IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
Case No. 5:11-cv-00049-FL

THE NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS, Plaintiff, v. FEDERAL TRADE COMMISSION, Defendant.	**MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Cases (cont.)

Cases (cont.)

Constitutional Authority

Statutes

Statutes (cont.)

Other Authorities

INTRODUCTION

I. Statement of the Case.

Plaintiff, the North Carolina State Board of Dental Examiners ("State Board" or "Plaintiff"), hereby submits this Memorandum of Law in Opposition to Defendant's Motion to Dismiss. As set forth in more detail below, Plaintiff brought its action against the Federal Trade Commission ("FTC" or "Defendant") because the FTC has violated the State Board's rights under the U.S. Constitution, the federal statute governing the FTC, and nearly seven decades of established, unquestioned, and unchallenged U.S. Supreme Court jurisprudence. Because of these violations, and regardless of any ongoing administrative proceedings against the State Board, jurisdiction to hear this action is properly before this court.

On February 1, 2011, the State Board filed a Complaint for Declaratory Judgment and Preliminary and Permanent Injunction against the FTC ("Complaint"), which, along with other State Board filings, is incorporated herein by reference. On February 2, 2011, the State Board filed a Memorandum in Support of Plaintiff's Motion for Temporary Restraining Order, Preliminary Injunction, and Permanent Injunction ("State Board Memorandum"). Still pending before the Court is the State Board's request for preliminary and permanent injunctions and other equitable relief. On February 28, 2011, the FTC responded to the State Board's Complaint by filing a Motion to Dismiss and Memorandum of Law in Support of Motion to Dismiss ("FTC Motion to Dismiss").

The FTC Motion to Dismiss is predicated on the argument that this Court has no jurisdiction over this lawsuit because the FTC has not yet rendered its final agency decision in the ongoing administrative enforcement action against the State Board. However, the FTC's arguments actually have it backwards – they miss the point that it is the FTC's pursuit of the

ongoing administrative enforcement action that has caused the State Board to suffer egregious violations of its constitutional rights. The Court's jurisdiction over this lawsuit arises from the very fact that the FTC's pursuit of the ongoing administrative action is unconstitutional and in brazen defiance of the very real and clear statutory and constitutional limits upon its statutory authority.

II. Statement of the Facts.

The State Board is a quasi-judicial agency of the State of North Carolina. It was created by the North Carolina General Assembly under the North Carolina Dental Practice Act ("Act") to regulate the practice of dentistry in North Carolina and protect the public health. N.C. Gen. Stat. § 90-22(a). The Act sets forth the Board's structure and mandates its activities. This includes requiring that the State Board be comprised of a majority of licensed dentists. N.C. Gen. Stat. § 90-22(b). The Act also mandates that the State Board limit the practice of dentistry to licensed dentists. N.C. Gen. Stat. § 90-22(b). Most significantly, the Act clearly and unambiguously defines the performance and offering to perform "stain removal" as the practice of dentistry, permitting such procedures to only be performed by a licensed dentist or dental hygienist under a dentist's supervision. N.C. Gen. Stat. § 90-29(b)(2).

At issue in this case is the FTC's pursuit of an administrative enforcement action against the State Board, in which the FTC has alleged that members of the State Board have "colluded" to engage in violations of the Federal Trade Commission Act ("FTC Act"). Specifically, the FTC predicates its administrative enforcement action on allegations that the State Board sent letters to non-licensed providers of teeth whitening services, such as spas and mall kiosks, as well as the owners of the property where these operations took place. These letters explained that stain removal services constituted the practice of dentistry in North Carolina, and thus could

only be performed by licensed dentists. State Board Response to Complaint at 15-16. The FTC alleges that, solely because the majority of the members of the State Board are licensed dentists—as required by North Carolina statute—the State Board members' activities were motivated by financial interest and, therefore, the State Board is not entitled to the defenses available under the "state action immunity" doctrine (see below).

Despite the absolute absence of legislative or judicial authority for its claim that the State Board is subject to the FTC Act, the FTC filed a complaint against the State Board on June 17, 2010. An administrative hearing on the matter began on February 17, 2011 and concluded on March 16, 2011. Pursuant to Rule 3.51(a) of the FTC's Rules of Practice for Adjudicative Proceedings, an initial decision by the Administrative Law Judge is required to be issued within 70 days of the filing of the (forthcoming) proposed findings of fact, conclusions of law and order and any reply thereto. Meanwhile, the State Board, and hundreds of other majority-licensee state agencies throughout the country are waiting to learn whether their authorizing statutes, governance structures, and licensing, disciplinary, and regulatory actions are illegal under an FTC-created rule that contravenes the clear letter and intent of Congressionally-created laws and Supreme Court jurisprudence.

These federal laws, enacted by the legislative branch[1] and clearly set forth in almost seventy years of Supreme Court jurisprudence,[2] dictate that the FTC, a federal executive branch agency, may not enforce antitrust legislation against state entities acting pursuant to state laws. However, as evidenced by its administrative enforcement action against the State Board, the FTC has sought to assert a breathtaking expansion of its limited statutory jurisdiction to include state agencies abiding by state laws. Incidentally, the FTC has otherwise lobbied for permission to

[1] 15 U.S.C. § 45 ("FTC Act").
[2] Parker v. Brown, 317 U.S. 341 (1943), discussed *infra* pp. 13-14.

find *per se* antitrust violations by any majority-licensee state agency that is not "actively supervised by the state." FED. TRADE COMM'N, REPORT OF THE STATE ACTION TASK FORCE at 37 (Sept. 2003), http://www.ftc.gov/os/2003/09/stateactionreport.pdf. Thus, the FTC's administrative proceeding against the State Board was apparently necessitated by the fact that Congress and the federal courts have chosen not to change federal law to suit the FTC's self-bestowed mantle of authority and its self-initiated jurisdictional manifest destiny.

The FTC alleges that the only way the State Board may benefit from the state action immunity defense is if its actions were taken pursuant to a "clearly articulated and affirmatively expressed" state policy and are "actively supervised" by the state itself. Active supervision is a standard developed by federal courts to judge whether the anticompetitive actions of *private parties*—such as liquor retailers or local bar associations—are subject to adequate oversight by state officials.[3] Problematically, no standard (judicial, statutory, or otherwise) exists for how active supervision may be applied to the *state* itself. Even so, courts have defined active supervision as oversight of private parties *by state agencies*. Neither case is present here. See, e.g., Flav-O-Rich, Inc. v. North Carolina Milk Comm'n, 593 F. Supp. 13 (E.D.N.C. 1983). The FTC has not cited, and the State Board has not identified, any case law that explains how active supervision of a state agency would operate, beyond federal courts' conclusions that *state agencies acting pursuant to a clearly articulated state law fulfill any active supervision requirement as to private parties*.

[3] The FTC rests its argument heavily on a selective and skewed interpretation of one case: Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975), which was decided prior to Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985). The FTC claims that the Supreme Court considers Goldfarb to (1) define state agencies as private parties and (2) to require these agencies, as private parties, to meet both parts of the Midcal test to obtain state action immunity. FTC Memorandum in Reply to the State Board's Corrected Memorandum in Opposition to FTC's Motion for Partial Summary Decision at 9. The FTC is incorrect on both of these points. Nowhere in the Goldfarb decision does the Court call the state agency a "private party." The issue in Goldfarb was the state bar's ratification of the price-fixing scheme concocted by the county bar association (a private actor), without a clearly articulated state law justifying this conduct. Id. at 790-91. The Goldfarb holding only would apply if, instead of following a clearly articulated state law, the State Board was ratifying a private organization's stain removal policy.

III. Standard for Dismissal Per Rule 12(b)(1).

In ruling on a Rule 12(b)(1) motion, a court must apply the standard applicable to a motion for summary judgment, under which the nonmoving party must set forth specific facts beyond the pleadings to show that a genuine issue of material fact exists. Richmond, Fredericksburg & Potomac R.R. Co. v. United States, 945 F.2d 765, 768 (4th Cir. 1991) (citing Trentacosta v. Frontier Pac. Aircraft Indus., 813 F.2d 1553, 1558 (9th Cir. 1987)). When a defendant challenges subject matter jurisdiction pursuant to Rule 12(b)(1), "the district court is to regard the pleadings as mere evidence on the issue, and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment." Evans v. B.F. Perkins Co., 166 F.3d 642, 647-50 (4th Cir. 1999); see also Williams v. United States, 50 F.3d 299, 304 (4th Cir. 1995) ("In ruling on a Rule 12(b)(1) motion, the court may consider exhibits outside the pleadings.").

