11 03 2010

CERTIFICATE OF SERVICE

I hereby certify that on November 3, 2010, I electronically filed the foregoing Motion to Dismiss with the Federal Trade Commission using the FTC E-file system, which will send notification of such filing to the following:

Donald S. Clark, Secretary
Federal Trade Commission
600 Pennsylvania Avenue, N.W.

I also certify that I have sent courtesy copies of the document via Federal Express

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Jon Leibowitz, Chairman**
William E. Kovacic

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Introduction

The Federal Trade Commission ("Commission") filed this action on June 17, 2010, alleging that Respondent, the North Carolina State Board of Dental Examiners ("State Board"), a state agency, has conspired to restrain trade by enforcing a state statute, N.C. Gen. Stat. § 90-29(b)(2). This statute (not a rule, and certainly not a rule exceeding or contravening state law), along with other subsections of N.C. Gen. Stat. § 90-29(b), clearly and unambiguously provides that a person engages in the practice of dentistry when he or she "removes stains, accretions or deposits from the human teeth." Similar and even less specific dental practice laws have been upheld by the courts and attorneys general of other states. The Complaint was filed at the end of a two-year investigation.[1] Prior to filing its unprecedented assault on a state's constitutionally-protected prerogative to protect its citizens by regulating the professions, the Commission issued a press release declaring that the State Board, the state officials who are its members and, indeed, the dentists of North Carolina, have engaged in an illegal conspiracy. According to the press release and the Complaint, the State Board's actions constituted violations of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

From the beginning, the Commission demonstrated its misunderstanding of the State Board's legal status by misnaming the Respondent in its Complaint. Indeed,

[1] Ironically, the investigation that preceded this Complaint was apparently managed by a Commissioner who previously recused her self from tooth whitening related proceedings because a family member served as in-house counsel for a leading teeth-whitening product manufacturer. This is not to insinuate that any unlawful conduct occurred; it is only to point out one of several of the Commission's dual standards. On the one hand, the Commission deems all dentist members of the Board to be potential competitors and thus *per se* antitrust conspirators because they are enforcing a law that protects the public but coincidentally restricts competition. The same flawed perspective inevitably would lead to the conclusion that any Board action against any licensee restrains trade by reducing competition even if the conduct at issue is dangerous to the public and unlawful.

although repeatedly challenged for any authority supporting its radical theory, the Commission has offered only one case involving a private association, not a state agency. The arrogance of this assault is compounded by the facts that this case involves a non-price, non-commercial speech restriction; illegal teeth whitening services; a market definition contrived to include unlawful services and exclude the largest competitive force (over-the-counter sales

FACTS OF LAW

Although the Respondent disputes most of the factual allegations of the Complaint, for purposes of this motion they are deemed true. Nevertheless, the Complaint is cluttered with legal assertions that erroneously pass as "facts." This is particularly true regarding the very name of the Respondent, the legal status of the State Board, the status of State Board members, the statutory definition of the practice of dentistry, and the direct oversight of the State Board and its members by the executive, legislative, and judicial branches of the state. Thus Respondent sets forth the following matters as facts of law for purposes of the State Board's Motion. Unless otherwise indicated, citations are infra.

- The Respondent is a State Board and is an official state agency.
- The State Board members are state officials sworn to uphold State statutes and prohibited by state laws from

- The state statute also prohibits the unauthorized offering or rending of other services that have been associated with teeth whitening services.[2]

- The State Board is a quasi-judicial agency of the state.
- The State Board's enforcement of the Dental Practice Act is subject to the state constitutional prohibition against monopolies.
- State Board members are prohibited from material conflicts of interest by law.
- Congress has never expressly authorized the Commission to regulate dentistry or the business of teeth whitening.
- State law provides a variety of means for illegal teeth whitening businesses to challenge the State Board's enforcement of the statutes.
- There is no legal precedent for the Commission's position regarding the state action exemption.
- The Supreme Court consistently has held that states have the constitutional prerogative of regulating professions.
- Actions by the North Carolina Dental Society, a private association, to influence legislation or rule making is constitutionally protected as free speech and the right to redress grievances.

I. A State Agency Governed by State Officials Enforcing a Clearly Articulated State Statute Regarding Non-Price, Non-Commercial Speech Public Protection Qualifies for State Action Immunity as a Matter of Law.

