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.	)	(Fed. R. Civ. P. 65 and Local Civil Rules 7.1, 7.2 and 10.1)

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER, PRELIMINARY INJUNCTION, AND PERMANENT INJUNCTION

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INTRODUCTION

A. Summary of the Nature of the Case.

Plaintiff, the North Carolina State Board of Dental Examiners ("State Board" or "Plaintiff"), hereby submits this Memorandum in Support of its Motion for a Temporary Restraining Order ("TRO"), Preliminary Injunction, and Permanent Injunction ("Memorandum"), pursuant to Federal Rules of Civil Procedure 65 and Local Civil Rules 7.1, 7.2 and 10.1.

As set forth in more detail in the Statement of the Facts (Section I.B, *infra*), Complaint Counsel for the Federal Trade Commission ("Complaint Counsel") currently is pursuing an administrative proceeding ("Administrative Proceeding") against the State Board before the Federal Trade Commission ("FTC," "Commission," or "Defendant"). In pursing this Administrative Proceeding, the Commission has violated—and continues to violate—the State Board's constitutional rights under Article I, Section 8 (the "Commerce Clause"); the Tenth Amendment to the U.S. Constitution; and Sections 4 and 5 of the FTC Act (15 U.S.C. §§ 44-45). If the Commission is permitted to proceed with these violations, the State Board—and, therefore, North Carolina's consuming public—will suffer immediate, permanent, and irreparable harm.

On February 1, 2011, the State Board filed a Complaint for Declaratory Judgment and Preliminary and Permanent Injunction against the FTC ("Complaint"), which is incorporated herein by reference, on the grounds that the FTC is violating the State Board's constitutional rights under the following provisions of the U.S. Constitution: Article I, § 8 (the Commerce Clause); the Tenth Amendment; Article III, § 2, Cl. 2 (original jurisdiction over actions against states); and the Due Process Clause of the Fifth Amendment. For the reasons detailed within this Memorandum, the State Board respectfully moves the Court:

a. To immediately stay and preliminarily and permanently enjoin the FTC from illegally asserting jurisdiction it does not have over the State Board;

b. To 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; and

c. To award the relief requested by the State Board in the Complaint.

B. Statement of the Facts.[1]

i. The State Board.

The State Board was created by North Carolina statute in 1879 when the N.C. General Assembly enacted North Carolina's Dental Practice Act ("Dental Practice Act"). The Dental Practice Act recognizes that the practice of dentistry affects the State's public health, safety, and welfare and declared that only "qualified" persons be permitted to practice dentistry. N.C. Gen. Stat. § 90-22(b). The statutory purpose of the State Board is "the regulation of the practice of dentistry" in North Carolina. N.C. Gen. Stat. § 90-22(b).

As a North Carolina state agency, the State Board 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 -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.

Additionally, the State Board must file annual reports regarding its finances, as well as 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. §§ 90-44, 93B-2, 93B-4. 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. The State

[1] The State Board incorporates by reference the facts set forth in its Complaint, filed on February 1, 2011.

Board's activities, which are taken in accordance with North Carolina statute, are subject to supervision and review by the Joint Legislative Administrative Procedure Oversight Committee.[2]

As to the unauthorized practice of dentistry, 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). 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. 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. 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. §§ 143-291 to –300.1A), and is entitled to legal defense from the Attorney General (N.C. Gen. Stat. § 143-298).[3]

The State Board's enforcement of the Dental Practice Act is subject to the State constitutional prohibition against monopolies.[4] 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]

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-

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[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."

[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).

555(3)-(4). 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 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 U.S. 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 in good faith. N.C. Gen. Stat. § 150B-40(b) (burden of proof is on party seeking disqualification of an agency member).

ii. FTC's Administrative Proceeding.

After a two-year investigation conducted by FTC staff members, Complaint Counsel filed a complaint against the State Board on June 17, 2010, which initiated the Administrative Proceeding. The Administrative Complaint, attached to the Complaint as Exhibit A, is predicated on the

[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 . . . ."

allegation that the State Board is "colluding to exclude non-dentists from competing with dentists in the provision of teeth whitening services." (*See* Admin. Compl., "Nature of the Case") Specifically, Complaint Counsel alleges that the State Board "has engaged in extra-judicial activities aimed at preventing non-dentists from providing teeth whitening services in North Carolina" by:

a. Transmitting "letters to non-dentist teeth whitening providers, communicating to the recipients that they were illegally practicing dentistry without a license and ordering the recipients to cease and desist from providing teeth whitening services" (Admin. Compl., ¶ 20);

b. Engaging in communications that "threatened and discouraged non-dentists who were considering opening teeth whitening businesses by communicating to them that teeth whitening services could be provided only under the direct supervision of a dentist" (Admin. Compl., ¶ 21); and

c. Issuing "letters to third parties, including mall owners and property management companies . . . stating that teeth whitening services offered at mall kiosks are illegal (Admin. Compl., ¶ 22).

Complaint Counsel also affirmatively alleges that the State Board's "exclusion of the provision of teeth whitening services by non-dentists does not qualify for a state action defense nor is it reasonably related to any efficiencies or other benefits sufficient to justify its harmful effect on competition." Admin. Compl., ¶ 23. Before Complaint Counsel filed the Administrative Complaint, the Commission voted to approve the Administrative Complaint because it felt that it had "reason to believe" the allegations set forth in the Administrative Complaint were true—including the allegations that the FTC has jurisdiction over the State Board. See 16 C.F.R. § 3.11.

Clearly, the Defendant has predetermined that the State Board is not entitled to state action immunity in the Administrative Proceeding; this predetermination is contrary to over 67 years of case law interpreting the meaning of Parker v. Brown, 317 U.S. 341 (1943) and contrary to the intent held by Congress when it enacted the FTC Act and other antitrust laws. Defendant's Administrative Proceeding against the State Board is based on a new theory of law, created and lobbied for by the

Commission[8] and its staff for several years, but completely unsupported by statute or case law.[9] This new theory is that state licensing agencies that are comprised of a majority of licensees are private—not state—entities and therefore are not entitled to the immunity from federal antitrust laws that states are guaranteed. By the Commission's estimation, any minute day-to-day action, regulatory or otherwise, by a state board comprised of a majority of licensees is suspect. Indeed, all such state licensing boards—in other words, the vast majority of agencies throughout the United States that are charged with regulating the legal, dental, medical, nursing, engineering, and architecture professions—are now presumptive violators of federal antitrust law.

