IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
No. 5:11-CV-49-FL

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

OPPOSITION OF THE FEDERAL TRADE COMMISSION TO PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER AND OTHER EQUITABLE RELIEF

Defendant Federal Trade Commission, by and through the United States Attorney for the Eastern District of North Carolina, hereby opposes plaintiff's motion for a temporary restraining order (TRO). Plaintiff (Board) filed its complaint in this Court on February 1, 2011, seeking declaratory judgment on a number of issues that are already the subject of an ongoing administrative proceeding before the Commission. Although Plaintiff may appeal the final decision of the Commission—if and when such a decision is made—it may not do so at this time. Consequently, Plaintiff's complaint and motion for temporary restraining order are an impermissible attempt to enjoin an ongoing enforcement proceeding, in the hope of avoiding an upcoming administrative hearing.

FACTUAL AND PROCEDURAL BACKGROUND

The case underlying the Board's complaint in this Court began when the Commission – as an antitrust law enforcement agency – initiated an investigation into allegedly anticompetitive conduct by the Board. The allegations that the Commission sought to investigate concerned actions by the Board – whose operation is controlled by North Carolina licensed dentists – to use its statutory authority to regulate the practice of dentistry in North Carolina as a means to exclude from the market a new and growing competitive threat to licensed dentists, in the form of non-dentist providers of lower-cost teeth whitening services.

Following long-established procedures for its investigation, Commission staff undertook a rigorous fact-gathering mission that culminated in a Commission determination that there existed sufficient evidence regarding the Board's conduct and its effect on the market to proceed with an administrative adjudication of those allegations.

Accordingly, the Commission issued an administrative complaint against the Board on June 17, 2010. The Commission's complaint charged that the Board violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by classifying teeth whitening services as the practice of dentistry and by

desist orders that were neither authorized nor supervised by the state. FTC Admin. Complaint ¶¶13-23. Specifically, the Board on numerous occasions sent letters (often styled as "orders") to non-dentist providers, charging that those recipients were engaging in the unauthorized practice of dentistry in violation of North Carolina laws, and unilaterally ordering the recipients to cease and desist from providing teeth-whitening services in North Carolina. Id. ___ ¶20. The Board also discouraged prospective non-dentist providers, id. ___ ¶21, and on several occasions interfered with third-party arrangements, by representing to some mall operators that teeth whitening services offered at mall kiosks are illegal. Id. ___ ¶22. The Commission's complaint alleged that those actions were neither authorized by North Carolina laws, nor exempt from antitrust liability by the "state action doctrine." Id. ___ ¶¶19, 23. [1]

---

[1] In Parker v. Brown, the Supreme Court held that Congress did not intend the federal antitrust laws to cover the acts of sovereign states. 317 U.S. 341 (1943). Subsequent Supreme Court cases then developed what has become known as the "state action" doctrine. This doctrine does not prevent a state from delegating to others (including private parties) its sovereign power to pursue anticompetitive policies, but because the careful balance between competition policies and federalism concerns underlying

Shortly after service of the Commission's administrative complaint on the Board, the parties to the administrative proceeding (i.e. ____ the "respondent" Board and "Complaint Counsel," which undertakes the prosecutorial role) submitted a Joint Scheduling Order, setting forth the various discovery and motions deadlines, including a hearing date. The Administrative Law Judge (ALJ) issued a scheduling order on July 15, 2010.[2] In accordance with that scheduling order, an evidentiary hearing on

Counsel had already filed a motion for partial summary decision (the equivalent of a Rule 56 motion in federal district courts) on the very same issue. The Commission ruled on those motions on February 3, 2011. The Commission concluded that to qualify for the state action exemption, the Board must meet both prongs of Midcal

February 17, 2011, [4] the ALJ "shall file an initial decision" within a narrowly prescribed period of time. 16 C.F.R. § 3.51(a). [5] Unless appealed to the Commission, "the initial decision shall become the decision of the Commission 30 days after service thereof upon the parties . . . ." Id. ___ If appealed to the Commission, "[a]n initial decision shall not be considered final agency action subject to judicial review under 5 U.S.C. 704." Id. § 3.51(b). Review of the initial decision by the Commission may be initiated by any party, upon the filing of a timely notice of appeal. Id. ___ § 3.52(b)(1). The length of time for such review is also narrowly prescribed by the Commission's rules. See ___ Id. § 3.52(b)(2). [6]

---

[4] According to these regulations, "[h]earings shall proceed with all reasonable expedition, and, insofar as practicable, shall be held at one place and shall continue, except for brief intervals of the sort normally involved in judicial proceedings, without suspension until concluded. The hearing . . . should be limited to no more than 210 hours." 16 C.F.R. § 3.41(b).

