: Plaintiff admits that the Commission made the finding. The finding itself—the assertion that Jonathan C. Meiers, DMD, is an expert in the field of dentistry, and that he has expertise in the field of teeth whitening—is inadmissible hearsay and cannot be taken for the truth of the matter asserted. Even if Defendants had produced admissible evidence of Dr. Meiers's qualifications and expertise (which they have not) and produced non-hearsay testimony from Dr. Meiers himself (which they have not) that testimony would still be inadmissible opinion testimony. As noted above, Defendants have not previously disclosed any expert

witnesses pursuant to Federal Rule of Civil Procedure 26(a)(2) or this Court's June 11, 2012 scheduling order.

33. After considering all of the written evidence and oral testimony, the Commission found in its findings of fact that: Dr. Meiers provided reliable and credible verbal and pre-filed testimony. Document 1-1, Declaratory Ruling page 4 of 7, FOF ¶ 3.

Response: Plaintiff admits that the Commission made the finding. The finding itself—the assertion that the testimony of Dr. Meiers was reliable and credible—is inadmissible hearsay and cannot be taken for the truth of the matter asserted.

34. After considering all of the written evidence and oral testimony, the Commission found in its findings of fact that: Tooth discoloration can be the result of numerous factors including smoking, coffee, tea or any other type of compound taken orally that can stain teeth. Document 1-1, Declaratory Ruling page 4 of 7, FOF ¶ 4.

Response: Plaintiff admits that the Commission made the finding. The finding itself is inadmissible hearsay which cannot be taken for the truth of the matter asserted and was based on statements of opinion by individuals who have not been tendered as experts in this action.

35. After considering all of the written evidence and oral testimony, the Commission found in its findings of fact that: Metabolic disease, trauma to the tooth pulp and certain drugs taken when the teeth were being formed can also cause discoloration. Document 1-1, Declaratory Ruling page 4 of 7, FOF ¶ 5.

Response: Plaintiff admits that the Commission made the finding. The finding itself is inadmissible hearsay and was based on the out-of-court opinion testimony of individuals who have not been tendered as experts in this action.

36. After considering all of the written evidence and oral testimony, the Commission found in its findings of fact that: Tooth whitening products contain potent oxidizing elements that, if applied incorrectly, can cause serious burns. Document 1-1, Declaratory Ruling page 4 of 7, FOF ¶ 6.

Response: Plaintiff admits that the Commission made that finding. The finding itself is inadmissible hearsay and was based on the out-of-court opinion testimony of individuals who have not been tendered as experts in this action. Further, Plaintiff affirmatively states that, as explained in the unrebutted testimony of Dr. Martin Giniger, teeth-whitening products are safe for consumers. Despite the fact that millions of people worldwide have whitened their teeth using peroxide-based products, the published literature does not reveal a single instance of anyone suffering permanent or serious harm as a result. Instead, the most common side effects are temporary tooth and gum sensitivity, which the reported literature finds resolve on their own within days of the whitening. Giniger Decl. ¶¶ 20, 22, 59-61, 64.

37. After considering all of the written evidence and oral testimony, the Commission found in its findings of fact that: Hydrogen peroxide and carbamide peroxide can cause tooth sensitivity and tissue burns. Document 1-1, Declaratory Ruling page 4 of 7, FOF ¶ 11.

Response: Plaintiff admits that the Commission made that finding. The finding itself is inadmissible hearsay, and was based on the out-of-court opinion testimony of individuals who have not been tendered as experts in this action. Plaintiff further states that this inadmissible finding of fact contradicts the unrebutted expert testimony of Dr. Martin Giniger that teeth-whitening products like those used by Plaintiff pose no risk to consumers, as detailed in Plaintiff's response to Paragraph 36.

38. After considering all of the written evidence and oral testimony, the Commission found in its findings of fact that: Professionally applied treatments attempt to prevent tissue burns by the use of tissue isolation by using a rubber dam and cotton roll or gauze isolation to prevent contact with the hydrogen peroxide. Document 1-1, Declaratory Ruling page 4 of 7, FOF ¶ 12.

Response: Plaintiff admits that the Commission made that finding. The finding itself is inadmissible hearsay, and was based on the out-of-court opinion testimony of individuals who have not been tendered as experts in this action. Plaintiff further states that this inadmissible finding of fact contradicts the unrebutted expert testimony of Dr. Martin Giniger that teeth-whitening products like those used by Plaintiff pose no risk to consumers, as detailed in Plaintiff's response to Paragraph 36.

39. After considering all of the written evidence and oral testimony, the Commission found in its findings of fact that: There are risks associated with the use of light for teeth whitening. Document 1-1, Declaratory Ruling page 5 of 7, FOF ¶ 14.

