

Interlocutory Orders, Etc.

IN THE MATTER OF

**THE NORTH CAROLINA BOARD OF DENTAL
EXAMINERS**

Docket No. 9343. Order, February 10, 2012

Order granting respondent's motion for Stay of Order Pending Review by the U.S. Court of Appeals.

**ORDER ON RESPONDENT'S APPLICATION FOR STAY OF ORDER
PENDING REVIEW BY U.S. COURT OF APPEALS**

On January 13, 2012, Respondent North Carolina State Board of Dental Examiners filed an Application for Stay of Order Pending Review by the U.S. Court of Appeals. Complaint Counsel opposes the motion. For the reasons described below, the Commission grants Respondent's motion and stays the Final Order entered on December 2, 2011 until disposition of Respondent's appeal.

On December 2, 2011, the Commission issued an Opinion and Final Order against Respondent. The Commission held that Respondent excluded non-dentist providers from the market for teeth whitening services, in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. The Commission's Final Order prohibited the Board from directing non-dentist teeth whitening providers to cease providing teeth whitening products or services. In its Application, Respondent asserts that it intends to seek review of the Commission's Opinion and Final Order in the Court of Appeals for the Fourth Circuit. (Petition at 1, 2.)

Section 5(g) of the Federal Trade Commission Act provides that Commission cease and desist orders (except divestiture orders) take effect "upon the sixtieth day after such order is served," unless "stayed, in whole or in part and subject to such conditions as may be appropriate, by ... the Commission" or "an appropriate court of appeals of the United States." 15 U.S.C. § 45(g)(2); *see also* 16 C.F.R. § 3.56(a). A party seeking a stay must first apply for such relief to the Commission, as Respondent has done here. *See* 15 U.S.C. § 45(g)(2); *see also* 16 C.F.R. § 3.56(b); Fed. R. App. P. 18(a)(1). If, "within the 30-day period

Interlocutory Orders, Etc.

beginning on the date the application was received by the Commission,” the Commission either denies the application or does not act on the application, the petitioner may seek a stay in the court of appeals where a petition for review of the final order is pending. 15 U.S.C. § 45(g)(2)(B); *see also* 16 C.F.R. § 3.56(b).

Pursuant to Rule 3.56(c) of the Commission’s Rules of Practice, an application for a stay is evaluated on four factors: (1) the likelihood of the applicant’s success on appeal; (2) whether the applicant will suffer irreparable harm if a stay is not granted; (3) the degree of injury to other parties if a stay is granted; and (4) whether the stay is in the public interest. 16 C.F.R. § 3.56(c); *Toys “R” Us, Inc.*, 126 F.T.C. 695, 696 (1998). If the balance of the equities (i.e., the last three factors) is not heavily tilted in the petitioner’s favor, the petitioner must make a more substantial showing of likelihood of success on the merits in order to obtain a stay pending appeal. *California Dental Ass’n*, No. 9259, 1996 FTC LEXIS 277, at *10 (May 22, 1996); *see also North Texas Specialty Physicians*, 141 F.T.C. 456, 457-58 & n.2 (2006) (the required likelihood of success “is inversely proportional to the amount of irreparable injury suffered absent the stay”).

Likelihood of Respondent’s Success on Appeal – Respondent asserts that it is likely to succeed in its appeal because the Commission’s decisions contravene the U.S. Constitution, federal law, and state law. (Petition at 2-5.) Respondent’s argument focuses on the Commission’s February 8, 2011 decision, which held that financially-interested governmental bodies must meet the active supervision prong of *Midcal* to be exempted from antitrust scrutiny under the state action doctrine. Respondent asserts that the Commission’s holding conflicts with *Midcal* itself, as well as several decisions of the Court of Appeals. (*Id.* at 3-4 (listing cases).)

The Commission harbors no doubts about its February 8, 2011 decision. As we noted in that decision, there is “ample” judicial precedent supporting the Commission’s Opinion—including from the Fourth Circuit—as well as leading antitrust commentary and the policies underlying the state action doctrine. *North Carolina Board of Dental Examiners*, 151 F.T.C. 607, 617-28 (2011)

Interlocutory Orders, Etc.

(citing *Asheville Tobacco Bd. of Trade, Inc. v. FTC*, 263 F.2d 502, 509 (4th Cir. 1959)).

Nevertheless, the Supreme Court has yet to rule on the applicability of the active supervision prong to regulatory bodies controlled by private market participants. In addition, we have acknowledged that “the courts of appeals have been less than consistent on this issue.” *Id.* at 620. Given that a difficult legal question can be sufficient to establish a substantial showing of a likelihood of success on the merits, *North Texas Specialty Physicians*, 141 F.T.C. at 457; *California Dental*, 1996 FTC LEXIS 277 at *10, we conclude that Respondent has made a sufficient showing to warrant consideration of the equities. *Cf. Florida v. HHS*, 780 F. Supp. 2d 1307, 1317-20 (N.D. Fla. 2011) (granting stay pending appeal in part because of split in authority); *Pokorny v. Quixtar Inc.*, No. 07-00201, 2008 U.S. Dist. LEXIS 91951, at *4 (N.D. Cal. Apr. 17, 2008) (finding that a serious question was raised due to an apparent split among the federal courts); *In re Westwood Plaza Apts.*, 150 B.R. 163, 168 (Bankr. E.D. Tex. 1993) (granting stay pending appeal because the “Fifth Circuit has yet to address this question and the circuits which have are split”).

