UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

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

EXPEDITED MOTION FOR STAY OF PROCEEDINGS PENDING THE OUTCOME OF A MOTION FOR PRELIMINARY AND PERMANENT INJUNCTION IN U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

Pursuant to FTC Rules 3.22(b) and 3.41(f), Respondent, the North Carolina State Board of Dental Examiners (the "State Board" or "Respondent"), hereby moves the Commission and the Administrative Law Judge ("ALJ") to stay all proceedings before the ALJ in this matter, pending the outcome of its motion for preliminary injunction now pending before the United States District Court for the Eastern District of North Carolina (the "Action").[1] In support of this motion, Respondent shows the following:

[1] *See* Complaint for Declaratory Judgment and Preliminary and Permanent Injunction, *The North Carolina State Board of Dental Examiners v. Federal Trade Commission*, Case No. 5:11-CV-00049-FL (E.D.N.C. Feb. 1, 2011), ECF No. 1 (attached as Exhibit A); Motion for Temporary Restraining Order and Other Equitable Relief, *The North Carolina State Board of Dental Examiners v. Federal Trade Commission*, Case No. 5:11-CV-00049-FL (E.D.N.C. Feb. 2, 2011), ECF No. 5 (attached as Exhibit B); Memorandum in Support of Plaintiff's Motion for Temporary Restraining Order, Preliminary Injunction, and Permanent Injunction, *The North Carolina State Board of Dental Examiners v. Federal Trade Commission*, Case No. 5:11-CV-00049-FL (E.D.N.C. Feb. 2, 2011), ECF No. 6 (attached as Exhibit C); Motion and Memorandum in Support of Motion for Expedited Relief, *The North Carolina State Board of Dental Examiners v. Federal Trade Commission*, Case No. 5:11-CV-00049-FL (E.D.N.C. Feb. 4, 2011), ECF No. 8 (attached as

1. The evidentiary hearing in this matter is scheduled to commence before the ALJ on February 17, 2011, with a pretrial hearing scheduled before the ALJ on February 15, 2011.

2. The Respondent, as plaintiff, initiated the Action seeking preliminary and permanent injunctive relief and seeking declaratory judgment relief regarding jurisdictional and constitutional issues not addressed in the Commission's recent rulings on dispositive motions. On February 9, 2011, Chief U.S. District Judge Louise W. Flanagan granted, in part, the State Board's request for expedited scheduling considerations of its motion for a preliminary injunction, as well as denying Plaintiff's request for a TRO.[2] Judge Flanagan's Order indicates that "[t]he case shall proceed now on motion for preliminary injunction" and directs the parties to confer and provide the Court with a trial scheduling order within fourteen days.

3. Respondent, an agency of the State of North Carolina, requests that the ALJ and the Commission give full and fair consideration to this request based upon the action pending in the U.S. District Court for the Eastern District of North Carolina. Respondent expresses concern that, with respect to all proceedings before the ALJ and the Commission in this matter, either the ALJ or the Commission has denied the vast majority of Respondent's motions (including one

---

Exhibit D); Reply Memorandum in Support of Motion for Temporary Restraining Order and Other Equitable Relief, *The North Carolina State Board of Dental Examiners v. Federal Trade Commission*, Case No. 5:11-CV-00049-FL (E.D.N.C. Feb. 8, 2011), ECF No. 12 (attached as Exhibit E).

[2] Order Granting in Part Motion to Expedite Motion for Preliminary Injunction and Denying Motion for TRO, *The North Carolina State Board of Dental Examiners v. Federal Trade Commission*, Case No. 5:11-CV-00049-FL (E.D.N.C. Feb. 9, 2011), ECF No. 13 (attached as Exhibit F).

that Complaint Counsel did not oppose)[3], and thus far has granted all of Complaint Counsel's motions in the matter.

4. Forcing the evidentiary hearing in this matter to proceed on February 17, 2011 likely would result in duplicative and unnecessary litigation efforts by both Complaint Counsel for the Federal Trade Commission ("FTC") and the State Board. Furthermore, in balancing the equities related to both parties, the relative harm to the State Board is great, but the harm to the FTC in postponing the hearing is minimal.

5. Respondent's Counsel has conferred with Complaint Counsel in a good-faith effort to resolve by agreement the issues raised by this motion and has been unable to reach such agreement. Further, Complaint Counsel has indicated their intention to oppose this motion.

6. The State Board respectfully requests expedited consideration of this Motion.

---

[3] Other than granting several of Respondent's motions for extensions of time and Respondent's motion for leave to file a limited surreply brief regarding Complaint Counsel's Motion for Partial Summary Decision, the Commission and the ALJ have denied all of Respondent's motions in the administrative proceeding.

This the 10th day of February, 2011.

ALLEN AND PINNIX, P.A.

/s/ Noel L. Allen

By: ______________________________

Noel L. Allen
Alfred P. Carlton, Jr.
M. Jackson Nichols
Attorneys for Respondent
Post Office Drawer 1270
Raleigh, North Carolina 27602
Telephone: 919-755-0505
Facsimile: 919-829-8098
Email: nallen@allen-pinnix.com
acarlton@allen-pinnix.com
mjn@allen-pinnix.com

CERTIFICATE OF SERVICE

I hereby certify that on February 10, 2011, 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-172
Washington, D.C. 20580
dclark@ftc.gov

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

William L. Lanning
Bureau of Competition
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Room NJ-6264
Washington, D.C. 20580
wlanning@ftc.gov

Melissa Westman-Cherry
Bureau of Competition
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Room NJ-6264
Washington, D.C. 20580
westman@ftc.gov

Michael J. Bloom
Bureau of Competition
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Room NJ-7122
Washington, D.C. 20580
mjbloom@ftc.gov

Steven L. Osnowitz
Bureau of Competition
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Room NJ-6264
Washington, D.C. 20580
sosnowitz@ftc.gov

Michael D. Bergman
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Room H-582
Washington, D.C. 20580
mbergman@ftc.gov

Tejasvi Srimushnam
Bureau of Competition
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Room NJ-6264
Washington, D.C. 20580
tsrimushnam@ftc.gov

Richard B. Dagen
Bureau of Competition
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Room NJ-6264
Washington, D.C. 20580
rdagen@ftc.gov

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
oalj@ftc.gov

This the 10th day of February, 2011.

/s/ Noel L. Allen

Noel L. Allen

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/ Noel L. Allen

Noel L. Allen

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

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

[PROPOSED] ORDER GRANTING THE EXPEDITED MOTION FOR STAY OF PROCEEDINGS

This matter is before the Commission on the Respondent North Carolina State Board of Dental Examiner's Motion for Stay of Proceedings Pending the Outcome of a Motion for Preliminary Injunction. The United States District Court for the Eastern District of North Carolina ("EDNC") currently is reviewing the Respondent's motion for preliminary and permanent injunction.

Upon consideration, the Commission hereby grants the motion. Accordingly, IT IS HEREBY ORDERED THAT the proceedings before the Administrative Law Judge in this matter are stayed, pending the final determination by the EDNC regarding Respondent's motion for preliminary and permanent injunction.

This the ____ day of February, 2011.

____

Donald S. Clark, Secretary
Federal Trade Commission

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
Case No. _____________**

THE NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS,	)	
Plaintiff,	)	**COMPLAINT FOR DECLARATORY JUDGMENT AND PRELIMINARY AND PERMANENT INJUNCTION**
v.	)	
FEDERAL TRADE COMMISSION,	)	
Defendant.	)	

OVERVIEW OF THIS ACTION

The objective of this action at law and in equity is to obtain an unprejudiced determination of the State of North Carolina's right to protect its citizens against the dangerous and illegal unauthorized practice of dentistry in North Carolina and to statutorily regulate professions within its borders through its state agencies governed by a majority of licensees. Further, the purpose of this action is to stop a pointless, baseless, and predetermined federal administrative proceeding that has impaired and continues to impair the ability of the State to protect its public, contravenes federal and state statutes, directly encroaches upon the State's sovereignty assured under the Tenth Amendment to the United States Constitution ("Tenth Amendment"), and defies very, very well-established Supreme Court holdings.

This civil action is not an interlocutory appeal of an administrative proceeding. Instead, it is an action directly challenging a federal agency's unlawful and unconstitutional assertion of jurisdiction over a sovereign state's right to protect its citizens within its borders by enforcing a clear public protection statute. This complaint is a request for the aid of the third branch of

federal government pursuant to the undeniable, fundamental principle of law that jurisdiction may be raised at any time in any forum.

The United States Constitution does not bestow unlimited and expandable powers upon the various entities comprising our federal "Government by the People." It delegates to the federal government of **limited** powers, and is designed to control the reach of the "sovereign" so that the People and the several sovereign States will not be subjugated to arbitrary, capricious, and unlawful exercises of extralegal federal authority. The United States Constitution, in establishing the third branch, created an independent judiciary to enforce limits on the reach of federal government authority in those cases where there is an extralegal attempt to assert federal authority. This is just such a case.

In support of this complaint, Plaintiff shows unto this Honorable Court the following:

PARTIES

Plaintiff

1. Plaintiff North Carolina State Board of Dental Examiners ("State Board") is an instrumentality of the State of North Carolina ("State"). It is authorized to bring suit in its own name, but it does so on behalf of the State. The State Board is not in-and-of-itself a "person," "partnership," or "corporation" as defined under the Federal Trade Commission Act ("FTC Act"). It is not an association, nor a for-profit or non-profit corporation. But for the State of North Carolina, the State Board does not exist.
2. The State Board was created by North Carolina statute in 1879 when the N.C. General Assembly enacted the State's Dental Practice Act. According to N.C. Gen. Stat. § 90-22(b): "The North Carolina State Board of Dental Examiners heretofore created by Chapter 139, Public Laws 1879 and by Chapter 178, Public Laws 1915, is hereby

continued as the agency of the State for the regulation of the practice of dentistry in this State."

3. As amended, the Dental Practice Act also provides that:

> The practice of dentistry in the State of North Carolina is hereby declared to affect the public health, safety and welfare and to be subject to regulation and control in the public interest. It is further declared to be a matter of public interest and concern that the dental profession merit and receive the confidence of the public and that only qualified persons be permitted to practice dentistry in the State of North Carolina. This Article shall be liberally construed to carry out these objects and purposes.

N.C. Gen. Stat. § 90-22(a). Since 1879, the N.C. General Assembly has amended the Dental Practice Act numerous times, but has never altered the relevant parts creating the State Board as a State agency and defining the practice of dentistry. Courts have consistently upheld the constitutionality of this statute and affirmed its enforcement.

4. Dentistry is one of several licensed occupations governed by statutorily-created state agencies within state government. Like lawyers, medical doctors and other universally regulated professions, the State of North Carolina uses a statutorily-established state agency (the State Board) to implement a tightly-controlled plan of regulation. Like each of those other professions, a majority of the appointed or elected members of the State Board are licensees.[1]

5. The State Board is a true State agency and, as further alleged below, is subject to state laws applicable to all instrumentalities of the State. Thus the State Board is subject to, and must comply with, the State's Constitution, the State's laws regarding open meetings (N.C. Gen. Stat. §§ 143-318.9 to -318.18), public records (N.C. Gen. Stat. §§ 132-1 to -

[1] The N.C. State Bar is comprised of 62 attorneys elected by lawyers in their communities. N.C. Gen. Stat. § 84-18. Eight of the 12 members of the N.C. Board of Medicine are physicians. N.C. Gen. Stat. § 90-2.

10), administrative procedures (N.C. Gen. Stat. §§ 150B-1 to -52), and ethics (N.C. Gen. Stat. §§ 138A-1 to -45). All of the State Board's rules must be reviewed and approved by the Legislature's Rules Review Commission. N.C. Gen. Stat. §§ 143B-30.1 to -30.4.

6. Additionally, the State Board must file annual reports regarding its finances and disciplinary, licensing, enforcement, and rulemaking activities with the Governor, the State Auditor, the Attorney General, the Secretary of State, the Office of State Budget and Management, and the General Assembly's Joint Legislative Procedure Administrative Oversight Committee. N.C. Gen. Stat. §§ 93B-2, 90-44. The State Board's books, records, and operations also are subject to the direct oversight of the State Auditor. N.C. Gen. Stat. §§ 93B-4, 147-64.1 to -64.14.

7. The State Board's activities, which are undertaken in accordance with North Carolina statutes, are subject to supervision and review by the Joint Legislative Administrative Procedure Oversight Committee.[2]

8. All of the State Board's administrative proceedings are subject to judicial review by the State's Superior Courts. N.C. Gen. Stat. §§ 150B-43 to -52. All actions to enjoin the unauthorized practice of dentistry and all prosecutions against illegal practice must be brought in State Superior Court in the county in which the defendant resides. N.C. Gen. Stat. § 90-40.1. In addition, under North Carolina law, State Board actions are subject to challenge in the General Court of Justice of North Carolina. *See* N.C. Gen. Stat. § 7A-3.

9. As an instrumentality of the State, the State Board has sovereign immunity (N.C. Gen. Stat. § 93B-16(c)), is covered under the State Tort Claims Act (N.C. Gen. Stat. §§ 143-

[2] Pursuant to N.C. Gen. Stat. § 120-70.101(3a), the Joint Committee has the authority to "[t]o review the activities of State occupational licensing boards to determine if the boards are operating in accordance with statutory requirements and if the boards are still necessary to achieve the purposes for which they were created."

291 to -300.1A), and is entitled to legal defense from the Attorney General (N.C. Gen. Stat. § 143-298).[3]

10. The State Board's enforcement of the Dental Practice Act is subject to the State's constitutional prohibition against monopolies.[4]

11. The State Board and State Board members are forbidden by State statute from engaging in any private business or from competing with any private services.[5]

12. As mandated by N.C. Gen. Stat. § 90-22(b), a majority of the members of the State Board are licensed dentists. Each member of the State Board is, by law, a State official who must take an oath or affirmation to comply with federal and state laws and constitutions. N.C. Gen. Stat. §§ 11-7, 143-555(3)-(4).

13. As a constitutionally-permitted quasi-judicial agency, the law empowers the president of the State Board and its secretary-treasurer "to administer oaths [and] issue subpoenas requiring the attendance of persons and the production of papers and records before said Board in any hearing, investigation or proceeding conducted by it." N.C. Gen. Stat. § 90-27. The State Board is empowered, in its own name, to "maintain an action in the name of the State of North Carolina to perpetually enjoin any person from so unlawfully practicing dentistry." N.C. Gen. Stat. § 90-40.1(a).

---

[3] As provided by statute, the State Board, with the assent of the Attorney General, is authorized to employ its own legal counsel and, like many other licensing boards in North Carolina, has done so for many years. Further, the North Carolina Attorney General's Office has assented to this action against the FTC.

[4] "Monopolies are contrary to the genius of a free state and shall not be tolerated." N.C. CONST., art. I, § 34.

[5] ". . . it shall be unlawful for any unit, department or agency of the State government . . . or any individual employee or employees of the unit, department or agency in his, or her, or their capacity as employee or employees thereof, to engage directly or indirectly in the sale of goods, wares or merchandise in competition with citizens of the State, or . . . to maintain service establishments for the rendering of services to the public ordinarily and customarily rendered by private enterprises . . . ." N.C. Gen. Stat. § 66-58(a).

14. The State Board is governed by eight members (including six licensed dentists,[6] one licensed hygienist, and a consumer appointed by the Governor) who are:

a. State officials (N.C. Gen. Stat. § 143-555(3)-(4));

b. Sworn to uphold state laws and the state and federal constitutions (N.C. Gen. Stat. §11-7);

c. Permitted to take office only after they are approved by the N.C. State Ethics Commission, and are required to disclose initially and annually any conflicts of interest (N.C. Gen. Stat. §§ 138A-21 – 138A-27);

d. Subject to removal for conflicts of interest (N.C. Gen. Stat. § 138A-39);

e. Subject to prosecution for using their Board membership for private gain (N.C. Gen. Stat. §§ 138A-31, 138A-34, 138A-45(g));

f. Required to remind all members of their duty to avoid conflicts of interest prior to each Board meeting and to disclose any conflicts of interest with matters coming before the Board (N.C. Gen. Stat. § 138A-15(e));

g. Required to attend classes on the State Government Ethics Act and compliance with other statutes regulating them as State Board members (N.C. Gen. Stat. §§ 138A-14(b), 93B-5(g))[7]; and,

h. Presumed to be acting in the public interest and in good faith. N.C. Gen. Stat. § 150B-40(b) (burden of proof is on party seeking disqualification of an agency member).

---

[6] N.C. Gen. Stat. §§ 90-22(b) and (c). The licensed dentists are elected pursuant to a detailed statutory process.

[7] N.C. Gen. Stat. § 93B-5(g) requires initial and biannual training for each member "to better understand the obligations and limitations of a State agency . . . ."

15. The State Board is currently the "Respondent" in the FTC-initiated administrative proceeding heretofore referenced (the "FTC administrative proceeding": *In the Matter of the North Carolina [State] Board of Dental Examiners*, Docket No. 9343).

Defendant

16. Defendant, the Federal Trade Commission ("FTC" or the "Commission"), is an independent administrative agency established by the United States Congress with the capability of being sued under the Constitutional and statutory provisions hereinafter alleged.

17. Congress has granted the FTC the jurisdiction to "prevent persons, partnerships, or corporations . . . from using unfair methods of competition." 15 U.S.C § 45(a)(2). However, the FTC has no jurisdiction or authority to take action against a state (or its *bona fide* state agencies), and Congress has never acted or implied an intent to enlarge the FTC's authority to extend over states' regulation of the practice of dentistry. Congress has never authorized the FTC to use its antitrust enforcement power to preempt state statutes. Congress has never authorized the FTC to regulate state statutory non-price and non-commercial speech restrictions, such as are at issue in this matter.

18. No U.S. Supreme Court opinion has held that the FTC has jurisdiction over a *bona fide* state agency, has jurisdiction to preempt a clear state statute, or has jurisdiction to regulate non-price and non-commercial speech restrictions.[8]

19. The FTC is empowered to initiate administrative proceedings by issuing administrative complaints only if it has "reason to believe that any such person, partnership, or

[8] "We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature." *Parker v. Brown*, 317 U.S. 341, 350-51 (1943).

corporation has been or is using any unfair method of competition . . . ." 45 U.S.C § 45(b).

20. The federal government's sovereign immunity does not preclude this suit because this is "an action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority." 5 U.S.C. § 702.

21. The FTC is currently the "Complainant" in the FTC administrative proceeding.

JURISDICTION AND VENUE

22. This action arises under the Constitution and laws of the United States, and this Court has federal question jurisdiction over this action pursuant to Article III of the Constitution and 28 U.S.C. § 1331.