According to Wright's Law of Federal Courts,

> The complaint in a declaratory judgment may be judged on its own merits; if it reveals a federal claim, then jurisdiction will exist. . . . There is no difficulty [in establishing federal question jurisdiction] in an action to establish that plaintiff has an affirmative federal right, [where] the federal claim necessarily appears on the face of the complaint . . . .

CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS 100-101 (1983).

Under a 12(b)(1) motion, "[t]he moving party should prevail only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law." Richmond, 945 F.2d at 768 (citing Trentacosta, 813 F.2d at 1558). Additionally, the Fourth Circuit has held in the antitrust context that "the conduct of the defendants as well as that of the plaintiff is relevant to the jurisdictional issue" on a 12(b)(1) motion. Mims v. Kemp, 516 F.2d 21, 23 (4th Cir. 1975).

Here, the material jurisdictional facts alleged in the pleadings establish that the conduct of the FTC has caused the State Board to suffer very real violations of its constitutional rights under the Commerce Clause and both the Fifth and Tenth Amendments, and further that the FTC has pursued its ongoing administrative action in brazen defiance of its limited statutory authority. As set forth in greater detail below, any of these allegations afford a basis for jurisdiction. If the FTC contests the material facts underlying these allegations, then a 12(b)(1) motion to dismiss is not appropriate. Accordingly, the Court's jurisdiction over this lawsuit properly arises from the material jurisdictional facts alleged in the pleadings.

ARGUMENT

I. The Judicial Power of This Court Has Been Properly Invoked.

In its Motion to Dismiss, Defendant asserts (in addition to its Rule 12(b)(1) claim, addressed below) that "The Board's Complaint *Improperly* Attempts to Enjoin Ongoing Administrative Enforcement Proceedings" (emphasis supplied). FTC Motion to Dismiss at 9. This argument is based on the express assumption that the FTC has indeed properly exercised its limited statutory jurisdiction (the "Assumption"), citing as authority for the Assumption its own affirming decision (the "Decision") reached by Defendant in the very "Administrative Enforcement Proceedings" which form the basis for this case and controversy which is the very subject of this action -- In the Matter of North Carolina [State] Board of Dental Examiners, FTC Docket No. 9343 (decision dated February 3, 2011, entered on the docket February 8, 2011). Defendant concludes, "[b]ecause the only *appropriate* forum at this time for the issues raised in the Board's Complaint is in the ongoing administrative enforcement action, this Court lacks jurisdiction over the Board's complaint." (emphasis supplied). FTC Motion to Dismiss at 12.

In other words, Defendant, in a spectacular attempt to bootstrap its own limited statutory (administrative) jurisdictional authority, has questioned the propriety of Plaintiff seeking to invoke the judicial power of this constitutionally empowered Article III Court.

Plaintiff finds this self-aggrandizing, self-justifying assertion of the lack of this Court's constitutional authority to consider this case to be constitutionally presumptuous, completely vacuous, and totally devoid of any substance – constitutional, statutory, or otherwise.

Article III, Section 2 of the U.S. Constitution provides as follows: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States . . . to Controversies to which the United States shall be a Party . . ." U.S. CONST. art. III, § 2, cl. 1. As Charles Alan Wright notes in the Law of Federal Courts, before the limited "judicial Power" may be invoked, ". . . facts that disclose the existence of jurisdiction must be affirmatively alleged." WRIGHT, LAW OF FEDERAL COURTS at 22 (citing Bingham v. Cabot, 3 U.S. 382 (1798)). Further, it matters not when the judicial powers of an Article III court may be invoked. See Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 377 n. 21 (1978) ("Federal judicial power does not depend upon 'prior action or conduct of the parties.'")

Indeed, this matter is resolved by the application of basic hornbook law. The requisite facts disclosing the existence of jurisdiction have been affirmatively alleged in Plaintiff's Complaint. The questions raised by that Complaint may be properly raised at this time, regardless of the existence of some "ongoing" administrative proceedings by which Defendant is purporting to preempt this Court's Article III jurisdiction.

II. Subject Matter Jurisdiction Is Properly Vested in This Court.

The instant question before this court is whether to grant the FTC's motion for a Rule 12(b)(1) dismissal for a lack of subject matter jurisdiction. The FTC claims that jurisdiction is

not properly before this court because it is currently attempting to apply its active supervision standard to the State Board through an "ongoing" administrative proceeding. Essentially, the FTC argues that a party cannot prevent illegal and unconstitutional acts by a federal agency until that federal agency has made its final, appealable decision in a case. This is obviously incorrect.

The U.S. Constitution vests in the federal courts "judicial Power [extending] to all Cases, in Law and Equity, arising under this Constitution [and] the Laws of the United States." U.S. CONST. art. II, § 3, cl. 1. The federal courts are not just appellate courts, empowered only after administrative tribunals have heard a case. Federal district courts have first instance jurisdiction over matters where violations of the Constitution and federal laws are at issue. 28 U.S.C. § 1331. This is just such a case.

Further, the FTC makes much of the "ongoing" nature of the administrative proceedings. However, the power of federal courts to hear such cases "does not depend upon 'prior action or consent of the parties.'" Owen Equip., 437 U.S. at 377 (citing Am. Fire & Cas. Co. v. Finn, 341 U.S. 6, 17-18 (1951)).

Plaintiff brought this case because of the FTC's unconstitutional acts and brazen defiance of its limited federal statutory mandate; therefore, regardless of the "ongoing" administrative proceedings against the State Board, jurisdiction is properly before this court. The FTC's Rule 12(b)(1) motion should be denied.

III. This Court Has Jurisdiction Over the Instant Case Regardless of the FTC's Administrative Proceedings Against the State Board.

The FTC argues that this Court lacks jurisdiction because the State Board must first exhaust administrative remedies before appealing its case to a federal court. According to the FTC, the State Board's claim is not yet ripe because the State Board has not yet obtained a final agency decision, and the State Board's lawsuit is an interlocutory appeal. The existence of this

proceeding renders these arguments moot. This declaratory judgment action (not an appeal) is necessitated by the FTC's violation of the State Board's constitutional and statutory rights. Our Constitution does not provide for administrative agencies in the Executive Branch to make constitutional determinations or decisions on their own limited statutory authorizations. The federal courts are the exclusive avenue for determination in such matters.

A. Ripeness and Exhaustion of Administrative Remedies Are Moot Issues Because This Court Has Jurisdiction.

While ripeness and the exhaustion of administrative remedies may preclude complaints against federal agencies from being brought in federal courts in some instances, these issues are not a bar on federal court jurisdiction as the FTC suggests. Lawsuits such as the State Board's are permitted as necessary to ensure that an adequate and fair remedy is available. Cavalier Tel., LLC v. Va. Elec. & Power Co., 303 F.3d 316, 323 (4th Cir. 2002) (citing McCarthy v. Madigan, 503 U.S. 140, 146 (1992)) (holding that "federal courts must balance the interest of the individual in retaining prompt access to a federal judicial forum against countervailing institutional interests favoring exhaustion").

The State Board's circumstances meet the standards of the following well-recognized exceptions: (1) allowing a direct federal suit to address a defendant's act of brazen defiance in the face of its authorizing statute; and (2) allowing a direct federal suit to address a substantial showing that a plaintiff's constitutional rights have been violated. See Am. Gen. Ins. Co. v. Fed. Trade Comm'n, 496 F.2d 197, 199-200 (5th Cir. 1974) (citing Fay v. Douds, 172 F.2d 720 (2d Cir. 1949) and Leedom v. Kyne, 358 U.S. 184 (1958)). As demonstrated in a number of cases where these exceptions applied, federal courts hear direct challenges to federal agency actions when necessary to prevent and stop those agencies' constitutional violations and *ultra vires* actions.

By pursing its administrative enforcement action against the State Board, the FTC is engaging in acts that violate the State Board's rights under the Commerce Clause (Article I, Section 8, Clause 3) and the Fifth and Tenth Amendments to the U.S. Constitution. The FTC also is engaging in *ultra vires* actions by exceeding its limited statutory authorization set forth in the FTC Act and the many decades of case law interpreting the Act. Because of these constitutional and statutory violations, the State Board is not required to exhaust its administrative remedies before bringing this lawsuit against the FTC. See, e.g., Leedom, 358 U.S. 184; Rhode Island Dep't of Envtl. Mgmt. v. United States, 304 F.3d 31 (1st Cir. 2002).

