

**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
v.)	IN SUPPORT OF MOTION
)	FOR EXPEDITED RELIEF
FEDERAL TRADE COMMISSION,)	(Fed. R. Civ. P. 65 and Local
)	Civil Rules 7.1, 7.2 and 10.1)
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, 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

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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:

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/s/ Noel L. Allen
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