



UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

_____)
In the Matter of _____)
NORTH CAROLINA STATE BOARD OF _____)
DENTAL EXAMINERS, _____)
Respondent. _____)

PUBLIC

Docket No. 9343

COMPLAINT COUNSEL’S OBJECTIONS AND RESPONSES TO RESPONDENT’S
FIRST SET OF REQUESTS FOR ADMISSION

Pursuant to Rule 3.32 of the Federal Trade Commission’s Rules of Practice, Complaint Counsel hereby responds to Respondent North Carolina State Board of Dental Examiners’ (“Dental Board’s”) Requests for Admission. Complaint Counsel reserves the right to supplement its responses to Respondent’s Requests for Admission after the close of discovery, especially insofar as Respondent has yet to certify compliance with Complaint Counsel’s First Set of Requests for Production of Documents served on June 29, 2010 and may produce additional documents, the review of which, may alter Complaint Counsel’s responses to these Requests for Admission.

Complaint Counsel has endeavored to offer a good faith response to each of Respondent’s Requests for Admission. Nevertheless, many of Respondent’s requests are improper, unintelligible, vague and ambiguous, or otherwise unanswerable. In fact, many of Respondent’s Requests do not narrow the issues for trial because the admission requested does not relate to “essentially undisputed or peripheral issues of fact.” Further, “[r]equests for admission should not be employed ‘to establish facts which are obviously in dispute or to answer

questions of law.” *In re Basic Research*, 2004 FTC LEXIS 225, *5 (Nov. 30, 2004) (citation omitted). As a result, Respondent’s Requests that seek admissions of contested legal and factual issues central to the case are improper. In addition, some of Respondent’s Requests seek legal conclusions or irrelevant matter that is beyond the proper scope of requests for admission in this matter under Rule 3.32. In several of these instances, the Requests specify broadly-worded and potentially inaccurate legal propositions that Complaint Counsel has no obligation to research and correct. In other cases, the Respondent’s Requests seek an improper admission based on Respondent’s restatement or paraphrase of statutory provisions when the full text of the statutes is equally available to all parties and a proper subject for judicial notice.

Subject to the General and Specific Objections below, Complaint Counsel answers as follows:

REQUEST NO. 1: *Admit that the U.S. Supreme Court has never held that a state agency enforcing a clear articulated state statute regarding non-price restraints must prove active state supervision in order to qualify for state action immunity.*

RESPONSE: Complaint Counsel incorporates its General Objections in its response to this Request for Admission.

Complaint Counsel specifically objects to this Request and states that no response is required inasmuch as it calls for a legal conclusion beyond the proper scope of requests for admission in this matter under Rule 3.32.

REQUEST NO. 2: *Admit that the market restrictions allegedly at issue in this case do not involve direct restrictions on commercial speech.*

RESPONSE: Complaint Counsel incorporates its General Objections in its response to this Request for Admission.

Complaint Counsel specifically objects to the use of the undefined phrase “direct

restrictions” as vague and ambiguous.

Subject to these objections and qualifications, to the extent that “direct restrictions” means an express restriction that regulates only the advertising of teeth whitening products (e.g., a letter stating “You are hereby ordered to Cease and Desist advertising your teeth whitening services”), and does not include any effects on commercial speech caused by restrictions on the provision of teeth whitening services, Complaint Counsel admits this Request.

REQUEST NO. 3: Admit that the market restrictions allegedly at issue in this case do not involve direct restrictions on pricing.

RESPONSE: Complaint Counsel incorporates its General Objections in its response to this Request for Admission.

Complaint Counsel specifically objects to the use of the undefined phrase “direct restrictions” as vague and ambiguous.

Subject to these objections and qualifications, to the extent that “direct restrictions” refers to setting or fixing the price of teeth whitening services, and does not include any non-direct effects on prices caused by the Board’s conduct, Complaint Counsel admits that the Dental Board’s conduct in this case does not involve direct restrictions on pricing.

