

**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,)	REPLY MEMORANDUM IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND OTHER EQUITABLE RELIEF
Plaintiff,)	
v.)	
FEDERAL TRADE COMMISSION,)	(Local Civil Rule 7.2(f)(1))
Defendant.)	

On February 2, 2011, Plaintiff, the North Carolina State Board of Dental Examiners (“State Board” or “Plaintiff”), filed with this Court a Complaint for Declaratory Judgment and Preliminary and Permanent Injunction (“Complaint”) against Defendant, the Federal Trade Commission (the “FTC,” “Commission,” or “Defendant”).

On February 3, 2011, Plaintiff filed with this Court a Motion for Temporary Restraining Order and Other Equitable Relief (“Motion”) and an accompanying Memorandum in Support of Plaintiff’s Motion for Temporary Restraining Order (“TRO”), Preliminary Injunction, and Permanent Injunction (“Memorandum”).

On February 4, 2011, Plaintiff filed with this Court a Motion and Memorandum in Support of Motion for Expedited Relief.

On February 7, 2011, Defendant filed with this Court its Opposition to Plaintiff’s Motion for Temporary Restraining Order and Other Equitable Relief (“Opposition Memorandum”).

Plaintiff hereby moves this Court to grant the relief sought in the Plaintiff’s Complaint, Motions, and Memorandums, for the reasons set forth below:

As set forth in the Complaint, Motion, and Memorandum, which are incorporated herein by reference, the State Board meets the legal standard for a TRO, preliminary injunction, and permanent injunction. As detailed in the Complaint, Motion, and Memorandum, and for the reasons set forth below:

- The State Board will suffer immediate, permanent, and irreparable injury if it is not granted immediate injunctive relief;
- The State Board is likely to succeed on the merits of its case;
- The equities weigh in favor of granting the State Board injunctive relief; and
- An injunction is in the public interest.

In addition to reiterating that this suit is a direct challenge to the Commission's unconstitutional and illegal actions, the Plaintiff seeks to respond to two particularly troubling claims set forth in Defendant's Opposition Memorandum.

I. Plaintiff's Action Is Not an "Appeal."

First, the Defendant claims that, by initiating this lawsuit, Plaintiff is attempting to "appeal" the Commission's investigation and action against the State Board. Opposition Memorandum at 15 *et seq.* This is not correct. Plaintiff's action against the Commission **is not** an interlocutory appeal. This action **is** based upon the fundamental legal principle that jurisdiction, or the absence thereof, can be raised at any time in any proper forum. Plaintiff's action therefore stands on its own as an action at law and in equity seeking a determination of rights. The Commission's investigation and action is an unlawful and unconstitutional assertion of jurisdiction -- an *ultra vires* "grab"-- and violates several constitutional and statutory provisions. Further, the Commission's investigation and action is clearly without any basis as to any kind of Congressionally-authorized pre-emption. *See Med-Trans Corp. v. Benton*, 581 F.

Supp. 2d 721, 730 (E.D.N.C. 2008) and American Petroleum Institute v. Cooper, 681 F. Supp. 2d 635, 640-42 (E.D.N.C. 2010).

As set forth in the incorporated documents, Plaintiff has brought this action in this Court to gain relief from Commission's unlawful actions against the State of North Carolina, the State Board, and the dentists of North Carolina. The State Board is not facing a normal federal administrative agency proceeding. It is the victim of a policy-driven, premeditated attempt to supplant the prerogatives of sovereign states, as assured by the Tenth Amendment. The ripeness of the Commission's case against the State Board is moot; the exhaustion of administrative remedies is moot. The State Board cannot obtain relief that it requires from the Commission; therefore, it is bringing a direct suit – not an appeal – in federal court.

Further, whereas this suit is premised upon the Defendant's violations of the United States Constitution, the Defendant's recently-issued (February 3, 2011) "decision" (the "recent decision") which affirmed its pre-determined self-serving claim of jurisdiction, did so without so much as a mention of either the U.S. Constitution, much less the specific statutes which Defendant seeks to preempt through the administrative proceeding. Defendant cannot avoid the constitutional issues presented in this action by ignoring the state statutes it seeks to directly preempt with its unauthorized and unprecedented interpretation of federal antitrust laws that contain no expression of Congressional intent to displace state laws.

