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U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BOARD OF DENTAL EXAMINERS OF ALABAMA, and its members in their official capacities, Plaintiffs, v. FEDERAL TRADE COMMISSION, Defendant.	CIVIL ACTION NO. 2:20-cv-01310-SGC

FEDERAL TRADE COMMISSION'S MOTION TO DISMISS

The Federal Trade Commission moves to dismiss the complaint of the Board of Dental Examiners of Alabama and its members ("the Board") for lack of subject matter jurisdiction, Fed. R. Civ. P. 12(b)(1), and failure to state a claim, Fed. R. Civ. P. 12(b)(6). The FTC is investigating the Board for possible federal antitrust violations surrounding actions it has taken to restrict competition from teledentistry services. As part of that inquiry, the FTC issued a civil investigative demand (CID) to the Board in April. The Board declined to respond to that CID, but did not avail itself of statutory procedures to challenge the CID before the agency; instead it waited months and then filed this declaratory action. The complaint asks this Court to short-circuit the ongoing administrative process and issue a sweeping,

unprecedented ruling: that the "state-action" doctrine is not just a defense against liability, but actually entitles the Board to disregard a federal investigation. That is a baseless claim and inconsistent with long-settled law and practice. The state-action doctrine, when it applies, is a defense to antitrust liability, not an immunity from investigation. Nevertheless, this Court need not reach that question because it lacks jurisdiction for two independent reasons.

First, under the Administrative Procedure Act, federal courts have no jurisdiction to hear challenges to preliminary, nonfinal agency actions such as conducting an investigation or issuing compulsory process. An unbroken line of decisions by the Supreme Court and the Eleventh Circuit bars such suits.

Second, the Board has not exhausted its administrative remedies, and so cannot seek judicial relief. Any state-action defense can be raised if and when the FTC brings an enforcement action. The Board may not short-circuit the process by preemptive court action.

Finally, even if this Court were to have jurisdiction, it should as a matter of discretion decline to exercise it. The issues raised by the Board are premature given the status of the investigation. Judicial intervention at this stage would only interfere with the ongoing administrative process and waste resources. The Court should dismiss the case and let the investigation run its course.

I. Enforcement Under The FTC Act

1. Section 5 of the FTC Act prohibits "unfair methods of competition," 15 U.S.C. § 45(a)(1), which includes agreements in restraint of trade that also violate Section 1 of the Sherman Act, 15 U.S.C. § 1. *FTC v. Actavis, Inc.*, 570 U.S. 136, 145 (2013). The FTC enforces the FTC Act, in its discretion, through either administrative adjudication, 15 U.S.C. § 45, or district court suits, *id.* § 53(b).

2. Congress also authorized the FTC to undertake investigations, and issue compulsory process, to ferret out violations of the FTC Act. Section 6 of the Act gives the agency broad power to gather and compile information about, and investigate, matters affecting commerce. *Id.* § 46. Section 20 authorizes the FTC to issue a civil investigative demand (CID) to "any person" who may have "any information" relevant to potential violations of laws it enforces. 15 U.S.C. § 57b-1 (c); *see* 16 C.F.R. § 2.7(b). "Any person" includes "any . . . legal entity, including any person acting under color or authority of State law." 15 U.S.C. § 57b-1 (a)(6).

3. CID recipients may petition the FTC for an order modifying or setting aside the CID within 20 days; such petitions may raise failure to comply with "any constitutional or other legal right." 15 U.S.C. § 57b-1 (f)(1)-(2).

4. CIDs are not self-enforcing. The FTC can compel compliance only by petitioning a district court for an order enforcing the CID, which may then be appealed. 15 U.S.C. § 57b-1 (e), (h).

II. Factual Background

5. The Board administers dental licensing in Alabama and implements the provisions of the Alabama Dental Practice Act. This case involves the Board's actions directed at companies and dentists that provide teeth alignment services through a teledentistry model. These services often are cheaper and more convenient for consumers than traditional services like braces or Invisalign.

