UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Lina M. Khan, Chair**
Noah Joshua Phillips
Rebecca Kelly Slaughter
Christine S. Wilson

In the Matter of	)	
	)	**Docket No. C-4757**
BOARD OF DENTAL EXAMINERS OF ALABAMA,	)	
a State Agency.	)	

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, Board of Dental Examiners of Alabama, 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

1. This case challenges actions of the Board of Dental Examiners of Alabama ("Dental Board") that unreasonably exclude emerging competition from certain new and innovative teledentistry platforms, and the dentists who partner with these platforms. The Dental Board is comprised of seven members, six of whom are practicing dentists.

2. In recent years, dentists working with several new firms have started to offer teeth alignment treatment that differs from the traditional treatments offered through dental offices, such as braces or clear aligners prescribed following an in-office appointment with a dentist. In this new treatment model, patients are fitted for clear aligners following a visit to a storefront location, where a digital scan is performed by a dental assistant. The scan is then reviewed by a dentist working remotely. Patient interactions with dental professionals also take place on a remote basis. This mode of treatment often is substantially less expensive than traditional treatments.

3. In 2017 and 2018, the Dental Board took actions to stop the expansion in Alabama of firms providing clear aligners in Alabama through a teledentistry model. First, the Board amended Alabama Administrative Code § 270-X-3.10(o)(2). The Board's interpretation of that amendment, in conjunction with other existing Board regulations, operates to prohibit non-

dentists from performing digital scans without on-site dentist supervision. Thereafter, the Dental Board directed the leading provider of clear aligners through a teledentistry model to cease performing digital scans without on-site dentist supervision.

4. The actions of the Dental Board have deprived consumers in Alabama of low-price, convenient options for teeth alignment treatment without any legitimate justification or defense. The actions of the Dental Board have unreasonably restrained competition and violate Section 5 of the Federal Trade Commission Act.

RESPONDENT

5. Respondent Dental Board is the regulatory body responsible for the licensure and monitoring of the practice of dentistry in the State of Alabama. The Dental Board is organized, exists, and transacts business under and by virtue of the laws of the State of Alabama, with its principal office and place of business located at 2229 Rocky Ridge Road, Birmingham, Alabama.

6. The State of Alabama created the Dental Board pursuant to the Alabama Dental Practice Act, Code of Alabama, Title 34, Chapter 9 (Dentists and Dental Hygienists) (Ala. Code § 34-9-1, *et. seq.*) ("Act") to carry out the purposes and enforce the provisions of the Act. It is unlawful for an individual to practice dentistry or to provide dental hygiene services in Alabama without holding a current license to practice issued by the Dental Board.

7. The Dental Board is responsible for the licensure of all dentists practicing in Alabama, including orthodontists.

8. The Dental Board is comprised of seven members: six dentists and one dental hygienist. To be eligible for Dental Board membership, the dentist members must be actively engaged in the practice of dentistry in Alabama for at least five years prior to their selection to the Dental Board. Members of the dental profession select the Dental Board members. Licensed dentists residing and practicing in Alabama vote to elect five of the six dentist members. The Alabama Dental Society selects the sixth. Licensed dental hygienists residing and practicing in the state elect the dental hygienist member.

9. Collectively, the six dentist members can and do control the operation of the Dental Board. While serving on the Dental Board, dentist members continue to engage in the for-profit business of providing dental services.

10. Except to the extent that competition has been restrained as alleged herein, and depending on their geographic location, dentists in Alabama compete with each other and with dentist members of the Dental Board in the provision of dental services. Through their dental practices, dentist board members are distinct economic actors.

JURISDICTION

11. 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.

12. 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 dental services in Alabama 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.

BACKGROUND

13. "Malocclusion" is a clinical term for the misalignment of or incorrect relation between teeth. Many dentists and orthodontists offer patients treatment for malocclusion. This treatment may include prescribing braces or clear aligners.

14. Braces are the traditional form of treatment for malocclusion. Braces typically employ visible components, including wires or brackets and rubber bands. Braces are installed and adjusted during in-person visits to a dentist's or orthodontist's office, and patients, or their insurance providers, pay dentists or orthodontists directly for these services.

15. Clear aligners are custom-made, removable plastic mouthpieces that are molded to fit the patient's teeth for the treatment of malocclusion. Clear aligners are less conspicuous than braces.

16. Clear aligner therapy consists of supplying the dental patient with a series of mouthpieces sequenced to correct incrementally the malocclusion over a prescribed period. Wearing clear aligners places gentle pressure on the patient's teeth to reposition them gradually.