The Commission's theory has thrown into doubt portions of the North Carolina statute that authorizes the State Board's structure and regulatory activities. By law, the State Board is required to be comprised of a majority of dentists. N.C. Gen. Stat. § 90-22(b).[10] Also by law, the State Board members may participate in State Board business even if those activities directly impact their own business. N.C. Gen. Stat. § 138A-38(a).

Again and again, federal courts have upheld the structure of such state agencies, and even have called on state agencies to actively supervise private actors in order to meet federal antitrust requirements. For instance, in Earles v. State Board of Certified Public Accountants, the Fifth Circuit reversed the district court's denial of the defendant state board's motion to dismiss, based on

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[8] See, e.g., FEDERAL TRADE COMMISSION, REPORT OF THE STATE ACTION TASK FORCE at 55 (Sept. 2003), http://www.ftc.gov/os/2003/09/stateactionreport.pdf (calling state agencies "quasi-governmental institutions" and recommending that the courts and Congress "clarify and rationalize the criteria for identifying the quasi-governmental entities that should be subject to active supervision").

[9] Despite the fact that the Commission's new theory has not been contemplated by Congress or approved by the federal courts—and is therefore without any legal justification—the Commission believes it is "common sense." Complaint Counsel's Memorandum in Reply to Respondent's Corrected Memorandum in Opposition to Complaint Counsel's Motion for Partial Summary Judgment at 13 (hereinafter "Complaint Counsel Reply") ("The exclusion of non-dentists may result in Board members and the Board's constituents obtaining higher prices for teeth whitening and a greater volume of teeth whitening procedures.").

[10] As stated above, the State Board shares this structure with the vast majority of state licensing agencies, not just in North Carolina, but in the rest of the country as well.

its immunity under the U.S. Constitution and the state action doctrine. In so holding, the Court noted that, "[d]espite the fact that the State Board is composed entirely of CPAs who compete in the profession they regulate, the public nature of the State Board's actions means that there is little danger of a cozy arrangement to restrict competition." 139 F.3d 1033, 1041 (5th Cir.), reh'g denied, 146 F.3d 869, cert. denied, 525 U.S. 982 (1998).

This U.S. District Court for the Eastern District of North Carolina has addressed the entitlement of state agencies that are comprised of industry professional to immunity under the state action doctrine. In Flav-O-Rich, Inc. v. N.C. Milk Commission, the Court granted the N.C. Milk Commission summary judgment against the plaintiff's complaint alleging antitrust violations. The Court held that that the Commission was entitled to state immunity, even though State statute required that a number of Commission members be engaged in the business of milk processing. 593 F. Supp. 13, 17 (E.D.N.C. 1983, Opinion by Dupree, Judge).

Despite the federal case law and state statutes, the Commission charges that, in order to bring itself into compliance with the Commission's demands, the State of North Carolina must change the composition of the State Board so that it is not comprised of a majority of licensees.[11] Alternatively, the Commission alleges that the State must change the North Carolina Dental Practice Act to allow for minute and specific supervision of the State Board's activities by the state courts, state legislature, attorney general, or an executive branch agency such as a department of health. Complaint Counsel's Memorandum in Opposition to Respondent's Surreply and Motion for Leave to File Limited Surreply, at 4. The Commission claims that, in the absence of such supervision, "with

[11] The Commission's untenable position gives rise to a number of new questions. For instance, how many licensees on a state board should be considered too many? Is it permissible to have one less licensee than non-licensee on a state board, or should non-licensees outnumber licensees by more than one? Are there professions that are deemed "too close" to being the licensed profession going to also be in violation of this requirement? For example, would a state board of dental examiners that is comprised of a majority of dental hygienists truly have a different view of unsupervised teeth whitening services than their dentist counterparts? Lastly, what impact would such a change have on state boards' handling of decisions that require a high degree of technical knowledge of an issue?

regard to the alleged unauthorized practice of dentistry, Respondent's authority is limited, definite, and specific: Respondent may file lawsuits." Complaint Counsel Reply, at 15.

The Commission's assertion is not only wrong, but it is also a clear misstatement of the plain meaning of the North Carolina General Statutes. Pursuant to those legislative enactments, the State Board may:

a. Refer matters for criminal prosecution (see N.C. Gen. Stat. §§ 90-40, 90-40.1(a));

b. Investigate violations of the N.C. Dental Practice Act (N.C. Gen. Stat. § 90-41(d));

c. File a civil lawsuit to enjoin the unlawful practice of dentistry and to declare the actions to be a "public nuisance" (N.C. Gen. Stat. § 90-40.1(a)); and

d. Examine the "adverse party and witnesses before filing a complaint" to enjoin a person from violating the Dental Practice Act (N.C. Gen. Stat. § 90-40.1(d)).

The alleged activities by the State Board upon which the Commission predicates its Administrative Complaint—*i.e.*, communicating to third parties that they (or others) are engaging in the unlawful practice of dentistry before seeking an injunction in court—are mere lesser powers that are encompassed in the State Board's statutory rights to enforce the Dental Practice Act. The Commission's argument makes no sense in light of the fact that the North Carolina legislature specifically provided that the North Carolina Dental Practice Act "shall be **liberally construed** to carry out [its] objects and purposes." N.C. Gen. Stat. § 90-22(a) (emphasis added).

Furthermore, the State Board's right to take preliminary steps to gain compliance with state law and potentially to bring a legal action is well established in practice and generally recognized as a common feature of state regulatory agencies. As the State Board has explained repeatedly to the Commission, the letters it sent to individuals regarding the unauthorized practice of dentistry[12] were mere warnings, which absent resort to an enforcement proceeding as authorized by law, were admittedly unenforceable. In all instances, the courts of North Carolina were—and continue to be—

[12] In no such "cease and desist" letters did the State Board "order[ ] the recipients to cease and desist from providing teeth whitening services," as alleged in Para. 20 of the Administrative Complaint, Exhibit A to the Complaint. Rather, the recipients were warned to not engage in the unlawful practice of dentistry.

open to any individual receiving such a "cease and desist" letter who feels "aggrieved" and, to date, none have sought redress in the courts.

