



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 [STATE] BOARD) PUBLIC
OF DENTAL EXAMINERS,) DOCKET NO. 9343
)
Respondent.)
_____)

**RESPONDENT’S REPLY TO COMPLAINT COUNSEL’S OPPOSITION TO
RESPONDENT’S APPLICATION FOR A STAY**

Pursuant to Rule 3.56(d) of the Commission’s Rules of Practice for Adjudicative Proceedings, Respondent North Carolina State Board of Dental Examiners hereby files its reply to Complaint Counsel’s Opposition to Respondent’s Application for a Stay.

I. INTRODUCTION

Complaint Counsel filed its Opposition to Respondent’s Application for Stay of Order (“Opposition”) on January 23, 2012. The Opposition demonstrates Complaint Counsel’s misunderstanding of Respondent North Carolina State Board of Dental Examiners’ (“State Board”) request for a stay in this matter. The State Board has met all four factors that are to be considered in evaluating whether to grant a stay, even though a stay may be granted if a respondent can show just one of the factors. See, e.g., CityFed Fin. Corp. v. Office of Thrift Supervision, 58 F.3d 738, 746 (D.C. Cir. 1995). Therefore, the serious questions of law presented on appeal and the substantial irreparable harm

faced by the state of North Carolina, the State Board, and the public warrant a stay of the Commission's Order pending the finality of all appeals in this matter.

III. ARGUMENT

A. **The State Board Is Not Required to Convince the Commission that Its Appeal Will “Likely” Succeed Because Such a Self-Serving Requirement Would Render the Commission’s Rule Regarding Stays Pointless.**

Contrary to Complaint Counsel’s arguments, the State Board does not have the burden of demonstrating a “great likelihood of success on appeal.” Opposition at 2. Moreover, an applicant for a stay must “address the likelihood of the applicant’s success on appeal”—not prove that success is more likely than not. 16 C.F.R. 3.56(c); see Wash. Metro. Transit Comm’n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977) (providing that likelihood of success is not a mathematical probability requiring proof of 50% or more). Complaint Counsel claims that the State Board’s likelihood of success depends on the amount of injury the Board will suffer if a stay is not granted, arguing that little or no injury will occur. Id. However, as discussed *infra*, the State Board will suffer irreparable injury as a result of constitutional violations if a stay is not granted. Further, as acknowledged in North Texas Specialty Physicians, an administrative proceeding which Complaint Counsel cites in support of its argument, harm to the public absent a stay and public interest in a stay must also be considered. N. Tex. Specialty Physicians, 141 F.T.C. 456, 457-58 n.2 (2006) (internal citations omitted). Weighing all of these factors together, the Commission in North Texas Specialty Physicians did in fact decide a partial stay was necessary, based on concerns over harm to the public and public interest, not, as Complaint Counsel suggests, concerns over irreparable injury to the respondent. Id. at 464-65.

The State Board's likelihood of success on appeal is high because its appeal is founded on firmly established case law and federal statutes. Even the case cited by Complaint Counsel in its Opposition as evidence that the State Board will not prevail on its state action defense, Asheville Tobacco Board of Trade, Inc. v. FTC, implicitly concluded that state agencies are immune from Commission jurisdiction. Opposition at 3, citing 263 F.2d 502 (4th Cir. 1959). The central questions in Asheville Tobacco Board of Trade were whether the board (a corporation) was required to comply "with a North Carolina statute which directs each State agency to file with the Secretary of State all rules and regulations adopted by the agency for the performance of its functions" and "whether its officers and directors were accountable to the state" Id. at 509-10. The answer to these questions for the Asheville Board was "no," thus, immunity was not granted. But, the answer to these questions for the State Board is "yes." Under the Asheville Tobacco Board of Trade criteria, the State Board is immune. Complaint Counsel's inability to support its position with sound case law once again demonstrates why the State Board is likely to prevail on appeal.

Rather than drawing on a case that is over fifty years old to support its position, the State Board's argument on appeal will rest on dozens of more recent cases demonstrating that the State Board is entitled to immunity. For example, just over a month ago, the Eleventh Circuit concluded that immunity even exists for sub-municipality-level hospital boards without a showing of active supervision. FTC v. Phoebe Putney Health Sys., Inc., No. 11-12906, 2011 U.S. App. LEXIS 24458, at *12 (11th Cir. Dec. 9, 2011) ("a political subdivision, like the [Hospital] Authority, enjoys state-action immunity if it shows that, 'through statutes, the state generally authorizes [it]

to perform the challenged action’ and that, ‘through statutes, the state has clearly articulated a state policy authorizing anticompetitive conduct’”). The Eleventh Circuit further opined:

The Commission would have us approach the state-action issue differently. It argues that this case involves no “genuine state action” at all . . . In the absence of genuine state action, the Commission insists, we can dispose of the immunity issue without even reaching the question whether the state authorized the transaction and clearly articulated a policy to displace competition. . . . We may not “look behind” governmental actions for “perceived conspiracies to restrain trade.” . . . We may not deconstruct[] . . . the governmental process or prob[e] . . . the official “intent” to determine whether the government’s decision-making process has been usurped by private parties.

