

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

Case No. _____

THE NORTH CAROLINA STATE)
BOARD OF DENTAL EXAMINERS,)
)
Plaintiff,)
v.)
)
FEDERAL TRADE COMMISSION,)
)
Defendant.)

**COMPLAINT FOR DECLARATORY
JUDGMENT AND PRELIMINARY
AND PERMANENT INJUNCTION**

OVERVIEW OF THIS ACTION

The objective of this action at law and in equity is to obtain an unprejudiced determination of the State of North Carolina’s right to protect its citizens against the dangerous and illegal unauthorized practice of dentistry in North Carolina and to statutorily regulate professions within its borders through its state agencies governed by a majority of licensees. Further, the purpose of this action is to stop a pointless, baseless, and predetermined federal administrative proceeding that has impaired and continues to impair the ability of the State to protect its public, contravenes federal and state statutes, directly encroaches upon the State’s sovereignty assured under the Tenth Amendment to the United States Constitution (“Tenth Amendment”), and defies very, very well-established Supreme Court holdings.

This civil action is not an interlocutory appeal of an administrative proceeding. Instead, it is an action directly challenging a federal agency’s unlawful and unconstitutional assertion of jurisdiction over a sovereign state’s right to protect its citizens within its borders by enforcing a clear public protection statute. This complaint is a request for the aid of the third branch of

federal government pursuant to the undeniable, fundamental principle of law that jurisdiction may be raised at any time in any forum.

The United States Constitution does not bestow unlimited and expandable powers upon the various entities comprising our federal “Government by the People.” It delegates to the federal government of **limited** powers, and is designed to control the reach of the “sovereign” so that the People and the several sovereign States will not be subjugated to arbitrary, capricious, and unlawful exercises of extralegal federal authority. The United States Constitution, in establishing the third branch, created an independent judiciary to enforce limits on the reach of federal government authority in those cases where there is an extralegal attempt to assert federal authority. This is just such a case.

In support of this complaint, Plaintiff shows unto this Honorable Court the following:

PARTIES

Plaintiff

1. Plaintiff North Carolina State Board of Dental Examiners (“State Board”) is an instrumentality of the State of North Carolina (“State”). It is authorized to bring suit in its own name, but it does so on behalf of the State. The State Board is not in-and-of-itself a “person,” “partnership,” or “corporation” as defined under the Federal Trade Commission Act (“FTC Act”). It is not an association, nor a for-profit or non-profit corporation. But for the State of North Carolina, the State Board does not exist.
2. The State Board was created by North Carolina statute in 1879 when the N.C. General Assembly enacted the State’s Dental Practice Act. According to N.C. Gen. Stat. § 90-22(b): “The North Carolina State Board of Dental Examiners heretofore created by Chapter 139, Public Laws 1879 and by Chapter 178, Public Laws 1915, is hereby

continued as the agency of the State for the regulation of the practice of dentistry in this State.”

3. As amended, the Dental Practice Act also provides that:

The practice of dentistry in the State of North Carolina is hereby declared to affect the public health, safety and welfare and to be subject to regulation and control in the public interest. It is further declared to be a matter of public interest and concern that the dental profession merit and receive the confidence of the public and that only qualified persons be permitted to practice dentistry in the State of North Carolina. This Article shall be liberally construed to carry out these objects and purposes.

N.C. Gen. Stat. § 90-22(a). Since 1879, the N.C. General Assembly has amended the Dental Practice Act numerous times, but has never altered the relevant parts creating the State Board as a State agency and defining the practice of dentistry. Courts have consistently upheld the constitutionality of this statute and affirmed its enforcement.

4. Dentistry is one of several licensed occupations governed by statutorily-created state agencies within state government. Like lawyers, medical doctors and other universally regulated professions, the State of North Carolina uses a statutorily-established state agency (the State Board) to implement a tightly-controlled plan of regulation. Like each of those other professions, a majority of the appointed or elected members of the State Board are licensees.¹
5. The State Board is a true State agency and, as further alleged below, is subject to state laws applicable to all instrumentalities of the State. Thus the State Board is subject to, and must comply with, the State’s Constitution, the State’s laws regarding open meetings (N.C. Gen. Stat. §§ 143-318.9 to -318.18), public records (N.C. Gen. Stat. §§ 132-1 to -

¹ The N.C. State Bar is comprised of 62 attorneys elected by lawyers in their communities. N.C. Gen. Stat. § 84-18. Eight of the 12 members of the N.C. Board of Medicine are physicians. N.C. Gen. Stat. § 90-2.

- 10), administrative procedures (N.C. Gen. Stat. §§ 150B-1 to -52), and ethics (N.C. Gen. Stat. §§ 138A-1 to -45). All of the State Board's rules must be reviewed and approved by the Legislature's Rules Review Commission. N.C. Gen. Stat. §§ 143B-30.1 to -30.4.
6. Additionally, the State Board must file annual reports regarding its finances and disciplinary, licensing, enforcement, and rulemaking activities with the Governor, the State Auditor, the Attorney General, the Secretary of State, the Office of State Budget and Management, and the General Assembly's Joint Legislative Procedure Administrative Oversight Committee. N.C. Gen. Stat. §§ 93B-2, 90-44. The State Board's books, records, and operations also are subject to the direct oversight of the State Auditor. N.C. Gen. Stat. §§ 93B-4, 147-64.1 to -64.14.
7. The State Board's activities, which are undertaken in accordance with North Carolina statutes, are subject to supervision and review by the Joint Legislative Administrative Procedure Oversight Committee.²
8. All of the State Board's administrative proceedings are subject to judicial review by the State's Superior Courts. N.C. Gen. Stat. §§ 150B-43 to -52. All actions to enjoin the unauthorized practice of dentistry and all prosecutions against illegal practice must be brought in State Superior Court in the county in which the defendant resides. N.C. Gen. Stat. § 90-40.1. In addition, under North Carolina law, State Board actions are subject to challenge in the General Court of Justice of North Carolina. *See* N.C. Gen. Stat. § 7A-3.
9. As an instrumentality of the State, the State Board has sovereign immunity (N.C. Gen. Stat. § 93B-16(c)), is covered under the State Tort Claims Act (N.C. Gen. Stat. §§ 143-

² Pursuant to N.C. Gen. Stat. § 120-70.101(3a), the Joint Committee has the authority to "[t]o review the activities of State occupational licensing boards to determine if the boards are operating in accordance with statutory requirements and if the boards are still necessary to achieve the purposes for which they were created."

291 to -300.1A), and is entitled to legal defense from the Attorney General (N.C. Gen. Stat. § 143-298).³

10. The State Board's enforcement of the Dental Practice Act is subject to the State's constitutional prohibition against monopolies.⁴
11. The State Board and State Board members are forbidden by State statute from engaging in any private business or from competing with any private services.⁵
12. As mandated by N.C. Gen. Stat. § 90-22(b), a majority of the members of the State Board are licensed dentists. Each member of the State Board is, by law, a State official who must take an oath or affirmation to comply with federal and state laws and constitutions. N.C. Gen. Stat. §§ 11-7, 143-555(3)-(4).
13. As a constitutionally-permitted quasi-judicial agency, the law empowers the president of the State Board and its secretary-treasurer "to administer oaths [and] issue subpoenas requiring the attendance of persons and the production of papers and records before said Board in any hearing, investigation or proceeding conducted by it." N.C. Gen. Stat. § 90-27. The State Board is empowered, in its own name, to "maintain an action in the name of the State of North Carolina to perpetually enjoin any person from so unlawfully practicing dentistry." N.C. Gen. Stat. § 90-40.1(a).

