

Complaint

IN THE MATTER OF

**SOUTH CAROLINA STATE BOARD OF
DENTISTRY**CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS
OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket 9311; File No. 021 0128**Complaint, September 12, 2003 – Decision, September 6, 2007*

This consent order relates to charges that the South Carolina State Board of Dentistry unlawfully restrained competition in the provision of preventive dental care services in the state by unreasonably restricting the delivery of dental cleanings, sealants, and topical fluoride treatments in school settings by licensed dental hygienists. The order requires the Board to affirm and publicize its support for the state legislative policy, embodied in the 2003 amendments to the Dental Practice Act that prevents the Board from requiring a dentist examination as a condition of the provision of preventive dental care in public health settings by dental hygienists. In addition, to prevent similar anticompetitive restraints in the future, the order requires the Board to give the Commission advance notice before adopting rules or taking other actions that relate to dental hygienists' provision of preventive dental services in a public health setting.

Participants

For the Commission: *Garry Gibbs, Elizabeth Hilder, Garth Huston, Markus H. Meier, Gary Schorr, and David P. Wales, Jr.*

For the Respondents: *William H. Davidson, II, Andrew Lindeman, and Kenneth P. Woodington, Davidson, Morrison & Lindeman; and Lynne W. Rogers, South Carolina Department of Labor, Licensing and Regulation.*

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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 South Carolina State Board of Dentistry violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this Complaint stating its charges in that respect as follows:

STATEMENT OF THE CASE

1. Respondent South Carolina State Board of Dentistry (“the Board”), which consists almost entirely of practicing dentists, restrained competition in the provision of preventive dental care services by unreasonably restricting the delivery of dental cleanings, sealants, and topical fluoride treatments in school settings by licensed dental hygienists. Although the South Carolina General Assembly passed legislation in 2000 eliminating a statutory requirement that a dentist examine each child before a hygienist may perform cleanings or apply sealants in school settings, the Board in 2001 re-imposed the very examination requirement that the legislature had eliminated, and extended it to the application of topical fluoride in school settings as well. The effect of the Board’s action was to deprive thousands of school children – particularly economically disadvantaged children – of the benefits of preventive oral health care services. The Board’s anticompetitive action, undertaken by self-interested industry participants with economic interests at stake, was contrary to state policy and was not reasonably related to any countervailing efficiencies or other benefits sufficient to justify its harmful effects on competition and consumers.

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RESPONDENT

2. The Board is organized, exists, and transacts business under and by virtue of the laws of South Carolina, with its principal office at Synergy Business Park, Kingstree Building, 110 Centerview Dr., Columbia, South Carolina 29210.

3. The Board was created by the South Carolina legislature to supervise the practice of dentistry and dental hygiene.

4. By virtue of the Board's make-up, the licensed dentists of South Carolina regulate both themselves and dental hygienists.

5. The Board is composed of seven dentists, one dental hygienist, and one public member. The licensed dentists in South Carolina elect six of the dentist members for approval by the governor, and the dental-hygienist member is elected by licensed dental hygienists in South Carolina for approval by the governor. The governor of South Carolina appoints one of the dentist members and the public member.

6. While serving their membership terms, dentist members of the Board may, and do, continue to engage in the business of providing dental services for a fee. Except to the extent that competition has been restrained as alleged below, and depending on their geographic location, licensed dentists in South Carolina compete with each other and with dentist members of the Board.

7. The Board is the sole licensing authority for dentists and dental hygienists in South Carolina. It is generally unlawful for an individual to practice or to offer to practice dentistry or dental hygiene in South Carolina unless he or she holds a current license to practice.

8. The Board is authorized by South Carolina law to take disciplinary action against any licensee who violates any rule or regulation promulgated by the Board. Disciplinary action by the

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Board may include the suspension or revocation of a license, or other limitations or restrictions on a licensee.

JURISDICTION

9. The Board is a state regulatory body and is a “person” within the meaning of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

10. Substantial sums of money flow into South Carolina from the federal government and other out-of-state payers for the purchase of preventive dental care services. The acts and practices of the Board, including the acts and practices alleged herein, have been or are in or affecting “commerce” within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

**PREVENTIVE DENTAL SERVICES
IN SOUTH CAROLINA**

11. Dental hygienists are licensed health care professionals who specialize in providing preventive oral health services. Such services include cleaning teeth, taking x-rays, providing nutrition and dietary counseling, providing fluoride treatments, and applying dental sealants. Dental hygienists are also trained to detect signs of oral disease and to educate patients on maintaining optimal oral health.

12. There are over 2,200 dental hygienists licensed to practice in South Carolina. Dental hygienists in South Carolina practice in collaboration with a supervising dentist or under the direction of the South Carolina Department of Health and Environmental Control’s public health dentist.