6. In 2017, the Board promulgated a rule prohibiting non-dentist personnel from taking pictures inside a patient's mouth unless they are supervised by an on-site dentist. Compl. ¶¶ 27, 31. Pursuant to this rule, the Board sent leading teledentistry provider SmileDirectClub, LLC a cease-and-desist letter, directing it to stop offering teledentistry services to Alabama consumers. *Id.* ¶ 34. The FTC is investigating whether the Board has harmed competition and consumers by restricting access to services offered by new and innovative teledentistry platforms like SmileDirectClub. The same conduct is the subject of private antitrust litigation. *See Leeds v. Board of Dental Examiners of Alabama*, Case No. 2:18-cv-01679 (N.D. Ala.) (filed Oct. 12, 2018). The *Leeds* court denied the Board's motion to dismiss on state-action grounds, holding that the defense raised factual issues that required further discovery. *See infra* at Section III.D.

7. On April 17, 2020, the FTC issued and served on the Board a CID asking for documents and information relating to its adoption and enforcement of

the rule. The Board did not ask the FTC to quash or limit the CID by the deadline of May 7 (20 days after service). Declaration of Philip Kehl ¶ 4. To the contrary, the Board repeatedly assured FTC staff that it intended "to fully cooperate with the FTC's investigation." *Id.* ¶¶ 3, 5. Ultimately, however, the Board did not cooperate, and it did not respond to the CID. *Id.* ¶ 8.

8. Instead, the Board filed this action against the FTC, asking this Court to declare that the Board "is under no obligation to respond to the FTC's CID because, as an arm of the State, the Board is immune from FTC scrutiny and cannot be commanded to submit to the FTC's investigation." Compl. ¶ 3; *see also id.* ¶¶ 16, 48-49, 52; Kehl Decl. ¶ 7. The Board also asked the Court to enjoin the FTC's investigation and enforcement of the CID. Compl. at 10; ¶¶ 45-52.

III. Legal Argument

Federal courts have "limited jurisdiction" that must be conferred by statute. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). The Board bears the burden to prove jurisdiction, *id.*, which it cannot meet.

A. The APA Does Not Provide Jurisdiction Over The Complaint

The APA authorizes judicial review only of "final agency action" "for which there is no other adequate remedy in a court." 5 U.S.C. § 704. This suit satisfies neither condition, creating two independently fatal defects in the complaint.

No Final Agency Action. An agency action is "final" under the APA only when it both "mark[s] the consummation of the agency's decisionmaking process" and is "one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 156, 177-78 (1997) (cleaned up). The CID and investigation challenged here do not meet either test.

Here, the FTC has not "consummated [its] decisionmaking process"; it has merely *begun* that process by initiating an investigation. The FTC is collecting evidence and evaluating applicable law. It has reached no determination to proceed against the Board. Many investigations result in no enforcement recommendation, and even if FTC staff recommends such an action, that is no guarantee that the five commissioners, who must vote by majority to issue a complaint, will decide to proceed. Even then, the FTC may enforce the FTC Act in district court, 15 U.S.C. § 53(b), or administratively, *id.* § 45(b). Judicial review of administrative proceedings is committed exclusively to the courts of appeals, and district courts lack jurisdiction over them. *Id.* § 45(c); *see Coca-Cola Co. v. FTC*, 475 F.2d 299, 302 (5th Cir. 1973).[1] Also, many investigations result in a consent order, obviating the need for any judicial review at all. But all this is yet to come, and may never happen at all. The FTC is just starting the decisionmaking process.

[1] Fifth Circuit decisions before October 1, 1981 are binding Eleventh Circuit precedent. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc).

Nor does the investigation or the CID determine any of the Board's final "rights or obligations" as the APA requires. In *FTC v. Standard Oil*, 449 U.S. 232 (1980), the Supreme Court held that issuing a complaint is not a "final" decision, since it merely begins the process of fixing rights and obligations. 449 U.S. at 238-43. If a complaint is not final, then *a fortiori* a preliminary investigation to decide whether to issue one cannot be final.

