

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION**

TRISHA ECK, )

Plaintiff, )

vs. )

TANJA D. BATTLE, in her official capacity as )

Executive Director of the Georgia Board of )

Dentistry, RICHARD BENNETT, LOGAN )

“BUZZY” NALLEY, JR., REBECCA B. )

BYNUM, RANDY DANIEL, TRACY GAY, )

THOMAS P. GODFREY, STEPHAN F. )

HOLCOMB, ANTWAN L. TREADWAY, H. )

BERT YEARGAN, CONNIE ENGEL, in their )

official capacities as Members of the Georgia )

Board of Dentistry, and SAMUEL S. OLENS, in )

his official capacity as the Attorney General of )

Georgia, )

Defendants. )

Civil Action No. \_\_\_\_\_

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**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

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**INTRODUCTION**

1. This is a civil-rights lawsuit seeking declaratory and injunctive relief.

Plaintiff is Trisha Eck, who is the sole proprietor of Tooth Fairies Teeth

Whitening. Mrs. Eck is a teeth-whitening entrepreneur who until recently sold

legal, over-the-counter teeth-whitening products and provided customers with a clean, comfortable environment in a medi-spa location in Warner Robins, Georgia, 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. Nonetheless, the Georgia Board of Dentistry has taken the position that non-dentist teeth-whitening entrepreneurs like Mrs. Eck are engaged in the unlicensed practice of dentistry if they permit customers to use these products at the place of purchase. The unlicensed practice of dentistry is a felony offense in Georgia, punishable by imprisonment for two to five years, a fine of up to \$1,000, or both. The Board's actions arbitrarily deprive Mrs. Eck of her right to pursue the occupation of her choice, in violation of the Equal Protection, Due Process, and Privileges or Immunities Clauses of the Fourteenth Amendment to the U.S. Constitution.

2. Plaintiff seeks a declaratory judgment that Ga. Code §§ 43-11-1 and -17 and Ga. Comp. R. & Regs. 150-14-.01, *et seq.*, as applied to teeth-whitening services like those Plaintiff provided, violate the Equal Protection, Due Process, and Privileges or Immunities Clauses of the Fourteenth Amendment to the U.S. Constitution.

3. Plaintiff seeks a permanent injunction forbidding future enforcement of Ga. Code §§ 43-11-1 and -17 and Ga. Comp. R. & Regs. 150-14-.01, *et seq.*, against her and other persons providing similar teeth-whitening services.

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

5. Plaintiff does not seek money damages against any party.

### **JURISDICTION AND VENUE**

6. Plaintiff brings 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.

7. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1343 and 42 U.S.C. § 1983.

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

### **PARTIES**

9. Plaintiff Trisha Eck is the owner and operator of Tooth Fairies Teeth Whitening, a sole proprietorship. Mrs. Eck is a Georgia resident who previously operated Tooth Fairies Teeth Whitening from space rented in a medical-office building in a commercial area of Warner Robins. She closed her business in October 2013 after receiving and complying with a subpoena issued to her by the

Dental Board, which demanded information about her customers and business practices, and after learning that the Board has prosecuted other similarly situated teeth-whitening entrepreneurs for the unlawful practice of dentistry. On March 14, 2014, the Board issued a cease-and-desist order to Mrs. Eck, prohibiting her from operating her business. She wishes to reopen her business, but cannot do so without risking fines or jail time because she is not a licensed dentist.

10. Defendant Tanja B. Battle is the Executive Director of the Georgia Board of Dentistry, charged with enforcing orders of the Board. Defendants Richard Bennett, Logan “Buzzy” Nalley Jr., Rebecca B. Bynum, Randy Daniel, Tracy Gay, Thomas P. Godfrey, Stephan F. Holcomb, Antwan L. Treadway, H. Bert Yeargan, and Connie Engel are members of the Board. As members of the Board, they are empowered to issue declaratory rulings interpreting the Dental Practice Act and to impose civil penalties for violations of the Act. Defendant Samuel S. Olens, Georgia’s Attorney General, is joined in this action because he is charged with enforcing the criminal penalties of the Act. All of the Defendants are sued only in their official capacities.

