

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

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

In the Matter of

**THE NORTH CAROLINA BOARD OF
DENTAL EXAMINERS**

Docket No. 9343

**ORDER ON RESPONDENT’S APPLICATION FOR STAY OF ORDER
PENDING REVIEW BY U.S. COURT OF APPEALS**

On January 13, 2012, Respondent North Carolina State Board of Dental Examiners filed an Application for Stay of Order Pending Review by the U.S. Court of Appeals. Complaint Counsel opposes the motion. For the reasons described below, the Commission grants Respondent’s motion and stays the Final Order entered on December 2, 2011 until disposition of Respondent’s appeal.

On December 2, 2011, the Commission issued an Opinion and Final Order against Respondent. The Commission held that Respondent excluded non-dentist providers from the market for teeth whitening services, in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. The Commission’s Final Order prohibited the Board from directing non-dentist teeth whitening providers to cease providing teeth whitening products or services. In its Application, Respondent asserts that it intends to seek review of the Commission’s Opinion and Final Order in the Court of Appeals for the Fourth Circuit. (Petition at 1, 2.)

Section 5(g) of the Federal Trade Commission Act provides that Commission cease and desist orders (except divestiture orders) take effect “upon the sixtieth day after such order is served,” unless “stayed, in whole or in part and subject to such conditions as may be appropriate, by ... the Commission” or “an appropriate court of appeals of the United States.” 15 U.S.C. § 45(g)(2); *see also* 16 C.F.R. § 3.56(a). A party seeking a stay must first apply for such relief to the Commission, as Respondent has done here. *See* 15 U.S.C. § 45(g)(2); *see also* 16 C.F.R. § 3.56(b); Fed. R. App. P. 18(a)(1). If, “within the 30-day period beginning on the date the application was received by the Commission,” the Commission either denies the application or does not act on the application, the petitioner may seek a stay in the court of appeals where a

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 factors) is not heavily tilted in the petitioner's favor, the petitioner must make a more substantial showing of likelihood of success on the merits in order to obtain a stay pending appeal. *California Dental Ass'n*, No. 9259, 1996 FTC LEXIS 277, at *10 (May 22, 1996); *see also North Texas Specialty Physicians*, 141 F.T.C. 456, 457-58 & n.2 (2006) (the required likelihood of success "is inversely proportional to the amount of irreparable injury suffered absent the stay").

Likelihood of Respondent's Success on Appeal – Respondent asserts that it is likely to succeed in its appeal because the Commission's decisions contravene the U.S. Constitution, federal law, and state law. (Petition at 2-5.) Respondent's argument focuses on the Commission's February 8, 2011 decision, which held that financially-interested governmental bodies must meet the active supervision prong of *Midcal* to be exempted from antitrust scrutiny under the state action doctrine. Respondent asserts that the Commission's holding conflicts with *Midcal* itself, as well as several decisions of the Court of Appeals. (*Id.* at 3-4 (listing cases).)

The Commission harbors no doubts about its February 8, 2011 decision. As we noted in that decision, there is "ample" judicial precedent supporting the Commission's Opinion—including from the Fourth Circuit—as well as leading antitrust commentary and the policies underlying the state action doctrine. *North Carolina Board of Dental Examiners*, 151 F.T.C. 607, 617-28 (2011) (citing *Asheville Tobacco Bd. of Trade, Inc. v. FTC*, 263 F.2d 502, 509 (4th Cir. 1959)).

Nevertheless, the Supreme Court has yet to rule on the applicability of the active supervision prong to regulatory bodies controlled by private market participants. In addition, we have acknowledged that "the courts of appeals have been less than consistent on this issue." *Id.* at 620. Given that a difficult legal question can be sufficient to establish a substantial showing of a likelihood of success on the merits, *North Texas Specialty Physicians*, 141 F.T.C. at 457; *California Dental*, 1996 FTC LEXIS 277 at *10, we conclude that Respondent has made a sufficient showing to warrant consideration of the equities. *Cf. Florida v. HHS*, 780 F. Supp. 2d 1307, 1317-20 (N.D. Fla. 2011) (granting stay pending appeal in part because of split in authority); *Pokorny v. Quixtar Inc.*, No. 07-00201, 2008 U.S. Dist. LEXIS 91951, at *4 (N.D. Cal. Apr. 17, 2008) (finding that a serious question was raised due to an apparent split among the federal courts); *In re Westwood Plaza Apts.*, 150 B.R. 163, 168 (Bankr. E.D. Tex. 1993) (granting stay pending appeal because the "Fifth Circuit has yet to address this question and the circuits which have are split").

Irreparable Injury to Respondent Absent a Stay – Respondent bears the burden of demonstrating that denial of a stay will cause irreparable harm. Simple assertions of harm or conclusory statements based on unsupported assumptions will not suffice. *See Toys “R” Us*, 126 F.T.C. at 698; *California Dental*, 1996 FTC LEXIS 277, at *7. A party seeking a stay must show, with particularity, that the alleged injury is substantial and likely to occur absent a stay. *See Toys “R” Us*, 126 F.T.C. at 698; *California Dental*, 1996 FTC LEXIS 277, at *7.

In a declaration submitted in support of its Application, the Dental Board’s Chief Operating Officer asserts that the Commission’s Final Order will cause “significant irreparable harm to the State Board and the consuming public.” (White Declaration ¶ 3.) Specifically, he asserts that the Final Order will prevent the Board from enforcing the Dental Practice Act (*id.* ¶ 6), will limit the Board’s remedies for violations of the Dental Practice Act to seeking judicial relief (*id.* ¶ 5), will force the Board to adopt a particular interpretation of the Dental Practice Act (*id.* ¶ 4), and will force the Board to provide administrative hearings to non-licensees (*id.* ¶ 8). As explained in Section VII of the Commission’s December 2, 2011 Opinion, each of these assertions is without merit and reflects a serious misreading of the Commission’s Final Order.

Nevertheless, it does appear that at least certain portions of the Final Order, when implemented, may cause harm to the Board and have the potential to cause confusion if reversed by the Court of Appeals. In particular, Section III of the Final Order requires the Board to send corrective disclosures to each person to whom the Board previously sent a cease and desist letter or similar communication. If the Commission’s decision were overturned on appeal, these persons could once again be subject to the Board’s cease and desist letters. This repeated change in policy could create significant confusion about the law—not only for recipients of the notifications, but also for dentists, non-dentist teeth whiteners, and consumers. The Commission has held that where compliance with an order could cause confusion or require costly notification if reversed on appeal, a party may be irreparably injured. *See, e.g., Novartis Corp.*, 128 F.T.C. 233, 235-36 (1999); *California Dental*, 1996 FTC LEXIS 277, at *7. Accordingly, this factor weighs in favor of a stay, at least with respect to Section III of the Final Order.

Harm to Others and the Public Interest – The final remaining questions are whether a stay would harm other parties and whether it is in the public interest. *California Dental*, 1996 FTC LEXIS 277, at *7-8. These two factors are stated separately, but the FTC considers them together because Complaint Counsel is responsible for representing the public interest by enforcing the law. *See id.* at *8.

Respondent argues that a stay would not harm any party because it has stopped the challenged conduct: “Over the past two years, the State Board has sent no letters stating North Carolina law to non-dentist providers or to their commercial real estate landlords.” (Petition at 8; *see also* Reply at 13 (“The State Board has sent no communications to non-licensees regarding

stain removal in the past two years.”)) Even if true,¹ 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

¹ 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).