³ As provided by statute, the State Board, with the assent of the Attorney General, is authorized to employ its own legal counsel and, like many other licensing boards in North Carolina, has done so for many years. Further, the North Carolina Attorney General's Office has assented to this action against the FTC.

⁴ "Monopolies are contrary to the genius of a free state and shall not be tolerated." N.C. CONST., art. I, § 34.

⁵ ". . . it shall be unlawful for any unit, department or agency of the State government . . . or any individual employee or employees of the unit, department or agency in his, or her, or their capacity as employee or employees thereof, to engage directly or indirectly in the sale of goods, wares or merchandise in competition with citizens of the State, or . . . to maintain service establishments for the rendering of services to the public ordinarily and customarily rendered by private enterprises . . ." N.C. Gen. Stat. § 66-58(a).

14. The State Board is governed by eight members (including six licensed dentists,⁶ one licensed hygienist, and a consumer appointed by the Governor) who are:
- a. State officials (N.C. Gen. Stat. § 143-555(3)-(4));
 - b. Sworn to uphold state laws and the state and federal constitutions (N.C. Gen. Stat. §11-7);
 - c. Permitted to take office only after they are approved by the N.C. State Ethics Commission, and are required to disclose initially and annually any conflicts of interest (N.C. Gen. Stat. §§ 138A-21 – 138A-27);
 - d. Subject to removal for conflicts of interest (N.C. Gen. Stat. § 138A-39);
 - e. Subject to prosecution for using their Board membership for private gain (N.C. Gen. Stat. §§ 138A-31, 138A-34, 138A-45(g));
 - f. Required to remind all members of their duty to avoid conflicts of interest prior to each Board meeting and to disclose any conflicts of interest with matters coming before the Board (N.C. Gen. Stat. § 138A-15(e));
 - g. Required to attend classes on the State Government Ethics Act and compliance with other statutes regulating them as State Board members (N.C. Gen. Stat. §§ 138A-14(b), 93B-5(g))⁷; and,
 - h. Presumed to be acting in the public interest and in good faith. N.C. Gen. Stat. § 150B-40(b) (burden of proof is on party seeking disqualification of an agency member).

⁶ N.C. Gen. Stat. §§ 90-22(b) and (c). The licensed dentists are elected pursuant to a detailed statutory process.

⁷ N.C. Gen. Stat. § 93B-5(g) requires initial and biannual training for each member “to better understand the obligations and limitations of a State agency”

15. The State Board is currently the “Respondent” in the FTC-initiated administrative proceeding heretofore referenced (the “FTC administrative proceeding”: *In the Matter of the North Carolina [State] Board of Dental Examiners*, Docket No. 9343).

Defendant

16. Defendant, the Federal Trade Commission (“FTC” or the “Commission”), is an independent administrative agency established by the United States Congress with the capability of being sued under the Constitutional and statutory provisions hereinafter alleged.
17. Congress has granted the FTC the jurisdiction to “prevent persons, partnerships, or corporations . . . from using unfair methods of competition.” 15 U.S.C § 45(a)(2). However, the FTC has no jurisdiction or authority to take action against a state (or its *bona fide* state agencies), and Congress has never acted or implied an intent to enlarge the FTC’s authority to extend over states’ regulation of the practice of dentistry. Congress has never authorized the FTC to use its antitrust enforcement power to preempt state statutes. Congress has never authorized the FTC to regulate state statutory non-price and non-commercial speech restrictions, such as are at issue in this matter.
18. No U.S. Supreme Court opinion has held that the FTC has jurisdiction over a *bona fide* state agency, has jurisdiction to preempt a clear state statute, or has jurisdiction to regulate non-price and non-commercial speech restrictions.⁸
19. The FTC is empowered to initiate administrative proceedings by issuing administrative complaints only if it has “reason to believe that any such person, partnership, or

⁸ “We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature.” *Parker v. Brown*, 317 U.S. 341, 350-51 (1943).

corporation has been or is using any unfair method of competition” 45 U.S.C § 45(b).

20. The federal government’s sovereign immunity does not preclude this suit because this is “an action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority.” 5 U.S.C. § 702.
21. The FTC is currently the “Complainant” in the FTC administrative proceeding.

JURISDICTION AND VENUE

22. This action arises under the Constitution and laws of the United States, and this Court has federal question jurisdiction over this action pursuant to Article III of the Constitution and 28 U.S.C. § 1331.
23. The FTC Act contains no waiver of sovereign immunity by North Carolina or any other state, as is unmistakably clear in the language of the statute.
24. Without waiving its sovereign immunity under the Tenth Amendment, the State Board seeks immediate judicial determination of the FTC's lack of jurisdiction as to the FTC administrative proceeding and of its violation of the following provisions of the U.S. Constitution: Article I, Section 8 (the Commerce Clause); the Tenth Amendment; Article III, Section 2, Clause 2 (original jurisdiction over actions against states); and the Due Process Clause of the Fifth Amendment. This action is brought pursuant to the federal Declaratory Judgment Act, 28 U.S.C. §§ 2201 (Creation of Remedy), 2202 (Further Relief); 28 U.S.C. § 1651 (Writs); the implied non-statutory review procedure provided by 28 U.S.C. § 1331 (Federal Question); 28 U.S.C. § 1361 (Action to Compel an Officer of the United States to Perform His Duty); and the Administrative Procedure Act, 5

U.S.C. § 500 *et seq.* Absent this immediate judicial determination of jurisdiction, the Commission's actions will wholly deprive the State Board and, thus, the State of a meaningful and adequate means of vindicating its constitutional rights, as discussed herein. Due to such violations of Constitutional rights, the State Board and, thus, the State has suffered and continues to suffer immediate, permanent, and irreparable harm.

25. Venue is proper in the Eastern District of North Carolina under 5 U.S.C. § 703 and 28 U.S.C. § 1391(e)(3) because the State Board is located at 507 Airport Boulevard, Suite 105, in Morrisville, Wake County, North Carolina.

RATIONALE AND BACKGROUND

**“Do you really think that the people who voted out the complaint didn't consider the law before they made that decision?
Do you think that they forgot something?”⁹**

26. In 1943, the U.S. Supreme Court ruled that, because the Tenth Amendment renders a state's actions immune from federal antitrust enforcement, the actions of private parties acting pursuant to such state action also could be immune. *Parker v. Brown*, 317 U.S. 341 (1943). Although the Court has since refined and clarified that general proposition, it consistently has held that actual state agencies are immune from federal antitrust enforcement.
27. The FTC administrative proceeding is not about whether dentists in North Carolina conspired to illegally restrain trade. Even though the FTC made that allegation in its administrative Complaint, it did not have the requisite “reason to believe” as mandated

⁹ Administrative Law Judge Chappell questioning counsel for the State Board regarding the FTC's Complaint allegation that “there is no state action defense.” July 14, 2010 Pretrial Conference transcript, p. 51. Counsel replied: “They are fundamentally wrong on this, absolutely. They do not understand this Board and the way that North Carolina structured it.”

