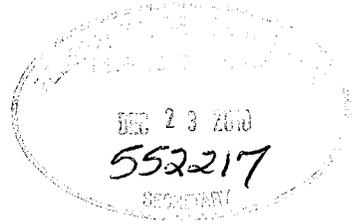


ORIGINAL



UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

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

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

**RESPONSE BY COUNSEL FOR RESPONDENT TO COMPLAINT COUNSEL'S  
SUPPLEMENTAL FILING IN REPLY TO RESPONDENT'S CORRECTED  
MEMORANDUM IN OPPOSITION TO COMPLAINT COUNSEL'S  
MOTION FOR PARTIAL SUMMARY DECISION  
(THE "SUPPLEMENTAL FILING")**

Counsel for Respondent hereby brings to the attention of the Commission the following Response to Complaint Counsel's Supplemental Filing:

1. In its Supplemental Filing, Complaint Counsel purported to present information relating to "important issues raised in this matter."
2. The information presented consisted of one statement by Respondent's Expert Witness, Dr. David Baumer. The statement consisted of one sentence containing 21 words, which is part of a three sentence paragraph, which is part of a two paragraph section entitled "Conclusions" in a sixteen page expert witness report.
3. Complaint Counsel has presented this information as it has repeatedly presented information and testimony throughout this proceeding: a short snippet of information or testimony that is deliberately taken out of context, is incomplete as to the

matter presented, does not provide additional information informing the reader of the import of the information provided, and thus is misleading and deceptive (see generally “Respondent’s Statement of Material Facts as to Which There Are and Are Not Genuine Issues”).

4. In addition, the information presented is to supplement Complaint Counsel’s Reply Brief to Respondent’s Memorandum in Opposition to Complaint Counsel’s Motion for Partial Summary Decision. As such, it is substantively and purposefully out of context, in addition to being contextually out of context.

5. Taken in context, the material presented by Complaint Counsel is included in the following and presented as follows:

#### IX. Conclusions

I do not contest Professor Kwoka’s statement that the actions of the State Board enforcing state law also benefit dentists financially. I do reject the claim that because a majority of the State Board are dentists that its actions are solely fashioned to benefit dentists. Unless I see evidence to the contrary, I believe that the actions of the State Board should be presumed to promote the public interest, which demands that practitioners of dentistry have training and education and are constrained by professional ethics that entitle them to a license issued by the State Board.

Given the weakness of his arguments and the evidence of harm to patients, Professor Kwoka makes the tepid claim that “elimination of the kiosk/spa teeth whitening option would likely harm consumers in North Carolina who are interested in teeth whitening.” The “harm” to consumers that concerns Professor Kwoka is the inconvenience of using one of three other methods for whitening teeth that are safe. He claims that elimination of competition would likely raise prices, but offers no quantitative data to justify that claim. Overall, Professor Kwoka’s Report is a broad based attack on professional licensing generally, an argument that is best made to state legislatures. It is clearly inappropriate to sue a State Board for enforcing a state law that it is charged with enforcing and about which there is no ambiguity.

6. Thus, it should appear that, taken in full context, Dr. Baumer's "information presented" by the supplemental filing is:

- not a legal analysis, but economic theory;
- offered for purposes of argument and discussion; and
- an integral part of a conclusory narrative, the sum and substance of which is far different from the "information presented" standing alone.

This statement relates to important issues raised in this matter, and addressed in Complaint Counsel's Reply to Respondent's Corrected Memorandum in Opposition to Complaint Counsel's Motion for Partial Summary Decision ("Reply") (pages 12-14); and, to its Supplemental Filing.

On December 20, 2010 at 4:00 p.m., Complaint Counsel filed its Reply. At 6:21 p.m., Respondent served Complaint Counsel with Respondent's Expert Witness Report of Dr. David L. Baumer. Dr. Baumer, Head of the Business Management Department at North Carolina State University, College of Management, had been asked by Respondent to review the Expert Report of Professor John Kwoka. Professor Kworks, the Neal F. Finnegan Distinguished Professor of Economics at Northeastern University, submitted an expert report on November 26, 2010.

Complaint Counsel indicated their supplemental filing was necessitated because the statement by Respondent's expert witness was not received by Complaint Counsel until 1) after Complaint Counsel's Reply was filed with the Secretary and 2) after the Secretary's Office was closed. It should be noted that Respondent's expert witness report was timely filed with the Commission and timely served upon Complaint Counsel. This Response was necessitated by the untimely filing of Complaint Counsel's Supplemental

Filing and necessitated in order to place upon the record of the proceeding a correct and true version of selected information from Respondent's Expert Witness Report.

This the 22nd day of December, 2010.

ALLEN AND PINNIX, P.A.

/s/ Alfred P. Carlton, Jr.

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

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## CERTIFICATE OF SERVICE

I hereby certify that on December 22, 2010, I electronically filed the foregoing with the Federal Trade Commission using the FTC E-file system, which will send notification of such filing to the following:

Donald S. Clark, Secretary  
Federal Trade Commission  
600 Pennsylvania Avenue, N.W.  
Room H-135  
Washington, D.C. 20580

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

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

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

This the 22nd day of December, 2010.

/s/ Alfred P. Carlton, Jr.

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Alfred P. Carlton, Jr.

#### **CERTIFICATION FOR ELECTRONIC FILING**

I further certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and by the adjudicator.

/s/ Alfred P. Carlton, Jr.

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Alfred P. Carlton, Jr.