

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
Civil Action No. 5:11-CV-49-FL**

THE NORTH CAROLINA STATE)	
BOARD OF DENTAL EXAMINERS,)	
)	JOINT STATUS REPORT AND
Plaintiff,)	PROPOSED DISCOVERY PLAN
v.)	(Fed. R. Civ. P. 26(f))
)	
FEDERAL TRADE COMMISSION,)	
)	
Defendant.)	

Plaintiff the North Carolina State Board of Dental Examiners (the “Plaintiff”) and Defendant Federal Trade Commission (“Defendant”) (collectively the “Parties”) submit the following, pursuant to the Court’s February 9, 2011 Order directing the Parties to confer and provide a joint report and plan on case scheduling matters by February 23, 2011 and, by agreement of the parties, pursuant to Rule 26(f) of the Federal Rules of Civil Procedure:

I. Rule 26(f) Conference. Pursuant to the Court’s February 9, 2011 Order and pursuant to Rule 26(f) of the Federal Rules of Civil Procedure, Noel L. Allen, M. Jackson Nichols and Alfred P. Carlton, Jr., counsel for Plaintiff, and Seth Wood, counsel for Defendant, conferred for the purpose of agreeing on a proposed plan for the completion of discovery, filing of motions, and pretrial and trial activities.

II. Initial Disclosures.

a. Plaintiff’s Position. The Parties will exchange the information required by Rule 26(a)(1) of the Federal Rules of Civil Procedure within 10 days after the Court issues an order regarding the Defendant’s forthcoming motion to dismiss, to the extent necessary.

b. Defendant's Position. In the event the Court denies Defendant's forthcoming motion to dismiss, the Parties will meet and confer and provide the Court, within 21 days of denial of that motion, a discovery plan to address initial disclosures and the items listed in Sections V(a)-V(h).

III. Jurisdiction, Preliminary Injunction & Oral Arguments. Pursuant to the Court's February 9, 2011 Order directing this case to proceed now on motion for preliminary injunction, Plaintiff and Defendant have conferred and determined that no additional evidence or briefs are necessary with respect to the issue of whether a preliminary injunction should be issued.

a. Plaintiff's Contentions. Plaintiff requests oral arguments with regard to its pending motion for a preliminary injunction. In the event that Defendant files a dispositive motion by February 28, 2011, the Court's consideration of that dispositive motion should not delay the Court's consideration of Plaintiff's pending motion for a preliminary injunction. In the event a dispositive motion is filed, to the extent that the Court would find it helpful, Plaintiff requests the opportunity to address at oral arguments both its pending motion for a preliminary injunction and any dispositive motion filed by Defendant.

b. Defendant's Contentions. This Court should first determine whether it has jurisdiction over this matter before considering any other questions, including whether a preliminary injunction should issue. As noted below, Section V(i), Defendant will file a motion to dismiss by February 28, 2011. Plaintiff will have 21 days to respond to that motion, and Defendant will have 14 days after that

response to file a reply (if any). If this Court wishes to hold a hearing on the motion to dismiss, it should do so before holding a hearing on whether to issue a preliminary injunction.

IV. Joint Report and Plan.

a. Nature and Complexity of Case.

i. Plaintiff's Contentions. This action arises out of Defendant's continuing attempts to preempt state statutes establishing the Plaintiff as a state agency comprised of a majority of licensees, to preempt the statutory definition of the practice of dentistry, and to assert administrative jurisdiction to enforce the antitrust laws against Plaintiff's enforcement of a clear and unambiguous statute. Plaintiff contends that in the absence of Congressional authorization, Defendant lacks jurisdiction and its actions are prohibited by the Constitution.

ii. Defendant's Contentions. Plaintiff challenges a pending, non-final, and unripe administrative matter. This Court lacks jurisdiction over this matter. Plaintiff may pursue its claims first to the FTC and, if necessary, to the Court of Appeals, as articulated in 15 U.S.C. § 45(c). Alternatively, the FTC may exercise jurisdiction over Plaintiff.

b. Basis for Subject Matter Jurisdiction.

i. Plaintiff's Contention. This Court has subject matter jurisdiction over this proceeding, pursuant to Article III of the Constitution and 28 U.S.C. § 1331.

ii. Defendant's Contention. This Court lacks subject matter jurisdiction over this proceeding.

c. Key Issues.

i. Plaintiff's Contentions. The factual and legal issues may include, but may not necessarily be limited to: (i) whether, in light of the restraints of the Tenth Amendment, the Commerce Clause and Article III of the U.S. Constitution, Congress has through federal antitrust laws explicitly preempted the North Carolina statutory definition of dentistry and the state's statutory scheme for regulating dentistry through a state agency comprised of a majority of licensees; (ii) whether Defendant has the statutory and constitutional authority to assert administrative jurisdiction *ab initio* over a state agency such as the Plaintiff; and (iii) whether Defendant has violated, and continues to violate, Plaintiff's constitutional rights in the administrative proceeding.

ii. Defendant's Contentions. Factual and legal issues include, but are not limited to: (i) whether a party subject to a pending administrative proceeding may seek to enjoin that proceeding before a district court; (ii) whether Plaintiff must first exhaust its arguments before the administrative body and, if necessary, before the Court of Appeals, as required pursuant to 15 U.S.C. 45(c); (iii) whether this Court has jurisdiction over this proceeding; (iv) whether Plaintiff has challenged any final agency order of the FTC.

- d. Damages.** No damages are being sought by the Parties in this proceeding; relief being sought by Plaintiff includes requests for declaratory judgments; requests for preliminary and permanent injunctions; and reimbursement for costs, including reasonable attorney's fees, pursuant to the Equal Access to Justice Act.
- V. Discovery Plan.** Plaintiff contends that this discovery plan shall be implemented once this Court has ruled on its jurisdiction over this matter and on the Defendant's forthcoming motion to dismiss. As noted below, Defendant contends that some, if not all, of the items listed in items (a) through (h) are not necessary, as this action is legal in nature rather than factual. It may be possible, given more time, to establish what specific factual issues (if any) require discovery and what discovery tools are appropriate. As a result, Defendant contends that, in the event this Court denies the Defendant's forthcoming motion to dismiss, the parties be given 21 days from issuance of the order denying the motion to provide the Court with a joint plan regarding discovery, as well as any issues regarding initial disclosures.
- a. Subjects of Discovery.**
- i. Plaintiff's Contention.** The Parties anticipate that limited discovery might be needed on certain facts related to the allegations, claims, and defenses contained in the Complaint and the responsive pleadings.
- ii. Defendant's Contention.** This matter should be addressed in a joint plan submitted by the parties, in the event the Court denies the Defendant's forthcoming motion to dismiss. Such a plan shall be submitted within 21 days of the order denying the motion to dismiss.

b. Phases of Discovery/Limitations on Issues of Discovery.

- i. Plaintiff's Contention.** The Parties do not believe that it is necessary for discovery to be conducted in phases or limited to or focused upon particular issues.
- ii. Defendant's Contention.** This matter should be addressed in a joint plan submitted by the parties, in the event the Court denies the Defendant's forthcoming motion to dismiss. Such a plan shall be submitted within 21 days of the order denying the motion to dismiss.

c. Categories and Proposed Limits on Discovery.

- i. Plaintiff's Contentions.** The Parties propose to use all means of discovery contemplated by the Federal Rules of Civil Procedure, subject to the following:
 - 1. Maximum of 10 interrogatories by each party to any other party;
 - 2. Maximum of 50 requests for admission by each party to any other party;
 - 3. Maximum of 5 non-expert depositions by each party;
 - 4. Maximum of 2 expert depositions by each party;
 - 5. Subject to the Court's review of the Protective Order Governing Discovery Material entered in the administrative proceeding, *In the Matter of the North Carolina [State] Board of Dental Examiners*, FTC Docket No. 9343, depositions taken in connection with that administrative proceeding may be used in this case; and

ii. Defendant's Contention. This matter should be addressed in a joint plan submitted by the parties, in the event the Court denies the Defendant's forthcoming motion to dismiss. Such a plan shall be submitted within 21 days of the order denying the motion to dismiss.

d. Deposition Length.

i. Plaintiff's Contention. Each deposition limited to a maximum of 8 hours unless extended by agreement of the Parties.

ii. Defendant's Contention. This matter should be addressed in a joint plan submitted by the parties, in the event the Court denies the Defendant's forthcoming motion to dismiss. Such a plan shall be submitted within 21 days of the order denying the motion to dismiss. Alternatively, to the extent depositions are allowed under a discovery plan, this limitation on their length is acceptable.

e. Issues Related to Discovery of Electronically-Stored Information. The Parties state that there are no issues relating to disclosure or discovery of electronically-stored information ("ESI"). When ESI is responsive to a discovery request or appropriately the subject of mandatory disclosure, the Parties agree that responsive ESI will be provided by the producing party in a computer-readable electronic format and the receiving party reserves the right to request that the producing party provide hard copies of the ESI, with the receiving party bearing the cost of any requested hard-copy production. Defendant contends, however, as a primary matter, that this issue should be addressed in a joint plan put together by

the parties, in the event the Court denies the Defendant's forthcoming motion to dismiss.

f. Issues Related to Claims of Privilege or Trial Preparation Material. The Parties will follow the general procedures set forth in Rule 26(b)(5) of the Federal Rules of Civil Procedure regarding the assertion of claims of privilege after production. Defendant contends, however, as a primary matter, that this issue should be addressed in a joint plan put together by the parties, in the event the Court denies the Defendant's forthcoming motion to dismiss.

g. Deadline for Completion of Discovery.

i. Plaintiff's Contentions. In the event that Defendant's forthcoming motion to dismiss is denied, the parties shall:

1. Issue and respond to interrogatories 60 days from entry of the Court's Order denying the motion to dismiss;
2. Identify expert witnesses 30 days from entry of the Court's Order denying the motion to dismiss;
3. Conduct expert witnesses depositions 45 days from entry of the Court's Order denying the motion to dismiss;
4. Identify rebuttal expert witnesses 60 days from entry of the Court's Order denying the motion to dismiss;
5. Conduct rebuttal expert witness depositions 75 days from entry of the Court's Order denying the motion to dismiss;

6. Conduct other depositions 90 days from entry of the Court's Order denying the motion to dismiss; and

7. Issue and respond to Requests for Admissions 120 days from entry of the Court's Order denying the motion to dismiss.

ii. Defendant's Contention. This matter should be addressed in a joint plan submitted by the parties, in the event the Court denies the Defendant's forthcoming motion to dismiss. Such a plan shall be submitted within 21 days of the order denying the motion to dismiss.

h. Other Anticipated Discovery Problems.

i. Plaintiff's Contentions. Based upon Plaintiff's experience in the Administrative Proceeding, Plaintiff anticipates problems in general with meaningful responses to document production, interrogatories and requests for admission, and, in particular, discovery regarding certain documents designated as protected by attorney-client privilege, attorney work product doctrine, government deliberative process privilege, law enforcement investigatory privilege, government informer privilege, common interest privilege and other privileges by Defendant, which Plaintiff contends are discoverable. Plaintiff also anticipates problems with discovery regarding certain files designated by Defendant as "investigation files," which Plaintiff contends are discoverable.

ii. Defendant's Contentions. This matter should be addressed in a joint plan submitted by the parties, in the event the Court denies the Defendant's

forthcoming motion to dismiss. Such a plan shall be submitted within 21 days of the order denying the motion to dismiss.

- i. Dismissal and Joinder of Parties.** Any motions for dismissal of claims or parties shall be made by February 28, 2011.
- j. Amendments to Pleadings.** Plaintiff is allowed until April 1, 2011 to request leave to amend its pleadings. Defendant is allowed until April 29, 2011 to request leave to amend its pleadings.
- k. Filing of Motions.** Motions for summary judgment, for judgment on the pleadings, and all potentially dispositive motions shall be filed 120 days from entry of the Court's Order denying Defendant's forthcoming motion to dismiss, if such an Order is entered.
- l. Pretrial Conference.**
 - i. Plaintiff's Contention.** Plaintiff requests that a pretrial conference be set in accordance with the Court's standard procedures, which Plaintiff understands will be approximately two weeks in advance of the trial date.
 - ii. Defendant's Contention.** Defendant does not believe a trial is necessary, as discussed below. In the event the Court wishes to hold a trial, Defendant also requests a pretrial conference in accordance with the Court's standard procedures.
- m. Trial Date.**
 - i. Plaintiff's Contention.** This case should be ready for trial after August 1, 2011 and, at this time, is expected to take approximately 3-5 days to try.

ii. Defendant's Contention. A trial is not necessary. The issues at stake are legal rather than factual.

n. Prospects for Settlement. The possibility of settlement cannot yet be evaluated.

o. Position on Referral to Magistrate Judge. No.

p. Rule 16(b) Pretrial Conference. No Rule 16(b) pretrial conference is requested prior to entry by the Court of its case management orders.

q. Scheduling Issues Affecting Parties or Counsel. The evidentiary hearing in the administrative proceeding, *In the Matter of the North Carolina [State] Board of Dental Examiners*, FTC Docket No. 9343, commenced on February 17, 2011 and is expected to conclude during the second week of March, 2011. Plaintiff requests that, to the extent that this Court permits oral arguments regarding Plaintiff's Motion for a Preliminary Injunction, this Court issue a stay of the administrative proceeding on the day that such oral arguments are scheduled. Defendant does not believe that such a stay is warranted.

This the 23rd day of February, 2011.

ALLEN AND PINNIX, P.A.

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of February, 2011, I filed the foregoing JOINT STATUS REPORT AND PROPOSED DISCOVERY PLAN with the Clerk of the Court using CM/ECF system, which will send notification of such filing to the following:

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