IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

LISA COLINDRES and ENLIGHTENED EXPRESSIONS, LLC, Plaintiffs, v. TANJA D. BATTLE, in her official capacity as Executive Director of the Board of Dentistry, STEVE HOLCOMB, H. BERT YEARGAN, RICHARD BENNETT, REBECCA BYNUM, RANDY DANIEL, TRACY GAY, THOMAS P. GODFREY, GREGORY G. GOGGANS, LOGAN "BUZZY" NALLEY, JR., ANTWAN L. TREADWAY, all in their official and individual capacities as Members of the Georgia Board of Dentistry, and SAMUEL S. OLENS, in his official capacity as the Attorney General of Georgia, Defendants.	:	CIVIL ACTION FILE NO. 1:15-CV-2843-SCJ

ORDER

This matter is before the Court on Defendants' motion to dismiss [5] and Plaintiffs' motion to re-file response to Defendants' motion to dismiss [15].

I. Background

A. Procedural History and Facts Alleged in Complaint

On August 12, 2015, Plaintiffs, Lisa Colindres and her company Enlightened Expressions, filed suit against Defendants Tanja D. Battle, in her official capacity as Executive Director of the Board of Dentistry, Steve Holcomb, H. Bert Yeargan,

Richard Bennett, Rebecca Bynum, Randy Daniel, Tracy Gay, Thomas P. Godfrey, Gregory G. Goggans, Logan "Buzzy" Nalley, Jr., Antwan L. Treadway, all in their official and individual capacities as Members of the Georgia Board of Dentistry, and Samuel S. Olens, in his official capacity as the Attorney General of Georgia, alleging various causes of action relating to Georgia's Dental Practice Act and the implementation of the Act by the Georgia Board of Dentistry and its members. Defendants then filed the instant motion to dismiss. See Doc. No. [14].

Plaintiff Colindres, the sole proprietor of Plaintiff Enlightened Expressions, is a "teeth-whitening entrepreneur who performs teeth-whitening services." See Cmplt., ¶ 1. Plaintiffs allege that the "services performed are analogous to the services any consumer can purchase via over-the-counter products." Id. The Georgia Board of Dentistry has taken the position that under Georgia's Dental Practice Act teeth-whitening services constitute the unlicensed practice of dentistry which is a felony offense in Georgia punishable by imprisonment for two to five years, a fine of up to $1000 or both. Id. The "Board's agents have been harassing the Plaintiffs and making threats, while simultaneously failing to take any formal enforcement action." Id., ¶ 3.

Plaintiffs define the relevant market as the teeth-whitening market in which dentists and non-dentists offer services. Id., ¶ 8. Many dentists offer patients both in-home and take-home teeth whitening kits. Id., ¶ 10. In the past several years,

entrepreneurs such as Plaintiff Colindres, have started to offer teeth-whitening services in salons, retail stores, and mall kiosks. Id., ¶ 11. Plaintiff Colindres describes her service as follows:

> The provider hands a strip or tray containing peroxide to the customer, who applies it to his or her own teeth. The customer's teeth are then exposed to a light-emitting diode ("LED") light source for 15 to 30 minutes. The amount of hydrogen peroxide applied to the teeth at non-dentist outlets generally falls into the 10-15 percent range. This is a greater concentration than over the counter products (usually 10 percent or less), but less than the concentration employed in dentist-applied products (approximately 20-35 percent). The Plaintiffs do not touch the customer's mouth.

Id., ¶ 12. Plaintiffs typically charge $150 per session, while dentists charge "anywhere from $300 to $700, and sometimes more." Id., ¶ 13. The products used by dentists and non-dentists in teeth-whitening "have reasonable interchangeability." Id., ¶ 14.

The dentist members of the Board and dentists of Georgia compete with each other and with non-dentist providers of teeth-whitening services. Id., ¶ 15. Each Board member continues to operate separate dental practices while serving on the Board and thus has "a personal financial interest in excluding non-dentist teeth-whitening service." Id., ¶ 16. "Upon information and belief, each dentist Board member offers teeth-whitening services as part of said member's practice." Id., ¶ 17.

Beginning in the early 2000s, in response to complaints from dentists, the Board began opening investigations into teeth-whitening services performed by non-dentists. Id., ¶¶ 19-20. The Board discussed these complaints and told practicing dentists it was attempting to shut down the non-dentist providers. Id., ¶ 21. "The Board demonstrated a unity of purpose, as well as common design and understanding, to eliminate non-dentist teeth-whitening." Id., ¶ 22. The Board "possess[es] a conscious commitment to a common scheme designed to achieve an unlawful objective." Id., ¶ 23. The "Board's intrafirm agreements act simply as a formalistic shell for ongoing concerted action." Id., ¶ 24.