13. Firms owned by dental hygienists working in collaboration with a dentist (either supervised by a private dentist or working at

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the direction of South Carolina's public health dentist) can compete with dentists for the provision of preventive dental care services.

14. Many children in South Carolina suffer from oral health problems because they do not receive preventive dental care, particularly children in low-income families. Over 400,000 children – more than 40 percent of children in South Carolina – are Medicaid-eligible. In the early 1990s, only 12 percent of Medicaid-eligible children received preventive dental care services.

15. In 1988, the South Carolina General Assembly enacted a law specifically authorizing dental hygienists to provide preventive services in schools. That law, however, required that hygienists could provide cleanings and apply dental sealants only if a dentist had examined the child's teeth within the previous 45 days. The 1988 law did not significantly increase the delivery of dental hygienists' services in school settings.

16. In 2000, South Carolina substantially increased Medicaid reimbursement for dental services. With federal matching funds, about \$79 million became available annually for Medicaid-eligible dental services.

17. After Medicaid payment levels for dental care services increased, the number of South Carolina dentists participating in South Carolina's Medicaid-Dental program increased about one-third. More than 900 of the over 1,500 licensed dentists licensed in South Carolina now participate in the state's Medicaid-Dental program.

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**SOUTH CAROLINA GENERAL ASSEMBLY REMOVES A
BARRIER TO THE PROVISION OF PREVENTIVE
DENTAL CARE IN SCHOOLS**

18. In 2000, the South Carolina General Assembly amended its statutes to make it easier for dental hygienists to deliver preventive dental care services in school settings. Prior to the 2000 amendments, South Carolina statutes provided that a dental hygienist could provide cleanings and sealants in a school setting only if:

- a. a supervising dentist examined the patient no more than 45 days before the treatment;
- b. a supervising dentist provided written authorization for the procedures;
- c. the patient was not an active patient of another dentist; and
- d. the patient's parents provided written permission for the treatment.

19. The 2000 amendments removed these requirements, except the requirement for parental consent. The 2000 amendments provided instead that a dental hygienist could apply topical fluoride and perform the application of sealants and oral prophylaxis "under general supervision." S.C. Acts § 40-15-80(B) (2000). General supervision "means that a licensed dentist or the South Carolina Department of Health and Environmental Control's public health dentist has authorized the procedures to be performed but does not require that a dentist be present when the procedures are performed." S.C. Acts § 40-15-85 (2000). By virtue of the 2000 amendments, the Board could not require a dentist examination as a condition of a dental hygienist's providing preventive services in a school setting.

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20. Upon signing the 2000 amendments, South Carolina's governor announced: "This new law removes a regulation that hindered access to dental care."

21. The 2000 amendments embodied a policy to remove artificial barriers to the provision of oral preventive health care by dental hygienists to school children.

22. Health Promotion Specialists ("HPS") is a firm owned by a dental hygienist that provides preventive dental services to South Carolina children. HPS employs dental hygienists to provide those services and contracts with dentists to supervise the hygienists.

23. In January 2001, HPS began providing cleanings, sealants, topical fluoride treatments, and other preventive dental services on-site to children in South Carolina schools. By July 2001, HPS had screened over 19,000 children, and provided preventive services (cleanings, sealants, and topical fluoride treatments) to over 4,000 children, including nearly 3,000 Medicaid-eligible children. Because HPS's services were provided in schools, they were more convenient for the families of the children served. Dentists in traditional office practices risked losing patients to HPS.

24. Because a tremendous unmet need for preventive dental care remained, HPS expected to treat more than twice as many students in the fall semester of 2001 as it had in the spring semester. Relying on this forecast, HPS more than doubled the number of hygienists it employed.

BOARD CONDUCT

25. The Board has restrained competition in the provision of preventive dental care services by combining or conspiring with its members or others, or by acting as a combination of its members or others, to restrict unreasonably the ability of dental hygienists to deliver preventive services in school settings. In particular, on July 12, 2001, the Board adopted an emergency regulation

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governing dental hygienist practice in school settings that re-imposed the same examination requirement that the General Assembly removed in 2000: that a supervising dentist had to examine the patient no more than 45 days prior to treatment.

26. For the regulation to become effective, it required the approval only of the Board, a majority of which consists of practicing dentists elected by the licensed dentists of South Carolina. No financially disinterested state actor approved the regulation before or while it was in effect. Under state law, the regulation terminated after 180 days.

27. The emergency regulation conflicted directly with the policy articulated by the General Assembly, by re-imposing the precise barriers to dental hygienists' providing preventive services to school children that the legislature had just removed.

