



UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: Jon Leibowitz, Chairman
William E. Kovacic
J. Thomas Rosch
Edith Ramirez
Julie Brill

_____)
In the Matter of)
)
NORTH CAROLINA BOARD OF) PUBLIC
DENTAL EXAMINERS,) Docket No. 9343
)
Respondent.)
_____)

COMPLAINT COUNSEL’S OPPOSITION TO RESPONDENT’S
FOURTH MOTION TO STAY THE EVIDENTIARY HEARING

Respondent’s latest motion¹ to delay the evidentiary hearing² is without merit and should be summarily denied. Respondent’s repetitive filing of delaying motions seemingly proceeds from the logical fallacy that something becomes true if it is repeated often enough.³ The putative justification for its present motion, the pendency of the Board’s collateral attack on the

¹ See Commission Order Denying (1) Respondent’s Motion for Reconsideration of the Order Denying Expedited Motion for A Later Hearing Date, and (2) Respondent’s Application for Review of the ALJ’s Order Denying Respondent’s Motion to Compel at 2 n.2 (February 9,2011) (“Comm. Order of Feb. 10, 2011”).

² Respondent’s Expedited Motion for Stay of Proceedings Pending the Outcome of a Motion for Preliminary and Permanent Injunction in U.S. District Court for the Eastern District of North Carolina (Feb. 11, 2011) (“R’s 4th Stay Motion”).

³ Rational Wiki, available at: http://rationalwiki.org/wiki/Argumentum_ad_nauseam (last visited Feb. 10, 2011) (citing, for example, Lewis Carroll, *The Hunting of the Snark* (“I have said it thrice: What I tell you three times is true.”)).

Commission’s complaint in the Eastern District of North Carolina,⁴ stands administrative procedure on its head⁵ and does not provide any more self-justification for a stay than had the Board’s prior blizzard of motions before the ALJ and the Commission. To the extent that the simultaneous proceedings here and in North Carolina harm the Board,⁶ it is a purely self-inflicted wound – it hardly qualifies for the “good cause” required by Rule 3.41(f).

Just days earlier, the Commission denied the exact same relief that the Board now (again) seeks. Had Judge Flanagan agreed with the Board in the court’s order of February 9, 2011,⁷ and not the Commission, the Board would have its stay. But Judge Flanagan did not, and the Board proffers no reason why the Commission should reconsider its prior position, or question Judge Flanagan’s decision. The Board’s motion practice gives new meaning to the phrase “exhaustion” of remedies.

Judge Flanagan is conducting the Board’s Suit in parallel with these “ongoing administrative enforcement proceedings.” *Id.* Judge Flanagan determined that parallel

⁴ *North Carolina State Bd. of Dental Examiners v. FTC*, Docket No. 5:11-cv-49-FL (E.D. N.C. Feb. 1, 2011) (“Board’s Suit”).

⁵ The Board’s invitation to the Commission to “give full and fair consideration to this request based upon the action pending in the U.S. District Court for the Eastern District of North Carolina,” R’s 4th Stay Motion at 2, amounts to a reversal of the exhaustion doctrine and “is at war with the long-settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.” *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938).

⁶ R’s 4th Stay Motion at 3.

⁷ A copy of that order is attached as Exhibit A; the order states at page 3, “Among other things, plaintiff [the Board] has failed to show that the threatened harm is sufficiently immediate so as to warrant the extraordinary remedy of a temporary restraining order. . . . Substantive issue of or relating to the likelihood of plaintiff’s success on the merits looms large concerning whether plaintiff seeks this court improperly to enjoin ongoing administrative enforcement proceedings.”).

proceedings are in the public interest, and nothing in the Respondent's present motion to stay the evidentiary hearing contradicts the wisdom of that decision.