Response: Plaintiff admits that the Commission made that finding. The finding itself is inadmissible hearsay and was based on the out-of-court opinion testimony of individuals who have not been tendered as experts in this action. Plaintiff affirmatively states the following:

- Dr. Giniger testified that the LED lights used in teeth whitening are very low energy and emit light over a narrow band of the visible spectrum. They generate little heat and no collateral UV B or C radiation, making them no more harmful than a typical consumer flashlight. Decl. of Dr. Martin Giniger in Supp. of Pl.'s Mot. Summ. J. (Giniger Decl.) ¶ 75.

- There is no published literature showing that any person has ever been harmed as a result of being exposed to the type of low-powered LED bleaching lights used by non-dentists. Giniger Decl. ¶ 75.

- Dr. Giniger has conducted first-hand scientific experiments with several of the LED bleaching lights available to non-dentists and found none of them able to generate additional external heat energy change above 1°C (1.8°F). This is significant because it is necessary to cause at least a 5.5°C (9.9°F) increase in the temperature of the tooth pulp to cause the possibility of even transient tooth harm. Giniger Decl. ¶ 76.

- "[I]t would be scientifically and practically impossible for these lights to cause any more harm than a household flashlight (in other words, no chance)." Giniger Decl. ¶ 77.

40. After considering all of the written evidence and oral testimony, the Commission found in its findings of fact that: There should be adequate eye and skin protection for the patient and the operator of the light if it is being used to enhance the product in a bleaching procedure. Document 1-1, Declaratory Ruling page 5 of 7, FOF ¶ 15.

Response: Plaintiff admits that the Commission made that finding. The finding itself is inadmissible hearsay and was based on the out-of-court opinion testimony of individuals who have not been tendered as experts in this action. Plaintiff re-states and incorporates by reference its affirmative statements from its response to Paragraph 39.

41. After considering all of the written evidence and oral testimony, the Commission found in its findings of fact that: Pulpal irritation, tooth sensitivity and lip burns have been reported to occur at a higher rate with the use of bleaching lights. Document 1-1, Declaratory Ruling page 5 of 7, FOF ¶ 16.

Response: Plaintiff admits that the Commission made that finding. The finding itself is inadmissible hearsay and was based on the out-of-court opinion testimony of individuals who have not been tendered as experts in this action. Plaintiff re-states and incorporates by reference its affirmative statements from its response to Paragraph 39.

42. After considering all of the written evidence and oral testimony, the Commission found in its findings of fact that: The decision of whether to recommend or apply bleaching agents and/or bleaching lights to a particular person's teeth requires significant diagnostic expertise and skills, in part, to allow the provider to distinguish between pathological versus non-pathological causes of tooth discoloration. Document 1-1, Declaratory Ruling page 5 of 7, FOF ¶ 17.

Response: Plaintiff admits that the Commission made that finding. The finding itself is inadmissible hearsay and was based on the out-of-court opinion testimony of individuals who have not been tendered as experts in this action. Plaintiff re-states and incorporates by reference its affirmative statements from its response to Paragraph 39.

43. The Commission found that teeth whitening under certain circumstances as detailed in the Declaratory Ruling are cosmetic procedures related to the oral cavity and therefore do not fall within the exception to the licensing statute that exempts cosmetic procedures other than those related to the oral cavity. Document 1-1, Declaratory Ruling page 5 of 7, Discussions and Law.

Response: Plaintiff admits that the Commission made that finding. The validity of the finding itself is a conclusion of law for which no admission or denial is necessary.

44. The Commission found that teeth whitening procedures constitute the practice of dentistry if the procedures involve the diagnosis, evaluation, prevention or treatment of an injury

or deformity, disease or condition of the oral cavity (such as discoloration). Document 1-1, Declaratory Ruling page 6 of 7.

Response: Plaintiff admits that the Commission made that finding. The validity of the finding itself is a conclusion of law for which no admission or denial is necessary.

45. The Commission found that when a person is "merely selling whitening products" that are otherwise legal to sell, it does not constitute the practice of dentistry. Document 1-1, Declaratory Ruling page 6 of 7.

Response: Plaintiff admits that the Commission made that finding. The validity of the finding itself is a conclusion of law for which no admission or denial is necessary.

46. The Commission found that the selling of teeth whitening gels of differing strengths by non-licensed persons is not, by itself, the practice of dentistry. Document 1-1, Declaratory Ruling page 6 of 7.

Response: Plaintiff admits that the Commission made that finding. The validity of the finding itself is a conclusion of law for which no admission or denial is necessary.