by 15 U.S.C. § 45(b). It had no evidence or any law to support the assertion. It had no “reason to believe” its own allegation because, in fact and in law, it knew or should have known otherwise. At the eleventh hour of the FTC administrative proceeding, when—despite over twenty depositions and a massive documentary fishing expedition—the Commission still did not have even a sliver of evidence of “collusion,” Complaint Counsel tacitly abandoned the allegation of collusion and argued, instead, that a state agency whose majority were licensees is a *per se* antitrust conspiracy, notwithstanding oaths of office, numerous statutory safeguards, and the Supreme Court’s presumption of good faith.¹⁰ FTC Complaint Counsel has refused to answer the State Board’s discovery about what evidence or law constituted the Commission’s “reason to believe,” and the Administrative Law Judge (who appeared incredulous at the suggestion that the FTC might issue its administrative Complaint without understanding the State’s laws) has refused to compel the FTC to provide relevant answers or produce pertinent documents on that very subject.¹¹

28. The FTC’s administrative proceeding is about the Commission’s desire to unilaterally and forcibly expand its jurisdiction despite the contrary will of Congress,¹² seven

¹⁰ *Withrow v. Larkin*, 421 U.S. 35 (1975). In *Withrow*, the Supreme Court ruled that a Board comprised of a majority of licensees would be presumed unbiased even when disciplining a competing licensee. It is ironic that the FTC at first alleged a conspiracy to commit fraud and issued a press release accusing the State Board members—and, indeed, all North Carolina dentists—of an illegal conspiracy, but now admits to an unprecedented strict liability theory. “It is not Complaint Counsel’s contention that any Board member is corrupt. And we are not obligated to show that any Board member is hostile to non-dentist teeth whitening because of his financial stake.” Complaint Counsel’s December 28, 2010 Reply Memorandum, pp. 13-14 (Public Version).

¹¹ See, *infra*, section on “Discovery and Abuses of Discovery.”

¹² “We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state’s control over its officers and agents is not lightly to be attributed to Congress.” *Parker*, 317 U.S. at 350-51; see also *Opdyke Inv. Co. v. Detroit*, 883 F.2d 1265, 1272 (6th

decades of adverse court precedent,¹³ and even Presidential orders.¹⁴ The FTC has set out to achieve by brute litigative force that which all three branches of government have denied it.

29. On June 17, 2010, after two years of investigation, the FTC initiated the FTC administrative proceeding by filing an administrative Complaint alleging that the State Board had conspired to restrain trade by enforcing a state statute, N.C. Gen. Stat. § 90-29(b)(2).¹⁵ This statute, along with other subsections of N.C. Gen. Stat. § 90-29(b),

Cir. 1989) (“The legislative history of the Sherman Act reveals no evidence of an express Congressional intent to apply the antitrust laws to either state or local governments.”) (*citing* H.Rep. No. 965, 98th Cong., 2d Sess. 4, 1984 U.S. Code Cong. & Admin. News at 4605).

¹³ FTC Complaint Counsel characterized *Parker v. Brown’s* progeny as “poorly reasoned” in its Memorandum in Opposition to Respondent’s Motion to Dismiss, at 7.

¹⁴ Executive Order 13132 of Aug. 4, 1999 (“The constitutional relationship among sovereign governments, State and national, is inherent in the very structure of the Constitution and is formalized in and protected by the Tenth Amendment to the Constitution.”). *See also* Presidential Memorandum for the Heads of Executive Dep’ts & Agencies (May 20, 2009) (“The purpose of this memorandum is to state the general policy . . . that preemption of State law by executive departments and agencies should be undertaken only with full consideration of the legitimate prerogatives of the States and with a sufficient legal basis for preemption.”) Of course, the FTC would contend that it is not required to comply with Presidential Orders.

¹⁵ N.C. Gen. Stat. § 90-29 provides in part that:

(a) No person shall engage in the practice of dentistry in this State, or offer or attempt to do so, unless such person is the holder of a valid license or certificate of renewal of license duly issued by the North Carolina State Board of Dental Examiners.

(b) **A person shall be deemed to be practicing dentistry in this State who does, undertakes or attempts to do, or claims the ability to do any one or more of the following acts or things which, for the purposes of this Article, constitute the practice of dentistry:**

...

(2) **Removes stains, accretions or deposits from the human teeth;**

...

(7) **Takes or makes an impression of the human teeth, gums or jaws;**

...

(11) Owns, manages, supervises, controls or conducts, either himself or by and through another person or other persons, any enterprise wherein any one or more of the acts or practices set forth in subdivisions (1) through (10) above are done, attempted to be done, or represented to be done;

...

(13) **Represents to the public, by any advertisement or announcement, by or through any media, the ability or qualification to do or perform any of the acts or practices set forth in subdivisions (1) through (10) above.**

clearly and unambiguously provides that a person engages in the practice of dentistry when he or she offers or renders to the public a service that “removes stains, accretions or deposits from the human teeth.”¹⁶ Various Commission communications have referred to this statute as a “rule.” This statute is a statute – it is not a rule, and certainly not a rule exceeding or contravening a state statute.

30. From the beginning, the Commission has demonstrated its misunderstanding of the State Board’s legal status by misnaming the State Board in its administrative Complaint.¹⁷ Although challenged repeatedly for any authority supporting its radical theory, the Commission has not pointed to a single case supporting its position that state agencies enforcing clearly articulated state statutes are not entitled to state action immunity.¹⁸ The arrogance of this assault on State sovereignty is highlighted by the following:

- a. The alleged restraint involves no form of price restriction and no form of commercial speech restriction;
- b. The alleged restraint is affirmatively expressed in a clearly articulated state statute;

(Emphasis added).

¹⁶ Although the FTC contends that teeth whitening does not constitute the removal of stains, accretions or deposits from human teeth, the Alabama Supreme Court and several state Attorneys General Opinions have ruled that teeth whitening is included in the practice of dentistry. Likewise, similar (and even less explicit state statutes) have been interpreted and enforced by numerous government authorities to recognize teeth whitening as the practice of dentistry.

¹⁷ The FTC so completely mischaracterized the state statutory and constitutional framework within which the State Board functions, that it captioned the administrative proceeding as against the “North Carolina Board of Dental Examiners,” which is not the legal name of the State Board and fails to recognize that the State Board is a State agency. As a State agency, the State Board is actually the “North Carolina State Board of Dental Examiners.” N.C. Gen. Stat. § 90-22(b). This mistake reflects the Commission’s wider misunderstanding of the State Board and its members’ mandate and role in the regulation of the practice of dentistry. The State Board is not a trade organization created to protect dentists’ interests. It is a state agency and is an “instrumentality of the state.”

¹⁸ For example, the Supreme Court held in *Town of Hallie v. City of Eau Claire* that it was “likely” that state agencies would not need to show active supervision to benefit from state action immunity. 471 U.S. 34, 46 (1985). There have been no cases where a state agency (as opposed to private individuals or associations) was denied state action immunity when acting pursuant to a clearly-articulated state statute in a non-price restraint case.

- c. The FTC's theory requires a contrived market definition that omits the largest commercial factor, over-the-counter sales, but includes "illegal teeth whitening services";
 - d. The FTC's theory of structural conspiracy flies in the face of the Supreme Court's presumption of state regulators' good faith; and
 - e. The FTC attacks the manner in which the State of North Carolina, by statute and State Constitution, has chosen to protect its citizens and regulate commerce within its borders.
31. If a clear state statute, a century of court precedence, well-established limits on Congressional authority, and the Fifth and Tenth Amendments to the U.S. Constitution no longer allow the State of North Carolina, acting through its General Assembly, to define the practice of dentistry in order to protect its citizens from the illegal and unsafe practice of dentistry, then it should be the Congress or the U.S. Supreme Court that pronounces the death of that state prerogative, and not the Commission acting extra-judicially under some self-anointed power.