## **FACTUAL ALLEGATIONS**

### **Teeth-Whitening Services and Entrepreneurs**

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

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

13. Because teeth-whitening products are regulated by the U.S. Food and Drug Administration as “cosmetics,” no prescription is required for their purchase. Anyone may legally purchase teeth-whitening products in any commercially available concentration and apply them to their own teeth with no supervision or instruction.

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

15. 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. Mrs. Eck uses only disposable, plastic, prefilled mouth trays in her business and instructs customers on how to use those trays.

16. Teeth-whitening entrepreneurs also typically provide customers with a chair to sit in while customers apply the product to their own teeth, just as they would at home. Some, including Mrs. Eck, 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.

17. Teeth-whitening entrepreneurs, including Mrs. Eck, do not make diagnoses and do not place anything in their customers’ mouths.

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

19. 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.

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

21. According to a 2008 Gallup poll, 80% of dentists nationwide offer teeth-whitening services. *In re N.C. Bd. of Dental Exam'rs*, No. 9343, at 29 (F.T.C. July 14, 2011) (Initial Decision by Chief Administrative Law Judge D. Michael Chappell), *available at* <http://www.ftc.gov/os/adjpro/d9343/110719ncb-decision.pdf> (listed under the sub-heading “July 19, 2011”).

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

### **Georgia’s Dental Practice Act and the Georgia Board of Dentistry**

23. Georgia’s Dental Practice Act is set forth in Ga. Code §§ 43-11-1 through 43-11-82. The Rules of the Georgia Board of Dentistry are set forth in Georgia Compiled Rules & Regulations Chapter 150.

24. Under the Act, any person who engages in any activity considered to be the practice of dentistry “without obtaining a license to practice from the board shall be guilty of a felony” and subject to fines and imprisonment. Ga. Code § 43-11-50. The unlawful practice of dentistry is punishable by imprisonment of two to five years, a fine of not less than \$500, or both. *Id.*

25. To become a licensed dentist in Georgia, one must have received a doctoral degree in dentistry, as well as successfully passed an examination approved by the Georgia Board of Dentistry. Ga. Comp. R. & Regs. 150-03-.04.

26. A doctoral degree in dentistry is typically a four-year course of study in addition to a four-year undergraduate degree.

27. The cost of dental school tuition in Georgia for a four-year doctoral degree ranges between \$85,000 and \$240,000, depending on the school chosen and the state of residency of the student.

28. Under the Dental Practice Act, the practice of dentistry includes “any dental operation whatsoever on the human oral cavity, teeth, gingiva, alveolar process, maxilla, mandible or associated structures.” Ga. Code § 43-11-17(a)(4).

29. Under the Dental Practice Act, the practice of dentistry includes supplying or fitting “for or to an ultimate user of the product in the State of Georgia, any appliance, cap, covering, prosthesis, or cosmetic covering, as defined by rules and regulations established by the board.” Ga. Code § 43-11-17(a)(6). Pursuant to those rules and regulations an “appliance” includes any removable structure used to “chang[e] the appearance of teeth” or “chang[e] the shape and shade of teeth.” Ga. Comp. R. & Regs. 150-14-.01(1).

30. The Dental Board interprets the Dental Practice Act and its Rules to include teeth-whitening businesses like Mrs. Eck's as the unlawful practice of dentistry. *See* Ex. A (Georgia Board of Dentistry Letter to Atlanta Better Business Bureau) ("altering the shade of teeth, such as is done by current whitening techniques is the practice of dentistry. Therefore, unless the facility has a Georgia licensed, direct supervision dentist present for the treatment, it is a violation of the Dental Practice Act and the laws of the State of Georgia. Such facilities that do not have a dentist performing and supervising the services would be charged with the unlicensed practice of dentistry, which is a felony in this state.") (emphasis in original).

