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IN THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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NO. 11-1679  
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NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS,

Plaintiff-Appellant,

v.

FEDERAL TRADE COMMISSION,

Respondent-Appellee.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

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SUPPLEMENTAL BRIEF OF THE FEDERAL TRADE COMMISSION

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STATEMENT OF ISSUE

On November 2, 2012, the Court directed the parties to file supplemental briefs addressing whether this appeal is moot. The Court directed the parties to address whether the plaintiff's requested relief is still available given that: (1) the administrative proceeding before the Commission has concluded with a final order; and (2) the Board's challenge to that final order before the Court is scheduled for oral argument on December 5, 2012.

OVERVIEW<sup>1</sup>

Plaintiff North Carolina State Board of Dental Examiners ("Board") filed a complaint for declaratory judgment and for a preliminary and permanent injunction with the United States District Court for the Eastern District of North Carolina on February 1, 2011. (J.A. 8-45). The Board asked the district court to enjoin administrative proceedings initiated by Defendant Federal Trade Commission ("Commission"). In that proceeding, the Commission alleged that the Board improperly excluded non-dentists from providing lower-cost teeth whitening services. (J.A. 150).

The Board filed a motion for a temporary restraining order on February 2, 2011. (J.A. 3, Docket Entry 5). Following briefing, the district court denied the Board's motion for a temporary restraining order on February 9, 2011. (J.A. 4, Docket Entry 13). The Commission filed a motion to dismiss based on lack of subject matter jurisdiction on February 28, 2011 (J.A. 147), and the district court stayed further

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<sup>1</sup> A more comprehensive review of the procedural history, factual background, and posture of this case appears in the defendant's brief.

proceedings pending its decision on the motion to dismiss. (J.A. 5, Docket Entry 22).

The district court granted the Commission's motion to dismiss on May 3, 2011. (J.A. 149-58). Among other things, the court held that it is "well-settled that this court lacks jurisdiction to enjoin ongoing administrative enforcement proceedings such as the one at issue here." (J.A. 153). The district court also noted that, in the event the Commission issued a final order subject to review, the Board could appeal that order exclusively to this Court. (J.A. 154-55). Judgment was entered on May 9, 2009. (J.A. 159). The Board filed a timely notice of appeal on June 27, 2011. (J.A. 160).

On December 2, 2011, the Commission issued a final cease and desist order in the administrative case at issue in this appeal. North Carolina Bd. of Dental Examiners, Final Order, Docket No. 9343 (F.T.C.) (Dec. 2, 2011), available at <http://www.ftc.gov/os/adjpro/d9343/111207ncdentalorder.pdf> (last accessed Dec. 16, 2011) ("Final Order"). Pursuant to 15 U.S.C. § 45(c), the Board challenged the Commission's final order in this Court. NC Board of Dental Examiners v. FTC, Case No. 12-

1172. Oral argument in Case Number 12-1172 is scheduled for December 5, 2012.



SUMMARY OF ARGUMENT

The original administrative proceeding that the Board challenged has concluded. The Board has appealed the final administrative order to this Court, pursuant to 15 U.S.C. § 45(c). As no live case or controversy remains as to the Board's original complaint and its appeal in this matter, this appeal is moot. Additionally, no exceptions to the mootness doctrine apply. Consequently, this Court should dismiss this matter based on mootness.

ARGUMENT

A case is moot “when the issues presented are no longer ‘live’ or the parties lack a legally cognizable interest in the out-come.” Incumaa v. Ozmint, 507 F.3d 281, 286 (4th Cir. 2007) (quoting Powell v. McCormack, 395 U.S. 486, 496 (1969)). “[I]f an event occurs while a case is pending on appeal that makes it impossible for the court to grant any effectual relief whatever to a prevailing party, the appeal must be dismissed.” Id. (quoting Church of Scientology of Cal. v. United States, 506 U.S. 9, 12 (1992) (internal quotation marks omitted)). “Litigation may become moot during the pendency of an appeal.” Id. (citing United States v. Munsingwear, Inc., 340 U.S. 36, 39 (1950)); J.W. v. Knight, 452 F. App’x 411, 414 (4th Cir. 2011) (unpublished) (noting that a “case can become moot due either to a change in the facts or a change in the law”) (citing Ross v. Reed, 719 F.2d 689, 693-94 (4th Cir. 1983)).