Id. at *14-*15 (internal citations omitted). In another recent decision, the Eleventh Circuit held that a state has a “compelling interest in the practice of professions within its boundaries and broad power to establish standards for licensing practitioners and regulating the practice of professions.” Locke v. Shore, 634 F.3d 1195, 1196, cert. denied, No. 11-348, 2012 U.S. LEXIS 261 (Jan. 9, 2012) (internal citations omitted). These cases, like many others, firmly support the State Board’s position, making it likely that the Board will prevail on appeal.

Lastly, the State Board has put forth complex legal questions that necessitate review, thus satisfying the North Texas Specialty Physicians criteria that such questions be present to warrant a stay. N. Tex. Specialty Physicians, 141 F.T.C. at 459. The Commission has constructed a novel legal argument, unfounded in case law, its own rules, or federal law, to prevent a state agency from enforcing a state law. Thus, the Commission’s claim is inherently complex, as it is based on a convoluted understanding of case law and a selective interpretation of unfavorable cases. A stay pending judicial appeal is critical for this reason.

The State Board has demonstrated that it has a high likelihood of success on appeal. It has shown that the costs of denying a stay are also high, both for itself and the public. It has demonstrated the complexity of the legal issues involved. Therefore, a stay should be granted.

B. The State of North Carolina, the State Board, and the Public Will Continue to Suffer Irreparable Harm Absent a Stay.

Complaint Counsel summarily overlooks the grave harm that would be perpetrated if a stay is not granted. The State Board has discussed the substantial and irreparable harms that will result if the Commission declines to stay the enforcement of its Order. This harm centers on a violation of the constitutional rights of the state of North Carolina, the State Board, and the citizens of the state. Complaint Counsel has failed to provide any substantive response to the State Board's discussion of the true harms in this matter. Thus, given the substantial legal questions regarding the Commission's novel theories about its own authority discussed above, the irreparable harm in this case warrants the grant of a stay. Even assuming, *arguendo*, that there was a possibility of a circuit court upholding the Commission's theories, the potential that irreparable harm that would continue to be experienced by a state and its citizens, as a result of constitutional violations, demands the issuance of a stay.

Contrary to Complaint Counsel's assertion, the State Board demonstrated that its constitutional rights would be further violated in the absence of a stay. Complaint Counsel states that "[t]he Board's oft-repeated claim of deprivation of constitutional rights . . . is not supported by any citation to relevant authority supporting such claims." Opposition at 4-5. This assertion is disingenuous and near-sighted as the State Board has continuously explained to the Commission throughout this proceeding, including in its

Application for Stay, that the Commission's actions are unconstitutional and a breach of the constitutional rights of states and the State Board constitutes irreparable harm. Application for Stay at 5; see also A.A. v. Needville Indep. School Dist., 701 F. Supp. 2d 863 (S.D. Tex 2009) (violation of plaintiff's constitutional rights constituted irreparable harm); Ginorio v. Gomez, 301 F. Supp. 2d 122, 133-34 (S.D. Tex. 2009) (same). The Commission has violated and continues to violate the State Board's constitutional rights, and it has put forth no authority to do so. In California State Board of Optometry, the D.C. Circuit upheld the principles of federalism and the separation of powers as they relate to the regulation of professions by protecting sovereign states from impermissible interference by the federal government in the absence of express congressional authorization. 910 F.2d 976, 982 (D.C. Cir. 1990).

As discussed in its Application for Stay, the State Board, North Carolina, and its citizens would suffer substantial and irreparable harm in the absence of a stay because the Order expressly prohibits the State Board from carrying out its mandate to enforce the laws that govern the profession of dentistry in the state. When an independent federal agency impermissibly interferes with the manner in which states regulate their professions and protect their citizens, fundamental principles of state sovereignty and the separation of powers are violated. Sections II through VI of the Order outline a laundry list of actions that the State Board must either take or refrain from taking in order to comply. It is the prerogative of the State Board acting pursuant to state law, not a federal agency's administrative will, to determine what actions should or should not be taken to protect the citizens of North Carolina.