The Board has issued letters on official letterhead that non-dentists providing teeth-whitening services should "cease and desist" all activity constituting the practice of dentistry. The letters "refer to or threaten" fines and potential criminal sanctions. Id.,¶ 26. The "Board also uses its investigators and agents to verbally threaten non-dentists from providing teeth-whitening services." Id.,¶ 28. The Board's "lengthy consistent campaign of sending letters and making threats to non-dentists is suggestive of and indicates coordinated action." Id., ¶ 29.

The Georgia Dental Practice Act does not expressly address teeth-whitening. Id.,¶ 30. The Board has decided that the provision of teeth-whitening services by non-dentists constitutes the unlicensed practice of dentistry. Id., ¶ 31. The Board does not interpret stores engaging in the sale of teeth-whitening products to be

practicing dentistry. But the Board has taken the position that "any service provided along with a teeth-whitening product, including advice, guidance, providing a customer with a personal tray, whitening solution, mouth piece and/or LED light, or providing a location to use the whitening product, constitutes the practice of dentistry." Id., ¶ 32.

An individual must receive a doctoral degree in dentistry and pass an examination approved by the Georgia Board of Dentistry to become a licensed dentist in Georgia. Id., ¶ 34. A doctoral degree in dentistry typically requires a four-year course of study in addition to an undergraduate degree. Id., ¶ 35. The cost of dental school tuition in Georgia can range from $85,000 to $240,000. Id., ¶ 36.

The Board consists of 11 members appointed by the Governor, including 9 dentists, 1 dental hygienist, and a non-dentist. There is a currently a vacancy in the non-dentist slot. Id., ¶ 37. The Board has "sufficient market power to affect competition, and deter and coerce non-dentists from providing teeth-whitening services." Id., ¶ 42. The Board's actions have a "detrimental effect" on competition. Id., ¶ 43. While the Board has not yet initiated formal enforcement actions against Plaintiffs, it has (through its agents) threatened Plaintiff with prospective penalties and engaged in harassing behavior toward Plaintiff. Id., ¶ 44. Plaintiffs' business "is currently suffering as a result of the Board's agents making threats, sometimes in the presence of consumers, but refusing to take any formal action." Id., ¶ 50. The Board's

agent has encouraged Plaintiffs to voluntarily cease operations "but has refused to provide any writings to such effect." Id., ¶ 57. The Board's agent also advised Plaintiff Colindres not to seek legal representation. Id., ¶ 58.

Plaintiffs allege Defendants' actions have violated the Sherman Act, constitute a prior restraint of speech in violation of the First and Fourteenth Amendments, and violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Plaintiffs also aver that Georgia's Dental Practice Act is unconstitutionally overbroad and vague.

B. Contentions

Defendants argue that the Court should dismiss Plaintiffs' complaint because Plaintiffs are not entitled to injunctive relief under § 1983 for acts Defendants have taken in their "judicial capacity." Defendants further contend that Plaintiffs do not have standing to raise an antitrust claim and have failed to plead their antitrust claim with the required specificity. Defendants aver that Plaintiffs' First Amendment claim fails because the Board's acts are content-neutral and directed toward the unauthorized practice of dentistry and not speech. Defendants argue that under rational basis review, Plaintiffs' equal protection and substantive due process claims fail because there are rational reasons for distinguishing between stores that merely sell teeth whitening products and Plaintiffs, here, who offer services in conjunction with sales of products. Finally, Defendants contend that Plaintiffs cannot raise a

constitutionally vague claim with respect to the Georgia Dental Practice Act because Plaintiffs' conduct is clearly proscribed by the statute. Moreover, Defendants allege, Plaintiffs have not plead any particular words, portions, or definitions, in the statute which they contend are impermissibly vague.

Plaintiffs respond that they are entitled to injunctive and declaratory relief under § 1983 because the Board is not acting in a "judicial" capacity and because Plaintiffs did not need to exhaust their administrative remedies prior to bringing a § 1983 claim. Plaintiffs contend that Burford abstention is not appropriate in this case because an attack on a single statute is unlikely to disrupt the state's regulation of the dental industry. Plaintiffs argue they have sufficiently stated a claim under the Sherman Act because they allege that the Board holds a monopoly power and it willfully acquired that power. Plaintiffs also state they have standing to pursue a monopoly claim because they have alleged an antitrust injury. Plaintiffs contend the Court should not dismiss their Equal Protection and Due Process claims because there is no rational basis for distinguishing between a store that sells teeth-whitening products and an entrepreneur who sells those products and offers a customer space to use them. Finally, Plaintiffs aver that Georgia's Dental Practice Act is unconstitutional because it is overbroad and vague.[1]

[1]In a minute order dated September 29, 2015, the Court denied the motions of both Defendants and Plaintiffs to exceed page limits on their briefs. Defendants filed

a motion to re-file their brief and attached their proposed brief which complied with the page limits. The Court granted that motion and Defendants' motion to dismiss was re-filed at Docket Entry [14].