The Board originally brought suit in district court to stop the ongoing administrative proceeding in North Carolina Bd. of Dental Examiners, Docket No. 9343 (F.T.C.). (J.A. 150) (order of the district court granting motion to dismiss, stating that this “ongoing administrative proceeding” is “[a]t the heart of

this case"). In its opening brief, the Board asked this Court to reverse the district court and "order the Commission to dismiss its administrative proceeding." (Brief at 49-50).

When the Commission filed its brief with the Court on October 6, 2011, the Commission had not yet issued its final order. On December 2, 2011, however, the Commission issued a final order upholding the ALJ's initial decision. See Final Order. As a result of this final order, the Board has appealed to this Court pursuant to 15 U.S.C. § 45(c). The parties have completed briefing, and oral argument has been scheduled for December 5, 2012.

As the Commission has issued a final order, the Court cannot enjoin or dismiss any ongoing administrative proceeding. Similarly, any declaratory relief would be without any force or effect. Since the Board's issues on appeal, as they relate to the challenge of the Commission's administrative proceeding, are no longer "live," this appeal is moot.

Moreover, given that the Board is challenging the Commission's final order before this Court, it has not lost an opportunity to advance its merits argument against the

Commission. See Suarez v. Rooney, 53 F. App'x 703, 703 (4th Cir. 2003) (unpublished). In Suarez, this Court dismissed as moot an appeal from a district court's denial of a 28 U.S.C. § 2241 petition that attempted to stop the petitioner's removal. This Court concluded that the petitioner's appeal was moot after the petitioner filed a direct challenge to his removal on the merits. Id. (holding that the "petition for review on the merits renders moot the jurisdictional issue in the current appeal by causing it to lose 'its character as a present, live controversy of the kind that must exist if we are to avoid advisory opinions on abstract propositions of law'" (quoting Maryland Highways Contractors Ass'n, Inc. v. Maryland, 933 F.2d 1246, 1249 (4th Cir. 1991))).

Additionally, the exceptions to the mootness doctrine do not save the Board's appeal. Incumaa, 507 F.3d at 288-89. The "voluntary cessation"<sup>1</sup> exception does not apply because the administrative process did not cease pending the Board's appeal.

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<sup>1</sup> Under this exception, the "'voluntary cessation of allegedly illegal activity does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot.'" Incumaa, 507 F.3d at 288 (quoting United States v. W.T. Grant Co., 345 U.S. 629, 632 (1953)). This doctrine does not apply, however, "where 'there is no reasonable expectation that the wrong will be repeated.'" Id. (quoting W.T. Grant, 345 U.S. at 633).

The "capable of repetition, yet evading review"<sup>2</sup> exception - which applies only in "exceptional situation[s]" - does not apply because neither of its required elements applies. Id. at 289. That is, the administrative process that the Board has challenged is not "in its duration too short to be fully litigated prior to cessation or expiration." Id. Likewise, there is no "reasonable expectation that the same complaining party" - the Board - "will be subject to the same action again." Id. As the Board's appeal is no longer a live controversy, this Court should dismiss it as moot.

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<sup>2</sup> Under this exception, in the "absence of a class action, jurisdiction on the basis that a dispute is capable of repetition, yet evading review is limited to the exceptional situation . . . in which (1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." Incumaa, 507 F.3d at 289 (internal quotation marks and citations omitted).

CONCLUSION

For the foregoing reasons, this Court should dismiss this appeal as moot. In the alternative, it should affirm the judgment of the district court for the reasons articulated in the Commission's brief.

Respectfully submitted, this 15th day of November, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on November 15, 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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