Enforcement of the Order presents irreparable harm because it would prevent the State Board from fulfilling its legislative mandate. The Order states that the State Board is prohibited from: “[d]irecting a non-dentist provider to cease providing teeth whitening goods or teeth whitening services, [c]ommunicating to a non-dentist provider that . . . the provision of teeth whitening goods or teeth whitening services by a non-dentist provider is a violation of the Dental Practice Act, and [p]rohibiting, restricting, impeding or discouraging the provision of teeth whitening goods or services by a non-dentist provider.” Order at 3. But, the Order also states that “nothing in this Order prohibits the Board from: “investigating a non-dentist provider for suspected violations of the Dental Practice Act . . .” or “filing, or causing to be filed, a court action against a non-dentist provider for an alleged violation of the Dental Practice Act” Order at 4. These conflicting statements would have the effect of prohibiting the State Board from fulfilling its state-mandated responsibility to prevent the unlicensed practice of dentistry.

This mandate to prevent the unlicensed practice of dentistry is set forth in N.C. General Statute § 90-29(b)(2), which clearly articulates that the removal of “stains, accretions or deposits from the human teeth” constitutes the practice of dentistry. Anyone performing these services without being duly licensed to do so, or, in the case of dental hygienists, performing the service under the direct supervision of a licensed dentist, is engaging in the practice of dentistry in violation of a clear state statute. Thus, if the State Board is prohibited from communicating to non-licensees that the services they are performing violate the Dental Practice Act, the State Board is prohibited from doing exactly what it must do under state law. To simply state that “nothing in this Order

prohibits the Board” from enforcing the Dental Practice Act does nothing to remedy this substantial violation of a state’s rights or to change the facts in this case.

Complaint Counsel suggests that the State Board has acknowledged that a stay is not warranted by citing a statement made by Mr. White, the Chief Operating Officer of the State Board. Opposition at 5 (“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”). Complaint Counsel’s reliance on this statement is a blatant mischaracterization as Mr. White’s statement focused on the nomenclature used in communications made by the State Board. He was not discussing the impact of the Commission’s Order on the State Board’s ability to enforce the Dental Practice Act. The State Board has previously brought this misportrayal of the record to the Commission’s attention. See Respondent’s Replies to Complaint Counsel’s Proposed Findings of Fact at 528-30; White, Tr. at 2240.

To illustrate what it considers irreparable harm, Complaint Counsel relies on North Texas Specialty Physicians, 141 F.T.C. 456 (2006) and Novartis Corp., 128 F.T.C. 233 (1999) and claims that the two private party respondents in these two cases faced greater harms than the State Board currently faces if a stay was not granted. Opposition at 4. The situations of those respondents are in no way comparable to the consequences for the State Board should the Order be enforced. The State Board is a sovereign state agency acting within its statutory mandate to protect the citizens of North Carolina. See N.C. State Bd. of Registration for Prof’l Eng’rs & Land Surveyors v. FTC, 615 F. Supp. 1155, 1162 n.7 (E.D.N.C. 1985) (“[t]he Commission fails to recognize that private parties

are not susceptible to the type of immediate injury that the Board, and indeed our constitutional system of government, would suffer should it be deemed a state entity”).

This case is not just about the loss of money or cancellation of contracts if the Order at issue is enforced (contrary to the situation in the two above-cited cases). Nor is this case about a private party attempting to advance the interests of its shareholders. Rather, this case is about whether a state has the right to regulate the professions within its borders, especially where public safety concerns are involved. See Locke, 634 F.3d at 1196. To analogize the harm faced by the State Board to that of a private actor concerned about taking a hit to its bottom line belies the Tenth Amendment to and the Commerce Clause of the Constitution, the Federal Trade Commission Act, as well as longstanding jurisprudence.

Finally, Complaint Counsel advances its own convoluted interpretation of a North Carolina statute in response to the State Board’s demonstration of how the Order runs contrary to North Carolina law. Complaint Counsel states that “[n]othing in the language [of N.C. General Statute § 90-43] prohibits the Board from incurring and expending monies for Order compliance.” Opposition at 5. But, the clear language of the state statute only permits the State Board “to expend . . . such additional sum or sums as it may determine necessary **in the administration and enforcement of this Article.**” Administering and enforcing the Dental Practice Act does not entail expending money or resources to comply with the extra-judicial orders of an independent federal agency. There are no subtleties or ambiguities in the statute to permit an argument that the state of North Carolina has authorized the State Board to utilize monies to comply with the Commission’s Order. Such an interpretation is illogical, and highlights the irreparable

harm that the State Board has and will continue to suffer in the absence of a stay of the Commission's Order.