Plaintiffs also filed a motion to re-file their response brief, but did not attach a proposed brief. Before the Court had ruled on that motion and directed Plaintiffs to file their renewed brief, Defendants filed their reply brief which responded to Plaintiffs' original response brief. Given that the parties have fully briefed Defendants' motion to dismiss on the basis of Plaintiffs' response at Docket Entry [11], the Court finds it would be inefficient now to go back and have Plaintiffs file a shortened response. The Court has considered Plaintiffs' response at Docket Entry [11] and therefore DENIES AS MOOT Plaintiffs' motion to re-file response.

II. Discussion[2]

A. Burford Abstention and Injunctive Relief

Defendants argue that the Court should apply Burford abstention because Plaintiffs' complaint asks the Court to define the practice of dentistry which is a core function of the State's power to regulate and protect the health of its citizens. The Supreme Court has explained Burford abstention as follows:

> Where timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar"; or (2) where the "exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern."

New Orleans Pub. Serv., Inc. v. Council of the City of New Orleans, 491 U.S. 350, 361 (1989) (citation omitted); see also Siegel v. LePore, 234 F.3d 1163, 1173 (11th Cir. 2000). "A central purpose furthered by Burford abstention is to protect complex state administrative processes from undue federal interference." Siegel, 234 F.3d at 1173. "Further, Burford is implicated when federal interference would disrupt a state's

[2]The Court recognizes that two other complaints in the Northern District of Georgia have raised certain similar claims as those alleged here and that those courts have entered orders granting in part and denying in part Defendants' motions to dismiss. See Eck v. Battle, Civil Action No. 1:14-CV-962-MHS and Collins v. Battle, Civil Action No. 1:14-CV-3824-LMM.

effort, through its administrative agencies, to achieve uniformity and consistency in addressing a problem." Id. Finally, Burford abstention is an "extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it." Id.

The Court finds that its consideration of Plaintiffs' challenge to the Georgia Dental Practice Act would not disrupt state regulation because it addresses only a small portion of the statute and would not disrupt the entire dental regulatory scheme. See Rindley v. Gallagher, 929 F.2d 1552, 1553-57 (11th Cir. 1991) (declining to apply Burford abstention where dentist challenged constitutionality of Florida's procedures for issuing dentists letters of guidance without notice or hearing); BT Inv. Managers, Inc. v. Lewis, 559 F.2d 950 (5th Cir. 1977) (declining to apply Burford abstention where plaintiffs challenge constitutionality of amendment to Florida's Banking Code).

As to injunctive relief, 42 U.S.C. § 1983 provides in part that "in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable." Id. Defendants concede that Plaintiffs may seek declaratory and injunctive relief against Defendants in their official capacity. Defendants, however, argue that under the Federal Courts Improvement Act of 1996 passed after Pulliam v. Allen, 466 U.S. 522 (1984), section

1983 bars injunctive relief against "judicial officers" and suggests that the Court should interpret "judicial officers" to include Board members performing "quasi-judicial" functions in the scope of their official duties. Plaintiffs respond that the Federal Courts Improvement Act explicitly used the term "judicial officers" and the statutory history of the act discusses only federal and magistrate judges.

The Eleventh Circuit had not yet addressed the scope of "judicial officers" under section 1983. In Eck v. Battle, Civil Action No. 1:14-CV-962-MHS and Collins v. Battle, Civil Action No. 1:14-CV-3824-LMM, two previous cases against members of the Georgia Board of Dentistry, the courts determined that "judicial officers" should be construed to cover only judges based on the plain language of the statute. Given that the Court finds below that all of Plaintiffs' constitutional challenges are due to be dismissed, the Court need not resolve this issue.

Finally, Plaintiffs are not barred from seeking declaratory relief due to any failure to pursue state administrative remedies. Under Patsy v. Board of Regents, 457 U.S. 496 (1982), exhaustion of state administrative remedies is not a prerequisite to a § 1983 action seeking prospective relief.

B. Equal Protection and Substantive Due Process

No party disputes that the Court should employ rational basis review of the Board's classifications because economic regulation and protection of the public is a legitimate government interest. In Federal Communications Commission v. Beach Communications, Inc., 508 U.S. 307 (1993), the Supreme Court reiterated the framework for analyzing equal protection challenges to statutes not involving suspect classes in areas of social and economic policy. Beach analyzed the Cable Communications Policy Act of 1984 where Congress distinguished between the regulation of cable television facilities in separately owned and managed buildings as opposed to buildings under common ownership and management, exempting those in the latter category from regulation under certain circumstances. Id. at 309. As an initial matter, the Court noted:

> equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. . . . The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted.