The Board's motion practice should be recognized as an ongoing tactic to interfere with Complaint Counsel's day-to-day preparation for, and conduct of, the evidentiary hearing. There is no longer any time for such repetitive, dilatory tactics. Accordingly, the Commission's order denying this fourth motion for a stay of the evidentiary hearing should require the Board to first obtain an order from the Commission granting it leave to file another motion for a stay (or any other equivalent motion), for good cause shown, before Complaint Counsel would be required to respond in any way to either the motion for leave to file or the accompanying motion itself.

For all of the foregoing reasons, Respondent's fourth motion to delay the evidentiary hearing should be denied, and Respondent should be ordered to first obtain leave before any more motions for a stay of these proceedings can be filed.

Respectfully submitted,

s/ Richard B. Dagen
Richard B. Dagen
William L. Lanning
Michael J. Bloom
Melissa Westman-Cherry
Counsel Supporting the Complaint
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Federal Trade Commission
601 New Jersey Avenue, NW
Washington, DC 20580

Dated: February 11, 2011

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

No.5:11-CV-49-FL

NORTH CAROLINA STATE BOARD OF)
DENTAL EXAMINERS,)

Plaintiff,)

v.)

FEDERAL TRADE COMMISSION,)

Defendant.)
)
)
)

ORDER

This matter is before the court on plaintiff's motion for temporary restraining order and other equitable relief (DE # 5) and motion for expedited relief (DE # 8). Defendant responded in opposition, and plaintiff replied. In this posture, the issues raised are ripe for review. For the reasons that follow, plaintiff's motion for a temporary restraining order is denied, and plaintiff's motion for expedited relief is granted in remaining part.

STATEMENT OF THE CASE

Plaintiff filed complaint on February 1, 2011, including request for declaratory judgment and a preliminary or permanent injunction. Immediately thereafter, on February 2, 2011, plaintiff filed motion for temporary restraining order and other equitable relief, seeking among other things order requiring defendant to remove from defendant's website certain statements regarding plaintiff (Pl.'s Mem. Supp. TRO, at 2.) On February 4, 2011, plaintiff filed a motion for expedited relief, asking that the court grant the relief sought in the complaint and the motion for temporary restraining order on expedited basis.

Plaintiff is respondent in an administrative proceeding initiated by defendant to investigate allegedly anticompetitive conduct by plaintiff. (Compl. ¶ 15); (Def.'s Resp. Opp'n Mot. TRO, at 2.) In its motion for expedited relief, plaintiff brought to the court's attention an evidentiary hearing in the administrative proceeding that is scheduled to commence on February 17, 2011, at 10:00 a.m., in Washington, D.C. A final prehearing conference is scheduled for February 15, 2011.

Before the close of discovery in the administrative proceeding, plaintiff filed a motion to dismiss the entire administrative complaint. Defendant ruled on the motion, and notified plaintiff that defendant's opinion and order denying plaintiff's motion to dismiss, as well as a "news release describing these documents," would be placed on the public record, including defendant's website, no sooner than 11:00 a.m. on Tuesday, February 8, 2011. (Pl.'s Mot. Expedited Relief ¶ 6.)

On February 7, 2011, defendant responded in opposition to plaintiff's motion for temporary restraining order and other equitable relief, arguing that plaintiff has failed to satisfy the requirements for injunctive relief, to which plaintiff replied on February 8, 2011.

DISCUSSION

Rule 65 of the Federal Rules of Civil Procedure allows a court to enter temporary restraining orders. Fed. R. Civ. P. 65. Rule 65(b) specifically provides for the issuance of temporary restraining orders without notice, yet the analysis is the same when the nonmoving party has notice, as is the case here. The court may grant a temporary restraining order if the moving party establishes four requirements: (1) likelihood of success on the merits; (2) likelihood of irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in plaintiff's favor; and (4) that an injunction is in the public interest. Real Truth About Obama, Inc. v. Federal Election Comm'n, 575 F.3d 342, 346 (4th Cir. 2009), vacated on other grounds 130 S. Ct. 2371 (2010), reinstated in

relevant part on remand, 607 F.3d 355 (4th Cir. 2010) (per curiam). All four requirements must be satisfied. Id.