The State Board's actions are immune from the application of the Federal Trade Commission Act ("FTC Act") under principles first set forth in Parker v. Brown, 317 U.S. 341 (1943). Decades of case law, starting with Parker v. Brown, have established that state agencies such as the State Board need only demonstrate that their actions are taken pursuant to a "clearly articulated and affirmatively expressed" state law in order to enjoy state action immunity. See generally, e.g., California Retail Liquor Dealers Ass'n

v. Midcal Aluminum, 445 U.S. 97 (1980); Neo Gen Screening Inc. v. New England Newborn Screening Program, 187 F.3d 24 (1st Cir. 1999); Nassimos v. N.J. Board of Examiners of Master Plumbers, No. 94-1319, 1995 U.S. Dist. LEXIS 21376 (D.N.J. Apr.

> 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."

California State Bd. of Optometry, 910 F.2d at 981. Seventy years later, Congress' silence remains unbroken regarding the Commission's lack of jurisdiction over state agency enforcement of state statutes.

Therefore, the State Board meets the well-established requirements for a state agency to enjoy state action immunity, as such requirements have been set forth in Earles v. State Board of Certified Public Accountants of Louisiana, 139 F.3d 1033, 1041 (5th Cir. 1998), cert. denied, 525 U.S. 982 (1998) (dismissing a suit against the Louisiana State Board of Certified Public Accountants for failure to state a claim upon which relief can be granted, based on the application of the state action doctrine), and numerous other cases. Even if all the facts alleged in the Commission's complaint were proven true, the State Board still would be immune from the FTC Act. Since the State Board is immune from the FCT Act, the Commission has failed to state a claim upon which relief can be granted. Therefore, the Commission lacks the jurisdiction to force the State Board to abrogate a state statute. Fe

The Commission contends that since the statute creating the State Board and defining the practice of dentistry was adopted almost one hundred years ago, it could not have reasonably anticipated teeth whitening business and thus should not be presumed to preclude or regulate that service. But the Sherman Antitrust Act was adopted decades before the passage of the statute creating the State Board. When the Supreme Court ruled

interstate commerce. The promoters of teeth whitening businesses have many options: (1) to conduct their business lawfully by operating their kiosks through licensed dentists; (2) to seek a declaratory ruling following the procedures set out in the North Carolina Administrative Procedures Act; (3) to challenge either the State Board's enforcement by supporting an appeal of one of the court cases in which the State Board sought civil or criminal sanctions against violators; (4) to challenge the statute through administrative proceedings and a declaratory judgment action; or (5) to pursue state legislative change. Instead, the illegal teeth whitening business promoters have invoked the aid of the Commission and eight staff attorneys to prejudge the State Board and its present and former members as "conspirators" guilty of illegal conduct that is subject to criminal sanctions under federal and state laws. At a known time of state budget crisis, the Commission has attempted to extort a settlement[3] by conducting dozens of depositions; serving dozens of interrogatories; serving dozens of requests for admissions; demanding production of thousands of documents; and serving over 30 subpoenas duces tecum on third-party witnesses, while steadfastly refusing to cite a single authority for its unprecedented attack.[4]

A. The North Carolina State Board of Dental Examiners Is a State Agency, an Instrumentality of the State, and Is Barred by State Law from Engaging in Any Conduct Intended to Profit Private Parties.

The Complaint so completely mischaracterizes the state statutory and constitutional framework within which the State Board functions, that it actually gets the name of the State Board wrong. The Commission introduces the State Board as the

[3] Attorneys for the Commission attempted in several depositions to quiz present and even former Board members on why they would not agree to the Commission's draft settlement agreement.

[4] The Commission even refused to answer the State Board's Request for Admission #1: "Admit that the U.S. Supreme Court has never held that a state agency enforcing a clear articulated state statute regarding non-price restraints must prove active state supervision in order to qualify for state action immunity."

the law empowers the president of the State Board and its secretary-treasurer "to administer oaths, issue subpoenas requiring the attendance of persons and the production of papers and records before said Board in any hearing, investigation or proceeding conducted by it." N.C. Gen. Stat. § 90-27. The State Board is empowered, in its own name, to "maintain an action in the name of the State of North Carolina to perpetually enjoin any person from so unlawfully practicing dentistry." N.C. Gen. Stat. § 90-40.1(a). The State Board cannot provide insurance to dentists, or financing. It is prohibited by law from using its funds to lobby. N.C. Gen. Stat. § 93B-6. It does not have any for-profit subsidiaries. It does not assist licensed dentists with marketing. Unlike the CDA, it does not "carry on business for its own profit or that of its members." California Dental Ass'n, 526 U.S. at 765.

