

**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

**THE NORTH CAROLINA BOARD OF
DENTAL EXAMINERS**

DOCKET NO. 9343

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission (“Commission”), having reason to believe that the Respondent, North Carolina Board of Dental Examiners, has violated the provisions of said Act, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues this Complaint stating its charges as follows:

NATURE OF THE CASE

Dentists in North Carolina, acting through the instrument of the North Carolina Board of Dental Examiners (“Dental Board”), are colluding to exclude non-dentists from competing with dentists in the provision of teeth whitening services. The actions of the Dental Board prevent and deter non-dentists from providing or expanding teeth whitening services, increase prices and reduce consumer choice without any legitimate justification or defense, including the “state action” defense. The actions of the Dental Board unreasonably restrain competition and violate Section 5 of the Federal Trade Commission Act.

RESPONDENT

1. The Dental Board is an agency of the State of North Carolina, and is charged with regulating the practice of dentistry in the interest of the public health, safety, and welfare of the citizens of North Carolina. The Dental Board is organized, exists, and transacts business under and by virtue of the laws of the State of North Carolina, with its principal office and place of business located at 507 Airport Blvd., Suite 105, Morrisville, NC 27560.
2. The Dental Board consists of six licensed dentists, one licensed hygienist, and one “consumer member,” who is neither a dentist nor a hygienist. Each dentist member is

elected to this position by the licensed dentists of North Carolina, and serves a three-year term. Collectively, the six dentist members can and do control the operation of the Dental Board. Each dentist member is financially interested in decisions reached by the Dental Board because, while serving on the Dental Board, each dentist member continues to engage in the for-profit business of providing dental services.

3. The conduct of the Dental Board constitutes concerted action by its members and the dentists of North Carolina.
4. The Dental Board is the sole licensing authority for dentists in North Carolina. It is unlawful for an individual to practice dentistry in North Carolina without holding a current license to practice issued by the Dental Board. The Dental Board is also tasked with policing instances of unauthorized practice of dentistry (“UPD”) as defined by and pursuant to the North Carolina dental statute.

JURISDICTION

5. The Dental Board is a “person” within the meaning of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.
6. The acts and practices of the Dental Board, including the acts and practices alleged herein, are in commerce or affect commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44. In particular, dentists and non-dentist providers of teeth whitening services in North Carolina purchase and receive products and equipment that are shipped across state lines by manufacturers and suppliers located out of state, and transfer money across state lines in payment for these products and equipment. Further, the actions alleged herein deter persons from other states from providing teeth whitening services in North Carolina.

THE RELEVANT MARKET

7. The relevant market in which to evaluate the conduct of the Dental Board is the provision of teeth whitening services in North Carolina. Teeth whitening services are offered by dentists and non-dentists.
8. Many dentists offer patients both in-office teeth whitening services and take-home teeth whitening kits. The most common in-office procedure consists of covering the gums with a protective material, applying to the teeth a hydrogen peroxide solution in the 20-35 percent range, and then exposing the teeth to a light source. Take home kits include a custom-made whitening tray, and a whitening gel that is generally a 15-20 percent carbamide peroxide solution. The consumer self-applies the gel in essentially the same manner as when using an over-the-counter (“OTC”) teeth whitening product purchased at, for example, a pharmacy.
9. During the last several years, in much of the United States, there has been an expansion of teeth whitening operations by non-dentists. Entrepreneurs have begun offering teeth-whitening services in salons, retail stores, and mall kiosks.

10. Typically, a non-dentist provider operates in the following way. The provider hands a strip or tray containing peroxide to the customer, who applies it to his or her own teeth. The customer's teeth are then exposed to a light-emitting diode ("LED") light source for 15 to 30 minutes. The amount of hydrogen peroxide applied to the teeth at non-dentist outlets generally falls into the 10-15 percent range. This is a greater concentration than OTC products (usually 10 percent or less), but less than the concentration employed in dentist-applied products (approximately 20-35 percent). The non-dentist provider generally does not touch the customer's mouth.
11. Teeth whitening services performed by non-dentists are much less expensive than those performed by dentists. A non-dentist typically charges \$100 to \$200 per session, whereas dentists typically charge \$300 to \$700, with some procedures costing as much as \$1,000.
12. Teeth whitening products (such as toothpaste and OTC whitening strips) are generally viewed by consumers as inadequate substitutes for teeth whitening services, due to differences in the nature of the product, quality, cost, and convenience.
13. Except to the extent that competition has been restrained as alleged below, and depending upon their geographic location, the dentist members of the Dental Board and the dentists of North Carolina compete with each other, and also compete with non-dentist providers of teeth whitening services.
14. The Dental Board has and exercises the power to exclude dentists and non-dentists from competing in the relevant market.

THE DENTAL BOARD IS ACTING TO SUPPRESS COMPETITION

15. The North Carolina dental statute does not expressly address whether, or under what circumstances, a non-dentist may engage in teeth whitening.
16. The Dental Board has decided that the provision of teeth whitening services by non-dentists constitutes UPD. As detailed herein, the Dental Board has acted in various ways to eliminate the provision of teeth whitening services by non-dentists.
17. The Dental Board interprets the North Carolina dental statute as permitting non-dentists to engage in the retail sale of teeth whitening products for use at home. However, the Dental Board has determined that any service provided along with a teeth whitening product, including advice, guidance, providing a customer with a personal tray, whitening solution, mouth piece and/or LED light, or providing a location to use the whitening product, constitutes the practice of dentistry.
18. The Dental Board has engaged in several types of activities aimed at preventing non-dentists from providing teeth whitening services in North Carolina.

