

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

COMMISSIONERS: **Timothy J. Muris, Chairman**
 Mozelle W. Thompson
 Orson Swindle
 Thomas B. Leary
 Pamela Jones Harbour

In the Matter of)	
)	
SOUTH CAROLINA STATE BOARD OF DENTISTRY)	Docket No. 9311
)	
)	

**COMPLAINT COUNSEL’S RESPONSE TO CLARIFY ITS POSITION WITH REGARD
TO RESPONDENT’S MOTION TO STAY DISCOVERY**

Complaint counsel do not oppose respondent’s motion to stay discovery pending the resolution of the Board’s imminent motion to dismiss, but take this position for reasons other than those stated in the Board’s motion. Complaint counsel would not ordinarily acquiesce in a motion to stay discovery pending the resolution of a motion to dismiss merely because it presents a purely legal question; however, the special circumstances of this case make it appropriate for the Commission to exercise its discretion to stay discovery at this juncture.

The Commission retained jurisdiction in this case to resolve any dispositive motions, and the Board has stated that it will file such a motion claiming that its challenged conduct is protected by the state action doctrine. Circuit courts and commentators have disagreed on whether an assertion of state action protection is the type of claim that requires a stay of discovery,¹ with some courts holding that state action is an immunity from suit, at least where the

¹ If state action immunity is an immunity from suit, staying discovery on the merits “[u]ntil this threshold immunity question is resolved” would likely be appropriate. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (approving stay in the context of qualified immunity);

defendant is an agent of the state. *Compare Martin v. Mem'l Hosp. at Gulfport*, 86 F.3d 1391, 1396 (5th Cir. 1996) (holding state action immunity is an immunity from suit); *Commuter Trans. Sys. v. Hillsborough Cty. Aviation Auth.*, 801 F.2d 1286, 1289 (11th Cir. 1986) (same); and I Areeda & Hovenkamp, *Antitrust Law* ¶ 222b (2d ed. 2000) (arguing state action should be an immunity from suit) with *Huron Valley Hosp., Inc. v. City of Pontiac*, 792 F.2d 563 (6th Cir. 1986) (holding state action immunity is not immediately appealable) and 15A Charles Alan Wright et al. *Federal Practice and Procedure* § 3914.10, 693-94 and n.86 (2d ed. 1992) (arguing state action should not be an immunity from suit).

The Commission need not resolve the legal issue whether the Board is entitled to a stay of discovery as a matter of right; rather it should exercise its discretion and stay discovery. Not only will this approach free the Commission from the need to manage ongoing discovery, it will also allow the Commission and the parties to focus on resolving the fundamental question of the Board's state action claim.

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accord Hegarty v. Somerset County, 25 F.3d 17, 18 (1st Cir. 1994) (same).