REQUEST NO. 4: Admit that the restriction the North Carolina State Board of Dental Examiners (“Dental Board”) is enforcing is a non-price restriction.

RESPONSE: Complaint Counsel incorporates its General Objections in its response to this Request for Admission.

Complaint Counsel specifically objects that the phrase “the restriction the North Carolina State Board of Dental Examiners (“Dental Board”) is enforcing” is vague, ambiguous, and misleading.

Subject to these objections and qualifications, to the extent that non-price restriction is used as typically used in antitrust as a reference to a vertical restraint between different levels of the distribution chain, Complaint Counsel denies this request. To the extent that the request only relates to whether the Board has colluded on price or otherwise directly set prices, Complaint Counsel admits this request.

REQUEST NO. 5: *Admit that the FTC does not have express Congressional authority to regulate teeth whitening products or services.*

RESPONSE: Complaint Counsel incorporates its General Objections in its response to this Request for Admission.

Complaint Counsel specifically objects to the phrase “express Congressional authority to regulate” as vague and ambiguous.

Subject to these objections and qualifications, Complaint Counsel states that Congress has expressly empowered and directed the Federal Trade Commission to prevent persons, partnerships, or corporations from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce. To the extent that “regulate” refers to efforts to prevent persons, partnerships, or corporations from using “unfair methods of competition” and “unfair or deceptive acts or practices” in the sale of tooth whitening products or services “in or affecting commerce,” this Request is specifically denied. To the extent that “express Congressional authority to regulate” means that the phrase “teeth whitening products and services” is contained in the F.T.C. Act, Complaint Counsel admits that the F.T.C. Act does not contain the phrase “teeth whitening products and services.”

REQUEST NO. 6: *Admit that a competitive alternative for consumers is to self administer over the counter teeth whitening products.*

RESPONSE: Complaint Counsel incorporates its General Objections in its response to this Request for Admission.

Complaint Counsel specifically objects to the use of the term “competitive alternative for consumers” as vague and ambiguous because this Request asks about “a competitive alternative” without specifying competitive alternative to what. Complaint Counsel further specifically objects to this Request as unintelligible and unanswerable and states that no response is required. To the extent that “competitive alternative for consumers” means that consumers may use different types of services and products to whiten their teeth, including but not limited to, over-the-counter teeth whitening products such as Crest White Strips sold in grocery stores and pharmacies, Complaint Counsel admits this request.

REQUEST NO. 7: Admit that the Dental Board has not restricted the mere sale of over the counter teeth whitening products.

RESPONSE: Complaint Counsel incorporates its General Objections in its response to this Request for Admission.

Complaint Counsel specifically objects to the use of the word “mere” as vague and ambiguous. Subject to these objections and qualifications, to the extent that “mere” means an express restriction on sale of over-the-counter teeth whitening products when such sale is unaccompanied by any other product or service component, and that “mere” excludes the adverse effect on sale of over-the-counter teeth whitening products that other restrictions may cause, Complaint Counsel admits that the Dental Board has not restricted the mere sale of branded over-the-counter teeth whitening products such as Crest White Strips through such retail outlets such as grocery stores and pharmacies.

REQUEST NO. 8: Admit that over the counter teeth whitening products are generally lower in

price than the prices at which non-licensed teeth whitening service providers offer their products.

RESPONSE: Complaint Counsel incorporates its General Objections in its response to this Request for Admission.

Subject to these objections and qualifications, Complaint Counsel admits this Request.

REQUEST NO. 9: *Admit that the FTC misnamed the Respondent in its Complaint.*

RESPONSE: Complaint Counsel incorporates its General Objections in its response to this Request for Admission.

Complaint Counsel specifically objects to this Request and states that no response is required inasmuch as it is irrelevant and beyond the proper scope of requests for admission in this matter under Rule 3.32.

REQUEST NO. 10: *Admit that the investigation which preceded the Complaint in this matter did not produce any direct evidence that the Dental Board had conspired to restrain trade.*

RESPONSE: Complaint Counsel incorporates its General Objections in its response to this Request for Admission.

Complaint Counsel specifically objects to this Request because the undefined phrase “direct evidence” is ambiguous and vague. Complaint Counsel further specifically objects to this Request and states that no response is required inasmuch as it is irrelevant and beyond the proper scope of requests for admission in this matter under Rule 3.32.

REQUEST NO. 11: *Admit that efforts by a private trade association to influence Dental Board rules or policies constitute constitutionally protected speech under the Noerr-Pennington doctrine.*

RESPONSE: Complaint Counsel incorporates its General Objections in its response to this Request for Admission.

Complaint Counsel specifically objects to this Request and states that no response is required inasmuch as it calls for a legal conclusion beyond the proper scope of requests for admission in this matter under Rule 3.32.

REQUEST NO. 12: *Admit that members of a state agency are presumed to be acting in good faith.*

RESPONSE: Complaint Counsel incorporates its General Objections in its response to this Request for Admission.

Complaint Counsel specifically objects to this Request and states that no response is required inasmuch as it calls for a legal conclusion beyond the proper scope of requests for admission in this matter under Rule 3.32.

REQUEST NO. 13: *Admit that the North Carolina State Ethics Commission has ruled that the mere fact that a Board member is a licensee of the Board does not constitute a conflict of interest when participating in the enforcement decisions of the Board.*

RESPONSE: Complaint Counsel incorporates its General Objections in its response to this Request for Admission.

Complaint Counsel specifically objects to the use of the word “mere” as vague and ambiguous. Complaint Counsel specifically objects to this Request and states that no response is required inasmuch as it calls for a legal conclusion beyond the proper scope of requests for admission in this matter under Rule 3.32.

REQUEST NO. 14: *Admit that no current member of the Dental Board has teeth whitening business amounting to more than 5% of their business revenues.*

RESPONSE: Complaint Counsel incorporates its General Objections in its response to this Request for Admission.

Complaint Counsel specifically objects to this Request because the phrase “business

revenues” is ambiguous and vague. Complaint Counsel further specifically objects to this Request because the phrase “their business revenues” is not defined or specified in any way in the Requests for Admission such as whether “their (current board members) business revenues” are derived from investments, non-dental businesses, or the practice of dentistry.

Subject to these objections and qualifications, Complaint Counsel admits this Request with respect to current Board members Owens, Holland, Wester, and Morgan. Complaint Counsel cannot truthfully admit or deny this Request with regard to current Board members Sadler, Howdy, and Sheppard.

REQUEST NO. 15: Admit that teeth whitening businesses compare their services to services provided by dentists.

RESPONSE: Complaint Counsel incorporates its General Objections in its response to this Request for Admission.

Complaint Counsel specifically objects to this Request because the undefined phrases “teeth whitening businesses,” and “their services” are ambiguous and vague. For instance, dentists themselves as part of their dental practices have teeth whitening businesses, some of which are substantial.

Subject to these objections and qualifications, to the extent that this Request asks whether non-dentist providers of teeth whitening services have compared their services to competing teeth whitening services provided by dentists, Complaint Counsel admits this Request.

REQUEST NO. 16: Admit that teeth whitening businesses promote their services as removing stains from teeth.

RESPONSE: Complaint Counsel incorporates its General Objections in its response to this Request for Admission.

Complaint Counsel specifically objects to this Request because the phrases “teeth whitening businesses,” and “their services” are ambiguous and vague. For instance, dentists themselves as part of their dental practices have teeth whitening businesses, some of which are substantial.

Subject to these objections and qualifications, Complaint Counsel admits that some dentists and non-dentists providing teeth whitening services promote their teeth whitening services as removing stains from teeth.

REQUEST NO. 17: *Admit that teeth whitening businesses promote their services as being more effective than self-administered over the counter teeth whitening products.*

RESPONSE: Complaint Counsel incorporates its General Objections in its response to this Request for Admission.