23. The FTC Act contains no waiver of sovereign immunity by North Carolina or any other state, as is unmistakably clear in the language of the statute.

24. Without waiving its sovereign immunity under the Tenth Amendment, the State Board seeks immediate judicial determination of the FTC's lack of jurisdiction as to the FTC administrative proceeding and of its violation of the following provisions of the U.S. Constitution: Article I, Section 8 (the Commerce Clause); the Tenth Amendment; Article III, Section 2, Clause 2 (original jurisdiction over actions against states); and the Due Process Clause of the Fifth Amendment. This action is brought pursuant to the federal Declaratory Judgment Act, 28 U.S.C. §§ 2201 (Creation of Remedy), 2202 (Further Relief); 28 U.S.C. § 1651 (Writs); the implied non-statutory review procedure provided by 28 U.S.C. § 1331 (Federal Question); 28 U.S.C. § 1361 (Action to Compel an Officer of the United States to Perform His Duty); and the Administrative Procedure Act, 5

U.S.C. § 500 *et seq*. Absent this immediate judicial determination of jurisdiction, the Commission's actions will wholly deprive the State Board and, thus, the State of a meaningful and adequate means of vindicating its constitutional rights, as discussed herein. Due to such violations of Constitutional rights, the State Board and, thus, the State has suffered and continues to suffer immediate, permanent, and irreparable harm.

25. Venue is proper in the Eastern District of North Carolina under 5 U.S.C. § 703 and 28 U.S.C. § 1391(e)(3) because the State Board is located at 507 Airport Boulevard, Suite 105, in Morrisville, Wake County, North Carolina.

RATIONALE AND BACKGROUND

"Do you really think that the people who voted out the complaint didn't consider the law before they made that decision? Do you think that they forgot something?"[9]

26. In 1943, the U.S. Supreme Court ruled that, because the Tenth Amendment renders a state's actions immune from federal antitrust enforcement, the actions of private parties acting pursuant to such state action also could be immune. *Parker v. Brown,* 317 U.S. 341 (1943). Although the Court has since refined and clarified that general proposition, it consistently has held that actual state agencies are immune from federal antitrust enforcement.

27. The FTC administrative proceeding is not about whether dentists in North Carolina conspired to illegally restrain trade. Even though the FTC made that allegation in its administrative Complaint, it did not have the requisite "reason to believe" as mandated

[9] Administrative Law Judge Chappell questioning counsel for the State Board regarding the FTC's Complaint allegation that "there is no state action defense." July 14, 2010 Pretrial Conference transcript, p. 51. Counsel replied: "They are fundamentally wrong on this, absolutely. They do not understand this Board and the way that North Carolina structured it."

by 15 U.S.C. § 45(b). It had no evidence or any law to support the assertion. It had no "reason to believe" its own allegation because, in fact and in law, it knew or should have known otherwise. At the eleventh hour of the FTC administrative proceeding, when—despite over twenty depositions and a massive documentary fishing expedition—the Commission still did not have even a sliver of evidence of "collusion," Complaint Counsel tacitly abandoned the allegation of collusion and argued, instead, that a state agency whose majority were licensees is a *per se* antitrust conspiracy, notwithstanding oaths of office, numerous statutory safeguards, and the Supreme Court's presumption of good faith.[10] FTC Complaint Counsel has refused to answer the State Board's discovery about what evidence or law constituted the Commission's "reason to believe," and the Administrative Law Judge (who appeared incredulous at the suggestion that the FTC might issue its administrative Complaint without understanding the State's laws) has refused to compel the FTC to provide relevant answers or produce pertinent documents on that very subject.[11]

28. The FTC's administrative proceeding is about the Commission's desire to unilaterally and forcibly expand its jurisdiction despite the contrary will of Congress,[12] seven

[10] *Withrow v. Larkin*, 421 U.S. 35 (1975). In *Withrow*, the Supreme Court ruled that a Board comprised of a majority of licensees would be presumed unbiased even when disciplining a competing licensee. It is ironic that the FTC at first alleged a conspiracy to commit fraud and issued a press release accusing the State Board members—and, indeed, all North Carolina dentists—of an illegal conspiracy, but now admits to an unprecedented strict liability theory. "It is not Complaint Counsel's contention that any Board member is corrupt. And we are not obligated to show that any Board member is hostile to non-dentist teeth whitening because of his financial stake." Complaint Counsel's December 28, 2010 Reply Memorandum, pp. 13-14 (Public Version).

[11] See, *infra*, section on "Discovery and Abuses of Discovery."

[12] "We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." *Parker*, 317 U.S. at 350-51; *see also Opdyke Inv. Co. v. Detroit*, 883 F.2d 1265, 1272 (6th

decades of adverse court precedent,[13] and even Presidential orders.[14] The FTC has set out to achieve by brute litigative force that which all three branches of government have denied it.

29. On June 17, 2010, after two years of investigation, the FTC initiated the FTC administrative proceeding by filing an administrative Complaint alleging that the State Board had conspired to restrain trade by enforcing a state statute, N.C. Gen. Stat. § 90-29(b)(2).[15] This statute, along with other subsections of N.C. Gen. Stat. § 90-29(b),

---

Cir. 1989) ("The legislative history of the Sherman Act reveals no evidence of an express Congressional intent to apply the antitrust laws to either state or local governments.") (*citing* H.Rep. No. 965, 98th Cong., 2d Sess. 4, 1984 U.S. Code Cong. & Admin. News at 4605).

[13] FTC Complaint Counsel characterized *Parker v. Brown*'s progeny as "poorly reasoned" in its Memorandum in Opposition to Respondent's Motion to Dismiss, at 7.

[14] Executive Order 13132 of Aug. 4, 1999 ("The constitutional relationship among sovereign governments, State and national, is inherent in the very structure of the Constitution and is formalized in and protected by the Tenth Amendment to the Constitution."). *See also* Presidential Memorandum for the Heads of Executive Dep'ts & Agencies (May 20, 2009) ("The purpose of this memorandum is to state the general policy . . . that preemption of State law by executive departments and agencies should be undertaken only with full consideration of the legitimate prerogatives of the States and with a sufficient legal basis for preemption.") Of course, the FTC would contend that it is not required to comply with Presidential Orders.

[15] N.C. Gen. Stat. § 90-29 provides in part that:

(a) No person shall engage in the practice of dentistry in this State, or offer or attempt to do so, unless such person is the holder of a valid license or certificate of renewal of license duly issued by the North Carolina State Board of Dental Examiners.

(b) **A person shall be deemed to be practicing dentistry in this State** who does, undertakes or attempts to do, or claims the ability to do any one or more of the following acts or things which, for the purposes of this Article, constitute the practice of dentistry:

. . .

(2) **Removes stains, accretions or deposits from the human teeth;**

. . .

(7) **Takes or makes an impression of the human teeth, gums or jaws;**

. . .

(11) Owns, manages, supervises, controls or conducts, either himself or by and through another person or other persons, any enterprise wherein any one or more of the acts or practices set forth in subdivisions (1) through (10) above are done, attempted to be done, or represented to be done;

. . .

(13) **Represents to the public,** by any advertisement or announcement, by or through any media, the ability or qualification to do or perform any of the acts or practices set forth in subdivisions (1) through (10) above.

clearly and unambiguously provides that a person engages in the practice of dentistry when he or she offers or renders to the public a service that "removes stains, accretions or deposits from the human teeth."[16] Various Commission communications have referred to this statute as a "rule." This statute is a statute – it is not a rule, and certainly not a rule exceeding or contravening a state statute.

30. From the beginning, the Commission has demonstrated its misunderstanding of the State Board's legal status by misnaming the State Board in its administrative Complaint.[17] Although challenged repeatedly for any authority supporting its radical theory, the Commission has not pointed to a single case supporting its position that state agencies enforcing clearly articulated state statutes are not entitled to state action immunity.[18] The arrogance of this assault on State sovereignty is highlighted by the following:

a. The alleged restraint involves no form of price restriction and no form of commercial speech restriction;

b. The alleged restraint is affirmatively expressed in a clearly articulated state statute;

(Emphasis added).

[16] Although the FTC contends that teeth whitening does not constitute the removal of stains, accretions or deposits from human teeth, the Alabama Supreme Court and several state Attorneys General Opinions have ruled that teeth whitening is included in the practice of dentistry. Likewise, similar (and even less explicit state statutes) have been interpreted and enforced by numerous government authorities to recognize teeth whitening as the practice of dentistry.

[17] The FTC so completely mischaracterized the state statutory and constitutional framework within which the State Board functions, that it captioned the administrative proceeding as against the "North Carolina Board of Dental Examiners," which is not the legal name of the State Board and fails to recognize that the State Board is a State agency. As a State agency, the State Board is actually the "North Carolina **State** Board of Dental Examiners." N.C. Gen. Stat. § 90-22(b). This mistake reflects the Commission's wider misunderstanding of the State Board and its members' mandate and role in the regulation of the practice of dentistry. The State Board is not a trade organization created to protect dentists' interests. It is a state agency and is an "instrumentality of the state."

[18] For example, the Supreme Court held in *Town of Hallie v. City of Eau Claire* that it was "likely" that state agencies would not need to show active supervision to benefit from state action immunity. 471 U.S. 34, 46 (1985). There have been no cases where a state agency (as opposed to private individuals or associations) was denied state action immunity when acting pursuant to a clearly-articulated state statute in a non-price restraint case.

c. The FTC's theory requires a contrived market definition that omits the largest commercial factor, over-the-counter sales, but includes "illegal teeth whitening services";

d. The FTC's theory of structural conspiracy flies in the face of the Supreme Court's presumption of state regulators' good faith; and

e. The FTC attacks the manner in which the State of North Carolina, by statute and State Constitution, has chosen to protect its citizens and regulate commerce within its borders.

31. If a clear state statute, a century of court precedence, well-established limits on Congressional authority, and the Fifth and Tenth Amendments to the U.S. Constitution no longer allow the State of North Carolina, acting through its General Assembly, to define the practice of dentistry in order to protect its citizens from the illegal and unsafe practice of dentistry, then it should be the Congress or the U.S. Supreme Court that pronounces the death of that state prerogative, and not the Commission acting extra-judicially under some self-anointed power.

THE STATE HAS A LEGITIMATE INTEREST IN REGULATING THE PRACTICE OF DENTISTRY, INCLUDING THE OFFERING AND RENDERING TO THE PUBLIC THE SERVICE OF REMOVAL OF STAINS FROM TEETH.

32. North Carolina enacted the Dental Practice Act with the purpose to protect the public. There is an abundance of scientific reports and actual cases of consumer harm supporting the rational basis for the Dental Practice Act. There are reported cases of actual injury,[19] even though the number of documented cases of public harm caused by non-dentist teeth whitening operations may have been diminished by the fact that such non-dentists

[19] In one case, a State Board investigator reported that an unauthorized stain remover had a poison ivy rash on her hands and was working without gloves. *See* ¶ 48, infra; see, *also*, Monica Laliberte, *Teeth Whitening Kiosks at the Mall Are Not Regulated*, WRAL (May 21, 2008), http://www.wral.com/5onyourside/story/2921079/ (last visited January 26, 2011).

routinely obtain waivers of liability from their customers before engaging in illegal teeth whitening. And, unlike dentists, they can hide behind corporate veils.

33. Aside from actual cases of harm, scientific/medical reasons for requiring that a licensed dentist provide or supervise stain removal services include, but are not limited to, the following:

    a. Pre-treatment diagnosis is important because many people are not appropriate candidates for teeth whitening;

    b. A dentist is educated and trained to perform a complete dental examination prior to a teeth whitening procedure; and

    c. A dentist possesses the education and training to diagnose whether teeth whitening is a safe or appropriate procedure for a particular patient.

34. Cases in which teeth whitening may not be safe or appropriate include, but are not limited to, situations where there is the risk for:

    a. Damage to existing restorations or to previous dental work;

    b. Pain or sensitivity due to a pre-existing root exposure or undiagnosed decay;

    c. Complications as the result of an undiagnosed medical condition; or

    d. Less satisfactory results because a tooth is dark due to injury or the need for endodontic treatment.

One study has indicated that ten to twenty percent of patients who request teeth whitening services from licensed dentists are not provided those services for the reasons set forth above.

35. Beyond these significant physical dangers, there is ample proof that unauthorized teeth whitening product vendors have so frequently engaged in false and deceptive marketing

practices that many states, and on at least two occasions the FTC itself, have found their practices to be unfair and deceptive.

"They're Going to Cave."[20]

36. The FTC has prejudged this matter and sought to leverage and manipulate unduly burdensome investigation and discovery, a fast-track hearing schedule, a foreign venue, ethically dubious legal tactics, and self-serving FTC Rules of Adjudicative Practice ("Rules") in an attempt to obtain an unjust result that would not be possible in an objective tribunal.

The FTC's Investigation

37. In 2008, the FTC initiated an investigation of the State Board upon the request of representatives of the teeth whitening service industry. The investigation was managed or supervised by a member of the Commission who previously had a conflict of interest regarding the teeth whitening products industry.

38. During this investigation, the FTC staff conducted six investigational hearings and issued ten specifications requiring production of thousands of pages of documents and detailed information about the State Board's operations. Subsequently, the FTC issued a *Subpoena Duces Tecum*, to which the State Board provided thousands of pages of additional documents.

39. The State Board cooperated in the pre-complaint investigation and even offered repeatedly to turn over all records, including attorney-client privileged documents, upon the condition that the FTC would take steps to assure that such production would not

---

[20] Upon information and belief, a member of Commission Staff made this statement to a third party regarding the FTC administrative proceeding during the week of December 6 through 10, 2010.

constitute a waiver of privilege and that the documents would not be disclosed to third parties currently under investigation by the State Board. The FTC refused to participate in such assurances. The State Board was concerned that the release of records would otherwise constitute a waiver of the attorney-client and work-product privileges.

40. Throughout the two-year investigation, the State Board provided lengthy, detailed memoranda refuting the Commission's assertions, and repeatedly requested a single case or single scrap of evidence to substantiate the FTC's position. The memoranda and the requests for authority or evidence were never answered.

FTC's Improper Press Release

41. Prior to the actual service of the administrative Complaint, the FTC issued a press release that announced the filing of the administrative Complaint that stated:

> The complaint charges that the Dental Board's conduct is an **anticompetitive conspiracy** among the dentist members of the Dental Board in violation of federal law. (Emphasis added).

42. Congress has not authorized the FTC to post on a government website a false press release even before the related complaint was served. 15 U.S.C. § 46(f). The press release falsely stated that the State Board had "unilaterally ordered non-dentists to stop providing whitening services."[21] The press release also stated that "[t]he Commission issues or files a complaint when it has **reason to believe** that the law has been or is being violated." (emphasis added). Aside from affirmative misstatements, the press release also omitted critical facts and law: that the State Board was enforcing a state statute that

[21] As the undisputed record shows, the State Board, acting upon public complaints and *prima facie* evidence, sent "cease and desist" demands that quoted pertinent parts of the Dental Practice Act, ordered the recipients to cease any unauthorized practice of dentistry, and requested cooperation in the State Board investigation. The words "teeth whitening" were in none of the letters. No one receiving such a letter was ever forced to stop engaging in lawful activity.

expressly bars non-licensees from offering or rendering to the public the service of "[removing] stains ... from the human teeth," and that the Board initiated several court actions under that law to enjoin or criminally prosecute violators.

43. The FTC through staff had informed the State Board that it would not issue a press release if the State Board would enter into a settlement stipulating to the FTC's jurisdiction and giving the federal agency veto power over the State Board's enforcement of the state statute.[22] As further alleged herein, the FTC has repeatedly attempted to coerce an unlawful stipulation of jurisdiction, even attempting to interrogate in depositions present and former State Board members about the terms of the settlement offer.

The FTC's Administrative Complaint[23]

44. On June 17, 2010, after posting the above-alleged press release, the Commission issued an administrative Complaint falsely alleging that the dentists of North Carolina, using the State Board, were "colluding" (in effect, feloniously conspiring to commit fraud) in violation the federal antitrust laws. (Exhibit A, "Nature of the Case.") The term "collude" is defined and commonly understood to mean: "conspire to commit fraud." After a two-year long investigation—during which the FTC repeatedly failed or refused to identify a scrap of evidence in support of a conspiracy in restraint of trade—and despite extensive discovery, the FTC still lacks any evidence of its false claims. Indeed,

[22] Neither the press release nor the FTC complaint mentioned any specific statutes, much less N.C. Gen. Stat. § 90-29(b)(2), the state statute which defines the practice of dentistry as including removal of stains from teeth.

[23] Pleadings in the FTC administrative proceeding are posted on the FTC's website at http://www.ftc.gov/os/adjpro/d9343/index.shtm. Those pleadings that are not attached to this Complaint may be accessed from the online docket found there.

upon direct interrogatory, Complaint Counsel has failed or refused to identify any evidence supporting that allegation. This accusation of felony conduct was knowingly based upon no evidence other than the mere fact that the majority of State Board members were licensees.

45. Immediately after the Commission declared to the world that it had "reason to believe" that the North Carolina licensees were "colluding," Board members who had honorably performed their sworn duty to enforce a clear state statute had to explain to their spouses, children, patients, and friends that they were not criminals despite what was posted on a federal government website. Six months after defaming innocent board members and other North Carolina dentists, FTC Complaint Counsel conceded that "[i]t is not Complaint Counsel's contention that any Board member is corrupt." Thus, instead of having a "reason to believe" that the State Board members were "colluding," the Commission actually had **reason to know** the allegation was false.

46. Beyond the Commission's false assertion that it had "reason to believe" collusion occurred, the Commission impermissibly reached legal conclusions in the administrative Complaint that it approved. Those legal conclusions predetermine subsequent dispositive motions as well as any other questions of law. Thus, by approving the administrative Complaint, the Commission has predetermined as a matter of law certain questions of law that are central to the State Board's pending dispositive motions:

    a. "The Dental Board is a "person" within the meaning of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45." (Admin. Compl., ¶ 5.)

    b. The State Board "does not qualify for a state action defense." (Admin. Compl., ¶ 23.)

c. "The North Carolina dental statute does not expressly address whether, or under what circumstances, a non-dentist may engage in teeth whitening." (Admin. Compl., ¶ 15.)

d. "The conduct of the Dental Board constitutes concerted action by its members and the dentists of North Carolina." (Admin. Compl., ¶ 3.)[24]

Ordinarily, this issue would be a question of fact, but it is now a pure question of law based on the Commission's admitted theory of a board with a majority of licensee members constituting a *per se* antitrust conspiracy.

47. On July 6, 2010, the State Board filed a Response to the administrative Complaint denying the allegations and asserting appropriate defenses. A copy of that Response to the administrative Complaint is attached as Exhibit B, and adopted herein by reference.