ARGUMENT

I. LEGAL STANDARD FOR TRO, PRELIMINARY INJUNCTION, AND PERMANENT INJUNCTION.

A federal court may issue a TRO, preliminary injunction, and permanent injunction upon notice to the adverse party. Fed. R. Civ. P. 65. To obtain such injunctive relief, a plaintiff must show "that he is likely to succeed on the merits; that he is likely to suffer irreparable harm in the absence of preliminary relief; that the balance of equities tips in his favor; and that an injunction is in the public interest." Kalos v. Greenwich Ins. Co., No. 10-1959, 2010 U.S. App. LEXIS 25600, at * 3 (4th Cir. Dec. 14, 2010) (per curiam); see C. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2948.1 155 (2d ed. 1995). There must be a clear showing that harm is imminent; it is not enough that harm be possible at some future date. Winter v. NRDC, Inc., 555 U.S. 7, 28 (2008). Because the State Board can establish the factors that are necessary to obtain injunctive relief, a stay of the Administrative Proceeding should be issued.

II. THE STATE BOARD WILL SUFFER IMMEDIATE, PERMANENT, AND IRREPARABLE INJURY IF IT IS NOT GRANTED IMMEDIATE INJUNCTIVE RELIEF.

A. The Commission Is Compromising the State Board's Ability to Fulfill Its Statutory Duty to Enforce the Dental Practice Act.

By pursuing the Administrative Proceeding, the Commission is denying the State Board the right to investigate and to warn violators of its laws, and ultimately denying the State Board its ability to enforce the North Carolina Dental Practice Act—which is preventing the State Board from fulfilling the statutory purpose of its creation.

As an initial matter, Complaint Counsel has accompanied its investigation and action against the State Board with a number of public proclamations that have resulted in immediate, permanent, and irreparable damage to the State Board. The Commission's press releases and filings have had,

and continue to have, an immediate negative effect on the State Board's ability to protect the health, safety and welfare of North Carolina citizens by carrying out its day-to-day functions, such as investigating the unauthorized practice of dentistry. Specifically, such conduct inevitably will have—and has had—a chilling effect on the public's willingness to seek relief from illegal activities by petitioning the State Board for redress of grievances by filing complaints with the State Board.[13]

Beyond that, the Commission's attack on the very composition of the State Board has created fundamental uncertainty and insecurity among State Board members and State Board staff as the question of their legitimacy, and the State Board's organizational structure is thrown into doubt. Given that months (even years) may go by before the Commission produces a final decision on this matter, it is critical to the functioning of the State Board that this Court intervene and put an end to the doubt and uncertainty that the Commission's novel and poorly thought-out legal theories have created.

Moreover, beginning with the Commission's press release and continuing with its filings in the Administrative Proceeding, the Commission has defamed the reputation of the State Board and its professional members, by alleging without evidence that they are "colluding to exclude non-dentists from competing with dentists in the provision of teeth whitening services." See, e.g. Fed. Leasing, Inc. v. Underwriters at Lloyd's, 650 F.2d 495, 500 (4th Cir. 1981); see, e.g. K-Mart Corp. v. Oriental Plaza, Inc., 875 F.2d 907, 915 (1st Cir. 1989) (harm to reputation "is the type of harm not readily measurable or fully compensable in damages—and for that reason, more likely to be found 'irreparable'").

[13] See ¶ 48(c) of the Complaint, describing Complaint Counsel's *ex parte* communications with members of the public who filed complaints with the State Board, as well as the chilling effect those activities are having on the public's willingness to seek relief from the State Board as to illegal activities.

B. The Commission's Continuing Breach of the State Board's Constitutional Rights Constitutes Irreparable Harm.

It is well established that a breach of constitutional rights may constitute irreparable harm. See, e.g. A.A. v. Needville Indep. School Dist., 701 F. Supp. 2d 863 (S.D. Tex 2009) (violation of plaintiff's constitutional rights to free exercise, freedom of speech, and due process constituted irreparable harm); see, e.g. Ginorio v. Gomez, 301 F. Supp. 2d 122, 133-34 (S.D. Tex. 2009) (violation of plaintiff's due process rights constituted irreparable harm). As alleged in the Complaint, the Commission's action is a total breach of the sovereign immunity of the State of North Carolina. Such action is contrary to State Board's rights under the Commerce Clause and Tenth Amendment. See infra, Sections III.B and III.C. Allowing the Administrative Proceeding to continue would condone the Commission's illegal actions that constitute acts by the executive branch without a Congressional delegation of authority.

Furthermore, as evident from the settlement overtures it previously has made to the State Board, the Commission clearly has been attempting to obtain from the State Board a stipulation into which the State Board has no ability to enter—that is, a stipulation that the FTC has jurisdiction over the State Board and antitrust veto power over the State's statutes. Although this stipulation would have largely absolved the State Board of any supposed wrongdoing (*i.e.*, conspiracy, which a serious crime under North Carolina law), it also would have forced the State Board to stipulate that the FTC has the authority to preempt the manner in which North Carolina has chosen to regulate the practice of dentistry—a stipulation that would fly in the face of the Tenth Amendment. In addition, such a stipulation also would require the State Board to admit that its structure and functioning are seriously flawed.

Based on the existing and future dangers of the confusion that the Commission's Administrative Proceeding is creating, the chilling effect on state agency investigative and enforcement efforts, and the Commission's continued exercise of extra-judicial lawmaking power

against the State Board and other agencies, the Commission's action against the State Board must be stopped immediately. Therefore, based upon this showing of irreparable and immediate harm, the State Board is entitled to a TRO, preliminary injunction, and permanent injunction against the Commission to stay the Administrative Proceeding.

III. THE STATE BOARD IS LIKELY TO SUCCEED ON THE MERITS OF ITS CASE.

To obtain injunctive relief in this matter, the State Board must show that it is likely to succeed on the merits of its case. Winter, 555 U.S. at 44. The State Board is entitled to fulfill its legislated mandate to protect the public by taking action against the unauthorized practice of dentistry in North Carolina. Since the federal government has enacted no law abridging this right, the FTC does not have the power to unilaterally enforce against the State Board antitrust statutes clearly meant to regulate private, non-state actors. Therefore, the State Board is likely to succeed in its causes of action against the Commission, as set forth in Counts I, III, IV, and VI of the Complaint, which are resulting from the Commission's course of conduct that is in violation of its Congressionally-delegated authority, as provided in Sections 4 and 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. §§ 44-45, and the requirements established by Parker v. Brown; the U.S. Constitution Article I, Sect. 8; and the Fifth and Tenth Amendments to the U.S. Constitution.[14]

A. The Commission Is Exceeding Its Authority as Provided by Sections 4 and 5 of the Federal Trade Commission Act and Its Accompanying Case Law.

i. Violation of Section 4 of the Federal Trade Commission Act and Its Accompanying Case Law.