28. The effect of the emergency regulation was to reduce substantially the number of children (particularly economically disadvantaged children) who received preventive dental care. During the latter half of 2001, the period when the emergency regulation was in effect, HPS screened fewer than 6,000 children, about 13,000 fewer than it had screened during the first half of 2001. The emergency regulation also limited HPS's ability to provide preventive dental care; as a result, the regulation deprived thousands of South Carolina children of preventive dental care.

29. The Board's requirement that a dentist examine each child before a dental hygienist provides a cleaning, sealant, or fluoride treatment in school settings was not reasonably related to any efficiencies or other benefits sufficient to justify its harmful effect on competition and consumers.

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**STATE ADMINISTRATIVE REVIEW FINDS IMPOSITION
OF THE DENTIST PREEXAMINATION REQUIREMENT
IN SCHOOL SETTINGS CONTRARY TO THE 2000
AMENDMENTS**

30. In August 2001, the Board published a proposed permanent regulation substantially identical to the emergency regulation, which by law would lapse in January 2002.

31. Pursuant to South Carolina law, an administrative law judge was required, after a public hearing, to determine whether the proposed permanent regulation was a reasonable exercise of the Board's authority. The administrative law judge's report, along with the proposed regulation, had to be forwarded to the General Assembly for review in order for the permanent regulation to become effective.

32. In February 2002, the presiding administrative law judge issued a report that concluded that the Board's proposed permanent regulation was unreasonable and contravened state policy to the extent it reinstated the dentist pre-examination requirement that the legislature had eliminated in 2000.

33. The administrative law judge found that deletion of the statutory pre-examination requirement reflected a state policy adopted by the South Carolina legislature during its 2000 session to increase access to preventive oral health care for low-income children. The administrative law judge recommended that the Board delete the pre-examination requirement from its proposal before forwarding it to the legislature.

34. After issuance of the administrative law judge's report, the Board did not submit its proposed permanent regulation to the General Assembly for review. As a result, the proposed regulation did not take effect.

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**THE CURRENT THREAT TO THE DELIVERY OF
PREVENTIVE DENTAL SERVICES IN
SOUTH CAROLINA**

35. After the emergency regulation lapsed, at least three firms, including HPS, provided preventive dental care in schools pursuant to contracts with the Department of Health and Environmental Control. Under the contracts, these firms provided cleanings, fluoride treatments, and sealants, under standing orders, without a mandatory pre-examination by a dentist.

36. During the latter part of 2002, HPS provided preventive dental care treatments to nearly 10,700 school children, 6,000 more than during the same period in 2001, when the Board's emergency regulation was in effect.

37. In May 2003, the South Carolina General Assembly enacted legislation that expressly provides that dentist examination requirements applicable in some settings do not apply to dental hygienists' provision of preventive oral health care services, including cleanings, sealants and topical fluoride, when they are working in public health settings under the direction of the Department of Health and Environmental Control.

38. Nonetheless, when the Board in March 2003 considered the statutory revisions that the General Assembly later enacted, it maintained that in all settings where a dental hygienist provides treatment – whether public health or private practice – a licensed dentist has to see the patient and provide a treatment plan.

ANTICOMPETITIVE EFFECTS

39. The Board's acts and practices have had the effect of restraining competition unreasonably and injuring consumers in the following ways, among others:

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- a. hindering competition in the delivery of cleaning, sealant, topical fluoride, and other preventive dental services to school-aged children in South Carolina; and
- b. depriving thousands of school children – particularly economically disadvantaged school children – of the benefits of preventive oral health care.

VIOLATION

40. The combination, conspiracy, acts and practices described above constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. Such combination, conspiracy, acts, and practices, or the effects thereof, are continuing and will continue or recur in the absence of the relief herein requested.

NOTICE

Notice is hereby given to the Respondent that the fourteenth day of January, 2004, at 10:00 a.m., or such later date as determined by the Commission or by an Administrative Law Judge of the Commission, is hereby fixed as the time and Federal Trade Commission offices, 600 Pennsylvania Ave., N.W., Washington, D.C. 20580, as the place when and where a hearing will be had on the charges set forth in this Complaint, at which time and place you will have the right under the FTC Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in the Complaint.

Pending further order of the Commission, the Commission will retain adjudicative responsibility for this matter. *See* § 3.42(a) of the Commission's Rules of Practice for Adjudicative Proceedings. Pursuant to § 3.12 of those Rules, the Commission hereby allows you until 30 days from the date of service of this Complaint upon you to file either an answer or a dispositive motion. If you file a dispositive motion within that time, your time for filing an answer is

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extended until 10 days after service of the Commission's order on such motion. If you do not file a dispositive motion within that time, you must file an answer.

An answer in which the allegations of the Complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the Complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the Complaint not thus answered shall be deemed to have been admitted.

