

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION



In the Matter of)

NORTH CAROLINA STATE BOARD OF)
DENTAL EXAMINERS,)

Respondent.)

PUBLIC

DOCKET NO. 9343

COMPLAINT COUNSEL'S PRETRIAL BRIEF

Richard A. Feinstein
Director

Pete Levitas
Deputy Director

Melanie Sabo
Assistant Director

Geoffrey M. Green
Deputy Assistant Director

Bureau of Competition

Richard B. Dagen
William L. Lanning
Melissa Westman-Cherry
Steven Osnowitz
Tejasvi Srimushnam

601 New Jersey Ave, NW
Washington, DC 20580
(202) 326-2628
(202) 326-3496 Facsimile
rdagen@ftc.gov

Michael J. Bloom, Assistant Director
Erika Meyers
Office of Policy & Coordination

Counsel Supporting Complaint

Dated: January 19, 2011

1.	A Quality of Care or Public Safety Defense Fails, both as a Matter of Law and Fact.	14
2.	The Board’s State Action Defense Is Without Merit and Should Be Dismissed.	15
IV.	REMEDY	18
V.	CONCLUSION	18

TABLE OF AUTHORITIES

CASES

<i>Am. Needle, Inc. v. NFL</i> , 130 S. Ct. 2201 (2010)	10
<i>California Dental Ass'n v. FTC</i> , 526 U.S. 756 (1999)	11
<i>California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.</i> , 445 U.S. 97 (1980)	17
<i>Chattanooga Foundry & Pipe Works v. City of Atlanta</i> , 203 U.S. 390 (1906)	8
<i>City of Lafayette v. Louisiana Power & Light Co.</i> , 435 U.S. 389 (1978)	8
<i>Continental Ore Co. v. Union Carbide & Carbon Corp.</i> , 370 U.S. 690 (1962)	16
<i>Denny's Marina, Inc. v. Renfro Productions, Inc.</i> , 8 F.3d 1217 (7th Cir. 1993)	12
<i>Fashion Originators' Guild, Inc. v. FTC</i> , 312 U.S. 457 (1941)	10
<i>FTC v. Brown Shoe Co.</i> , 384 U.S. 316 (1966)	11
<i>FTC v. Indiana Federation of Dentists</i> , 476 U.S. 447 (1986)	13, 14
<i>FTC v. Motion Picture Advertising Services Co.</i> , 344 U.S. 392 (1953)	11
<i>FTC v. Ticor Title Ins. Co.</i> , 504 U.S. 621 (1992)	17
<i>Georgia v. Evans</i> , 316 U.S. 159 (1942)	8
<i>Goldfarb v. Virginia State Bar</i> , 421 U.S. 773 (1975)	16
<i>Hahn v. Oregon Physicians' Serv.</i> , 868 F.2d 1022 (9th Cir. 1988)	11
<i>In re Coca-Cola Co.</i>	

<i>McClain v. Real Estate Board</i> , 444 U.S. 232 (1980)	9
<i>National Soc’y of Professional Engineers v. United States</i> , 435 U.S. 679 (1978)	14
<i>Parker v. Brown</i> , 317 U.S. 341 (1942)	16
<i>Patrick v. Burget</i> , 486 U.S. 94 (1988)	18
<i>Pfizer Inc. v. Government of India</i> , 434 U.S. 308 (1978) .	9
<i>Polygram Holding, Inc. v. FTC</i> , 416 F.3d 29 (D.C. Cir. 2005)	11
<i>Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.</i> , 364 U.S. 656 (1991)	11
<i>Rothery Storage & Van Co. v. Atlas Van Lines, Inc.</i> , 792 F.2d 210 (D.C. Cir. 1986)	15
<i>Schering-Plough v. FTC</i> , 402 F.3d 1056 (11th Cir. 2005)	15
<i>Summit Health v. Pinhas</i> , 500 U.S. 322 (1991)	9, 10
<i>Standard Oil Co. v. United States</i> , 283 U.S. 163 (1931)	11
<i>Town of Hallie v. City of Eau Claire</i> , 471 U.S. 34 (1985)	16
<i>United States v. E.I. du Pont de Nemours & Co.</i> , 351 U.S. 377 (1956)	12
<i>United States v. Foley</i> , 598 F.2d 1323 (4th Cir. 1979)	10
<i>United States v. Romer</i> , 148 F.3d 359 (4th Cir. 1998)	10
<i>Valuepest.com v. Charlotte, Inc.</i> , 561 F.3d 282 (4th Cir. 2009)	10
<i>Wilk v. Am. Medical Ass’n</i> , 719 F.2d 207 (7th Cir. 1983)	14