By the express terms of the statute, the Commission only is authorized to enforce the FTC Act against "persons, partnerships or corporations . . . from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting

[14]U.S. CONST. amend. X (reserving to the states and the people the powers which are not delegated to the federal government).

commerce." 15 U.S.C. § 45. Clearly, the State Board does not meet the definition of a corporation, as Section 4 of the FTC Act defines "corporation" as a company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, which is organized to carry on business for its own profit or that of its members . . . ". 15 U.S.C. § 44. Likewise, the State Board is not a partnership. Rather, the State Board is a North Carolina agency that exists for no other reason but to protect the health, welfare, and safety of North Carolina citizens through the regulation of the practice of dentistry. The activities of the State Board have no apparent "proximate relation to lucre," which is a factor recognized by the U.S. Supreme Court as essential to establish such jurisdiction. California Dental Ass'n v. FTC, 526 U.S. 756, 766-68 (1999); see also Nat'l Fed. of the Blind v. FTC, 420 F.3d 331 (4th Cir. 2005) (affirming lower court holding that the FTC had no jurisdiction over non-profit organization engaged in telemarketing for charitable purposes).

Furthermore, neither North Carolina nor the State Board is a person under the FTC Act. Although a few federal courts have recognized that a State may be considered a person under certain antitrust laws, no such decision has been rendered with regard to the FTC Act. Furthermore, federal courts have not recognized state agencies, such as the State Board, as "persons" under the FTC Act.[15]

ii. Violation of Section 5 of the Federal Trade Commission Act and Its Accompanying Case Law.

By law, federal antitrust legislation is aimed at violations by non-state actors; state actors are exempt from these laws. This distinction was established by the U.S. Supreme Court in Parker v.

[15] To the extent that the FTC itself has issued agency decisions finding that state agencies are "persons" under the FTC, such decisions hold no persuasive authority in this Court. Montgomery Ward & Co. v. FTC, 379 F.2d 666 (7th Cir. 1967) ("Because the Commission is charged with the administration of a regulatory statute through practical application of its expertise, prior Commission decisions are not of compelling precedential value.").

Brown, where the Court examined the record of Congressional debate to determine that the Sherman Antitrust Act was not intended to apply to state government actions. The Court held that:

> 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. The same conclusion holds true of the Federal Trade Commission Act.

Since Parker, Congress has had nearly 70 years to amend the FTC Act to include states (or even just state agencies) within the ambit of federal antitrust legislation; it has not done so. It has chosen to eliminate state sovereign immunity in other circumstances, but not for state agencies. See, e.g., Genentech, Inc. v. Regents of the Univ. of Cal., 143 F.3d 1446, 1449 (1998); see also 137 Cong. Rec. 53930-02 (daily ed. Mar. 21, 1991) (citing Public Law 102-560, enacted in 1992, "for the purpose of abrogating Eleventh Amendment immunity in patent cases, to close a 'sovereign immunity loophole'").

The federal courts have had many opportunities to make such changes to state action immunity as well; they have reiterated again and again the determination that federal antitrust laws do not apply to a sovereign state:

> In determining whether the actions of a political subdivision of a State as well as those of a state legislature are immune from the Sherman Act, we must interpret the provisions of the Act "in the light of its legislative history and of the particular evils at which the legislation was aimed." Those "particular evils" did not include acts of governmental bodies. Rather, Congress was concerned with attacking concentrations of private economic power unresponsive to public needs, such as "these great trusts, these great corporations, these large moneyed institutions."

City of Lafayette v. La. Power & Light Co., 435 U.S. 389, 428 (1977) (citing 21 Cong. Rec. 2562 (1890) and Apex Hosiery Co. v. Leader, 310 U.S. 469, 489 (1940)). The courts have reached the same conclusion when the Commission has attempted to eliminate state action immunity through direct rulemaking rather than adjudication:

> We can find nothing in the language or history of subsequently adopted amendments to support a finding that Congress has expanded the FTC's jurisdiction to embrace state action. In the absence of any evidence of such a purpose, we turn to well-established rules of statutory construction, which we find dispositive. See INS v. Cardoza-Fonseca, 480 U.S. 421, 449 (1987) ("ordinary canons of statutory construction compelling").

California State Bd. of Optometry v. FTC, 910 F.2d 976, 980 (D.C. Cir. 1990).

Similarly, in Opdyke Inv. Co. v. Detroit, the Sixth Circuit held that: "[t]he 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." 883 F.2d 1265, 1272 (6th Cir. 1989) (citing H.Rep. No. 965, 98th Cong., 2d Sess. 4, 1984 U.S. Code Cong. & Admin. News at 4605).

In reliance upon the Supreme Court's decision in Parker, federal courts have repeatedly granted state agencies immunity from federal antitrust legislation. See, e.g, Hass v. Oregon State Bar, 883 F.2d 1453, 1461 (9th Cir. 1989); Gambrel v. Kentucky Board of Dentistry, 689 F.2d 612, 616-18 (6th Cir. 1982); see also Brazil v. Arkansas Board 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. Board 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). In these and other cases, state agencies need only prove that they acted pursuant to a clearly articulated state statute for their actions to be treated as immune. In 1985, the Supreme Court held that "it is likely" that that requirement alone must be met for state agencies to enjoy immunity. Town of Hallie v. City of Eau Claire, 471 U.S. 34, 46 n.10 (1985). Since then, not a single state agency has been required to make a showing beyond the clearly articulated state statute requirement in order to enjoy state action immunity.

The Commission cannot act against the State Board in this matter without unmistakably clear legislative intent directing the federal government to remove from the states the power that they have traditionally held and exercised. See, e.g., California State Bd. of Optometry v. FTC, 910 F.2d 976, 981 (D.C. Cir. 2990) (If Congress intends to alter the "usual constitutional balance between the

States and the Federal Government," it must make its intention to do so "unmistakably clear in the language of the statute."); Will v. Michigan Dep't of State Police, 491 U.S. 58, 63 (1989) (internal citations omitted) ("In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that **the legislature** has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.").

During the Administrative Proceeding and now, the State Board maintains that the actions which are at issue in this matter—that is, the Board's investigation of non-dentist providers of teeth whitening services and the sending of warning letters regarding these services—are clearly within the ambit of the North Carolina Dental Practice Act and the State Board's prerogative to enforce that Act. The Commission seeks to impose a requirement that the State Board's investigation and preliminary warning letters be subject to another test beyond the "clearly articulated" requirement. Clearly, the Commission is twisting case law that is aimed at private, non-governmental parties to suit its aims in this proceeding against a state agency and stretching to create a wrong where none exists.

