



UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: Jon Leibowitz, Chairman
William E. Kovacic
J. Thomas Rosch
Edith Ramirez
Julie Brill

_____) PUBLIC
In the Matter of)
)
)
THE NORTH CAROLINA BOARD) DOCKET NO. 9343
OF DENTAL EXAMINERS,)
)
Respondent. _____)

**COMPLAINT COUNSEL’S MEMORANDUM
IN OPPOSITION TO RESPONDENT’S SURREPLY
AND MOTION FOR LEAVE TO FILE LIMITED SURREPLY BRIEF**

Respondent the North Carolina Board of Dental Examiners (“Board”) has filed with the Commission its fourth brief on the state action defense, this one styled as “Respondent’s Surreply and Motion for Leave to File Limited Surreply Brief.”¹ Complaint Counsel respectfully urges the Commission to deny the Board’s motion, and to disregard the Board’s surreply brief. As explained below, the Board’s submission is: (1) procedurally improper, (2) untimely, (3) unwarranted, and (4) predicated upon a peculiar misreading of Complaint Counsel’s Memorandum in Reply to Respondent’s Corrected Memorandum in Response to Complaint Counsel’s Motion for Partial Summary Decision (“Reply Memorandum”).

1. The Board’s submission is procedurally improper. The Board has melded into one

¹ This is one of nine motions filed by the Board over the ten-day period from January 11, 2011 through January 20, 2011.

document its motion for leave to file a surreply brief and the surreply brief itself. The Commissioners have perhaps already read and considered the Board's motion/surreply brief. If so, with this maneuver, the Board has helped itself to the privilege that it nominally requests.²

2. The Board's submission is untimely. Commission Rule of Practice 3.22(d) provides that any reply with respect to a dispositive motion shall be filed within 5 days after the memorandum to which it responds. A surreply, where permitted at all (see point 3 below), should certainly meet this timing requirement as well. The Board has failed to comply with this 5-day standard, and not by a small margin. Complaint Counsel's Reply Memorandum was filed on December 20, 2010. The Board's surreply brief (the instant motion) was filed a full month later, on January 20, 2011.

The Board attempts to excuse its lethargy by pointing the finger of blame at Complaint Counsel. The Board asserts (falsely and without substantiation) that Complaint Counsel failed to provide appropriate discovery. This is nonsense. Again, the Board has had Complaint Counsel's Reply Memorandum since December 20. No separate discovery was required to determine the propriety of a surreply. Whatever argument or evidence motivated the Board to file its motion on January 20 was fully available to the Board on December 20.

3. The Board's submission is unwarranted. The Commission's Rules of Practice, like the Federal Rules of Civil Procedure, do not expressly provide for the filing of a surreply. Courts will allow a surreply only in "the most extraordinary circumstances." *Sims v. Paramount*

² The customary and proper procedure for filing a surreply brief is this. The party seeking leave to file the brief may file its motion, and separately and conditionally file the discretionary brief that is the subject of the motion. See Commission Rule 3.22(d) ("The reply may be conditionally filed with" – and not as part of – "the motion seeking leave to reply."). In this way, the party avoids handing the tribunal a *fait accompli*.

Gold & Silver Corp., No. CV 10-356-PHX-MHM, 2010 U.S. Dist. LEXIS 135661, at *20 (D. Az. Dec. 21, 2010). *Accord Atlin v. Mendes*, No. 3:06-CV-1909-L, 2008 U.S. Dist. LEXIS 105066, at *9 (N.D. Tex. Dec. 31, 2008) (moving party must set forth “exceptional or extraordinary circumstances warranting a surreply”); *General Electric Co. v. Latin Am. Imports, S.A.*, 187 F. Supp. 2d 749, 752 n.1 (W.D. Ky. 2001) (“[M]otions for surreplies . . . will be denied absent extraordinary circumstances.”). The rationale for this rule is straightforward: “The paper exchanges between parties must have an end point and cannot be permitted to become self perpetuating.” *EEOC v. International Paper Co.*, No. 91-2017-L, 1992 U.S. Dist. LEXIS 18895, at *29 (D. Kan. Oct. 28, 1992).