Discovery and Abuses of Discovery

48. Complaint Counsel conducted 22 depositions, many of which were of the State Board's witnesses, between September 1 and November 9, 2010.

a. Almost all of the depositions were six to eight hours in length and were conducted at times and locations that required deponents to travel distances and absent themselves from their work.

b. Although all depositions were noticed by Complaint Counsel, some were actually conducted by FTC policy staff. In conducting these depositions, Complaint Counsel and policy staff often engaged in conduct that can best be described as

[24] Complaint Counsel even refused to answer State Board's discovery regarding ¶¶ 3, 5, 15, and 23 of the administrative Complaint. *See, e.g.*, Response to Request for Admission ¶ 1: "Complaint Counsel specifically objects to this Request and states that no response is required inasmuch as it calls for a legal conclusion beyond the proper scope of requests for admission in this matter under Rule 3.32."

condescending, abrasive, high-handed and insulting; and, on at least two occasions, dentist deponents were urged to violate the Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 1320 *et seq.* ("HIPAA").

c. In addition, Complaint Counsel embarked upon a broad scale, purposeful campaign to subpoena information from numerous members of the public who had filed complaints with the State Board regarding illegal teeth whitening. Upon information and belief, in *ex parte* communication, Complaint Counsel and policy staff questioned the right of those persons to file complaints with the State Board and challenged the veracity of the complaints that were filed. Such conduct inevitably will have and has had a chilling effect on the complainants' and the public's willingness to seek relief from illegal activities and to petition the State Board for redress of grievances by filing complaints with the State Board.

d. An example of such conduct includes the Commission's deposition of a non-dentist consumer, Brian Runsick, who was injured by illegal teeth whitening and had filed a complaint with the State Board against an illegal teeth whitening service provider. He was required by the Commission (without legal authority) to travel for his deposition from Florida to the Commission's offices in Washington, D.C. on November 4, 2010. Regarding his required appearance in D.C., he testified by separate affidavit that: "At no point during my three telephone conversations was the true adversarial nature of this proceeding conveyed to me. I was led to assume that the FTC was assisting the North Carolina Board with the matter that I had complained about." He also testified that he was not advised that he had the option of testifying in any other location than Washington, D.C.

e. Complaint Counsel later deposed Dr. Larry Tilley, the dentist who treated Mr. Runsick at the request of the State Board after Mr. Runsick filed his complaint of injury caused by a non-dentist teeth whitening provider. During Dr. Tilley's deposition, the FTC policy staff member posing the questions demanded that he produce his patient's medical records, despite the patient's right to confidentiality under HIPAA.

49. From June 17 to December 16, 2010, the State Board produced documents on 14 different occasions in response to Complaint Counsel's Requests for Production of Documents (RFP); on November 18, 2010, the State Board responded to Complaint Counsel's First Set of Interrogatories containing 22 numbered interrogatories, which in actuality were in excess of 50 interrogatories due to the number of subparts contained therein; and, on October 22, 2010, the State Board responded to Complaint Counsel's Requests for Admission (RFA), which contained 44 numbered requests. Such RFPs, Interrogatories, and RFAs constituted overly broad and burdensome requests.

50. At various times between October 12 and November 18, 2010, the State Board served upon Complaint Counsel a Request for Production of Documents (19 requests); Request for Admission (24 requests); and Interrogatories (14 requests). In response, Complaint Counsel objected to all 19 RFPs, 12 of 24 RFAs, and all 14 Interrogatories.

51. Based upon Complaint Counsel's conduct of depositions, subpoenas and telephone calls to complainants, pugilistic approach to discovery, and the inadequacy of Complaint Counsel's responses to the State Board's requests for discovery, the State Board concluded that Complaint Counsel was making a purposeful attempt to shift the burden of proof in the proceeding and to wrongfully subvert the purposes of discovery.

52. Accordingly, on January 5, 2011, the State Board presented Complaint Counsel with a list of "Specific Discovery Items Requested," detailing responses by Complaint Counsel to various discovery requests that were inadequate (the "Specific Requests", including 77 specific items). The presentation of Specific Requests was accompanied by a request that Complaint Counsel respond timely by entering into good-faith negotiations.

53. Between January 5 and January 11, 2011, the State Board entered into good-faith negotiations with Complaint Counsel, communicating with Complaint Counsel on at least 42 occasions regarding the nature and substance of those negotiations. On January 10, 2011, Complaint Counsel refused to negotiate in good faith to resolve the dispute. Complaint Counsel issued a non-negotiable demand that the State Board waive its rights to file a Motion to Compel Discovery and seek redress of other discovery abuses as an express precondition to Complaint Counsel's continued participation in negotiations regarding discovery requests.

54. On January 11, 2011, based upon Complaint Counsel's refusal to negotiate in good faith, the State Board declared an impasse and filed its Motion for an Order Compelling Discovery with the Administrative Law Judge ("ALJ"); and on January 14, 2011, the State Board electronically filed and served its Supplemental Statement to Respondent's Motion to Compel.

55. On January 18, 2011, the ALJ denied Respondent's Motion to Compel.[25] Pursuant to FTC Rules, in order to appeal the ALJ's Order, the State Board must "apply" for an order

[25] The ALJ based the denial on the belief that the State Board's Supplemental Statement was filed on January 18th (the day of the Order itself). The e-filing receipt was dated January 14th, and copies were served before the close of business the same day. The ALJ refused to rule on the merits, denied the Motion in its entirety, and issued an order that cited a statute incorrectly repeated in Complaint Counsel's proposed order.

allowing any "interlocutory appeal" of the Order to the **same ALJ who issued the Order**. Thus, on January 21, 2011, the State Board filed an Application for Review of an Order Denying Respondent's Motion to Compel Discovery.

56. Throughout the dispute and the subsequent proceedings relating to the Motion to Compel, certain counsel of record and policy staff appearing on behalf of the Commission conducted themselves in an aggressively disingenuous manner, failing on numerous occasions to discharge their professional ethical responsibilities under the ABA's Model Rules of Professional Conduct, specifically Rule 3.3 ("Candor Toward the Tribunal") and Rule 3.4 ("Fairness to Opposing Party and Counsel"). For further detail, see January 14, 2011 Declaration of Alfred P. Carlton, Jr. (Exhibit C).

Dispositive Motions

57. On November 3, 2010, the State Board filed a Motion to Dismiss, based primarily upon its state action defense. On November 2, 2010, the FTC filed a Motion for Partial Summary Decision, seeking to eliminate the State Board's state action defense. Subsequently, the parties have filed various opposition and reply memoranda regarding the respective motions. As of the date of this Complaint, the Commission has not yet ruled on either motion.

State Board's Request to Stay Proceedings

58. On November 3, 2010, along with its Motion to Dismiss, the State Board filed an unopposed Motion for a Stay of the FCT administrative proceeding. Nevertheless, on November 15, 2010, the Commission denied the unopposed Motion for a Stay.

59. The FTC's denial of the State Board's Motion to Stay Proceedings provides in and of itself the basis for this Court's objective determination of this matter. The Commission's

"Rules," as implemented through the ALJ's Scheduling Order, institutionalize an unsustainable fast-track process that favors a strategy to force capitulation, regardless of the merits of a matter.

The FTC Administrative Proceeding

60. The FTC administrative proceeding against the State Board is apparently one of the first cases litigated under its recently-amended Rules. As a practical matter, the selective delay in ruling on dispositive motions, the refusals to stay proceedings or change venue, and the consistent denial of each substantive motion filed by the State Board, combined with confusing, new and biased fast-track Rules, and one-sided enforcement of the Scheduling Order, virtually guarantee a rush to injustice. For example:

a. Dispositive motions had to be filed prior to the conclusion of discovery;

b. The State Board had to serve its lists of hearing witnesses and hearing exhibits prior to the ruling on the State Board's Motion to Compel;

c. The State Board had to file its pretrial brief prior to the Commission's ruling on dispositive motions;

d. In order to appeal the ALJ's Order denying the Motion to Compel, the State Board had to "apply" to the same ALJ for an order allowing an interlocutory appeal;[26]

e. In order to appeal the ALJ's Order denying the State Board's Motion for Change of Location of the hearing (which the ALJ denied apparently due to potential

[26] Even if permission to appeal is granted, the "appeal" must be submitted to the Commission within one day, and the Commission must, within 3 days after the deadline for a response, determine whether or not to "review" the original ruling. If the Commission agrees to review the ALJ's ruling, there is no readily discernible deadline for the Commission to rule on the merits of the "appeal."

inconvenience of the ALJ), the State Board must, again, "apply" to the same ALJ for an order allowing an interlocutory appeal;[27] and

f. Meanwhile, the Commission has yet to rule on pending dispositive motions for nearly ninety days while the State Board must prepare for a hearing of up to six weeks in length that will start two weeks (or perhaps less) after the Commission's ruling in a location that is at least 300 miles away from all of the State Board's witnesses. In any other adjudicative context, a refusal to grant a stay, postpone a hearing, or change venue under these circumstances would be an abuse of discretion.

61. On January 18, 2011, the State Board filed an Expedited Motion for a Later Hearing Date, seeking to postpone the commencement of the administrative hearing because, among other reasons, dispositive motions were (and currently are) pending before the Commission; the State Board's Motion to Disqualify the Commission was (and currently is) pending before the Commission; the State Board's Motion to Change the Hearing Location was pending before the Commission; and discovery and disputes over discovery are on-going.

62. On January 21, 2011, the Commission denied the State Board's Expedited Motion for a Later Hearing Date.

63. On January 24, 2011, the State Board filed a Motion for Reconsideration of the Commission's Order Denying Expedited Motion for a Later Hearing Date.

[27] In so applying, the State Board must follow the same curious process described in footnote 26.

The Actions of the Commission Reveal Prejudgment of the Dispositive Issues in the FTC Administrative Proceeding.

64. The FTC's intention to extend its jurisdiction with or without Congressional authorization has been affirmatively expressed in recent years on several occasions.[28] As shown in the administrative Complaint, the FTC has already decided the lynchpin issue in this case: that the FTC can haul a *bona fide* state agency before the Commission and force the state's submission to an "adequate state supervision" test designed by the courts to apply to municipalities and private parties that are allegedly restraining trade through nonprofit associations or corporations.

65. Upon information and belief, the Commission has not upheld a decision by an administrative law judge to dismiss an administrative complaint in the previous 15 years.

66. In voting to approve the administrative Complaint, the Commission already reached a determination regarding the core issue as a matter of law: that the State Board, as established by the State, is not entitled to the presumptions and benefits of immunity usually accorded to state agencies merely because the State Legislature mandated that the majority of the State Board be licensed dentists.

67. There is some evidence that the Commission erroneously believed that the State Board was enforcing one of its own rules instead of a statute.[29]

---

[28] For example, the Commission created a Task Force on State Action, which culminated in a report published in 2003, and strongly lobbied for increased jurisdiction over state agencies.

[29] In a recent article attempting to rationalize the FTC's action against the State Board, a recused Commissioner erroneously wrote that a board rule (rather than a statute) is at issue in the FTC administrative proceeding. Further, the FTC's expert economist witness mistakenly premised his entire economic opinion upon the assumption that a rule, rather than a statute, was at issue in the FTC administrative proceeding. The FTC's administrative Complaint did not mention a single state statute. The misunderstanding or indifference was exemplified by Complaint Counsel's persistent use of an out-of-date version of North Carolina's Dental Practice Act throughout depositions.

68. Even the administrative law judge presiding over the administrative proceeding expressed disbelief that the Commission would vote to approve a complaint against the State Board without knowing that it was a real state agency and that a statute, rather than a rule, was at issue in the proceeding.

69. The FTC's prejudgment of the applicable law on each of the State Board's primary legal defenses deprives the State Board of not only its sovereign rights assured under Article III and the Tenth Amendment to the U.S. Constitution, but also the right of due process guaranteed by the Fifth Amendment to the U.S. Constitution.[30] As more fully alleged below, the FTC's Rules are intrinsically biased against respondents and unlawfully shift the burden of proof to respondents:

    a. The FTC's action against the State Board is one of the first cases being adjudicated under their revised Rules. Additionally, the FTC administrative proceeding is among the first to be subject to the Commission's electronic filing procedure. At times, neither Respondent's Counsel, nor Complaint Counsel, nor even the Commission itself, have completely understood the twists and turns, one way streets and blind alleys presented by the new Rules, or the practical challenges to e-filing on a system that has been occasionally erratic and more than occasionally completely down.

    b. The new Rules obligate attorneys such as Plaintiff's Counsel who "practice before the Commission" to comply with specific state bar rules, but are silent about

[30] *See* remarks of J. Thomas Rosch, "So I Serve as Both a Prosecutor and a Judge – What's the Big Deal?", American Bar Association Annual Meeting, p. 2 (Aug. 5, 2010), the text of a presentation made by a FTC Commissioner after he voted to issue the FTC's administrative Complaint against the State Board.

which rules of ethics, if any, are binding on Complaint Counsel, policy staff, or other Commission staff attorneys.[31]

c. The Rules do not require verification of Complaint Counsel's "statement of facts" accompanying its motion for partial summary decision; however, the Rules require a respondent's counter-statement of facts to be verified. FTC Rule of Practice, 16 C.F.R. § 3.24(a)(1) and (2).

d. The Scheduling Order allows Complaint Counsel to use at the hearing any investigative hearing transcripts against a respondent, even though the Rules restrict the role of the respondent's legal counsel, limit grounds for objections, provide no opportunity for the witness to review and sign (unless pursuant to a civil investigative demand), and sequester the witness without recourse. The FTC staff attorney conducting the investigative hearing has "sole discretion" to deny a witness the opportunity to clarify or correct testimony. July 15, 2010, Scheduling Order ¶ 17, and FTC Rules of Practice, 16 C.F.R. §§ 2.8, 2.9.

e. Complaint Counsel and certain policy staff counsel have displayed a disturbing pattern of distortion and outright false representations in correspondence and pleadings, and a pattern of abuse, including misleading and intimidating witnesses.

70. Ironically, the FTC's slogan is "Protecting America's Consumers," but in our federal system of government, it does not have a monopoly on consumer protection. For the State Board, consumer protection is far more than a slogan.

[31] Complaint Counsel has refused to provide this information despite repeated requests.

71. Perhaps the FTC's administrative case against the State Board would have been more compelling if the State Board had done to an unauthorized dental practitioner what the FTC has actually done to the State of North Carolina: if it had issued a false press release on a government website stating that it has "reason to believe" that teeth whitening providers had conspired to commit fraud (¶¶ 41-43), if it had intimidated and misled witnesses (¶ 48), if it had pursued prosecutions even when courts had ruled that it does not have jurisdiction (¶¶ 26-31), if it had required teeth whiteners to defend cases 300 miles from home (¶ 60), if it had filed charges against defendants based upon an investigation supervised by a board member with an actual conflict of interest (¶ 37), if it abused discovery (¶¶ 48-56), or if it had hauled defendants before a drumhead, predisposed tribunal at which the prosecutors also acted as judges (¶¶ 64-69). But, the State Board did none of these. The FTC has done all of them. Only this Court can protect the State Board from further injustice.

COUNT I

Declaratory Judgment Regarding Jurisdiction and State Action Immunity

72. The State Board restates and incorporates by reference each and every allegation of the preceding paragraphs.

73. Plaintiff, as alleged above, is an agency of the sovereign State of North Carolina, established by statute and having no existence, corporate or otherwise, but for the State. It is an instrumentality of the State and enforces the North Carolina Dental Practice Act as the State, and is an indivisible part of the sovereign State. Also, as alleged above, the State Board is statutorily barred from engaging in any competition for the sale of goods

or services to the public. As provided by the N.C. Constitution, Article I, § 34, it can only protect the public and cannot engage in monopolistic conduct.

74. The Tenth Amendment does not allow, the Federal Trade Commission Act does not provide, the Sherman Antitrust Act does not authorize, and Article I, § 8 of the U.S. Constitution does not provide the FTC antitrust jurisdiction over the State Board's enforcement of the Dental Practice Act against the unauthorized practice of dentistry.

75. As a result, the State Board is entitled to declaratory judgment and injunctive relief to protect its sovereign interests and Constitutional rights.

COUNT II

Declaratory Judgment Regarding Violation of U.S. Constitution Article III, Section 2, Clause 2

76. The State Board restates and incorporates by reference each and every allegation of the preceding paragraphs.

77. The FTC is an independent administrative agency under the Executive Branch. It is not a federal court within the Judicial Branch of Article III of the U.S. Constitution. It is a quasi-judicial body with limited authority to commence, hear, and rule upon cases against "persons, partnerships and corporations" other than sovereign states.

78. The State of North Carolina has not waived its sovereign immunity or consented to the FTC's quasi-judicial authority over Plaintiff State Board of Dental Examiners.

79. The FTC is barred by the U.S. Constitution, Article III, § 2, Clause 2 from forcing the State of North Carolina to be tried in a tribunal that is not either the U.S. Supreme Court or a lesser tribunal established by Congress as part of the federal judiciary.

80. As a result, the State Board is entitled to declaratory judgment and injunctive relief to protect its sovereign interests and constitutional rights.

COUNT III

Declaratory Judgment Regarding the Statutory Composition of the State Board

81. The State Board restates and incorporates by reference each and every allegation of the preceding paragraphs.

82. The State of North Carolina has prescribed by statute that a majority of the members of its State Board of Dental Examiners shall be licensed dentists. Like dozens of other North Carolina licensing boards, like hundreds of other licensing boards in other sovereign states, and, indeed, like various federally-established regulatory boards, the State of North Carolina has determined that it can efficiently and effectively protect the public by regulating the practice of dentistry through use of a board with a majority consisting of licensed dentists who have the requisite education, training and experience, as well as the confidence and respect of other licensees.

83. To assure that members of the State Board, including licensee members, respect the sacred trust of their responsibilities on the State Board, voting only in the interest of public protection, and forsaking self-aggrandizement, conflicts of interest or illegal private gain, the State of North Carolina has subjected the State Board to strict statutory oversight, and enacted numerous above-alleged statutes prohibiting conflicts of interest or use of their public offices for private gain. The State has also extended by statute its sovereign immunity to the State Board, its members, and its staff.

84. The composition of the State Board is a reasonable exercise of the State's constitutionally guaranteed prerogative to protect its citizens and regulate the practice of dentistry within its borders.

85. No act of Congress, most particularly no part of the federal antitrust laws, nor any provision in the Federal Trade Commission Act, has authorized the FTC to claim that North Carolina's State Board of Dental Examiners is an antitrust conspiracy merely because a majority of the State officials who comprise its membership are licensees.

86. The FTC is barred by the Tenth Amendment and U.S. Constitution, Article I, § 8, from attempting to preempt North Carolina's statutorily mandated composition of a State Board established to define and regulate the practice of dentistry in North Carolina.