THE STATE HAS A LEGITIMATE INTEREST IN REGULATING THE PRACTICE OF DENTISTRY, INCLUDING THE OFFERING AND RENDERING TO THE PUBLIC THE SERVICE OF REMOVAL OF STAINS FROM TEETH.

32. North Carolina enacted the Dental Practice Act with the purpose to protect the public. There is an abundance of scientific reports and actual cases of consumer harm supporting the rational basis for the Dental Practice Act. There are reported cases of actual injury,¹⁹ even though the number of documented cases of public harm caused by non-dentist teeth whitening operations may have been diminished by the fact that such non-dentists

¹⁹ In one case, a State Board investigator reported that an unauthorized stain remover had a poison ivy rash on her hands and was working without gloves. See ¶ 48, *infra*; see, also, Monica Laliberte, *Teeth Whitening Kiosks at the Mall Are Not Regulated*, WRAL (May 21, 2008), <http://www.wral.com/5onyourside/story/2921079/> (last visited January 26, 2011).

routinely obtain waivers of liability from their customers before engaging in illegal teeth whitening. And, unlike dentists, they can hide behind corporate veils.

33. Aside from actual cases of harm, scientific/medical reasons for requiring that a licensed dentist provide or supervise stain removal services include, but are not limited to, the following:

- a. Pre-treatment diagnosis is important because many people are not appropriate candidates for teeth whitening;
- b. A dentist is educated and trained to perform a complete dental examination prior to a teeth whitening procedure; and
- c. A dentist possesses the education and training to diagnose whether teeth whitening is a safe or appropriate procedure for a particular patient.

34. Cases in which teeth whitening may not be safe or appropriate include, but are not limited to, situations where there is the risk for:

- a. Damage to existing restorations or to previous dental work;
- b. Pain or sensitivity due to a pre-existing root exposure or undiagnosed decay;
- c. Complications as the result of an undiagnosed medical condition; or
- d. Less satisfactory results because a tooth is dark due to injury or the need for endodontic treatment.

One study has indicated that ten to twenty percent of patients who request teeth whitening services from licensed dentists are not provided those services for the reasons set forth above.

35. Beyond these significant physical dangers, there is ample proof that unauthorized teeth whitening product vendors have so frequently engaged in false and deceptive marketing

practices that many states, and on at least two occasions the FTC itself, have found their practices to be unfair and deceptive.

“They’re Going to Cave.”²⁰

36. The FTC has prejudged this matter and sought to leverage and manipulate unduly burdensome investigation and discovery, a fast-track hearing schedule, a foreign venue, ethically dubious legal tactics, and self-serving FTC Rules of Adjudicative Practice (“Rules”) in an attempt to obtain an unjust result that would not be possible in an objective tribunal.

The FTC’s Investigation

37. In 2008, the FTC initiated an investigation of the State Board upon the request of representatives of the teeth whitening service industry. The investigation was managed or supervised by a member of the Commission who previously had a conflict of interest regarding the teeth whitening products industry.
38. During this investigation, the FTC staff conducted six investigational hearings and issued ten specifications requiring production of thousands of pages of documents and detailed information about the State Board’s operations. Subsequently, the FTC issued a *Subpoena Duces Tecum*, to which the State Board provided thousands of pages of additional documents.
39. The State Board cooperated in the pre-complaint investigation and even offered repeatedly to turn over all records, including attorney-client privileged documents, upon the condition that the FTC would take steps to assure that such production would not

²⁰ Upon information and belief, a member of Commission Staff made this statement to a third party regarding the FTC administrative proceeding during the week of December 6 through 10, 2010.

constitute a waiver of privilege and that the documents would not be disclosed to third parties currently under investigation by the State Board. The FTC refused to participate in such assurances. The State Board was concerned that the release of records would otherwise constitute a waiver of the attorney-client and work-product privileges.

40. Throughout the two-year investigation, the State Board provided lengthy, detailed memoranda refuting the Commission's assertions, and repeatedly requested a single case or single scrap of evidence to substantiate the FTC's position. The memoranda and the requests for authority or evidence were never answered.

FTC's Improper Press Release

41. Prior to the actual service of the administrative Complaint, the FTC issued a press release that announced the filing of the administrative Complaint that stated:

The complaint charges that the Dental Board's conduct is an **anticompetitive conspiracy** among the dentist members of the Dental Board in violation of federal law. (Emphasis added).

42. Congress has not authorized the FTC to post on a government website a false press release even before the related complaint was served. 15 U.S.C. § 46(f). The press release falsely stated that the State Board had "unilaterally ordered non-dentists to stop providing whitening services."²¹ The press release also stated that "[t]he Commission issues or files a complaint when it has **reason to believe** that the law has been or is being violated." (emphasis added). Aside from affirmative misstatements, the press release also omitted critical facts and law: that the State Board was enforcing a state statute that

²¹ As the undisputed record shows, the State Board, acting upon public complaints and *prima facie* evidence, sent "cease and desist" demands that quoted pertinent parts of the Dental Practice Act, ordered the recipients to cease any unauthorized practice of dentistry, and requested cooperation in the State Board investigation. The words "teeth whitening" were in none of the letters. No one receiving such a letter was ever forced to stop engaging in lawful activity.

expressly bars non-licensees from offering or rendering to the public the service of “[removing] stains ... from the human teeth,” and that the Board initiated several court actions under that law to enjoin or criminally prosecute violators.

43. The FTC through staff had informed the State Board that it would not issue a press release if the State Board would enter into a settlement stipulating to the FTC’s jurisdiction and giving the federal agency veto power over the State Board’s enforcement of the state statute.²² As further alleged herein, the FTC has repeatedly attempted to coerce an unlawful stipulation of jurisdiction, even attempting to interrogate in depositions present and former State Board members about the terms of the settlement offer.

The FTC’s Administrative Complaint²³

44. On June 17, 2010, after posting the above-alleged press release, the Commission issued an administrative Complaint falsely alleging that the dentists of North Carolina, using the State Board, were “colluding” (in effect, feloniously conspiring to commit fraud) in violation the federal antitrust laws. (Exhibit A, “Nature of the Case.”) The term “collude” is defined and commonly understood to mean: “conspire to commit fraud.” After a two-year long investigation—during which the FTC repeatedly failed or refused to identify a scrap of evidence in support of a conspiracy in restraint of trade—and despite extensive discovery, the FTC still lacks any evidence of its false claims. Indeed,

²² Neither the press release nor the FTC complaint mentioned any specific statutes, much less N.C. Gen. Stat. § 90-29(b)(2), the state statute which defines the practice of dentistry as including removal of stains from teeth.

²³ Pleadings in the FTC administrative proceeding are posted on the FTC’s website at <http://www.ftc.gov/os/adjpro/d9343/index.shtm>. Those pleadings that are not attached to this Complaint may be accessed from the online docket found there.

upon direct interrogatory, Complaint Counsel has failed or refused to identify any evidence supporting that allegation. This accusation of felony conduct was knowingly based upon no evidence other than the mere fact that the majority of State Board members were licensees.