If you elect not to contest the allegations of fact set forth in the Complaint, the answer shall consist of a statement that you admit all of the material facts to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the Complaint and, together with the Complaint, will provide a record basis on which the Administrative Law Judge shall file an initial decision containing appropriate findings and conclusions and an appropriate order disposing of the proceeding. In such answer, you may, however, reserve the right to submit proposed findings and conclusions under § 3.46 of the Commission's Rules of Practice for Adjudicative Proceedings and the right to appeal the initial decision to the Commission under §3.52 of said Rules.

Failure to answer within the time above provided shall be deemed to constitute a waiver of your right to appear and contest the allegations of the Complaint and shall authorize the Administrative Law Judge, without further notice to you, to find the facts to be as alleged in the Complaint and to enter an initial decision containing such findings, appropriate conclusions, and order.

The Commission or the Administrative Law Judge will schedule an initial prehearing scheduling conference to be held not later than 14 days after an answer is filed by Respondent. Unless otherwise directed by the Commission or the Administrative Law Judge, the

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scheduling conference and further proceedings will take place at the Federal Trade Commission, 600 Pennsylvania Avenue, NW, Room 532, Washington, D.C. 20580. Rule 3.21(a) requires a meeting of the parties' counsel as early as practicable before the prehearing scheduling conference, and Rule 3.31(b) obligates counsel for each party, within 5 days of receiving a respondent's answer, to make certain initial disclosures without awaiting a formal discovery request.

NOTICE OF CONTEMPLATED RELIEF

Should the Commission conclude from the record developed in an adjudicative proceeding in this matter that the Board is in violation of Section 5 of the Federal Trade Commission Act, as alleged in the Complaint, the Commission may order such relief as is supported by the record and is necessary and appropriate, including, but not limited to, an order that requires the following:

1. The Board shall cease and desist from, either directly or indirectly, requiring that a dentist conduct an examination of a patient as a condition of a dental hygienist who is working in a public health setting pursuant to S.C. Code Ann. § 40-15-110(A)(10), or any recodification thereof, performing oral prophylaxis or applying sealants or topical fluoride to that patient, unless the examination requirement is adopted by the South Carolina General Assembly after the date that the order becomes final.

2. The Board shall mail a copy of the Complaint, order, and an explanatory notice to each Board member; each officer, director, representative, agent, and employee of the Board; each person licensed to practice dentistry or dental hygiene in South Carolina; and the superintendent of each school district in South Carolina.

3. The Board shall take such other measures that are appropriate to correct or remedy, or prevent the recurrence of, the anticompetitive practices in which it engaged.

Decision and Order

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twelfth day of September, 2003, issues its Complaint against Respondent South Carolina State Board of Dentistry.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission (“Commission”) having heretofore issued its Complaint charging South Carolina State Board of Dentistry (“the Board”), hereinafter sometimes referred to as “Respondent,” with violating Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondent, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order (“Consent Agreement”), containing an admission by Respondent of all the jurisdictional facts set forth in the Complaint, a statement that the signing of the Consent 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, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(f) of the Commission’s Rules, 16 C.F.R. § 3.25(f), and the Commission having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt

Decision and Order

and consideration of public comments, and having duly considered the comments filed thereafter by interested persons pursuant to Section 3.25 of its Rules, now in further conformity with the procedure described in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order (“Order”):

1. Respondent is organized, exists, and transacts business under and by virtue of the laws of South Carolina, with its principal office at Synergy Business Park, Kingstree Building, 110 Centerview Dr., Columbia, South Carolina 29210.

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.**

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

- A. “South Carolina State Board of Dentistry” or “the Board” means South Carolina State Board of Dentistry, its members, officers, directors, committees, representatives, agents, employees, and successors, including, but not limited to, its executive director and investigators; and
- B. “Dental hygienist” means a person who practices dental hygiene, as defined in S.C. Code of Laws § 40-15-80.

Decision and Order

II.

IT IS FURTHER ORDERED that Respondent shall provide written notice to the Commission at least (30) thirty days prior to the promulgation of any proposed or final rule, regulation, policy, issuance of a formal complaint in a disciplinary action, or other action of the Board, relating to the provision by dental hygienists of preventive dental services in a public health setting pursuant to S.C. Code Ann. § 40-15-110(A)(10), or any recodification thereof, including, but not limited to, an action concerning a dentist who authorizes, supervises, or bills for, the provision by dental hygienists of preventive dental services in a public health setting.

Provided, however, that if protection of the public health prevents Respondent from notifying the Commission thirty days in advance of an action, then Respondent shall provide the notice required by this Paragraph as soon as is reasonably practicable.

III.