Unlike state actors, private parties must show "active supervision" by the state for each of their actions to be permitted. See California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980). Furthermore, even if state agencies were required to show "active supervision"—which they are not—a state agency demonstrates such "active supervision" when it acts pursuant to state statutes to supervise the actions of private actors. Flav-O-Rich, Inc., 593 F. Supp. at 18 (concluding that, although the Commission was a state agency, it demonstrated active supervision of a clearly-articulated state law by holding "regular meetings" and by its monitoring of private milk producers' "flow of price and cost information," as required by state statutes).

Lacking examples of state agencies being actively supervised, the Commission draws on examples of the active supervision of foreign corporations (Continental Ore Co. v. Union Carbide &

Carbon Corp., 370 U.S. 690 (1962)); completely non-state private membership organizations (Kentucky Household Goods Carrier Ass'n, 139 F.T.C. 404 (2005); and National Society of Professional Engineers v. United States, 435 U.S. 679 (1978)); and price-setting by liquor retailers (Midcal, 445 U.S. at 97). Perhaps these examples would be relevant, instructive, and reasonable if this was an unsettled area of case law, or if the courts and Congress had left room for doubt in the matter. But, as discussed, decades of federal cases and Supreme Court *dicta* draw a clear distinction between private commercial actors and the state government. The Commission is not prosecuting this case to enforce a law, or to clarify even the lightest shade of gray in an existing law: it is prosecuting this case as part of a larger campaign to enact new case law in order to increase its power and reach.

Therefore, the Commission's enforcement action violates the well-understood and well-established meaning of Sections 4 and 5 of the Federal Trade Commission Act, and the long-standing well-established principles first articulated in Parker v. Brown: federal antitrust legislation is intended to apply to private actors, and not states.

B. The Commission Is Violating Article I, Section 8 of the U.S. Constitution.

By overstepping the constitutionally-established divide between federal and state powers to regulate commerce, the Commission is violating the Article I, Section 8 of the U.S. Constitution (the "Commerce Clause"). The Commerce Clause gives the legislative branch (and not the executive branch) the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." U.S. CONST. art. I, § 8. In order for an executive branch agency to regulate commerce—including the enforcement of federal antitrust legislation as in this case—it must have Congressional authority. However, no such authority exists in this case. If it did exist, it would be found in Sections 4 and 5 of the FTC Act. As has already been discussed, no such grant of power is found there.

Even if the Commission was delegated the power to regulate commerce under the Commerce Clause, the limits on that Commerce Clause would prevent any regulation of the State Board. A state statute only triggers scrutiny under the Commerce Clause in two situations: one, if it discriminates, either *de jure* or *de facto*, against interstate transactions; or two, if the statute is fair and evenhanded, but nevertheless burdens interstate transactions as an incidental effect. Hass, 883 F.2d at 1462. The limitation of stain removal services to licensed dentists and persons supervised by licensed dentists set forth in the North Carolina General Statutes does not discriminate against interstate transactions. Non-licensed North Carolina residents providing stain removal services without dentist supervision are treated the same as non-residents crossing the border into North Carolina to provide these services. Any effect on interstate commerce is merely incidental. By law, such incidental effects are permissible so long as they are not "clearly excessive in relation to the putative local benefits." Maine v. Taylor, 477 U.S. 131, 138 (1986) (quoting Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)). The Dental Practice Act's regulation of teeth whitening services provides significant legal benefits in that it prevents harm to consumers and ensures that persons harmed by illegal conduct have recourse. This benefit far outweighs any concerns about out-of-state persons receiving or providing illegal stain removal services.

State agencies have the right to enforce state laws such as this one without Commerce Clause-mandated Congressional interference. See, e.g., Hass, 883 F.2d at 1453. Further, as discussed elsewhere in this brief, the executive branch does not have the right even to attempt regulation of state laws without Congressional authorization. Therefore, the Commission's efforts to impose federal antitrust legislation on the State Board amounts to a violation of the Article I, Section 8 of the U.S. Constitution.

C. The Commission Is Violating the Tenth Amendment to the U.S. Constitution.

In overstepping its legislative authority, the Commission has violated the Tenth Amendment to the U.S. Constitution. This Amendment sets forth the principle that "the powers not delegated to

the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. This state sovereignty guaranty is closely related to the principle of state action immunity. See, e.g., In the Matter of Massachusetts Furniture & Piano Movers Ass'n Inc., Final Order of the FTC, Docket 9137 (1983) (finding that the state action exemption "derives from the Tenth Amendment reservation of state sovereignty..."). The State Board was created "as the agency of the State for the regulation of the practice of dentistry in this State." N.C. Gen. Stat. § 90-22(b). As discussed elsewhere in this brief, and as established via nearly seven decades of federal case law, the State Board is entitled to immunity from federal antitrust law as a state agency. By failing to recognize this immunity, the Commission is violating the State Board's Constitutional right, set forth under the Tenth Amendment, to the power to regulate the practice of dentistry.

D. The Commission Is Violating the Fifth Amendment to the U.S. Constitution.

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.

Such fairness and impartiality are notably absent in the Administrative Proceeding. First, the State Board has been deprived of a fair and impartial adjudicatory proceeding because, prior to the filing of the Administrative Complaint, the Commission already had decided and publicly stated that: 1) the FTC has jurisdiction over the State Board; 2) the State Board does not have state action immunity; and 3) a state agency comprised of a majority of licensee members is a *per se* antitrust conspiracy. See N. Sims Organ & Co. v. Securities & Exchange Comm'n, 293 F.2d 78, 81 (2d Cir. 1961) ("when the body which is the investigator, the prosecutor and the judge starts a proceeding by saying that the order of the [Securities and Exchange] Commission asserts that members of its staff have reported information tending to show that Organ has violated anti-fraudulent provisions, it

creates an impression which could be interpreted as tending to indicate that the [Securities and Exchange] Commission had already made up its mind.").