On the other hand, the only legal authority ever tendered to this date by the Commission has been National Society of Professional Engineers v. United States, 435 U.S. 679 (1978).[5] However, this case is irrelevant to the instant facts in two basic ways. First, the National Society of Professional Engineers ("Society") was not a state agency; it was private membership organization. See generally id. at 679. Therefore, it was not -- in any way -- a state agency. Second, the Society was not seeking state action immunity, since of course it would not be eligible for such immunity. The Court's rejection of a health and safety rationale for regulation was tied to the Court's analysis of an entirely different doctrine, the rule of reason. Id be eligible fNsligib 0.093s/on.2eref8a9s own sit6(sir)-1(TD wh

reasonable). Id. at 694-95. Unfortunately for the Commission, a case involving a private actor and a completely different theory of law is similarly irrelevant to the instant case.

Unlike a trade association, an extra-governmental agency or a non-profit organization, the State Board is prohibited by state statutes, state constitutional provisions, and state case law from engaging in business or aggrandizing private parties. By law, its only permissible purpose is public protection. Indeed, there is a constitutional prohibition against private emoluments. By the Supreme Court's standard, there is no basis for Commission jurisdiction over a statutorily-established, state agency such as the State Board, which is neither a for-profit nor non-profit "organization," and barred by state law from aiding private persons. The Board does not provide the benefits for its members that "plainly fall within the object of enhancing its members' 'profit.'" California Dental Ass'n, 526 U.S. at 767.

B. The State Board Is Enforcing a North Carolina Statute That Is a Clearly Articulated and Affirmatively Expressed State Policy to Restrain Trade.

The State Board, as a state agency, is immune from federal antitrust law for its enforcement of a "clearly articulated and affirmatively expressed" state policy to restrain trade. Earles, 139 F.3d at 1041. The state statute at issue limits the practice of dentistry to dentists, and defines dentistry as undertaking, attempting, or claiming the ability to "remove[ ] stains, accretions, or deposits from the human teeth." N.C. Gen. Stat. § 90-29(b)(3). Based upon the above facts which are established as a matter of law, the State Board, as a state agency, was acting pursuant to state law, and its efforts were directed at enforcing a clear statute rather than an attempt to limit the provision of teeth whitening

services by non-dentists. The State Board's actions are thus immune from the federal antitrust laws and from enforcement jurisdiction of the Commission.

The Commission alleges that the State Board "has decided that the provision of teeth whitening services by non-dentists constitutes [the unauthorized practice of dentistry]." To the contrary, the applicable statute, not the State Board, clearly determines that the removal of stains from teeth is the practice of dentistry, and may only be done by licensed dentists or dental hygienists under the direct supervision of licensed dentists. N.C. Gen. Stat. § 90-29(a)-(b), (c)(1). On its face, this authorization, set forth by state law rather than by a board rule, is a "clearly articulated and affirmatively expressed state policy." See Earles, 139 F.3d at 1041. By limiting certain activities to dentists, the statute meets the requirement of the Commission (and the Supreme Court) that suppression of competition be the "foreseeable result" of the statute. City of Columbia v. Omni Outdoor Adver., 499 U.S. 365, 372-73 (1991); see also Complaint Counsel's Opposition to the South Carolina State Board of Dentistry's Motion to Dismiss at 28, In the Matter of South Carolina State Bd. of Dentistry, No. 9311 (F.T.C. Nov. 25, 2003) ("a legislature also articulates a policy to displace competition when it expressly authorizes conduct that would 'foreseeably' result in anticompetitive effects"). Further satisfying the "clear articulation" standard, the statute demonstrates that the state "contemplated the kind of action complained of" by delegating to the State Board the authority to "operate in a particular area." Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 415 (1978) (citing Lafayette v. Louisiana, 532 F.2d 431, 434 (5th Cir. 1976), overruled on other grounds by Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985)); see also, e.g., First Amer. Title Co. v. South Dakota Land Title Ass'n, 714 F.2d

1439, 1451 (8th Cir. 1983); Southern Motor Carriers Rate Conference, Inc. v. United

sufficient that the State Board's authority "suggest[ ] that the legislature contemplated that the entity might invoke such authority to restrain trade." Brazil at 1362 (citing First Amer. Title Co., 714 F.2d at 1451 and Town of Hallie, 700 F.2d at 381).

