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,	)	MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS
Plaintiff,	)	
v.	)	
FEDERAL TRADE COMMISSION,	)	
Defendant.	)	

Defendant Federal Trade Commission, by and through the United States Attorney for the Eastern District of North Carolina, submits this Memorandum of Law in Support of its Motion to Dismiss. 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 to the United States Court of Appeals—if and when such a decision is made—it may not do so at this time. As this Court lacks subject matter jurisdiction over Plaintiff's complaint, it should dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(1).

STATEMENT OF THE CASE

Plaintiff filed the instant action with this Court on February 1, 2011. [DE-1]. In its initial complaint, Plaintiff sought declaratory and injunctive relief. On February 2, 2011, Plaintiff filed a motion for a temporary restraining order (TRO)

and other equitable relief. [DE-5]. On February 4, 2011, Plaintiff filed a motion for expedited consideration. [DE-8]. Defendant opposed the TRO [DE-11], and this Court denied Plaintiff's TRO motion on February 9, 2011. [DE-13]. In that same order, the Court also granted in part Plaintiff's motion for expedited consideration. The parties filed a joint scheduling order on February 23, 2011.

STATEMENT OF FACTS

A. Proceedings Before the FTC.

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 unilaterally enforcing this determination through cease and 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]

Shortly after service of the Commission's administrative complaint on the Board, the parties to the administrative proceeding (i.e.

Judge (ALJ) issued a scheduling order on July 15, 2010.[2] In accordance with that scheduling order, an evidentiary hearing on the Commission's allegations before the ALJ began on February 17, 2011 – the same date included in the parties' joint submission.

On the eve of the close of discovery, the Board filed a motion to dismiss the entire administrative complaint on the ground that, as a state agency, the Board is exempted from antitrust scrutiny under the state action doctrine. Complaint 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, discussed supra n. 1, and further concluded that the Board has failed to satisfy the "active supervision" prong of that test. See Opinion of the Commission, In the Matter of North Carolina Board of Dental Examiners, FTC Dkt. No. 9343 (Feb. 3, 2011) (listed on the docket on Feb. 8, 2011), available at http://www.ftc.gov/os/adjpro/d9343/index.shtm. Also on February 3, 2011, the Commission denied the Board's motion to disqualify

[2] The docket sheet in the Commission's administrative action, In the Matter of North Carolina Board of Dental Examiners, FTC Dkt. No. 9343, is available at http://www.ftc.gov/os/adjpro/d9343/index.shtm (last accessed February 7, 2011).

the Commission from considering its motion to dismiss (the Commission's opinion on the disqualification ruling was issued

barred from "attempting to preempt North Carolina's statutorily mandated composition of a State Board" (Count III); that the Commission "does not have the authority to consider or rule upon" its own jurisdiction over the Board, and that the Commission's determination of its own jurisdiction thus violates the Board's due process (Count IV); that the Commission's assertion of jurisdiction and its administrative process violates the Administrative Procedure Act (Count V); and that the Commission's assertion of jurisdiction and its administrative proceeding against the Board amount to a violation of the U.S. Constitution (Count VI). In its prayer for relief, the Board seeks, in addition, to "stay or restrain and preliminarily and permanently enjoin" the Commission from asserting jurisdiction over the Board.

SUMMARY OF PROCEEDINGS AND APPELLATE RIGHTS BEFORE THE FTC

Administrative proceedings before the Commission are designed to afford respondents multiple safeguards against burdensome or erroneous decisions. Pursuant to the Commission's Rules of Practice for Adjudicative Proceedings, 16 C.F.R. Part 3, following the administrative hearing currently underway,[4] the ALJ

[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

"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]

Judicial review of the Commission's cease and desist orders is set forth in the Federal Trade Commission Act, which provides

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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."

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]

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 FTC had filed an enforcement action against Direct Marketing.

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[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).

The latter, however, also 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)).

matter. 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).

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). Such an early intervention would also "den[y] the agency an opportunity to correct its own mistakes and to apply its expertise." Id. at 242. Additionally, 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. Consequently, Standard Oil 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 Commission had issued any final order on antitrust liability. South Carolina State Bd. of Dentistry v. FTC, 455 F.3d 436, 441 (4th Cir. 2006). In South Carolina, the dental board brought an interlocutory appeal of the FTC's denial of the Board's motion for protection pursuant to Parker v. Brown, 317 U.S. 341 (1943). As noted previously, the Board in this matter relies on Parker to argue it is shielded from FTC jurisdiction. [DE-1 at 9 ¶ 26].

