

BEFORE THE KANSAS STATE BOARD OF EXAMINERS IN OPTOMETRY

In the Matter of)
)
COLE SMART, O.D.) Case No. 2022-07
)
Respondent.)

STIPULATION AND FINAL AGENCY ORDER

IT IS HEREBY STIPULATED AND AGREED by and between the Kansas Board of Examiners in Optometry (the "Board") and Cole Smart, O.D. (the "Respondent") as follows:

1. The Board is represented herein by its attorneys, Timothy D. Resner of Frieden & Forbes, LLP 1414 SW Ashworth Place, Suite 201, Topeka, Kansas 66604. The Respondent is represented herein by his attorney N/A, or has been afforded the independent right of representation and examination, and acting upon the independent right of representation and examination voluntarily enters into this Stipulation and Final Agency Order.

2. The Board is a Kansas administrative agency vested with the authority, pursuant to K.S.A. 74-1501 and K.S.A. 74-1504, to carry out and enforce the provisions of the Kansas Optometry Act, K.S.A. 65-1501 *et seq.*, ("Optometry Law"), including conducting hearings and proceedings to revoke, suspend or otherwise discipline a Kansas license to practice optometry.

3. Respondent became licensed to engage in the practice of optometry in the State of Kansas by virtue of the Board issuing license number 1879.

4. The Board has received certain information, has investigated and has determined that there are reasonable grounds to believe that the Respondent has committed an act or acts that violate the Optometry Law.

5. Respondent hereby admits and waives any further proof in this proceeding before by the Board and the Board finds that:

A. On or about December 2, 2021, Respondent submitted a trade name application to the Board for approval of “Smart Family Vision” for use at 1501 SW Wanamaker Rd., Topeka, KS 66604.

B. In conjunction with a trade name audit and after further investigation by the Board it was discovered that Respondent has been practicing optometry under the trade name “Smart Family Vision” at 1501 SW Wanamaker Rd., Topeka, KS 66604 since the beginning of 2019 without Board approval.

C. Pursuant to K.S.A. 65-1522 and K.A.R. 65-9-1, a licensee may practice optometry in the State of Kansas using a trade or assumed name; however, a licensee is prohibited from practicing optometry under a trade name until an application to use a trade name at a specific location has been approved by the Board.

D. Respondent has engaged in the practice of optometry under the trade name Smart Family Vision without Board approval for approximately three (3) years at 1501 SW Wanamaker Rd, Topeka, KS 66604.

6. The Board hereby finds and concludes that Respondent's conduct, as described above violates K.A.R. 65-9-1, and therefore, constitutes grounds for discipline pursuant to K.S.A. 65-1517(l) for violating a lawful regulation of the Board.

7. The Board hereby finds and the Respondent hereby agrees that it is just and appropriate under the circumstances:

A. ADMINISTRATIVE FINE. Respondent agrees, and the Board further orders Respondent to pay to the Board an administrative fine in the amount of Six Hundred Dollars (\$600.00) within ten (10) calendar days of the entry of this Stipulation and Final Agency Order.

B. CONDITIONAL APPROVAL. Respondent agrees, and the Board further orders that upon signing this Stipulation and Final Agency Order, Respondent shall obtain conditional approval of the trade name "Smart Family Vision" for the 1501 SW Wanamaker Rd., Topeka, KS 66604 location from December 2, 2021 through July 22, 2022. In the event the Board approves the trade name application at its July 22, 2022 meeting, then its approval of the trade name shall become final and without condition.

C. OTHER REQUIREMENTS. Respondent hereby acknowledges and agrees that as a condition of this Stipulation and Final Agency Order, he must:

- i. Comply fully with this Stipulation and Final Agency Order; and
- ii. Comply fully with the Kansas Optometry Act, the Board's rules and regulations and all state and federal laws relating to Kansas optometrists.

8. Respondent hereby agrees that all information in the possession of the Board's Investigation Member, its staff, its investigators and its attorney regarding the investigation, which led to this disciplinary action, and all information discovered during the pendency of the disciplinary action may be disclosed to and considered by the Board as part of the presentation and consideration of the proposal of settlement in the form of this Stipulation and Final Agency Order and the Final Order provided for herein, with or without the presence of the Respondent or his attorney. In the event that this Stipulation and Final Agency Order and the Final Order provided

for herein are not accepted and approved by the Board, the Respondent further waives any objection to the Board members' consideration of this Stipulation and Final Agency Order or the information mentioned in the preceding sentence and further agrees to waive any claim of due process violation or the right to seek the disqualification of any Board member as a result of the Board member's consideration of said document and information.

9. The stipulations contained herein shall not become effective and/or binding until this Stipulation and Final Agency Action is approved by the Board and the Final Order provided for herein is entered by the Board. The Respondent acknowledges that the approval of the Board's attorney shall not constitute the approval of the Board or bind the Board to approve this Stipulation and Final Agency Action or the Final Order provided for herein.

10. The Respondent agrees that this Stipulation and Final Agency Order is in conformance with Kansas and federal law and the Board has jurisdiction to enter into it and enter the Final Order provided for herein. The Respondent further agrees that the Kansas Optometry Act, K.S.A. 65-1501, *et seq.*, is constitutional on its face and as applied in this case.