87. As a result, the State Board is entitled to declaratory judgment and injunctive relief to protect its sovereign interests and constitutional rights.

COUNT IV

Violation of Due Process Clause
(Regarding Commission's Predetermination of the State Board's Legal Defenses)

88. The State Board restates and incorporates by reference each and every allegation of the preceding paragraphs.

89. The State Board has sovereign and constitutional rights and privileges, as well as significant liberty and property interests that are at stake in the administrative proceeding before the Commission.

90. The FTC, as an administrative agency rather than a *bona fide* federal court, does not have the authority to consider or rule upon the constitutionality of its own unauthorized assertions of jurisdiction, nor upon the application of the Tenth Amendment to its

statutory limits of power. The fundamental constitutional questions raised in this Complaint are beyond the self-serving grasp of the FTC.

91. The Due Process Clause of the Fifth Amendment to the U.S. Constitution requires that the Commission, as an administrative agency, provide the State Board with a fair and impartial adjudicatory proceeding—both in appearance and in reality—that is free of any prejudgment on the key factual and legal merits of the allegations in the administrative Complaint.

92. As more fully alleged above, the Commission has violated the State Board's due process rights to a fair and impartial proceeding by having decided before the administrative hearing commenced, that as a matter of law the FTC had jurisdiction over the State Board, the State Board did not have state action immunity, and a state agency comprised of a majority of licensee members was a *per se* antitrust conspiracy.

93. As more fully alleged above, the FTC has also violated the Due Process Clause of the Fifth Amendment to the U.S. Constitution by adopting and enforcing inherently biased rules, permitting and condoning persistent and flagrant procedural and discovery abuses, requiring that the FTC administrative proceeding be conducted outside the State of North Carolina (over 300 miles from the State Board's witnesses), and refusing to stay the administrative proceeding while the defendant FTC may take as long as for two months on rulings on dispositive motions. The Plaintiff State Board is informed and believes and therefore alleges that the FTC's tactics are consciously intended to force the State Board to "cave" and stipulate to the FTC's jurisdiction and to the FTC's attempted preemption of state laws.

94. As a result of the foregoing, the Commission's administrative proceedings against the State Board are fundamentally flawed under the Due Process Clause, and no valid order can result from those administrative proceedings.

95. The Commission's conduct has caused and will continue to cause the State Board to suffer immediate and irreparable harm to its constitutional right to due process. No money damages can remedy this harm, and the State Board has no legal avenue by which to recover any money damages against the Commission.

96. As a result, the State Board is entitled to judgment and injunctive relief to protect its sovereign interests and constitutional rights.

COUNT V

Violation of Federal APA Prohibition of Arbitrary & Capricious Conduct

97. The State Board restates and incorporates by reference each and every allegation of the preceding paragraphs.

98. Additionally, and in the alternative to the previous Counts, the State Board is asserting claims under the Federal Administrative Procedure Act (APA), 5 U.S.C. § 500 *et seq.*, which requires that the Commission refrain from engaging in "arbitrary and capricious" conduct that bears no rational connection to the facts and circumstances of a particular case.

99. During the prosecution of the administrative Complaint, the Rules of the Commission do not establish a level playing field.

100. Complaint Counsel has frustrated the discovery process by providing evasive and non-responsive discovery. All three of its discovery responses (to Requests for Admissions, Production, and Interrogatories) evince an unjustifiable, disrespectful, and unacceptably

pugnacious disregard for the facts of the matter as well as the rules of discovery and general purposes for which discovery exists. This veiled contempt for the institution of discovery is highlighted by a failure to accept the responsibility to respond to the State Board's numerous requests for information as the moving party in the administrative proceeding—and incidentally, as the party with the burden of proof. The result of this evasive approach to discovery appears to be an attempt to intentionally subvert the purpose of discovery—which, as generally understood, is to exchange meaningful information and narrow issues. Instead, Complaint Counsel's course of conduct here, intentional or not, has obscured meaningful information and sought to expand the issues at hand. In colloquial terms, the result of discovery to date is that "we have lost information."

101. The Commission has violated the Federal APA, 5 U.S.C. § 500 *et seq*., by acting in an arbitrary and capricious manner and by unilaterally subjecting the State Board to an unauthorized assertion of the Commission's jurisdiction to thwart the State Board's proper regulatory actions.

102. The Commission's conduct constitutes arbitrary and capricious agency action in violation of the Federal APA, 5 U.S.C. § 500 *et seq*. Further, the Commission's proceedings against the State Board are fundamentally flawed such that no valid order can result from the administrative proceedings, and immediate review by this Court for injunctive relief is proper.

103. The Commission's conduct has deprived the State Board of a fair and impartial hearing, to which the State Board is entitled in accordance with Federal APA requirements.

104. The Commission's conduct has caused and will continue to cause the State Board to suffer immediate and irreparable harm. No money damages can remedy this harm, and the State Board has no legal avenue by which to recover any money damages against the Commission.

105. As a result, the State Board is entitled to judgment and injunctive relief to protect its sovereign interests and constitutional rights.

COUNT VI

Direct Suit Under the U.S. Constitution

106. The State Board restates and incorporates by reference each and every allegation of the preceding paragraphs.

107. Additionally, and in the alternative, the conduct alleged above constitutes a violation of the Tenth Amendment, the Commerce Clause and Due Process Clauses, and Article III, Section 2, Clause 2 of the U.S. Constitution, and the State Board brings this action as a direct claim under the U.S. Constitution.

108. As a result of the foregoing, the Commission's administrative proceedings against the State Board are fundamentally flawed and no valid order can result from the FTC administrative proceedings, and immediate review by this Court for injunctive relief is proper.

109. The Commission's conduct has caused and will continue to cause the State Board to suffer immediate and irreparable harm to its constitutional rights to due process. No money damages can remedy this harm, and the State Board has no legal avenue by which to recover any money damages against the Commission.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff State Board respectfully requests this Court to:

I. Issue a Declaratory Judgment that the FTC lacks antitrust jurisdiction over the State Board under Constitutional and statutory provisions described above.

II. Issue a Declaratory Judgment that the FTC lacks the authority to adjudicate a claim against the State Board in an administrative tribunal rather than a federal court, for the grounds described above.

III. Issue a Declaratory Judgment that North Carolina's statutory scheme of regulating the practice of dentistry by a licensing board comprised of a majority of licensees is not subject to FTC jurisdiction under the Tenth Amendment, the Commerce Clause, the Federal Trade Commission Act, and the Sherman Antitrust Act.

IV. Enter a Declaratory Judgment that the FTC has violated the State Board's right to due process, by predetermining constitutional legal defenses, by adopting and enforcing intrinsically unfair procedural rules, by mandating an untenable fast track schedule, by refusing to change the location of the hearing, by refusing to grant an unopposed motion to stay during the pendency of dispositive motions, by failing to disqualify itself, and by permitting or condoning systematic abuses of discovery and witnesses.

V. Enter a Declaratory Judgment that the FTC has violated the State Board's rights under the Administrative Procedure Act.

VI. Immediately stay or restrain and preliminarily and permanently enjoin the FTC from illegally asserting jurisdiction it does not have over the State Board.

VII. Order the FTC to remove from its federal government website all false, derogatory and unsubstantiated assertions against the State Board, the members of the State Board, and the dentists of North Carolina.

VIII. Award the State Board its reasonable costs, including reasonable attorney fees, incurred in defending the preliminary investigation, the administrative Complaint, and this action.

IX. Award such other and further relief as the Court deems just and proper.

This the 1st day of February, 2011.

Respectfully submitted,

ALLEN AND PINNIX, P.A.

/s/ Noel L. Allen

Noel L. Allen
NC State Bar No. 5485
Alfred P. Carlton, Jr.
NC State Bar No. 6544
Attorneys for Plaintiff
Post Office Drawer 1270
Raleigh, North Carolina 27602
Telephone: 919-755-0505
Facsimile: 919-829-8098
Email: nallen@allen-pinnix.com
acarlton@allen-pinnix.com

STATE OF NORTH CAROLINA

VERIFICATION

COUNTY OF WAKE

Bobby D. White, Chief Operations Officer of the Plaintiff, North Carolina State Board of Dental Examiners, herein, being first duly sworn, deposes and says that he has read the foregoing and knows the content thereof and that the same is true of his own knowledge, except as to those matters and things stated upon information and belief, and as to those matters, he believes them to be true.

This the 1st day of February, 2011.

Bobby D. White, Chief Operations Officer
North Carolina State Board of Dental Examiners

Sworn to and subscribed before me, a Notary Public, this the 1ST day of February, 2011.

Katharine M. Gloden
Notary Public

Printed name: KATHARINE M. GLODEN

My Commission expires: 10/15/15

ALL-STATE LEGAL®
EXHIBIT
B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
Case No. 5:11-cv-00049-FL

THE NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS, Plaintiff, v. FEDERAL TRADE COMMISSION, Defendant.	**MOTION FOR TEMPORARY RESTRAINING ORDER AND OTHER EQUITABLE RELIEF**

Plaintiff, the North Carolina State Board of Dental Examiners ("State Board" or "Plaintiff"), having filed its Complaint in this matter, moves this Court for a Temporary Restraining Order ("TRO") against Defendant the Federal Trade Commission ("Commission" or "Defendant") and its Commissioners, agents, employees, Administrative Law Judges, and attorneys, pursuant to Rule 65 of the Federal Rules of Civil Procedure. A TRO is necessary to prevent Defendant from continuing the violations alleged in the Plaintiff's Complaint for Declaratory Judgment and Preliminary and Permanent Injunction ("Complaint") and Memorandum in Support of Plaintiff's Motion for TRO, Preliminary Injunction, and Permanent Injunction ("Memorandum"). Specifically, it is alleged that:

1. The Commission has engaged in and is likely to engage in acts or practices that violate Art. I, Sect. 8, Cl. 3 of the U.S. Constitution; the 5th and 10th Amendments to the U.S. Constitution; the Federal Trade Commission Act; and the progeny of *Parker v. Brown,* 317 U.S. 341 (1943), as alleged in the Plaintiff's Complaint and Memorandum;

2. These actions constitute immediate and irreparable harm to the Plaintiff, and will continue to cause immediate and irreparable harm to the Plaintiff unless relief is granted; and

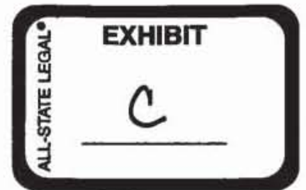
3. Therefore, the Plaintiff is entitled to a TRO and other equitable relief enjoining the Defendant from further violations of Art. I, Sect. 8, Cl. 3 of the U.S. Constitution; the 5th and 10th Amendments to the U.S. Constitution; the Federal Trade Commission Act; and the progeny of *Parker v. Brown,* 317 U.S. 341 (1943).

WHEREFORE, the State Board respectfully requests that the Court grant its motion for a TRO and other Equitable Relief, and enter the State Board's TRO against the Defendant.

This the 2nd day of February, 2011.

/s/ Noel L. Allen

Noel L. Allen
NC State Bar No. 5485
Alfred P. Carlton, Jr.
NC State Bar No. 6544
M. Jackson Nichols
NC State Bar No. 7933
Attorneys for Plaintiff
Post Office Drawer 1270
Raleigh, North Carolina 27602
Telephone: 919-755-0505
Facsimile: 919-829-8098
Email: nallen@allen-pinnix.com
acarlton@allen-pinnix.com
mjn@allen-pinnix.com



UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
Case No. 5:11-CV-00049-FL

THE NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS,	)	
	)	
Plaintiff,	)	
	)	(Fed. R. Civ. P. 65 and Local Civil Rules 7.1, 7.2 and 10.1)
v.	)	
	)	
FEDERAL TRADE COMMISSION,	)	
	)	
Defendant.	)	

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER, PRELIMINARY INJUNCTION, AND PERMANENT INJUNCTION

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

INTRODUCTION

A. Summary of the Nature of the Case 1

B. Statement of the Facts 2

ARGUMENT

I. LEGAL STANDARD FOR TRO, PRELIMINARY INJUNCTION, AND PERMANENT INJUNCTION 9

II. THE STATE BOARD WILL SUFFER IMMEDIATE, PERMANENT, AND IRREPARABLE INJURY IF IT IS NOT GRANTED IMMEDIATE INJUNCTIVE RELIEF 9

A. The Commission Is Compromising the State Board's Ability to Fulfill Its Statutory Duty to Enforce the Dental Practice Act 9

B. The Commission's Continuing Breach of the State Board's Constitutional Rights Constitutes Irreparable Harm 11

III. THE STATE BOARD IS LIKELY TO SUCCEED ON THE MERITS OF ITS CASE 12

A. The Commission Is Exceeding Its Authority as Provided by Sections 4 and 5 of the Federal Trade Commission Act and Its Accompanying Case Law 12

B. The Commission Is Violating Article I, Section 8 of the U.S. Constitution 17

C. The Commission Is Violating the Tenth Amendment of the U.S. Constitution 18

D. The Commission Is Violating the Fifth Amendment to the U.S. Constitution 19

E. Absence of Jurisdiction Moots the Administrative Proceeding (and Incidentally Moots Questions of Exhaustion of Remedies as Well) 21

IV. THE EQUITIES WEIGH IN FAVOR OF GRANTING THE STATE BOARD INJUNCTIVE RELIEF 24

V. AN INJUNCTION IS IN THE PUBLIC INTEREST 24

CONCLUSION 26

TABLE OF AUTHORITIES

Cases

A.A. v. Needville Indep. School Dist., 701 F. Supp. 2d 863
S.D. Tex. 2009) ... 11

Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940) ... 14

Brazil v. Arkansas Bd. of Dental Exam'rs,
593 F. Supp. 1354 (E.D. Ark. 1984) ... 15

California Dental Ass'n v. FTC, 526 U.S. 756 (1994) ... 13

California Retail Liquor Dealers Ass 'n v. Midcal Aluminum, Inc.
445 U.S. 97 (1980) ... 16

California State Bd. of Optometry v. FTC,
910 F.2d 976 (D.C. Cir. 1990) ... 15

Cinderella Career and Finishing Sch., Inc. v. FTC,
425 F.2d 583, 591 (D.C. Cir. 1970) ... 20

City of Lafayette v. La. Power & Light Co., 435 U.S. 389 (1977) ... 14

Continental Ore Co. v. Union Carbide & Carbon Corp.,
370 U.S. 690 (1962) ... 16-17

Downen v. Warner, 481 F.2d 642 (9th Cir. 1973) ... 22

Earles v. State Bd. of Certified Public Accountants,
139 F.3d 1033 (5th Cir. 1998) ... 6-7

Fed. Leasing, Inc. v. Underwriters at Lloyd's, 650 F.2d 495 (4th Cir. 1981) ... 10

Flav-O-Rich, Inc. v. N.C. Milk Comm'n,
593 F. Supp. 13 (E.D.N.C. 1983) ... 7, 16

FTC v. Atlantic Richfield Co., 567 F.2d 96 (D.C. Cir. 1977) ... 21

Gambrel v. Kentucky Bd. of Dentistry,
689 F.2d 612 (6th Cir. 1982) ... 15

Genentech, Inc. v. Regents of the Univ. of Cal.,
143 F.3d 1446 (Fed. Cir. 1998) ... 14

Gibson v. Berryhill, 411 U.S. 564 (1973) ... 22

Cases (cont.)

Gilligan, Will & Co. v. Securities & Exchange Comm'n, 267 F.2d 461 (2d Cir. 1959) 20

Ginorio v. Gomez, 301 F. Supp. 2d 122 (S.D. Tex. 2009) 11

Glines v. Wade, 586 F.2d 675 (9th Cir. 1978) 22

Hass v. Oregon State Bar, 883 F.2d 1453 (9th Cir. 1989) 15, 18

Houghton v. Shafer, 392 U.S. 639 (1968) 23

K-Mart Corp. v. Oriental Plaza, Inc., 875 F.2d 907 (1st Cir. 1989) 10

Kalos v. Greenwich Ins. Co., No. 10-1959, 2010 U.S. App. LEXIS 25600 (4th Cir. Dec. 14, 2010) 9

Kentucky Household Goods Carrier Ass'n, 139 F.T.C. 404 (2005) 17

Maine v. Taylor, 477 U.S. 131 (1986) 18

Mathews v. Eldridge, 424 U.S. 319 (1976) 22

McCarthy v. Madigan, 503 U.S. 140 (1992) 23

Montgomery Ward & Co. v. FTC, 379 F.2d 666 (7th Cir. 1967) 13

Muhammad v. Secretary of the Army, 770 F.2d 1494 (9th Cir. 1985) 22

Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1983) 22

Nassimos v. N.J. Board of Exam'rs of Master Plumbers, No. 94-1319, 1995 U.S. Dist. LEXIS 21376 (D.N.J. Apr. 4, 1995) 15

Nat'l Fed. of the Blind v. FTC, 420 F.3d 331 (4th Cir. 2005) 13

Nat'l Society of Prof'l Eng'rs v. United States, 435 U.S. 679 (1978) 17

N. Sims Organ & Co. v. Securities & Exchange Comm'n, 293 F.2d 78 (2d Cir. 1961) 19

Opdyke Inv. Co. v. Detroit, 883 F.2d 1265 (6th Cir. 1989) 15

Parker v. Brown, 317 U.S. 341 (1943) 5, 12, 13, 14, 17, 23

Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) 18

Thorne v. U.S. Dep't of Defense, 916 F. Supp. 1358 (E.D.Va. 1996) 22

Cases (cont.)

Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985) 15

Will v. Michigan Dep't of State Police, 491 U.S. 58 (1989) 16

Winter v. NRDC, Inc., 555 U.S. 7 (2008) 9, 12

Federal Agency Cases

In the Matter of Union Oil Co. of California, FTC Docket No. 9305 23

In the Matter of Massachusetts Furniture & Piano Movers Ass'n Inc., FTC Docket No. 9137 19

Constitutional Authority

N.C. CONST. art. I, § 34 3

U.S. CONST. art. I, § 8 .... 1, 12, 17

U.S. CONST. amend. V 1, 12

U.S. CONST. amend. X 1, 12, 18, 19

Statutes

N.C. Gen. Stat. § 7A-3 3

N.C. Gen. Stat. § 11-7 .... 3, 4

N.C. Gen. Stat. § 66-58(a) 3

N.C. Gen. Stat. § 90-22 .... 2, 3, 4, 6, 8, 19

N.C. Gen. Stat. § 90-27 4

N.C. Gen. Stat. § 90-40 8

N.C. Gen. Stat. § 90-40.1 .... 3, 8

N.C. Gen. Stat. § 90-41 8

N.C. Gen. Stat. § 90-44 2

N.C. Gen. Stat. § 93B-2 2

N.C. Gen. Stat. § 93B-4 2

Statutes (cont.)