Giving further weight to the State Board's interpretation of state law in this case is the fact that there have been no legal challenges to the state law, with the exception of the Commission's complaint. The State Board's understanding of the law should have "great persuasive weight." Gambrel v. Kentucky Bd. of Dentistry, 689 F.2d 612, 619 (6th Cir. 1982); see also, e.g., Yeager's Fuel, Inc. v. Pennsylvania Power & Light Co., 22 F.3d 1260, 1268-69 (3rd Cir. 1994); see also, e.g., Nugget Hydroelectric, L.P. v. Pacific Gas & Elec. Co., 981 F.2d 429, 434 (9th Cir. 1992). The State Board's interpretation is not arbitrary or self-serving, but

unsupervised, immediately following the passage of a completely contrary state statute. South Carolina State Bd. of Dentistry, 455 F.3d at 436. In contrast, the North Carolina statute has been preserved unchanged for years.[6] The State Board's interpretation of it developed naturally based on relatively recent concerns that have arisen with the proliferation of non-dentist stain removal.

The Court in National Society of Professional Engineers, as discussed earlier, reiterated an important state action immunity principle: "by their nature, professional services may differ from other business services, and accordingly, the nature of the competition in such services may vary. Ethical norms may serve to regulate and promote this competition, and thus fall within the Rule of Reason." 435 U.S. at 694. The Supreme Court reached a similar conclusion in Goldfarb v. Virginia State Bar, a state action immunity case:

> the fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act … The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently.

421 U.S. 773, 788 n.17 (1975).

In Goldfarb, the Court did not grant state action immunity for the Virginia State Bar; however, the facts of the case can be distinguished from the instant facts in several

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[6] Commission counsel has alleged that the statutory language at issue was promulgated "in the late 1800s … long before teeth whitening, as we knew it, existed[.]" Pretrial Conference H'rg Tr. pp.29-30. The Commission argues that because the statute is so old, and because it was enacted before current teeth whitening practices were in existence, it should not be relied on. There are several flaws to this argument. The portion of the statute at issue, N.C. Gen. Stat. § 90-29, was promulgated in 1935, not the 1800s. Further, teeth whitening procedures have changed little in the past 125 years. Dr. Van B. Haywood, A Comparison of At-Home and In-Office Bleaching, DENTISTRY TODAY (2000) pp. 44-53 (In-office bleaching of teeth has been in use for approximately 125 years, with little change in science or technique during that time). Id. Regardless of when it was promulgated, it is the law, and the State Board is bound by it. By the Commission's flawed logic, the Sherman Antitrust Act should not be followed in the instant case, since it is

important ways. First, the issue in Goldfarb was price-fixing: the State Bar was essentially ratifying a fee schedule that had been adopted by a county-level bar association. 421 U.S. at 791. Price-fixing is viewed with greater skepticism by the courts than practices such as those at issue in this case. Id. at 792; see also Federal Trade Commission, REPORT OF THE STATE ACTION TASK FORCE (Sept. 2003) (hereinafter "Task Force Report"), at 38 (citing Crosby v. Hosp. Auth. of Valdosta, 93 F.3d 1515, 1524 (11th Cir. 1996)); see alsoAMERICAN BAR ASSOCIATION STATE ACTION PRACTICE MANUAL. Second, the State Bar's enforcement of the fee schedule lTc.1ot authorized by

dentist for employment of unlicensed assistants and misleading advertising from the Society's efforts to restrain competition among members of an association. 526 F. Supp. 452, 458 (W.D. Mich. 1981) ("The present case

the public. See, e.g.,

aff'd, 74 F.3d 1227 (3rd Cir. 1995), cert. denied, 517 U.S. 1244 (1996); Charley's Taxi Radio Dispatch Corp. v. SIDA of Hawaii, Inc., 810 F.2d 869 (9th Cir. 1987).