[5] "The Administrative Law Judge shall file an initial decision within 70 days after the filing of the last filed initial or reply proposed findings of fact, conclusions of law and order pursuant to §3.46, within 85 days of the closing the hearing record pursuant to §3.44(c) where the parties have waived the filing of proposed findings, or within 14 days after the granting of a motion for summary decision following a referral of such motion from the Commission. The Administrative Law Judge may extend any of these time periods by up to 30 days for good cause."

[6] "The Commission will issue its final decision pursuant to §3.54 within 100 days after oral argument. If no oral argument is scheduled, the Commission will issue its final decision pursuant to §3.54 within 100 days after the deadline for the filing of any reply briefs."

Judicial review of the Commission's cease and desist orders is set forth in the Federal Trade Commission Act, which provides for review directly in the courts of appeal (in this case in the United States Court of Appeals for the Fourth Circuit). See ___ 15 U.S.C. § 45(c). [7] Upon such review, the court of appeals "shall have power to make and enter a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgement to prevent injury to the public or to competitors pendente lite." Id. ___

ARGUMENT

Plaintiff has failed to satisfy the requirements for injunctive relief articulated in Real Truth About Obam Tmrcing the Inc. v4.4 450.309f B373200323200f

(E.D.N.C. June 22, 2010) (unpublished and attached as Exhibit B).

Plaintiff has failed to meet any ___ of the four requirements for preliminary relief. By asking for relief in this court, the Board is simply seeking to short-circuit a congressionally-mandated enforcement process that permits full review in the federal courts of appeals if and when a final cease and desist order is issued.

I. THE BOARD HAS NOT MADE A CLEAR SHOWING THAT IT IS LIKELY TO PREVAIL ON THE MERITS.

The Board argues that is likely to succeed in the claims alleged in its complaint – that, by filing and prosecuting its administrative complaint, the Commission is violating the FTC Act, various constitutional provisions, and the Parker _____ state action doctrine. [DE-6 at 20]. A party seeking a preliminary injunction must make a "clear showing" that it is likely to succeed on the merits at trial. Winter _____, 555 U.S. at __, 129 S. Ct. at 376; Real Truth _____, 575 F.3d at 345. For several reasons, the Board fails to make this required clear showing.

A. The Board's Complaint Constitutes an Improper Attempt to Enjoin the Ongoing Administrative Enforcement Proceedings.

The Board's complaint improperly attempts to enjoin the Commission's ongoing administrative enforcement action, slated for an evidentiary hearing on February 17, 2011. It has long been settled law that those subject to an enforcement action – including in administrative proceedings – may not file a separate

collateral challenge to that action in federal courts, but must instead raise any issues or defenses they have in the enforcement case itself. See Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594, 598 (1950) (holding that an opportunity for hearing in an enforcement action "satisfies the requirements of due process"); Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 48 (1938) ("The District Court is without jurisdiction to enjoin [NLRB's administrative] hearings"); Gallanosa by Gallanosa v. United States, 785 F.2d 116, 119 (4th Cir. 1986) (holding that a district court lacks jurisdiction to enjoin administrative enforcement proceedings both because no final agency decision existed and because jurisdiction to review final agency decision rests exclusively with the courts of appeal).[8]

In another FTC case, the court rejected an attempt to obtain relief similar to the relief sought here. In Direct Marketing Concepts, Inc. v. FTC, 581 F. Supp. 2d 115 (D. Mass. 2008), the

[8] See also, e.g., X-tra Art v. CPSC, 969 F.2d 793, 796 (9th Cir. 1992) (holding that the opportunity for court hearing in enforcement action "satisfies the requirements of due process"); United States v. Alcon Laboratories, 636 F.2d 876, 882 (1st Cir. 1981) ("Supreme Court's decision in Ewing precludes judicial interference with the FDA's decision to institute enforcement actions"); Southeastern Minerals, Inc. v. Harris, 622 F.2d 758, 764 (5th Cir. 1980) (holding that "pre-enforcement review of the FDA's determination that probable cause existed to seize and initiate enforcement proceedings [was] clearly proscribed by Ewing ."); Pharmadyne Labs, Inc. v. Kennedy, 596 F.2d 568, 570-71 (3d Cir. 1979) (finding no jurisdiction to enjoin enforcement actions under Ewing); Parke, Davis & Co. v. Califano, 564 F.2d 1200, 1206 (6th Cir. 1977) (finding that the district court abused its discretion by enjoining FDA enforcement action).