N.C. Gen. Stat. § 93B-5 4

N.C. Gen. Stat. § 93B-16 3

N.C. Gen. Stat. § 120-70.1.1(3a) 3

N.C. Gen. Stat. §§ 132-1 to -10 2

N.C. Gen. Stat. §§ 138A-1 to -45 .... 4, 6

N.C. Gen. Stat. §§ 143-291 to -300.1A 3

N.C. Gen. Stat. § 143-555 4

N.C. Gen. Stat. §§ 143-318.9 to -318.18 2

N.C. Gen. Stat. §§ 143B-30.1 to -30.4 2

N.C. Gen. Stat. §§ 147-64.1 to -64.14 2

N.C. Gen. Stat. §§ 150B-1 to -52 .... 2, 3, 4

15 U.S.C. § 44 .... 1, 12, 13, 17

15 U.S.C. § 45 .... 1, 12, 13, 17

Regulations

16 C.F.R. § 3.11 5

Rules

Fed. R. Civ. P. 65 .... 1, 9

Other Authorities

137 Cong. Rec. 53930-02 14

ABA Section on Antitrust Law Comments in Response to the Federal Trade Commission's Request for Public Comment Regarding Parts 3 and 4 Rules of Practice Rule Making (Nov. 6, 2008) 20

FEDERAL TRADE COMMISSION, REPORT OF THE STATE ACTION TASK FORCE at 55 (Sept. 2003), http://www.ftc.gov/os/2003/09/stateactionreport.pdf 6

Other Authorities (cont.)

Monica Laliberte, *Teeth Whitening Kiosks at the Mall Are Not Regulated*, WRAL (May 21, 2008), http://www.wral.com/5onyourside/story/2921079/ (last visited January 26, 2011)........24

C. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2948.1 155 (2d ed. 1995)........9

INTRODUCTION

A. Summary of the Nature of the Case.

Plaintiff, the North Carolina State Board of Dental Examiners ("State Board" or "Plaintiff"), hereby submits this Memorandum in Support of its Motion for a Temporary Restraining Order ("TRO"), Preliminary Injunction, and Permanent Injunction ("Memorandum"), pursuant to Federal Rules of Civil Procedure 65 and Local Civil Rules 7.1, 7.2 and 10.1.

As set forth in more detail in the Statement of the Facts (Section I.B, *infra*), Complaint Counsel for the Federal Trade Commission ("Complaint Counsel") currently is pursuing an administrative proceeding ("Administrative Proceeding") against the State Board before the Federal Trade Commission ("FTC," "Commission," or "Defendant"). In pursing this Administrative Proceeding, the Commission has violated—and continues to violate—the State Board's constitutional rights under Article I, Section 8 (the "Commerce Clause"); the Tenth Amendment to the U.S. Constitution; and Sections 4 and 5 of the FTC Act (15 U.S.C. §§ 44-45). If the Commission is permitted to proceed with these violations, the State Board—and, therefore, North Carolina's consuming public—will suffer immediate, permanent, and irreparable harm.

On February 1, 2011, the State Board filed a Complaint for Declaratory Judgment and Preliminary and Permanent Injunction against the FTC ("Complaint"), which is incorporated herein by reference, on the grounds that the FTC is violating the State Board's constitutional rights under the following provisions of the U.S. Constitution: Article I, § 8 (the Commerce Clause); the Tenth Amendment; Article III, § 2, Cl. 2 (original jurisdiction over actions against states); and the Due Process Clause of the Fifth Amendment. For the reasons detailed within this Memorandum, the State Board respectfully moves the Court:

a. To immediately stay and preliminarily and permanently enjoin the FTC from illegally asserting jurisdiction it does not have over the State Board;

b. To order the FTC to remove from its federal government website all false, derogatory, and unsubstantiated assertions against the State Board, the members of the State Board, and the dentists of North Carolina; and

c. To award the relief requested by the State Board in the Complaint.

B. Statement of the Facts.[1]

i. The State Board.

The State Board was created by North Carolina statute in 1879 when the N.C. General Assembly enacted North Carolina's Dental Practice Act ("Dental Practice Act"). The Dental Practice Act recognizes that the practice of dentistry affects the State's public health, safety, and welfare and declared that only "qualified" persons be permitted to practice dentistry. N.C. Gen. Stat. § 90-22(b). The statutory purpose of the State Board is "the regulation of the practice of dentistry" in North Carolina. N.C. Gen. Stat. § 90-22(b).

As a North Carolina state agency, the State Board is subject to state laws applicable to all instrumentalities of the State. Thus the State Board is subject to, and must comply with, the State's Constitution, the State's laws regarding open meetings (N.C. Gen. Stat. §§ 143-318.9 to –318.18), public records (N.C. Gen. Stat. §§ 132-1 to -10), administrative procedures (N.C. Gen. Stat. §§ 150B-1 to -52), and ethics (N.C. Gen. Stat. §§ 138A-1 to -45). All of the State Board's rules must be reviewed and approved by the Legislature's Rules Review Commission. N.C. Gen. Stat. §§ 143B-30.1 to –30.4.

Additionally, the State Board must file annual reports regarding its finances, as well as disciplinary, licensing, enforcement, and rulemaking activities with the Governor, the State Auditor, the Attorney General, the Secretary of State, the Office of State Budget and Management, and the General Assembly's Joint Legislative Procedure Administrative Oversight Committee. N.C. Gen. Stat. §§ 90-44, 93B-2, 93B-4. The State Board's books, records, and operations also are subject to the direct oversight of the State Auditor. N.C. Gen. Stat. §§ 93B-4, 147-64.1 to –64.14. The State

[1] The State Board incorporates by reference the facts set forth in its Complaint, filed on February 1, 2011.

Board's activities, which are taken in accordance with North Carolina statute, are subject to supervision and review by the Joint Legislative Administrative Procedure Oversight Committee.[2]

As to the unauthorized practice of dentistry, the State Board is empowered, in its own name, to "maintain an action in the name of the State of North Carolina to perpetually enjoin any person from so unlawfully practicing dentistry." N.C. Gen. Stat. § 90-40.1(a). All of the State Board's administrative proceedings are subject to judicial review by the State's Superior Courts. N.C. Gen. Stat. §§ 150B-43 to -52. In addition, under North Carolina law, State Board actions are subject to challenge in the General Court of Justice of North Carolina. *See* N.C. Gen. Stat. § 7A-3. As an instrumentality of the State, the State Board has sovereign immunity (N.C. Gen. Stat. § 93B-16(c)), is covered under the State Tort Claims Act (N.C. Gen. Stat. §§ 143-291 to –300.1A), and is entitled to legal defense from the Attorney General (N.C. Gen. Stat. § 143-298).[3]

The State Board's enforcement of the Dental Practice Act is subject to the State constitutional prohibition against monopolies.[4] The State Board and State Board members are forbidden by State statute from engaging in any private business or from competing with any private services.[5]

As mandated by N.C. Gen. Stat. § 90-22(b), a majority of the members of the State Board are licensed dentists. Each member of the State Board is, by law, a State official who must take an oath or affirmation to comply with federal and state laws and constitutions. N.C. Gen. Stat. §§ 11-7, 143-

[2] Pursuant to N.C. Gen. Stat. § 120-70.101(3a), the Joint Committee has the authority to "[t]o review the activities of State occupational licensing boards to determine if the boards are operating in accordance with statutory requirements and if the boards are still necessary to achieve the purposes for which they were created."

[3] As provided by statute, the State Board, with the assent of the Attorney General, is authorized to employ its own legal counsel and, like many other licensing boards in North Carolina, has done so for many years. Further, the North Carolina Attorney General's Office has assented to this action against the FTC.

[4] "Monopolies are contrary to the genius of a free state and shall not be tolerated." N.C. CONST., art. I, § 34.

[5] ". . . it shall be unlawful for any unit, department or agency of the State government ... or any individual employee or employees of the unit, department or agency in his, or her, or their capacity as employee or employees thereof, to engage directly or indirectly in the sale of goods, wares or merchandise in competition with citizens of the State, or . . . to maintain service establishments for the rendering of services to the public ordinarily and customarily rendered by private enterprises . . . ." N.C. Gen. Stat. § 66-58(a).

555(3)-(4). As a constitutionally-permitted quasi-judicial agency, the law empowers the president of the State Board and its secretary-treasurer "to administer oaths [and] issue subpoenas requiring the attendance of persons and the production of papers and records before said Board in any hearing, investigation or proceeding conducted by it." N.C. Gen. Stat. § 90-27.

The State Board is governed by eight members (including six licensed dentists,[6] one licensed hygienist, and a consumer appointed by the Governor) who are:

a. State officials (N.C. Gen. Stat. § 143-555(3)-(4));

b. Sworn to uphold state laws and the State and U.S. constitutions (N.C. Gen. Stat. §11-7);

c. Permitted to take office only after they are approved by the N.C. State Ethics Commission, and are required to disclose initially and annually any conflicts of interest (N.C. Gen. Stat. §§ 138A-21 – 138A-27);

d. Subject to removal for conflicts of interest (N.C. Gen. Stat. § 138A-39);

e. Subject to prosecution for using their Board membership for private gain (N.C. Gen. Stat. §§ 138A-31, 138A-34, 138A-45(g));

f. Required to remind all members of their duty to avoid conflicts of interest prior to each Board meeting and to disclose any conflicts of interest with matters coming before the Board (N.C. Gen. Stat. § 138A-15(e));

g. Required to attend classes on the State Government Ethics Act and compliance with other statutes regulating them as State Board members (N.C. Gen. Stat. §§ 138A-14(b), 93B-5(g))[7]; and

h. Presumed to be acting in the public interest in good faith. N.C. Gen. Stat. § 150B-40(b) (burden of proof is on party seeking disqualification of an agency member).

ii. FTC's Administrative Proceeding.

After a two-year investigation conducted by FTC staff members, Complaint Counsel filed a complaint against the State Board on June 17, 2010, which initiated the Administrative Proceeding. The Administrative Complaint, attached to the Complaint as Exhibit A, is predicated on the

[6] N.C. Gen. Stat. §§ 90-22(b) and (c). The licensed dentists are elected pursuant to a detailed statutory process.

[7] N.C. Gen. Stat. § 93B-5(g) requires initial and biannual training for each member "to better understand the obligations and limitations of a State agency . . . ."

allegation that the State Board is "colluding to exclude non-dentists from competing with dentists in the provision of teeth whitening services." (*See* Admin. Compl., "Nature of the Case") Specifically, Complaint Counsel alleges that the State Board "has engaged in extra-judicial activities aimed at preventing non-dentists from providing teeth whitening services in North Carolina" by:

a. Transmitting "letters to non-dentist teeth whitening providers, communicating to the recipients that they were illegally practicing dentistry without a license and ordering the recipients to cease and desist from providing teeth whitening services" (Admin. Compl., ¶ 20);

b. Engaging in communications that "threatened and discouraged non-dentists who were considering opening teeth whitening businesses by communicating to them that teeth whitening services could be provided only under the direct supervision of a dentist" (Admin. Compl., ¶ 21); and

c. Issuing "letters to third parties, including mall owners and property management companies . . . stating that teeth whitening services offered at mall kiosks are illegal (Admin. Compl., ¶ 22).

Complaint Counsel also affirmatively alleges that the State Board's "exclusion of the provision of teeth whitening services by non-dentists does not qualify for a state action defense nor is it reasonably related to any efficiencies or other benefits sufficient to justify its harmful effect on competition." Admin. Compl., ¶ 23. Before Complaint Counsel filed the Administrative Complaint, the Commission voted to approve the Administrative Complaint because it felt that it had "reason to believe" the allegations set forth in the Administrative Complaint were true—including the allegations that the FTC has jurisdiction over the State Board. See 16 C.F.R. § 3.11.

Clearly, the Defendant has predetermined that the State Board is not entitled to state action immunity in the Administrative Proceeding; this predetermination is contrary to over 67 years of case law interpreting the meaning of Parker v. Brown, 317 U.S. 341 (1943) and contrary to the intent held by Congress when it enacted the FTC Act and other antitrust laws. Defendant's Administrative Proceeding against the State Board is based on a new theory of law, created and lobbied for by the

Commission[8] and its staff for several years, but completely unsupported by statute or case law.[9] This new theory is that state licensing agencies that are comprised of a majority of licensees are private—not state—entities and therefore are not entitled to the immunity from federal antitrust laws that states are guaranteed. By the Commission's estimation, any minute day-to-day action, regulatory or otherwise, by a state board comprised of a majority of licensees is suspect. Indeed, all such state licensing boards—in other words, the vast majority of agencies throughout the United States that are charged with regulating the legal, dental, medical, nursing, engineering, and architecture professions—are now presumptive violators of federal antitrust law.

The Commission's theory has thrown into doubt portions of the North Carolina statute that authorizes the State Board's structure and regulatory activities. By law, the State Board is required to be comprised of a majority of dentists. N.C. Gen. Stat. § 90-22(b).[10] Also by law, the State Board members may participate in State Board business even if those activities directly impact their own business. N.C. Gen. Stat. § 138A-38(a).

Again and again, federal courts have upheld the structure of such state agencies, and even have called on state agencies to actively supervise private actors in order to meet federal antitrust requirements. For instance, in Earles v. State Board of Certified Public Accountants, the Fifth Circuit reversed the district court's denial of the defendant state board's motion to dismiss, based on

---

[8] See, e.g., FEDERAL TRADE COMMISSION, REPORT OF THE STATE ACTION TASK FORCE at 55 (Sept. 2003), http://www.ftc.gov/os/2003/09/stateactionreport.pdf (calling state agencies "quasi-governmental institutions" and recommending that the courts and Congress "clarify and rationalize the criteria for identifying the quasi-governmental entities that should be subject to active supervision").

[9] Despite the fact that the Commission's new theory has not been contemplated by Congress or approved by the federal courts—and is therefore without any legal justification—the Commission believes it is "common sense." Complaint Counsel's Memorandum in Reply to Respondent's Corrected Memorandum in Opposition to Complaint Counsel's Motion for Partial Summary Judgment at 13 (hereinafter "Complaint Counsel Reply") ("The exclusion of non-dentists may result in Board members and the Board's constituents obtaining higher prices for teeth whitening and a greater volume of teeth whitening procedures.").

[10] As stated above, the State Board shares this structure with the vast majority of state licensing agencies, not just in North Carolina, but in the rest of the country as well.

its immunity under the U.S. Constitution and the state action doctrine. In so holding, the Court noted that, "[d]espite the fact that the State Board is composed entirely of CPAs who compete in the profession they regulate, the public nature of the State Board's actions means that there is little danger of a cozy arrangement to restrict competition." 139 F.3d 1033, 1041 (5th Cir.), reh'g denied, 146 F.3d 869, cert. denied, 525 U.S. 982 (1998).

This U.S. District Court for the Eastern District of North Carolina has addressed the entitlement of state agencies that are comprised of industry professional to immunity under the state action doctrine. In Flav-O-Rich, Inc. v. N.C. Milk Commission, the Court granted the N.C. Milk Commission summary judgment against the plaintiff's complaint alleging antitrust violations. The Court held that that the Commission was entitled to state immunity, even though State statute required that a number of Commission members be engaged in the business of milk processing. 593 F. Supp. 13, 17 (E.D.N.C. 1983, Opinion by Dupree, Judge).

Despite the federal case law and state statutes, the Commission charges that, in order to bring itself into compliance with the Commission's demands, the State of North Carolina must change the composition of the State Board so that it is not comprised of a majority of licensees.[11] Alternatively, the Commission alleges that the State must change the North Carolina Dental Practice Act to allow for minute and specific supervision of the State Board's activities by the state courts, state legislature, attorney general, or an executive branch agency such as a department of health. Complaint Counsel's Memorandum in Opposition to Respondent's Surreply and Motion for Leave to File Limited Surreply, at 4. The Commission claims that, in the absence of such supervision, "with

[11] The Commission's untenable position gives rise to a number of new questions. For instance, how many licensees on a state board should be considered too many? Is it permissible to have one less licensee than non-licensee on a state board, or should non-licensees outnumber licensees by more than one? Are there professions that are deemed "too close" to being the licensed profession going to also be in violation of this requirement? For example, would a state board of dental examiners that is comprised of a majority of dental hygienists truly have a different view of unsupervised teeth whitening services than their dentist counterparts? Lastly, what impact would such a change have on state boards' handling of decisions that require a high degree of technical knowledge of an issue?

regard to the alleged unauthorized practice of dentistry, Respondent's authority is limited, definite, and specific: Respondent may file lawsuits." Complaint Counsel Reply, at 15.

The Commission's assertion is not only wrong, but it is also a clear misstatement of the plain meaning of the North Carolina General Statutes. Pursuant to those legislative enactments, the State Board may:

a. Refer matters for criminal prosecution (see N.C. Gen. Stat. §§ 90-40, 90-40.1(a));

b. Investigate violations of the N.C. Dental Practice Act (N.C. Gen. Stat. § 90-41(d));

c. File a civil lawsuit to enjoin the unlawful practice of dentistry and to declare the actions to be a "public nuisance" (N.C. Gen. Stat. § 90-40.1(a)); and

d. Examine the "adverse party and witnesses before filing a complaint" to enjoin a person from violating the Dental Practice Act (N.C. Gen. Stat. § 90-40.1(d)).

The alleged activities by the State Board upon which the Commission predicates its Administrative Complaint—*i.e.*, communicating to third parties that they (or others) are engaging in the unlawful practice of dentistry before seeking an injunction in court—are mere lesser powers that are encompassed in the State Board's statutory rights to enforce the Dental Practice Act. The Commission's argument makes no sense in light of the fact that the North Carolina legislature specifically provided that the North Carolina Dental Practice Act "shall be **liberally construed** to carry out [its] objects and purposes." N.C. Gen. Stat. § 90-22(a) (emphasis added).

Furthermore, the State Board's right to take preliminary steps to gain compliance with state law and potentially to bring a legal action is well established in practice and generally recognized as a common feature of state regulatory agencies. As the State Board has explained repeatedly to the Commission, the letters it sent to individuals regarding the unauthorized practice of dentistry[12] were mere warnings, which absent resort to an enforcement proceeding as authorized by law, were admittedly unenforceable. In all instances, the courts of North Carolina were—and continue to be—

[12] In no such "cease and desist" letters did the State Board "order[ ] the recipients to cease and desist from providing teeth whitening services," as alleged in Para. 20 of the Administrative Complaint, Exhibit A to the Complaint. Rather, the recipients were warned to not engage in the unlawful practice of dentistry.

open to any individual receiving such a "cease and desist" letter who feels "aggrieved" and, to date, none have sought redress in the courts.