Id. at 313-14 (quotations and citations omitted). On a "rational-basis review" the classification bears a "strong presumption of validity" and a party challenging the

classification must "negate every conceivable basis which might support it." Id. at 314-15.

Significantly, the Court stated that "a legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." Id. at 315. Furthermore, the Court noted that these "restraints on judicial review have added force where the legislature must necessarily engage in a process of line-drawing." Id. (quotation and citation omitted).

> Defining the class of persons subject to a regulatory requirement – much like classifying governmental beneficiaries – inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line, and the fact [that] the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration.

Id. at 315-16 (quotation and citation omitted).

As the Court noted with respect to the cable regulation at issue in Beach, Congress delineated the bounds of the regulatory field by subjecting some systems to regulation and not others. "Such scope-of-coverage provisions are unavoidable components of most economic or social legislation. This necessity [of line-drawing] renders the precise coordinates of the resulting legislative judgment virtually unreviewable, since the legislature must be allowed leeway to approach a perceived problem incrementally." Id. at 316 (citing Williamson v. Lee Optical, 348 U.S. 483 (1955)). In Beach, the Court accepted as the basis for the distinction the belief that

"common ownership was thought to be indicative of those systems for which the costs of regulation would outweigh the benefits to consumers." Id. at 317. The Court concluded by noting that the "assumptions underlying these rationales may be erroneous, but the very fact that they are 'arguable' is sufficient, on rational-basis review, to 'immunize' the [legislative] choice from constitutional challenge." Id. at 320 (citation omitted).

The Eleventh Circuit applied this analysis in Panama City Medical Diagnostic Ltd. v. Williams, 13 F.3d 1541 (11th Cir. 1994). There, the plaintiffs alleged that a Florida statute exempting hospitals and group practices from statutory fee cap on the provision of diagnostic imaging services violated the Equal Protection Clause. The court noted that "in cases involving economic classifications, the rational basis test is extremely lenient." Id. at 1545 (citing Beach). "A searching inquiry into the validity of legislative judgments concerning economic regulation is not required. . . . The task is to determine if any set of facts may be reasonably conceived of to justify the legislation." Id. (quotation and citation omitted). Thus, "even if these rationales are based on faulty premises, the fact that they are arguable guides our decision in this case." Id.; see also Leib v. Hillsborough County Pub. Transp. Comm'n, 558 F.3d 1301, 1306 (11th Cir. 2009) (rejecting equal protection claim regarding definition of "luxury" in county taxi regulation); Georgia Cemetery Ass'n, Inc. v. Cox, 353 F.3d 1319, 1321 (11th Cir. 2003) (per curiam) (rejecting equal protection claim where state

law imposed certain rules and regulations on private cemeteries but exempted religious cemeteries); Haves v. City of Miami, 52 F.3d 918 (11th Cir. 1993) (rejecting equal protection challenge to city ordinance that banned houseboats in the city, but "grandfathered" certain city areas).

Importantly, under rational basis review, "two things become *irrelevant* to the inquiry. *First*: Whether the conceived reason was in fact the reason for the legislation." Georgia Cemetery Ass'n, 353 F.3d at 1321 (emphasis in original). "*Second*: Whether substantial evidence supports the conceived rationale. Even if the legislation is based on 'faulty premises,' so long as there is any '*conceivable* rational basis' to differentiate . . . the court cannot become involved in an evidentiary contest as to whether this is an actual rational basis for such differentiation. Id. (emphasis in original).

Finally, the Court notes that in Sensational Smiles, LLC v. Mullen, 793 F.3d 281 (2d Cir. 2015) (Calabresi, J.), the Second Circuit faced this exact question when considering whether a Connecticut rule restricting the use of certain teeth-whitening procedures to licensed dentists was unconstitutional. The court rejected the plaintiff's argument that there was no rational basis upon which to bar an unlicensed teeth-whitening professional from guiding or positioning an LED light in a customer's mouth but permit the unlicensed teeth-whitening professional to instruct to the consumer on how to position the light. The court stated:

> The law . . . does not require perfect tailoring of economic regulations, and the Dental Commission can only define the practice of dentistry; it has limited control over what people choose to do to their own mouths. Moreover, and perhaps more importantly, individuals are often prohibited from doing to (or for) others what they are permitted to do (or for) themselves.

Id. at 285.[3]

Here, the Court finds there is a conceivable rational basis for differentiating between stores that sell teeth-whitening products and Plaintiffs who plead in their complaint that they do more than simply sell the products; Plaintiffs also give the customer a strip or a tray with peroxide (no specification on how this tray is prepared or where it comes from); the customer applies to peroxide to his own teeth; the teeth are then exposed to an LED light source (no discussion of who holds the light); and Plaintiffs do not touch the customer's mouth.