The second prong of the Midcal test is reserved for situations similar to Midcal:

According to the Commission, the fact that the State Board is composed mainly of dentists is another reason to

active supervision is required. Federal Trade Commission, REPORT OF THE STATE ACTION TASK (Sept. 2003) at 38 (citing Bankers Ins. Co. v. Florida Residential Prop. & Cas. Joint Underwriting Ass'n, 137 F.3d 1293, 1296-97 (11th Cir. 1998).

The State Board fully satisfies the requirements set forth in Hass

action immunity. Based on the State Board's characteristics as a state agency, an inquiry into active supervision is not necessary to establish this immunity.

D. Even if Active Supervision Were at Issue, North Carolina's Structural Legal Oversight of This State Board Is Sufficient as a Matter of Law.

An evidentiary showing of active supervision of the State Board's actions is not required; nevertheless, the State Board's activities were actively supervised as a matter of law. The State Board is not required to show active supervision of its activities because it is a state agency forbidden by state law from directly serving private interests, rather than a private entity exercising delegated state authority. In fact, cases where courts even attempted to analyze active supervision for state agencies are few and far between. As the Commission itself has acknowledged, there is no settled case law establishing what "kind of state review of private actions … would constitute 'active' supervision, in terms of either the kind of scrutiny required by the state official or procedural requirements." Task Force Report at 52-53.

Case law discussing the issue of active supervision almost universally presumes that private parties are involved. This makes it difficult to translate to the instant facts, where the Commission itself has admitted that the Board is a state agency. Complaint, p. 1; see also, e.g., Patrick v. Burget, 486 U.S. 94, 100-01 (1988); see also, e.g., Federal Trade Comm'n v. Ticor Ins. Co., 504 U.S. 621, 634-35 (1992); see also e.g., Federal Trade Comm'n v. Indiana Fed'n of Dentists, 476 U.S. 447, 465 (1986). The Commission's State Action Task Force has settled on the requirement that states "have and exercise power to actually review particular anticompetitive acts." Task Force Report at 2. The State Board demonstrates active state supervision of its enforcement

actions against non-dentist teeth whitening se

Kentucky Board of Dentistry, the Sixth Circuit affirmed summary judgment to the defendant Board of Dentistry and dentists, upon a finding that they were immune from suit under the Sherman Antitrust Act. Gambrel, 689 F.2d at 621. When discussing active supervision, the Sixth Circuit concluded that there was no dispute on the issue, since the actions at issue in the case were undertaken directly pursuant to state law. Seeing the existence of a clearly articulated state policy as evidence of active supervision, the court concluded:

> First, the policy [at issue] emanates directly from the language of a state statute and not from any agreements by private individuals as in Midcal. Secondly, the powers of enforcement are expressly conferred upon the Board of Dentistry, and it appears that historically the Board has indeed acted to uphold and enforce the regulatory scheme. In fact, the enforcement of the statute by the Board against [the plaintiff] and others has been one of the impelling reasons for the commencement of this action.

Id. at 620. The issue in Gambrel was private individuals' (den

there was "no dispute" over whether active supervision exists. Id. at 620. This was because, as is true in this case, "the policy emanate[d] directly from the language of the state statute." Id. The policy was not invented by an

laws. N.C. Gen. Stat. § 90-22(b) requires that the eight member board shall include "six dentists who are licensed to practice dentistry in North Carolina." As discussed further below, a second statute, N.C. Gen. Stat. § 138A-38(a) expressly allows such competitors to participate in board business even if it directly their own business so long as the competitive benefits to the members are "no greater than that which could reasonably be foreseen to accrue to all members of that profession…" The Complaint does not mention that statute, much less question whether is a clear articulation of a state policy restricting trade. Fatally, the Commission has failed to allege that present or former dentist members of the State Board had more of an interest in teeth whitening business than the profession at large. More fatally, the Commission has pled the opposite: "Dentists in North Carolina, acting through the instrument of the North Carolina Board of Dental Examiners [sic], are colluding to exclude non-dentists from competing with dentists in the provision of teeth whitening services." Inasmuch as the statutes explicitly sanction the very "conspiracy" which the Commission alleges, the Complaint fails as a matter of law under Parker v. Brown for the reasons stated earlier in this memo.