47. The Commission found that conduct becomes the practice of dentistry when such unlicensed person either uses light in an attempt to enhance the product's effectiveness or a person conducts an analysis of that person's individual needs based upon an examination or other evaluation. Document 1-1, Declaratory Ruling page 6 of 7.

Response: Plaintiff admits that the Commission made that finding. The validity of the finding itself is a conclusion of law for which no admission or denial is necessary.

48. The Commission found that as a general rule, actual application of a tooth whitening gel to another person by a non-licensed person constitutes the practice of dentistry. Document 1-1, Declaratory Ruling page 6 of 7.

Response: Plaintiff admits that the Commission made that finding. The validity of the finding itself is a conclusion of law for which no admission or denial is necessary.

49. The Commission found that the selling of over the counter teeth whitening products does not constitute the practice of dentistry if the seller is not evaluating a particular patient and recommending products based upon an examination or evaluation of a particular patient/consumer. Document 1-1, Declaratory Ruling page 6 of 7.

Response: Plaintiff admits that the Commission made that finding. The validity of the finding itself is a conclusion of law for which no admission or denial is necessary.

50. The Commission found that assessing, fabricating, selecting, or advising the selection of tooth trays used to apply products that lighten or whiten teeth constitutes the practice of dentistry. Document 1-1, Declaratory Ruling page 6 of 7.

Response: Plaintiff admits that the Commission made that finding. The validity of the finding itself is a conclusion of law for which no admission or denial is necessary.

51. The Commission found that applying a light source or other light assisted bleaching systems that result in lightening or whitening teeth to enhance the tooth whitening process constitutes the practice of dentistry. Document 1-1, Declaratory Ruling pages 6-7 of 7.

Response: Plaintiff admits that the Commission made that finding. The validity of the finding itself is a conclusion of law for which no admission or denial is necessary.

52. The Commission found that all of the witnesses who testified at the hearing were reliable and credible. Document 1-1, Declaratory Ruling page 7 of 7.

Response: Plaintiff admits that the Commission made that finding. The finding itself is inadmissible hearsay and therefore cannot be taken for the truth of the matter asserted.

53. In his pre-filed testimony, Jonathan Meiers, DMD, attached charts from other scientific studies with indicated properties and risks when using light-activated bleaching. Affidavit of Jeffrey Kardys, Exhibit A (Exhibit 14 of the Declaratory Ruling Record, page 6).

Response: Plaintiff admits that the exhibit is included in the record of the Declaratory Ruling. The exhibit itself, and the statements contained therein, are inadmissible hearsay and cannot be taken for the truth of the matter asserted. The statements set forth in the exhibit also reflect impermissible opinion testimony; as discussed above, Defendants in this action have never disclosed any expert witnesses pursuant to Rule 26 or this Court's June 11, 2012 scheduling order. If these statements were offered for their truth, Plaintiff would deny them based on the unrebutted sworn testimony of Dr. Martin Giniger, as set forth above in Plaintiff's response to Paragraph 39.

54. In his pre-filed testimony, Jonathan Meiers, DMD, cited scientific studies which indicated that "[p]ulpal irritation, tooth sensitivity and mucosal or lip burns have been reported to occur at a higher rate with the use of bleaching lights for in office bleaching procedures than for non light enhanced bleaching treatments." Affidavit of Jeffrey Kardys, Exhibit A (Exhibit 14 of the Declaratory Ruling Record, page 7).

Response: Plaintiff admits that the quoted statement appears in the Declaratory Ruling record. The statement itself (like the studies to which it cites) is inadmissible hearsay and cannot

be taken for the truth of the matter asserted. The quoted statement also reflects impermissible opinion testimony; as discussed above, Defendants in this action have never disclosed any expert witnesses pursuant to Rule 26 or this Court's June 11, 2012 scheduling order. If these statements had been offered for their truth, Plaintiff would deny them based on the unrebutted sworn testimony of Dr. Martin Giniger, as set forth above in Plaintiff's response to Paragraph 39.

55. As part of his pre-filed testimony, Dr. Meiers attached more than 150 pages of documentation in support of his pre-filed testimony regarding teeth whitening. Affidavit of Jeffrey Kardys, Exhibit A (Exhibit 14 of the Declaratory Ruling Record, page 12-178).

Response: Plaintiff admits that the record of the Declaratory Ruling contains 150 pages of documents. All of the statements in those 150 pages, however, are inadmissible hearsay and cannot be taken for the truth of the matter asserted. The statements set forth in those pages also reflect impermissible opinion testimony; as discussed above, Defendants in this action have never disclosed any expert witnesses pursuant to Rule 26. If these statements were offered for their truth, Plaintiff would deny them based on the unrebutted sworn testimony of Dr. Martin Giniger, as set forth above in Plaintiff's response to Paragraph 39.

