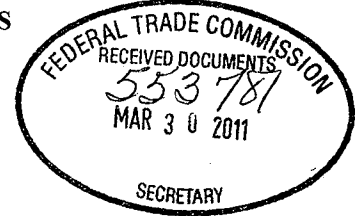


UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

ORIGINAL



In the Matter of)
)
)

The North Carolina Board of)
Dental Examiners,)
Respondent.)
)
)

DOCKET NO. 9343

**ORDER DENYING RESPONDENT'S MOTION TO DISMISS
AT THE CLOSE OF EVIDENCE OFFERED
IN SUPPORT OF THE COMPLAINT**

I.

This is an action for conspiracy in restraint of trade, constituting an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act ("FTC Act"). Unfair methods of competition under Section 5 include any conduct that would violate Sections 1 or 2 of the Sherman Act. *See, e.g., California Dental Assn. v. FTC*, 526 U.S. 756, 762 & n.3 (1999); *FTC v. Cement Inst.*, 333 U.S. 683, 694 (1948); *Fashion Originators' Guild v. FTC*, 312 U.S. 457, 463-64 (1941). Section 1 of the Sherman Act prohibits "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . ." 15 U.S.C. § 1. Thus, a Section 1 violation requires proof of the existence of a contract, combination, or conspiracy among two or more separate entities, that unreasonably restrains trade in the relevant market. *Valuepest.com of Charlotte, Inc. v. Bayer Corp.*, 561 F.3d 282, 286 (4th Cir. N.C. 2009); *Law v. NCAA*, 134 F.3d 1010, 1016 (10th Cir. 1998).

Trial in this matter commenced on February 17, 2011. On February 28, 2011, Complaint Counsel rested and Respondent, on the record at trial, made an oral motion to dismiss at the close of Complaint Counsel's evidence, pursuant to Commission Rule 3.22(a) ("Motion")¹. Rule 3.22(a) sets forth:

When a motion to dismiss is made at the close of the evidence offered in support of the complaint based upon an alleged failure to establish a prima facie case, the Administrative Law Judge shall defer ruling thereon until immediately after all evidence has been received and the hearing record is closed.

16 C.F.R. §3.22(a). Complaint Counsel stated its opposition to the Motion on the record at

¹ Respondent's arguments in support of its Motion are set forth in the transcript of the hearing on February 28, 2011, pages 1418-1424.

trial on February 28, 2011 (“Opposition”)².

Upon consideration of the arguments in support of and in opposition to Respondent’s Motion, as set forth below, Respondent’s Motion is DENIED.

II.

In support of its Motion, Respondent argues that the Complaint in this matter charged that dentists in North Carolina, acting through the instrument of the North Carolina State Board of Dental Examiners (“Board”), are colluding to exclude non-dentists from competing with dentists in the provision of teeth-whitening services, but that Complaint Counsel failed to offer any credible evidence of collusion, and, therefore, Complaint Counsel’s evidence does not support a finding of collusion. Respondent further argues that Complaint Counsel must prove a conspiracy, but that Complaint Counsel’s evidence in this regard is insufficient. In support of this charge, Respondent states that Complaint Counsel presented no evidence that the Board and the practicing dentists who comprise the Board “have an inherent financial interest, which is a pecuniary motivation for themselves and other dentists” or that “in-office teeth-whitening is potentially a lucrative business.” Respondent further posits that Complaint Counsel has shown no evidence of loss in the non-dentist provided and over-the-counter markets for teeth-whitening.

Respondent also challenges whether Complaint Counsel demonstrated that non-dentist providers of teeth-whitening services were forced to leave the market because of the cease and desist letters issued by the Board. Respondent next charges that Complaint Counsel failed to prove substantial economic consumer injury. Respondent states that Complaint Counsel’s expert admitted “that economic theory would allow a limited exclusion model” and that the “public interest would be a basis for such a limited exclusion.” Finally, Respondent asserts that Complaint Counsel failed to show that the Board “is not engaging in protecting the public health, safety, welfare and public interest.” For these reasons, Respondent urges its motion to dismiss be granted based on a lack of evidence.

In opposition, Complaint Counsel contends that the issues raised by Respondent have “already been addressed in the Commission’s decision involving the state action defense.”³ Complaint Counsel states that the Commission found that the Board and the practicing dentists who comprise the Board have a financial interest. Complaint Counsel next argues that the Commission addressed Respondent’s arguments “that there is no conspiracy, no collusion, [and] that [the Board] is not a person.” Complaint Counsel asserts that the Commission also addressed whether “people could ignore the cease and desist letters” issued by the Board. In addition, Complaint Counsel states that the Board’s taking action as a board “as a group of dentists with their own independent financial interest is a conspiracy” and that

² Complaint Counsel’s arguments in Opposition to the Motion are set forth in the transcript of the hearing on February 28, 2011, pages 1424-1432.

³ On February 3, 2011, the Commission issued an opinion concluding that “given the Board’s obvious interest in the challenged restraint, the state must actively supervise the Board in order for the Board to claim state action protection from antitrust laws. Because we find such supervision lacking, we further hold that the Federal Trade Commission Act reaches the Board’s conduct.” *In re North Carolina State Board of Dental Examiners*, Docket 9343 (Comm. Op. Feb. 3, 2011).

Respondent has “not suggested that this is a joint profit-sharing venture sharing the risk.” Therefore, according to Complaint Counsel, the only conclusion is that the dentists that comprise the Board compete with one another, and that “that is sufficient to show collusion and conspiracy.” Complaint Counsel argues that “accommodation or agreement” has also been demonstrated.

Next, Complaint Counsel contends that there has been evidence of loss to consumers, evidence that “distributors suffered substantial losses, which caused consumer harm in North Carolina,” and evidence that a number of salons and kiosk operators “closed down as a result of the cease and desist orders being sent.” Complaint Counsel argues also that “a restraint that excludes a form of competition does without question have a tendency to suppress competition.” Complaint Counsel contends that “[i]ssues . . . relating to the ability of the recipients and others to ignore the [cease and desist] letter or take advantage of the courts . . . are issues directly related to active supervision which the Commission addressed” Lastly, Complaint Counsel states that it has shown that non-dentist teeth-whitening is at least as safe as, and in some instances much safer than, over-the-counter products and dentist-provided teeth-whitening services.

III.

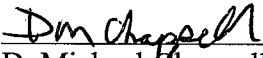
The record closed on March 30, 2011. Rule 3.22(a) requires the Administrative Law Judge to defer ruling on a motion to dismiss made at the close of the evidence until immediately after all evidence has been received and the hearing record is closed. Accordingly, a ruling on the Motion was deferred until this time.

Based on the evidentiary record, and having fully considered the arguments of the parties, Respondent has failed to demonstrate that the Complaint should be dismissed for failure to establish a prima facie case. The issues raised by the Motion, to the extent necessary or appropriate in regard to a determination of the merits for the initial decision in this case, and to the extent briefed by the parties in their post-trial briefs, will be addressed in the initial decision when issued. *E.g., In re Chicago Bridge & Iron Co.*, 2003 FTC LEXIS 28, *2-3 (Jan. 28, 2003); *In re Porter & Dietsch*, 90 F.T.C. 770, 1977 FTC LEXIS 11 (Dec. 20, 1977).

IV.

Accordingly, Respondent’s Motion is DENIED.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: March 30, 2011