Complaint Counsel specifically objects to this Request because the phrases “teeth whitening businesses,” and “more effective” are vague and ambiguous. For instance, dentists themselves as part of their dental practices have teeth whitening businesses, some of which are substantial. Complaint Counsel further objects that the Request compares a teeth whitening service to a teeth whitening product, and over-the-counter teeth whitening products such as Crest White Strips sold in grocery stores or pharmacies lack service components.

Subject to these objections and qualifications, to the extent “more effective” includes characteristics such as the amount of time required to complete the whitening process, Complaint Counsel admits that some dentists and non-dentists providing teeth whitening services promote their teeth whitening services as generating more effective results than over-the-counter teeth whitening products such as Crest White Strips sold in grocery stores and pharmacies.

REQUEST NO. 18: *Admit that there are adequate public protection grounds for state*

regulation of the practice of dentistry.

RESPONSE: Complaint Counsel incorporates its General Objections in its response to this Request for Admission.

Complaint Counsel specifically objects to the use of the word “adequate” and the phrase “public protection grounds” in this Request as ambiguous and vague.

Complaint Counsel specifically objects to this Request and states that no response is required inasmuch as it calls for a legal conclusion beyond the proper scope of requests for admission in this matter under Rule 3.32.

REQUEST NO. 19: *Admit that the North Carolina statutes include the removal of stains from teeth as the practice of dentistry.*

RESPONSE: Complaint Counsel incorporates its General Objections in its response to this Request for Admission.

Complaint Counsel specifically objects to this Request and states that no response is required inasmuch as it calls for a legal conclusion beyond the proper scope of requests for admission in this matter under Rule 3.32. Complaint Counsel further specifically objects to this Request inasmuch as the full text of the North Carolina Statute, as opposed to the Dental Board’s restatement of the statute in the form of a legal conclusion, is a proper subject of judicial notice by the Court.

REQUEST NO. 20: *Admit that the North Carolina statutes include making impressions of teeth or gums in the definition of the practice of dentistry.*

RESPONSE: Complaint Counsel incorporates its General Objections in its response to this Request for Admission.

Complaint Counsel specifically objects to this Request and states that no response is

required inasmuch as it calls for a legal conclusion beyond the proper scope of requests for admission in this matter under Rule 3.32. Complaint Counsel further specifically objects to this Request inasmuch as the full text of the North Carolina Statute, as opposed to the Dental Board's restatement of the statute in the form of a legal conclusion, is a proper subject of judicial notice by the Court.

REQUEST NO. 21: Admit that the North Carolina statutes include the offering as well as the rendering of dental services in the definition of the practice of dentistry.

RESPONSE: Complaint Counsel incorporates its General Objections in its response to this Request for Admission.

Complaint Counsel specifically objects to this Request and states that no response is required inasmuch as it calls for a legal conclusion beyond the proper scope of requests for admission in this matter under Rule 3.32. Complaint Counsel further specifically objects to this Request inasmuch as the full text of the North Carolina Statute, as opposed to the Dental Board's restatement of the statute in the form of a legal conclusion, is a proper subject of judicial notice by the Court.

REQUEST NO. 22: Admit that the North Carolina statutes include operating a business providing dental services in the definition of the practice of dentistry.

RESPONSE: Complaint Counsel incorporates its General Objections in its response to this Request for Admission.

Complaint Counsel specifically objects to this Request and states that no response is required inasmuch as it calls for a legal conclusion beyond the proper scope of requests for admission in this matter under Rule 3.32. Complaint Counsel further specifically objects to this Request inasmuch as the full text of the North Carolina Statute, as opposed to the Dental Board's

restatement of the statute in the form of a legal conclusion, is a proper subject of judicial notice by the Court.

REQUEST NO. 23: *Admit that the FTC's jurisdiction does not include oversight into the procedures by which a state agency enforces clearly articulated state statutes.*

RESPONSE: Complaint Counsel incorporates its General Objections in its response to this request for Admission.

