



petition for review of the final order is pending. 15 U.S.C. § 45(g)(2)(B); see also 16 C.F.R. § 3.56(b).

Pursuant to Rule 3.56(c) of the Commission's Rules of Practice, an application for a stay is evaluated on four factors: (1) the likelihood of the applicant's success on appeal; (2) whether the applicant will suffer irreparable harm if a stay is not granted; (3) the degree of injury to other parties if a stay is granted; and (4) whether the stay is in the public interest. 16 C.F.R. § 3.56(c); Toys "R" Us, Inc, 126 F.T.C. 695, 696 (1998). If the balance of the equities (i.e., the last three

Irreparable Injury to

stain removal in the past two years. )) Even if true,<sup>1</sup> this would not eliminate the potential for ongoing harm to consumers during the pendency of the appeal. For example, many non-dentist teeth whitening providers that had received cease and desist letters would continue to remain off the market, and potential entrants could be deterred from entering by the Board's past conduct. Nevertheless, the Board's apparent cessation of the conduct that led to this action substantially diminishes the potential for ongoing consumer harm during the appeal.

**Conclusion** Although this motion presents a close call, we conclude that Respondent has satisfied the requirements for a stay pending appeal. On the one hand, there is some potential for ongoing harm to consumers in North Carolina during the pendency of the appeal. On the other hand, this case presents an important unresolved legal question, Respondent has represented that it has stopped the challenged conduct, and there is a potential for consumer confusion if the Commission's Opinion and Final Order were overturned. We reiterate that the grant of stay pending appeal neither states nor implies doubt on our part as to the soundness of the Commission's resolution of this matter. See *Novartis*, 128 F.T.C. at 234-35; *California Dental*, 1996 LEXIS 227, at \*10.

Accordingly,

**IT IS ORDERED THAT** enforcement of the Commission's Final Order of December 2, 2011 be stayed upon the filing of a timely petition for review of the Commission's order in an appropriate Court of Appeals until issuance of the Court of Appeals' mandate.

By the Commission, Commissioner Ramirez dissenting and Commissioner Brill recused.

Donald S. Clark  
Secretary

ISSUED: February 10, 2012

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<sup>1</sup> This assertion in Respondent's brief is not supported by affidavits or other sworn statements, as required by Commission Rule 3.56(c), 16 C.F.R. § 3.56(c). Nevertheless, this assertion is consistent with the ALJ's findings (IDF 208-218), and is not challenged by Complaint Counsel (Opposition at 7).