



**matter what statutory protections** the North Carolina Legislature may adopt requiring licensee members to act only in the public interest.

2, The Commission's radical new theory of the case was not disclosed in discovery, despite Respondent's repeated requests (some of which are the subject of a pending Motion for an Order Compelling Discovery). As a result of Complaint Counsel's refusal to answer discovery adequately, Respondent has been prejudiced in its ability to file this Surreply and Motion for Leave until now.<sup>1</sup>

3. With this latest filing, the Commission has moved substantively beyond its original argument, stated in its Complaint, that any action by the State Board to regulate teeth whitening by non-dentists must be approved by "an independent state authority." Complaint at 6. Now it broadens its focus, effectively arguing that it is a violation of federal antitrust law for a state agency comprised of a majority of the members of the profession it regulates to take any action having the coincidental effect of restricting trade without specific and express state court or state legislature ratification. Complaint Counsel Memorandum in Reply to Respondent's Corrected Memorandum in Opposition to Complaint Counsel's Motion for Partial Summary Decision (Complaint Counsel Reply) at 3. ("Each anticompetitive restraint" must be ratified by the State).

4. Originally, Complaint Counsel alleged that it had reason to believe that the dentists in North Carolina, acting through the instrument of the North Carolina Board of Dental Examiners, "are colluding" (*i.e.*, conspiring to commit fraud) to exclude non-

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<sup>1</sup> For instance, Complaint Counsel consistently has refused to answer in good faith Interrogatories Nos. 10 and 14 of Respondent's First Set of Interrogatories to the Federal Trade Commission, in which the Respondent asked Complaint Counsel to identify their basis for alleging that the Respondent does not qualify for a state action defense. In response, Complaint Counsel simply referred the Respondent to the arguments set forth in its Memorandum in Support of Partial Summary Decision ("Memorandum"). Complaint Counsel's new legal theory is not addressed in that section—or anywhere else—in the Memorandum, and Respondent has been denied the benefit of adequate discovery responses from Complaint Counsel.

dentists from competing with dentists in the provision of teeth whitening services. After a two-year investigation, tens of thousands of pages of discovery, and dozens of depositions, Complaint Counsel could not identify a shred of evidence supporting that false allegation. In desperation, Complaint Counsel fundamentally has changed the basis of claims while failing to properly answer discovery directly on point.

5. Lacking any legal authority, Complaint Counsel bases this sweeping expansion of its power on a selective and skewed reading of otherwise inapplicable case law. Complaint Counsel, without authority, declares (purportedly upon diligent inquiry) that any licensing board comprised of a majority of licensees presumptively is conspiring to restrain trade.

6. That the Commission is putting forth misinterpreted and incorrect interpretations of state action immunity case law is troubling.<sup>2</sup> What is of greater concern, though, is the larger agenda that the Commission is now advancing. Suddenly, it is not enough that a state licensing agency comprised of a majority of the members of the profession it regulates show that it is acting pursuant to a clearly articulated state policy (in this case, limiting stain removal—teeth whitening—activities to licensed dentists or those under the supervision of a licensed dentist). If the Commission prevails, the widespread state agency practice of sending warning letters and investigating

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<sup>2</sup> As in prior filings, the Commission rests its argument heavily on its selective and skewed interpretation Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975). The Commission claims that the Supreme Court considers Goldfarb to (1) define state agencies as private parties and (2) to require these agencies, as private parties, to meet both parts of the Midcal test to obtain state action immunity. Complaint Counsel Reply at 9. Complaint counsel is incorrect on both of these points. Nowhere in the Goldfarb decision does the Court call the state agency a “private party.” See Goldfarb, 421 U.S. at 792. The issue in Goldfarb was the state bar’s ratification of the price-fixing scheme concocted by the county bar association (a private actor), without a clearly articulated state law justifying this conduct. Id. at 790-91. The Goldfarb holding only would apply if, instead of following a clearly articulated state law, the State Board was ratifying a private organization’s stain removal policy.

unauthorized practice will be permissible only with the case-specific authorization of a state court or state legislature. In effect, this newly alleged argument renders the test set forth in California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980), entirely moot.

7. The Commission's basis for this unjustified expansion of its regulatory power is not found in case law. Likewise, it is not found in legislative intent, or any study it has conducted to prove that state agencies are selfish and unreliable actors. Instead, the Commission declares its position to be based on "common sense": "the exclusion of non-dentists may result in Board members and the Board's constituents obtaining higher prices for teeth whitening and a greater volume of teeth whitening procedures." Complaint Counsel Reply at 13.

8. To the State Board, and the vast majority of state licensing agencies in the country, this is not "common sense." It is a naive justification for a power-grab, predicated on the argument that a majority-dentist dental board cannot be trusted to implement clearly articulated state law, while a minority-dentist dental board could. It is naive to assume that a non-dentist will carry out state law better than a dentist and to believe that, because one is not a dentist, one is unaffected by the teeth whitening industry. FTC Commissioner Lisa Brill is a perfect example of this fact. If eliminating members of the regulated population from a governing body would prevent bias and conspiracy, then the Commission itself would best be served by switching out all of its Commissioners for Canadian citizens. The analogy is extreme, but so is the idea of changing the membership of the vast majority of licensing agencies in the country.