For all of these reasons, the Court GRANTS Defendants' motion to dismiss as to Plaintiffs' equal protection claim. As both Plaintiffs' Equal Protection and Substantive Due Process claims are analyzed under a "rational basis" test, the Court also GRANTS Defendants' motion to dismiss as to Plaintiffs' substantive due process claim. See, e.g., Gary v. City of Warner Robins, Georgia, 311 F.3d 1334, 1339 n.10

[3]The Sensational Smiles court went the additional step of holding that even if the only conceivable basis for distinction was economic favoritism, that would also form a rational basis. Id. at 286. Because the Court find that there is a rational public welfare basis for the line-drawing here, the Court need not address whether economic favoritism on its own would survive rational basis review.

(11th Cir. 2002) ("rational basis test utilized with respect to an equal protection claim is identical to the rational basis test utilized with respect to a substantive due process claim" and court "need not reiterate our analysis").

C. Antitrust

Before the Court considers Defendants' arguments that Plaintiffs do not have "antitrust standing" and have not alleged any injury, the Court addresses Plaintiffs' comments concerning North Carolina State Board of Dental Examiners v. FTC, 135 S. Ct. 1101 (2015). Contrary to Plaintiffs' view, while the plaintiffs in North Carolina State Board of Dental Examiners allege similar antitrust violations concerning the attempted regulation of non-licensed teeth-whitening providers, the Court did not address any substantive antitrust argument in its opinion. Rather, the Court considered (and rejected) only Defendants' argument that the Board was entitled to Parker state action immunity from federal antitrust law. Id. The Court did not "affirm" the Fourth Circuit's opinion on the broader antitrust grounds. In fact, the Court was explicit in limiting the scope of its holding because it refers to the substantive antitrust proceedings as "not relevant here." Id. at 1109. Because Defendants here have not raised any Parker state action immunity defense, North Carolina State Board of Dental Examiners is not relevant to the Court's consideration of Defendants' motion to dismiss.

Plaintiffs are correct, however, that the lower court in North Carolina State Board of Dental Examiners v. FTC, 717 F.3d 359 (4th Cir. 2013), did uphold the determination of the Federal Trade Commission that the North Carolina Board had conspired under the Sherman Act and that the Board's cease-and-desist letters were likely to cause significant anticompetitive harms. Significantly, however, the Fourth Circuit's opinion did not address the arguments raised by Defendants here – that Plaintiffs do not have "antitrust standing" and that Plaintiffs have not sufficiently alleged any harm suffered by them.

Courts have developed the notion of "antitrust standing" because a "literal reading of the [Sherman Act] is broad enough to encompass every harm that can be attributed directly or indirectly to the consequences of the antitrust violation." See, e.g., Associated Gen. Contractors of Cal., Inc. v. Cal State Council of Carpenters, 459 U.S. 519, 529 (1983). "Standing in an antitrust case involves more than the 'case or controversy' requirement that drives constitutional standing." Todorov v. DCH Healthcare Authority, 921 F.2d 1438, 1448 (11th Cir. 1991). The plaintiff must allege an "antitrust injury" which the Supreme Court has described as an "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be the type of loss that the claimed violations. . . would be likely to cause."

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977) (quotations and citations omitted).

Here, Plaintiffs allege that the relevant market is the teeth-whitening market in which dentists and non-dentists offer services. Cmplt, ¶ 8. They also allege that the dentist members of the Board and dentists of Georgia compete with each other and with non-dentist providers of teeth-whitening services. Id., ¶ 15. Each Board member continues to operate separate dental practices while serving on the Board and thus has "a personal financial interest in excluding non-dentist teeth-whitening service." Id., ¶ 16. "Upon information and belief, each dentist Board member offers teeth-whitening services as part of said member's practice." Id., ¶ 17.

Plaintiffs continue to state that after receiving complaints from dentists, the Board began to investigate teeth-whitening services performed by non-dentists. Id., ¶¶ 19-20. The Board discussed these complaints and told practicing dentists it was attempting to shut down the non-dentist providers. Id., ¶ 21. "The Board demonstrated a unity of purpose, as well as common design and understanding, to eliminate non-dentist teeth-whitening." Id., ¶ 22. The Board "possess[es] a conscious commitment to a common scheme designed to achieve an unlawful objective." Id., ¶ 23. The "Board's intrafirm agreements act simply as a formalistic shell for ongoing concerted action." Id., ¶ 24.

The Board has issued "cease and desist" to non-dentists performing teeth-whitening services. The letters "refer to or threaten" fines and potential criminal sanctions. Id.,¶ 26. The "Board also uses its investigators and agents to verbally threaten non-dentists from providing teeth-whitening services." Id.,¶ 28. The Board's "lengthy consistent campaign of sending letters and making threats to non-dentists is suggestive of an indicates coordinated action." Id., ¶ 29.

