



UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

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

COMPLAINT COUNSEL’S OPPOSITION TO RESPONDENT’S
APPLICATION FOR A STAY OF ORDER

The Commission has determined that Respondent North Carolina State Board of Dental Examiners (“Board”) has violated Section 5 of the FTC Act by excluding non-dentist providers, and has issued a Cease and Desist Order designed to restore competition. This Order enjoins the Board from ordering non-dentists to stop providing teeth whitening services, or communicating to potential entrants, manufacturers, and commercial property lessors that non-dentist teeth whitening is unlawful. The Order specifically expressly does not prohibit the Board from investigating non-dentist providers for suspected violations of the State’s Dental Practice Act (“DPA”), filing a court action against a non-dentist for alleged violations of the Act, or communicating its belief or opinion regarding whether a particular method of teeth whitening may violate the Dental Practice Act.

The Board’s Stay Application now asks the Commission to permit the Board to continue its exclusionary conduct - a campaign that substantially eliminated non-dentist teeth whitening

services in North Carolina. The Board's Application fails to satisfy the four-part test for a stay specified in Commission Rule 3.56©). The Board has not (1) shown it is likely to prevail on appeal; (2) shown any harm, let alone irreparable harm, absent a stay; (3) addressed the harm to others that would occur if a stay is granted; or (4) established that a stay would be in the public interest. The Application should therefore be denied. *Realcomp II, Ltd.*, Docket No. 9320 (F.T.C. Jan. 7, 2010) (Commission Order denying stay because all "four factors set forth in the rule weigh against granting the motion").

I. The Board Is Not Likely to Prevail on Appeal.

The Board asserts that to establish likelihood of success on appeal, it need only demonstrate "serious and substantial questions going to the merits." Appl. at 2. This is incorrect. The required likelihood of success "is inversely proportional to the amount of irreparable injury suffered absent the stay." *North Texas Specialty Physicians*, 141 F.T.C. 456, 457-58, n.2 (Jan. 20, 2006), quoting *California Dental Ass'n*, No. 9259, 1996 FTC LEXIS 277, at *10 (May 22, 1996). Because denial of a stay will not result in any irreparable injury, see *infra*, the Board cannot satisfy the "likelihood of success" requirement as a matter of law. But *arguendo*, if one were to conclude that some slight irreparable harm might result from denial of a stay, the Board would have to show a correspondingly great likelihood of prevailing on appeal. It has not shown any substantial likelihood of success on appeal.

The critical question on appeal will be whether the financially-interested Board is subject to the State Action Doctrine's active supervision requirement. Even as the Commission acknowledged some inconsistency among the circuits on the active supervision question, the Commission held, "there is ample support for the proposition that financially interested governmental bodies must meet the active supervision prong of *Midcal*." *North Carolina Board*

of Dental Examiners, 151 F.T.C. 607, 620 (Feb. 3, 2011) (“State Action Op.”). In light of the strong precedent supporting the Commission’s holding, a split in the circuits is not sufficient to satisfy the “likelihood of success” requirement absent a showing that denial of a stay would cause a substantial likelihood of irreparable harm. Moreover, the Board’s likelihood of success is particularly low because the Fourth Circuit, the court before which the Board will file its appeal, is in substantial accord with the Commission’s holding that a financially interested Board must be actively supervised to sustain a state action defense. *State Action Op.* at 10 (quoting *Asheville Tobacco Bd. of Trade, Inc. v. FTC*, 263 F.2d 502, 509 (4th Cir. 1959) (“[The State] may even permit persons subject to such control to participate in the regulation, provided their activities are adequately supervised by independent state officials.”) (citations omitted)).¹

The Board merely recycles the state action arguments the Commission rejected without showing why its arguments are likely to prevail on appellate review. Because the Board’s extra-legal enforcement “orders” were not in any manner supervised by the state, the Board cannot satisfy prong two of the state action defense as specified by *California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980).

The difficulty or complexity of the legal and factual issues in this case do not independently warrant granting a stay, and Board reliance on *Novartis Corp.*, 128 F.T.C. 233, 234 (1999), and *Toys “R” Us, Inc.*, 126 F.T.C. 695, 697 (1998), is misplaced. In this case, the Commission did not “evaluate numerous scientific studies of consumer behavior to assess and remedy potentially lingering misbeliefs fostered by deceptive advertising.” *North Texas*

¹ *Cf. North Carolina Bd. of Dental Examiners v. FTC*, 768 F. Supp.2d 818, 820 (2011) (dismissing for want of jurisdiction the Board’s interlocutory appeal) (“The Supreme Court has thus far expressly declined to determine whether active supervision is required for a state agency to invoke the *Parker* exemption.”)

Specialty Physicians, 141 F.T.C. at 459 (distinguishing *Novartis*). Similarly, reliance on *Toys “R” Us* is unavailing because the partial stay granted there was justified by a strong showing that compliance would cause the firm to incur “irretrievable costs.” *Toys “R” Us*, 126 F.T.C. at 699.

The Board has not demonstrated its likelihood of success on the state action issues involved in this matter, nor has it shown the requisite complexity of those issues or that it will incur significant “irretrievable costs.” Accordingly, it is not entitled to a stay by reason of likelihood of success.

