

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

COMMISSIONERS: **Lina M. Khan, Chair**
 Noah Joshua Phillips
 Rohit Chopra
 Rebecca Kelly Slaughter
 Christine S. Wilson

In the Matter of)	
)	<u>DECISION AND ORDER</u>
Board of Dental Examiners of Alabama,)	Docket No.
 a State Agency)	
)	

DECISION

The Federal Trade Commission initiated an investigation of certain acts and practices of the Board of Dental Examiners of Alabama (“Board” or “Respondent”). The Commission’s Bureau of Competition prepared and furnished to Respondent the Draft Complaint, which it proposed to present to the Commission for its consideration. If issued by the Commission, the Draft Complaint would charge Respondent with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

Respondent and the Bureau of Competition executed an Agreement Containing Consent Order (“Consent Agreement”) containing (1) an admission by Respondent of all the jurisdictional facts set forth in the Draft Complaint, (2) a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by Respondent that the law has been violated as alleged in the Draft Complaint, or that the facts as alleged in the Draft Complaint, other than jurisdictional facts, are true, (3) waivers and other provisions as required by the Commission’s Rules, and (4) a proposed Decision and Order.

The Commission considered the matter and determined that it had reason to believe that Respondent has violated the said Act, and that a complaint should issue stating its charges in that respect. The Commission accepted the Consent Agreement and placed it on the public record for a period of 30 days for the receipt and consideration of public comments; at the same time, it issued and served its Complaint. The Commission duly considered any comments received from interested persons pursuant to Commission Rule 2.34, 16 C.F.R. § 2.34. Now, in further conformity with the procedure described in Rule 2.34, the Commission makes the following jurisdictional findings:

1. Respondent Board of Dental Examiners of Alabama is the regulatory board responsible for the licensure, monitoring and safe practice of dentistry in the State of Alabama with

its executive offices and principal place of business located at 2229 Rocky Ridge Road, Birmingham, Alabama 35216.

2. The Commission has jurisdiction of the subject matter of this proceeding and over Respondent, and the proceeding is in the public interest.

ORDER

I. Definitions

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

- A. “Board” or “Respondent” means the Board of Dental Examiners of Alabama, and its committees, groups, members, employees, agents, representatives, and assigns.
- B. “Commission” means the Federal Trade Commission.
- C. “Alabama Dental Practice Act” means the Code of Alabama, Title 34, Chapter 9 (Dentists and Dental Hygienists) (Ala. Code § 34-9-1, *et. seq.*).
- D. “Clear Aligner Platform” means any Person that provides, or facilitates the provision of, remote treatment for malocclusion through the provision of Clear Aligner Therapy, using remote supervision by a Dentist.
- E. “Clear Aligner Therapy” means the use of Intraoral Scanning and fabricated, removable aligners for the treatment of malocclusion.
- F. “Dentist” means any individual holding a license, issued by the Board, to practice dentistry in Alabama.
- G. “Intraoral Scan” or “Intraoral Scanning” means the capture and creation of dental pictures, photographs, or images using a device, such as an *iTero* brand device or similar device, to scan inside of a patient’s mouth. The terms Intraoral Scan and Intraoral Scanning do not include radiographic or x-ray imagining techniques.
- H. “Non-Dentist Provider” means any Person other than a Dentist that provides Clear Aligner Therapy.
- I. “Person” means both natural and artificial persons, including but not limited to, corporations and unincorporated entities.

II. Injunction

IT IS FURTHER ORDERED that Respondent, in connection with its activities in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, shall cease and desist from, directly or indirectly:

- A. Requiring any Non-Dentist Provider affiliated with any Clear Aligner Platform to have on-site supervision by a Dentist when performing Intraoral Scanning; and
- B. Prohibiting, restricting, impeding, or discouraging any (i) Clear Aligner Platform or (ii) Dentist or Non-Dentist Provider affiliated with any Clear Aligner Platform from providing or facilitating the provision of Clear Aligner Therapy through remote treatment;

Provided, however, nothing in this Order shall prohibit Respondent from filing, or causing to be filed, a court action against a Non-Dentist Provider, Dentist, or Clear Aligner Platform for an alleged violation of the Alabama Dental Practice Act;

For the avoidance of doubt, and other than as set out above in Paragraphs II.A. and II.B., this Order shall not be construed as preventing Respondent from pursuing any administrative remedies against a Dentist or Non-Dentist Provider pursuant to and in accordance with the Alabama Dental Practice Act and Chapter 270 of the Alabama Administrative Code.