C. The Public Interest Will Be Advanced by Granting a Stay.

The public interest weighs heavily in favor of granting a stay because there is no harm to the Commission or any other party should a stay be granted. On the other hand, the State Board, the state of North Carolina, and its citizens would suffer substantial and irreparable harm in the absence of a stay. Complaint Counsel does not provide any examples of harm that could flow to the Commission should a stay be granted. Then, without providing any support, Complaint Counsel states that there are "clear and substantial harms to the public that would persist if a stay were to be granted." Opposition at 7. This unsupported claim is not true and it masks the fact that the State Board and the public would suffer substantial and irreparable harm if a stay is not granted. In addition, as the State Board has persistently maintained throughout the course of this administrative proceeding, there can be no "harm" to, nor legal competition with, illegal providers of services that are statutorily defined as the practice of dentistry.

The Administrative Law Judge, in his Initial Decision, and the Commission, in its Final Opinion, both ruled that social welfare and public safety concerns are not justifications for restraints on competition. Opinion at 24-26. Ironically, a substantial component of the factors to be considered in an evaluation of whether a stay should be granted is whether there is a potential for harm if the stay is not granted. Indeed, public protection is a necessary, important consideration when evaluating whether a stay is warranted.

The State Board's enforcement of the North Carolina Dental Practice Act was necessitated by serious and well-known concerns over the dangers of unsupervised teeth whitening. Evidence offered by the State Board shows that teeth whitening services are safer when provided under dental supervision than when not. Respondent's Proposed Findings of Fact ("RPFOF") 376-88. Dentists have a professional obligation to protect their patients' safety; they fulfill this obligation by taking far greater safety precautions than non-dentist teeth whitening service providers. Id. Dentists perform a thorough medical examination of potential teeth-whitening candidates and ensure that sanitation, sterilization, and safety procedures are followed. RPFOF 385-388, 428. Dentists also cannot evade personal liability for their own malpractice, thereby protecting patients who would otherwise be required to sign liability-absolving waivers as customers of non-dentist providers. See e.g., RPFOF 425, 631-32; see N.C. Gen. Stat. § 55B-9.

In contrast, numerous health hazards are present at non-dentist teeth whitening kiosks, which often do not have running water. RPFOF 376-84, 434-44, 440-42, 680. Kiosk employees are therefore unable to wash their hands, and can clean equipment only by wiping it down with Lysol wipes. RPFOF 438-44. The State Board received reports of kiosk employees working without gloves or masks. RPFOF 440. Furthermore, although spas and salons typically have running water and must operate pursuant to the sanitation regulations of the North Carolina Board of Cosmetic Art Examiners, such facilities do not have to meet the strict sterilization rules of the American Dental Association, as adopted by reference in the State Board's rules. RPFOF 436-37.

Beyond sanitation and sterilization concerns, teeth whitening industry representatives themselves admit the immediate medical dangers of teeth whitening.

When conducted without proper medical oversight, it can “mask pathology.” RPF0F 395, 421-22. Other dangers identified by dentists include tooth damage, necrosis, tearing of mouth and lip flesh, aspirating, and allergic reactions. RPF0F 449-57. Dangers such as these were not just perceived by State Board members; they have been reported by consumers of illegal teeth whitening services and have been covered in numerous state and national news stories.¹ RPF0F 241, 408.

Complaint Counsel observes that the State Board is still free, under the terms of the Commission’s Order, to investigate and pursue claims. But, as stated in its Application for a Stay, the State Board is not free to direct (not order, but just direct) a non-dentist provider to cease providing teeth whitening services. See Order at 3. Also, the State Board may not communicate that a non-dentist provider is violating or has violated North Carolina’s Dental Practice Act by providing teeth whitening services. Id. However, state law requires the State Board, not the Commission, to interpret the Dental Practice Act and take the steps necessary to ensure its provisions are enforced. Not only does North Carolina’s Dental Practice Act specifically provide that it shall be “liberally construed” by the State Board to carry out its purposes, North Carolina courts have held that the interpretation of a statute by an agency created to administer that statute is traditionally accorded deference by the courts. N.C. Gen. Stat. § 90-22(a); Best v. N.C.

¹ See, e.g., Monica Laliberte, *Teeth Whitening Kiosks at the Mall Are Not Regulated*, WRAL (May 21, 2008), <http://www.wral.com/5onyourside/story/2921079/> (last visited Jan. 26, 2012); Amber Rupinta, *Hidden Dangers of Teeth Whitening*, WTVD (Feb. 17, 2008), <http://abclocal.go.com/wtvd/story?section=news/health&id=5963320> (last visited Jan. 26, 2012); Gina Silva, *Mall Teeth Whitening: Are There Risks?*, KTTV (October 21, 2011), <http://www.myfoxla.com/dpp/news/investigative/teeth-whitening-risks-20111031> (last visited January 26, 2012); *Mall Teeth Whitening: Is It Safe?*, WCVB (November 20, 2009), <http://www.thebostonchannel.com/r/21677013/detail.html> (last visited January 26, 2012); Susan Koeppen, *Teeth Whitening Troubles*, CBS News (August 26, 2004), <http://www.cbsnews.com/video/watch/?id=634401n> (last visited January 26, 2012).