FTC had filed an enforcement action against Direct Marketing, but the latter sued the FTC in a separate action, alleging that the analysis the FTC uses to determine whether advertising violates the FTC Act runs afoul of the First Amendment. Id. ___ at 116-17. The court held that the case should be dismissed because "[i]f this action is related to the enforcement action, then it must be dismissed as an impermissible attempt to enjoin an ongoing enforcement action. If the two actions are not related, then this action must be dismissed for failure to present a ripe claim for judicial adjudication." Id. ___ at 117; see also Alpine Industries v. FTC, 40 F. Supp. 2d 938, 942-43 (E.D. Tenn. 1998), aff'd, 238 F.3d 419 (6th Cir. 2000) (Table) (denying plaintiff's declaratory judgment action that amounted to a request to enjoin possible FTC enforcement action).

These cases stand for the important principle that permitting judicial review of agency actions in a court separate from the enforcement action itself would result in unnecessary and premature judicial interference in a pending proceeding:

> [I]t has never been held that the hand of government must be stayed until the courts have an opportunity to determine whether the government is justified in instituting suit in the courts. Discretion of any official may be abused. Yet it is not a requirement of due process that there be judicial inquiry before discretion can be exercised. It is sufficient, where only property rights are concerned, that there is at some stage an opportunity for a hearing and a judicial determination.

Ewing, 339 U.S. at 599; see also Alcon Laboratories, 636 F.2d at

886 (holding that "the imposition of any formal, pre-enforcement hearing requirement might seriously impair the effectiveness of the Act's enforcement provisions"). Cf. Wilton v. Seven Falls Co., 515 U.S. 277, 283 (1995) (holding, when a state proceeding "involving the same parties and presenting opportunity for ventilation of the same law issues is pending" in another tribunal, "a district court might be indulging in '[g]ratuitous interference' if it permitted the federal declaratory action to proceed" (quoting Brillhart v. Excess Ins. Co. of Am., 316 U.S. 491, 495 (1942)).

Here, the Board has raised the claims alleged in its complaint as defenses and arguments in the ongoing administrative proceeding before the Commission, for which full judicial review is available (in the court of appeals) and which provides due process guarantees to both the Board and agency enforcement counsel. Because the only appropriate forum for the issues raised in the Board's complaint is in the ongoing administrative enforcement action, this court lacks jurisdiction over the Board's complaint. For these reasons, the Board is unlikely to prevail on the merits of this case.

B. No Final Commission Order Is at Issue Here.

The Board is unlikely to prevail on the merits of its case because the Board's complaint challenges an unripe, non-final agency action. As discussed below, because the Board's pleadings

challenge a non-final action, this Court should not take jurisdiction of this matter. Similarly, the posture of the currently pending administrative proceedings make this matter unripe for review. As a result of either defect, Plaintiff's complaint and pleadings should fail.

The Supreme Court has specifically held that the key administrative action complained about by the Board here – the issuance of an administrative complaint alleging that the Commission had "reason to believe" that the Board had violated the FTC Act – does not ___ constitute a "final" agency action. In FTC v. Standard Oil Co. _____, the Court held that the complaint was only a determination that adjudicatory proceedings would commence. 449 U.S. 232 (1980). Importantly, although the Court recognized that the burden of responding to the complaint could be "substantial," such burden did not constitute irreparable injury. Id. ___ at 244. Permitting judicial review of the FTC's complaint, reasoned the Court, would lead to "piecemeal review which at the least is inefficient and upon completion of the agency process might prove to have been unnecessary," and, moreover, "every respondent to a Commission complaint could make the claim that [plaintiff] had made." Id. ___ at 242-43 (citations omitted). Standard Oil _____, thus, prohibits judicial interference in the administrative process until a final cease and desist order

(if any) is handed down by the Commission.[9]

The Fourth Circuit has also considered and rejected as premature an attempt to challenge a pending FTC matter before the FTC issued any final order on antitrust liability. South Carolina State Bd. of Dentistry v. FTC, 455 F.3d 436, 441 (4th Cir. 2006). Importantly, the panel reasoned that the state action doctrine does not provide immunity from suit, but is part of the "merits of the antitrust action." Id. at 442-43. In South Carolina, the Board challenged the FTC's denial of the Board's motion for protection pursuant to Parker v. Brown

attempts to challenge a pending FTC matter until a final decision (if any) regarding antitrust liability is made by the Commission.