45. Immediately after the Commission declared to the world that it had “reason to believe” that the North Carolina licensees were “colluding,” Board members who had honorably performed their sworn duty to enforce a clear state statute had to explain to their spouses, children, patients, and friends that they were not criminals despite what was posted on a federal government website. Six months after defaming innocent board members and other North Carolina dentists, FTC Complaint Counsel conceded that “[i]t is not Complaint Counsel’s contention that any Board member is corrupt.” Thus, instead of having a “reason to believe” that the State Board members were “colluding,” the Commission actually had **reason to know** the allegation was false.

46. Beyond the Commission’s false assertion that it had “reason to believe” collusion occurred, the Commission impermissibly reached legal conclusions in the administrative Complaint that it approved. Those legal conclusions predetermine subsequent dispositive motions as well as any other questions of law. Thus, by approving the administrative Complaint, the Commission has predetermined as a matter of law certain questions of law that are central to the State Board’s pending dispositive motions:

- a. “The Dental Board is a “person” within the meaning of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.” (Admin. Compl., ¶ 5.)
- b. The State Board “does not qualify for a state action defense.” (Admin. Compl., ¶ 23.)

- c. “The North Carolina dental statute does not expressly address whether, or under what circumstances, a non-dentist may engage in teeth whitening.” (Admin. Compl., ¶ 15.)
- d. “The conduct of the Dental Board constitutes concerted action by its members and the dentists of North Carolina.” (Admin. Compl., ¶ 3.)²⁴

Ordinarily, this issue would be a question of fact, but it is now a pure question of law based on the Commission’s admitted theory of a board with a majority of licensee members constituting a *per se* antitrust conspiracy.

- 47. On July 6, 2010, the State Board filed a Response to the administrative Complaint denying the allegations and asserting appropriate defenses. A copy of that Response to the administrative Complaint is attached as Exhibit B, and adopted herein by reference.

Discovery and Abuses of Discovery

- 48. Complaint Counsel conducted 22 depositions, many of which were of the State Board’s witnesses, between September 1 and November 9, 2010.
 - a. Almost all of the depositions were six to eight hours in length and were conducted at times and locations that required deponents to travel distances and absent themselves from their work.
 - b. Although all depositions were noticed by Complaint Counsel, some were actually conducted by FTC policy staff. In conducting these depositions, Complaint Counsel and policy staff often engaged in conduct that can best be described as

²⁴ Complaint Counsel even refused to answer State Board’s discovery regarding ¶¶ 3, 5, 15, and 23 of the administrative Complaint. *See, e.g.*, Response to Request for Admission ¶ 1: “Complaint Counsel specifically objects to this Request and states that no response is required inasmuch as it calls for a legal conclusion beyond the proper scope of requests for admission in this matter under Rule 3.32.”

condescending, abrasive, high-handed and insulting; and, on at least two occasions, dentist deponents were urged to violate the Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 1320 *et seq.* (“HIPAA”).

- c. In addition, Complaint Counsel embarked upon a broad scale, purposeful campaign to subpoena information from numerous members of the public who had filed complaints with the State Board regarding illegal teeth whitening. Upon information and belief, in *ex parte* communication, Complaint Counsel and policy staff questioned the right of those persons to file complaints with the State Board and challenged the veracity of the complaints that were filed. Such conduct inevitably will have and has had a chilling effect on the complainants’ and the public’s willingness to seek relief from illegal activities and to petition the State Board for redress of grievances by filing complaints with the State Board.
- d. An example of such conduct includes the Commission's deposition of a non-dentist consumer, Brian Runsick, who was injured by illegal teeth whitening and had filed a complaint with the State Board against an illegal teeth whitening service provider. He was required by the Commission (without legal authority) to travel for his deposition from Florida to the Commission's offices in Washington, D.C. on November 4, 2010. Regarding his required appearance in D.C., he testified by separate affidavit that: "At no point during my three telephone conversations was the true adversarial nature of this proceeding conveyed to me. I was led to assume that the FTC was assisting the North Carolina Board with the matter that I had complained about." He also testified that he was not advised that he had the option of testifying in any other location than Washington, D.C.

- e. Complaint Counsel later deposed Dr. Larry Tilley, the dentist who treated Mr. Runsick at the request of the State Board after Mr. Runsick filed his complaint of injury caused by a non-dentist teeth whitening provider. During Dr. Tilley's deposition, the FTC policy staff member posing the questions demanded that he produce his patient's medical records, despite the patient's right to confidentiality under HIPAA.
49. From June 17 to December 16, 2010, the State Board produced documents on 14 different occasions in response to Complaint Counsel's Requests for Production of Documents (RFP); on November 18, 2010, the State Board responded to Complaint Counsel's First Set of Interrogatories containing 22 numbered interrogatories, which in actuality were in excess of 50 interrogatories due to the number of subparts contained therein; and, on October 22, 2010, the State Board responded to Complaint Counsel's Requests for Admission (RFA), which contained 44 numbered requests. Such RFPs, Interrogatories, and RFAs constituted overly broad and burdensome requests.
50. At various times between October 12 and November 18, 2010, the State Board served upon Complaint Counsel a Request for Production of Documents (19 requests); Request for Admission (24 requests); and Interrogatories (14 requests). In response, Complaint Counsel objected to all 19 RFPs, 12 of 24 RFAs, and all 14 Interrogatories.
51. Based upon Complaint Counsel's conduct of depositions, subpoenas and telephone calls to complainants, pugilistic approach to discovery, and the inadequacy of Complaint Counsel's responses to the State Board's requests for discovery, the State Board concluded that Complaint Counsel was making a purposeful attempt to shift the burden of proof in the proceeding and to wrongfully subvert the purposes of discovery.

52. Accordingly, on January 5, 2011, the State Board presented Complaint Counsel with a list of “Specific Discovery Items Requested,” detailing responses by Complaint Counsel to various discovery requests that were inadequate (the “Specific Requests”, including 77 specific items). The presentation of Specific Requests was accompanied by a request that Complaint Counsel respond timely by entering into good-faith negotiations.
53. Between January 5 and January 11, 2011, the State Board entered into good-faith negotiations with Complaint Counsel, communicating with Complaint Counsel on at least 42 occasions regarding the nature and substance of those negotiations. On January 10, 2011, Complaint Counsel refused to negotiate in good faith to resolve the dispute. Complaint Counsel issued a non-negotiable demand that the State Board waive its rights to file a Motion to Compel Discovery and seek redress of other discovery abuses as an express precondition to Complaint Counsel’s continued participation in negotiations regarding discovery requests.
54. On January 11, 2011, based upon Complaint Counsel’s refusal to negotiate in good faith, the State Board declared an impasse and filed its Motion for an Order Compelling Discovery with the Administrative Law Judge (“ALJ”); and on January 14, 2011, the State Board electronically filed and served its Supplemental Statement to Respondent’s Motion to Compel.
55. On January 18, 2011, the ALJ denied Respondent’s Motion to Compel.²⁵ Pursuant to FTC Rules, in order to appeal the ALJ’s Order, the State Board must “apply” for an order

²⁵ The ALJ based the denial on the belief that the State Board’s Supplemental Statement was filed on January 18th (the day of the Order itself). The e-filing receipt was dated January 14th, and copies were served before the close of business the same day. The ALJ refused to rule on the merits, denied the Motion in its entirety, and issued an order that cited a statute incorrectly repeated in Complaint Counsel’s proposed order.

allowing any “interlocutory appeal” of the Order to the **same ALJ who issued the Order**. Thus, on January 21, 2011, the State Board filed an Application for Review of an Order Denying Respondent’s Motion to Compel Discovery.