III. Notice to Board Members

IT IS FURTHER ORDERED that Respondent shall:

- A. No later than 30 days from the date this Order is issued, distribute by electronic mail with return receipt requested, a copy of this Order and the Complaint to:
 - 1. Each Board member;
 - 2. Each officer, director, manager, representative, agent, attorney, and employee of the Board;
 - 3. Each Dentist or Non-Dentist Provider to whom the Board sent any correspondence related to Intraoral Scanning; and
 - 4. Each Clear Aligner Platform identified in Appendix A.
- B. For a period of 5 years from the date this Order is issued, distribute by electronic mail with return receipt requested, a copy of this Order and the Complaint to each new Board member, officer, director, manager, attorney, representative, agent or employee, and who

did not previously receive a copy of this Order and the Complaint from Respondent, no later than 30 days from the date that such Person assumes his or her position.

IV. Notice to the Commission

IT IS FURTHER ORDERED that, from the date this Order is issued, Respondent shall notify the Commission no later than 60 days after any publication of advance notice of any proposed change to Chapter 270 of the Alabama Administrative Code that relates to Intraoral Scanning or Clear Aligner Platforms, including modifications to the existing rules or proposals for new rules.

V. Compliance Reports

IT IS FURTHER ORDERED that Respondent shall file verified written reports (“compliance reports”) in accordance with the following:

- A. Respondent shall submit interim compliance reports 30 days after the Order is issued, and every 60 days thereafter until Respondent has fully complied with Paragraph III.A.; annual compliance reports one year after the date this Order is issued, and annually for the next 5 years on the anniversary of that date; and additional compliance reports as the Commission or its staff may request.
- B. Each compliance report shall contain sufficient information and documentation to enable the Commission to determine independently whether Respondent is in compliance with the Order. Conclusory statements that Respondent has complied with its obligations under the Order are insufficient. Respondent shall include in its report, among other information or documentation that may be necessary to demonstrate compliance:
 - 1. A full description of the measures Respondent has implemented or plans to implement to ensure that it has complied or will comply with each paragraph of the Order;
 - 2. A full description of any enforcement action and the circumstances leading to such enforcement action, including the sending of any cease and desist letter, against any Clear Aligner Platform. Each description should include copies of any cease and desist letter or compliant filed by the Board, as applicable;
 - 3. A full description of any enforcement action and the circumstances leading to such enforcement action, including the sending of any cease and desist letter, against any Dentist or Non-Dentist Provider related to Intraoral Scanning. Each description should include copies of any cease and desist letter or compliant filed by the Board, as applicable; and
 - 4. Copies of notices sent pursuant to Paragraph III of the Order.

Provided, however, that the Board need not provide any information under Paragraphs V.B.2 or V.B.3 the disclosure of which would violate Ala. Admin. Code r. 270-x-1.08(3).

- C. Respondent shall retain all material written communications with each party identified in the compliance report and all non-privileged internal memoranda, reports, and recommendations concerning fulfilling Respondent's obligations under the Order and provide copies of these documents to Commission staff upon request.
- D. Respondent shall verify each compliance report in the manner set forth in 28 U.S.C. § 1746 by the President or another officer or employee specifically authorized to perform this function. Respondent shall submit an original and 2 copies of each compliance report as required by Commission Rule 2.41(a), 16 C.F.R. § 2,41(a), including a paper original submitted to the Secretary of the Commission and electronic copies to the Secretary at ElectronicFilings@ftc.gov and to the Compliance Division at bccompliance@ftc.gov.

VI. Change in Respondent

IT IS FURTHER ORDERED that Respondent shall notify the Commission at least 20 days prior to:

- A. Any change in the Board of Dental Examiners of Alabama's principal place of business address; or
- B. Any other change in Respondent if such change may affect compliance obligations arising out of this Order.

VII. Access

IT IS FURTHER ORDERED that, for purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, upon written request and 5 days' notice to Respondent, made to its principal place of business as identified in this Order, Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

- A. Access, during business office hours of the Respondent and in the presence of counsel, to all facilities and access to inspect and copy all books and other records and all documentary material and electronically stored information as defined in Commission Rules 2.7(a)(1) and (2), 16 C.F.R. § 2.7(a)(1) and (2), in the possession or under the control of Respondent related to compliance with this Order, which copying services shall be provided by Respondent at the request of the authorized representative of the Commission and at the expense of Respondent; and
- B. To interview officers, directors, or employees of the Respondent, who may have counsel present, regarding such matters.

VIII. Purpose

IT IS FURTHER ORDERED that the purpose of this Order is to remedy the harm to competition in the provision of Clear Aligner Therapy as the Commission alleged in its Complaint.

IX. Term

IT IS FURTHER ORDERED that this Order shall terminate 10 years from the date it is issued.

By the Commission.

April J. Tabor
Secretary

SEAL
ISSUED:

Appendix A

1. SmileDirect Club, LLC
2. Candid Care Co.
3. Smilelove LLC