

IN THE MATTER OF
LOUISIANA STATE BOARD OF DENTISTRY

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF
THE FEDERAL TRADE COMMISSION ACT

Docket 9188. Complaint, Oct. 29, 1984—Decision, Aug. 26, 1985

This consent order requires the Louisiana State Board of Dentistry (the Board), the sole licensing authority for dentists in Louisiana, among other things, to cease adopting or maintaining any rule, regulation, policy or course of conduct that would tend to prevent or hinder the advertising or publishing of pricing discounts for dental products and services. The Board is also barred from prohibiting any dentist or dental organization from advertising the availability of a discounted price; taking or threatening to take disciplinary action against advertisers of such prices; declaring the publication of discounted prices to be illegal, unethical, unprofessional or otherwise improper; and inducing or encouraging any individual or organization to take any of the actions prohibited by the order. The Board is additionally required to distribute a copy of the order and an explanatory announcement to all dentists licensed to practice in Louisiana; and provide such material to all those applying for a license for a period of two years.

Appearances

For the Commission: *Elizabeth R. Hilder* and *Oscar M. Voss*.

For the respondent: *John Gallagher, Jr.* and *Guy Wootan, Wootan, Hennen, Pelayo & Gallagher*, New Orleans, Louisiana and *Phillip A. Wittmann* and *Stephen G. Bullock, Stone, Pigman, Walther, Wittmann & Hutchinson*, New Orleans, Louisiana.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. 41 *et seq.*, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the named respondent has violated Section 5 of the Federal Trade Commission Act, and that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint stating its charges as follows:

Respondent

1. Respondent Louisiana State Board of Dentistry (hereinafter "the Board") is organized, exists, and transacts business under the laws of the State of Louisiana (Louisiana Revised Statutes Section 37:751 *et seq.*), with its principal office at Ten-O-One Howard Avenue, Suite

4308, New Orleans, Louisiana. The Board is subject to the Commission's jurisdiction pursuant to Section 5 of the Federal Trade Commission Act.

2. The Board is composed of nine dentists and one dental hygienist, as provided in La. Rev. Stat. Section 37:753.

3. While serving their membership terms, dentist members of the Board may, and do, continue to engage in the business of providing dental care services for a fee. Compensation for serving on the Board is limited to fifty dollars per day and necessary traveling expenses for each day actually engaged in the duties of Board membership, and is paid out of fees collected by the Board.

4. The licensed dentists in each of the eight Louisiana congressional districts select from among themselves nominees for appointment to the Board. The Governor of Louisiana appoints from the nominees of each congressional district one dentist to represent each district. The Governor appoints a ninth dentist as an at large member.

5. The Board is the sole licensing authority for dentists in Louisiana. It is unlawful for individuals to practice or to offer to practice dentistry in Louisiana unless they hold a current license to practice issued by the Board.

6. The Board is authorized by Louisiana law, La. Rev. Stat. Section 37:776(15), to take disciplinary action against any licensee who engages in unprofessional conduct as defined in La. Rev. Stat. Section 37:775. Disciplinary action by the Board may include the suspension or revocation of a license, or the imposition of a fine, probation, or other limitations or restrictions on a licensee.

7. The dental hygienist serving on the Board may vote only on matters pertaining to the profession of dental hygiene. Board actions pertaining to dentists in the State of Louisiana are decided by nine dentists, each of whose principal occupation is the private practice of dentistry.

Trade and Commerce

8. Except to the extent that competition has been restrained as alleged below, and depending on their specialties and geographic location, dentists in Louisiana compete with each other and with dentists serving on the Board.

9. There are more than 1800 dentists practicing in Louisiana. More than \$200 million is spent on dental care annually in Louisiana by Louisiana residents, governmental entities, and private third-party payors.

10. In the conduct of their businesses, dentists in Louisiana receive and treat patients from other states, receive substantial sums of

from private insurers for rendering dental services, prescribe or administer medicines that are shipped in interstate commerce, and use supplies and equipment that are shipped across state lines. The acts and practices described below are in interstate commerce, or affect the interstate activities of dentists in Louisiana and third parties who pay for dental services, and are in or affect commerce within the meaning of Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1).