56. Throughout the dispute and the subsequent proceedings relating to the Motion to Compel, certain counsel of record and policy staff appearing on behalf of the Commission conducted themselves in an aggressively disingenuous manner, failing on numerous occasions to discharge their professional ethical responsibilities under the ABA’s Model Rules of Professional Conduct, specifically Rule 3.3 (“Candor Toward the Tribunal”) and Rule 3.4 (“Fairness to Opposing Party and Counsel”). For further detail, see January 14, 2011 Declaration of Alfred P. Carlton, Jr. (Exhibit C).

Dispositive Motions

57. On November 3, 2010, the State Board filed a Motion to Dismiss, based primarily upon its state action defense. On November 2, 2010, the FTC filed a Motion for Partial Summary Decision, seeking to eliminate the State Board’s state action defense. Subsequently, the parties have filed various opposition and reply memoranda regarding the respective motions. As of the date of this Complaint, the Commission has not yet ruled on either motion.

State Board’s Request to Stay Proceedings

58. On November 3, 2010, along with its Motion to Dismiss, the State Board filed an unopposed Motion for a Stay of the FCT administrative proceeding. Nevertheless, on November 15, 2010, the Commission denied the unopposed Motion for a Stay.
59. The FTC’s denial of the State Board’s Motion to Stay Proceedings provides in and of itself the basis for this Court’s objective determination of this matter. The Commission’s

“Rules,” as implemented through the ALJ’s Scheduling Order, institutionalize an unsustainable fast-track process that favors a strategy to force capitulation, regardless of the merits of a matter.

The FTC Administrative Proceeding

60. The FTC administrative proceeding against the State Board is apparently one of the first cases litigated under its recently-amended Rules. As a practical matter, the selective delay in ruling on dispositive motions, the refusals to stay proceedings or change venue, and the consistent denial of each substantive motion filed by the State Board, combined with confusing, new and biased fast-track Rules, and one-sided enforcement of the Scheduling Order, virtually guarantee a rush to injustice. For example:
- a. Dispositive motions had to be filed prior to the conclusion of discovery;
 - b. The State Board had to serve its lists of hearing witnesses and hearing exhibits prior to the ruling on the State Board’s Motion to Compel;
 - c. The State Board had to file its pretrial brief prior to the Commission’s ruling on dispositive motions;
 - d. In order to appeal the ALJ’s Order denying the Motion to Compel, the State Board had to “apply” to the same ALJ for an order allowing an interlocutory appeal;²⁶
 - e. In order to appeal the ALJ’s Order denying the State Board’s Motion for Change of Location of the hearing (which the ALJ denied apparently due to potential

²⁶ Even if permission to appeal is granted, the “appeal” must be submitted to the Commission within one day, and the Commission must, within 3 days after the deadline for a response, determine whether or not to “review” the original ruling. If the Commission agrees to review the ALJ’s ruling, there is no readily discernible deadline for the Commission to rule on the merits of the “appeal.”

inconvenience of the ALJ), the State Board must, again, “apply” to the same ALJ for an order allowing an interlocutory appeal;²⁷ and

f. Meanwhile, the Commission has yet to rule on pending dispositive motions for nearly ninety days while the State Board must prepare for a hearing of up to six weeks in length that will start two weeks (or perhaps less) after the Commission’s ruling in a location that is at least 300 miles away from all of the State Board’s witnesses. In any other adjudicative context, a refusal to grant a stay, postpone a hearing, or change venue under these circumstances would be an abuse of discretion.

61. On January 18, 2011, the State Board filed an Expedited Motion for a Later Hearing Date, seeking to postpone the commencement of the administrative hearing because, among other reasons, dispositive motions were (and currently are) pending before the Commission; the State Board’s Motion to Disqualify the Commission was (and currently is) pending before the Commission; the State Board’s Motion to Change the Hearing Location was pending before the Commission; and discovery and disputes over discovery are on-going.
62. On January 21, 2011, the Commission denied the State Board’s Expedited Motion for a Later Hearing Date.
63. On January 24, 2011, the State Board filed a Motion for Reconsideration of the Commission’s Order Denying Expedited Motion for a Later Hearing Date.

²⁷ In so applying, the State Board must follow the same curious process described in footnote 26.

**The Actions of the Commission Reveal Prejudgment of the
Dispositive Issues in the FTC Administrative Proceeding.**

64. The FTC's intention to extend its jurisdiction with or without Congressional authorization has been affirmatively expressed in recent years on several occasions.²⁸ As shown in the administrative Complaint, the FTC has already decided the lynchpin issue in this case: that the FTC can haul a *bona fide* state agency before the Commission and force the state's submission to an "adequate state supervision" test designed by the courts to apply to municipalities and private parties that are allegedly restraining trade through nonprofit associations or corporations.
65. Upon information and belief, the Commission has not upheld a decision by an administrative law judge to dismiss an administrative complaint in the previous 15 years.
66. In voting to approve the administrative Complaint, the Commission already reached a determination regarding the core issue as a matter of law: that the State Board, as established by the State, is not entitled to the presumptions and benefits of immunity usually accorded to state agencies merely because the State Legislature mandated that the majority of the State Board be licensed dentists.
67. There is some evidence that the Commission erroneously believed that the State Board was enforcing one of its own rules instead of a statute.²⁹

²⁸ For example, the Commission created a Task Force on State Action, which culminated in a report published in 2003, and strongly lobbied for increased jurisdiction over state agencies.

²⁹ In a recent article attempting to rationalize the FTC's action against the State Board, a recused Commissioner erroneously wrote that a board rule (rather than a statute) is at issue in the FTC administrative proceeding. Further, the FTC's expert economist witness mistakenly premised his entire economic opinion upon the assumption that a rule, rather than a statute, was at issue in the FTC administrative proceeding. The FTC's administrative Complaint did not mention a single state statute. The misunderstanding or indifference was exemplified by Complaint Counsel's persistent use of an out-of-date version of North Carolina's Dental Practice Act throughout depositions.

68. Even the administrative law judge presiding over the administrative proceeding expressed disbelief that the Commission would vote to approve a complaint against the State Board without knowing that it was a real state agency and that a statute, rather than a rule, was at issue in the proceeding.
69. The FTC's prejudgment of the applicable law on each of the State Board's primary legal defenses deprives the State Board of not only its sovereign rights assured under Article III and the Tenth Amendment to the U.S. Constitution, but also the right of due process guaranteed by the Fifth Amendment to the U.S. Constitution.³⁰ As more fully alleged below, the FTC's Rules are intrinsically biased against respondents and unlawfully shift the burden of proof to respondents:
- a. The FTC's action against the State Board is one of the first cases being adjudicated under their revised Rules. Additionally, the FTC administrative proceeding is among the first to be subject to the Commission's electronic filing procedure. At times, neither Respondent's Counsel, nor Complaint Counsel, nor even the Commission itself, have completely understood the twists and turns, one way streets and blind alleys presented by the new Rules, or the practical challenges to e-filing on a system that has been occasionally erratic and more than occasionally completely down.
 - b. The new Rules obligate attorneys such as Plaintiff's Counsel who "practice before the Commission" to comply with specific state bar rules, but are silent about