B. Jurisdiction Exists Because This Is a Direct Suit, Not an Interlocutory Appeal.

The FTC Motion to Dismiss devotes several pages to drawing comparisons between the instant case to an interlocutory appeal brought before the Fourth Circuit in 2006 by the South Carolina State Board of Dentistry ("South Carolina Board"). FTC Motion to Dismiss at 14 *et seq.*; South Carolina State Board of Dentistry v. Fed. Trade Comm'n, 455 F.3d 436 (4th Cir. 2006). However, the instant case and South Carolina State Board of Dentistry are vastly different. The FTC acted against the South Carolina Board because that board enacted a *rule* that directly *violated* a clearly worded state statute. The FTC acted against the Plaintiff because it merely *enforced* a clearly worded state statute. The South Carolina Board's suit was an interlocutory appeal. The Plaintiff State Board is bringing this declaratory judgment action because the FTC is acting beyond its constitutional and statutory authority in violation of the State Board's rights.

The FTC's reliance on South Carolina State Board of Dentistry is also rather unusual given the Fourth Circuit's approach to the South Carolina Board's state action immunity claim. The South Carolina Board's argument was based on an interpretation of the state action

immunity doctrine granting it *ipso facto* immunity without any analysis of whether it was acting pursuant to state law, let alone a discussion of "active supervision." The Fourth Circuit weighed the possibility that *ipso facto* immunity – without even a showing of a clearly articulated state statute, let alone active supervision – might be permitted, as it has been by some federal courts. South Carolina State Bd. of Dentistry, 455 F.3d at 442 n.6. It is surprising then that the FTC would so heavily cite a case before the Fourth Circuit in which the applicability of the active supervision requirement to the state agency was not even considered, and only clear articulation of a state statute was discussed (and not necessarily even required).

Apparently, the FTC believes that this Court will not be able to distinguish between North Carolina and South Carolina, between one dental board from another, and between a state statute and a state agency rule that violated a state statute. It follows that the FTC must also hope that this Court will misconstrue a direct suit over constitutional and statutory violations as an interlocutory appeal.

IV. Jurisdiction Is Properly Before This Court Because the FTC Is Acting in Brazen Defiance of Its Limited Statutory Mandate.

The federal courts have jurisdiction to hear a dispute over whether an executive branch agency has "exceeded its statutory powers." Skinner & Eddy Corp. v. United States, 249 U.S. 557, 562 (1919); Southern Ry. Co. v. Amer. Train Dispatchers Ass'n, 948 F.2d 887, 894 (4th Cir. 1991); Jewel Cos. v. Fed. Trade Comm'n, 432 F.2d 1155, 1158 (7th Cir. 1970) (finding jurisdiction despite the failure to exhaust administrative remedies, based on the determination that the question at issue was statutory construction); N.C. State Bd. of Registration for Prof'l Engineers & Land Surveyors v. Fed. Trade Comm'n, 615 F. Supp. 1155, 1159 (E.D.N.C. 1985) (recognizing that, when an agency acts in "brazen defiance" of its statutory authorization, a "notable exception to [the] general rule requiring adherence to congressionally created judicial

review procedures" exists); Philip Morris, Inc. v. Block, 755 F.2d 368, 370 (4th Cir. 1985) (holding "judicial intervention is authorized when an agency acts in "brazen defiance" of its statutory authorization." In Phillip Morris, the Fourth Circuit did not find that defiance had occurred because the action at issue was explicitly permitted by law). Therefore, jurisdiction in the instant suit is properly before this court.

The FTC is exceeding its limited statutory authority as set forth in Sections 5 and 4 of the FTC Act and its accompanying case law. State Board Memorandum at 12 *et seq*. In Skinner, *supra*, this exact type of extralegal action was the basis for federal jurisdiction. The plaintiff in Skinner brought a suit in district court against the Interstate Commerce Commission claiming that its railroad rates were increased illegally by the Commission without the requisite agency hearing. The court agreed that it had jurisdiction to hear the case, citing statutory language requiring a hearing prior to rate increases. 249 U.S. at 559.

A. No Jurisdiction Exists Under Section 5 of the FTC Act.

Section 5 of the FTC Act limits the FTC's powers to "prevent persons, partnerships, or corporations . . . from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(2). Federal courts do not recognize the State Board as a "person" or a "partnership" or a "corporation" for the purpose of antitrust enforcement. For example, the FTC Act defines a "corporation" as "organized to carry on business for its own profit or that of its members"; this requires that a corporation must have "proximate relation to lucre." 15 U.S.C. § 44; California Dental Ass'n v. Fed. Trade Comm'n, 526 U.S. 756, 766-68 (1999). No such ties exist in this case; unlike in California Dental Association, the State Board does not (and constitutionally cannot) have any for-profit subsidiaries, cannot by law engage in lobbying efforts, does not engage in marketing or

public relations on behalf of its members, and in fact is constituted solely for the purpose of "the regulation of the practice of dentistry." 526 U.S. at 767; N.C. Gen. Stat. § 90-22(a). See also 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."). Therefore, the State Board does not pass the Supreme Court's test for determining that an entity is a for-profit corporation, and thus is not subject to the limited jurisdiction of Section 5 of FTC Act.

B. No Jurisdiction Exists Under Section 4 of the FTC Act.

Defendant has alleged that the "acts and practices of the Dental Board . . . are in commerce or affect commerce, as 'commerce' is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44." FTC Complaint in the Matter of: North Carolina [State] Board of Dental Examiners at 5. In commerce or affecting commerce or not, and as firmly established through nearly seven decades of Supreme Court precedent, Congress did not create the Sherman Antitrust Act to apply to state government actions taken pursuant to clearly articulated state law. This bright-line rule was enunciated in 1942 by Supreme Court Chief Justice Harlan F. Stone, and has been reinforced in dozens of Supreme Court cases since then. Parker, 317 U.S. at 350-51 (holding "[w]e 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"; further, "the states are sovereign, save only as Congress may constitutionally subtract from their authority, [and] an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress"). In the many decades since the Parker decision was handed down, Congress has chosen not to amend

the FTC Act to include states (or just state agencies); and while it has made other changes to close loopholes, it has actively chosen to continue to exclude states from the application of federal antitrust laws. State Board Memorandum at 14.

Federal courts also have had the opportunity to interpret the holding in Parker so as to exclude state agencies from state action immunity. Instead, in 1985, the Supreme Court held that "it is likely" that state agencies are granted immunity so long as their actions are pursuant to a clearly articulated state statute. Hallie, 471 U.S. at 46 n.10. In contrast, the Supreme Court has held *private parties* to a different standard: they must show that they are acting pursuant to a clearly articulated state statute, with the active supervision of the state. California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980). In over 25 years since the Hallie decision that addressed *state agencies*, no federal court has ever denied immunity to a state agency engaged in an anticompetitive action pursuant to a clearly articulated state statute. Instead, again and again, federal courts have granted immunity to state licensing agencies that are composed, structured, and supervised just like the State Board. See, e.g, Hass v. Oregon State Bar, 883 F.2d 1453, 1461 (9th Cir. 1989); Gambrel v. Kentucky Bd. of Dentistry, 689 F.2d 612, 616-18 (6th Cir. 1982); see also Brazil v. Arkansas Bd. of Dental Examiners, 593 F. Supp. 1354, 1362 (E.D. Ark. 1984), aff'd, 759 F.2d 674 (8th Cir. 1985); Nassimos v. N.J. Bd. of Examiners of Master Plumbers, No. 94-1319, 1995 U.S. Dist. LEXIS 21376, at *10 (D.N.J. Apr. 4, 1995), aff'd, 74 F.3d 1227 (3rd Cir. 1995), cert. denied, 517 U.S. 1244 (1996).

The State Board's actions against teeth whitening service providers were taken pursuant to a clearly articulated state statute. State Board Memorandum at 3; N.C. Gen. Stat. § 90-29(a) and (b)(1). Despite the clear legislative intent of Congress and the settled conclusions of court after court, the FTC is attempting to expand its jurisdiction to enforce the Sherman Act under the

guise of its Section 4 jurisdiction, asserting baldly that it applies to state agencies. Thus, by the standard applied by federal courts in numerous cases, the State Board can and should bring its claim that the FTC has exceeded its statutory authority directly to the federal courts. See Skinner, 249 U.S. at 562; Leedom, 358 U.S. at 190 (granting federal court jurisdiction without exhaustion of administrative remedies because "[i]f the absence of jurisdiction of the federal courts meant a sacrifice or obliteration of a right which Congress had created, the inference would be strong that Congress intended the statutory provisions governing the general jurisdiction of those courts to control"); Jewel Cos., 432 F.2d at 1159-60; Southern Ry. Co., 948 F.2d at 894.