IT IS FURTHER ORDERED that Respondent shall:

- A. Within thirty (30) days after the date on which this Order becomes final, distribute by first-class mail or electronic mail a notice in the form set forth in Appendix A of this Order, with a copy of the Order and Complaint attached, to:
 - 1. each Board member;
 - 2. each officer, director, representative, agent, and employee of the Board; and
 - 3. each person licensed to practice dentistry or dental hygiene in South Carolina.

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- B. Within thirty (30) days after the date on which this Order becomes final, distribute by first-class mail a notice in the form set forth in Appendix A of this Order, with a copy of the Order and Complaint attached, to the superintendent of each school district listed in Appendix B.
- C. Within thirty (30) days after the date on which this Order becomes final, publish a notice in the form set forth in Appendix A of this Order, along with a link to a copy of the Order and Complaint, on the South Carolina State Board of Dentistry website, and maintain these materials on the website for three (3) years from the date this Order becomes final.
- D. Publish a notice in the form set forth in Appendix A of this Order in the first South Carolina State Board of Dentistry newsletter to be published after the date this Order becomes final, and annually thereafter for three (3) years.
- E. For a period of three (3) years after the date this Order becomes final, distribute by first-class mail or electronic mail a notice in the form set forth in Appendix A of this Order, and attaching a copy of the Order and Complaint, to:
 - 1. any person who becomes a member of the Board, within thirty (30) days of the time his or her membership begins;
 - 2. any person who becomes an officer, director, representative, agent, or employee of the Board, within thirty (30) days of the time that he or she assumes such responsibility with the Board; and
 - 3. any person who becomes licensed to practice dentistry or dental hygiene in South Carolina, within thirty (30) days of the time he or she becomes licensed.

IV.

Decision and Order

IT IS FURTHER ORDERED that within thirty (30) days after the date this Order becomes final, annually thereafter for three (3) years on the anniversary of the date this Order becomes final, and at such other times as the Commission may by written notice require, the Board shall submit to the Commission a verified written report detailing the manner and form in which the Board has complied and is complying with this Order.

V.

IT IS FURTHER ORDERED that, for purposes of determining or securing compliance with this Order, and upon written request with reasonable notice, Respondent shall permit any duly authorized representative of the Commission:

- A. Access, during office hours of Respondent and in the presence of counsel, to all facilities to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession or under the control of Respondent related to compliance with this Order; and
- B. Upon five (5) days' notice to Respondent and without restraint or interference from Respondent, to interview officers, directors, or employees of Respondent, who may have counsel present, regarding such matters.

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VI.

IT IS FURTHER ORDERED that Respondent shall notify the Commission at least thirty (30) days prior to any change in the Board's authority to regulate the practice of dentistry and dental hygiene in South Carolina that may affect compliance obligations arising out of this Order, such as the complete or partial assumption of that authority by another governmental entity, or the dissolution of the Board.

VII.

IT IS FURTHER ORDERED that this Order shall terminate on September 6, 2017.

By the Commission.

Decision and Order

APPENDIX A

[date]

NOTICE

The South Carolina State Board of Dentistry has entered into a consent agreement with the Federal Trade Commission. In connection with the Commission's order issued pursuant to that agreement, which became final on [date], the Board is publishing this notice concerning the delivery of preventive dental services in public health settings:

The 2003 amendments to the Dental Practice Act (Act No. 45 of 2003) provide that the Board may not, directly or indirectly, require that a dentist conduct an examination of a patient as a condition of a dental hygienist who is working in a public health setting pursuant to S.C. Code Ann. § 40-15-110(A)(10), which pertains to licensed dental hygienists employed within or contracted through the public health system, or any recodification thereof, performing oral prophylaxis or applying sealants or topical fluoride to that patient.

The Board is in full agreement with the legislative policy set forth in the 2003 amendments as recited above.