STATUTES AND REGULATIONS

15 U.S.C. § 45(a)(1) (2006)	9
Magnuson-Moss Act, Act of Jan. 4, 1975, Pub. L. No. 93-637, § 201(a), 88 Stat. 2183, 2193 ..	9
Dental Practice Act, N.C. Gen. Stat. § 90-20 <i>et seq</i>	17
N.C. Gen Stat. § 90-22	2
N.C. Gen Stat. § 90-40.1	2
Statement of Basis and Purposes for the Trade Regulation Rule on Advertising and of Ophthalmic Goods and Services, 43 Fed. Reg. 23992 24004 (1979))	8

OTHER AUTHORITIES

Areeda & Hovenkamp, *Antitrust Law*, ¶ 1505 (3d ed. 2006) 15

Department of Justice and Federal Trade Commission, *Antitrust Guidelines for Collaborations Among Competitors* § 3.36(b) (April 7, 2000) 15

Herbert Hovenkamp, *Exclusive Joint Ventures and Antitrust Policy*, 1995 Colum. Bus. L. Rev. 1 (1995) 12

II. STATEMENT OF FACTS

A. **The North Carolina Dental Board Is Controlled By Dentists, And Its Authority Under State Law Is Limited To Petitioning The Courts To Enjoin Or Sanction The Unauthorized Practice Of Dentistry In North Carolina**

The Board is created by the Dental Act to regulate dentists and hygienists.¹ The Board consists of six dentists, one hygienist, and one consumer representative. Only the consumer representative is selected by an elected official (the Governor). The dentist Board members, who must be licensed dentists, are elected by other licensed dentists for a term of three years. Members are eligible for re-election, and some dentist members have served two or more terms.

The Dental Act authorizes the Board to address suspected instances of the unlicensed practice of dentistry in either of two ways: the Board may petition a state court for an injunction, or it may request that the district attorney initiate a criminal prosecution.² Pursuant to this authority, the Board has on occasion sought civil as well as criminal relief in the North Carolina courts.³ We do not challenge those actions. On the other hand, the detailed provisions of the Dental Act do not provide the Board with the authority, on its own, to order an alleged violator to cease and desist from the unlicensed practice of dentistry. Yet it has repeatedly done so. This case challenges those actions, as well as other naked efforts to exclude competitors of dentists from providing teeth whitening services.

North Carolina law establishes no mechanism for any person or entity to review a Board decision to issue a cease and desist order to a non-dentist before the order is issued (or even thereafter). The Board does annually file audited financial statements with the Secretary of State, as well as an Annual Report to the Governor, Secretary of State, Attorney General, and Joint Legislative Administrative Oversight Committee, and individual Board members file

¹ N.C. Gen. Stat. § 90-22.

² N.C. Gen. Stat. § 90-40.1.

³ All were resolved without judgment on the merits.

Statements of Economic Interest with the State Ethics Commission. These reports/statements do not enable any governmental entity to examine Board decisions before or near the time that the Board acts. In short, no independent governmental entity engages in any review.

B. Absent Intervention By The Board, Teeth Whitening Services Would Be Offered In North Carolina By Both Dentists And Non-Dentists

In-office teeth whitening is a potentially lucrative business opportunity for both dentists and non-dentists. Dentists perform in-office teeth whitening treatments using hydrogen peroxide or carbamide peroxide.⁴ Because in-office procedures use high concentrations of peroxide, before applying the peroxide solution, the dentist takes steps to protect the gums from burning. Then the peroxide solution is painted on the teeth. Dentists commonly direct a light source at the teeth, which according to some studies helps to “activate” the whitener. The entire procedure generally takes place in one sitting and has immediate whitening results. A dentist’s in-office whitening procedure typically costs \$300 to \$500, and sometimes more.

Beginning in 1989, numerous companies began making products for dentists to dispense for at-home teeth whitening, which is implemented using a custom tray placed in the consumer’s mouth. In addition to the tray, dentists send patients home with a supply of hydrogen or carbamide peroxide solution. The take-home kits can be used either as a follow-up to the in-office treatment, or as the sole whitening service. Used alone, a take-home kit can take many weeks to whiten the teeth. Dentist-provided take-home kits, including a custom tray, may cost the consumer hundreds of dollars.

Teeth whitening or bleaching is the number one requested cosmetic dentistry procedure.⁵ In 2007, the American Academy of Cosmetic Dentistry (“AACD”) reported that dental teeth

⁴ Originally, hydrogen peroxide was used as a periodontal treatment to help heal diseased gums; as a result, the substance gained quick acceptance as a safe and effective means to whiten teeth.