The Fourth Circuit set forth a useful test for determining whether a suit should properly be brought before a federal court instead of an administrative agency in Long Term Care Partners LLC v. United States, 516 F.3d 225 (4th Cir. 2008).[4] First, the agency must have acted contrary to clear and mandatory statutory prohibitions. Second, the plaintiff must have no meaningful and adequate means, apart from litigation, of vindicating its statutory rights. The Court will hear a case if, after conducting a "cursory review of the merits to determine if the agency acted clearly beyond the boundaries of its authority," it finds that the "agency offered a plausible interpretation of the relevant statute" to justify its actions. 516 F.3d at 234 (citing Newport News Shipbuilding & Dry Dock Co. v. NLRB, 633 F.2d 1079, 1081 (4th Cir. 1980)). If both parties to a case raise "compelling arguments regarding the proper interpretation of the disputed statutory provisions," then the case should complete the administrative review process

[4] In Long Term Care, the issue was whether a federal agency had jurisdiction over contract-based labor disputes brought by employees of the federal Office of Personnel Management (OPM). The plaintiffs contended that the issue in the case was the agency's review of the dispute, in defiance of the contract, which clearly did not grant the agency such review power. The defendants, who prevailed, argued that the real issue in the case was the agency's review not of the case, but of the contract itself, and the OPM's right to enter into it. 516 F.3d at 234-36. No such dual interpretation of the focus of the FTC and the State Board's dispute is possible here.

before appeal to the federal courts. Id. at 234 (citing Nat'l Air Traffic Controllers Ass'n AFL-CIO v. Fed. Serv. Impasses Panel, 437 F.3d 1256, 1264 (D.C. Cir. 2006)).

The State Board's Complaint before this Court meets the first element of the Long Term Care test. The FTC acted contrary to clear and mandatory statutory restrictions. The FTC is openly defying the Constitution, its own jurisdictional statute, and almost seven decades of Supreme Court jurisprudence to create a new standard for state action immunity. The active supervision requirement is so far outside of statutory and case law mandates that the FTC has not even been able to piece together a coherent explanation of what this supervision would entail. To examine the FTC's argument in light of the Long Term Care Partners test, the FTC has not offered a "plausible interpretation of the relevant statute." To permit the FTC to rule on its own invented law in this case would be problematic for many reasons. There is no clear statement in any law of what might be required of the hundreds of state occupational licensing boards as they go about their daily business of enforcing state laws to license, regulate, and discipline professionals. Respondent's Surreply and Motion for Leave to File Limited Surreply Brief at 3-4. The FTC is arguing for an unspecific and uncharted overhaul of all state laws that create majority-licensee state agencies. It does not have any statutory or case law basis for making this argument. It is critical that this overreach is immediately judged by a federal court constituted pursuant to Article III of the Constitution; not by the FTC itself.

The State Board also meets the second part of the Long Term Care Partners test: the State Board's only avenue for vindicating its legal rights is through a federal court case. As stated in the State Board Memorandum, the FTC's administrative proceedings against the State Board are having an immediate negative effect on the State Board's ability to function, and a chilling effect on the public's willingness to seek relief from illegal activities. State Board Memorandum at 22.

Further, the FTC's administrative proceedings do not have the jurisdiction to address the constitutional questions that the State Board has raised regarding its treatment by the agency. Id. at 22-23; see also Thorne v. U.S. Dep't of Defense, 916 F. Supp. 1358, 1364 (E.D. Va. 1996) ("Resolving a claim founded solely upon a constitutional right is singularly suited to a judicial forum and clearly inappropriate to an administrative board.") (internal citations omitted); see also Mathews v. Eldridge, 424 U.S. 319, 330 (1976).

The FTC's bias is another reason that a federal court is the only viable path for the State Board to vindicate its legal rights. McCarthy, 503 U.S. at 148 ("[A]n administrative remedy may be inadequate where the administrative body is shown to be biased or has otherwise predetermined the issue before it"). Of the hundreds of cases opened by the FTC in recent years, the FTC and its administrative law judges held in favor of the respondents in only a handful. State Board Memorandum at 23; Houghton v. Shafer, 392 U.S. 639, 640 (1968) (holding that exhaustion of plaintiff prisoner's administrative remedies was not required when, under the facts of the case, it seemed likely that forcing plaintiff to exhaust administrative remedies "would be to demand a futile act"). For that reason, and also based on the constitutional nature of the State Board's claims, the FTC's administrative proceedings will not provide an equitable setting.

Thus, Parker v. Brown and its living legacy of almost seventy years of applied case law stand tall for the clear conclusion that "in commerce, of commerce" or not, the State Board's activities in question here are not subject to jurisdiction under Section 4 of the FTC Act.

V. Jurisdiction Is Properly Before This Court Because the FTC Is Violating the State Board's Constitutional Rights.

This Court has jurisdiction in the instant case because the State Board's constitutional rights have been violated. Rhode Island Dep't of Envtl. Mgmt., 304 F.3d at 41 (finding that, in light of the fact that the state's sovereign immunity claim was "constitutional in scope," the court

was "bound by a strong presumption in favor of providing the state some vehicle for vindicating its rights"); Am. Gen. Ins. Co., 496 F.2d at 200 (citing Fay v. Douds, 172 F.2d 720, 723 (2d Cir. 1949)). In Fay, the assertion of a constitutional right was sufficient to warrant a federal court hearing instead of an administrative agency proceeding. In fact, the court in Fay stated that, to reach that conclusion, it was not even required to accept the premise that the plaintiff's right was violated. Id. As long as the assertion of the right was not "transparently frivolous," then the case belonged in federal court. Id. In the instant case, the State Board's constitutional rights have been, and are being, violated by the FTC. At issue in Fay was the plaintiff labor union's assertion of a constitutional "property right" in its position as a bargaining agent. This was the union's justification, accepted by the court, for filing a federal suit to stop the defendant regional labor board director from an election without the plaintiff on the ballot. Id. at 772-73. Presenting an even stronger case than that made in Fay, the State Board's Complaint against the FTC includes several different allegations of constitutional violations, as explained more fully below. See infra; see Complaint at 36.

A. The FTC Is Violating the State Board's Rights Under the Tenth Amendment.

It is well-established that the principles of federalism embodied in the Tenth Amendment to the U.S. Constitution prohibit the federal government from instructing states to take federally-mandated actions. New York v. United States, 505 U.S. 144, 161 (1992) (internal citations omitted) (invalidating a federal law provision because "Congress may not simply commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program").

The federal government cannot bypass this fundamental prohibition by attempting to direct the actions of state officials. Printz v. United States, 521 U.S. 898, 929 (1997) (requiring

state officers "to perform discrete, ministerial tasks specified by Congress" violates the federalism principles under the Tenth Amendment). As aptly stated by Justice Scalia,

> It is an essential attribute of the States' retained sovereignty that they remain independent and autonomous with their proper sphere of authority. It is no more compatible with this independence and autonomy than their officers be "dragooned" . . . into administering federal law, than it would be compatible with the independence and autonomy of the United States that its officers be impressed into service for the execution of state laws.

Id. at 928 (internal citations omitted).

Not only is the federal government prohibited from directing states' officers to act, the federal government also cannot prescribe the qualifications of state officials. In Gregory v. Ashcroft, the U.S. Supreme Court refused to apply a federal law prohibiting age discrimination to certain state judges, as the state law required those judges to retire by the age of 70 and as the federal law did not "plainly cover" those judges. 501 U.S. 452, 467 (1991). The Court recognized that, "[t]o give the state-displacing weight of federal law to mere congressional *ambiguity* would evade the very procedure for lawmaking on which [Garcia v. San Antonio Metropolitan Transit Authority] relied to protect states' interests." Id. at 464 (quoting L. Tribe, American Constitutional Law § 6-25, p. 480 (2d ed. 1988) (emphasis in original).

The FTC clearly is trampling upon the State Board's Tenth Amendment rights. The FTC has predicated its administrative enforcement action on the assumption that, simply because North Carolina's statute requires that the majority of the members of the State Board are licensed dentists, the members of the State Board are "colluding" to violate antitrust laws. This assumption ignores the presumption of proper action by public officials, established in case law and statutes, and the standards set forth in North Carolina's State Government in Ethics Act. See N.C. Gen. Stat. § 150B-40(b); see also N.C. Gen. Stat. § 138A *et seq.*; see also Withrow v. Larkin, 421 U.S. 35, 47 (1975). Nevertheless, based on this assumption, the FTC would have

North Carolina either change its statutes so that the State Board is not "dominated" by licensed dentists, or take steps to provide additional oversight of the Board's enforcement activities.

These attempts to dictate the qualifications of the members of the State Board violate the Tenth Amendment. The North Carolina statute mandating that the majority of State Board members be licensed dentists exists for good reason: the North Carolina legislature wishes to ensure that the regulation of the practice of dentistry is conducted by individuals with the knowledge to do so competently. In fact, North Carolina courts give deference to occupational licensing boards' expertise to the exclusion of expert witnesses. See, e.g., Leahy v. North Carolina Board of Nursing, 346 N.C. 775, 780-81 (1997). The FTC cannot point to any evidence that Congress intended to give the FTC the power to preempt this state statute. Therefore, pursuing preemption is unconstitutional.