resident

South Carolina State Board of Dentistry

Decision and Order

APPENDIX B

<u>Abbeville</u>	<u>Aiken</u>	<u>Allendale</u>	<u>Anderson 1</u>	<u>Anderson 2</u>	<u>Anderson 3</u>
<u>Anderson 4</u>	<u>Anderson 5</u>	<u>Bamberg 1</u>	<u>Bamberg 2</u>	<u>Barnwell 19</u>	<u>Barnwell 29</u>
<u>Barnwell 45</u>	<u>Beaufort</u>	<u>Berkeley</u>	<u>Calhoun</u>	<u>Charleston</u>	<u>Cherokee</u>
<u>Chester</u>	<u>Chesterfield</u>	<u>Clarendon 1</u>	<u>Clarendon 2</u>	<u>Clarendon 3</u>	<u>Colleton</u>
<u>Darlington</u>	<u>Dillon 1</u>	<u>Dillon 2</u>	<u>Dillon 3</u>	<u>Dorchester 2</u>	<u>Dorchester 4</u>
<u>Edgefield</u>	<u>Fairfield</u>	<u>Florence 1</u>	<u>Florence 2</u>	<u>Florence 3</u>	<u>Florence 4</u>
<u>Florence 5</u>	<u>Georgetown</u>	<u>Greenville</u>	<u>Greenwood 50</u>	<u>Greenwood 51</u>	<u>Greenwood 52</u>
<u>Hampton 1</u>	<u>Hampton 2</u>	<u>Horry</u>	<u>Jasper</u>	<u>Juvenile Justice</u>	<u>Kershaw</u>
<u>Lancaster</u>	<u>Laurens 55</u>	<u>Laurens 56</u>	<u>Lee</u>	<u>Lexington 1</u>	<u>Lexington 2</u>
<u>Lexington 3</u>	<u>Lexington 4</u>	<u>Lexington 5</u>	<u>Marion 1</u>	<u>Marion 2</u>	<u>Marion 7</u>
<u>Marlboro</u>	<u>McCormick</u>	<u>Newberry</u>	<u>Oconee</u>	<u>Orangeburg 3</u>	<u>Orangeburg 4</u>
<u>Orangeburg 5</u>	<u>Pickens</u>	<u>Richland 1</u>	<u>Richland 2</u>	<u>Saluda</u>	<u>Spartanburg 1</u>
<u>Spartanburg 2</u>	<u>Spartanburg 3</u>	<u>Spartanburg 4</u>	<u>Spartanburg 5</u>	<u>Spartanburg 6</u>	<u>Spartanburg 7</u>
<u>Sumter 17</u>	<u>Sumter 2</u>	<u>Union</u>	<u>Williamsburg</u>	<u>York 1</u>	<u>York 2</u>
<u>York 3</u>	<u>York 4</u>				

Analysis to Aid Public Comment

**ANALYSIS OF CONSENT ORDER TO AID PUBLIC
COMMENT**

The Federal Trade Commission has accepted for public comment an agreement to a proposed consent order with the South Carolina State Board of Dentistry. The purpose of this analysis is to facilitate public comment on the proposed order. The analysis is not intended to constitute an official interpretation of the agreement and proposed order, or to modify their terms in any way. The proposed consent order has been placed on the public record for 30 days to receive comments by interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make the proposed order final.

The proposed consent order has been entered into for settlement purposes only and does not constitute an admission by the Respondent that it violated the law or that the facts alleged in the complaint, other than the jurisdictional facts, are true.

The Challenged Conduct

The Commission's complaint, issued September 12, 2003, charges the South Carolina State Board of Dentistry with unlawfully restraining competition in the provision of preventive dental care services in South Carolina, in violation of Section 5 of the Federal Trade Commission Act. The Board is a state regulatory agency that licenses and regulates dentists and dental hygienists. The nine-member Board includes seven practicing dentists, six of whom are elected by the dentists in their local area.

The complaint alleges that the Board illegally restricted the ability of dental hygienists to provide preventive dental services (cleanings, topical fluoride treatments, and application of dental sealants) in school settings. The South Carolina legislature in 2000

Analysis to Aid Public Comment

eliminated a statutory requirement that a dentist examine each child before a hygienist may perform preventive care in schools, in order to address concerns that many schoolchildren, particularly those in low-income families, were receiving no preventive dental services. In July 2001, however, the Board adopted an emergency regulation that re-imposed the dentist examination requirement that the legislature had eliminated. As a result of the Board's action, a hygienist-owned company known as Health Promotion Services, which had begun sending hygienists to schools to provide preventive services under written protocols from a supervising dentist, had to change its business model and was able to serve far fewer patients.

By operation of South Carolina law, the emergency regulation expired after six months, in January 2002. By that time, the Board had published a proposal to adopt the dentist examination requirement as a permanent regulation. However, after a state administrative law judge concluded that the Board's proposed regulation was unreasonable and contravened state policy, the Board did not proceed with the permanent regulation.

The South Carolina legislature subsequently enacted legislation in May 2003 that expressly provides that dentist examination requirements applicable in some settings do not apply to dental hygienists' provision of preventive care services delivered in public health settings under the direction of the state health department. The new statute also added a provision stating that a dentist billing for services provided by a dental hygienist under such an arrangement was "clinically responsible" for the delivery of those services. Because in South Carolina dental hygienists cannot bill the state Medicaid program directly, this new provision would plainly apply to school-based preventive dental care programs. Aside from the general concern that the Board might once again defy a legislative change, there was evidence in Board minutes suggesting that the Board might interpret the "clinically responsible" language in the new statute to require that a licensed dentist examine a patient and provide a treatment plan in all settings, whether private dental offices or public health locations.

