

Dissenting Statement of Commissioner Edith Ramirez

**In the Matter of
THE NORTH CAROLINA BOARD OF DENTAL EXAMINERS
Docket No. 9343**

I respectfully dissent from the Commission's decision to grant Respondent North Carolina State Board of Dental Examiners' Application for a Stay of Order Pending Review by the U.S. Court of Appeals. In my view, the Board has not shown that it is likely to succeed on appeal or that, absent a stay, it will suffer irreparable harm. This, together with the harm to competition the Commission has identified and sought to remedy, leads me to conclude that the public interest would be best served by immediate enforcement of our order.

The Board's request for a stay centers on the claim that the Commission's order improperly interferes with the Board's legitimate enforcement activities, resulting in irreparable harm to the Board and the citizens of North Carolina. The claim does not withstand scrutiny. In addressing the first factor of the applicable test, likelihood of success on appeal, the Board relies on arguments the Commission has already twice considered and rejected, as reflected in our February 8, 2011 decision denying the Board's motion to dismiss the complaint on state action grounds and December 2, 2011 ruling that the Board violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. As the majority makes clear, none of the Board's renewed arguments gives us pause about our decision.

Whether a case is especially complex or poses a difficult legal question is, however, relevant to the likelihood of success factor. *See North Texas Specialty Physicians ("NTSP")*, 141 F.T.C. 456, 457 (2006). According to the Board, with its decision, the Commission "has constructed a novel legal argument unfounded in case law . . . to prevent a state agency from enforcing a state law." Respondent's Reply at 4. While it is certainly true that the Supreme Court has yet to address the applicability of the active supervision prong to financially-interested regulatory boards and that the courts of appeals have not adopted a uniform approach to this issue, the Board's characterization is far from accurate. The Commission's determination that the Board's exclusionary acts are not immune from the antitrust laws as conduct of the state is well supported by judicial precedent, including that in the Fourth Circuit where the Board's appeal will be heard, and fully consistent with the policies underlying the state action doctrine. In light of the balance of equities discussed below, the absence of direct Supreme Court precedent and lack of unity in the courts of appeals on the core issue the Commission decided are not enough to justify a stay. *See In re California Dental Ass'n*, No. 9259, 1996 FTC LEXIS 277, at *10 (May 22, 1996) (noting that "the probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury suffered absent the stay").

Turning to the equities, the Board must show that its alleged irreparable injury "is both substantial and likely to occur absent a stay" in order to satisfy its burden. *NTSP*, 141 F.T.C. at 460. But rather than address the impact of the Commission's order as it actually reads, the Board instead maintains that the order contains "conflicting statements" and "would have the effect of prohibiting the State Board from fulfilling its state-mandated responsibility to prevent the

unlicensed practice of dentistry.” Respondent’s Reply at 7. In fact, the relief fashioned by the Commission, carefully and narrowly tailored as it is to forbid only the Board’s exclusionary conduct, would do no such thing. By its express terms, the order permits the Board to enforce the North Carolina Dental Practice Act in the manner specified by the North Carolina legislature. The Board may investigate suspected violations of the Act, institute court actions for alleged violations, and pursue available administrative remedies. Final Order at 4. The order even makes clear that the Board may notify third parties of its “belief or opinion” regarding suspected violations. *Id.* The Board is only prohibited from conduct it claims it has not engaged in for at least the last two years: “directing” non-dentists to stop providing teeth whitening services and conveying to potential entrants or lessors of commercial property that non-dentist teeth whitening is illegal. *Id.* § 2; Respondent’s Application at 8.

The majority acknowledges that the Board’s assertion of irreparable injury is “without merit” and based on “a serious misreading of the Commission’s Final Order.” Order on Respondent’s Application at 3. The majority nonetheless makes a finding of irreparable injury citing a concern the Board never even raised: the potential for confusion arising from the remedial portion of the Commission’s order if the ruling were overturned. While the potential for confusion may suffice to show irreparable injury in some circumstances, I do not agree that this case rises to that level.

For instance, in *California Dental*, on which the majority relies, the association sought a narrow stay of the portion of the Commission’s order requiring, among other things, the dissemination of information about the Commission’s decision to all 19,000 of the association’s members, the review of past disciplinary actions, and reinstatement of members who had been improperly expelled. 1996 FTC LEXIS 277, at *7-8. Recognizing that a reversal would require re-notification to all association members and could subject reinstated members to renewed expulsion, thereby inflicting significant costs on the association and creating a significant potential for confusion about the law, the Commission granted a limited stay. *Id.* In *Novartis*, also cited by the majority, the Commission granted a partial stay after respondent showed it would needlessly incur substantial financial costs and reputational harm if there were a reversal of the re-labeling of product and corrective advertising ordered by the Commission. *In re Novartis Corp.*, 233 F.T.C. 235, 235-36 (1999). There is no comparable cost or potential for harm here. Not only is the number of affected persons who received the Board’s unlawful cease and desist letters and would be due a corrective disclosure dramatically smaller (approximately 60), but the corrective disclosure ordered by the Commission merely clarifies that the Board’s prior communications did not constitute a “legal determination,” a fact that is undisputed. *See* Final Order, Section III and Appendices A-C; *NTSP*, 141 F.T.C. at 465-66 (rejecting argument that notifying 400 member physicians and a limited number of payors of the Commission’s decision would cause irreparable injury).

On the other hand, a stay will cause substantial harm to competition and consumers. The harm resulting from the Board’s exclusionary conduct will continue if the order is not enforced. The non-dentist providers who exited the market after receiving cease and desist letters from the Board will likely remain out of the market unless corrective action is taken, thereby depriving consumers of access to less expensive services. I also believe that delaying enforcement of the order until the Board’s appeal is resolved, a process that could take years, will undermine the

effectiveness of the corrective notices the Commission has ordered. Finally, in the absence of an enforceable order, there is nothing to prevent the Board from resuming its anticompetitive campaign of sending cease and desist letters to potential new entrants or returning firms.

The Board therefore has not shown that the equities weigh in its favor or that a stay is otherwise warranted. In my view, the public interest calls for enforcement of the order without delay.