Furthermore, the State Board has been deprived of a fair and impartial adjudicatory proceeding because its proceeding has been conducted under inherently biased FTC rules of practice. See the State Board Complaint at 28-29; see also Gilligan, Will & Co. v. Securities & Exchange Comm'n, 267 F.2d 461, 468-69 (2d Cir. 1959) ("the [Securities and Exchange] Commission's reputation for objectivity and impartiality is opened to challenge by the adoption of a procedure from which a disinterested observer may conclude that it has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it."). The FTC's newly revised Rules of Practice, under which the State Board's case has proceeded, were seriously criticized during their drafting as being potentially harmful to respondents' due process rights. See generally, American Bar Association Section on Antitrust Law Comments in Response to the Federal Trade Commission's Request for Public Comment Regarding Parts 3 and 4 Rules of Practice Rule Making (Nov. 2008).[16]

For the reasons detailed here and in the State Board's Complaint, the Commission's Rules have not permitted the State Board to exercise its due process. See Cinderella Career and Finishing Sch., Inc. v. FTC, 425 F.2d 583, 591 (D.C. Cir. 1970) ("The procedures which have been established (under the FTC Act) are designed to provide for proceedings in which both the Commission **and the responding party** have a fair and equal opportunity to present exhibits and witnesses designed to establish the legitimacy of their argument.") (emphasis added).

Other substantially unfair and biased decisions that have tainted the State Board's ability to obtain a fair hearing include the FTC's persistent and flagrant procedural and discovery abuses; refusal to allow administrative proceeding be conducted in a location other than its headquarters in

[16] E.g., The American Bar Association's concern that there will no longer be "the regular turnover of Commissioners [which] has tended to ensure that the Commission that votes to issue a complaint is often different from the Commission that sits in a quasi-judicial function to hear an appeal from an ALJ's initial decision." ABA Section on Antitrust Law Comments in Response to the Federal Trade Commission's Request for Public Comment Regarding Parts 3 and 4 Rules of Practice Rule Making (Nov. 6, 2008) at 3.

Washington, D.C. (over 300 miles from the State Board's witnesses in North Carolina); and refusal to stay the Administrative Proceeding during the two-month period in which the parties have been waiting for rulings on dispositive motions.

As a result of the foregoing, the Commission's Administrative Proceeding against the State Board is fundamentally flawed under the Due Process Clause, and no valid order can result from those administrative proceedings. See FTC v. Atlantic Richfield Co., 567 F.2d 96, 107 n.24 (D.C. Cir. 1977) (holding that an interpretation by the FTC of its Rules of Practice in violation of the respondent's due process rights had to be rectified or else "the whole proceeding would have gone for naught"). 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.

E. Absence of Jurisdiction Moots the Administrative Proceeding (and Incidentally Moots Questions of Exhaustion of Remedies as Well).

This civil action is not an interlocutory appeal of an administrative proceeding. It is a direct challenge to the Commission's unlawful and unconstitutional assertion of jurisdiction over the State Board. The question in this matter is whether the Commission may exceed its statutory and constitutional authority to overturn a state law and assert jurisdiction over a state agency. This is not a question that can be resolved by the Commission itself; it is a question that must be settled by the federal judicial branch. Since this action is not an appeal and since the issue in this action is whether jurisdiction exists, the doctrine of exhaustion of judicial remedies is moot. However, even in the event that the Commission does raise the issue of exhaustion of administrative remedies, the following is an explanation of why the State Board is not required to continue its futile proceedings before the FTC.

Federal courts routinely recognize that when administrative remedies cannot and will not provide adequate relief, there is no need to exhaust the remedies. Instead, a direct suit in federal court is appropriate. See Myers v. Bethlehem Shipbuiding Corp., 303 U.S. 41 (1983); but see Downen v. Warner, 481 F.2d 642, 643 (9th Cir. 1973) (holding that the exhaustion of remedies requirement "is not an absolute bar to judicial consideration and where justification for invoking the doctrine is absent, application is unwarranted"); see also Muhammad v. Secretary of the Army, 770 F.2d 1494, 1495 (9th Cir. 1985) (finding that a litigant may be excused from exhausting administrative remedies "if the remedies do not provide an opportunity for adequate relief . . . or if substantial constitutional questions are raised"); see also Gibson v. Berryhill, 411 U.S. 564, 575 (1973) (not requiring exhaustion of administrative remedies when "the question of the adequacy of the administrative remedy . . . [is] for all practical purposes identical with the merits of [the plaintiff's] lawsuit").

There is no adequate relief available to the State Board through the Administrative Proceeding for several reasons. The proceeding itself is having an immediate negative effect on the State Board's abilities to carry out day-to-day functions, such as investigating the unauthorized practice of dentistry. The Administrative Proceeding is also having 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.

Further proceedings before the FTC cannot address the substantial Constitutional questions that are at issue in the State Board's request for injunctive relief, as set forth *supra*. "Resolving a claim founded solely upon a constitutional right is singularly suited to a judicial form and clearly inappropriate to an administrative board." Thorne v. U.S. Dep't of Defense, 916 F. Supp. 1358, 1364 (E.D. Va. 1996) (citing Glines v. Wade, 586 F.2d 675, 678 (9th Cir. 1978), rev'd on other grounds sub nom. Brown v. Glines, 444 U.S. 348 (1980)). It is well established that a litigant is not required to exhaust administrative remedies where the administrative process is being challenged as

procedurally defective. Mathews v. Eldridge, 424 U.S. 319, 330 (1976) (upholding federal court jurisdiction for a constitutional challenge to administrative-review proceedings because that "constitutional challenge is entirely collateral to [the] substantive claim of entitlement"). Here, the Commission's investigation and administrative action against the State Board is based upon the Commission's biased strategy with a predetermined outcome, rendering any attempt at administrative remedies useless.

Lastly, because of the Commission's bias, the exhaustion of administrative remedies is futile in this case. In contradiction of over 67 years of case law interpreting the meaning of Parker v. Brown and the intent of Congress in enacting the FTC Act and other antitrust laws, the Commission alleges that the State Board is not entitled to state action immunity in this matter. If this case proceeds to a hearing before the administrative law judge, it is almost inevitable that it will then end up before the Commission, because it will either be appealed by the State Board or by the Commission itself. There is an extremely low—perhaps zero—chance that the Commission then will dismiss its own action against the State Board. As a general practice, the Commission and administrative law judges have held in favor of respondents in only a handful of the hundreds of actions brought in the past decade. Even when an administrative law judge finds in favor of a respondent, the appeal before the Commission can drag on for even longer. See In the Matter of Union Oil Company of California, FTC Docket No. 9305 (in which the Commission's appeal of the administrative law judge's finding in favor of the respondent lasted for over a year and a half before the parties settled the matter). Therefore, continued administrative proceedings in this case would be futile. See McCarthy v. Madigan, 503 U.S. 140, 148 (1992) (citing Houghton v. Shafer, 392 U.S. 639, 640 (1968) ("in view of Attorney General's submission that the challenged rules of the prison were 'validly and correctly applied to petitioner,' requiring administrative review through a process culminating with the Attorney General 'would be to demand a futile act.'")).