ARGUMENT

I. LEGAL STANDARD FOR TRO, PRELIMINARY INJUNCTION, AND PERMANENT INJUNCTION.

A federal court may issue a TRO, preliminary injunction, and permanent injunction upon notice to the adverse party. Fed. R. Civ. P. 65. To obtain such injunctive relief, a plaintiff must show "that he is likely to succeed on the merits; that he is likely to suffer irreparable harm in the absence of preliminary relief; that the balance of equities tips in his favor; and that an injunction is in the public interest." Kalos v. Greenwich Ins. Co., No. 10-1959, 2010 U.S. App. LEXIS 25600, at * 3 (4th Cir. Dec. 14, 2010) (per curiam); see C. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2948.1 155 (2d ed. 1995). There must be a clear showing that harm is imminent; it is not enough that harm be possible at some future date. Winter v. NRDC, Inc., 555 U.S. 7, 28 (2008). Because the State Board can establish the factors that are necessary to obtain injunctive relief, a stay of the Administrative Proceeding should be issued.

II. THE STATE BOARD WILL SUFFER IMMEDIATE, PERMANENT, AND IRREPARABLE INJURY IF IT IS NOT GRANTED IMMEDIATE INJUNCTIVE RELIEF.

A. The Commission Is Compromising the State Board's Ability to Fulfill Its Statutory Duty to Enforce the Dental Practice Act.

By pursuing the Administrative Proceeding, the Commission is denying the State Board the right to investigate and to warn violators of its laws, and ultimately denying the State Board its ability to enforce the North Carolina Dental Practice Act—which is preventing the State Board from fulfilling the statutory purpose of its creation.

As an initial matter, Complaint Counsel has accompanied its investigation and action against the State Board with a number of public proclamations that have resulted in immediate, permanent, and irreparable damage to the State Board. The Commission's press releases and filings have had,

and continue to have, an immediate negative effect on the State Board's ability to protect the health, safety and welfare of North Carolina citizens by carrying out its day-to-day functions, such as investigating the unauthorized practice of dentistry. Specifically, such conduct inevitably will have—and has had—a chilling effect on the public's willingness to seek relief from illegal activities by petitioning the State Board for redress of grievances by filing complaints with the State Board.[13]

Beyond that, the Commission's attack on the very composition of the State Board has created fundamental uncertainty and insecurity among State Board members and State Board staff as the question of their legitimacy, and the State Board's organizational structure is thrown into doubt. Given that months (even years) may go by before the Commission produces a final decision on this matter, it is critical to the functioning of the State Board that this Court intervene and put an end to the doubt and uncertainty that the Commission's novel and poorly thought-out legal theories have created.

Moreover, beginning with the Commission's press release and continuing with its filings in the Administrative Proceeding, the Commission has defamed the reputation of the State Board and its professional members, by alleging without evidence that they are "colluding to exclude non-dentists from competing with dentists in the provision of teeth whitening services." See, e.g. Fed. Leasing, Inc. v. Underwriters at Lloyd's, 650 F.2d 495, 500 (4th Cir. 1981); see, e.g. K-Mart Corp. v. Oriental Plaza, Inc., 875 F.2d 907, 915 (1st Cir. 1989) (harm to reputation "is the type of harm not readily measurable or fully compensable in damages—and for that reason, more likely to be found 'irreparable'").

[13] See ¶ 48(c) of the Complaint, describing Complaint Counsel's *ex parte* communications with members of the public who filed complaints with the State Board, as well as the chilling effect those activities are having on the public's willingness to seek relief from the State Board as to illegal activities.

B. The Commission's Continuing Breach of the State Board's Constitutional Rights Constitutes Irreparable Harm.

It is well established that a breach of constitutional rights may constitute irreparable harm. See, e.g. A.A. v. Needville Indep. School Dist., 701 F. Supp. 2d 863 (S.D. Tex 2009) (violation of plaintiff's constitutional rights to free exercise, freedom of speech, and due process constituted irreparable harm); see, e.g. Ginorio v. Gomez, 301 F. Supp. 2d 122, 133-34 (S.D. Tex. 2009) (violation of plaintiff's due process rights constituted irreparable harm). As alleged in the Complaint, the Commission's action is a total breach of the sovereign immunity of the State of North Carolina. Such action is contrary to State Board's rights under the Commerce Clause and Tenth Amendment. See infra, Sections III.B and III.C. Allowing the Administrative Proceeding to continue would condone the Commission's illegal actions that constitute acts by the executive branch without a Congressional delegation of authority.

Furthermore, as evident from the settlement overtures it previously has made to the State Board, the Commission clearly has been attempting to obtain from the State Board a stipulation into which the State Board has no ability to enter—that is, a stipulation that the FTC has jurisdiction over the State Board and antitrust veto power over the State's statutes. Although this stipulation would have largely absolved the State Board of any supposed wrongdoing (*i.e.*, conspiracy, which a serious crime under North Carolina law), it also would have forced the State Board to stipulate that the FTC has the authority to preempt the manner in which North Carolina has chosen to regulate the practice of dentistry—a stipulation that would fly in the face of the Tenth Amendment. In addition, such a stipulation also would require the State Board to admit that its structure and functioning are seriously flawed.

Based on the existing and future dangers of the confusion that the Commission's Administrative Proceeding is creating, the chilling effect on state agency investigative and enforcement efforts, and the Commission's continued exercise of extra-judicial lawmaking power

against the State Board and other agencies, the Commission's action against the State Board must be stopped immediately. Therefore, based upon this showing of irreparable and immediate harm, the State Board is entitled to a TRO, preliminary injunction, and permanent injunction against the Commission to stay the Administrative Proceeding.

III. THE STATE BOARD IS LIKELY TO SUCCEED ON THE MERITS OF ITS CASE.

To obtain injunctive relief in this matter, the State Board must show that it is likely to succeed on the merits of its case. Winter, 555 U.S. at 44. The State Board is entitled to fulfill its legislated mandate to protect the public by taking action against the unauthorized practice of dentistry in North Carolina. Since the federal government has enacted no law abridging this right, the FTC does not have the power to unilaterally enforce against the State Board antitrust statutes clearly meant to regulate private, non-state actors. Therefore, the State Board is likely to succeed in its causes of action against the Commission, as set forth in Counts I, III, IV, and VI of the Complaint, which are resulting from the Commission's course of conduct that is in violation of its Congressionally-delegated authority, as provided in Sections 4 and 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. §§ 44-45, and the requirements established by Parker v. Brown; the U.S. Constitution Article I, Sect. 8; and the Fifth and Tenth Amendments to the U.S. Constitution.[14]

A. The Commission Is Exceeding Its Authority as Provided by Sections 4 and 5 of the Federal Trade Commission Act and Its Accompanying Case Law.

i. Violation of Section 4 of the Federal Trade Commission Act and Its Accompanying Case Law.

By the express terms of the statute, the Commission only is authorized to enforce the FTC Act against "persons, partnerships or corporations . . . from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting

[14] U.S. CONST. amend. X (reserving to the states and the people the powers which are not delegated to the federal government).

commerce." 15 U.S.C. § 45. Clearly, the State Board does not meet the definition of a corporation, as Section 4 of the FTC Act defines "corporation" as a company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, which is organized to carry on business for its own profit or that of its members . . . ". 15 U.S.C. § 44. Likewise, the State Board is not a partnership. Rather, the State Board is a North Carolina agency that exists for no other reason but to protect the health, welfare, and safety of North Carolina citizens through the regulation of the practice of dentistry. The activities of the State Board have no apparent "proximate relation to lucre," which is a factor recognized by the U.S. Supreme Court as essential to establish such jurisdiction. California Dental Ass'n v. FTC, 526 U.S. 756, 766-68 (1999); see also Nat'l Fed. of the Blind v. FTC, 420 F.3d 331 (4th Cir. 2005) (affirming lower court holding that the FTC had no jurisdiction over non-profit organization engaged in telemarketing for charitable purposes).

Furthermore, neither North Carolina nor the State Board is a person under the FTC Act. Although a few federal courts have recognized that a State may be considered a person under certain antitrust laws, no such decision has been rendered with regard to the FTC Act. Furthermore, federal courts have not recognized state agencies, such as the State Board, as "persons" under the FTC Act.[15]

ii. Violation of Section 5 of the Federal Trade Commission Act and Its Accompanying Case Law.

By law, federal antitrust legislation is aimed at violations by non-state actors; state actors are exempt from these laws. This distinction was established by the U.S. Supreme Court in Parker v.

[15] To the extent that the FTC itself has issued agency decisions finding that state agencies are "persons" under the FTC, such decisions hold no persuasive authority in this Court. Montgomery Ward & Co. v. FTC, 379 F.2d 666 (7th Cir. 1967) ("Because the Commission is charged with the administration of a regulatory statute through practical application of its expertise, prior Commission decisions are not of compelling precedential value.").

Brown, where the Court examined the record of Congressional debate to determine that the Sherman Antitrust Act was not intended to apply to state government actions. The Court held that:

> We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.

Parker, 317 U.S. at 350-51. The same conclusion holds true of the Federal Trade Commission Act.

Since Parker, Congress has had nearly 70 years to amend the FTC Act to include states (or even just state agencies) within the ambit of federal antitrust legislation; it has not done so. It has chosen to eliminate state sovereign immunity in other circumstances, but not for state agencies. See, e.g., Genentech, Inc. v. Regents of the Univ. of Cal., 143 F.3d 1446, 1449 (1998); see also 137 Cong. Rec. 53930-02 (daily ed. Mar. 21, 1991) (citing Public Law 102-560, enacted in 1992, "for the purpose of abrogating Eleventh Amendment immunity in patent cases, to close a 'sovereign immunity loophole'").

The federal courts have had many opportunities to make such changes to state action immunity as well; they have reiterated again and again the determination that federal antitrust laws do not apply to a sovereign state:

> In determining whether the actions of a political subdivision of a State as well as those of a state legislature are immune from the Sherman Act, we must interpret the provisions of the Act "in the light of its legislative history and of the particular evils at which the legislation was aimed." Those "particular evils" did not include acts of governmental bodies. Rather, Congress was concerned with attacking concentrations of private economic power unresponsive to public needs, such as "these great trusts, these great corporations, these large moneyed institutions."

City of Lafayette v. La. Power & Light Co., 435 U.S. 389, 428 (1977) (citing 21 Cong. Rec. 2562 (1890) and Apex Hosiery Co. v. Leader, 310 U.S. 469, 489 (1940)). The courts have reached the same conclusion when the Commission has attempted to eliminate state action immunity through direct rulemaking rather than adjudication:

> We can find nothing in the language or history of subsequently adopted amendments to support a finding that Congress has expanded the FTC's jurisdiction to embrace state action. In the absence of any evidence of such a purpose, we turn to well-established rules of statutory construction, which we find dispositive. See INS v. Cardoza-Fonseca, 480 U.S. 421, 449 (1987) ("ordinary canons of statutory construction compelling").

California State Bd. of Optometry v. FTC, 910 F.2d 976, 980 (D.C. Cir. 1990).

Similarly, in Opdyke Inv. Co. v. Detroit, the Sixth Circuit held that: "[t]he legislative history of the Sherman Act reveals no evidence of an express Congressional intent to apply the antitrust laws to either state or local governments." 883 F.2d 1265, 1272 (6th Cir. 1989) (citing H.Rep. No. 965, 98th Cong., 2d Sess. 4, 1984 U.S. Code Cong. & Admin. News at 4605).

In reliance upon the Supreme Court's decision in Parker, federal courts have repeatedly granted state agencies immunity from federal antitrust legislation. See, e.g. Hass v. Oregon State Bar, 883 F.2d 1453, 1461 (9th Cir. 1989); Gambrel v. Kentucky Board of Dentistry, 689 F.2d 612, 616-18 (6th Cir. 1982); see also Brazil v. Arkansas Board of Dental Examiners, 593 F. Supp. 1354, 1362 (E.D. Ark. 1984), aff'd, 759 F.2d 674 (8th Cir. 1985); Nassimos v. N.J. Board of Examiners of Master Plumbers, No. 94-1319, 1995 U.S. Dist. LEXIS 21376, at *10 (D.N.J. Apr. 4, 1995), aff'd, 74 F.3d 1227 (3rd Cir. 1995), cert. denied, 517 U.S. 1244 (1996). In these and other cases, state agencies need only prove that they acted pursuant to a clearly articulated state statute for their actions to be treated as immune. In 1985, the Supreme Court held that "it is likely" that that requirement alone must be met for state agencies to enjoy immunity. Town of Hallie v. City of Eau Claire, 471 U.S. 34, 46 n.10 (1985). Since then, not a single state agency has been required to make a showing beyond the clearly articulated state statute requirement in order to enjoy state action immunity.

The Commission cannot act against the State Board in this matter without unmistakably clear legislative intent directing the federal government to remove from the states the power that they have traditionally held and exercised. See, e.g., California State Bd. of Optometry v. FTC, 910 F.2d 976, 981 (D.C. Cir. 2990) (If Congress intends to alter the "usual constitutional balance between the

States and the Federal Government," it must make its intention to do so "unmistakably clear in the language of the statute."); Will v. Michigan Dep't of State Police, 491 U.S. 58, 63 (1989) (internal citations omitted) ("In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that **the legislature** has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.").

During the Administrative Proceeding and now, the State Board maintains that the actions which are at issue in this matter—that is, the Board's investigation of non-dentist providers of teeth whitening services and the sending of warning letters regarding these services—are clearly within the ambit of the North Carolina Dental Practice Act and the State Board's prerogative to enforce that Act. The Commission seeks to impose a requirement that the State Board's investigation and preliminary warning letters be subject to another test beyond the "clearly articulated" requirement. Clearly, the Commission is twisting case law that is aimed at private, non-governmental parties to suit its aims in this proceeding against a state agency and stretching to create a wrong where none exists.

Unlike state actors, private parties must show "active supervision" by the state for each of their actions to be permitted. See California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980). Furthermore, even if state agencies were required to show "active supervision"—which they are not—a state agency demonstrates such "active supervision" when it acts pursuant to state statutes to supervise the actions of private actors. Flav-O-Rich, Inc., 593 F. Supp. at 18 (concluding that, although the Commission was a state agency, it demonstrated active supervision of a clearly-articulated state law by holding "regular meetings" and by its monitoring of private milk producers' "flow of price and cost information," as required by state statutes).

Lacking examples of state agencies being actively supervised, the Commission draws on examples of the active supervision of foreign corporations (Continental Ore Co. v. Union Carbide &

Carbon Corp., 370 U.S. 690 (1962)); completely non-state private membership organizations (Kentucky Household Goods Carrier Ass'n, 139 F.T.C. 404 (2005); and National Society of Professional Engineers v. United States, 435 U.S. 679 (1978)); and price-setting by liquor retailers (Midcal, 445 U.S. at 97). Perhaps these examples would be relevant, instructive, and reasonable if this was an unsettled area of case law, or if the courts and Congress had left room for doubt in the matter. But, as discussed, decades of federal cases and Supreme Court *dicta* draw a clear distinction between private commercial actors and the state government. The Commission is not prosecuting this case to enforce a law, or to clarify even the lightest shade of gray in an existing law: it is prosecuting this case as part of a larger campaign to enact new case law in order to increase its power and reach.

Therefore, the Commission's enforcement action violates the well-understood and well-established meaning of Sections 4 and 5 of the Federal Trade Commission Act, and the long-standing well-established principles first articulated in Parker v. Brown: federal antitrust legislation is intended to apply to private actors, and not states.

B. The Commission Is Violating Article I, Section 8 of the U.S. Constitution.

By overstepping the constitutionally-established divide between federal and state powers to regulate commerce, the Commission is violating the Article I, Section 8 of the U.S. Constitution (the "Commerce Clause"). The Commerce Clause gives the legislative branch (and not the executive branch) the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." U.S. CONST. art. I, § 8. In order for an executive branch agency to regulate commerce—including the enforcement of federal antitrust legislation as in this case—it must have Congressional authority. However, no such authority exists in this case. If it did exist, it would be found in Sections 4 and 5 of the FTC Act. As has already been discussed, no such grant of power is found there.

Even if the Commission was delegated the power to regulate commerce under the Commerce Clause, the limits on that Commerce Clause would prevent any regulation of the State Board. A state statute only triggers scrutiny under the Commerce Clause in two situations: one, if it discriminates, either *de jure* or *de facto*, against interstate transactions; or two, if the statute is fair and evenhanded, but nevertheless burdens interstate transactions as an incidental effect. Hass, 883 F.2d at 1462. The limitation of stain removal services to licensed dentists and persons supervised by licensed dentists set forth in the North Carolina General Statutes does not discriminate against interstate transactions. Non-licensed North Carolina residents providing stain removal services without dentist supervision are treated the same as non-residents crossing the border into North Carolina to provide these services. Any effect on interstate commerce is merely incidental. By law, such incidental effects are permissible so long as they are not "clearly excessive in relation to the putative local benefits." Maine v. Taylor, 477 U.S. 131, 138 (1986) (quoting Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)). The Dental Practice Act's regulation of teeth whitening services provides significant legal benefits in that it prevents harm to consumers and ensures that persons harmed by illegal conduct have recourse. This benefit far outweighs any concerns about out-of-state persons receiving or providing illegal stain removal services.

State agencies have the right to enforce state laws such as this one without Commerce Clause-mandated Congressional interference. See, e.g., Hass, 883 F.2d at 1453. Further, as discussed elsewhere in this brief, the executive branch does not have the right even to attempt regulation of state laws without Congressional authorization. Therefore, the Commission's efforts to impose federal antitrust legislation on the State Board amounts to a violation of the Article I, Section 8 of the U.S. Constitution.

C. The Commission Is Violating the Tenth Amendment to the U.S. Constitution.

In overstepping its legislative authority, the Commission has violated the Tenth Amendment to the U.S. Constitution. This Amendment sets forth the principle that "the powers not delegated to

the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. This state sovereignty guaranty is closely related to the principle of state action immunity. See, e.g., In the Matter of Massachusetts Furniture & Piano Movers Ass'n Inc., Final Order of the FTC, Docket 9137 (1983) (finding that the state action exemption "derives from the Tenth Amendment reservation of state sovereignty..."). The State Board was created "as the agency of the State for the regulation of the practice of dentistry in this State." N.C. Gen. Stat. § 90-22(b). As discussed elsewhere in this brief, and as established via nearly seven decades of federal case law, the State Board is entitled to immunity from federal antitrust law as a state agency. By failing to recognize this immunity, the Commission is violating the State Board's Constitutional right, set forth under the Tenth Amendment, to the power to regulate the practice of dentistry.