³⁰ See remarks of J. Thomas Rosch, "So I Serve as Both a Prosecutor and a Judge – What's the Big Deal?", American Bar Association Annual Meeting, p. 2 (Aug. 5, 2010), the text of a presentation made by a FTC Commissioner after he voted to issue the FTC's administrative Complaint against the State Board.

which rules of ethics, if any, are binding on Complaint Counsel, policy staff, or other Commission staff attorneys.³¹

- c. The Rules do not require verification of Complaint Counsel's "statement of facts" accompanying its motion for partial summary decision; however, the Rules require a respondent's counter-statement of facts to be verified. FTC Rule of Practice, 16 C.F.R. § 3.24(a)(1) and (2).
- d. The Scheduling Order allows Complaint Counsel to use at the hearing any investigative hearing transcripts against a respondent, even though the Rules restrict the role of the respondent's legal counsel, limit grounds for objections, provide no opportunity for the witness to review and sign (unless pursuant to a civil investigative demand), and sequester the witness without recourse. The FTC staff attorney conducting the investigative hearing has "sole discretion" to deny a witness the opportunity to clarify or correct testimony. July 15, 2010, Scheduling Order ¶ 17, and FTC Rules of Practice, 16 C.F.R. §§ 2.8, 2.9.
- e. Complaint Counsel and certain policy staff counsel have displayed a disturbing pattern of distortion and outright false representations in correspondence and pleadings, and a pattern of abuse, including misleading and intimidating witnesses.

70. Ironically, the FTC's slogan is "Protecting America's Consumers," but in our federal system of government, it does not have a monopoly on consumer protection. For the State Board, consumer protection is far more than a slogan.

³¹ Complaint Counsel has refused to provide this information despite repeated requests.

71. Perhaps the FTC's administrative case against the State Board would have been more compelling if the State Board had done to an unauthorized dental practitioner what the FTC has actually done to the State of North Carolina: if it had issued a false press release on a government website stating that it has "reason to believe" that teeth whitening providers had conspired to commit fraud (¶¶ 41-43), if it had intimidated and misled witnesses (¶ 48), if it had pursued prosecutions even when courts had ruled that it does not have jurisdiction (¶¶ 26-31), if it had required teeth whiteners to defend cases 300 miles from home (¶ 60), if it had filed charges against defendants based upon an investigation supervised by a board member with an actual conflict of interest (¶ 37), if it abused discovery (¶¶ 48-56), or if it had hauled defendants before a drumhead, predisposed tribunal at which the prosecutors also acted as judges (¶¶ 64-69). But, the State Board did none of these. The FTC has done all of them. Only this Court can protect the State Board from further injustice.

COUNT I

Declaratory Judgment Regarding Jurisdiction and State Action Immunity

72. The State Board restates and incorporates by reference each and every allegation of the preceding paragraphs.
73. Plaintiff, as alleged above, is an agency of the sovereign State of North Carolina, established by statute and having no existence, corporate or otherwise, but for the State. It is an instrumentality of the State and enforces the North Carolina Dental Practice Act as the State, and is an indivisible part of the sovereign State. Also, as alleged above, the State Board is statutorily barred from engaging in any competition for the sale of goods

or services to the public. As provided by the N.C. Constitution, Article I, § 34, it can only protect the public and cannot engage in monopolistic conduct.

74. The Tenth Amendment does not allow, the Federal Trade Commission Act does not provide, the Sherman Antitrust Act does not authorize, and Article I, § 8 of the U.S. Constitution does not provide the FTC antitrust jurisdiction over the State Board's enforcement of the Dental Practice Act against the unauthorized practice of dentistry.
75. As a result, the State Board is entitled to declaratory judgment and injunctive relief to protect its sovereign interests and Constitutional rights.

COUNT II

Declaratory Judgment Regarding Violation of U.S. Constitution Article III, Section 2, Clause 2

76. The State Board restates and incorporates by reference each and every allegation of the preceding paragraphs.
77. The FTC is an independent administrative agency under the Executive Branch. It is not a federal court within the Judicial Branch of Article III of the U.S. Constitution. It is a quasi-judicial body with limited authority to commence, hear, and rule upon cases against "persons, partnerships and corporations" other than sovereign states.
78. The State of North Carolina has not waived its sovereign immunity or consented to the FTC's quasi-judicial authority over Plaintiff State Board of Dental Examiners.
79. The FTC is barred by the U.S. Constitution, Article III, § 2, Clause 2 from forcing the State of North Carolina to be tried in a tribunal that is not either the U.S. Supreme Court or a lesser tribunal established by Congress as part of the federal judiciary.

80. As a result, the State Board is entitled to declaratory judgment and injunctive relief to protect its sovereign interests and constitutional rights.

COUNT III

Declaratory Judgment Regarding the Statutory Composition of the State Board

81. The State Board restates and incorporates by reference each and every allegation of the preceding paragraphs.
82. The State of North Carolina has prescribed by statute that a majority of the members of its State Board of Dental Examiners shall be licensed dentists. Like dozens of other North Carolina licensing boards, like hundreds of other licensing boards in other sovereign states, and, indeed, like various federally-established regulatory boards, the State of North Carolina has determined that it can efficiently and effectively protect the public by regulating the practice of dentistry through use of a board with a majority consisting of licensed dentists who have the requisite education, training and experience, as well as the confidence and respect of other licensees.
83. To assure that members of the State Board, including licensee members, respect the sacred trust of their responsibilities on the State Board, voting only in the interest of public protection, and forsaking self-aggrandizement, conflicts of interest or illegal private gain, the State of North Carolina has subjected the State Board to strict statutory oversight, and enacted numerous above-alleged statutes prohibiting conflicts of interest or use of their public offices for private gain. The State has also extended by statute its sovereign immunity to the State Board, its members, and its staff.

84. The composition of the State Board is a reasonable exercise of the State's constitutionally guaranteed prerogative to protect its citizens and regulate the practice of dentistry within its borders.
85. No act of Congress, most particularly no part of the federal antitrust laws, nor any provision in the Federal Trade Commission Act, has authorized the FTC to claim that North Carolina's State Board of Dental Examiners is an antitrust conspiracy merely because a majority of the State officials who comprise its membership are licensees.
86. The FTC is barred by the Tenth Amendment and U.S. Constitution, Article I, § 8, from attempting to preempt North Carolina's statutorily mandated composition of a State Board established to define and regulate the practice of dentistry in North Carolina.
87. As a result, the State Board is entitled to declaratory judgment and injunctive relief to protect its sovereign interests and constitutional rights.

COUNT IV

Violation of Due Process Clause (Regarding Commission's Predetermination of the State Board's Legal Defenses)

88. The State Board restates and incorporates by reference each and every allegation of the preceding paragraphs.
89. The State Board has sovereign and constitutional rights and privileges, as well as significant liberty and property interests that are at stake in the administrative proceeding before the Commission.
90. The FTC, as an administrative agency rather than a *bona fide* federal court, does not have the authority to consider or rule upon the constitutionality of its own unauthorized assertions of jurisdiction, nor upon the application of the Tenth Amendment to its

statutory limits of power. The fundamental constitutional questions raised in this Complaint are beyond the self-serving grasp of the FTC.