State Regulation of Dental Advertising

11. The State of Louisiana does not ban truthful price advertising by dentists.

a. In 1940, the Louisiana legislature enacted La. Rev. Stat. Section 37:775 defining unprofessional conduct by dentists, and included provisions prohibiting the advertising of prices for dental services and any other advertising by dentists other than publication of a professional card. La. Rev. Stat. Section 37:775(8) and (14).

b. In February 1978, following the United States Supreme Court's decision in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), the Louisiana Attorney General issued an opinion letter declaring that the prohibition on price advertising by dentists "denies the public of its right to receive vital information guaranteed by the free speech provisions of the First Amendment to the United States Constitution," and that "any attempt to enforce [La. Rev. Stat. Sections] 37:775 and 776 . . . against truthful and informative advertising would be subject to constitutional attack and, in our opinion, [would be] in bad faith."

c. In December 1978, the United States District Court for the Eastern District of Louisiana held that truthful newspaper advertising concerning the availability or cost of routine dental services is commercial speech protected by the First Amendment, and that La. Rev. Stat. Section 37:775(8) and (14), and La. Rev. Stat. Section 37:776(12) [now Section 37:776(15)], are unconstitutional to the extent that they restrict such advertising. *Dewey v. Louisiana State Board of Dentistry*, 491 F.Supp. 132 (1978), *aff'd per curiam*, 625 F.2d 499 (5th Cir. 1980).

12. The statutes of Louisiana now in effect do not prohibit dentists from offering or truthfully advertising discounts from their usual fees. The State of Louisiana has no established or articulated policy of restricting dentists from offering or advertising discounts from their usual fees.

Board Conduct

13. The Board has restrained competition among dentists in Louisiana by combining or conspiring with its members or others, or by acting as a combination of its members or others, to restrict unreasonably the dissemination by dentists of truthful information about the prices of their services. In particular, since at least February 1982, respondent has combined or conspired to:

a. Prohibit licensed dentists from truthfully advertising discounts from their usual fees; and

b. Coerce individual dentists into abandoning their efforts to advertise truthful information about discounts from their usual fees.

14. The Board has engaged in various acts or practices in furtherance of this combination or conspiracy, including, among other things, the following:

a. The Board, since at least February 1982, has prohibited advertising by dentists of discounts from their usual fees, without regard to the truth or falsity of the advertising, on the purported ground that such advertising violates a Louisiana statutory provision that declares the advertisement of free dental services as an inducement to secure dental patronage to be unprofessional conduct (La. Rev. Stat. Section 37:775(7));

b. The Board has intimidated dentists who advertised discounts from their usual fees by sending them letters signed by the Board's attorney stating that such advertising is unprofessional conduct and therefore grounds for suspension of a dental license under La. Rev. Stat. Section 37:776(15), and demanding that they file a written statement with the Board promising to cease advertising discounts;

c. The Board has coerced dentists who advertised discounts from their usual fees into ceasing such advertising, including a group of dentists who advertised in August 1983, a "Back to School Special" offering cleaning, examination, fluoride treatment, and bitewing x-rays for a specified price;

d. In August 1983, the Board brought disciplinary proceedings under La. Rev. Stat. Section 37:776(15) against, and imposed a fine and a public reprimand on, a dentist for advertising a discount from his usual fees on the ground that his advertising of a discount constituted unprofessional conduct; and

e. The Board has taken the above actions with knowledge that restriction by the Board of truthful advertising of the cost and availability of routine dental services violates the United States Constitution, and, in particular, that use of La. Rev. Stat. Section 37:776(15)

Louisiana State Board of Dentistry, 491 F.Supp. 132 (1978), *aff'd per curiam*, 625 F.2d 499 (5th Cir. 1980).

Effects

15. The effects of the combination or conspiracy described above are and have been to restrain competition unreasonably and injure consumers in the following ways, among others:

- a. Price competition among dentists for patients is being unreasonably restrained;
- b. Consumers of dental care services are being deprived of the benefits of vigorous price competition among dentists; some consumers have paid higher prices for dental care and some consumers have delayed or foregone needed dental care;
- c. Dentists are being prevented from disseminating truthful information about their fees, and restrained in their ability to make dental care services fully and readily available to consumers needing such services, including, for example, services provided through innovative dental care financing arrangements that involve discounting of fees; and
- d. Consumers are being deprived of truthful information about dentists' fees, such as information about dentists' offering of discounts to the elderly or others.

Violation

16. The combination or conspiracy and the acts and practices described above constitute unfair methods of competition or unfair or deceptive acts or practices that violate Section 5 of the Federal Trade Commission Act. This combination or conspiracy is continuing and will continue unless the Commission enters appropriate relief against the Board.