D. The Commission Is Violating the Fifth Amendment to the U.S. Constitution.

The Due Process Clause of the Fifth Amendment to the U.S. Constitution requires that the Commission, as an administrative agency, provide the State Board with a fair and impartial adjudicatory proceeding—both in appearance and in reality—that is free of any prejudgment on the key factual and legal merits of the allegations in the Administrative Complaint.

Such fairness and impartiality are notably absent in the Administrative Proceeding. First, the State Board has been deprived of a fair and impartial adjudicatory proceeding because, prior to the filing of the Administrative Complaint, the Commission already had decided and publicly stated that: 1) the FTC has jurisdiction over the State Board; 2) the State Board does not have state action immunity; and 3) a state agency comprised of a majority of licensee members is a *per se* antitrust conspiracy. See N. Sims Organ & Co. v. Securities & Exchange Comm'n, 293 F.2d 78, 81 (2d Cir. 1961) ("when the body which is the investigator, the prosecutor and the judge starts a proceeding by saying that the order of the [Securities and Exchange] Commission asserts that members of its staff have reported information tending to show that Organ has violated anti-fraudulent provisions, it

creates an impression which could be interpreted as tending to indicate that the [Securities and Exchange] Commission had already made up its mind.").

Furthermore, the State Board has been deprived of a fair and impartial adjudicatory proceeding because its proceeding has been conducted under inherently biased FTC rules of practice. See the State Board Complaint at 28-29; see also Gilligan, Will & Co. v. Securities & Exchange Comm'n, 267 F.2d 461, 468-69 (2d Cir. 1959) ("the [Securities and Exchange] Commission's reputation for objectivity and impartiality is opened to challenge by the adoption of a procedure from which a disinterested observer may conclude that it has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it."). The FTC's newly revised Rules of Practice, under which the State Board's case has proceeded, were seriously criticized during their drafting as being potentially harmful to respondents' due process rights. See generally, American Bar Association Section on Antitrust Law Comments in Response to the Federal Trade Commission's Request for Public Comment Regarding Parts 3 and 4 Rules of Practice Rule Making (Nov. 2008).[16]

For the reasons detailed here and in the State Board's Complaint, the Commission's Rules have not permitted the State Board to exercise its due process. See Cinderella Career and Finishing Sch., Inc. v. FTC, 425 F.2d 583, 591 (D.C. Cir. 1970) ("The procedures which have been established (under the FTC Act) are designed to provide for proceedings in which both the Commission **and the responding party** have a fair and equal opportunity to present exhibits and witnesses designed to establish the legitimacy of their argument.") (emphasis added).

Other substantially unfair and biased decisions that have tainted the State Board's ability to obtain a fair hearing include the FTC's persistent and flagrant procedural and discovery abuses; refusal to allow administrative proceeding be conducted in a location other than its headquarters in

[16] E.g., The American Bar Association's concern that there will no longer be "the regular turnover of Commissioners [which] has tended to ensure that the Commission that votes to issue a complaint is often different from the Commission that sits in a quasi-judicial function to hear an appeal from an ALJ's initial decision." ABA Section on Antitrust Law Comments in Response to the Federal Trade Commission's Request for Public Comment Regarding Parts 3 and 4 Rules of Practice Rule Making (Nov. 6, 2008) at 3.

Washington, D.C. (over 300 miles from the State Board's witnesses in North Carolina); and refusal to stay the Administrative Proceeding during the two-month period in which the parties have been waiting for rulings on dispositive motions.

As a result of the foregoing, the Commission's Administrative Proceeding against the State Board is fundamentally flawed under the Due Process Clause, and no valid order can result from those administrative proceedings. See FTC v. Atlantic Richfield Co., 567 F.2d 96, 107 n.24 (D.C. Cir. 1977) (holding that an interpretation by the FTC of its Rules of Practice in violation of the respondent's due process rights had to be rectified or else "the whole proceeding would have gone for naught"). The Commission's conduct has caused and will continue to cause the State Board to suffer immediate and irreparable harm to its Constitutional right to due process. No money damages can remedy this harm, and the State Board has no legal avenue by which to recover any money damages against the Commission.

E. Absence of Jurisdiction Moots the Administrative Proceeding (and Incidentally Moots Questions of Exhaustion of Remedies as Well).

This civil action is not an interlocutory appeal of an administrative proceeding. It is a direct challenge to the Commission's unlawful and unconstitutional assertion of jurisdiction over the State Board. The question in this matter is whether the Commission may exceed its statutory and constitutional authority to overturn a state law and assert jurisdiction over a state agency. This is not a question that can be resolved by the Commission itself; it is a question that must be settled by the federal judicial branch. Since this action is not an appeal and since the issue in this action is whether jurisdiction exists, the doctrine of exhaustion of judicial remedies is moot. However, even in the event that the Commission does raise the issue of exhaustion of administrative remedies, the following is an explanation of why the State Board is not required to continue its futile proceedings before the FTC.

Federal courts routinely recognize that when administrative remedies cannot and will not provide adequate relief, there is no need to exhaust the remedies. Instead, a direct suit in federal court is appropriate. See Myers v. Bethlehem Shipbuiding Corp., 303 U.S. 41 (1983); but see Downen v. Warner, 481 F.2d 642, 643 (9th Cir. 1973) (holding that the exhaustion of remedies requirement "is not an absolute bar to judicial consideration and where justification for invoking the doctrine is absent, application is unwarranted"); see also Muhammad v. Secretary of the Army, 770 F.2d 1494, 1495 (9th Cir. 1985) (finding that a litigant may be excused from exhausting administrative remedies "if the remedies do not provide an opportunity for adequate relief . . . or if substantial constitutional questions are raised"); see also Gibson v. Berryhill, 411 U.S. 564, 575 (1973) (not requiring exhaustion of administrative remedies when "the question of the adequacy of the administrative remedy . . . [is] for all practical purposes identical with the merits of [the plaintiff's] lawsuit").

There is no adequate relief available to the State Board through the Administrative Proceeding for several reasons. The proceeding itself is having an immediate negative effect on the State Board's abilities to carry out day-to-day functions, such as investigating the unauthorized practice of dentistry. The Administrative Proceeding is also having a chilling effect on the complainants' and the public's willingness to seek relief from illegal activities and to petition the State Board for redress of grievances by filing complaints with the State Board.

Further proceedings before the FTC cannot address the substantial Constitutional questions that are at issue in the State Board's request for injunctive relief, as set forth *supra*. "Resolving a claim founded solely upon a constitutional right is singularly suited to a judicial form and clearly inappropriate to an administrative board." Thorne v. U.S. Dep't of Defense, 916 F. Supp. 1358, 1364 (E.D. Va. 1996) (citing Glines v. Wade, 586 F.2d 675, 678 (9th Cir. 1978), rev'd on other grounds sub nom. Brown v. Glines, 444 U.S. 348 (1980)). It is well established that a litigant is not required to exhaust administrative remedies where the administrative process is being challenged as

procedurally defective. Mathews v. Eldridge, 424 U.S. 319, 330 (1976) (upholding federal court jurisdiction for a constitutional challenge to administrative-review proceedings because that "constitutional challenge is entirely collateral to [the] substantive claim of entitlement"). Here, the Commission's investigation and administrative action against the State Board is based upon the Commission's biased strategy with a predetermined outcome, rendering any attempt at administrative remedies useless.

Lastly, because of the Commission's bias, the exhaustion of administrative remedies is futile in this case. In contradiction of over 67 years of case law interpreting the meaning of Parker v. Brown and the intent of Congress in enacting the FTC Act and other antitrust laws, the Commission alleges that the State Board is not entitled to state action immunity in this matter. If this case proceeds to a hearing before the administrative law judge, it is almost inevitable that it will then end up before the Commission, because it will either be appealed by the State Board or by the Commission itself. There is an extremely low—perhaps zero—chance that the Commission then will dismiss its own action against the State Board. As a general practice, the Commission and administrative law judges have held in favor of respondents in only a handful of the hundreds of actions brought in the past decade. Even when an administrative law judge finds in favor of a respondent, the appeal before the Commission can drag on for even longer. See In the Matter of Union Oil Company of California, FTC Docket No. 9305 (in which the Commission's appeal of the administrative law judge's finding in favor of the respondent lasted for over a year and a half before the parties settled the matter). Therefore, continued administrative proceedings in this case would be futile. See McCarthy v. Madigan, 503 U.S. 140, 148 (1992) (citing Houghton v. Shafer, 392 U.S. 639, 640 (1968) ("in view of Attorney General's submission that the challenged rules of the prison were 'validly and correctly applied to petitioner,' requiring administrative review through a process culminating with the Attorney General 'would be to demand a futile act.'")).

IV. THE EQUITIES WEIGH IN FAVOR OF GRANTING THE STATE BOARD INJUNCTIVE RELIEF.

The balance of equities strongly favors issuance of the requested TRO, preliminary injunction, and permanent injunction. See ¶¶ 58-59 of the Complaint describing the State Board's motion to stay the Administrative Proceeding. Complaint Counsel did not object to the motion, no harm would have been effected had the motion been granted, and the State Board's right to an unfettered hearing of its motion to dismiss the Administrative Proceeding would have been preserved. Thus, it would appear that the issuance of the requested TRO, preliminary injunction, and permanent injunction will cause no harm to the Defendant.

Unless this Court issues the requested injunctions, the State Board likely will be unable to undo the damage caused by the continued Administrative Proceeding against it by the Commission. Such damage will be serious and widespread, as it affects not just the conduct of day-to-day business by the State Board, but also the health, safety, and welfare of North Carolina citizens and the structure and activities of the vast majority of state licensing agencies in the country. The State Board recognizes the Commission's right to lobby for changes to laws with which it disagrees; however, the balance of equities requires that the Commission lobby through traditional and legal means, rather than through a bald-faced, unlawful assertion of jurisdiction, and an illegal and baseless administrative action against a state agency.

V. AN INJUNCTION IS IN THE PUBLIC INTEREST.

As set forth above, North Carolina enacted the Dental Practice Act with the purpose to protect the public. There is an abundance of scientific reports and actual cases of consumer harm supporting the rational basis for the Dental Practice Act. There are, indeed, reported cases of actual injury,[17] even though the number of documented cases of public harm caused by non-dentist teeth

[17] Monica Laliberte, *Teeth Whitening Kiosks at the Mall Are Not Regulated*, WRAL (May 21, 2008), http://www.wral.com/5onyourside/story/2921079/ (last visited January 26, 2011).

whitening operations may have been diminished by the fact that such non-dentists routinely obtain waivers of liability from their customers before engaging in illegal teeth whitening.

Aside from actual cases of harm, scientific/medical reasons for requiring that a licensed dentist provide or supervise stain removal services include, but are not limited to, the following:

a. Pre-treatment diagnosis is important because many people are not appropriate candidates for teeth whitening;

b. A dentist is educated and trained to perform a complete dental examination prior to a teeth whitening procedure; and

c. A dentist possesses the education and training to diagnose whether teeth whitening is a safe or appropriate procedure for a particular patient.

Cases in which teeth whitening may not be safe or appropriate include, but are not limited to situations where there is the risk for:

a. Damage to existing restorations or to previous dental work;

b. Pain or sensitivity due to a pre-existing root exposure or undiagnosed decay;

c. Complications as the result of an undiagnosed medical condition; or

d. Less than satisfactory results because a tooth is dark due to injury or the need for endodontic treatment.

One study has indicated that ten to twenty percent of patients who request teeth whitening services from licensed dentists are not provided those services for the reasons set forth above.

Beyond these significant physical dangers, there is ample proof that teeth whitening product vendors have so frequently engaged in false and deceptive marketing practices that many states, and on at least two occasions the FTC itself, have found their practices to be unfair and deceptive. There can be little doubt that an injunction to protect the State Board's ability to enforce the Dental Practice Act will be in the public's best interest. Indeed, the very statutory purpose of the Dental Practice Act—and, thus, the purpose of the State Board—is to protect the health, safety, and welfare of North Carolina citizens through the regulation of the practice of dentistry.

CONCLUSION

Accordingly, the State Board respectfully urges this Court to grant a TRO, Preliminary Injunction, and Permanent Injunction regarding the Commission's ongoing Administrative Proceeding against the State Board and regarding defamatory statements by the Commission against the State Board.

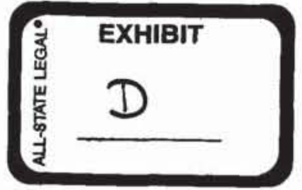
This the 2nd day of February, 2011.

Respectfully submitted,

ALLEN AND PINNIX, P.A.

/s/ Noel L. Allen

Noel L. Allen
N.C. Bar No. 5485
Alfred P. Carton, Jr.
N.C. Bar No. 6544
M. Jackson Nichols
N.C. Bar No. 7933
Attorneys for Plaintiff
Post Office Drawer 1270
Raleigh, North Carolina 27602
Telephone: 919-755-0505
Facsimile: 919-829-8098
Email: nallen@allen-pinnix.com
acarlton@allen-pinnix.com
mjn@allen-pinnix.com



UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
Case No. 5:11-CV-00049-FL

THE NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS,	)	
Plaintiff,	)	**MOTION AND MEMORANDUM IN SUPPORT OF MOTION FOR EXPEDITED RELIEF**
v.	)	(Fed. R. Civ. P. 65 and Local Civil Rules 7.1, 7.2 and 10.1)
FEDERAL TRADE COMMISSION,	)	
Defendant.	)	

On February 2, 2011, Plaintiff, the North Carolina State Board of Dental Examiners ("State Board" or "Plaintiff"), filed with this Court a Complaint for Declaratory Judgment and Preliminary and Permanent Injunction ("Complaint") against Defendant, the Federal Trade Commission (the "FTC," "Commission," or "Defendant").

On February 3, 2011, Plaintiff filed with this Court a Motion for Temporary Restraining Order and Other Equitable Relief ("Motion") and an accompanying Memorandum in Support of Plaintiff's Motion for Temporary Restraining Order, Preliminary Injunction, and Permanent Injunction ("Memorandum").

Plaintiff hereby moves this Court to grant the relief sought in the Complaint, the Motion, and the Memorandum on an expedited basis, for the reasons set forth below:

1. As set forth in the Complaint, Motion, and Memorandum, which are incorporated herein by reference, the FTC is pursuing an administrative proceeding before the Commission on the alleged basis that the dentists of North Carolina, using the State

Board, are "colluding" to violate the FTC Act through their enforcement of a North Carolina statute ("Administrative Proceeding").

2. The State Board is an instrumentality of the State of North Carolina, and was created by the North Carolina Legislature to regulate the practice of dentistry in North Carolina.

3. The FTC's pursuit of the Administrative Proceeding is violating, among other things, the State Board's Constitutional rights under the following provisions of the U.S. Constitution: Article I, § 8 (the Commerce Clause); the Tenth Amendment; Article III, § 2, Cl. 2 (original jurisdiction over actions against states); and the Due Process Clause of the Fifth Amendment.

4. The evidentiary hearing in the Administrative Proceeding is scheduled to commence on February 17, 2011 at 10:00 a.m. in Washington, D.C. A final prehearing conference is scheduled to commence on February 15, 2011 at 10:00 a.m. in Washington, D.C.

5. On February 3, 2011, the Commission issued an order denying the State Board's Motion to Dismiss the Administrative Proceeding and granting the FTC's Motion for Partial Summary Decision ("Opinion and Order"). In so ordering, the Commission held that the FTC may exercise jurisdiction over the State Board for purposes of the FTC Act, despite the admitted fact that the State Board is "an agency of the State of North Carolina, tasked with regulating the practice of dentistry in that state."[1] (Opinion and Order, p. 4.) In that Opinion and Order, the Commission:

---

[1] Per FTC Secretary Clark's email to the State Board's counsel on February 3, 2011, certain information in the Opinion and Order may be subject to redaction and, therefore, the Opinion and Order will not be made publically available until no sooner than 11 a.m. on Tuesday, February 8, 2011. To the extent that this Court would benefit

a. Makes no mention of the U.S. Constitution and the rights afforded to the states by the U.S. Constitution;

b. Incorrectly refers to the State Board's regulation of the practice of dentistry as the State Board's "policy" rather than a North Carolina legislative mandate;

c. Disregards published appellate decisions that support a finding that the FTC has no jurisdiction over the State Board for purposes of the FTC Act;

d. Ignores published decisions issued by this Court, including Flav-O-Rich, Inc. v. N.C. Milk Commission, 593 F. Supp. 13, 17 (E.D.N.C. 1983, Opinion by Dupree, Judge) and North Carolina State Bd. of Registration for Prof'l Eng'rs and Land Surveyors, 615 F. Supp. 1155 (E.D.N.C. 1985), that support a finding that the FTC has no jurisdiction over the State Board for purposes of the FTC Act;

e. Persists in treating the State Board as a "private part[y] who occasionally [is] cloaked in a modicum of state authority" rather than a sovereign of the State (Opinion and Order, p. 11);

f. Mandates a review process to supervise the State Board's activities that is contrary to North Carolina statutes and that would subordinate the State Board to an unnamed, non-existent State reviewer; and

g. Asserts no law or statute that gives the FTC the authority to substitute its preferences in lieu of North Carolina's statutory method for regulating the practice of dentistry.

---

from an *in camera* review of the Opinion and Order, the State Board will provide the Court with the Opinion and Order upon request.

6. On February 3, 2011, the FTC informed the State Board that its Opinion and Order, along with a "news release describing these documents," will be "placed on the public record—including the public Commission Website—no sooner than 11 a.m. on Tuesday, February 8, 2011." On February 3, 2011, the State Board requested the opportunity to review the proposed news release prior to its issuance. On February 4, 2011, the FTC refused the State Board's request. On the other hand, it appears that the news release that was issued on the day that the Administrative Proceedings were commenced in June 2010 was shared with Commission staff prior to release and that Complaint Counsel was listed as the "staff contact person."

7. In light of the FTC's previous publication of an inaccurate news release that mischaracterized the nature of the Administrative Proceedings and defamed the State Board members and, indeed, all dentists of North Carolina, the State Board has a reasonable belief that the FTC's forthcoming news release regarding the Order and Opinion will contain similar instances of mischaracterization and defamation—which will cause irreparable harm to the State Board, its members, North Carolina dentists at large, and the consuming public of North Carolina. Specifically:

    a. It is highly likely that every incompetent licensee, every unqualified applicant, and every unlicensed practitioner will misinterpret the FTC's Order and Opinion as permission to engage in the unauthorized practice of dentistry, to the detriment of the health, welfare and safety of North Carolina citizens; and

    b. The State Board's ability to enforce the North Carolina statutes regulating the practice of dentistry will be impaired significantly. See

North Carolina State Bd. of Registration for Prof'l Eng'rs and Land Surveyors, 615 F. Supp. at 1162 n.7 (recognizing that the State Board, "and indeed our constitutional system of government" would be particularly susceptible to immediate injury by the FTC's unlawful actions if the State Board is a "state entity").