31. The Board has issued a cease-and-desist order to Mrs. Eck to prohibit her from operating her teeth-whitening business. Ex. B (cease-and-desist order). On information and belief, the Board has issued similar cease-and-desist orders to other teeth-whitening entrepreneurs in Georgia.

32. The Dental Board consists of 11 members appointed by the Governor. Nine members of the Board are required to be dentists; one must be a dental hygienist; and one member must be a non-dentist. Ga. Code § 43-11-2(a)-(b). At present there are ten members on the dental board and one vacancy; eight current members are dentists.

33. On information and belief, the Dental Board does not require dentists to have any experience or demonstrated proficiency with teeth-whitening practices as a condition of licensure.

34. On information and belief, the Dental Board does not require dental schools to teach teeth-whitening practices as a condition of accepting graduates of those schools for licensure in Georgia.

35. On information and belief, the practical and written examinations accepted by the Dental Board for licensure as a dentist in Georgia do not cover teeth whitening.

36. The Dental Board may conduct investigations, issue subpoenas to compel the production of documents, and conduct hearings concerning the unlawful practice of dentistry. Ga. Code § 43-11-7(13)-(16).

37. The Dental Board may bring an action to enjoin any person, firm, partnership, or corporation who engages in the practice of dentistry without being licensed to do so by the Board. Ga. Code. § 43-11-2(e).

38. The Dental Board may issue a cease-and-desist order prohibiting any person from engaging in the practice of dentistry without a license. The violation of a cease-and-desist order from the Board subjects the violator to a fine of up to \$500.00 for each transaction constituting a violation. Ga. Code § 43-1-20.1.

### **The Dental Board's Subpoena and Plaintiff's Response**

39. On information and belief, the Dental Board opened an investigation of Mrs. Eck and Tooth Fairies Teeth Whitening to determine whether Mrs. Eck was violating the Dental Practice Act by offering teeth whitening to customers in Georgia.

40. On September 30, 2013, the Dental Board issued a subpoena to Plaintiff demanding copies of all her client lists, promotional materials, invoices, protocols, contracts, and billing records, among other materials. Ex. C (investigative subpoena).

41. On October 17, 2013, Mrs. Eck complied with the subpoena and turned over all materials demanded by the Dental Board.

42. On or about November 1, 2013, Mrs. Eck voluntarily closed her business and vacated her suite at the Warner Robins medi-spa, upon learning of the Dental Board's official position that the teeth-whitening techniques she used constituted the unlawful practice of dentistry. Mrs. Eck intends to remain closed in order to avoid being subject to fines or imprisonment until such time as the law has changed or the Dental Practice Act is judged unconstitutional as applied to teeth-whitening services such as those provided by her.

43. On March 14, 2014, the Dental Board approved a cease-and-desist order, prohibiting Mrs. Eck from operating her business subject to fines of \$500 per transaction, *see* Ex. B, and other potential civil and criminal punishment.

### **PLAINTIFF AND HER BUSINESS**

44. Plaintiff Trisha Eck is a teeth-whitening entrepreneur who resides in Warner Robins, Georgia. She is a mother of two and grandmother of three. Mrs. Eck launched Tooth Fairies Teeth Whitening after many years as a homemaker and stay-at-home mom.

45. Mrs. Eck began her teeth-whitening business in order to supplement her family's income when her family became concerned that her husband, a civilian machinist at Warner Robins Air Force Base, might have his hours reduced as a result of federal budget cuts.

46. In searching for opportunities within the range of her skills, Mrs. Eck became enthusiastic about the potential to open a small business in the emerging field of teeth whitening. She attended a trade show and visited kiosks and other locations in Georgia to learn more about the business, ultimately investing in equipment, supplies, and training to provide the services to the public.

47. In November 2012, Mrs. Eck began operating Tooth Fairies Teeth Whitening. She performed teeth whitening at parties, conventions, and other

locations where she was invited. In December 2012, she expanded her business and began offering teeth whitening from a suite within a medi-spa in Warner Robins.

48. Mrs. Eck'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.

49. Mrs. Eck charged between \$79 and \$109, depending on the source of the customer and the application of various coupons and other discounts.