The Commission's conspiracy also fails as a matter of law because there are no allegations (nor any evidence) that the dentist members of the State Board have done anything other than interpret and enforce in good faith a state statute. In the light most favorable to the Commission, the Complaint deems all dentist members of the Board to be teeth whitening competitors and thus per seantitrust conspirators illegally restraining trade when they enforce a public protection law that coincidentally restricts the unauthorized practice of dentistry. The logical extension the Commission's conspiracy theory would inevitably would lead to the conclusion that any Board action against any

licensee restrains trade by reducing competition even if the conduct at issue is dangerous to the public and unlawful. Yet another logical extension would be to criminalize hundreds of state boards throughout the country if the majority of board members are licensees. Such a drastic measure surely requires at least a sliver of Congressional authority and at least a hint of one Supreme Court precedent. There are none.

The members of the State Board who are engaged in the practice of dentistry are also public officials, and are bound by law to only take enforcement actions to protect the public. See, e.g., N.C. Gen. Stat. § 14-230. State law requires members to disclose material conflicts of interest at any meeting and annually in financial reports.[11] N.C. Gen. Stat. § 138A-38(a) explains that merely being a practicing dentist on the State Board is not ipso facto a violation of the Ethics Act, nor, obviously, is the member a per se antitrust conspirator. As part of its active supervision of the State Board, the legislature has provided that a State Board member:

> may participate in an official action [if] the only interest or reasonably foreseeable benefit or detriment that accrues …is no greater than that which could reasonably be foreseen to accrue to all members of that profession, occupation, or general class.

N.C. Gen. Stat. § 138A-38(a)(1).

Further, the Commission's allegation that "Dentists in North Carolina, acting through the instrument" of the State Board are colluding in violation of the antitrust laws

[11] Ironically, the investigation that preceded the Commission's Complaint was apparently managed by a Commissioner who previously recused her self from tooth whitening related proceedings because a family member served as in-house counsel for a leading teeth-whitening product manufacturer. This is not to insinuate that any unlawful conduct occurred; it is only to point out one of several of the Commission's dual standards. The Commission deems a

conveniently overlooks well established doctrines that recognize to First Amendment rights of citizens and trade associations. These allegations in the light most favorable to the Commission are no more than unjustified, unauthorized and unsubstantiated attempts to make an antitrust conspiracy out of constitutionally protected efforts of trade associations to influence legislation or even agency policy. The Supreme Court has clearly articulatedand consistently upheld the rights of those organizations to attend, to communicate with, to influence and even to lobby state agencies. See

safety and welfare and to be subject to regulation and control in the public interest." The Commission's structural "conspiracy" theory ignores applicable state laws, Supreme Court precedence, the oaths that the State Board members have taken and the well-established presumption that licensing board members serve in good faith. As a matter of law, the Commission has failed to allege any contract, combination or conspiracy cognizable under federal antitrust laws. Moreover, the Complaint, on its face, pleads only conduct that is lawful.

enforcement of the Dental Practice Act can be so easily undone, can any state occupational licensing agency continue to protect the public from unauthorized practice? What would the Commission do with the power to second guess state statutory definitions of every licensed occupation? Would licensing boards for attorneys, architects, doctors, professional engineers, cosmetologists, barbers, psychologists, nurses, or general contractors be able to stop unlicensed persons from engaging in unlicensed practice? The chilling effect is clear and premeditated.

For these reasons, the North Carolina State Board of Dental Examiners respectfully submits that this action should be dismissed in its entirety.

This the 3nd day of November, 2010.

CERTIFICATE OF SERVICE

I hereby certify that on the 3nd day of November, 2010, I electronically filed the foregoing Memorandum in Support of Motion to Dismiss with the Federal Trade Commission using the Federal Trade Commission E-file system, which will send notification of such filing to the following:

Donald S. Clark, Secretary
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Room H-159
Washington, D.C. 20580

I hereby certify that the undersigned has this date served copies of the foregoing upon all parties to this cause by electronic mail as follows:

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I also certify that I have sent courtesy copies of the document via Federal Express and electronic mail to:

The Honorable D. Michael Chappell
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This the 3nd day of November, 2010.

/s/ Noel L. Allen

_____

Noel L. Allen

CERTIFICATION FOR ELECTRONIC FILING

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

/s/ Noel L. Allen

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Noel L. Allen