After considering the collateral order doctrine, the panel in South Carolina concluded that the Board could not pursue such a remedy prior to the completion of the administrative proceedings. The panel noted that the Supreme Court has "reserved 'collateral order' status only for orders that meet three stringent' conditions." Id. at 441 (quoting Will v. Hallock, 546 U.S. 345, 349 (2006)). Specifically, an order must "[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." Will, 546 U.S. at 349. "If the order fails to satisfy any one of these requirements, it is not an immediately appealable collateral order." Carefirst of Md., Inc. v. Carefirst Urgent Care Ctr., 305 F.3d 253, 258 (4th Cir.2002).

The panel concluded that any rights a party may have under Parker do not qualify under either the second or third requirements. South Carolina, 455 F.3d at 445 ("Hence we cannot conclude that the Supreme Court fashioned the Parker state action doctrine to protect against any harm other than a misinterpretation of federal antitrust laws."). In reaching this conclusion, the panel acknowledged, like the Supreme Court in Standard Oil, that "it is undoubtedly less convenient for a

party-in this case the Board-to have to wait until after trial to press its legal arguments." Id. The panel concluded, however, that "no protection afforded by Parker will be lost in the delay" between completing the administrative process and filing an appeal with the Court of Appeals. Id. Thus, pursuant to Standard Oil and South Carolina, Plaintiff's premature challenge to a non-final order of the FTC should fail. [10]

General principles of ripeness also show why Plaintiff's complaint is premature. The ripeness doctrine serves "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726, 732-33 (1998); Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 200 (1983) (same);

[10] In its Motion to Expedite, Plaintiff cites North Carolina State Bd. of Registration for Profl Eng'rs and Land Surveyors, 615 F. Supp. 1155 (E.D.N.C. 1985) and Flav-O-Rich, Inc. v. N.C. Milk Commission, 593 F. Supp. 13, 17 (E.D.N.C. 1983) to support its contention that the FTC lacks jurisdiction over the Board. [DE-8 at 3]. The former case, however, contains no binding language that could support its contention. Moreover, any dicta that may be helpful to the Plaintiff is controlled by the Fourth Circuit's decision in South Carolina State Bd. of Dentistry, discussed supra. The latter case is readily distinguishable, as it concerned a challenge to a final state administrative decision. By contrast, this matter challenges a non-final and pending Federal administrative proceeding.

Retail Industry Leaders Ass'n v. Fielder, 475 F.3d 180, 188 (4th Cir. 2007) (same). Thus, "[a]n issue is not fit for review if 'it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all'." Id. (quoting Texas v. United States, 523 U.S. 296, 300 (1998)). A declaratory judgment action must, moreover, "allege disputes that are 'real and substantial and admi[t] of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts'." Jones v. Sears Roebuck & Co., 301 Fed. Appx. 276, 282 (4th Cir. 2008) (quoting MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 127 S. Ct. 764, 771 (2007) (unpublished and attached as Exhibit C).

As the Fourth Circuit has held "[r]egarding administrative cases, a claim is not ripe for review unless the issues to be considered are purely legal ones and the agency rule giving rise to the claim is final and not dependent on future uncertainties or intervening agency rulings." Pearson v. Leavitt, 189 Fed. App. 161, 163 (4th Cir. 2006) (citing Charter Fed. Sav. Bank v. Office of Thrift Supervision, 976 F.2d 203, 208 (4th Cir.1992)) (attached as Exhibit D). In order to constitute final agency action, the conduct at issue must "mark the 'consummation' of the agency's decisionmaking process" and must also "be one by which 'rights or obligations have been determined,' or from which

'legal consequences will flow.'" Nat'l Ass'n of Home Builders v. Norton, 415 F.3d 8, 13 (D.C. Cir. 2005) (quoting in part Bennett v. Spear, 520 U.S. 154, 177-78 (1997)).