IV. THE EQUITIES WEIGH IN FAVOR OF GRANTING THE STATE BOARD INJUNCTIVE RELIEF.

The balance of equities strongly favors issuance of the requested TRO, preliminary injunction, and permanent injunction. See ¶¶ 58-59 of the Complaint describing the State Board's motion to stay the Administrative Proceeding. Complaint Counsel did not object to the motion, no harm would have been effected had the motion been granted, and the State Board's right to an unfettered hearing of its motion to dismiss the Administrative Proceeding would have been preserved. Thus, it would appear that the issuance of the requested TRO, preliminary injunction, and permanent injunction will cause no harm to the Defendant.

Unless this Court issues the requested injunctions, the State Board likely will be unable to undo the damage caused by the continued Administrative Proceeding against it by the Commission. Such damage will be serious and widespread, as it affects not just the conduct of day-to-day business by the State Board, but also the health, safety, and welfare of North Carolina citizens and the structure and activities of the vast majority of state licensing agencies in the country. The State Board recognizes the Commission's right to lobby for changes to laws with which it disagrees; however, the balance of equities requires that the Commission lobby through traditional and legal means, rather than through a bald-faced, unlawful assertion of jurisdiction, and an illegal and baseless administrative action against a state agency.

V. AN INJUNCTION IS IN THE PUBLIC INTEREST.

As set forth above, 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, indeed, reported cases of actual injury,[17] even though the number of documented cases of public harm caused by non-dentist teeth

[17] 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).

whitening operations may have been diminished by the fact that such non-dentists routinely obtain waivers of liability from their customers before engaging in illegal teeth whitening.

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.

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 than 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.

Beyond these significant physical dangers, there is ample proof that 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. There can be little doubt that an injunction to protect the State Board's ability to enforce the Dental Practice Act will be in the public's best interest. Indeed, the very statutory purpose of the Dental Practice Act—and, thus, the purpose of the State Board—is to protect the health, safety, and welfare of North Carolina citizens through the regulation of the practice of dentistry.

CONCLUSION

Accordingly, the State Board respectfully urges this Court to grant a TRO, Preliminary Injunction, and Permanent Injunction regarding the Commission's ongoing Administrative Proceeding against the State Board and regarding defamatory statements by the Commission against the State Board.

This the 2nd day of February, 2011.

Respectfully submitted,

ALLEN AND PINNIX, P.A.

/s/ Noel L. Allen

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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.	**[PROPOSED] TEMPORARY RESTRAINING ORDER AND OTHER EQUITABLE RELIEF**

Plaintiff North Carolina State Board of Dental Examiners ("State Board" or "Plaintiff"), having filed its Complaint in this matter and having moved for the issuance of a Temporary Restraining Order ("TRO"), and this Court having considered the State Board's Complaint for Declaratory Judgment and Preliminary and Permanent Injunction ("Complaint"), Memorandum in Support of Plaintiff's Motion for TRO, Preliminary Injunction, and Permanent Injunction ("Memorandum"), and Motion for TRO, filed in support thereof, and now being advised in the premises, finds that:

1. The Court has jurisdiction over the subject matter of the case, and there is good cause to believe it will have jurisdiction of all parties hereto.
2. There is good cause to believe that venue lies properly with this Court.
3. There is good and probable cause to believe that the State Board will ultimately succeed in establishing that the Defendant Federal Trade Commission ("Commission" or "Defendant") has engaged in and is likely to engage in acts or practices that violate Art.

Art. I, Sect. 8, Cl. 3 of the U.S. Constitution; the 5th and 10th Amendments to the U.S. Constitution; the Federal Trade Commission Act; and the progeny of *Parker v. Brown,* 317 U.S. 341 (1943). Therefore, Plaintiff is likely to prevail on the merits of this action.

4. There is good cause to believe that immediate and irreparable damage to the Court's ability to grant effective final relief for the State Board will occur from the investigation and legal action commenced by the Defendant unless the Defendant is immediately restrained by Order of this Court. Thus, there is good cause to relieve Plaintiff of the duty to provide the Defendant with prior notice of Plaintiff's motion.
5. Weighing the equities and considering Plaintiff's likelihood of success on the merits, a TRO providing for injunctive relief is in the public interest.

[PROPOSED] ORDER

IT IS THEREFORE ORDERED that the Defendant and its Commissioners, agents, employees, Administrative Law Judges, and attorneys, are hereby temporarily restrained and enjoined from:

I. Further prosecution of the administrative action *In the Matter of the North Carolina [State] Board of Dental Examiners*, Docket No. 9343.

II. Proceeding with the Administrative Hearing scheduled to begin on February 17, 2011 and all prehearing conferences and motions, and other actions, pleadings, or depositions, pending the determination of Plaintiff's request for a preliminary injunction.

III. Making, or assisting others in making, expressly or by implication, any oral or written statement or representation of material fact alleging that the Plaintiff's actions in connection to the administrative action *In the Matter of the North Carolina [State] Board of Dental Examiners*, Docket No. 9343 constitute an unlawful combination or conspiracy,

or constitute anticompetitive or unfair methods of competition in or affecting commerce in violation the Federal Trade Commission Act.

IV. Illegally asserting jurisdiction over the State Board in connection with actions taken by the State Board pursuant to a clearly articulated state law.

IT IS FURTHER ORDERED THAT that the Defendant and its Commissioners, agents, employees, Administrative Law Judges, and attorneys will retract and remove from the Commission's website all false, derogatory, and unsubstantiated assertions against the State Board, present and past members of the State Board, and the dentists of North Carolina.

IT IS FURTHER ORDERED THAT that the Defendant will award the State Board its reasonable costs, including attorney fees, incurred in defending the preliminary investigation, the Administrative Complaint, and this action.

SERVICE OF PLEADINGS

IT IS FURTHER ORDERED that the Defendant shall serve on counsel for the State Board all memoranda, affidavits, and other evidence on which they intend to rely at the preliminary injunction hearing in this matter at least three (3) calendar days prior to the hearing date, by 3:00 p.m., Eastern Time.