Courts, including the Eleventh Circuit, consistently apply *Standard Oil*'s reasoning to reject premature challenges to ongoing FTC matters. *See, e.g.*, *LabMD v. FTC*, 776 F.3d 1275, 1279 (11th Cir. 2015); *Wearly v. FTC*, 616 F.2d 662, 665-68 (3d Cir. 1980); *Ukiah Valley v. FTC*, 911 F.2d 261, 263-64 (9th Cir. 1990); *Blue Ribbon Quality Meats, Inc. v. FTC*, 560 F.2d 874, 876-77 (8th Cir. 1977). In *LabMD*, for example, a company sued the FTC while an administrative proceeding was ongoing, challenging the agency's jurisdiction and alleging constitutional violations. The Eleventh Circuit held that the finality requirement was not met, noting that the FTC – not the court – was "best suited to develop the factual record, continue to evaluate its position on the issues, and apply its expertise to complete the proceeding." 776 F.3d at 1278-80. Even constitutional claims, it held, "must be funneled through the direct-appeal process after a final agency action" since "that is the scheme created by Congress." *Id.* at 1279. This reasoning applies with extra force here. The investigation has not yet concluded,

and no enforcement action has been recommended or commenced – much less completed. The Board thus cannot show its suit challenges "final agency action," requiring dismissal.

Adequate Remedy. The Board also cannot establish that it has "no other adequate remedy in a court." 5 U.S.C. § 704. It plainly does. If the FTC petitions to enforce the CID, the Board can raise relevant objections in that proceeding. And if the FTC ultimately decides to bring an antitrust enforcement action, the Board will be able to assert, in its defense, all the arguments it advances here. (The FTC preserves all responses to those arguments, including waiver by the Board.)

Case after case squarely forecloses attempts to seek pre-enforcement judicial review when the same claims could be raised in a future or ongoing enforcement action. For example, in *Reisman v. Caplin*, 375 U.S. 440 (1964), targets of an IRS investigation sued the agency for declaratory and injunctive relief from subpoenas akin to the CID here. The Supreme Court held that the suit was improper because the recipients would have a full opportunity to contest the subpoenas if and when the agency sought to enforce them in district court, as the statute provided. *Id.* at 449-50. Requiring recipients to wait for and raise objections through "the remedy specified by Congress works no injustice" and "provides full opportunity for judicial review before any coercive sanctions may be imposed." *Id.*

The pre-division Fifth Circuit applied *Reisman* in *Atlantic Richfield Co. v. FTC*, 546 F.2d 646, 649 (5th Cir. 1977), to bar judicial review of FTC subpoenas before any enforcement action, even where constitutional violations were alleged. Noting that FTC subpoenas are no more "self-executing" than those in *Reisman*, the Court held that the company "may raise all its due process and regulatory procedural objections in any enforcement proceeding." *Id.* at 649. Other courts apply the same reasoning to dismiss preemptive suits challenging FTC CIDs or subpoenas. *See, e.g.*, *General Finance Corp. v. FTC*, 700 F.2d 366 (7th Cir. 1983); *Wearly*, 616 F.2d at 665; *Casey v. FTC*, 578 F.2d 793 (9th Cir. 1978); *Anheuser-Busch, Inc. v. FTC*, 359 F.2d 487, 490 (8th Cir. 1966). These cases are consistent with the APA requirements for judicial review, but also with the longstanding general principle that a party may not halt an agency matter by seeking an injunction, so long as there is a meaningful opportunity for judicial review after a final order. *See FTC v. Claire Furnace Co.*, 274 U.S. 160, 173-74 (1927); *see also Texaco v. FTC*, 301 F.2d 662, 663 (5th Cir. 1962) (any errors "may be reviewed and corrected" during appeal from a final order, not in a suit against the agency).

The Board's invocation of the state-action doctrine does not change the APA analysis. The Board will have an adequate opportunity in an appropriate forum to raise that defense, if the FTC brings an enforcement action. For that very reason, the Fifth Circuit recently ordered the dismissal of a similar lawsuit, holding that a

state regulatory board could not preemptively sue to stop an FTC administrative proceeding. The court held that the state-action defense could be effectively reviewed on appeal from a final order. *La. Real Estate Appraisers Board v. FTC* ("*LREAB II*"), No. 19-30796, at 3 (5th Cir. Oct. 2, 2020). Supreme Court cases confirm that the defense should be raised in an enforcement case (and appeals), not a separate suit against the FTC. *See, e.g.*, *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 627-32 (1992) (raised in FTC case and appeals); *N.C. St. Bd. of Dental Examiners v. FTC* ("*Dental Examiners*"), 574 U.S. 494, 501-02 (2015) (same).