Here, the "consummation of the agency's decisionmaking process" from which rights or obligations can be imposed will only result from a final decision by the Commission (on review of an order by the administrative law judge) to issue a cease and desist order on the Board as respondent in the pending administrative proceeding. There has been no such final order. As discussed above, under the FTC Act, final cease and desist orders in Commission enforcement proceedings are fully reviewable in the federal courts of appeal. See 15 U.S.C. § 45(c). Thus, district courts have no jurisdiction to review administrative proceedings such as the one underlying the Board's complaint here. [11]

Nothing in the Board's complaint in this Court challenges a final Commission decision, or warrants a deviation from the established principles set forth above. The bulk of the Board's

[11] Because the review of the Commission's final orders is entrusted by Congress to the courts of appeal, district courts also have no jurisdiction to hear collateral challenges whose success may impinge on the ability of the court of appeals to provide full judicial review of the agency's final decision. See Telecomms. Research and Action Ctr. v. FCC, 750 F.2d 70, 72 (D.C. Cir. 1984) (holding that "where a statute commits final agency action to review by the Court of Appeals, the appellate court has exclusive jurisdiction to hear suits seeking relief that might affect its future statutory power of review").

complaint concerns the question whether the Commission can exercise jurisdiction over the Board's conduct or, more specifically, whether the Board qualifies for an exemption from the federal antitrust laws under the state action doctrine of Parker v. Brown and its progeny. See supra note 1. This kind of question should be adjudicated in the first instance before the Commission – an expert body charged by Congress with enforcing the antitrust laws, promoting the efficient functioning of the marketplace, and protecting consumer welfare. See 15 U.S.C. §§ 41 et seq.; FTC v. Texaco, Inc., 393 U.S. 223, 226 (1968) ("[W]e have held on many occasions that the determinations of the Commission, an expert body charged with the practical application of the [FTC] statute, are entitled to great weight"). [12] The

[12] Indeed, many courts have held that, where an administrative proceeding has commenced, the FTC should adjudicate in the first instance many of the issues raised in the Board complaint – including specifically the applicability of the state action defense. See, e.g., South Carolina State Bd. of Dentistry, discussed supra; California ex rel. Christensen v. FTC, 549 F.2d 1321, 1324-25 (9th Cir. 1977) (determination of state action defense should be decided by the FTC); FTC v. Markin, 532 F.2d 541, 543-44 (6th Cir. 1976) ("We think that the applicability of Parker v. Brown should be determined by the Commission in the first instance"); FTC v. Feldman, 532 F.2d 1092, 1097-98 (7th Cir. 1976) (review of state action defense premature until after final FTC order). These courts have relied, in part, on the agency's expertise to determine the applicability of the state action defense, and the recognition that the agency may in the end refuse to issue a cease and desist order. See, e.g., Christensen, 549 F.2d at 1324-25. See generally Fed. Power Comm'n v. Louisiana Power & Light Co., 406 U.S. 621, 647 (1972) (agency is to make the initial determination of its own jurisdiction).

Board can (and, in fact, did) make the same arguments in the administrative proceeding as it has alleged in its complaint, including whether the Midcal _____ "active supervision" prong should apply to state regulatory bodies like the Board. The Board can also petition the Fourth Circuit (and, in turn, the Supreme Court), for review of any Commission cease and desist order, if and when such order issues.

The Board's other allegations – that the Commission has

andturer allairly dersjud heicialmplnductthafare no betterThe Boy T* (and re equegay witld)t mer(a, in r

and ddress aefirste oe Commission hasthe

andceeding asTheFersexaaine,e Board. gumenlikt the ComFTCs

Midcal test, [13] or that a Commissioner has given a speech on the general subject matter of administrative litigation, [14] does not amount to prejudgment that violates the Board's due process.

In FTC v. Cement Institute, for example, the Supreme Court held that the fact that members of the Commission had previously testified before Congress that a pricing system employed in the cement industry was equivalent to price fixing, did not disqualify the Commissioners from providing a fair tribunal in a subsequent investigation of the same parties involving a similar conduct. 333 U.S. 683, 700-03 (1948). More importantly, for purposes of the Board's complaint in this Court, these claims should be addressed to the Commission in the first instance, as discussed previously. The Commission's determination can be reviewed in a petition to the court of appeals, if and when a cease and desist order issues.

II. THE BOARD HAS NOT MADE A CLEAR SHOWING THAT IT IS LIKELY TO BE IRREPARABLY HARMED AS A RESULT OF THE ACTIVITIES IT SEEKS TO ENJOIN.