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondent named in the caption hereof with violation of Section 5 of the Federal Trade Commission Act, as amended, and the respondent having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional allegations set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission

by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Louisiana State Board of Dentistry is organized, exists, and transacts business under the laws of the State of Louisiana, with its principal office at Ten-O-One Howard Avenue, Suite 4308, in the City of New Orleans, State of Louisiana.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I.

For the purposes of this order, the following definitions shall apply:

A. *Board* shall mean the Louisiana State Board of Dentistry, its officers, committees, representatives, agents, employees, and successors.

B. *Discounted price* shall mean a price offered or charged by a person or organization for any dental product or service that is less than the price the person or organization usually offers or charges for the product or service. Products or services expressly offered free of charge shall not be deemed to be offered at a *discounted price*.

C. *Price advertising* shall mean advertising or publishing information about the price of any dental product or service. It shall not include express offers to provide a product or service free of charge.

D. *Disciplinary action* shall mean:

1. the revocation or suspension of, or refusal to grant, a license to practice dentistry in Louisiana, or the imposition of a reprimand, fine, probation, or other penalty or condition; or

II.

It is ordered, That the Board, in or in connection with its activities in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, shall cease and desist from, directly or indirectly, or through any device:

A. Prohibiting, restricting, impeding, or discouraging any person or organization from advertising the availability of, offering, or publishing a discounted price, or otherwise engaging in price advertising. Such conduct includes, but is not limited to:

1. adopting or maintaining any rule, regulation, policy, or course of conduct that prohibits or seeks to prohibit any person or organization from advertising the availability of, offering, or publishing discounted prices;
2. taking or threatening to take any disciplinary action against any person or organization for advertising the availability of, offering, or publishing discounted prices; and
3. declaring it to be an illegal, unethical, unprofessional, or otherwise improper practice for any person or organization to advertise the availability of, offer, or publish discounted prices; and

B. Inducing, urging, or encouraging any dentist, group of dentists, or dental association to take any of the actions prohibited by this Part.

Provided, That nothing in this order shall prevent the Board from adopting and enforcing reasonable rules, including reasonable affirmative disclosure requirements, or taking disciplinary or other action, to prevent advertising that the Board reasonably believes to be fraudulent, false, deceptive, or misleading within the meaning of Louisiana Revised Statutes Sections 37:775(3), 37:776(12), 37:776(16) or any Louisiana statutory provision governing dental advertising enacted subsequent to the date this Order becomes final, as limited by the First and Fourteenth Amendments to the United States Constitution.

In particular, nothing in this order shall prevent the Board from finding to be fraudulent, false, deceptive, or misleading:

- a. advertising by a dentist in which a price is represented to be a discounted price when in fact it is the customary or usual price charged by that dentist;
- b. advertising by a dentist of a discounted price for a dental service and failing to provide the same quality and components of service at the discounted price that are normally provided at the regular, non-discounted price for that service; and
- c. a dentist's failure to disclose the expiration date of an advertised

discount offer if the dentist fails to make the discounted price available for a reasonable period of time from publication of the offer.

III.

It is further ordered, That this order shall not be construed to prevent the Board from petitioning for or seeking legislation concerning the practice of dentistry as defined in Louisiana Revised Statutes Sections 37:751 *et seq.*

IV.

It is further ordered, That the Board shall:

A. Distribute by mail an announcement in the form shown in Appendix A, and a copy of this order:

1. to each person licensed to practice dentistry in Louisiana, and to each person who has at the time this order becomes final a pending application for such a license, within sixty (60) days after this order becomes final; and

2. for a period of two (2) years after this order becomes final, to each person who hereafter applies for a license to practice dentistry in Louisiana, within sixty (60) days after he or she applies for the license;

B. Within one hundred twenty (120) days after this order becomes final, submit a written report to the Federal Trade Commission setting forth in detail the manner and form in which the Board has complied and is complying with this order;

C. For a period of five (5) years after this order becomes final, maintain and make available to the Federal Trade Commission staff for inspection and copying, upon reasonable notice, records adequate to describe in detail any action taken in connection with any activity covered by Part II of this order, including records of rulemaking and enforcement proceedings, and written communications, and any summaries of oral communications, to or from the Board regarding the advertising of the availability of, or the offering or publishing of, discounted prices, or other price advertising.