The procedural posture of this case makes it even more inappropriate for preemptive litigation than *LREAB II* and similar cases. The Board's rights have not been adversely affected at all; they merely *could be* in the future, "on the contingency of future administrative action" which may or may not occur. *Rochester Tel. Corp. v. U.S.*, 307 U.S. 125, 130 (1939). "[R]esort to the courts in these situations is either premature or wholly beyond their province." *Id.* If the FTC brings a case against the Board, it will have ample opportunity to litigate its state-action defense in that proceeding. No earlier review is permitted.

B. The Board Failed To Exhaust Its Administrative Remedies

The case also should be dismissed for the separate but related reason that the Board has failed to exhaust its administrative remedies. It is elementary that "no one is entitled to judicial relief for a supposed or threatened injury until the

prescribed administrative remedy has been exhausted." *Myers v. Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938). Here, Congress has specified how CID recipients must raise challenges to a CID: by filing a petition to modify or set aside the CID with the FTC, and then, if necessary, by making arguments in any CID enforcement case. *See supra* at 3, 8. The Board's suit here attempts an end-run around that process. It did not file a petition to set aside the CID, Kehl Decl. ¶ 4, and the FTC has not yet sought to enforce the CID in court, *id.* If and when it does so, the Board can make relevant arguments at that time, as Congress intended.

"Where Congress has provided an adequate procedure for judicial review of administrative actions, that procedure must be followed." *Frito-Lay, Inc. v. FTC*, 380 F.2d 8, 10 (5th Cir. 1967) (per curiam). A plaintiff "may not bypass the specific method that Congress has provided for reviewing adverse agency action simply by suing the agency in federal district court"; rather, it "must wait till the [FTC] sues to enforce a [CID]," "since that is the method of judicial review of FTC investigations that Congress has prescribed." *General Finance*, 700 F.2d at 367-68 (dismissing suit by companies claiming immunity from investigation, citing "more than 50 years" of precedent); *accord Atlantic Richfield*, 546 F.2d at 649.

Nor does it make any difference if "the contention is made that the administrative body lacked power." *Myers*, 303 U.S. at 50-51. *General Finance* barred suit in precisely that situation. 700 F.2d at 369. And the Fifth Circuit

rejected a preemptive complaint in *Am. Gen. Ins. Co. v. FTC* ("*American General*"), 496 F.2d 197, 198 (5th Cir. 1974), holding that it "has never been the law" that a claim the FTC lacks jurisdiction "throws open the gates to premature court action." *Id.* at 200 (dismissing for failure to exhaust administrative remedies, even where jurisdictional question was "close"); *see also Frito-Lay*, 380 F.2d at 10 (ruling that judicial intervention was not justified in similar circumstances).[2]

C. The State-Action Doctrine Does Not Affect The FTC's Power To Investigate

Finally, the Board's complaint also should be dismissed because it is based on an erroneous premise: that the state-action doctrine provides immunity not just from liability but from investigation. That is wrong as a matter of law, so the complaint fails to state a claim.

The state-action doctrine is not an immunity from suit akin to sovereign immunity but rather a judicially-crafted limit on the reach of federal antitrust laws. *See Parker v. Brown*, 317 U.S. 341, 350-51 (1943). It provides that certain state actions – when "an exercise of the State's sovereign power" – do not violate federal antitrust law. *Dental Examiners*, 574 U.S. at 504. To ensure that the "fundamental national values of free enterprise and economic competition" are not thwarted, the Supreme Court has imposed strict limits on the doctrine, which is

[2] The case also is not ripe: it raises significant factual issues, and no hardship will result from waiting. *See Abbott Labs., Inc. v. Gardner*, 387 U.S. 136 (1967); *Wearly*, 616 F.2d at 667-68.

"disfavored." 574 U.S. at 504-07. State boards controlled by market participants in a regulated profession, as the Board is (Compl. ¶ 4), receive protection only if they show that the alleged conduct (1) was taken pursuant to a "clearly articulated and affirmatively expressed" state policy to displace competition, and (2) was "actively supervised by the State itself." *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980); *Dental Examiners*, 574 U.S. at 506-12.