The FTC's attempts to direct the manner in which North Carolina and the State Board regulate the practice of dentistry also violate the Tenth Amendment. As discussed above, such attempts are contrary to the prohibitions set forth in New York and Printz. Those prohibitions are even more important to the sovereignty of North Carolina in the instant case since the power to regulate the practice of dentistry resides with the State. As the U.S. Supreme Court has held:

> That the State may regulate the practice of dentistry, prescribing the qualifications that are reasonably necessary, and to that end may require licenses and establish supervision by an administrative board, is not open to dispute. The State may thus afford protection against ignorance, incapacity, and imposition. We have held that the State may deny to corporations the right to practice, insisting upon the personal obligations of individuals, and that it may prohibit advertising that tends to mislead the public in this respect.

Semler v. Oregon State Bd. of Dental Examiners, 294 U.S. 608, 611 (1935) (internal citations omitted). In sum, the FTC has no authority to dictate the steps that must be taken by the State

Board to enforce North Carolina's Dental Practice Act. Asserting such authority is a violation of the Tenth Amendment.

B. The FTC Is Violating the State Board's Rights Under the Commerce Clause.

As set forth above, neither the FTC Act nor the Tenth Amendment allow the FTC to pursue its administrative action against the State Board. Likewise, the Commerce Clause does not allow the FTC to pursue its administrative enforcement action against State Board. U.S. CONST. art. I § 8, cl. 3. This is because, in essence, the FTC is attempting to instruct the State Board on how to regulate the practice of dentistry in North Carolina. State Board Memorandum at 17. The legislative branch—not the executive branch—is empowered to regulate interstate commerce. An executive branch agency is only permitted to regulate commerce under the delegation of Congressional authority. As stated, the FTC Act permits the FTC to address antitrust violations by people, corporations, and partnerships, but no such right exists regarding states acting pursuant to a clearly articulated statute. See supra, the Statement of Facts; see also Parker, 317 U.S. 341, 359-360 ("The governments of the states are sovereign within their territory save only as they are subject to the prohibitions of the Constitution or as their action in some measure conflicts with powers delegated to the National Government, or with Congressional legislation enacted in the exercise of those powers").

Further, even if the FTC did have a direct grant of authority from the legislative branch—which it does not—the State Board's enforcement activities are outside the reach of the Commerce Clause. As recently noted by the U.S. Supreme Court:

> [t]he dormant Commerce Clause is not a roving license for federal courts to decide what activities are appropriate for state and local government to undertake, and what activities must be the province of private market competition. . . . "The Commerce Clause significantly limits the ability of States and localities to regulate or otherwise burden the flow of interstate commerce, but it does not elevate free trade above all other values."

United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 343-44 (2007) (quoting Maine v. Taylor, 477 U.S. 131, 151 (1986)). In United Haulers Association, the U.S. Supreme Court affirmed the Second Circuit's decision holding that certain ordinances requiring private haulers to obtain permits from the defendant state agency to collect solid waste did not violate the Commerce Clause, when such ordinance benefitted a public facility but treated both in-state and out-of-state private parties in the same manner. The U.S. Supreme Court held that the ordinances at issue did not discriminate against interstate commerce and that any incidental burden that the ordinances may have on interstate commerce did not outweigh the benefits conferred on the state citizen; therefore, no violation of the Commerce Clause had taken place. 550 U.S. at 334. The Court in Parker reached a similar conclusion permitting indirect interstate commerce effects by a state. Chief Justice Stone stated that state regulations falling outside the power of federal Commerce Clause regulation yet directly or indirectly affecting interstate commerce should be upheld when:

> upon a consideration of all the relevant facts and circumstances it appears that the matter is one which may appropriately be regulated in the interest of the safety, health and well-being of local communities, and which, because of its local character, and the practical difficulties involved, may never be adequately dealt with by Congress.

Parker, 317 U.S. at 362. In Parker, ninety-five percent of the products regulated by California's state statute were ultimately sold outside the state. Yet the Court did not find any Commerce Clause violation stemming from the state law. Id. at 359.

In the instant action, the statute under which the State Board acted to enforce prohibitions against the unauthorized practice of dentistry does not discriminate against interstate commerce, and the benefits of the statute outweigh any burden that it places on interstate commerce. The State could have left the regulation of dentistry entirely up to the free market, but it made a

lawful choice to vest such responsibility with the State Board and empowered its members to take action to uphold their statutory duties. State Board Memorandum at 18; Hass, 883 F.2d at 1462. The state law restricts stain removal from teeth to licensed dentists and persons supervised by licensed dentists, and treats non-residents and residents identically, with only incidental effects on non-residents. Specifically, ensuring the health and safety of consumers of teeth whitening services far outweighs any incidental effects on interstate commerce; as recognized in United Haulers Association:

> [G]overnment is vested with the responsibility of protecting the health, safety, and welfare of its citizens. . . . These important responsibilities set state and local government apart from a typical private business. . . . Given these differences, it does not make sense to regard laws favoring local government and laws favoring private industry with equal skepticism.

550 U.S. at 342-43 (internal citations omitted); Hawkins v. North Carolina Dental Society, 355 F.2d 718, 720 (4th Cir. 1966) (Board of Dental Examiners is a "creature[] of the State of North Carolina" and that its functions are "concededly public functions of the state").

The FTC can make no argument that the FTC Act is intended to preempt the North Carolina state statutes at issue in this case. As recognized by the Fourth Circuit, federal law only can preempt state law under three circumstances: "(1) when Congress has clearly expressed an intention to do so ('express preemption'); (2) when Congress has clearly intended, by legislating comprehensively, to occupy an entire field of regulation ('field preemption'); and (3) when a state law conflicts with federal law ('conflict preemption')." Med-Trans Corp. v. Benton, 581 F. Supp. 2d 721, 730 (E.D.N.C. 2008); College Loan Corp. v. SLM Corp., 396 F.3d 588, 595-96 (4th Cir. 2005) (internal citations omitted). The "starting presumption is that Congress does not intend to supplant state law," and this presumption is "even stronger against preemption of state remedies . . . when no federal remedy exists." 396 F.3d. at 597 (internal citations omitted).

Further, the Fourth Circuit has determined that the decision on "whether a federal statute preempts a state statute . . . is a constitutional question." Am. Petroleum Inst. v. Cooper, 681 F. Supp. 2d 635, 641 (E.D.N.C. 2010) (internal citation omitted) (finding that a federal law did not preempt a North Carolina statute because the state law "did not stand as an obstacle" to the federal law). Therefore, it is a question properly put to this Court, not an administrative proceeding.

In this case, as discussed above, there is nothing in the legislative history of the FTC Act to suggest that Congress intended to preempt North Carolina's laws on the regulation of the practice of dentistry. Furthermore, even if the FTC could argue that the FTC Act is intended to preempt North Carolina's ability to regulate the practice of dentistry as it best sees fit—which it cannot—such preemption would be unconstitutional. Petersburg Cellular P'ship v. Bd. of Supervisors of Nottoway County, 205 F.3d 688 (4th Cir. 2000). In Petersburg Cellular Partnership, the plaintiff, a private business, applied for a conditional use permit to construct a communications facility. The defendant, a county board, recommended approval of the permit, subject to certain conditions, including approval by the Federal Aviation Administration ("FAA"). However, even though the FAA ultimately approved the application for the permit, the defendant rejected the application because of concerns expressed by county citizens. Plaintiff filed a federal lawsuit to reverse the board's decision, seeking a "mandatory injunction enforcing the terms of the Telecommunications Act by ordering the approval of plaintiff's application." The Fourth Circuit reversed the district court's grant of the mandamus, rejecting the plaintiff's arguments that the federal law permissibly preempted the state's licensing standards. The Fourth Circuit noted that:

> Preemption involves the *direct* federal governance of the people in a way that supersedes concurrent state governance of the same people, not a federal

> usurpation of state government or a "commandeering" of state legislative or executive processes for federal ends. . . . The deliberate choice that Congress made not to preempt, but to use, state legislative processes for siting towers precludes the federal government from instructing the states on how to use their processes for this purpose.

Id. at 703-04. In this case, Congress has made the deliberate choice to not preempt the states' ability to regulate the practice of dentistry, and the FTC is precluded from now attempting to assert the FTC Act as an offensive measure to usurp such control from North Carolina.

In sum, even if the FTC had been delegated the power to apply the FTC Act to a state agency acting pursuant to state law, the State Board's enforcement of North Carolina law would be outside the reach of federal Commerce Clause regulation.