Irreparable Injury to Respondent Absent a Stay – Respondent bears the burden of demonstrating that denial of a stay will cause irreparable harm. Simple assertions of harm or conclusory statements based on unsupported assumptions will not suffice. *See Toys “R” Us*, 126 F.T.C. at 698; *California Dental*, 1996 FTC LEXIS 277, at *7. A party seeking a stay must show, with particularity, that the alleged injury is substantial and likely to occur absent a stay. *See Toys “R” Us*, 126 F.T.C. at 698; *California Dental*, 1996 FTC LEXIS 277, at *7.

In a declaration submitted in support of its Application, the Dental Board’s Chief Operating Officer asserts that the Commission’s Final Order will cause “significant irreparable harm to the State Board and the consuming public.” (White Declaration ¶ 3.) Specifically, he asserts that the Final Order will prevent the Board from enforcing the Dental Practice Act (*id.* ¶ 6), will limit the Board’s remedies for violations of the Dental Practice Act to seeking judicial relief (*id.* ¶ 5), will force the

Interlocutory Orders, Etc.

Board to adopt a particular interpretation of the Dental Practice Act (*id.* ¶ 4), and will force the Board to provide administrative hearings to non-licensees (*id.* ¶ 8). As explained in Section VII of the Commission's December 2, 2011 Opinion, each of these assertions is without merit and reflects a serious misreading of the Commission's Final Order.

Nevertheless, it does appear that at least certain portions of the Final Order, when implemented, may cause harm to the Board and have the potential to cause confusion if reversed by the Court of Appeals. In particular, Section III of the Final Order requires the Board to send corrective disclosures to each person to whom the Board previously sent a cease and desist letter or similar communication. If the Commission's decision were overturned on appeal, these persons could once again be subject to the Board's cease and desist letters. This repeated change in policy could create significant confusion about the law—not only for recipients of the notifications, but also for dentists, non-dentist teeth whiteners, and consumers. The Commission has held that where compliance with an order could cause confusion or require costly notification if reversed on appeal, a party may be irreparably injured. *See, e.g., Novartis Corp.*, 128 F.T.C. 233, 235-36 (1999); *California Dental*, 1996 FTC LEXIS 277, at *7. Accordingly, this factor weighs in favor of a stay, at least with respect to Section III of the Final Order.

Harm to Others and the Public Interest – The final remaining questions are whether a stay would harm other parties and whether it is in the public interest. *California Dental*, 1996 FTC LEXIS 277, at *7-8. These two factors are stated separately, but the FTC considers them together because Complaint Counsel is responsible for representing the public interest by enforcing the law. *See id.* at *8.

Respondent argues that a stay would not harm any party because it has stopped the challenged conduct: “Over the past two years, the State Board has sent no letters stating North Carolina law to non-dentist providers or to their commercial real estate landlords.” (Petition at 8; *see also* Reply at 13 (“The State Board has sent no communications to non-licensees regarding

Interlocutory Orders, Etc.

stain removal in the past two years.”)) Even if true,¹ this would not eliminate the potential for ongoing harm to consumers during the pendency of the appeal. For example, many non-dentist teeth whitening providers that had received cease and desist letters would continue to remain off the market, and potential entrants could be deterred from entering by the Board’s past conduct. Nevertheless, the Board’s apparent cessation of the conduct that led to this action substantially diminishes the potential for ongoing consumer harm during the appeal.

Conclusion – Although this motion presents a close call, we conclude that Respondent has satisfied the requirements for a stay pending appeal. On the one hand, there is some potential for ongoing harm to consumers in North Carolina during the pendency of the appeal. On the other hand, this case presents an important unresolved legal question, Respondent has represented that it has stopped the challenged conduct, and there is a potential for consumer confusion if the Commission’s Opinion and Final Order were overturned. We reiterate that the grant of stay pending appeal neither states nor implies doubt on our part as to the soundness of the Commission’s resolution of this matter. See *Novartis*, 128 F.T.C. at 234-35; *California Dental*, 1996 LEXIS 227, at *10.

Accordingly,

IT IS ORDERED THAT enforcement of the Commission’s Final Order of December 2, 2011 be stayed upon the filing of a timely petition for review of the Commission’s order in an appropriate Court of Appeals until issuance of the Court of Appeals’ mandate.

By the Commission, Commissioner Ramirez dissenting and Commissioner Brill recused.

¹ This assertion in Respondent’s brief is not supported by “affidavits or other sworn statements,” as required by Commission Rule 3.56(c), 16 C.F.R. § 3.56(c). Nevertheless, this assertion is consistent with the ALJ’s findings (IDF 208-218), and is not challenged by Complaint Counsel (Opposition at 7).

Dissenting Statement

Dissenting Statement of Commissioner Edith Ramirez

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

Dissenting Statement

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.

Dissenting Statement

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

Dissenting Statement

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.

Interlocutory Orders, Etc.

IN THE MATTER OF

THE DOW CHEMICAL COMPANY

Docket No. C-4243. Order, February 23, 2012

Letter approving the divestiture of the real property related to the Torrance Facility to Hager Pacific Properties.

LETTER ORDER APPROVING DIVESTITURE OF CERTAIN ASSETS

George S. Cary, Esq.
Cleary Gottlieb Steen & Hamilton LLP

*Re: In the Matter of The Dow Chemical Company, Docket No.
C-4243*

Dear Mr. Cary:

Pursuant to Rule 2.41(f) of the Commission's Rules of Practice, the Commission has determined to approve the Petition of The Dow Chemical Company For Approval of the Proposed Divestiture of the Real Property Related to the Torrance Facility to Hager Pacific.

In according its approval to Dow's Petition, the Commission has relied upon the information submitted by Dow and the acquiring entities, and the representations made by Dow, in the course of the Commission staff's review of Dow's Petition. The Commission has assumed the information and representations to be accurate and complete. The manner of divestiture considered by the Commission is that set forth in the Real Estate Purchase and Sale Agreement filed with the Petition.

By direction of the Commission.