Complaint Counsel specifically objects to this Request and states that no response is required inasmuch as it calls for a legal conclusion beyond the proper scope of requests for admission in this matter under Rule 3.32.

REQUEST NO. 24: *Admit that the investigation in this matter was managed, supervised or overseen by a Commissioner who had previously been recused from participation in an FTC case involving teeth whitening products or services.*

RESPONSE: Complaint Counsel incorporates its General Objections in its response to this request for Admission.

Complaint Counsel specifically objects to this Request and states that no response is required inasmuch as it is irrelevant and beyond the proper scope of requests for admission in this matter under Rule 3.32.

General Objections

The following General Objections apply to all of Respondent's Requests for Admission and are incorporated by reference into each response. The assertion of the same, similar, or additional objections or the provision of partial answers in response to an individual request for admission does not waive any of Complaint Counsel's general objections as to the other Requests for Admission.

1. Complaint Counsel objects to Respondent's Requests for Admission to the extent that

they seek information that relates to issues that may be the subject of expert testimony in this case.

2. Complaint Counsel objects to Respondent's Requests for Admission to the extent that they are overly broad, vague, ambiguous, unduly burdensome, oppressive, and are not reasonably calculated to lead to the discovery of admissible evidence.
3. Complaint Counsel objects to Respondent's Requests for Admission to the extent that they call for information previously provided to Respondent or information that may be less onerously obtained through other means.
4. Complaint Counsel objects to Respondent's Requests for Admission to the extent that they seek information protected by deliberative process privilege, law enforcement investigative privilege, informant's privilege, or attorney work product doctrine.
5. Complaint Counsel objects to Respondent's Requests for Admission to the extent they do not relate to statements or opinions of fact or of the application of law to fact, and thereby exceed the scope of Rule 3.32, governing admissions.
6. Complaint Counsel objects to Respondent's Requests for Admission to the extent that any Request quotes from a document or references a statement and solicits an admission that the quote or statement is evidence of the truth of the matter asserted.
7. Complaint Counsel reserves all of its evidentiary objections or other objections to the introduction or use of any response at the hearing in this action and does not, by any response to any request for information, waive any objection to that request for admission, stated or unstated.
8. Complaint Counsel does not, by any response to any Request, admit to the validity of any

legal or factual contention asserted or assumed in the text of any Request for Admission.

9. Complaint Counsel's discovery and investigation in this matter are continuing.

Complaint Counsel reserves the right to assert additional objections to Respondent's First Set of Requests for Admission, and to amend or supplement these objections and its responses as necessary.

10. Complaint Counsel objects to Respondent's First Set of Requests for Admission to the extent that they are directed to the Federal Trade Commission rather than to Complaint Counsel.

I state under penalty of perjury that the above Complaint Counsel's Objections and Responses to Respondent's First Set of Requests For Admission was prepared and assembled under my supervision, and that the information contained herein is, to the best of my knowledge, true and correct.

Dated: October 22, 2010

Respectfully submitted,

s/ Melissa Westman-Cherry
Richard B. Dagen
William L. Lanning
Melissa Westman-Cherry
Counsel Supporting the Complaint
Bureau of Competition
Federal Trade Commission
601 New Jersey Avenue NW
Washington, DC 20580

CERTIFICATE OF SERVICE

I hereby certify that on October 22, 2010, 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-159
Washington, DC 20580

I also certify that I delivered via electronic mail and hand delivery a copy of the foregoing document to:

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., NW
Washington, DC 20580

I further certify that I delivered via electronic mail a copy of the foregoing document to:

Noel Allen
Allen & Pinnix, P.A.
333 Fayetteville Street
Suite 1200
Raleigh, NC 27602
nla@Allen-Pinnix.com

*Counsel for Respondent
North Carolina State Board of Dental Examiners*

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.

October 22, 2010

By: s/ Melissa Westman-Cherry
Melissa Westman-Cherry