⁵ Cosmetic dentistry consists of optional services.

dentist operations.

The views of the Board and Board members on what constitutes unlawful teeth whitening have varied among members and over time. At its strictest, the Board may seek to terminate a business where teeth whitening is done almost exclusively by the customer; for example, that an operator simply offers instructions on how to use an OTC product is sufficient to draw a Cease and Desist Order from the Board.

Non-dentist operations have closed as a result of the Board's conduct. Furthermore, mall owners are now reluctant to lease space to teeth whitening operations, limiting the growth of this industry. As a result, consumers are deprived of a less expensive alternative to dentist-provided teeth whitening, and other benefits that would accrue from competition between dentist and non-dentist providers.

D. The Board's Conduct Is Anticompetitive With No Offsetting Efficiency Justifications

Dr. Giniger will testify that a ban on non-dentist teeth whitening is not necessary to protect the public health. The Board's contrary argument is simply incorrect. Non-dentist teeth whitening is similar in terms of safety to other means of teeth whitening. Non-dentist teeth whitening is very safe.

Professor Kwoka, Neal F. Finnegan Distinguished Professor of Economics at Northeastern University, will testify that the Board and its constituents have a material financial interest in excluding non-dentists from competing in the provision of teeth whitening services. Professor Kwoka will further testify that the Board's conduct, excluding an innovative low cost competitor, is presumptively anticompetitive absent some efficiency justification.

No cognizable justification has been proffered by the Board. Further, with regard to the health and safety "justification" cited by the Board, there are ways to achieve any legitimate objective that are less restrictive than a total ban of non-dentist teeth whitening.

⁶ *In re*

‘purchasers-is sufficiently broad to cover governmental bodies.’) (citations omitted). Similarly, the Supreme Court has held that a foreign government plaintiff is also a “person” within the meaning of the Clayton Act. *Pfizer Inc. v. Government of India*, 434 U.S. 308, 318 (1978) (a

reducing quality, or consumer choice. *See, e.g., Standard Oil Co. v. United States*, 283 U.S. 163, 179 (1931); *Hahn v. Oregon Physicians' Serv.*, 868 F.2d 1022, 1026 (9th Cir. 1988).

The trial evidence will establish that the Board's ongoing campaign of excluding non-dentists from providing teeth whitening services unreasonably restrains competition that the actual and/or likely future effect of this conduct is to harm both competition and consumers. *See California Dental Ass'n v. FTC*, 526 U.S. 756, 780-81 (1999) (the "essential enquiry" is whether "the circumstances, details, and logic of a restraint" support "a confident conclusion" that "the principal tendency" of that restraint is to harm competition and consumers); *FTC v. Brown Shoe Co.*, 384 U.S. 316, 322 (1966) (Section 5 empowers the Commission to enjoin in their incipiency restraints which, if allowed to continue, would substantially harm competition); *FTC v. Motion Picture Advertising Services Co.*, 344 U.S. 392, 394-95 (1953) (same); *In re Coca-Cola Co.*, 117 F.T.C. 795 (1994) (same).

An antitrust court determines the "principal tendency" of a restraint by evaluating, first, the plaintiff's prima facie case of competitive harm, and then, any efficiency defenses advanced by the defendant. To make this determination courts consider one or more of three factors: the nature of the restraint; market power; and evidence of actual effects. *In re Realcomp II, Ltd.*, No. 9320, 2009 FTC LEXIS 250, at *43-51 (Oct. 30, 2009) (Commission Opinion). Although a finding of liability in this case will not require evidence on all of these issues, Complaint Counsel will nonetheless offer evidence on each of these issues.

Nature Of The Restraint. The Board's exclusionary strategy should be judged to be inherently suspect; which is to say, the restraint requires justification even in the absence of a showing of market power or direct evidence of competitive harm. *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 36-37 (D.C. Cir. 2005). Case law establishes that an agreement among competitors to exclude from the market a service that consumers would prefer is inherently likely to harm competition, and requires justification. *Radiant Burners, Inc. v. Peoples Gas*

agency. Because the Board acts with the imprimatur of the State of North Carolina, small businesses are apt to comply when ordered by the Board to cease and desist from providing teeth whitening services. Further, there will be direct evidence, both testimony and documents, showing that recipients of the Board's orders have in fact exited the market.

The nature of the Board's actions together with this showing of market power are sufficient to establish that the conduct has the potential for significant adverse effects on competition. *See In re Realcomp II*, 2009 FTC LEXIS 250, at *51.