IDENTIFICATION OF WITNESSES

IT IS FURTHER ORDERED that if the Defendant intends to present the testimony of any witness at the preliminary injunction hearing, it shall serve on the Plaintiff a statement disclosing the name, address, and telephone number of any such witness, and either a summary of the witness' expected testimony or an affidavit revealing the substance of such witness' expected testimony, at least three (3) calendar days prior to the hearing date, by 3:00 p.m., Eastern Standard Time.

ACKNOWLEDGMENT OF RECEIPT OF ORDER BY DEFENDANTS

IT IS FURTHER ORDERED that the Defendant, within three (3) business days of receipt of this Order, shall submit to counsel for the State Board a truthful sworn statement acknowledging receipt of this Order.

EXPIRATION DATE OF TEMPORARY RESTRAINING ORDER

IT IS FURTHER ORDERED that the Temporary Restraining Order granted herein shall expire on _____, 2011, at 11:59 p.m., unless within such time the Order, for good cause shown, is extended, or unless the Defendant consents that it should be extended for a longer period of time.

DATE OF NEXT COURT PROCEEDING

IT IS FURTHER ORDERED that the Defendant shall appear before this Court on the_____ day of _____, 2011, at _____ ___.m. at the United States Courthouse, Courtroom _____, for the United States District Court for the Eastern District of North Carolina, to show cause, if any there be, why this Court should not enter a preliminary injunction, pending final ruling on the Complaint, against said Defendant, its Commissioners, agents, employees, Administrative Law Judges, and attorneys enjoining them from further violations of Plaintiff's sovereign rights.

SERVICE OF ANSWERING AFFIDAVITS, MEMORANDA, AND OTHER EVIDENCE

IT IS FURTHER ORDERED that the Defendant shall serve answering affidavits, pleadings, and legal memoranda on counsel for Plaintiff not less than four (4) business days prior to the hearing on Plaintiff's request for a preliminary injunction. The Defendant shall serve copies of all such materials on Plaintiff by personal service, U.S. mail, facsimile, or electronic mail to:

If by personal service to:

Noel L. Allen
Allen and Pinnix, P.A.
333 Fayetteville Street, Suite 1200
Raleigh, North Carolina 27601

If by U.S. mail to:

Noel L. Allen
Allen and Pinnix, P.A.
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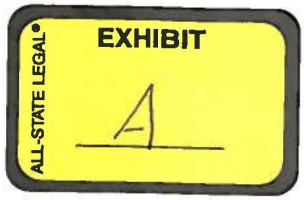
Raleigh, North Carolina 27602

Facsimile: 919-829-8098

Electronic mail: nallen@allen-pinnix.com.

This the _____ day of February, 2011.

LOUISE W. FLANAGAN
Chief United States District Judge



LEXSEE 2010 U.S. APP. LEXIS 25600

PETER KALOS; VERON LEE KALOS, Plaintiffs - Appellants, v. GREENWICH INSURANCE COMPANY; WISENBAKER HOLDINGS, LLC, Defendants - Appellees.

No. 10-1959

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

2010 U.S. App. LEXIS 25600

November 22, 2010, Submitted
December 14, 2010, Decided

NOTICE: PLEASE REFER TO *FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1* GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

PRIOR HISTORY: [*1]

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. (1:10-cv-00841-JCC-TRJ). James C. Cacheris, Senior District Judge.

DISPOSITION: AFFIRMED.

COUNSEL: Peter and Veron Lee Kalos, Appellants Pro se.

Shannon Jacob Posner, LAW OFFICES OF SHANNON J. POSNER, PA, Sparks, Maryland, for Appellee Greenwich Insurance Company.

JUDGES: Before GREGORY, SHEDD, and AGEE, Circuit Judges.

OPINION

PER CURIAM:

In July 2010, Peter and Veron Lee Kalos filed this action against Greenwich Insurance Company ("Greenwich") and Wisenbaker Holdings, LLC, ("Wisenbaker") seeking emergency injunctive relief, a declaratory judgment, and "other equitable relief relating to a cloud on title to real property." The Kaloses simultaneously filed a motion for emergency injunctive relief echoing the claims in their complaint and asking the district court to "forestall a sale or further clouding of trust property."

The district court held a hearing on the Kaloses' emergency motion for injunctive relief. At the conclusion of the hearing, the district court denied the motion, explaining that given the numerous rulings against them, the Kaloses could not demonstrate a likelihood of success on the merits. The district court also [*2] dismissed the Kaloses' complaint with prejudice because the claims had previously been adjudicated by other courts. We affirm.

The doctrine of collateral estoppel precludes relitigation of issues that are identical to issues actually determined and necessarily decided in prior litigation in which the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate. *McHan v. Comm'r, 558 F.3d 326, 331 (4th Cir. 2009)*. Res judicata precludes the assertion of a claim that has already been "litigated to a final judgment by that party or such party's privies and precludes the assertion by such parties of any legal theory, cause of action, or defense which could have been asserted in that action." Ohio *Valley Envtl. Coalition v. Aracoma Coal Co., 556 F.3d 177, 210 (4th Cir. 2009)* (quoting 18 James Wm. Moore et al., *Moore's Federal Practice § 131.10(1)(a)* (3d ed. 2008)). Application of these doctrines constitutes a legal question that we review de novo. See *Sartin v. Macik, 535 F.3d 284, 292 (4th Cir. 2008)*; *Q Int'l Courier Inc. v. Smoak, 441 F.3d 214, 216 (4th Cir. 2006)*.

Here, the record reveals that the Kaloses have filed numerous actions against Greenwich and [*3] Wisenbaker in state courts, all related to the foreclosure of the property at issue in the instant case. These claims

have been conclusively adjudicated and may not be relitigated.

Turning to the Kaloses' request for emergency injunctive relief, we agree with the district court that they did not make the requisite showing. In order to obtain a preliminary injunction, a plaintiff must establish "[1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 129 S. Ct. 365, 374, 172 L. Ed. 2d 249 (2008)*; *Real Truth About Obama, Inc. v. Federal Election Comm'n, 575 F.3d 342, 346 (4th Cir. 2009)*. The district court concluded that the Kaloses were not entitled to injunctive relief because they could not demonstrate a likelihood of success on the merits. In light of the numerous adverse state court judgments and their preclusive effects, we agree with this determination. Nothing in the other factors causes us to reach a different result.

Accordingly, we affirm the district court's [*4] judgment. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

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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.

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.*

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.

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, "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 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)*.

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. 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