CONCLUSION

The FTC's Motion to Dismiss, like its pleadings in the administrative proceeding, ignores the reality of this case and attempts to subvert the clear intent of the law through pure acts of sophistry. The State Board has filed this declaratory judgment action—not an appeal and certainly not an interlocutory appeal—against the FTC as a direct result of the FTC's violations of the State Board's constitutional rights and brazen defiance of its limited statutory authorization. Such an action can only be considered by the third branch – the judiciary – rather than the FTC's inherently biased administrative proceedings. Contrary to the FTC's claims, jurisdiction is properly before this Court, because this Court has the inherent and express constitutional authority to hear this case and controversy, and the State Board has no other plausible path to relief.

Thus, the FTC's "ongoing" administrative proceeding has no bearing upon: this Court's ability to hear this case now; this Court's jurisdiction over the case and controversy before it; this Court's ability to render judgment in that case and controversy; this Court's ability to order relief

for Plaintiff, either temporary or permanent; and, this Court's ability to consider such other remedies requested by the Plaintiff should the Plaintiff prevail. Therefore, and in view of the foregoing, Defendant's misplaced Motion to Dismiss should justifiably be summarily dismissed.

This the 24 day of March, 2011.

/s/ Noel L. Allen

Noel L. Allen
NC State Bar No. 5485
Alfred P. Carlton, Jr.
NC State Bar No. 6544
M. Jackson Nichols
NC State Bar No. 7933
Attorneys for Plaintiff
Post Office Drawer 1270
Raleigh, North Carolina 27602
Telephone: 919-755-0505
Facsimile: 919-829-8098
Email: nallen@allen-pinnix.com
acarlton@allen-pinnix.com
mjn@allen-pinnix.com

CERTIFICATE OF SERVICE

I hereby certify that on this the 24h day of March, 2011, I filed the foregoing Memorandum of Law in Opposition to Defendant's Motion to Dismiss with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

Seth M. Wood
Assistant United State Attorney
Civil Division
310 New Bern Avenue, Suite 800
Raleigh, NC 27601
Seth.wood@usdoj.gov

/s/ Noel L. Allen

Noel L. Allen

LEXSEE 1995 U S DIST LEXIS 21376

ANTOINE NASSIMOS, et al., Plaintiffs, v. BOARD OF EXAMINERS OF MASTER PLUMBERS, THOMAS BIONDI, Defendants.

CIVIL ACTION NO. 94-1319 (MLP)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

1995 U.S. Dist. LEXIS 21376; 1996-1 Trade Cas. (CCH) P71,372

March 31, 1995, Decided
March 31, 1995, FILED; April 4, 1995, ENTERED

NOTICE: [*1] NOT FOR PUBLICATION

DISPOSITION: Motion for summary judgment by defendants New Jersey Board of Examiners of Master Plumbers, Thomas Biondi, Alan Feid and Robert Muller GRANTED; motion to dismiss by defendants New Jersey Association of Plumbing-Heating-Cooling Contractors, Inc. and Bayshore Association of Plumbing, Heating and Cooling Contractors GRANTED; and application by plaintiffs for a preliminary injunction DENIED.

CASE SUMMARY:

PROCEDURAL POSTURE: The court considered a motion for summary judgment filed by defendants, the New Jersey Board of Examiners of Master Plumbers (board) and its members, a motion to dismiss filed by defendant trade associations, and plaintiff plumbers' application for a preliminary injunction. The plumbers alleged that there was a conspiracy to fix prices in violation of *§ 1* of the Sherman Antitrust Act, *15 U.S.C.S. § 1*.

OVERVIEW: A disciplinary complaint against a plumber for charging unconscionable prices lead to the filing of an action by the plumbers, who alleged that the board's enforcement of N.J. Admin. Code § 13:32-1.12 resulted in illegal price fixing. The court granted the motion for summary judgment. The board and its members were all state actors and thus fell within the "state-action exemption" to the federal antitrust laws. In enforcing the requirement that licensed master plumbers not charge excessive prices, the board was acting pursuant to a clearly articulated and affirmatively expressed state policy. The court granted the associations' *Fed. R. Civ. P. 12(b)(6)* motion to dismiss because the price fixing claim against the board failed so the associations could not conspire with the board to fix prices. Because the court resolved the issues set forth in plaintiffs' complaint in favor of defendants, there was no basis upon which to grant plaintiffs' request for injunctive relief so the application for injunctive relief was denied.

OUTCOME: The board and its members' motion for summary judgment and the associations' motion to dismiss were granted. The plumber's application for injunctive relief in their action alleging price fixing in violation of the Sherman Antitrust Act was denied.

CORE TERMS: plumber, plumbing, excessive, licensed, summary judgment, disciplinary, exemption, state-action, licensee, charging, consumer, antitrust laws, preliminary injunction, unconscionable,

conspiracy, locality, genuine, customary, Sherman Act, state policy, issue of material fact, disciplinary action, similar services, affirmatively, customarily, articulated, profession, antitrust, enforcing, entity

LexisNexis(R) Headnotes

Antitrust & Trade Law > Consumer Protection > Deceptive Acts & Practices > General Overview
Governments > State & Territorial Governments > Licenses

[HN1] N.J. Admin. Code § 13:32-1.12 provides: A licensee of the Board of Examiners of Master Plumbers shall not charge an excessive price for services. A price is excessive when, after review of the facts, a licensee of ordinary prudence would be left with a definite and firm conviction that the price is so high as to be manifestly unconscionable or overreaching under the circumstances. Factors which may be considered in determining whether a price is excessive include, but are not limited to, the following: the time and effort required; the novelty or difficulty of the job; the skill required to perform the job properly; any special conditions placed upon the performance of the job by the person or entity for which the work is being performed; the experience, reputation and ability of the licensee to perform the services; and the price customarily charged in the locality for similar services. Charging an excessive price shall constitute occupational misconduct within the meaning of *N.J. Stat. Ann. § 45:1-21(e)* and may subject the licensee to disciplinary action.

Civil Procedure > Summary Judgment > Opposition > General Overview
Civil Procedure > Summary Judgment > Standards > Legal Entitlement
Civil Procedure > Summary Judgment > Standards > Materiality

[HN2] A court shall enter summary judgment under *Fed. R. Civ. P. 56(c)* when the moving party demonstrates that there is no genuine issue of material fact and the evidence establishes the moving party's entitlement to judgment as a matter of law. In order to defeat a motion for summary judgment, the opposing party must establish that a genuine issue of material fact exists. A nonmoving party may not rely on mere allegations; it must present actual evidence that creates a genuine issue of material fact. Issues of fact are genuine only if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.

Antitrust & Trade Law > Sherman Act > General Overview
Civil Procedure > Summary Judgment > Burdens of Production & Proof > General Overview
Civil Procedure > Summary Judgment > Evidence

[HN3] Allegations of restraint of trade must be supported by "significant probative evidence" to overcome a motion for summary judgment.

Antitrust & Trade Law > Exemptions & Immunities > General Overview
Antitrust & Trade Law > Industry Regulation > Professional Associations & Higher Education > General Overview
Antitrust & Trade Law > Sherman Act > General Overview

[HN4] The Sherman Act was not intended to apply to certain types of governmental action by the states. There is a "state-action exemption" to the federal antitrust laws. The exercise of traditional regulatory functions by the states, including regulation of the practice of licensed professions, such as medicine, law, accounting, engineering, architecture, and plumbing, is governmental action which qualifies as a "state-action exemption" to the federal antitrust laws.

Antitrust & Trade Law > Exemptions & Immunities > General Overview
Antitrust & Trade Law > Sherman Act > General Overview
Governments > State & Territorial Governments > Licenses

[HN5] Where an entity is designated to serve as the state's administrative adjunct for purposes of regulating a licensed profession, the entity is considered a state agency for purposes of the "state-action exemption" to the federal antitrust laws. A state agency is presumed to act in the public interest and, in order to come within the "state action exemp-

tion," it need only establish that its action is taken pursuant to a clearly articulated and affirmatively expressed state policy.

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Failures to State Claims

[HN6] A court may dismiss a complaint pursuant to *Fed. R. Civ. P. 12(b)(6)* only if, accepting all well pleaded facts as true, plaintiff is not entitled to relief. All reasonable inferences from plaintiff's allegations must be accepted as true and viewed in the light most favorable to the non-moving party. The court may not dismiss a complaint unless plaintiff can prove no set of facts that would entitle him to relief. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.