State Bd. of Dental Examiners, 108 N.C. App. 158, 162, 423 S.E.2d 330, 332 (1992), review denied, 333 N.C. 461, 428 S.E.2d 184 (1993); Lee v. Gore, ___ N.C. ___, ___, 717 S.E.2d 356, 358 (2011).

Complaint Counsel argues that the consuming public is better served by relying on the Commission's Order, not the State Board's "recent moratorium" on issuing cease and desist letters. Opposition at 7. But, the public is not served and, in fact, is harmed, when an independent federal agency circumvents constitutional principles to prevent a sovereign state from protecting its citizens. North Carolinians require and expect the state agency that oversees the dentistry profession to protect them by policing illegal activities.

The State Board has sent no communications to non-licensees regarding stain removal in the past two years. But even if a non-licensee were to receive a communication from the State Board regarding stain removal, state law provides adequate measures if recipients object to the contents of the communication. Indeed, any recipient of such a communication from the State Board about the unauthorized practice of dentistry has rights and avenues for relief already available to them under North Carolina law. The recipient may: 1) simply choose to ignore the request; 2) seek a declaratory ruling from the State Board pursuant to N.C. Gen. Stat. § 150B-4 and 21 N.C.A.C. 16N .0402²; 3) pursue relief in the courts of the state of North Carolina if they feel they have been aggrieved; 4) challenge the statute through administrative proceedings and a declaratory judgment action; or 5) pursue state legislative change. Oversight by an independent federal agency acting outside of its authority and

² Appendix A of the Commission's Order incorrectly cites 21 N.C.A.C. 16N .0400.

jurisdiction is not necessary, and constitutes an infringement upon the sovereign authority of a state to regulate its professions.

Complaint Counsel avers in its Opposition that 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 choice.” Opposition at 6. Although it disputes these findings, the State Board notes that although the Commission did opine that the Board’s conduct increased prices and deprived consumers of choice, the Commission offered no conclusion regarding reduced output. See Opinion at 32.

The balance of equities in this matter overwhelmingly favors the grant of a stay. In its Opposition, Complaint Counsel failed to discuss any harm that would result to any party, much less the Commission, if a stay is granted. Conversely, the State Board demonstrated that the public interest is best served if a stay is granted by the Commission because this case presents substantial constitutional and statutory questions concerning the extra-judicial actions of an independent federal agency and because states are entitled to regulate professional occupations without unconstitutional interference. Complaint Counsel has offered no relevant authority to substantiate the constitutional violations perpetrated by the Commission against the state of North Carolina, the State Board, and the citizens of North Carolina. Furthermore, as detailed above, consumers could be harmed by non-licensed individuals who are illegally performing dental services while the Commission’s jurisdictional expansion theories are tested in the courts.

III. CONCLUSION

The State Board will bring its compelling interests and the infringement upon its constitutional rights (and those of the state of North Carolina and its citizens) to the

attention of the circuit court on appeal. Until the appeals in this case are completed, a stay of the Commission's Order is warranted because the State Board has demonstrated all four factors considered when evaluating whether to grant a stay, even though a stay should be granted if the State Board can demonstrate any one of the four factors.

For all the foregoing reasons, the Commission should stay the effect and enforcement of its Order pending final disposition of the State Board's appeals.

This the 26th day of January, 2012.

Respectfully submitted,

ALLEN, PINNIX & NICHOLS, P.A.

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CERTIFICATE OF SERVICE

I hereby certify that on January 26, 2012, I electronically filed the foregoing with the Federal Trade Commission using the FTC E-file system, which will send notification of such filing to the following:

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I further certify that I sent twelve hard copies of the foregoing for the Commission's use to Secretary Clark at the above address via Federal Express.

I hereby certify that the undersigned has this date served copies of the foregoing upon all parties to this cause by electronic mail as follows:

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I also certify that I have sent courtesy copies of the document via Federal Express and electronic mail to:

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This the 26th day of January, 2012.

/s/ Noel L. Allen
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CERTIFICATION FOR ELECTRONIC FILING

I further 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 by the adjudicator.

/s/ Noel L. Allen
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