11. This stipulation constitutes the entire agreement of the parties and may only be modified by a subsequent writing signed by them. The agreement shall be interpreted in accordance with the laws of the State of Kansas.

12. The Respondent acknowledges that he has the following rights:

- A. To have formal notice of charges served upon him;
- B. To file a response to the charges;

- C. To have notice of and participate in a formal adjudicative hearing with the Board making specific findings of facts and conclusions of law based only upon evidence admitted at such hearing.
- D. To take advantage of all applicable provisions of the Kansas Administrative Procedures Act and the Kansas Judicial Review Act.

13. The Respondent freely waives these foregoing rights and acknowledges that the said waiver is made voluntarily and in consideration of the Board's limiting the disciplinary action taken against him to those provided for herein. The Respondent further waives the right to seek reconsideration or appeal or otherwise contest this Stipulation and Final Agency Order and the Final Order provided for herein.

14. The Respondent acknowledges that he enters into this Stipulation and Final Agency Order freely and voluntarily after consultation with counsel of his choosing or after having had the opportunity to do so. The Respondent further acknowledges that he has read this Stipulation and Final Agency order in its entirety, that he understands its legal consequences and that he agrees that none of its terms are unconscionable, arbitrary or capricious.

15. Time is of the essence to this Stipulation and Final Agency Order. Respondent acknowledges and agrees that any violation of this Stipulation and Final Agency Order shall constitute a willful violation of a lawful Board order and grounds for further disciplinary action against him. The pendency of any disciplinary action arising out of an alleged violation of this Stipulation and Final Agency Order shall not affect the obligation of Respondent to comply with all terms and conditions of this Stipulation and Final Agency Order.

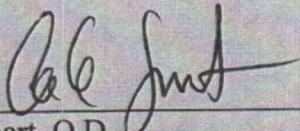
16. This Stipulation and Final Agency Order constitutes the entire and final agreement of the parties. In the event any provision of this Stipulation and Final Agency Order is deemed invalid or unenforceable by a court of competent jurisdiction, it shall be severed and the remaining provisions of this Stipulation and Final Agency Order shall be given full force and effect.

17. Upon execution by all parties, this Stipulation and Final Agency Order shall be a public record in the custody of the Board.

18. This Stipulation and Final Agency Order shall become effective on the day it is approved, accepted and made an order of the Board by way of signature of the Board's authorized representative.

19. The Respondent acknowledges that he has been advised by the Board that he would have the right within fifteen (15) days after service of the Final Order provided for herein to file a petition for reconsideration with the Board and the right within thirty (30) days after service of the Final Order provided for herein to file a petition for judicial review in the District Court of Shawnee County, Kansas, in accordance with the Kansas Act for Judicial Review and Civil Enforcement of Agency Actions, K.S.A. 77-601, *et seq.*, and to serve such a petition for judicial review on the Kansas Board of Examiners in Optometry by serving Jan Murray at 3109 West 6th Street, Suite B, Lawrence, Kansas 66049. The Respondent hereby waives those rights.

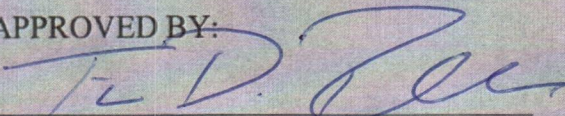
AGREED AND ACCEPTED BY:



Cole Smart, O.D.

07/08/2022
Date

APPROVED BY:



Timothy D. Resner, #25064
FRIEDEN & FORBES, LLP
1414 SW Ashworth Place, Suite 201
Topeka, KS 66604
785.354.1100
785.354.1113 facsimile

7.13.2022
Date

Attorneys for Kansas State Board of Examiners In Optometry

**BEFORE THE BOARD OF EXAMINERS IN OPTOMETRY
STATE OF KANSAS**

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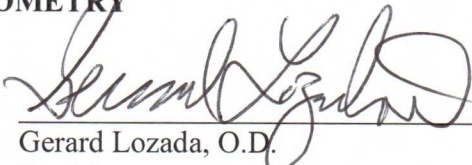
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FINAL ORDER

Upon motion duly made, seconded and passed, the Kansas Board of Examiners in Optometry (the "Board") hereby approves and accepts the within Stipulation and Final Agency Order and incorporates the provisions thereof as the Final Order of the Board.

ENTERED AND EFFECTIVE this the 22 day of June, 2022.

**KANSAS STATE BOARD OF EXAMINERS IN
OPTOMETRY**

By: 

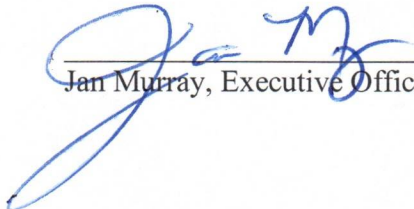
Gerard Lozada, O.D.
President

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing STIPULATION AND FINAL AGENCY ORDER was served by depositing same in the United States mail, postage prepaid, on this the 25 day of July, 2022 addressed to:

Cole Smart, O.D.
1501 SW Wanamaker Rd.
Topeka, KS 66604
Respondent

Timothy D. Resner
FRIEDEN & FORBES, LLP
1414 SW Ashworth Place, Suite 201
Topeka, KS 66604
Attorneys for Kansas State Board of Examiners In Optometry



Jan Murray, Executive Officer