This action is about the Defendant's effort to preempt North Carolina statutes setting forth the State's chosen legislative mandate to protect the public health, safety, and welfare of its citizens by regulating dentistry within its borders. At issue are *not* lesser rules or policy adopted by the Board, but the plain language of a statute adopted by the General Assembly. The Defendant has not and cannot cite a rule or policy regarding teeth whitening because none exist.

For example, the Defendant hangs its case upon the cease and desist letters the State Board sent to businesses in cases where it had *prima facie* evidence of a statutory violation based upon third-party complaints. Contrary to Defendant's persistent and creative wrongful assertion, none of those letters order anyone to stop "teeth whitening." As this court can see from the attached example (Exhibit A), the letters do not mention "teeth whitening" and do not cite a board rule or policy. Rather, the letters literally repeat the applicable statute verbatim, and conclude by simply stating:

The Board requests that you cooperate in the current investigation by calling the Board's office and arranging to be interviewed by the Board's investigator and by submitting a written response to this notice and order within fifteen (15) days of the receipt of this letter.

Defendant has not alleged, and there is no evidence that any of the letters ever resulted in anyone ceasing and desisting a lawful business activity permitted by North Carolina statute.

By statute, the General Assembly defined the practice of dentistry to include offering or rendering the service to the public of "removal of stains from teeth" (N.C. Gen. Stat. § 90-29(b)(2)), made unauthorized practice illegal (N.C. Gen. Stat. § 90-40), and established its State Board, comprised of a majority of licensees (N.C. Gen. Stat. § 90-22(b)), and mandated it to enforce that statute (N.C. Stat. § 90-40.1). Again, these statutes were not afforded their due weight by the FTC. Indeed, the FTC based its opinion on the premise that at issue is only the State Board's "interpretation" of the statutes or the State Board's "policy."

As this Court has held in American Petroleum Institute, "[d]etermining whether a federal statute preempts a state statute ... is a constitutional question." 681 F. Supp. 2d at 641. In Med-Trans Corp., this Court considered a question of preemption that involved a federal law that explicitly preempted state law. 581 F. Supp. 2d at 731. By contrast, the Supreme Court held in Parker v. Brown, 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.

317 U.S. 341, 350-51 (1943). Instead, the Court found that "[t]here is no suggestion of a purpose to restrain state action in the Act's legislative history. The sponsor of the bill which was ultimately enacted as the Sherman Act declared that it prevented only "business combinations." Id. at 351; 21 Cong. Rec. 2562, 2457; see also at 2459, 2461. The Sherman Act's purpose "was to suppress combinations to restrain competition and attempts to monopolize by individuals and corporations, abundantly appears from its legislative history." The Defendant has not, and, indeed cannot, and should not assume the mantle of the Third Branch and rule upon its own constitutional limits. That is this court's duty.

II. The Public Interest and the Health, Safety, and Welfare of North Carolina Citizens.

Second, the Defendant claims that an injunction at this stage will not be in the public interest. Opposition Memorandum at 25 *et seq.* However, contrary to the Defendant's claims:

- There is a greater public interest in the State of North Carolina's right to protect the health, safety, and welfare of its citizens from the unlicensed practice of dentistry than the Commission's right to bring a baseless lawsuit to advance its (so far unsuccessful) lobbying agenda.
- There is a greater public interest in protecting the State of North Carolina's sovereign right to enforce its clearly articulated state statute than in the Commission's right to circumvent the separation of powers and create new laws.

- There is a greater public interest in protecting the State of North Carolina's right to dictate the form and activities of its occupational licensing agencies than allowing the Commission's unfounded jurisdiction enlargement.
- The Defendant's administrative proceeding is interfering with the Plaintiff's ability to protect the public because of the chilling effect the investigation has had on public complaints, and by the obvious effort to distract the State Board and deplete its resources by forcing it to defend an administrative trial held 300 miles away from the State Board's office and almost all of its witness.
- Injunctive relief will cause no harm to the Defendant.

Other equities weighing in favor of granting Plaintiff injunctive relief as a matter of public policy factors include: the facts that the Defendant took over two years to investigate the State Board prior to filing its administrative complaint, and the Complaint Counsel did not object to the State Board's Motion for a Stay of the administrative proceedings (which the Defendant nevertheless denied).

