



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

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.

