

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, ) REPLY TO PLAINTIFF'S MEMORANDUM  
 ) OF LAW IN OPPOSITION TO  
v. ) DEFENDANT'S MOTION TO DISMISS  
 )  
FEDERAL TRADE COMMISSION, )  
 )  
Defendant. )

Defendant Federal Trade Commission, by and through the United States Attorney for the Eastern District of North Carolina, submits this brief Reply to Plaintiff's Memorandum of Law in Opposition to Defendant's Motion to Dismiss. [DE-23]. In its Opposition, Plaintiff largely repeats arguments made in its complaint [DE-1] and in its request for injunctive relief. [DE-5]. Consequently, Defendant incorporates by reference the arguments made in its Memorandum of Law in Support of its Motion to Dismiss. [DE-18].

ARGUMENT

I. There is no dispute regarding "jurisdictional facts" for purposes of Defendant's motion to dismiss.

The Fourth Circuit has held that, when a court considers a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1), "the facts alleged in the complaint are taken as true, and the motion must be denied if the complaint alleges sufficient facts to invoke subject matter jurisdiction." Kerns v. United States, 585

F.3d 187, 192 (4th Cir. 2009). Nevertheless, "on a motion to dismiss, courts 'are not bound to accept as true a legal conclusion couched as a factual allegation.'" Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting Papasan v. Allain, 478 U.S. 265, 286 (1986)).

In its Opposition, Plaintiff incorrectly characterizes a legal conclusion—that the Commission "has pursued its ongoing administrative action in brazen defiance of its limited statutory authority"—as a "jurisdictional fact" for purposes of Rule 12(b)(1). [DE-23 at 12]. Indeed, most, if not all, of the Complaint's allegations regarding jurisdiction and venue are legal conclusions. [DE-1 at 8-9]. Importantly, the parties appear to agree that: (1) Plaintiff is currently subject to an ongoing administrative proceeding before the Commission; and (2) Plaintiff asks this Court to enjoin or otherwise dissolve that pending administrative proceeding. For reasons discussed herein and in Defendant's other pleadings, these facts are sufficient to warrant dismissal.

## II. No exceptions to the exhaustion requirement apply.

As discussed in Defendant's Memorandum, Congress has empowered the Commission, inter alia, to conduct administrative proceedings to address violations of the antitrust laws. 15 U.S.C. § 45(b). Congress has also provided for judicial review of any cease and desist order issued by the Commission. Id.



its acts and practices are "in commerce or affect commerce," within the meaning of Section 4 of that Act, 15 U.S.C. § 44. See Admin. Cmpl't. ¶¶5-6.<sup>2</sup> Neither of those jurisdictional predicates is "clearly" erroneous.

The Supreme Court has held that States and their regulatory bodies do constitute "persons" under the antitrust laws, see, e.g., Jefferson Cnty. Pharm. Ass'n v. Abbott Labs., 460 U.S. 150, 155 (1983); Lafayette v. La. Power & Light Co., 435 U.S. 389, 395 (1978). Consistent with this precedent, and recognizing that the antitrust statutes should be construed together, the Commission has many times exercised jurisdiction over state boards, such as Plaintiff, as "persons" under the FTC Act. See, e.g., In the Matter of Virginia Bd. of Funeral Dirs. & Embalmers, 138 F.T.C. 645 (2004); In the Matter of South Carolina State Bd. of Dentistry, 138 F.T.C. 229 (2004); In the Matter of Massachusetts Bd. of Registration in Optometry, 110 F.T.C. 549 (1988). Plaintiff, which merely argued that it is not a "corporation," within the meaning of the FTC Act, has not shown that the exercise of jurisdiction over it by the Commission even arguably exceeds Section 5's limits, much less "clearly" so. [DE-23 at 12-13].

Nor has Plaintiff shown that the Commission "clearly exceeded" the "in commerce" requirement of its jurisdiction. The

---

<sup>2</sup> Available at [www.ftc.gov/os/adjpro/d9343/index.shtm](http://www.ftc.gov/os/adjpro/d9343/index.shtm).

Commission's complaint charged that "dentists and non-dentist providers of teeth whitening services in North Carolina purchase and receive products and equipment that are shipped across state lines . . . and transfer money across state lines in payment for these products and equipment." Admin. Cmplt. ¶6. The complaint charged further that the Board's actions "deter persons from other states from providing teeth whitening services in North Carolina." Id. Plaintiff's arguments that no jurisdiction existed under Section 4 of the FTC Act do not even address these factual predicates, much less show that they are "clearly" erroneous. [DE-23 at 13-17].