Post-Complaint Proceedings

Shortly after the complaint issued, the Board moved to dismiss the case, asserting that its actions were exempt from the antitrust laws by virtue of the state action doctrine. That doctrine, first articulated by the Supreme Court in *Parker v. Brown*, 317 U.S. 341 (1943), rests on the Court's holding that the Sherman Act was not intended to "restrain a state or its officers or agents from activities directed by its legislature." The Board also argued that the 2003 statute made it legally impossible for it to resume its challenged conduct and therefore rendered the case moot.

In a July 2004 opinion, the Commission rejected the Board's state action arguments.¹ As the Commission's opinion explains, the Board's claim to automatic state action protection by virtue of its status as a state agency is contrary to well-established Supreme Court precedent.² Furthermore, the Board failed to establish an essential element of the state action defense, because it was unable to show that its challenged conduct was undertaken pursuant to a clearly articulated policy of the legislature to displace competition with regard to the delivery of preventive dental care in schools. Neither the Board's general authority to regulate, nor its claims about the meaning of the state legislature's 2000 statutory revisions, demonstrated the requisite clear articulation to bring the challenged conduct within the protection afforded by the state action doctrine. On the contrary, the policy expressed by the legislature's elimination in 2000 of the statutory requirement for a dentist examination before dental hygienists could provide preventive services in schools was one favoring such competition, in order to increase access to

¹ In the Matter of South Carolina State Board of Dentistry, 138 F.T.C. 229, 230 (2004), available at <http://www.ftc.gov/os/adjpro/d9311/040728commissionopinion.pdf> and <http://www.ftc.gov/os/decisions/docs/Volume138.pdf>.

² See, e.g., *Southern Motor Carriers Rate Conf., Inc. v. United States*, 471 U.S. 48, at 57, 60-61 (1985).

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critically important oral health care. Finally, because the Board failed to make a threshold showing of a legislative policy to displace the type of competition that it is charged with suppressing, its final argument, that any conflict with the 2000 statute was merely an error of state law and of no federal antitrust significance, failed as well.

The Board filed an appeal with the United States Court of Appeals for the Fourth Circuit seeking an interlocutory review of the Commission's state action ruling. The Commission moved to dismiss the appeal, arguing that the ruling did not fall within the narrow class of "collateral orders" that fall outside the general rule that interlocutory orders are not immediately appealable. The court of appeals agreed and dismissed the appeal for lack of jurisdiction. In its May 2006 decision in *South Carolina State Board of Dentistry v. F.T.C.*, 455 F.3d 436 (4th Cir. 2006), the court of appeals rejected the position of some other circuits, which have upheld interlocutory appeals from the denial of a claim of state action protection on the theory that the state action exemption is an immunity from suit:

[W]e cannot conclude that *Parker* creates an immunity from suit. The *Parker* doctrine did not arise from any concerns about special harms that would result from trial. Instead, *Parker* speaks only about the proper interpretation of the Sherman Act.

455 F.3d at 444.

With respect to the Board's arguments that the 2003 statute made it impossible for the Board to resume the challenged conduct, the Commission's July 2004 ruling rejected the Board's claim that the statute compelled dismissal of the complaint as a matter of law. Instead, it held the Board's motion to dismiss in abeyance pending discovery on factual issues relating to the risk of recurrence of the

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challenged conduct.³ As noted in the Commission’s decision, the very premise of the alleged violation in this case is that the Board flouted a statutory directive designed to promote competition and increase access to preventive dental services. Moreover, the complaint also alleges particular facts with regard to the Board’s interpretation of language added by the 2003 statute that raise a significant risk of recurrence.

During the pendency of the Board’s appeal on state action, the Commission stayed discovery in the case. The stay expired in January 2007, after the Supreme Court denied the Board’s petition for certiorari seeking review of the appellate court’s dismissal of the appeal, thereby clearing the way for discovery on the issues delegated to an FTC administrative law judge.

The Proposed Order

The proposed order has two central features:

- First, to eliminate the alleged anticompetitive effects of the challenged conduct, the proposed order requires the Board to affirm and publicize its support for the state legislative policy, now embodied in the 2003 amendments to the Dental Practice Act, that prevents the Board from requiring a dentist examination as a condition of dental hygienists providing preventive dental care in public health settings.
- Second, to prevent similar anticompetitive restraints in the future, the proposed order requires the Board to give the Commission advance notice before adopting rules or taking

³ Administrative agencies are not subject to the constitutional requirement of a “case or controversy” that limits the jurisdiction of Article III courts, but instead exercise discretion in deciding whether to hear cases that might be considered moot. See, e.g., *R.T. Communications, Inc. v. FCC*, 201 F.3d 1264, 1276 (10th Cir. 2001); *Tenn. Gas Pipeline Co. v. Fed. Power Comm’n*, 606 F.2d 1373, 1380 (D.C. Cir 1979).