Upon careful consideration of the issues raised, the undersigned concludes that plaintiff has failed to satisfy the requirements for a temporary restraining order. Among other things, plaintiff has failed to show that the threatened harm is sufficiently immediate so as to warrant the extraordinary remedy of a temporary restraining order. For example, plaintiff has failed to show how placing information regarding the administrative proceedings on the public record, or on defendant's website, will result in irreparable harm to plaintiff or the citizens of North Carolina, if relief is not granted preliminarily. Substantive issue of or relating to the likelihood of plaintiff's success on the merits looms large concerning whether plaintiff seeks this court improperly to enjoin ongoing administrative enforcement proceedings. The present showing is not sufficient to warrant a temporary restraining order. Plaintiff's request for temporary restraining order is DENIED.

The case shall proceed now on motion for preliminary injunction. To the extent that plaintiffs' motion for expedited relief seeks expedited scheduling considerations, in this part the motion is ALLOWED. The parties are DIRECTED to confer and provide a joint report and plan on case scheduling matters within fourteen (14) days of entry of this order. If either side deems that conference by telephone with the court may aid in final development of a case management order, said request may be made in the form of the joint report and plan.

CONCLUSION

For the foregoing reasons, plaintiff's motion for temporary restraining order (DE # 5) is denied. To the extent plaintiff's motion for expedited relief (DE # 8) seeks expedited scheduling

considerations, the motion is granted in this part.

SO ORDERED, this the 9th day of February, 2011.


LOUISE W. FLANAGAN
Chief United States District Judge

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

COMMISSIONERS: **Jon Leibowitz, Chairman**
 William E. Kovacic
 J. Thomas Rosch
 Edith Ramirez
 Julie Brill

In the Matter of)	
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NORTH CAROLINA BOARD OF)	Docket No. 9343
DENTAL EXAMINERS,)	
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Respondent.)	
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**[PROPOSED ORDER] DENYING RESPONDENT’S EXPEDITED MOTION FOR STAY
OF PROCEEDINGS PENDING THE OUTCOME OF A MOTION FOR PRELIMINARY
AND PERMANENT INJUNCTION IN THE U.S. DISTRICT COURT FOR THE
EASTERN DISTRICT OF NORTH CAROLINA**

The Board’s fourth motion for a stay of the evidentiary hearing was filed February 11, 2011, and Complaint Counsel’s opposition to it was filed on the same day. Complaint Counsel further ask for additional relief in the form of an order conditioning Respondent’s subsequent right to file additional motions for a stay of the evidentiary hearing on first obtaining an order from the Commission granting it leave to file such a motion. For good cause appearing,

IT IS ORDERED THAT the Board’s motion to stay the evidentiary hearing be, and it hereby is, **DENIED**.

IT IS FURTHER ORDERED THAT any additional motions for a stay of the evidentiary hearing (or equivalent motion) filed by the Respondent shall only be filed when the Commission has granted leave for good cause shown in advance of such filing; further, the non-

moving party will have no obligation to respond to such a motions for leave to file a stay motion unless the Commission solicits the views of the non-moving party.

By the Commission, Commissioner Brill recused.

Donald S. Clark
Secretary

SEAL.
ISSUED:

CERTIFICATE OF SERVICE

I hereby certify that on February 11, 2011, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-113
Washington, DC 20580

I also certify that I delivered via electronic mail and hand delivery a copy of the foregoing document to:

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-110
Washington, DC 20580

I further certify that I delivered via electronic mail a copy of the foregoing document to:

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*Counsel for Respondent
North Carolina State Board of Dental Examiners*

CERTIFICATE FOR ELECTRONIC FILING

I certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator.

February 11, 2011

By: s/ Richard B. Dagen
Richard B. Dagen