COUNSEL: For ANTOINE NASSIMOS, plaintiff: JOEL N. KREIZMAN, EVANS, BURGESS, OSBORNE & KREIZMAN, ESQS., LITTLE SILVER, NJ. For JOSEPH FICHNER, JR., plaintiff: JOEL N. KREIZMAN, (See above). For MICHAEL CONROY, plaintiff: JOEL N. KREIZMAN, (See above). For ANTHONY ROSSI, plaintiff: JOEL N. KREIZMAN, (See above). For DANIEL W. WELTMAN, plaintiff: JOEL N. KREIZMAN, (See above). For GEORGE STEINER, plaintiff: JOEL N. KREIZMAN, (See above). For WILLIAM A. MOORE, plaintiff: JOEL N. KREIZMAN, (See above). For WILLIAM TEDESCO, plaintiff: JOEL N. KREIZMAN, (See above). For MICHAEL IGNOZZI, plaintiff: JOEL N. KREIZMAN, (See above). For ALAN HANZO, plaintiff: JOEL N. KREIZMAN, (See above).

For THE NEW JERSEY BOARD OF EXAMINERS OF MASTER PLUMBERS, defendant: BERTRAM P. GOLTZ, JR., OFFICE **[*2]** OF THE NEW JERSEY ATTORNEY GENERAL, DIVISION OF LAW, NEWARK, NJ. For NEW JERSEY ASSOCIATION OF PLUMBING, HEATING AND COOLING CONTRACTORS, INC., defendant: DAVID I FOX, FOX AND FOX, LIVINGSTON, NJ. For BAYSHORE ASSOCIATION OF PLUMBING, HEATING AND COOLING CONTRACTORS, defendant: DAVID I FOX, (See above). For ROBERT MULLER, INDIVIDUALLY AND IN HIS CAPACITY AS AN OFFICER OF THE NEW JERSEY ASSOCIATION OF PLUMBING, HEATING AND COOLING CONTRACTORS, defendant: BERTRAM P. GOLTZ, JR., (See above). For THOMAS BIONDI, defendant: BERTRAM P. GOLTZ, JR., OFFICE OF THE NEW JERSEY ATTORNEY GENERAL, DIVISION OF LAW, NEWARK, NJ. For ALAN FEID, defendant: BERTRAM P. GOLTZ, JR., (See above).

JUDGES: MARY LITTLE PARELL, United States District Judge

OPINION BY: MARY LITTLE PARELL

OPINION

MEMORANDUM AND ORDER

PARELL, District Judge

This matter is before the Court on motion for summary judgment by defendants New Jersey Board of Examiners of Master Plumbers, Thomas Biondi, Alan Feid and Robert Muller, on motion to dismiss by defendants New Jersey Association of Plumbing-Heating-Cooling Contractors, Inc. and Bayshore Association of Plumbing, Heating and Cooling Contractors, and on application by plaintiffs **[*3]** for a preliminary injunction. For the following reasons, defendants' motions are granted and plaintiffs' application is denied.

BACKGROUND

Plaintiffs here are master plumbers who are licensed by the New Jersey Board of Examiners of Master Plumbers (the "Board"), a licensing agency for the State of New Jersey, and who conduct business in the state of New Jersey. [1] Plaintiffs allege that defendants [2] conspired to fix prices in violation of *Section 1* of the Sherman Antitrust Act, *15 U.S.C. § 1*. [3] Plaintiffs assert that the Board, in conspiracy with the other defendants, has enforced N.J.A.C. § 13:32-1.12, which prohibits a licensee of the Board from charging "an excessive price for services," in a manner which effectively fixes the prices which may be charged by master plumbers for their services.

1 Two of the named plaintiffs are not licensed master plumbers but rather allege that they are currently in the process of obtaining such licensure. The Court notes that these two plaintiffs may not have standing to assert the claims in this action; however, since the issue of standing has not been raised by any of the defendants and since the issue is not material to the resolution of this litigation, the Court does not address it.

[*4]

2 Defendants here are the New Jersey Board of Examiners of Master Plumbers (the "Board"), the New Jersey Association of Plumbing-Heating-Cooling Contractors, Inc. ("NJAPHCC"), the Bayshore Association of Plumbing, Heating and Cooling Contractors ("Bayshore"), Thomas Biondi, Alan Feid and Robert Muller.

NJAPHCC and Bayshore are both trade associations. Thomas Biondi and Alan Feid are individuals who have both served as the Chairman of the New Jersey Board of Examiners of Master Plumbers. Robert Muller is an individual who has served as an officer of NJAPHCC and who testified on behalf of the State at a disciplinary hearing against plaintiff Joseph Fichner.

3 *Section 1* of the Sherman Antitrust Act provides that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce" is illegal. *15 U.S.C. § 1.*

[HN1] N.J.A.C. § 13:32-1.12 provides:

> (a) A licensee of the Board of Examiners of Master Plumbers shall not charge an excessive price for services. A price is excessive when, after review of the facts, a licensee of ordinary prudence would **[*5]** be left with a definite and firm conviction that the price is so high as to be manifestly unconscionable or overreaching under the circumstances.
>
> (b) Factors which may be considered in determining whether a price is excessive include, but are not limited to, the following:
>
> 1. The time and effort required;
>
> 2. The novelty or difficulty of the job;
>
> 3. The skill required to perform the job properly;
>
> 4. Any special conditions placed upon the performance of the job by the person or entity for which the work is being performed;
>
> 5. The experience, reputation and ability of the licensee to perform the services; and
>
> 6. The price customarily charged in the locality for similar services.
>
> (c) Charging an excessive price shall constitute occupational misconduct within the meaning of *N.J.S.A. 45:1-21(e)* and may subject the licensee to disciplinary action.

N.J.A.C. § 13:32-1.12.

Specifically, in Count One of the Amended Complaint, plaintiffs allege that the Board has accepted and enforced, as "the price customarily charged in the locality for similar services," the price established by defendants and members of the defendant trade associations. (*See* Am. Compl. **[*6]** at 4-6.) Plaintiffs further allege that they have been forced to charge the fixed prices in order to avoid disciplinary action under N.J.A.C. § 13:32-1.12(c).

The claim of price fixing set forth in Count Two is premised on allegations related to a disciplinary proceeding previously instituted by the Attorney General for the State of New Jersey against plaintiff Joseph Fichner. (*See* Am. Compl. at 6-8.)

This Court is familiar with this disciplinary proceeding. [4]

4 On October 6, 1993, Joseph Fichner filed a complaint with this Court, *Fichner v. Board of Examiners of Master Plumbers*, Civil Action No. 93-4597 (MLP), challenging the constitutionality of N.J.A.C. § 13:32-1.12, which is the same rule challenged by plaintiffs in the instant action, as this rule was applied against Fichner in the disciplinary proceeding. By Memorandum and Order dated September 27, 1994, this Court granted the defendants' motion to abstain in *Fichner v. Board of Examiners of Master Plumbers*, Civ. Action No. 93-4597 (MLP).

[*7] Based on consumer complaints, the Attorney General for the State of New Jersey filed a disciplinary complaint with the Board on July 30, 1992, [5] alleging that, in seven different consumer transactions for plumbing services between October 6, 1988 and July 2, 1991, Joseph Fichner charged prices which exceeded the usual and customary charges for such work. Hearings were held on the complaint on December 17, 1992, January 14, 1993, February 9, 1993, March 16, 1993 and April 28, 1993. Defendant Thomas Biondi was Chairman of the Board on these dates and presided over the hearings. Defendant Robert Muller testified on behalf of the State as to usual and customary prices charged by plumbers in the relevant locality. Mr. Fichner presented the testimony of Richard DiToma on the issue of pricing. By Final Decision and Order filed August 20, 1993, the Board determined that Fichner had "engaged in unconscionable overpricing of plumbing work performed for seven consumers by charging six consumers more than double the usual and customary rate for such services, and charging the seventh approximately $ 200.00 in excess of the usual and customary rate." (Ex. B. attached to Compl. filed in Civil **[*8]** Action No. 93-4597 (MLP).)

5 This was apparently the second disciplinary complaint filed against Joseph Fichner. A previous complaint had been filed in 1988 which resulted in a reprimand and an order to pay restitution.

DISCUSSION

I. *Motion for Summary Judgment*

The Board, Thomas Biondi, Alan Feid and Robert Muller move for summary judgment on the basis that these defendants are state actors and thus fall within the "state-action exemption" to the federal antitrust laws.

