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UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: Jon Leibowitz, Chairman
William E. Kovacic
J. Thomas Rosch
Edith Ramirez
Julie Brill

In the Matter of)	PUBLIC
)	
)	
THE NORTH CAROLINA BOARD)	DOCKET NO. 9343
OF DENTAL EXAMINERS,)	
)	
Respondent.)	

**COMPLAINT COUNSEL’S MEMORANDUM
IN OPPOSITION TO RESPONDENT’S SURREPLY
AND MOTION FOR LEAVE TO FILE LIMITED SURREPLY BRIEF**

Respondent the North Carolina Board of Dental Examiners (“Board”) has filed with the Commission its fourth brief on the state action defense, this one styled as “Respondent’s Surreply and Motion for Leave to File Limited Surreply Brief.”¹ Complaint Counsel respectfully urges the Commission to deny the Board’s motion, and to disregard the Board’s surreply brief. As explained below, the Board’s submission is: (1) procedurally improper, (2) untimely, (3) unwarranted, and (4) predicated upon a peculiar misreading of Complaint Counsel’s Memorandum in Reply to Respondent’s Corrected Memorandum in Response to Complaint Counsel’s Motion for Partial Summary Decision (“Reply Memorandum”).

1. The Board’s submission is procedurally improper. The Board has melded into one

¹ This is one of nine motions filed by the Board over the ten-day period from January 11, 2011 through January 20, 2011.

document its motion for leave to file a surreply brief and the surreply brief itself. The Commissioners have perhaps already read and considered the Board's motion/surreply brief. If so, with this maneuver, the Board has helped itself to the privilege that it nominally requests.²

2. The Board's submission is untimely. Commission Rule of Practice 3.22(d) provides that any reply with respect to a dispositive motion shall be filed within 5 days after the memorandum to which it responds. A surreply, where permitted at all (see point 3 below), should certainly meet this timing requirement as well. The Board has failed to comply with this 5-day standard, and not by a small margin. Complaint Counsel's Reply Memorandum was filed on December 20, 2010. The Board's surreply brief (the instant motion) was filed a full month later, on January 20, 2011.

The Board attempts to excuse its lethargy by pointing the finger of blame at Complaint Counsel. The Board asserts (falsely and without substantiation) that Complaint Counsel failed to provide appropriate discovery. This is nonsense. Again, the Board has had Complaint Counsel's Reply Memorandum since December 20. No separate discovery was required to determine the propriety of a surreply. Whatever argument or evidence motivated the Board to file its motion on January 20 was fully available to the Board on December 20.

3. The Board's submission is unwarranted. The Commission's Rules of Practice, like the Federal Rules of Civil Procedure, do not expressly provide for the filing of a surreply. Courts will allow a surreply only in "the most extraordinary circumstances." *Sims v. Paramount*

4. Finally, the Board's submission is predicated upon a peculiar misreading of Complaint Counsel's Reply Memorandum. The Board attributes to Complaint Counsel the contention that, in order to satisfy prong 2 of the *Midcal* state action test (active supervision), the restraints of a financially-interested state board must be directly supervised by either the state legislature or a state court. This is not Complaint Counsel's position.

Complaint Counsel has explained, in each of three legal memoranda filed with the Commission, that in order for a private actor to be exempt from liability under the state action doctrine, the challenged restraint must be actively supervised by a non-financially-interested (independent) state actor. The supervising entity does not need to be the legislature or a court. For example, in some jurisdictions, regulatory boards are overseen by the state department of health.³ In other jurisdictions, regulatory boards are overseen by the Office of the Attorney General.⁴ No doubt, there are other oversight arrangements in use as well.

North Carolina employs a different model. The legislature has directed the Board to bring allegations concerning the unauthorized practice of dentistry to the state courts. The Board has, however, elected to circumvent the courts – and to act in excess of its statutory authority – by issuing its own Cease and Desist Orders. As the Board is acting without supervision by the courts, without supervision by an executive agency, and indeed without any independent

³ *E.g.*, R.I. Gen. Laws § 5-34-7 (2003) (Rhode Island nursing board is authorized to adopt regulations, conduct disciplinary hearings, and prosecute violations, subject to the approval of the director of the department of health); R.I. Gen. Laws § 5-44-6(1) (2008) (Rhode Island

supervision whatsoever, the state action defense is unavailable to the Board.

For all of the foregoing reasons, the Board's motion should be denied, and the Commission should disregard the Board's surreply brief.

Respectfully submitted,

s/ Richard B. Dagen
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Dated: January 25, 2011

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**[PROPOSED] ORDER DENYING RESPONDENT’S MOTION FOR
LEAVE TO FILE LIMITED SURREPLY BRIEF**

On January 20, 2011, Respondent submitted its Surreply and Motion for Leave to File Limited Surreply Brief.

On January 25, 2011, Complaint Counsel submitted its Memorandum in Opposition to Respondent's Motion. 14yL.t2Fnsiderati2 Mot24NG

CERTIFICATE OF SERVICE

I hereby certify that on January 25, 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-113
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, Rm. H-110
Washington, DC 20580

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

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*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 25, 2011

By: s/ Richard B. Dagen
Richard B. Dagen