The Board has failed to identify extraordinary circumstances justifying its request to file yet another state action brief. The Board claims that Complaint Counsel’s Reply Memorandum contained a “new theory.” This is absolutely inaccurate. Through three sets of state action briefs, Complaint Counsel has consistently maintained that: (i) the actions of the Board constitute concerted action, (ii) the Board and its electors (licensed dentists) have a financial interest in the exclusion of non-dentist teeth whitening, (iii) for state action purposes, the challenged restraints constitute private action, and (iv) neither prong of the two-prong *Midcal* test has not been satisfied.

The Board next contends that Complaint Counsel’s re-assertion of these points in its Reply Memorandum was in legal error, and merits a response. This too is inaccurate. Disagreeing with opposing counsel’s legal position is hardly an extraordinary development warranting surreply. The Board’s views on state action are set forth in each of its previous three legal memoranda, and no further restatement is necessary or appropriate. *See Starr v. Cox*, No. 05-cv-368-JD, 2008 U.S. Dist. LEXIS 34708, at *5 (D.N.H. April 28, 2008).

4. Finally, the Board's submission is predicated upon a peculiar misreading of Complaint Counsel's Reply Memorandum. The Board attributes to Complaint Counsel the contention that, in order to satisfy prong 2 of the *Midcal* state action test (active supervision), the restraints of a financially-interested state board must be directly supervised by either the state legislature or a state court. This is not Complaint Counsel's position.

Complaint Counsel has explained, in each of three legal memoranda filed with the Commission, that in order for a private actor to be exempt from liability under the state action doctrine, the challenged restraint must be actively supervised by a non-financially-interested (independent) state actor. The supervising entity does not need to be the legislature or a court. For example, in some jurisdictions, regulatory boards are overseen by the state department of health.³ In other jurisdictions, regulatory boards are overseen by the Office of the Attorney General.⁴ No doubt, there are other oversight arrangements in use as well.

North Carolina employs a different model. The legislature has directed the Board to bring allegations concerning the unauthorized practice of dentistry to the state courts. The Board has, however, elected to circumvent the courts – and to act in excess of its statutory authority – by issuing its own Cease and Desist Orders. As the Board is acting without supervision by the courts, without supervision by an executive agency, and indeed without any independent

³ *E.g.*, R.I. Gen. Laws § 5-34-7 (2003) (Rhode Island nursing board is authorized to adopt regulations, conduct disciplinary hearings, and prosecute violations, subject to the approval of the director of the department of health); R.I. Gen. Laws § 5-44-6(1) (2008) (Rhode Island psychology board is authorized to recommend rules and regulations, subject to the approval of the director of the department of health).

⁴ *E.g.*, N.J. Stat. Ann. 45:1-3.1; 45:1-17 (New Jersey Attorney General may set aside, modify, or amend any action or decision of state boards governing accountants, architects, massage therapists, nurses, land surveyors, doctors and dentists).

supervision whatsoever, the state action defense is unavailable to the Board.

For all of the foregoing reasons, the Board's motion should be denied, and the Commission should disregard the Board's surreply brief.

Respectfully submitted,

s/ Richard B. Dagen
Richard B. Dagen
Counsel Supporting the Complaint
Bureau of Competition
Federal Trade Commission
601 New Jersey Avenue NW
Washington, DC 20580
(202) 326-2628

Dated: January 25, 2011

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

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

_____)	
In the Matter of)	
)	
NORTH CAROLINA BOARD OF)	
DENTAL EXAMINERS,)	DOCKET NO. 9343
)	
Respondent.)	
_____)	

**[PROPOSED] ORDER DENYING RESPONDENT’S MOTION FOR
LEAVE TO FILE LIMITED SURREPLY BRIEF**

On January 20, 2011, Respondent submitted its Surreply and Motion for Leave to File Limited Surreply Brief.

On January 25, 2011, Complaint Counsel submitted its Memorandum in Opposition to Respondent's Motion.

Upon consideration of the points raised in the motion and the opposition thereto, Respondent's motion is DENIED.

ORDERED:

Donald S. Clark
Secretary

Date:

CERTIFICATE OF SERVICE

I hereby certify that on January 25, 2011, 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-113
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, Rm. H-110
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.

January 25, 2011

By: s/ Richard B. Dagen
Richard B. Dagen