9. Such a change would be necessary for state agencies to continue to function if they were otherwise required to seek state legislature or state court approval for the minute details of their day-to-day work. The decision to mandate a change of this scale is not a decision that is within the ambit of the Federal Trade Commission. It is Congress, not the Commission, which may legislate a change such as this.

Respondent's Counsel has conferred with Complaint Counsel in a good-faith effort to resolve by agreement the issues raised by this motion and has been unable to reach such agreement. Further, Complaint Counsel has indicated their intention to oppose this motion.

This the 20th day of January, 2011.

ALLEN AND PINNIX, P.A.

/s/ Noel L. Allen

By: \_\_\_\_\_

Noel L. Allen  
Alfred P. Carlton, Jr.  
M. Jackson Nichols  
Attorneys for Respondent  
Post Office Drawer 1270  
Raleigh, North Carolina 27602  
Telephone: 919-755-0505  
Facsimile: 919-829-8098  
Email: [nallen@allen-pinnix.com](mailto:nallen@allen-pinnix.com)

## CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of January, 2011, I electronically filed the foregoing with the Federal Trade Commission using the Federal Trade Commission E-file system, which will send notification of such filing to the following:

Donald S. Clark, Secretary  
Federal Trade Commission  
600 Pennsylvania Avenue, N.W., Room H-159  
Washington, D.C. 20580  
[dclark@ftc.gov](mailto:dclark@ftc.gov)

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

William L. Lanning  
Bureau of Competition  
Federal Trade Commission  
600 Pennsylvania Avenue, N.W.  
Room NJ-6264  
Washington, D.C. 20580  
[wlanning@ftc.gov](mailto:wlanning@ftc.gov)

Steven L. Osnowitz  
Bureau of Competition  
Federal Trade Commission  
600 Pennsylvania Avenue, N.W.  
Room NJ-6264  
Washington, D.C. 20580  
[sosnowitz@ftc.gov](mailto:sosnowitz@ftc.gov)

Melissa Westman-Cherry  
Bureau of Competition  
Federal Trade Commission  
600 Pennsylvania Avenue, N.W.  
Room NJ-6264  
Washington, D.C. 20580  
[westman@ftc.gov](mailto:westman@ftc.gov)

Tejasvi Srimushnam  
Bureau of Competition  
Federal Trade Commission  
600 Pennsylvania Avenue, N.W.  
Room NJ-6264  
Washington, D.C. 20580  
[tsrimushnam@ftc.gov](mailto:tsrimushnam@ftc.gov)

Michael J. Bloom  
Bureau of Competition  
Federal Trade Commission  
600 Pennsylvania Avenue, N.W.  
Room H-374  
Washington, D.C. 20580  
[mjbloom@ftc.gov](mailto:mjbloom@ftc.gov)

Richard B. Dagen  
Bureau of Competition  
Federal Trade Commission  
600 Pennsylvania Avenue, N.W.  
Room H-374  
Washington, D.C. 20580  
[rdagen@ftc.gov](mailto:rdagen@ftc.gov)

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

The Honorable D. Michael Chappell  
Administrative Law Judge  
Federal Trade Commission  
600 Pennsylvania Avenue N.W.  
Room H-113  
Washington, D.C. 20580  
[oalj@ftc.gov](mailto:oalj@ftc.gov)

This the 20th day of January, 2011.

/s/ Noel L. Allen  
Noel L. Allen

#### **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  
Noel L. Allen

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

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

In the Matter of	)	<b>PUBLIC</b>
THE NORTH CAROLINA [STATE] BOARD	)	DOCKET NO. 9343
OF DENTAL EXAMINERS,	)	
Respondent.	)	

**PROPOSED ORDER ON RESPONDENT’S SURREPLY AND  
MOTION FOR LEAVE TO FILE LIMITED SURREPLY BRIEF**

On November 2, 2010, Complaint Counsel filed its Motion for Partial Summary Decision. Respondent filed its Memorandum in Opposition to Complaint Counsel’s Motion for Partial Summary Decision on December 10, 2010, with a corrected version of the same filed on December 13, 2010. A Reply to Respondent’s Corrected Memorandum in Opposition was filed by Complaint Counsel on December 20, 2010.

Respondent states that it seeks to file a Surreply for the limited purpose of addressing certain issues raised in Complaint Counsel’s Reply for the first time in this proceeding, and which therefore could not have been raised earlier in the State Board’s principal brief. Respondent also states that it has been prejudiced in its ability to file this Surreply and Motion for Leave by unresolved discovery issues.

Based on the foregoing, it is hereby ORDERED that Respondent has leave to file its Surreply for the limited purpose of addressing issues first raised in Complaint Counsel’s Reply to the Respondent’s Corrected Memorandum in Opposition to Complaint Counsel’s Motion for Partial Summary Decision. The deadline for filing said Surreply shall be \_\_\_\_\_, 2011.

ORDERED:

\_\_\_\_\_  
Donald S. Clark  
Secretary

Dated \_\_\_\_\_