Importantly, the Board's status as an "arm of the state" for certain *state* law purposes, Compl. ¶¶ 6, 51, does not resolve the separate *federal* question of whether the state-action doctrine applies, which turns on different facts. Under federal law, "the need for supervision turns not on the formal designation given by States to regulators but on the risk that active market participants will pursue private interests in restraining trade." *Dental Examiners*, 574 U.S. at 510-11; *see also* 1A Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 227a, at 225 (4th ed. 2013). The Board's contrary argument is a mistaken attempt to import Eleventh Amendment sovereign immunity principles into the state-action defense. *See* Br. of United States and FTC as Amicus Curiae in *Leeds v. Jackson*, (11th Cir.) (No. 19-11502), at 32-35. An entity simultaneously can be an "arm of the state" under the Eleventh Amendment and a non-sovereign actor for state-action purposes. *Edinboro Coll. Park Apts. v. Edinboro Univ. Found.*, 850 F.3d 567, 575 (3d. Cir. 2017); *S.C. St. Bd. of Dentistry v. FTC*, 455 F.3d 436, 446-47 (4th Cir.

2006); *LREAB II*, at 10. Holding otherwise would eliminate the supervision rule where "the need for [it] is manifest." *Dental Examiners*, 574 U.S. at 510-11.

No court has ever held that the state-action doctrine blocks the FTC from conducting an investigation or enforcing compulsory process. Such a holding could not be squared with the basic principle that "states retain no sovereign immunity as against the federal government," including in antitrust suits. *West Virginia v. United States*, 479 U.S. 305, 312 n.4 (1987); *S.C. Board*, 455 F.3d at 447; *LREAB II*, at 10. Nor is it compatible with the Supreme Court's approval of antitrust enforcement against state boards in *Dental Examiners*. *See* 574 U.S. at 505. If the FTC cannot even investigate such bodies, it cannot effectively enforce the law against them as plainly contemplated in *Dental Examiners*.

Courts have rejected similar arguments as to other antitrust exemptions, emphasizing the FTC's broad investigatory powers and its superior position to determine whether an exemption applies or agency jurisdiction is lacking. *See, e.g.*, *United States v. Morton Salt Co.*, 338 U.S. 632, 642-43 (1950) (affirming broad FTC power to investigate); *Frito-Lay*, 380 F.2d at 10 (FTC "may be more qualified than the court" to assess jurisdiction); *American General*, 496 F. 2d at 200 (issue "better left to a review of any final order"); *see also Casey*, 578 F.2d at 795, 797-98 (refusing to enjoin investigation of allegedly exempt entities); *Dairymen, Inc. v. FTC*, 684 F.2d 376, 379 (6th Cir. 1982); *Blue Ribbon*, 560 F.2d at 876-77.

D. In Any Event, This Court Should Decline To Exercise Declaratory Judgment Jurisdiction, Which Is Discretionary.

Finally, even if it had jurisdiction, the Court should decline to exercise it. District courts have "unique and substantial" discretion to hear declaratory cases. *Wilton v. Seven Falls Co.*, 515 U.S. 277, 286 (1995); 28 U.S.C. § 2201(a). Doing so here will interfere with an ongoing federal investigation, and if the FTC brings a CID or antitrust enforcement case, there will be concurrent, duplicative litigation on overlapping issues. Determining whether the state-action doctrine applies would require resolving significant factual issues (the very ones the FTC is investigating). Indeed, in private litigation over the same conduct, this Court held that state-action issues could not be determined on a motion to dismiss. *See Leeds v. Bd. of Dental Examiners of Alabama*, 382 F. Supp. 3d 1214, 1239 (N.D. Ala. 2019) (denying Board's motion) (appeal pending). And the Eleventh Circuit recently held that the doctrine did not shield a Georgia board from similar claims at the motion to dismiss stage. *See SmileDirectClub, LLC v. Battle*, 969 F.3d 1134, 1140-46 (11th Cir. 2020); *Leeds* Am. Br. at 26-33. If the doctrine does not apply, any antitrust action would involve liability issues not presented here. And if the FTC opts *not* to bring a case, a ruling here would have been unnecessary, and the Board would have suffered no harm. This action thus is baseless in law and inefficient and wasteful in practice. It should be dismissed.

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CERTIFICATE OF SERVICE

I hereby certify that on November 13, 2020, I served plaintiffs by email through the Court's CM/ECF system.

s/ Mariel Goetz
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FEDERAL TRADE COMMISSION