The dental board in South Carolina argued "that the denial of Parker protection falls within the narrow class of 'collateral orders' that may be appealed notwithstanding their lack of finality." 455 F.3d at 439. In rejecting the dental board's appeal, as noted below, the panel reasoned that the state action doctrine does not provide immunity from suit, but is part of the

[9] Similarly, in Floersheim v. Engman, 494 F.2d 949 (D.C. Cir. 1973), the seller of forms used in collecting debts – who was subject to a cease and desist order prohibiting certain deceptive and misleading practices – brought suit in district court seeking a declaration that certain forms conformed to the Commission order and an injunction preventing the FTC from seeking civil penalties based on non-compliance with its order. The court of appeals held that the district court did not have subject matter jurisdiction over the seller's complaint, because "[t]his is the kind of point that can be raised when an enforcement sanction is pursued," and directed dismissal of the action. Id. at 954.

"merits of the antitrust action." Id. at 442-43. As a result, the Board must first make any arguments along those lines before the FTC and receive a final order on antitrust liability before it may file an appeal with the Court of Appeals.

The collateral order doctrine operates as a narrow exception to the general rule that appeals may only come from final orders. Id. at 440-41 (noting that the "Supreme Court has, however, allowed interlocutory appeals in a 'small class' of cases that 'finally determine claims of right separable from, and collateral to, rights asserted in the action.'" (quoting Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949)). 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.

As a result, a party must receive a final order from the Commission on antitrust liability before it may bring a challenge in Federal Court. Indeed, the Fourth Circuit's decision in South Carolina applies even more strongly in this proceeding. In South Carolina, the petitioner at least filed a challenge to the FTC with the proper appellate body—namely, the court of appeals. 15 U.S.C. § 45(c). By contrast, Plaintiff here is attempting to challenge the FTC's pending proceedings in a court that Congress

has not designated for such a purpose.

In Standard Oil, the Supreme Court also rejected an attempt under the collateral order doctrine to review an order of a pending proceeding. 449 U.S. at 246 ("[T]he issuance of the complaint averring reason to believe is a step toward, and will merge in, the Commission's decision on the merits. Therefore, review of this preliminary step should abide review of the final order."). Thus, pursuant to Standard Oil and South Carolina, Plaintiff's premature challenge to a non-final order of the FTC should fail. See also Ukiah Valley Med. Ctr. v. FTC, 911 F.2d 261, 264-65 (9th Cir. 1990) (holding that FTC issuance of administrative complaint was not final agency action subject to judicial review); cf. General Finance Corp. v. FTC, 700 F.2d 366 (7th Cir. 1983) (finding no federal court jurisdiction to enjoin the FTC from investigating plaintiffs and holding that a party "may not bypass the specific method that Congress has provided for reviewing adverse agency action simply by suing the agency in federal district court under [sections] 1331 or 1337; the specific statutory method, if adequate, is exclusive").

C. This Matter is Not Ripe for Review.

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); 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) (unpublished) (quoting MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 127 S. Ct. 764, 771 (2007)).

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) (unpublished) (citing Charter Fed. Sav. Bank v. Office of Thrift Supervision, 976 F.2d 203, 208 (4th Cir. 1992)). 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.SBTf7i reir. 2005i7Tj-fBT479.p .r. S992o. 12 isSbT1s.5 5o.7

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"); Dow AgroSciences LLC v. National Marine Fisheries Service, 638 F. Supp. 2d 508, 512 (D. Md. 2009) (applying Telecomms. Research and noting that the "D.C. Circuit deals with a vast amount of administrative cases, and its holding on such matters are highly instructive in the absence of Fourth Circuit precedent"); County of Jackson v. Duke Energy Carolinas, LLC, 2010 WL 272744, *2 (W.D.N.C. 2010) (unpublished) (applying Telecomms. Research).

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").[10]

Indeed, the Board has made the same arguments in the administrative proceeding as it has alleged in its complaint,

[10] 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's 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).

including whether the Midcal “active supervision” prong should apply to state regulatory bodies like the Board. Although the Commission has rejected the Board's arguments, no final decision on antitrust liability has been reached. If the Commission ultimately issues an adverse final ruling regarding antitrust liability against the Board, it may petition the Fourth Circuit

Commission staff had studied the state action doctrine and opined that state regulatory bodies may in certain circumstances be subject to the active supervision prong of the Midcal test,[11] or that a Commissioner has given a speech on the general subject matter of administrative litigation,[12] 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, the Board must first address these claims to the Commission, as discussed previously. Although the Commission has denied the Board's motion to disqualify itself, the Board may seek review in a petition to the court of appeals, if and when a

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[11] See FTC Office of Policy Planning, Pn82 21.6 d.rd2.6 o 0 7.2 496.sly

cease and desist order issues.

CONCLUSION

For the reasons set forth above, this Court should dismiss this matter pursuant to Fed. R. Civ. P. 12(b)(1).

Respectfully submitted, this 28th day of February, 2011.

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CERTIFICATE OF SERVICE

I do hereby certify that I have this 28th 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:

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