56. The Commission as its Declaratory Ruling conclusion determined that teeth whitening services involve 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 this declaratory ruling. Document 1-1, Declaratory Ruling page 7 of 7.

Response: Plaintiff admits that the Commission made that determination. The validity of the determination itself is a conclusion of law for which no admission or denial is necessary.

57. On July 11, 2011, Kathleen Boulware, R.N., on behalf of the Practitioner Licensing and Investigations Section of the Department sent plaintiff a letter which indicated that the Commission issued a Declaratory Ruling regarding teeth whitening. Document 1-2, ¶ 2.

Response: Plaintiff admits that Ms. Boulware sent this letter to Stephen Barraco, co-owner of Plaintiff Smile Bright.

58. The letter from Kathleen Boulware contained the conclusion of the Declaratory Ruling Proceeding and Ms. Boulware listed the nine circumstances which the Commission held constitute the practice of dentistry. Document 1-2, ¶ 2.

Response: Admitted.

59. Based upon the conclusion in the Declaratory Ruling, Ms. Boulware "requests" that plaintiff voluntarily cease the practice of offering teeth whitening services which would violate the Commission's Declaratory Ruling. Document 1-2, ¶ 3.

Response: Plaintiff admits this allegation to the extent that the word "requests" appears in Ms. Boulware's letter and that the letter informed Mr. Barraco that he should cease performing any activities listed in the declaratory ruling. This allegation is denied to the extent that it implies that the Department of Public Health sought only "voluntar[y]" compliance. The evidence in the record clearly demonstrates that the Department of Public Health sent the letter because it believed Smile Bright's whitening procedure violated the Declaratory Ruling. Ms. Boulware, as 30(b)(6) designee for the Department, testified specifically that she sent the letter because she believed Stephen Barracco, co-owner of Smile Bright, was positioning the LED lights used for

teeth whitening. *See* Decl. of Paul Sherman in Supp. of Pl.'s Mot. Summ J. (Sherman Decl.) Ex. 3, at 30:13-22, 31:7-10.

60. Ms. Boulware indicated that if plaintiff did not cease, the Department will consider proceeding with legal action. Document 1-2, ¶ 3.

Response: Admitted.

61. The same letter from Ms. Boulware was sent to former plaintiff Martinez. Document 1-3.

Response: Admitted.

62. Neither the plaintiff nor former plaintiff Martinez participated in the Declaratory Ruling proceeding. Document 1-1, pp. 2-3.

Response: Admitted

Disputed Issues of Material Fact

Defendants' motion for summary judgment presents no disputed issues of material fact because its only allegations of fact are a simple recitation of the procedures followed by the Commission in deciding to regulate the practice of teeth whitening. Plaintiff does not dispute that the Commission made a decision to define certain teeth-whitening practices as the practice of "dentistry," nor does it dispute that the Commission followed the required statutory procedures in doing so. Plaintiff disputes whether that decision had a rational basis, and the Defendants' statement of material facts contains no assertions on that score. For example, it contains no assertions (let alone citations to record evidence tending to show) that any of the Commission's factual findings are correct or reasonable or even plausible. It contains no assertions (let alone

citations to record evidence tending to show) that there is any conceivable danger to the public from teeth-whitening services like those previously offered by Plaintiff Smile Bright.

Even if Defendants' motion for summary judgment had contained any of these assertions, Plaintiff would dispute them based on the contrary evidence presented in Plaintiff's own motion for summary judgment. For example, the record evidence (and unrebutted expert testimony) shows that there is no conceivable danger to the public from teeth whitening, and it shows that no health-and-safety objective is achieved by preventing private businesses like Plaintiff's from helping customers use perfectly legal over-the-counter whitening products. *See, e.g.*, Pl.'s Local Rule 56(a)(1) Statement of Undisputed Facts at ¶¶ 40-67. Because none of Defendants' assertions of fact contradict or address these facts, Plaintiff cannot identify whether Defendants would dispute them (or on what evidence that dispute would be based). Put differently, and as explained in Plaintiff's brief in opposition (see Pl.'s Resp. to Defs.' Mot. for Summ. J. at 8-9), Defendants' motion for summary judgment raises no disputed issues of material fact because it fails to make any of the factual assertions that would be necessary for this Court to grant its motion.

Respectfully submitted,

Institute for Justice

/s/ _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 16, 2013, a true and correct copy of the foregoing **LOCAL RULE 56(a)(2) RESPONSE TO DEFENDANTS' STATEMENT OF UNDISPUTED FACTS** was sent via the Court's CM/ECF to the following counsel of record:

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