Finally, Plaintiffs allege that the Board has "sufficient market power to affect competition, and deter and coerce non-dentists from providing teeth-whitening services." Id., ¶ 42. The Board's actions have a "detrimental effect" on competition. Id., ¶ 43.

The Court finds these allegations sufficient to establish an injury under "antitrust standing" because these alleged injuries are the type the antitrust laws were intended to prevent and Plaintiffs' allegations connect the injury to actions taken by Defendants. The injury reflects the anticompetitive effect of Defendants' alleged violations.

But Plaintiffs need to allege more than just a relevant injury to satisfy "antitrust standing." "[A]ntitrust standing is not simply a search for an injury in fact; it involves an analysis of prudential considerations aimed at preserving the effective enforcement of the antitrust laws." Todorov, 921 F.2d at 1448. "Antitrust standing is best understood in a general sense as a search for the proper plaintiff to enforce the

antitrust laws." Id. The Court is required to "evaluate the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them." Id. (quotations and citations omitted); see also Sunbeam Television Corp. v. Nielsen Media Research, Inc., 711 F.3d 1264, 1270 (11th Cir. 2013). That is, "the plaintiff must be an efficient enforcer of the antitrust laws." Palmyra Park Hosp., Inc. v. Phoebe Putney Memorial Hosp., 604 F.3d 1291, 1299 (11th Cir. 2010).

To determine whether a plaintiff is an efficient enforcer, the Court must consider factors such as "the directness or indirectness of the injury, the remoteness of the injury, whether other potential plaintiffs were better suited to vindicate the harm, whether the damages were highly speculative, the extent to which the apportionment of damages was highly complex and would risk duplicative recoveries, and whether the plaintiff would be able to efficiently and effectively enforce the judgment." Palmyra Park Hospital, 604 F.3d at 1299.

As damages, Plaintiffs allege that while the Board has not yet initiated formal enforcement actions against Plaintiffs, it has (through its agents) threatened Plaintiff with prospective penalties and engaged in harassing behavior toward Plaintiff. Id., ¶ 44. Plaintiffs' business "is currently suffering as a result of the Board's agents making threats, sometimes in the presence of consumers, but refusing to take any formal action." Id., ¶ 50. The Board's agent has encouraged Plaintiffs to voluntarily cease operations "but has refused to provide any writings to such effect." Id., ¶ 57.

The Board's agent also advised Plaintiff Colindres not to seek legal representation. Id., ¶ 58.

The Court finds that under these circumstances, Plaintiffs can be an efficient enforcer. Significant to the Court's determination is the fact that according to Plaintiffs' allegations the Board has not taken any direct enforcement action against any non-dentist provider of teeth-whitening services; nor has the Board issued any rules or regulations which directly address the question of whether the provision of teeth-whitening services constitute the practice of dentistry. As such, there has not yet been a direct avenue through which to challenge the Board's actions. Had the Board taken more direct action against other providers, the Court might find that the "mere" threats against Plaintiffs here are not yet sufficient injury. But the Board may not avoid scrutiny by declining to enter the rulemaking process or by failing to take any direct enforcement action. As such, while the Court understands Defendants' argument to be that Plaintiffs' store-front is still open for business and other businesses have received an actual cease and desist letter and not just the threat of one, the Court finds Plaintiffs can still be efficient enforcers.

The Court also disagrees with Defendants' argument that Plaintiffs have not plead their antitrust claims with sufficient specificity. Unlike a traditional monopoly claim where a plaintiff might have to give greater detail to describe the manner in which independent companies acted in concert; here, the alleged conspirators are not

separate companies, but rather are all of the individuals working together on the Board. The manner in which the Board functions provides the context for their concerted activity. Plaintiffs have alleged that upon receiving complaints from dentists, the Board made the decision to investigate the provision of teeth-whitening services by non-dentists and to issue or threaten to issue cease-and-desist letters to non-dentists providing this service. Under these particular circumstances, the Court does not find that greater pleading detail is required at the motion to dismiss stage. For these reasons, the Court DENIES Defendants' motion to dismiss Plaintiffs' antitrust claims.

D. First Amendment

The precise nature of Plaintiffs' First Amendment claim is unclear. The Court believes that Plaintiffs claim an infringement of commercial speech via advertising, but Plaintiffs do not articulate in what manner their speech has been restricted. Plaintiffs do generally contend that the "Board's actions constitute an extralegal and unconstitutional prior restraint of speech." See Cmplt., ¶ 79. Plaintiffs also allege that the Board's actions in threatening non-dentist providers of teeth-whitening services is the least restrictive means to accomplish a compelling state interest. Id., ¶ 82.