50. The products Mrs. Eck sold had a 12% to 16% 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.

51. The leading sources of Mrs. Eck's customers were fliers distributed to Warner Robins-area homes and by referrals to customers receiving other services at the medi-spa.

52. Mrs. Eck's business was successful, but she closed it in response to the Dental Board's subpoena, her learning of the Board's official opinion that teeth-whitening as it was done by her is the unlawful practice of dentistry, and the

Board's issuance of a cease-and-desist letter. Mrs. Eck was unwilling to risk having to pay thousands of dollars in fines or going to jail.

53. Mrs. Eck still has the equipment from her business, including whitening products and lights. She has an agreement with her former landlord that she can re-open the business in the same location in the future so long as it is lawful. She would (and could) immediately begin taking steps to reestablish her business if it were legal for her to do so.

54. Mrs. Eck 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.

### **INJURY**

55. Plaintiff Trisha Eck closed her successful teeth-whitening business in response to the Georgia Board of Dentistry's position that services like hers constitute the unlicensed practice of dentistry, and its investigation of her for providing those services.

56. Mrs. Eck's business remains closed because the Dental Board has issued a cease-and-desist order threatening her with fines and other potential punishments if she were to reopen the business.

57. Since closing her business, Mrs. Eck has had to take a new job as a secretary. Although she has been grateful for the opportunity, the job is not as satisfying, flexible, or remunerative as running her own small business.

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

## **LEGAL CLAIMS**

### **Count I**

#### **Equal Protection**

59. Plaintiff incorporates and realleges the allegations of Paragraphs 1 through 58 as if fully set forth herein.

60. 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.

61. The Georgia Dental Practice Act provides that only licensed dentists are authorized to provide services that constitute the practice of dentistry. Ga. Code § 43-11-50.

62. The Dental Board interprets the “practice of dentistry” to include teeth-whitening services like those formerly offered by Mrs. Eck. Ga. Comp. R. & Regs. 150-14-.01(1); Ex. A.

63. Plaintiff is not a licensed dentist and is not eligible to become a licensed dentist without nearly a decade of training and education. Therefore, she cannot offer teeth-whitening services.

64. Products identical to those previously sold by Mrs. Eck 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.

65. Enhancing lights identical to those used by Mrs. Eck are available for purchase and home use without a prescription.

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

67. Plaintiff has been denied equal protection of the law because there is no rational reason for Georgia’s 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 Georgia considers to be engaged in the practice of dentistry.

68. Plaintiff has also been denied equal protection of the law because there is no rational reason for the distinction between her provision of in-person instruction to customers on how to apply teeth-whitening products to their own teeth, which Georgia 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.

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

## **Count II**

### **Due Process**

70. Plaintiff incorporates and realleges the allegations of Paragraphs 1 through 58 as if fully set forth herein.

71. 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.

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

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

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

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

### **Count III**

#### **Privileges or Immunities**

76. Plaintiff incorporates and realleges the allegations of Paragraphs 1 through 58 as if fully set forth herein.

77. 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.

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

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

### **REQUEST FOR RELIEF**

WHEREFORE, Plaintiff respectfully requests relief as follows:

- a. declare that Ga. Code §§ 43-11-1 and -17 and Ga. Comp. R. & Regs. 150-14-.01, *et seq.*, as applied to teeth-whitening services provided by Plaintiff, and others similarly situated, violate the Equal Protection, Due Process, and Privileges or Immunities Clauses of the Fourteenth Amendment to the U.S. Constitution;

- b. enjoin the enforcement of Ga. Code §§ 43-11-1 and -17 and Ga. Comp. R. & Regs. 150-14-.01, *et seq.*, against Plaintiff and other persons providing similar teeth-whitening services;
- c. award reasonable attorneys' fees, costs, and expenses in this action pursuant to 42 U.S.C. § 1988; and
- e. award such further non-monetary legal and equitable relief as the Court may deem just and proper.

Dated this 1st day of April, 2014.

Respectfully submitted,

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