D. In addition to the report required by Part IV.B., at such times as the Commission may by written notice to the Board reasonably require, file a written report with the Federal Trade Commission setting forth in detail the manner and form in which the Board has complied and is complying with this order; and

E. Notify the Federal Trade Commission at least thirty (30) days in advance if possible, or otherwise as soon as possible, of any change in

ana that may affect compliance obligations arising out of this order, such as the complete or partial elimination of that authority, the complete or partial assumption of that authority by another governmental entity, or the dissolution of the Board.

APPENDIX A

[Date]

ANNOUNCEMENT

As you may be aware, the Louisiana State Board of Dentistry has entered into a consent agreement with the Federal Trade Commission that became final on [date]. The order issued pursuant to the consent agreement provides that the Board may not prohibit dentists from advertising the availability of discounts from their usual fees, or otherwise restrict price advertising for dental services or products, except as provided below. In particular, with respect to advertising of discounts, the Board may not (1) adopt rules, regulations, or policies prohibiting the advertising of discounted prices for dental care, (2) take disciplinary action (such as the imposition of a fine, or the suspension or revocation of a dental license) or threaten disciplinary action against dentists who so advertise, or (3) declare it to be illegal or unethical for dentists to so advertise, except as provided below. The Board is also prohibited from encouraging any dentist or dental association to take actions that the order prohibits the Board from taking.

The order does not affect the Board's authority to prohibit, and discipline dentists for, (1) advertising free dental services or examinations as an inducement to secure dental patronage (which is expressly prohibited by Louisiana law), or (2) advertising that is fraudulent, false, deceptive, or misleading. Furthermore, the order does not affect the Board's authority to adopt and enforce reasonable affirmative disclosure requirements to prevent advertising that the Board reasonably believes is fraudulent, false, deceptive, or misleading.

In particular, the order provides that the Board may find to be fraudulent, false, deceptive, or misleading:

- a. advertising by a dentist in which a price is represented to be a discounted price when in fact it is the customary or usual price charged by that dentist;
- b. advertising by a dentist of a discounted price for a dental service and failing to provide the same quality and components of service at the discounted price that are normally provided at the regular, nondiscounted price for that service; and
- c. a dentist's failure to disclose the expiration date of an advertised discount offer if the dentist fails to make the discounted price available for a reasonable period of time from publication of the offer.

For more specific information, you should refer to the attached FTC order.

President
Louisiana State Board of Dentistry

Complaint

106 F.T.C.

IN THE MATTER OF

KAISER ALUMINUM & CHEMICAL CORPORATION

DISMISSAL ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT*Docket 9080. Complaint, April 27, 1976—Dismissal Order, Aug. 27, 1985*

The Federal Trade Commission has dismissed a complaint that charged Kaiser Aluminum & Chemical Corp. substantially lessened competition in the basic refractories industry by acquiring two basic refractories plants from International Mineral and Chemical Corp.'s Lavino Division. After the Commission placed a consent agreement with respondent that would settle the charges on the public record for comment (50 FR 19697), Kaiser sold all of its basic refractories plants to other companies and indicated that it has no indication of remaining in the business. As a result, the Commission has determined that it is in the public interest to reject the consent agreement and dismiss the complaint.

COMPLAINT

The Federal Trade Commission having reason to believe that Kaiser Aluminum and Chemical Corporation, a corporation subject to the jurisdiction of the Commission, has acquired the two operating basic refractory plants, inventory and related assets of the Lavino division of International Minerals and Chemical Corporation, a corporation, in violation of Section 7 of the Clayton Act, as amended (15 U.S.C. 18), and/or Section 5 of the Federal Trade Commission Act, as amended, (15 U.S.C. 45), and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint charging as follows:

I. DEFINITIONS

1. For the purpose of this complaint the following definitions shall apply:

(a) *Basic refractories* are non-metallic insulating materials composed predominately of magnesia, magnesite, dolomite, or chromite or chrome ore, or a combination thereof.

(b) *Basic refractory bricks and shapes* are non-metallic insulating materials composed predominately of magnesia, magnesite, dolomite, or chromite or chrome ore, or a combination thereof and which are formed during manufacture into bricks and other special shapes.

(c) *Basic refractory specialties* are non-metallic insulating materials composed predominately of magnesia, magnesite, dolomite, or chromite or chrome ore, or a combination thereof and which are sold in a "bulk" or non-shaped form