As an initial matter, Plaintiffs do not even allege that they have or would like to engage in advertising or that this interest has been adversely affected by the Board's actions. Nor do Plaintiffs allege any manner in which "threats" to close their

business translate into a suppression of their attempts to advertise. The Georgia Dental Practice Act regulates "activities" and not "speech" so the Court find that the First Amendment cannot be at issue. Furthermore, the Dental Practice Act is content-neutral because it does not make any reference to the content of speech but rather addresses the unauthorized practice of dentistry. Moreover, the Court finds that none of Plaintiffs' allegations relate to any "broader category of expressive activity in which conduct itself can be said to convey a particularly message and, thus, be entitled to protection as symbolic speech." Wine & Spirits Retailers, Inc. v. Rhode Island, 418 F.3d 36, 49 (1st Cir. 2005) (citing United States v. O'Brien, 391 U.S. 367, 376-77 (1968)). For all of these reasons, the Court finds that Plaintiffs have failed to allege a First Amendment claim.

E. Constitutionality

1. Overbroad (First Amendment and/or Due Process)

The "overbreadth doctrine" is an exception to prudential standing principles and "applies in First Amendment cases involving non-commercial speech and [] permits third-party standing when a statute is constitutionally applied to the litigant but might be unconstitutionally applied to third parties not before the court." Granite State Outdoor Advertising, Inc. v. City of Clearwater, 351 F.3d 1112, 1116 (11th Cir. 2003) (citing Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 634 (1980) (emphasis in original)). As the Court explained above,

however, Plaintiffs have not sufficiently alleged any relationship between their claims and the First Amendment.

A due process overbreadth challenge relates to whether statutory language is so vague that it allows for selective enforcement. See, e.g., Smith v. Goguen, 415 U.S. 556, 576 (1974). However, if a plaintiff is engaged in conduct that is clearly prohibited by a statute, that individual may not raise an overbreadth challenge. See, e.g., United States v. De Pietro, 615 F.3d 1369, 1371 (11th Cir. 2010). Only if a plaintiff challenges on the basis of the First Amendment can he make a facial attack. If he challenges on due process grounds, then he can only challenge the statute as applied to his own conduct and Plaintiffs have not sufficiently alleged that their own conduct is constitutionally protected.

2. Impermissibly Vague

The Dental Practice Act regards as "practicing dentistry" any person who performs the following "procedures, operations, or services." See O.C.G.A. § 43-11-17. It then describes those activities to include: (1) dental operation on the human oral cavity, teeth, and other structures for the purpose of treatment of disease, (2) extraction of teeth or correction of malposition, (3) filling or crowning a human tooth, (4) any dental operation on the human oral cavity, teeth, and other structures, (5) examining the human oral cavity, teeth and associated structure for the purpose of treatment of disease, and (6) any person who

> [s]upplies, makes fits, repairs, adjusts, or relines, directly for or to an ultimate user of the product in the State of Georgia, any appliance, cap, covering, prosthesis, or cosmetic covering, as defined by rules and regulations established by the board, usable on or as human teeth unless such provision, production, fit, repair, adjustment, or reline of such product is ordered by and returned to a licensed dentist or unless such product is used solely for theatrical purposes as defined by rules and regulations established by the board.

O.C.G.A. § 43-11-17(a). Under the rules and regulations promulgated by the Board, an "appliance" includes any "removable structure" used to "chang[e] the appearance of teeth" or "chang[e] the shape or shade of teeth." See Ga. Camp. R. & Regs. 150-14-.01. "Cosmetic covering" means "any fixed or removable artificial structure or product used or worn as a covering on natural or artificial human teeth created with a model, impression or any other measuring device . . . of the human mouth or any portion thereof and used solely for cosmetic purposes." Id.

Plaintiffs contend that Georgia's statute is impermissibly vague because (1) it fails to sufficiently provide notice as to what constitutes the practice of dentistry, (2) nothing in the Board's rules and regulations would allow an ordinary observer to understand that the provision of teeth-whitening services is prohibited, and (3) the statutory scheme allows for arbitrary enforcement because the Board's position is that the sale of teeth-whitening products is exempt because it is "available commercially and is marketed to the public."

"Due process requires 'that the law must be one that carries an understandable meaning with legal standards that courts must enforce.'" Harris v. Mexican Specialty Foods, Inc., 564 F.3d 1301, 1310 (11th Cir. 2009) (quoting Giaccio v. State of Pa., 382 U.S. 399, 403 (1966)). "The void-for-vagueness doctrine reflects the principle that a statute which either forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." Id. (quotation and citation omitted); see also United States v. Lanier, 520 U.S. 259, 266 (1997) (vagueness is "related manifestation[]of the fair warning requirement").