The Board must also make a "clear showing" that it is likely to be irreparably harmed absent the preliminary relief it is

---

[13] See FTC Office of Policy Planning, Report of the State Action Task Force (September 2003), available at http://www.ftc.gov/os/2003/09/stateactionreport.pdf.

[14] See J. Thomas Rosch, So I Serve as Both a Prosecutor and a Judge – What's the Big Deal?, Remarks before the American Bar Association Annual Meeting, San Francisco, California (Aug. 5, 2010), available at http://www.ftc.gov/speeches/rosch/100805abaspeech.pdf.

seeking. Real Truth

Moreover, the Commission has neither interfered with the Board's enforcement of the North Carolina Dental Act, nor even sought to stay the enforcement of the Board's teeth whitening policy during the pendency of the administrative proceeding. The Commission's press release and other public statements, moreover, merely referred to the complaint's allegations or to ongoing proceedings and, as discussed above, contained no false information. Those statements also made clear that there has been no final decision by the Commission as to the Board's liability under the FTC Act. Thus, neither the Commission's administrative proceeding nor any public pronouncements about it should cause any interference with the proper and authorized activities or functioning of the Board. Thus, the Board has not made any showing that it will suffer irreparable harm by allowing the adjudication of the pending administrative proceedings to continue, followed by review (if a cease and desist order does issue

is[(III.)-600(THE BALANCE OF THE EQUITIES FAVORS DENYING THE PLAINTIFF'S)]TJ ET 71027

377-78.

Although the Board argues that the equities weigh in favor of granting the requested injunction because there is no harm if the administrative proceedings are stayed [DE-6 at 32], only through the unhindered completion of the administrative process can the important rights of North Carolina consumers to access non-dentist teeth whitening services be determined. The administrative hearing is scheduled to begin on February 17, 2011, with a final decision by the administrative law judge expected shortly thereafter. Supra note 5. A final decision on any appeal to the full Commission will take place within a short period after that. Supra note 6. Granting the Board's requested relief can only serve to delay the final determination of the legality of the Board's conduct. Meanwhile, as noted previously, the Board is not precluded from continuing its activities during the pendency of the administrative proceedings. Accordingly, the equities here run strongly in favor of denying an injunction so that the pending administrative proceedings run their course and the rights of North Carolina consumers can be resolved.

IV. PLAINTIFF HAS NOT SHOWN THAT GRANTING A TRO IS IN THE PUBLIC INTEREST.

Finally, the Board argues that the injunction is necessary to the public interest, in order to allow the Board to fulfill its responsibilities under state law to protect the public. [DE-6 at 32-33]. This contention is entirely without merit.

While the North Carolina Dental Act undoubtedly is designed to protect the public, the Commission's administrative complaint has alleged that the Board, in fact, has abused its authority to regulate the practice of dentistry under state law in order to protect not the public, but the private interests of licensed dentists. The Board asserts that there have been instances of actual harm resulting from teeth whitening by non-dentists, or that there are certain medical reasons to limit the provision of those services to licensed dentists. The Commission's proceeding, however, seeks merely to vindicate the public interest in a free and efficient marketplace, and (to the extent they are relevant to the Board's challenged conduct), to test the accuracy and relevance of the Board's assertions. More pertinent to the issues before this Court, these arguments can and should be made to the Commission, in the ongoing administrative proceeding, if deemed by the Board as a necessary defense to the Commission's complaint allegations. Ultimately, a TRO is not ___ in the public interest, as North Carolina citizens have the right to a determination, sooner rather than later, whether the Board has improperly denied their ability to receive the often less costly teeth whitening services provided by non-dentists.

CONCLUSION

CERTIFICATE OF SERVICE

I do hereby certify that I have this 7th day of February, 2011, served a copy of the foregoing Opposition upon the below-listed party electronically and/or by placing a copy of the same in the U.S. Mail, addressed as follows:

Noel L. Allen
Allen and Pinnix, PA
Post Office Drawer 1270
Raleigh, NC 27602

/s/ Seth M. Wood
SETH M. WOOD
Attorney for Defendant
Assistant United States Attorney
Civil Division
310 New Bern Avenue, Suite 800
Raleigh, NC 27601-1461
Telephone: (919) 856-4530
Facsimile: (919) 856-4821
E-Mail: seth.wood@usdoj.gov
D.C. Bar No. 491011