[HN2] A court shall enter summary judgment under *Federal Rule of Civil Procedure 56(c)* when the moving party demonstrates that there is no genuine issue of material fact and the evidence establishes the moving party's entitlement to judgment as a matter of law. *Celotex Corp. v. Catrett, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)*. In order to defeat a motion for summary judgment, the opposing party must establish that a genuine issue of material fact exists. *Jersey Cent. Power & Light Co. v. Lacey Township,* **[*9]** *772 F.2d 1103, 1109 (3d Cir. 1985), cert. denied, 475 U.S. 1013, 89 L. Ed. 2d 305, 106 S. Ct. 1190 (1986)*. A nonmoving party may not rely on mere allegations; it must present actual evidence that creates a genuine issue of material fact. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)* (citing *First Nat'l Bank of Arizona v. Cities Service Co., 391 U.S. 253, 290, 20 L. Ed. 2d 569, 88 S. Ct. 1575 (1968))*; *Schoch v. First Fidelity Bancorporation, 912 F.2d 654, 657 (3d Cir. 1990)*. Issues of fact are genuine only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc., 477 U.S. at 248*. Moreover, [HN3] "allegations of restraint of trade must be supported by 'significant probative evidence' to overcome a motion for summary judgment." *Bushie v. Stenocord Corp., 460 F.2d 116, 120 (9th Cir. 1972)* (quoting *First National Bank v. Cities Service, Inc., 391 U.S. 253, 20 L. Ed. 2d 569, 88 S. Ct. 1575 (1968))*.

The Supreme Court held in *Parker v. Brown, 317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307 (1943)* that [HN4] the Sherman Act was not intended to apply to certain **[*10]** types of governmental action by the states. Thus, the *Parker* court first established the well-settled "state-action exemption" to the federal antitrust laws. The exercise of traditional regulatory functions by the states, including regulation of the practice of licensed professions, e.g., medicine, law, accounting, engineering, architecture, plumbing, etc., is governmental action which

qualifies as a "state-action exemption" to the federal antitrust laws. *See Bates v. Arizona State Bar, 433 U.S. 350, 359-63, 53 L. Ed. 2d 810, 97 S. Ct. 2691* and 360 n.11 (1977) (state authority to regulate licensed professions should not be diminished by application of the Sherman Act); *California State Bd. of Optometry v. F.T.C., 285 U.S. App. D.C. 476, 910 F.2d 976, 982 (D.C. Cir. 1990); Healey v. Bendick, 628 F. Supp. 681, 689 (D.R.I. 1986).*

[HN5] Where an entity is designated to serve as the state's administrative adjunct for purposes of regulating a licensed profession, the entity is considered a state agency for purposes of the "state-action exemption" to the federal antitrust laws. *Brazil v. Arkansas Bd. of Dental Examiners, 593 F. Supp. 1354, 1362-63 (E.D. Ark. 1984), aff'd,* **[*11]** *759 F.2d 674 (8th Cir. 1985)* (citing *Gambrel v. Kentucky Board of Dentistry, 689 F.2d 612, 618 n. 2 (6th Cir. 1982), cert. denied, 459 U.S. 1208, 75 L. Ed. 2d 441, 103 S. Ct. 1198 (1983)).* A state agency is presumed to act in the public interest and, in order to come within the "state action exemption," it need only establish that its action is taken pursuant to a clearly articulated and affirmatively expressed state policy. *See Hallie v. Eau Claire, 471 U.S. 34, 45-47, 85 L. Ed. 2d 24, 105 S. Ct. 1713 (1985); Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48, 64, 85 L. Ed. 2d 36, 105 S. Ct. 1721 (1985).*

In 1968, the New Jersey Legislature enacted the State Plumbing License Law, *N.J. Stat. Ann. § 45:14C-1, et seq.*, which provides the Board with broad supervisory powers over the practice of plumbing. In order to carry out the responsibilities inherent in this broad vest of supervisory power, the Board is authorized to "adopt, amend and promulgate such rules and regulations which may be necessary to carry out the provisions of [this Act]." *N.J. Stat. Ann. § 45:14C-7.* The purpose of N.J.A.C. § 13:32-1.12, the rule promulgated by the **[*12]** Board and challenged by plaintiffs, is to protect consumers from being charged unconscionable prices by licensed plumbers and is reflective of the clearly articulated and affirmatively expressed state policy aimed at preventing such wrongful activity by licensed professionals. *See New Jersey Guild of Hearing Aid Dispensers v. Long, 75 N.J. 544, 565-66, 384 A.2d 795 (1978); see also American Trial Lawyers Assoc. v. New Jersey Supreme Court, 66 N.J. 258, 265, 330 A.2d 350 (1974); see generally Kugler v. Romain, 58 N.J. 522, 279 A.2d 640 (1971).* Thus, in enforcing the requirement that licensed master plumbers not charge excessive prices, the Board is acting pursuant to a clearly articulated and affirmatively expressed state policy.

Accordingly, it is clear that the Board, Thomas Biondi, Alan Feid and Robert Muller, [6] should be exempt from this suit which is based on an alleged violation of the Sherman Act, and the motion for summary judgment by these defendants shall be granted on this basis. *See Bates v. Arizona State Bar, 433 U.S. at 361-63.*

6 Defendants Thomas Biondi and Alan Feid are defendants here on the basis that they have both served as Chairman of the New Jersey Board of Examiners of Master Plumbers. Thus, these defendants are sued here only in their capacity as state officials. Robert Muller is a defendant here on the basis that he testified on behalf of the State at the hearings held on the disciplinary complaint filed against plaintiff Joseph Fichner. Thus, for purposes of the "state-action exemption" analysis here, defendant Muller was a state actor when he provided testimony at the request of the State.

[*13] II. *Motion to Dismiss*

Defendant trade associations, NJAPHCC and Bayshore, move to dismiss plaintiffs' complaint against them. [HN6] A court may dismiss a complaint pursuant to *Rule 12(b)(6)* "only if, accepting all well pleaded facts as true, the plaintiff is not entitled to relief." *Bartholomew v. Fischl, 782 F.2d 1148, 1152 (3d Cir. 1986).* Additionally, all reasonable inferences from plaintiff's allegations "must be accepted as true and viewed in the light most favorable to the non-moving party." *Sturm v. Clark, 835 F.2d 1009, 1011 (3d Cir. 1987).* This Court may not dismiss a complaint unless plaintiff can prove no set of facts which would entitle him to relief. *Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957).* "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Scheuer v. Rhodes, 416 U.S. 232, 236, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974).*

The crux of plaintiffs' complaint is that the Board, in conspiracy with the defendant trade associations, Biondi, Feid and Muller, has enforced N.J.A.C. § 13:32-1.12 in such a manner as to effectively force plumbers **[*14]** to charge a fixed price for services. The assertion that the rule prohibiting master plumbers from charging excessive and unconscionable prices results in a situation where only "fixed prices" can be charged for plumbing services in order to avoid the threat of disciplinary action by the Board is without merit. There is simply no support for plaintiffs' assertion that the Board's enforcement of the requirement that plumbers not charge unconscionably excessive prices has effectively "fixed" the price which a licensed plumber may charge for plumbing services. Indeed, evidence of the price customarily charged in the locality for similar services is only one of six factors which may be considered in determining whether a price charged is excessive within the meaning of the rule. Plaintiffs' theory of a conspiracy to fix prices rests on the allegation that the Board is wrongfully enforcing N.J.A.C. § 13:32-1.12 and since this allegation is without merit, plaintiffs' assertion of an antitrust violation fails as to defendants NJAPHCC and Bayshore as well. Accordingly, the motion to dismiss by defendants NJAPHCC and Bayshore shall be granted. [7]

7 Plaintiffs have applied to the Court for a preliminary injunction (a) prohibiting the Board from relying upon information provided by the defendant trade associations in determining the reasonableness of fees and (b) prohibiting the Board from enforcing the judgment issued against plaintiff Joseph Fichner. Since this Court herein has resolved the issues set forth in plaintiffs' complaint in favor of defendants, there is no basis upon which to grant plaintiffs' request for injunctive relief. *See Opticians Ass'n of America v. Independent Opticians of America, 920 F.2d 187, 191-92 (3d Cir. 1990)*; *Hoxworth v. Blinder, Robinson & Co., Inc., 903 F.2d 186, 197-98 (3d Cir. 1990)*; *In re Arthur Treacher's Franchisee Litigation, 689 F.2d 1137, 1143 (3d Cir. 1982)*. Accordingly, the application for a preliminary injunction shall be denied.

[*15] IT IS therefore on this *31st* day of March, 1995, **ORDERED** that the motion for summary judgment by defendants New Jersey Board of Examiners of Master Plumbers, Thomas Biondi, Alan Feid and Robert Muller is hereby **GRANTED;**

IT IS FURTHER ORDERED that the motion to dismiss by defendants New Jersey Association of Plumbing-Heating-Cooling Contractors, Inc. and Bayshore Association of Plumbing, Heating and Cooling Contractors is hereby **GRANTED**; and

IT IS FURTHER ORDERED that the application by plaintiffs for a preliminary injunction is hereby **DENIED.**

MARY LITTLE PARELL

United States District Judge