A court, however, reviews "statutes for vagueness concerns only when a litigant alleges a constitutional harm." Bankshot Billiards, Inc. v. City of Ocala, 634 F.3d 1340, 1349 (11th Cir. 2011). "The harms – or, injury, if you like – come in two forms." Id. The first is when a person violates the law, is indicted, and then moves to either dismiss the indictment or reverse a conviction arguing that he did not have notice that his conduct was proscribed. Id. The second is when "a litigant asks the federal court to review a vague statute before the State seeks to enforce its law, known as pre-enforcement review." Id. at 1350. Even though the court does not know whether the litigant will ever be deprived of his liberty without due process, the vague law has caused a separate injury: "the litigant is chilled from engaging in constitutionally protected activity." Id.

Significantly, however, the activity that is "chilled" must be a constitutional activity; it cannot be a "normal business activity." Id. For example, in Bankshot Billiards, the plaintiff was "simply unsure whether it may simultaneously serve alcohol and permit entry to persons under twenty-one." Id. The court found this was not a constitutionally protected activity. Similarly, here, Plaintiffs are engaged in normal business activity of providing teeth-whitening services and not a constitutionally protected activity.[4] Therefore, the Court finds Plaintiffs may not raise a "vagueness" challenge under a "pre-enforcement review" theory.

Even if Plaintiffs could bring a void-for-vagueness challenge, it would not succeed. "To overcome a vagueness challenge, statutes must 'give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly' and 'must provide explicit standards for those who apply them.'" Leib v. Hillsborough County Pub. Transp. Comm'n, 558 F.3d 1301, 1310 (11th Cir. 2009) (quoting Grayned v. City of Rockford, 408 U.S. 104, 108 (1972)). The "degree of vagueness that the Constitution tolerates . . . depends in part on the nature of the enactment." Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455

[4]In their response, Plaintiffs generally assert that the "right to earn a living is fundamental, natural, inherent, and it one of the most sacred and valuable rights of a citizen." See Doc. No. [11], p. 26. However, Plaintiffs cite only to Georgia cases for this proposition. "The [Supreme] Court, however, has never held that the right to pursue a particular occupation is a fundamental right." Jones v. Board of Comm'rs of Alabama State Bar, 737 F.3d 996, 1000 (11th Cir. 1984).

U.S. 489, 498 (1982). Courts are more tolerant of a vague statute that "simply regulates business behavior." Kolender v. Lawson, 41 U.S. 352, 358 n.8 (1983) (quotation and citation omitted).

Here, Plaintiffs do not point precisely to which portions of the statute they believe are vague. The Court finds that the statute and regulations make clear that tooth whitening gels are a "cosmetic covering;" that the provision of teeth whitening services involves "examining the oral cavity;" that supplying a "cosmetic covering" is a dental service and involves a "physical evaluation" of a customer. Thus, the Court finds that a person of ordinary intelligence can discern what is prohibited under the Act.

The Court rejects Plaintiffs' assertion that only the "fabrication" of a "cosmetic covering" or "appliance" constitutes the prohibited practice of dentistry. See Doc. No. [11], pp. 30-31 & n.85. While the regulations specifically define "fabrication," the statute itself, provides that anyone who "supplies" any "appliance, cap, covering, prosthesis, or cosmetic covering, as defined by rules and regulations established by the board," also engages in the practice of dentistry. See O.C.G.A. § 43-11-17(a)(6). Similarly, the Court rejects Plaintiffs' contention that the Act would criminalize a football coach who provides a football player with a mouth guard. The two definitions in the Act that affect Plaintiffs' activities are an "appliance" which includes any "removable structure" used to "chang[e] the appearance of teeth" or

"chang[e] the shape or shade of teeth" and a "cosmetic covering" which means "any fixed or removable artificial structure or product used or worn as a covering on natural or artificial human teeth created with a model, impression or any other measuring device . . . of the human mouth or any portion thereof and used solely for cosmetic purposes." Neither of these applies to a protective mouth guard which does not change the appearance of teeth and which is not used solely for cosmetic purposes.

Further, as the Court explained above, there is a significant difference between simply selling teeth-whitening products and providing teeth-whitening products and services, which is what Plaintiffs, themselves, allege they do in their complaint. Because of this difference, the Court rejects Plaintiffs' argument that there is the possibility of arbitrary enforcement. Stores selling only products are clearly distinguishable from businesses providing teeth-whitening services. For the foregoing reasons, the Court GRANTS Defendants' motion to dismiss Plaintiffs' overbreadth and vagueness challenges to the Georgia Dental Practice Act.[5]

III. Conclusion

The Court GRANTS IN PART AND DENIES IN PART Defendants' motion to dismiss [5] and DENIES AS MOOT Plaintiffs' motion to re-file response to

[5]Because the Court rejects Plaintiffs' constitutional challenges, the Court need not address the issue of qualified immunity.

Defendants' motion to dismiss [15]. Plaintiffs' complaint proceeds on the basis of their antitrust claims only.

IT IS SO ORDERED this 6th day of June 2016.

s/Steve C. Jones
HONORABLE STEVE C. JONES
UNITED STATES DISTRICT JUDGE