II. The Board Will Not Suffer Irreparable Harm Absent A Stay.

An applicant for a stay must establish that it will suffer irreparable harm if a stay is not granted. 16 C.F.R. § 3.56[c]. “Simple assertions of harm or conclusory statements based on unsupported assumptions will not suffice. [The Respondent] must show that the irreparable injury alleged is both *substantial and likely* to occur absent a stay.” *North Texas Specialty Physicians*, 141 F.T.C. at 460 (emphasis added)(“*NTSP*”). This case is unlike *Novartis*, where Respondent showed that it would necessarily spend \$8,000,000 for corrective advertising absent a partial stay. *NTSP*, 141 F.T.C. at 462 (distinguishing *Novartis*). This case is also unlike *NTSP* where a partial stay was granted because the Commission found that cancellation of *NTSP*’s existing contracts “may well affect the thousands of patients who are covered by the health plans under contract.” *Id.* at 466.

The Board’s oft-repeated claim of deprivation of constitutional rights under the Commerce Clause and the Tenth Amendment is not supported by any citation to relevant

authority supporting such claims.² The Board has neither identified nor substantiated any material harms associated with its compliance, and a stay should be denied it on this ground.

Further, the irreparable harm claimed by the Board is premised on a misreading of the Order. Contrary to the Board's argument, the Order does not prohibit the Board from interpreting, communicating its enforcement intentions, or enforcing the provisions of the Dental Practice Act in the manner directed by the North Carolina Legislature. Indeed, as the Commission observed, "the Board's Chief Operating Officer testified that the Board's ability to enforce the Act would not be affected if it sent litigation warning letters to non-dentist teeth whiteners instead of cease and desist letters." Opinion of the Commission at 36.

Moreover, the Commission's Order expressly permits the Board to enforce the North Carolina Dental Practices Act in the manner specified and intended by the North Carolina Legislature. Accordingly, its claim that the Order unconstitutionally prevents the Board from enforcing that statute is frivolous. The Board's cramped reading of Paragraph II of the Order is disingenuous. The Board cites the Order without reference to the provisos that permit the very actions the Board claims are prohibited. For example, the Board claims it cannot investigate suspected violations and warn suspected violators that it may bring an action. Application at 6. Yet, the provisos to Paragraph II provide that nothing prohibits the Board from investigating,

² The Board's assertion that it would be illegal for the Board to incur costs to comply with the Order is neither supported nor credible. Application at 6, Declaration of White at 2, ¶ 7 (Application Exhibit 1). N.C. Gen. Stat. § 90-43 permits the Board "to expend . . . such additional sum or sums as it may determine necessary in the administration and enforcement of this Article." Nothing in that language prohibits the Board from incurring and expending monies for Order compliance.

expressing its opinions, providing notice of its enforcement intentions, and filing an enforcement action. Order at 4 and 7.³

The Board's claims of harm are without substantiation and do not deserve consideration. *See California Dental Ass'n*, 1996 FTC LEXIS 277, at *6-7 ("A party seeking a stay must show with particularity, that the alleged irreparable injury is substantial and likely to occur absent a stay.").

III. The Public Interest Would Be Advanced By Denying the Stay.

The Board's claim that a stay protects the public from harms that would result from the enforcement of the Order is simply incorrect. The Order leaves the Board free to investigate and pursue claims relating to the unauthorized practice of dentistry.

On the other hand, the Commission found that the elimination of a class of competitors from the teeth whitening marketplace results in higher prices, and reduces output and consumer

³ Finally, a supporting declaration (but not the Application) maintains that "The Order calls for procedural steps that are not permitted by North Carolina's Administrative Procedure Act. For example, the Order mandates that the State Board provide administrative hearings to non-licensees." White Declaration § 8, Application Exhibit 1 at 2. This argument is flatly inconsistent with the Board's representations throughout this proceeding. The Board has repeatedly made written and oral representations to the Commission and the Administrative Law Judge that the North Carolina Administrative Procedures provides for such hearings. *See, e.g.*, Trial Transcript at 67:14-17 (Feb. 17, 2011) (Opening Statement so advising the Court); Respondent's Proposed Findings of Fact, Conclusions of Law, and Order, As Amended at 85, ¶ 16 (May 5, 2011) ("Any person or entity receiving a cease and desist letter could initiate a declaratory ruling proceeding pursuant to N.C. Gen. Stat. § 150B-4."); *Id.* at ¶ 18 ("Any person or entity receiving a cease and desist letter has a right to pursue an administrative hearing [contested case] pursuant to N.C. Gen. Stat. § 150B-23(a)."). Based on these representations, provisions relating to such hearings were included in Appendices to the proposed Order. These representations continued through oral argument before the Commission on appeal, where Board counsel reiterated that non-licensees could request an administrative hearing before the Board. Oral Argument Transcript at 36:23-24 (Oct. 28, 2011). The Board is not entitled to repudiate its representations simply because it no longer suits its purposes. Moreover, even if this argument were credited, it would merit at most a stay with respect to that particular provision.

choice. These are clear and substantial harms to the public that would persist if a stay were to be granted.

The Board also notes that it has not issued any cease and desist orders in the past two years. Motion at 8. The public is entitled to rely on the Order, not the Board's recent moratorium. Indeed, the Board asks the Commission to disregard its principal argument that it cannot enforce the DPA without issuing such letters.

IV. Conclusion.

The Commission's Order – properly interpreted – does not impede the Board from enforcing the DPA. Further, the Board, and more importantly, North Carolina citizens, will suffer no harm from denying a stay. On the other hand, continued harm to consumers would be inevitable if a stay is granted. The Board has provided no countervailing equities in support of its request for a stay pending appeal.

Because the balance of equities overwhelmingly weigh in favor of denying the Board's Application for a stay, the Board's Application should be denied.

Respectfully submitted,

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Dated: January 23, 2012

CERTIFICATE OF SERVICE

I hereby certify that on January 23, 2012, 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 a copy of the foregoing document to:

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
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I further certify that I delivered via electronic mail a copy of the foregoing document to:

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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 23, 2012

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