8. The publication of the FTC's forthcoming news release serves no compelling public interest. To the contrary, its only purpose would be to facilitate the FTC's efforts to engage in similar unconstitutional assertions of its alleged jurisdiction with regard to other state boards similar to the State Board across the United States.

9. In addition to the foregoing, the FTC has continued to take actions that will deprive the State Board from receiving a fair and impartial administrative proceeding, in violation of its due process rights under the Fifth Amendment:

    a. On January 31, 2011, the FTC requested to substitute two witnesses in lieu of other witnesses that had been identified in its final proposed witness list, which was due on January 26, 2011, pursuant to the administrative Scheduling Order;

    b. On February 2, 2011, the State Board conditionally agreed to the FTC's proposed substitution, provided that the State Board be given the opportunity to depose the witnesses prior to the evidentiary hearing; and

    c. The FTC indicated that it would not allow the State Board the opportunity to depose the proposed substitute witnesses prior to the evidentiary hearing, and indicated that it would file a motion to allow such substitution.

10. Among other types of relief sought in its Complaint and Motion, the State Board is seeking an order from this Court to immediately stay or restrain and preliminarily and permanently enjoin the FTC from illegally asserting jurisdiction it does not have over the State Board. The State Board also is seeking an order that the FTC remove from its federal government website all false, derogatory, and unsubstantiated assertions against the State Board, the members of the State Board, and the dentists of North Carolina.

11. The balance of the equities weighs in favor of a stay of the administrative hearing scheduled for February 17, 2011, pending this Court's adjudication of Plaintiff's pending Complaint and Motion, for the reasons set forth herein and set forth in the State Board's Memorandum. In sum, there is no urgency to allow the FTC's evidentiary hearing to proceed prior to an adjudication by this Court of the State Board's Complaint and Motion, other than the faux sense of urgency established in the FTC's Rules of Practice.[2]

[2] The FTC will face no prejudice from an order by this Court staying the Administrative Proceeding, as the FTC did not send out administrative subpoenas compelling the attendance of witnesses at the Administrative Proceeding until yesterday, February 3, 2011. As further indication that the FTC will not be prejudiced, it is important to note that the FTC did not object to the State Board's request to the Commission for a stay of the proceedings in November 2010, pending a ruling from the Commission on the issue of state action doctrine, and has not sought any preliminary order for equitable relief during the pendency of its investigation or administrative proceeding against the State Board.

This the 4th day of February, 2011.

/s/ Noel L. Allen

Noel L. Allen
NC State Bar No. 5485
Alfred P. Carlton, Jr.
NC State Bar No. 6544
M. Jackson Nichols
NC State Bar No. 7933
Attorneys for Plaintiff
Post Office Drawer 1270
Raleigh, North Carolina 27602
Telephone: 919-755-0505
Facsimile: 919-829-8098
Email: nallen@allen-pinnix.com
acarlton@allen-pinnix.com
mjn@allen-pinnix.com

CERTIFICATE OF SERVICE

I hereby certify that on this the 4th day of February, 2011, I filed the foregoing PLAINTIFF'S Motion and Memorandum in Support of Motion for Expedited Relief with the Clerk of the Court using CM/ECF system, which will send notification of such filing to the following:

Seth M. Wood
Assistant United State Attorney
Civil Division
310 New Bern Avenue, Suite 800
Raleigh, NC 27601
Seth.wood@usdoj.gov

/s/ Noel L. Allen
Noel L. Allen

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
Case No. 5:11-CV-00049-FL

THE NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS,	)	**REPLY MEMORANDUM IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND OTHER EQUITABLE RELIEF**
Plaintiff,	)	
v.	)	
FEDERAL TRADE COMMISSION,	)	(Local Civil Rule 7.2(f)(1))
Defendant.	)	

On February 2, 2011, Plaintiff, the North Carolina State Board of Dental Examiners ("State Board" or "Plaintiff"), filed with this Court a Complaint for Declaratory Judgment and Preliminary and Permanent Injunction ("Complaint") against Defendant, the Federal Trade Commission (the "FTC," "Commission," or "Defendant").

On February 3, 2011, Plaintiff filed with this Court a Motion for Temporary Restraining Order and Other Equitable Relief ("Motion") and an accompanying Memorandum in Support of Plaintiff's Motion for Temporary Restraining Order ("TRO"), Preliminary Injunction, and Permanent Injunction ("Memorandum").

On February 4, 2011, Plaintiff filed with this Court a Motion and Memorandum in Support of Motion for Expedited Relief.

On February 7, 2011, Defendant filed with this Court its Opposition to Plaintiff's Motion for Temporary Restraining Order and Other Equitable Relief ("Opposition Memorandum").

Plaintiff hereby moves this Court to grant the relief sought in the Plaintiff's Complaint, Motions, and Memorandums, for the reasons set forth below:

As set forth in the Complaint, Motion, and Memorandum, which are incorporated herein by reference, the State Board meets the legal standard for a TRO, preliminary injunction, and permanent injunction. As detailed in the Complaint, Motion, and Memorandum, and for the reasons set forth below:

- The State Board will suffer immediate, permanent, and irreparable injury if it is not granted immediate injunctive relief;
- The State Board is likely to succeed on the merits of its case;
- The equities weigh in favor of granting the State Board injunctive relief; and
- An injunction is in the public interest.

In addition to reiterating that this suit is a direct challenge to the Commission's unconstitutional and illegal actions, the Plaintiff seeks to respond to two particularly troubling claims set forth in Defendant's Opposition Memorandum.

I. Plaintiff's Action Is Not an "Appeal."

First, the Defendant claims that, by initiating this lawsuit, Plaintiff is attempting to "appeal" the Commission's investigation and action against the State Board. Opposition Memorandum at 15 *et seq*. This is not correct. Plaintiff's action against the Commission **is not** an interlocutory appeal. This action **is** based upon the fundamental legal principle that jurisdiction, or the absence thereof, can be raised at any time in any proper forum. Plaintiff's action therefore stands on its own as an action at law and in equity seeking a determination of rights. The Commission's investigation and action is an unlawful and unconstitutional assertion of jurisdiction -- an *ultra vires* "grab"-- and violates several constitutional and statutory provisions. Further, the Commission's investigation and action is clearly without any basis as to any kind of Congressionally-authorized pre-emption. *See* Med-Trans Corp. v. Benton, 581 F.

Supp. 2d 721, 730 (E.D.N.C. 2008) and American Petroleum Institute v. Cooper, 681 F. Supp. 2d 635, 640-42 (E.D.N.C. 2010).

As set forth in the incorporated documents, Plaintiff has brought this action in this Court to gain relief from Commission's unlawful actions against the State of North Carolina, the State Board, and the dentists of North Carolina. The State Board is not facing a normal federal administrative agency proceeding. It is the victim of a policy-driven, premeditated attempt to supplant the prerogatives of sovereign states, as assured by the Tenth Amendment. The ripeness of the Commission's case against the State Board is moot; the exhaustion of administrative remedies is moot. The State Board cannot obtain relief that it requires from the Commission; therefore, it is bringing a direct suit – not an appeal – in federal court.

Further, whereas this suit is premised upon the Defendant's violations of the United States Constitution, the Defendant's recently-issued (February 3, 2011) "decision" (the "recent decision") which affirmed its pre-determined self-serving claim of jurisdiction, did so without so much as a mention of either the U.S. Constitution, much less the specific statutes which Defendant seeks to preempt through the administrative proceeding. Defendant cannot avoid the constitutional issues presented in this action by ignoring the state statutes it seeks to directly preempt with its unauthorized and unprecedented interpretation of federal antitrust laws that contain no expression of Congressional intent to displace state laws.

This action is about the Defendant's effort to preempt North Carolina statutes setting forth the State's chosen legislative mandate to protect the public health, safety, and welfare of its citizens by regulating dentistry within its borders. At issue are *not* lesser rules or policy adopted by the Board, but the plain language of a statute adopted by the General Assembly. The Defendant has not and cannot cite a rule or policy regarding teeth whitening because none exist.

For example, the Defendant hangs its case upon the cease and desist letters the State Board sent to businesses in cases where it had *prima facie* evidence of a statutory violation based upon third-party complaints. Contrary to Defendant's persistent and creative wrongful assertion, none of those letters order anyone to stop "teeth whitening." As this court can see from the attached example (Exhibit A), the letters do not mention "teeth whitening" and do not cite a board rule or policy. Rather, the leters literally repeat the applicable statute verbatim, and conclude by simply stating:

> The Board requests that you cooperate in the current investigation by calling the Board's office and arranging to be interviewed by the Board's investigator and by submitting a written response to this notice and order within fifteen (15) days of the receipt of this letter.

Defendant has not alleged, and there is no evidence that any of the letters ever resulted in anyone ceasing and desisting a lawful business activity permitted by North Carolina statute.

By statute, the General Assembly defined the practice of dentistry to include offering or rendering the service to the public of "removal of stains from teeth" (N.C. Gen. Stat. § 90-29(b)(2)), made unauthorized practice illegal (N.C. Gen. Stat. § 90-40), and established its State Board, comprised of a majority of licensees (N.C. Gen. Stat. § 90-22(b)), and mandated it to enforce that statute (N.C. Stat. § 90-40.1). Again, these statutes were not afforded their due weight by the FTC. Indeed, the FTC based its opinion on the premise that at issue is only the State Board's "interpretation" of the statutes or the State Board's "policy."

As this Court has held in American Petroleum Institute, "[d]etermining whether a federal statute preempts a state statute ... is a constitutional question." 681 F. Supp. 2d at 641. In Med-Trans Corp., this Court considered a question of preemption that involved a federal law that explicitly preempted state law. 581 F. Supp. 2d at 731. By contrast, the Supreme Court held in Parker v. Brown, that

> We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.

317 U.S. 341, 350-51 (1943). Instead, the Court found that "[t]here is no suggestion of a purpose to restrain state action in the Act's legislative history. The sponsor of the bill which was ultimately enacted as the Sherman Act declared that it prevented only "business combinations." Id. at 351; 21 Cong. Rec. 2562, 2457; see also at 2459, 2461. The Sherman Act's purpose "was to suppress combinations to restrain competition and attempts to monopolize by individuals and corporations, abundantly appears from its legislative history." The Defendant has not, and, indeed cannot, and should not assume the mantle of the Third Branch and rule upon its own constitutional limits. That is this court's duty.

II. The Public Interest and the Health, Safety, and Welfare of North Carolina Citizens.

Second, the Defendant claims that an injunction at this stage will not be in the public interest. Opposition Memorandum at 25 *et seq*. However, contrary to the Defendant's claims:

- There is a greater public interest in the State of North Carolina's right to protect the health, safety, and welfare of its citizens from the unlicensed practice of dentistry than the Commission's right to bring a baseless lawsuit to advance its (so far unsuccessful) lobbying agenda.
- There is a greater public interest in protecting the State of North Carolina's sovereign right to enforce its clearly articulated state statute than in the Commission's right to circumvent the separation of powers and create new laws.

- There is a greater public interest in protecting the State of North Carolina's right to dictate the form and activities of its occupational licensing agencies than allowing the Commission's unfounded jurisdiction enlargement.
- The Defendant's administrative proceeding is interfering with the Plaintiff's ability to protect the public because of the chilling effect the investigation has had on public complaints, and by the obvious effort to distract the State Board and deplete its resources by forcing it to defend an administrative trial held 300 miles away from the State Board's office and almost all of its witness.
- Injunctive relief will cause no harm to the Defendant.

Other equities weighing in favor of granting Plaintiff injunctive relief as a matter of public policy factors include: the facts that the Defendant took over two years to investigate the State Board prior to filing its administrative complaint, and the Complaint Counsel did not object to the State Board's Motion for a Stay of the administrative proceedings (which the Defendant nevertheless denied).

If the Commission succeeds in creating its new federal antitrust law making, then every majority licensee licensing board in the country will be *per se* antitrust conspirators. The North Carolina State Board of Dental Examiners, and its counterparts regulating North Carolina's lawyers, engineers, architects, doctors, and general contractors, will all be violating federal law. To the Commission, every applicant denied admission to the profession, every disciplined licensee, and every unauthorized practitioner is a potential competitor. Such an extreme ruling calls into question every state licensing board's primary functions, making a *per se* antitrust conspiracy out of each license denial, disciplinary case, or unauthorized practice enforcement. The Congress has not hinted at such a preemption, and courts have not proclaimed it. C.f. Earles

v. State Bd. of Certified Pub. Accountants of Louisiana, 139 F.3d 1033 (5th Cir.), cert. denied, 525 U.S. 982 (1998) (granting a state board immunity from an antitrust challenge).

The Defendant preempts state statutes in three ways: by overriding a statutory definition of a professional practice wholly within the state; by substituting its theories for the General Assembly's determination of how that statute will be enforced; and, by countermanding the manner that states have efficiently and effectively protected their citizens for over a century through state agencies comprised of panels of experts. The result could be the *per se* illegality of every majority licensee state agency in the country. Such a radical change can only be implemented through an act of Congress rather than imposed by a closed-circuit process administered by what has been described as a "headless fourth branch of government."

This the 8th day of February, 2011.

/s/ Noel L. Allen

Noel L. Allen
NC State Bar No. 5485
Alfred P. Carlton, Jr.
NC State Bar No. 6544
M. Jackson Nichols
NC State Bar No. 7933
Attorneys for Plaintiff
Post Office Drawer 1270
Raleigh, North Carolina 27602
Telephone: 919-755-0505
Facsimile: 919-829-8098
Email: nallen@allen-pinnix.com
acarlton@allen-pinnix.com
mjn@allen-pinnix.com

CERTIFICATE OF SERVICE

I hereby certify that on this the 8th day of February, 2011, I filed the foregoing PLAINTIFF'S Reply Memorandum in Support of Motion for Temporary Restraining Order and Other Equitable Relief with the Clerk of the Court using CM/ECF system, which will send notification of such filing to the following:

Seth M. Wood
Assistant United State Attorney
Civil Division
310 New Bern Avenue, Suite 800
Raleigh, NC 27601
Seth.wood@usdoj.gov

/s/ Noel L. Allen
Noel L. Allen

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

No.5:11-CV-49-FL

NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS, Plaintiff, v. FEDERAL TRADE COMMISSION, Defendant.	)	ORDER

This matter is before the court on plaintiff's motion for temporary restraining order and other equitable relief (DE # 5) and motion for expedited relief (DE # 8). Defendant responded in opposition, and plaintiff replied. In this posture, the issues raised are ripe for review. For the reasons that follow, plaintiff's motion for a temporary restraining order is denied, and plaintiff's motion for expedited relief is granted in remaining part.

STATEMENT OF THE CASE

Plaintiff filed complaint on February 1, 2011, including request for declaratory judgment and a preliminary or permanent injunction. Immediately thereafter, on February 2, 2011, plaintiff filed motion for temporary restraining order and other equitable relief, seeking among other things order requiring defendant to remove from defendant's website certain statements regarding plaintiff (Pl.'s Mem. Supp. TRO, at 2.) On February 4, 2011, plaintiff filed a motion for expedited relief, asking that the court grant the relief sought in the complaint and the motion for temporary restraining order on expedited basis.

Plaintiff is respondent in an administrative proceeding initiated by defendant to investigate allegedly anticompetitive conduct by plaintiff. (Compl. ¶ 15); (Def.'s Resp. Opp'n Mot. TRO, at 2.) In its motion for expedited relief, plaintiff brought to the court's attention an evidentiary hearing in the administrative proceeding that is scheduled to commence on February 17, 2011, at 10:00 a.m., in Washington, D.C. A final prehearing conference is scheduled for February 15, 2011.

Before the close of discovery in the administrative proceeding, plaintiff filed a motion to dismiss the entire administrative complaint. Defendant ruled on the motion, and notified plaintiff that defendant's opinion and order denying plaintiff's motion to dismiss, as well as a "news release describing these documents," would be placed on the public record, including defendant's website, no sooner than 11:00 a.m. on Tuesday, February 8, 2011. (Pl.'s Mot. Expedited Relief ¶ 6.)

On February 7, 2011, defendant responded in opposition to plaintiff's motion for temporary restraining order and other equitable relief, arguing that plaintiff has failed to satisfy the requirements for injunctive relief, to which plaintiff replied on February 8, 2011.

DISCUSSION

Rule 65 of the Federal Rules of Civil Procedure allows a court to enter temporary restraining orders. Fed. R. Civ. P. 65. Rule 65(b) specifically provides for the issuance of temporary restraining orders without notice, yet the analysis is the same when the nonmoving party has notice, as is the case here. The court may grant a temporary restraining order if the moving party establishes four requirements: (1) likelihood of success on the merits; (2) likelihood of irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in plaintiff's favor; and (4) that an injunction is in the public interest. Real Truth About Obama, Inc. v. Federal Election Comm'n, 575 F.3d 342, 346 (4th Cir. 2009), vacated on other grounds 130 S. Ct. 2371 (2010), reinstated in

relevant part on remand, 607 F.3d 355 (4th Cir. 2010) (per curiam). All four requirements must be satisfied. Id.

Upon careful consideration of the issues raised, the undersigned concludes that plaintiff has failed to satisfy the requirements for a temporary restraining order. Among other things, plaintiff has failed to show that the threatened harm is sufficiently immediate so as to warrant the extraordinary remedy of a temporary restraining order. For example, plaintiff has failed to show how placing information regarding the administrative proceedings on the public record, or on defendant's website, will result in irreparable harm to plaintiff or the citizens of North Carolina, if relief is not granted preliminarily. Substantive issue of or relating to the likelihood of plaintiff's success on the merits looms large concerning whether plaintiff seeks this court improperly to enjoin ongoing administrative enforcement proceedings. The present showing is not sufficient to warrant a temporary restraining order. Plaintiff's request for temporary restraining order is DENIED.

The case shall proceed now on motion for preliminary injunction. To the extent that plaintiffs' motion for expedited relief seeks expedited scheduling considerations, in this part the motion is ALLOWED. The parties are DIRECTED to confer and provide a joint report and plan on case scheduling matters within fourteen (14) days of entry of this order. If either side deems that conference by telephone with the court may aid in final development of a case management order, said request may be made in the form of the joint report and plan.

CONCLUSION

For the foregoing reasons, plaintiff's motion for temporary restraining order (DE # 5) is denied. To the extent plaintiff's motion for expedited relief (DE # 8) seeks expedited scheduling

considerations, the motion is granted in this part.

SO ORDERED, this the 9th day of February, 2011.

LOUISE W. FLANAGAN
Chief United States District Judge