Direct proof of actual detrimental effects. In

teeth whitening by non-dentists, the problem can be satisfactorily remedied with steps far less

inapplicable. Two motions addressing the state action defense are pending with the Commission, and the Commission may issue its decisions before trial.¹⁵ Thus, it is possible that all dispute concerning the state action doctrine will be resolved by the Commission. Alternatively, the Commission may identify particular issues that require fact finding and resolution by the ALJ. For present purposes, we offer a brief overview of the state action defense in this case.

The state action doctrine limits the reach of the federal antitrust laws in order to safeguard the traditional role of the states in regulating commerce “in the interest of the safety, health, and well-being of local communities.”¹⁶ Supreme Court cases provide for three distinct modes of state action review, depending upon whether the decision-maker is the state acting in its sovereign capacity, a public actor, or a private actor. Plainly, the Board is not the sovereign, a term that refers to the state legislature and the state’s highest court.

The Supreme Court distinguishes between public actors and private actors based upon the decision-making incentives of the actor. When a state board or its controlling members have a financial interest in the market that is being restrained, the state board is considered to be a private actor. *Compare Goldfarb v. Virginia State Bar*, 421 U.S. 773, 791 (1975) (financially interested state agency, the Virginia State Bar Association, treated as a private actor for state action analysis), and *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 706 (1962) (financially-interested corporation exercising governmental authority treated as a private actor for state action purposes), with *Town of Hallie v City of Eau Claire*, 471 U.S. 34, 45-46 (1985) (a municipality is a public actor because it is not a market participant and generally lacks the incentive to engage in private anticompetitive conduct).

The Board and its constituents (licensed dentists) have a financial incentive to exclude

¹⁵ Complaint Counsel filed a motion for partial summary decision striking the Board’s asserted state action defense. The Board filed a motion to dismiss the Complaint in its entirety.

¹⁶ See *Parker v. Brown*, 317 U.S. 341, 362 (1942).

non-dentists and in restrain competition. For this reason, the Board is considered a private person for purposes of the state action defense.

Private conduct is exempt from the antitrust laws only if both prongs of the exacting two-part *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*¹⁷ test are satisfied. First, a state wishing to shield anticompetitive private conduct from the antitrust laws must clearly articulate a policy to displace those laws with a regulatory regime (referred to as prong 1, or the clear articulation requirement). Second, to assure that the anticompetitive restraint truly embodies state policy, the state must actively supervise the conduct in question (referred to as prong 2, or the active supervision requirement). Together, these requirements ensure that the state action doctrine shelters only the particular anticompetitive acts of private parties that, in the judgment of the State, promote state regulatory policies, as opposed to the individual interests of the private parties. *FTC v. Ticor Title Insurance Co.*, 504 U.S. 621, 633-34 (1992). Neither *Midcal* requirement is satisfied in this case.

The State of North Carolina has not clearly articulated a policy of permitting the Board to exclude non-dentists. The Board is created by, and derives its authority from, the Dental Practice Act, N.C. Gen. Stat. § 90-20 *et seq.* (“Dental Act”). This statute does not authorize the Board to issue cease and desist orders to non-dentists. In fact, the Dental Act does not authorize the Board, acting on its own authority, to take any actions that impede the competitive activity of non-dentists. Only the courts of North Carolina are empowered to exclude persons engaged in the unauthorized practice of dentistry. The legislature could not have intended or foreseen that the Board would ignore the clear language of the statute and usurp the authority expressly granted to the judiciary. Thus, prong 1 of the state action doctrine is not satisfied.

In addition, the State of North Carolina does not actively supervise the exclusionary conduct of the Board. Active supervision requires that state officials both have and exercise

¹⁷ 445 U.S. 97 (1980).

CERTIFICATE OF SERVICE

I hereby certify that on January 19, 2011, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-159
Washington, DC 20580

I also certify that I delivered via electronic mail and hand delivery a copy of the foregoing document to:

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., NW
Washington, DC 20580

I further certify that I delivered via electronic mail a copy of the foregoing document to:

Noel Allen
Allen & Pinnix, P.A.
333 Fayetteville Street
Suite 1200
Raleigh, NC 27602
nla@Allen-Pinnix.com

*Counsel for Respondent
North Carolina State Board of Dental Examiners*

CERTIFICATE FOR ELECTRONIC FILING

I certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator.

January 19, 2011

s/ Richard B. Dagen
Richard B. Dagen

Counsel Supporting the Complaint