19. In particular, the Dental Board has engaged in extra-judicial activities aimed at preventing non-dentists from providing teeth whitening services in North Carolina. These activities are not authorized by statute and circumvent any review or oversight by the State.
20. On 42 occasions, the Dental Board transmitted letters to non-dentist teeth whitening providers, communicating to the recipients that they were illegally practicing dentistry without a license and ordering the recipients to cease and desist from providing teeth whitening services.
21. On at least six occasions, agents of the Dental Board also threatened and discouraged non-dentists who were considering opening teeth whitening businesses by communicating to them that teeth whitening services could be provided only under the direct supervision of a dentist.
22. Furthermore, the Dental Board issued at least 11 letters to third parties, including mall owners and property management companies, with interests in approximately 27 malls, stating that teeth whitening services offered at mall kiosks are illegal. The purpose of these letters was to block the expansion of teeth whitening kiosks in shopping malls.
23. The Dental Board's exclusion of the provision of teeth whitening services by non-dentists does not qualify for a state action defense nor is it reasonably related to any efficiencies or other benefits sufficient to justify its harmful effect on competition.

ANTICOMPETITIVE EFFECTS OF THE DENTAL BOARD'S ACTIONS

24. The exclusionary course of conduct of the Dental Board as alleged in Paragraphs 18-22 of the Complaint may be expected to continue in the absence of effective relief. As a consequence of the challenged actions and course of conduct of the Dental Board, the availability of non-dentist teeth whitening services in North Carolina has been and will be significantly diminished. Numerous businesses have closed down entirely or have ceased to sell teeth whitening products and/or services. Additional teeth whitening businesses have curtailed their advertising or are unable to provide the types of services desired by customers. Several malls in North Carolina have declined to permit the operation therein of non-dentist teeth whitening businesses.
25. The challenged actions and course of conduct of the Dental Board have had and will have the effect of restraining competition unreasonably and injuring consumers in the following ways, among others:
 - a. preventing and deterring non-dentists from providing teeth whitening services in North Carolina;
 - b. depriving consumers of the benefits of price competition; and
 - c. reducing consumer choice in North Carolina for the provision of teeth whitening services.

VIOLATIONS ALLEGED

26. The combination, conspiracy, acts and practices described above, constitute anticompetitive and unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45. Such combination, conspiracy, acts and practices, or the effects thereof, are continuing and will continue or recur in the absence of appropriate relief.

Notice

Notice is hereby given to the respondent that the seventeenth day of February, 2011, at 10:00 a.m., is hereby fixed as the time and Federal Trade Commission offices, 600 Pennsylvania Avenue, NW, Washington D.C. 20580, as the place when and where a hearing will be had before an Administrative Law Judge of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under the Federal Trade Commission Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in the complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the fourteenth (14th) day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted.

If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material allegations to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint and, together with the complaint, will provide a record basis on which the Commission shall issue a final decision containing appropriate findings and conclusions and a final order disposing of the proceeding. In such answer, you may, however, reserve the right to submit proposed findings of fact and conclusions of law under § 3.46 of said Rules.

Failure to file an answer within the time above provided shall be deemed to constitute a waiver of your right to appear and to contest the allegations of the complaint, and shall authorize the Commission, without further notice to you, to find the facts to be as alleged in the complaint and to enter a final decision containing appropriate findings and conclusions and a final order disposing of the proceeding.

The Administrative Law Judge shall hold a prehearing scheduling conference not later than ten (10) days after an answer is filed by the respondent. Unless otherwise directed by the Administrative Law Judge, the scheduling conference and further proceedings will take place at the Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington DC 20580. Rule 3.21(a) requires a meeting of the parties' counsel as early as practicable before the prehearing scheduling conference, and Rule 3.31(b) obligates counsel for each party, within five days of receiving respondent's answer, to make certain initial disclosures without awaiting a formal discovery request.

Notice of Contemplated Relief

Should the Commission conclude from the record developed in any adjudicative proceedings in this matter that respondent's conduct violated Section 5 of the Federal Trade Commission Act as alleged in the complaint, the Commission may order such relief as is supported by the record and is necessary and appropriate, including but not limited to:

1. Requiring respondent to provide appropriate notification to an independent state authority of any proposed or contemplated action of the Dental Board that may, if implemented by the Dental Board, restrain the provision of teeth whitening services by non-dentist providers.
2. Requiring respondent to secure the prior and appropriate approval of an independent state authority before taking any action that may restrain the provision of teeth whitening services by non-dentist providers.
3. Requiring respondent to cease and desist from directing any non-dentist provider of teeth whitening services to cease providing teeth whitening services.
4. Requiring respondent to cease and desist communicating to any non-dentist provider of teeth whitening services that: (i) such non-dentist provider is violating, has violated, or may be violating the North Carolina Dental Practice Act by providing teeth whitening services; or (ii) the provision of teeth whitening services by a non-dentist provider is a violation of the North Carolina Dental Practice Act.
5. Requiring respondent to include in all correspondence with any non-dentist provider of teeth whitening services, including any threat to file a law suit, that the Board does not have the authority to determine whether the law has been violated, and that only a court can make that determination and then assess penalties, if judged appropriate.
6. Requiring respondent to cease and desist communicating to a lessor of commercial property or other third party that (i) the provision of teeth whitening services by a non-dentist provider is a violation of the North Carolina Dental Practice Act, or (ii) that any non-dentist provider of teeth whitening services is violating, has violated, or may be violating the North Carolina Dental Practice Act by providing teeth whitening services.
7. Requiring respondent to distribute a copy of the Commission's order to each and every current and future Dental Board member; officer, manager, representative, agent, and employee of the Dental Board.
8. Such additional relief as is necessary to correct or remedy the violations alleged in the complaint.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this seventeenth day of June, 2010, issues its complaint against the Dental Board.

By the Commission, Commissioner Brill recused.

Richard C. Donohue
Acting Secretary

SEAL: