

**UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION**

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**In the Matter of**  
**SOUTH CAROLINA STATE BOARD OF DENTISTRY.**  
\_\_\_\_\_

**Docket No. 9311**

**MOTION FOR STAY PENDING  
PETITION FOR CERTIORARI**

Respondent, the South Carolina State Board of Dentistry, hereby moves to stay the 90-day discovery period set in this matter by the Commission’s Order dated July 28, 2004, pending the filing by Respondent of a Petition for Certiorari in the United States Supreme Court in this matter. The Petition for Certiorari is due to be filed no later than September 25, 2006.

The Commission, in an Order dated July 28, 2004, denied the Motion to Dismiss filed by the Board of Dentistry, but referred the mootness issues raised by the Board to Chief Administrative Law Judge Stephen J. McGuire or his designee for further proceedings, including the conduct of limited discovery on the issue of mootness, for a period not to exceed ninety (90) days from the date of issuance of Commission’s Order.

The Board of Dentistry appealed the denial of the Motion to Dismiss to the Court of Appeals for the Fourth Circuit. In conjunction with its appeal, the Board filed an unopposed motion with the Commission to stay the discovery provisions of its Order pending appeal. The Commission granted this motion in an Order dated August 17, 2004. Specifically, the Commission ordered that “discovery and all other proceedings before

the Chief Administrative Law Judge [are] stayed until the issuance by the United States Court of Appeals for the Fourth Circuit of an Order disposing of [the Board's] Petition for Review.”

By opinion dated May 1, 2006, the Fourth Circuit dismissed the Petition for Review as being interlocutory and outside that Court's jurisdiction. The Board filed a Petition for Rehearing and Suggestion for Rehearing En Banc. These filings were denied by Order dated June 27, 2006. The mandate of the Fourth Circuit was issued on July 5, 2006.

The bases for this motion are as follows: The Order of the Commission denying the Board of Dentistry's motion to dismiss on state action grounds is essentially a refusal to dismiss the case based on the immunity or exemption of the respondent State Board of Dentistry from suit. Such decisions have been regarded by several federal circuits as appealable under the “collateral order doctrine.” The leading case in the context of immunities from suit is *Mitchell v. Forsyth*, 472 U.S. 511 (1985). An analogous case involving a petition for judicial review of administrative action is *Meredith v. Federal Mine Safety and Health Review Commission*, 177 F.3d 1042 (D.C. Cir. 1999)(permitting judicial review of administrative decision that had denied immunity from suit claimed by employees of Mine Safety and Health Administration and had remanded the case to an ALJ for factfinding). As *Meredith* explains, an immunity from suit is more than a defense to the action, it is instead “a right to avoid suit altogether.” 177 F.3d at 1051. This right “is effectively lost if a case is erroneously permitted to go to trial.” *Mitchell, supra*, 472 U.S. at 526.

The state action doctrine has been regarded by at least two circuits as creating an immunity, and one to which the collateral order doctrine applies. *Martin v. Memorial Hospital at Gulfport*, 86 F.3d 1391, 1395-96 (5th Cir. 1996); *Earles v. State Bd. of Certified Public Accountants of Louisiana*, 139 F.3d 1033, 1040 (11th Cir. 1998) (“[s]tate action is properly treated as an immunity from suit”). Another two circuits have suggested in dicta that they concur in the rule adopted by the Fifth and Eleventh Circuits: *We, Inc. v. City of Philadelphia*, 174 F.3d 322, 329 (3rd Cir. 1999); *Segni v. Commercial Office of Spain*, 816 F.2d 344, 346 (7th Cir. 1987). Finally, two circuits, the Sixth Circuit in *Huron Valley Hosp., Inc. v. City of Pontiac*, 792 F.2d 563, 568 (6th Cir. 1986), and the Fourth Circuit in the present case, have decided that orders denying state action immunity under *Parker v. Brown*, 317 U.S. 341 (1943), are not immediately appealable under the collateral order doctrine.

This split among the circuits suggests that the Supreme Court may well grant certiorari in order to resolve the issue. It is well recognized that certiorari is frequently granted when there is a split among the circuits, as stated explicitly by Rule 10(a) of the Rules of the Supreme Court. That rule provides in part that one of the reasons for a grant of certiorari is that “a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter.” Given the extent of the split, and the importance of the issue both to state agencies and to the Commission, there is a reasonable possibility that the Supreme Court will accept the present case for review.

With regard to the balancing of the interests of the parties in connection with the present motion, the Board would reiterate that its claim of immunity is a claim of a right

to avoid suit altogether, as indicated above. Such a claim has been accepted or viewed with approval by four separate federal circuits, even though not by the Fourth Circuit. The Board therefore has a substantial, recognized interest in not being subjected to discovery until it has had a chance to have its immunity arguments fully reviewed in court. On the other hand, granting the present motion, and allowing a stay of at least several more months, will not prejudice Complaint Counsel or the interests which counsel seeks to protect. The acts of Board of Dentistry on which the Complaint is based were discontinued in early 2002, and the Board has never taken similar action again. In other words, there is no Board action presently being taken that is in need of immediate remediation, and as a result, a stay will work no harm to the interests asserted by the Commission.

Based on the factors set forth above, the Board submits that it would be appropriate for the Commission to stay further proceedings before it at present. This stay is necessary to preserve the asserted right of the Board to be free from this litigation, and is also necessary to spare both sides the necessity of beginning a discovery process that may ultimately become unnecessary. In effect, this motion asks for a stay for the same reasons that supported the Board's earlier request for a stay, granted by the Commission on August 17, 2004. Finally, a stay would insure that if the case eventually returns to the Commission from the Supreme Court, both parties will have most or all of the full 90 days in which to conduct discovery, and will prevent the need for taking discovery that might become stale if the case is ultimately remanded back to the Commission.

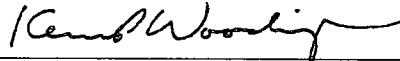
For these reasons, the Respondent respectfully requests that proceedings and discovery be stayed in this matter pending final action by the Supreme Court on the Petition for Certiorari to be filed by the Respondent.

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