If the Commission succeeds in creating its new federal antitrust law making, then every majority licensee licensing board in the country will be *per se* antitrust conspirators. The North Carolina State Board of Dental Examiners, and its counterparts regulating North Carolina's lawyers, engineers, architects, doctors, and general contractors, will all be violating federal law. To the Commission, every applicant denied admission to the profession, every disciplined licensee, and every unauthorized practitioner is a potential competitor. Such an extreme ruling calls into question every state licensing board's primary functions, making a *per se* antitrust conspiracy out of each license denial, disciplinary case, or unauthorized practice enforcement. The Congress has not hinted at such a preemption, and courts have not proclaimed it. C.f. Earles

v. State Bd. of Certified Pub. Accountants of Louisiana, 139 F.3d 1033 (5th Cir.), cert. denied, 525 U.S. 982 (1998) (granting a state board immunity from an antitrust challenge).

The Defendant preempts state statutes in three ways: by overriding a statutory definition of a professional practice wholly within the state; by substituting its theories for the General Assembly's determination of how that statute will be enforced; and, by countering the manner that states have efficiently and effectively protected their citizens for over a century through state agencies comprised of panels of experts. The result could be the *per se* illegality of every majority licensee state agency in the country. Such a radical change can only be implemented through an act of Congress rather than imposed by a closed-circuit process administered by what has been described as a "headless fourth branch of government."

This the 8th day of February, 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 8th day of February, 2011, I filed the foregoing PLAINTIFF'S Reply Memorandum in Support of Motion for Temporary Restraining Order and Other Equitable Relief with the Clerk of the Court using 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

NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS

W. STAN HARDESTY, D.D.S., President
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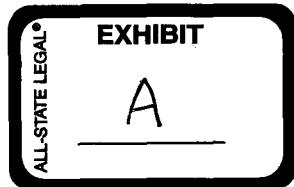
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NEPLUS S. HALL, R.D.H.

BOBBY D. WHITE, Chief Operations Officer

November 20, 2007

HAND-DELIVERED

Ms. Christiane Dotson
Ms. Sherry Nelson
Celebrity Smiles
c/o The Streets at SouthPoint
6910 Fayetteville Road
Durham, North Carolina 27713



NOTICE AND ORDER TO CEASE AND DESIST

Dear Ms. Dotson and Ms. Nelson:

The North Carolina State Board of Dental Examiners is investigating a report that you are engaged in the unlicensed practice of dentistry. Practicing dentistry without a license in North Carolina is a crime. See (NC General Statutes § 90-40 and §90-40.1).

You are hereby ordered to CEASE AND DESIST any and all activity constituting the practice of dentistry or dental hygiene as defined by North Carolina General Statutes §90-29 and §90-233 and the Dental Board Rules promulgated thereunder.

Specifically, G.S. 90-29(b) states that"A person shall be deemed to be practicing dentistry in this State who does, undertakes or attempts to do, or claims the ability to do any one or more of the following acts or things which, for the purposes of this Article, constitute the practice of dentistry:"

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

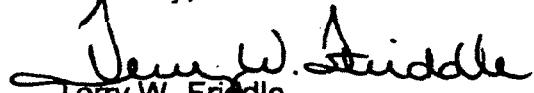
"(10) Performs or engages in any of the clinical practices included in the curricula of recognized dental schools or colleges."

Ms. Christiane Dotson
Ms. Sherry Nelson
November 20, 2007
Page Two

The North Carolina State Board of Dental Examiners is the state agency charged with regulating the practice of dentistry in North Carolina and is the proper agency to conduct this investigation. The Board may use any legal means at its disposal to conduct this investigation including, but not limited to, interviews with current and former patients, surveillance, and the hiring of undercover agents.

The Board requests that you cooperate in the current investigation by calling the Board's office and arranging to be interviewed by the Board's investigator and by submitting a written response to this notice and order within fifteen (15) days of the receipt of this letter.

Sincerely,


Terry W. Friddle
Deputy Operations Officer

THE NORTH CAROLINA STATE
BOARD OF DENTAL EXAMINERS

cc: Case Officer
Ms. Carolin Bakewell, Board Attorney
Mr. Frank Recker, Attorney at Law