91. The Due Process Clause of the Fifth Amendment to the U.S. Constitution requires that the Commission, as an administrative agency, provide the State Board with a fair and impartial adjudicatory proceeding—both in appearance and in reality—that is free of any prejudgment on the key factual and legal merits of the allegations in the administrative Complaint.
92. As more fully alleged above, the Commission has violated the State Board's due process rights to a fair and impartial proceeding by having decided before the administrative hearing commenced, that as a matter of law the FTC had jurisdiction over the State Board, the State Board did not have state action immunity, and a state agency comprised of a majority of licensee members was a *per se* antitrust conspiracy.
93. As more fully alleged above, the FTC has also violated the Due Process Clause of the Fifth Amendment to the U.S. Constitution by adopting and enforcing inherently biased rules, permitting and condoning persistent and flagrant procedural and discovery abuses, requiring that the FTC administrative proceeding be conducted outside the State of North Carolina (over 300 miles from the State Board's witnesses), and refusing to stay the administrative proceeding while the defendant FTC may take as long as for two months on rulings on dispositive motions. The Plaintiff State Board is informed and believes and therefore alleges that the FTC's tactics are consciously intended to force the State Board to "cave" and stipulate to the FTC's jurisdiction and to the FTC's attempted preemption of state laws.

94. As a result of the foregoing, the Commission's administrative proceedings against the State Board are fundamentally flawed under the Due Process Clause, and no valid order can result from those administrative proceedings.
95. The Commission's conduct has caused and will continue to cause the State Board to suffer immediate and irreparable harm to its constitutional right to due process. No money damages can remedy this harm, and the State Board has no legal avenue by which to recover any money damages against the Commission.
96. As a result, the State Board is entitled to judgment and injunctive relief to protect its sovereign interests and constitutional rights.

COUNT V

Violation of Federal APA Prohibition of Arbitrary & Capricious Conduct

97. The State Board restates and incorporates by reference each and every allegation of the preceding paragraphs.
98. Additionally, and in the alternative to the previous Counts, the State Board is asserting claims under the Federal Administrative Procedure Act (APA), 5 U.S.C. § 500 *et seq.*, which requires that the Commission refrain from engaging in “arbitrary and capricious” conduct that bears no rational connection to the facts and circumstances of a particular case.
99. During the prosecution of the administrative Complaint, the Rules of the Commission do not establish a level playing field.
100. Complaint Counsel has frustrated the discovery process by providing evasive and non-responsive discovery. All three of its discovery responses (to Requests for Admissions, Production, and Interrogatories) evince an unjustifiable, disrespectful, and unacceptably

pugnacious disregard for the facts of the matter as well as the rules of discovery and general purposes for which discovery exists. This veiled contempt for the institution of discovery is highlighted by a failure to accept the responsibility to respond to the State Board's numerous requests for information as the moving party in the administrative proceeding—and incidentally, as the party with the burden of proof. The result of this evasive approach to discovery appears to be an attempt to intentionally subvert the purpose of discovery—which, as generally understood, is to exchange meaningful information and narrow issues. Instead, Complaint Counsel's course of conduct here, intentional or not, has obscured meaningful information and sought to expand the issues at hand. In colloquial terms, the result of discovery to date is that “we have lost information.”

101. The Commission has violated the Federal APA, 5 U.S.C. § 500 *et seq.*, by acting in an arbitrary and capricious manner and by unilaterally subjecting the State Board to an unauthorized assertion of the Commission's jurisdiction to thwart the State Board's proper regulatory actions.
102. The Commission's conduct constitutes arbitrary and capricious agency action in violation of the Federal APA, 5 U.S.C. § 500 *et seq.* Further, the Commission's proceedings against the State Board are fundamentally flawed such that no valid order can result from the administrative proceedings, and immediate review by this Court for injunctive relief is proper.
103. The Commission's conduct has deprived the State Board of a fair and impartial hearing, to which the State Board is entitled in accordance with Federal APA requirements.

104. The Commission's conduct has caused and will continue to cause the State Board to suffer immediate and irreparable harm. No money damages can remedy this harm, and the State Board has no legal avenue by which to recover any money damages against the Commission.
105. As a result, the State Board is entitled to judgment and injunctive relief to protect its sovereign interests and constitutional rights.

COUNT VI

Direct Suit Under the U.S. Constitution

106. The State Board restates and incorporates by reference each and every allegation of the preceding paragraphs.
107. Additionally, and in the alternative, the conduct alleged above constitutes a violation of the Tenth Amendment, the Commerce Clause and Due Process Clauses, and Article III, Section 2, Clause 2 of the U.S. Constitution, and the State Board brings this action as a direct claim under the U.S. Constitution.
108. As a result of the foregoing, the Commission's administrative proceedings against the State Board are fundamentally flawed and no valid order can result from the FTC administrative proceedings, and immediate review by this Court for injunctive relief is proper.
109. The Commission's conduct has caused and will continue to cause the State Board to suffer immediate and irreparable harm to its constitutional rights to due process. No money damages can remedy this harm, and the State Board has no legal avenue by which to recover any money damages against the Commission.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff State Board respectfully requests this Court to:

- I. Issue a Declaratory Judgment that the FTC lacks antitrust jurisdiction over the State Board under Constitutional and statutory provisions described above.
- II. Issue a Declaratory Judgment that the FTC lacks the authority to adjudicate a claim against the State Board in an administrative tribunal rather than a federal court, for the grounds described above.
- III. Issue a Declaratory Judgment that North Carolina's statutory scheme of regulating the practice of dentistry by a licensing board comprised of a majority of licensees is not subject to FTC jurisdiction under the Tenth Amendment, the Commerce Clause, the Federal Trade Commission Act, and the Sherman Antitrust Act.
- IV. Enter a Declaratory Judgment that the FTC has violated the State Board's right to due process, by predetermining constitutional legal defenses, by adopting and enforcing intrinsically unfair procedural rules, by mandating an untenable fast track schedule, by refusing to change the location of the hearing, by refusing to grant an unopposed motion to stay during the pendency of dispositive motions, by failing to disqualify itself, and by permitting or condoning systematic abuses of discovery and witnesses.
- V. Enter a Declaratory Judgment that the FTC has violated the State Board's rights under the Administrative Procedure Act.
- VI. Immediately stay or restrain and preliminarily and permanently enjoin the FTC from illegally asserting jurisdiction it does not have over the State Board.

VII. Order the FTC to 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.

VIII. Award the State Board its reasonable costs, including reasonable attorney fees, incurred in defending the preliminary investigation, the administrative Complaint, and this action.

IX. Award such other and further relief as the Court deems just and proper.

This the 1st day of February, 2011.

Respectfully submitted,

ALLEN AND PINNIX, P.A.

/s/ Noel L. Allen

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STATE OF NORTH CAROLINA

VERIFICATION

COUNTY OF WAKE

Bobby D. White, Chief Operations Officer of the Plaintiff, North Carolina State Board of Dental Examiners, herein, being first duly sworn, deposes and says that he has read the foregoing and knows the content thereof and that the same is true of his own knowledge, except as to those matters and things stated upon information and belief, and as to those matters, he believes them to be true.

This the 1ST day of February, 2011.



Bobby D. White, Chief Operations Officer
North Carolina State Board of Dental Examiners

Sworn to and subscribed before me,
a Notary Public, this the 1ST day of
February, 2011.



Notary Public

Printed name: KATHARINE M. GLODEN

My Commission expires: 10/15/15