17. Clear aligner therapy often begins with an intraoral scan of the patient's teeth using a scanning device placed inside the patient's mouth. The intraoral scanning device, also known as an "optical impression device," is a wand-like tool inserted into the patient's mouth to create a three-dimensional digital model of the patient's teeth, bite, gums, and palate. The scanning device enables clinical evaluations without a conventional plaster-cast impression. After the scan is completed, a dentist or orthodontist determines whether the patient is a candidate for clear aligner therapy.

18. Many patients are prescribed clear aligners through a visit to a dentist's or orthodontist's office. A patient will schedule an in-person visit with a dentist or orthodontist for assessment of and possible treatment for malocclusion and may receive a prescription for clear aligners from the dentist or orthodontist. As with braces, patients or their insurance providers typically pay dentists or orthodontists directly for these services.

19. In recent years, several new firms, referred to herein as clear aligner platforms, have launched a new business model utilizing teledentistry. Under this model, the clear aligner platform may send an "impression kit" to the prospective patient's home, which the patient uses to take impressions of her teeth and then sends to the provider. Alternatively, the prospective patient may visit a storefront location, where a dental hygienist, dental assistant, or other non-dentist professional performs an intraoral scan of the patient's teeth. For reasons of ease and convenience, many patients prefer to initiate treatment with clear aligner platforms by visiting a physical storefront.

20. The typical patient treatment process employed by clear aligner platforms is as follows. After an impression or digital scan of the prospective patient's teeth is taken, the clear aligner platform provides the results to a dentist working remotely. The dentist reviews the results and determines whether the patient is a candidate for clear aligner therapy. If so, the dentist may prescribe a set of clear aligners for the patient. A set of custom-made clear aligners is manufactured and sent to the patient's home. Dental professionals are available for consultations on a remote basis.

21. Several firms employ this teledentistry model to provide clear aligner therapy to patients, including SmileDirectClub, Candid, and Smilelove. These firms typically offer clear aligner therapy at prices substantially below the prices associated with treatment using braces or clear aligners supplied by a dentist or orthodontist in a traditional office setting.

22. Many patients prefer clear aligner therapy supplied through a teledentistry model to treatment through a traditional dentist's or orthodontist's office. These patients find this model to be less expensive and more convenient than clear aligners or braces fitted through in-person office visits to a dentist or orthodontist.

THE CHALLENGED CONDUCT

23. Following the rollout and initial success of the first clear aligner platforms, the Dental Board adopted a regulation impeding their operations. Specifically, in September 2017, members of the Board voted to amend Alabama Administrative Code § 270-X-3.10(o)(2). The Board's interpretation of that amendment, in conjunction with other existing Board regulations, operates to prohibit non-dentist dental personnel, such as dental hygienists and assistants, from taking digital intraoral scans of a patient's teeth without supervision by a dentist who is physically present in the dental facility. The business model employed by emerging clear aligner platforms is not compatible with the Board's interpretation of the amended rule, as dental hygienists or assistants who perform digital scans for the platforms are supervised by dentists working remotely.

24. In September 2018, pursuant to a Dental Board vote, the Dental Board sent a cease-and-desist letter to SmileDirectClub. In the letter, the Dental Board instructed SmileDirectClub that the firm and its affiliated personnel were engaged in the unauthorized practice of dentistry.

25. The actions of the Dental Board described above constitute concerted action for purposes of the antitrust laws.

26. As a result of the Dental Board's actions, SmileDirectClub halted a planned expansion of facilities in Alabama. In addition, the Dental Board's actions were widely publicized, including as a result of related litigation between the Dental Board and SmileDirectClub. Other clear aligner platforms are therefore aware of the Board's conduct.

27. The Dental Board's actions have unreasonably restrained competition for the treatment of malocclusion in Alabama. Consumers in Alabama have been deprived of full competition across all channels through which consumers could access treatment for malocclusion.

28. The Dental Board's actions do not yield procompetitive benefits sufficient to justify their harmful effect on competition.

29. The Dental Board's actions have not been reviewed or approved by any neutral state officials with the power to veto or modify the Board's actions.

VIOLATION ALLEGED

30. The acts and practices described above unreasonably restrain competition and constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. Such acts and practices or the effects thereof are continuing and will likely continue or recur in the absence of appropriate relief.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twentieth day of December 2021, issues its Complaint against Respondent.

By the Commission.

April J. Tabor
Secretary

SEAL