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other actions that relate to dental hygienists' provision of preventive dental services in a public health setting.

The Board announcement is set forth in Appendix A of the proposed order. That announcement: (1) expresses the Board's view that the 2003 statute prevents it from requiring a dentist examination when patients receive preventive services from dental hygienists working under arrangements with the state health department; and (2) states that the Board fully supports this legislative policy.

In addition to publication on the Board's website and in its newsletter, Paragraph III of the proposed order requires the Board to distribute this announcement, along with a copy of the Commission's complaint and order, to every dentist and dental hygienist holding a license to practice in South Carolina (and, for a period of three years, to new licensees), and to the superintendent of every school district in South Carolina. Widespread publication of this announcement is designed to remedy potentially significant chilling effects from the Board's past conduct on market participants who might otherwise be interested in participating in public health preventive dental care programs involving dental hygienists.

The proposed order's prior notice provision is contained in Paragraph II. It requires the Board to give the Commission written notice 30 days in advance of adopting proposed or final rules, policies, disciplinary and other actions, that relate to the provision by dental hygienists of preventive dental services in a public health setting pursuant to S.C. Code Ann. § 40-15-110(A)(10), a provision that governs dental hygienist practice in public health settings. The scope of the notice provision includes actions that concern dentists' authorizing, supervising, or billing for the provision by dental hygienists of preventive dental services in a public health setting. This prior notice requirement, which extends beyond the reinstitution of the restraint contained in the Board's 2001 emergency regulation, will enhance the Commission's ability to monitor the Board's future conduct and take prompt action where warranted.

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The Commission has determined that it is not necessary to include a “cease and desist” provision that directly prohibits the Board from resuming the conduct challenged in the complaint. This conclusion rests on various factors particular to this case. A key factor is the experience in South Carolina since the 2003 changes to the South Carolina Dental Practice Act. The new statutory scheme has now been in place for nearly four years. Throughout this period, dental hygienists have been providing preventive services in schools under an agreement with the health department – without an initial examination by a dentist – and the Board has not reimposed its previous dentist examination requirement. Thus, although the 2003 amendments have not eliminated the need for relief in this case, they are a relevant consideration in determining the nature and scope of that relief.

Accordingly, the proposed order takes the statutory change into account. First, requiring the Board to distribute the announcement set forth in Appendix A to all dentists, dental hygienists, and school districts will ensure that interested parties know that the Board has formally acknowledged that it is legally barred from resuming the conduct challenged in the Commission’s complaint. Second, the notice requirement of Paragraph II addresses the possibility that the Board might attempt to restrain competition in the provision of dental hygienist services in public health settings in ways not addressed by the 2003 amendments. This notice provision will increase the Commission’s ability to monitor the Board’s future conduct and is likely to help deter the Board from imposing restraints on public health preventive dental care that are not grounded in the policies articulated by the South Carolina legislature.

As is standard in Commission orders, the proposed order contains certain reporting and other provisions that are designed to assist the Commission in monitoring compliance with the order.

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The proposed order would expire in ten years.

Complaint

IN THE MATTER OF

**JARDEN CORPORATION
AND
K2 INC.**CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS
OF SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL
TRADE COMMISSION ACT*Docket C-4196; File No. 071 0168**Complaint, August 8, 2007 – Decision, September 14, 2007*

This consent order addresses the \$1.2 billion acquisition by Jarden Corporation (“Jarden”) of K2 Incorporated (“K2”). The complaint alleged that the proposed acquisition, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act by lessening competition in the U.S. market for monofilament fishing line. The consent order requires the divestiture of Cajun Line[®], Omniflex[®], Outcast[®], and Supreme[™] monofilament fishing line products (the “Divested Assets”) to W. C. Bradley/Zebco (“Zebco”). Additionally, the order prohibits Jarden from using confidential information relating to the Divested Assets, and precludes certain key K2 employees from working at Jarden on competitive fishing line products for two years. The order further requires respondents to provide Zebco with the opportunity to enter into employment contracts with key individuals experienced in working with the Divested Assets.

Participants

For the *Commission*: Stephen Argeris, Sylvia M. Brooks, Mark Frankena, David Glasner, Tammy L. Imhoff, Brendan J. McNamara, Michael R. Moiseyev, and Louis Silvia.

For the *Respondents*: Christopher Dusseault, Gibson, Dunn & Crutcher; Mitchell D. Hollander, Kane Kessler; Raymond A. Jacobsen, Jr., McDermott, Will & Emery.