Secondly, Defendant has not "clearly violated the constitutional rights" of the Plaintiff under either the 10th Amendment or the Commerce Clause of the U.S. Constitution. Philip Morris, 755 F.2d at 371. As a threshold matter, the principles of federalism underlying the 10th Amendment have been enshrined by the courts, insofar as the Commission's jurisdiction is concerned, in what has come to be known as the state action doctrine. See Parker v. Brown, 317 U.S. 341 (1943); California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980). Plaintiff's arguments of direct 10th Amendment violations appear, therefore, to be merely an attempt to avoid the limits on that doctrine that have led the Commission to deny Plaintiff's motion to dismiss the administrative complaint on

state action grounds. See [DE-18 at 4 n.1, 5-6].

At any rate, Plaintiff's allegations of Commission violations of the 10th Amendment do not withstand scrutiny. The Commission has neither charged that the Board's membership make-up itself constitutes a violation of the antitrust laws nor insisted that North Carolina change the Board's membership or provide additional oversight over its challenged acts and practices. [DE-23 at 19-20]. Rather, the Commission has charged the Board with using its statutory authority under North Carolina law to exclude from the market non-dentist providers of teeth whitening services, without following the state-mandated procedures for obtaining cease and desist orders for such exclusion. Such a charge can hardly be viewed as a "clear" constitutional violation.<sup>3</sup>

Plaintiff goes even further afield with arguments based on the Commerce Clause, relying upon cases in which parties have

---

<sup>3</sup> To be sure, Plaintiff has claimed that its actions are exempted from antitrust liability by the state action doctrine, a position that was rejected by the Commission after a careful and thorough examination of the facts of this case and applicable precedent. 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>. Of course, even if Plaintiff's position had some basis in the law, and even if eventually it might prove successful on review by the court of appeals, such an outcome, without more, would not show that the Commission had "clearly" exceeded its statutory authority. To hold otherwise would turn even the closest of cases into a violation of constitutional rights.

sought judicial restraints upon state regulatory activities, under the "dormant" Commerce Clause. [DE-23 at 21-23]. These precedents have nothing to do with the present case, in which the Commission invokes the authority of a federal statute - the FTC Act - that was plainly within Congress's Commerce Clause authority.<sup>4</sup> Here again, plaintiff is simply trying to transform the straightforward statutory question at the heart of this case - the proper application of the state action doctrine - into a novel constitutional issue, in an effort to avoid the limitations of that doctrine and short-circuit the statutorily-prescribed path for resolution of that question.

Additionally, the mere fact that a party raises a constitutional challenge to an administrative proceeding does not allow it to escape exhaustion. As the Fourth Circuit has held, "'exhaustion is particularly appropriate when the administrative remedy may eliminate the necessity of deciding constitutional questions.'" Thetford Properties IV Ltd. Partnership v. United

AFL-CIO v. Nimmo, 711 F.2d 28, 31 (4th Cir.1983)). In the pending administrative matter, if the Commission resolves the matter in favor of the Plaintiff, no court will need to address any perceived Constitutional questions. Even if, however, the Commission enters an order adverse to the Plaintiff and, for the sake of argument, violates one of the Constitutional principles that the Plaintiff raises, the Fourth Circuit will still have the opportunity to consider this matter fully. Such exhaustion will "allow an agency the opportunity to use its discretion and expertise to resolve a dispute without premature judicial intervention and to allow the courts to have benefit of an agency's talents through a fully developed administrative record." Id.

Similarly, Plaintiff's claims do not satisfy the two requirements discussed in Long Term Care Partners, LLC v. United States, 516 F.3d 225 (4th Cir. 2008), and Leedom v. Kyne, 358 U.S. 184 (1958). First, Plaintiff has not made a "'strong and clear demonstration that a clear, specific and mandatory [statutory provision] has been violated.'" Long Term, 516 F.3d at 234 (quoting Newport News Shipbuilding and Dry Dock Co. v. NLRB, 633 F.2d 1079, 1081 (4th Cir.1980) (emphasis added) (alteration in original)). As discussed previously, the Commission has acted within its statutory mandate. But even if the law is uncertain regarding the Commission's authority,



Plaintiff is not entitled to the Leedom exception. North Carolina State Bd. of Registration for Professional Engineers and Land Surveyors v. F.T.C. 615 F. Supp. 1155, 1161 (E.D.N.C. 1985) (rejecting a plaintiff's first prong of Leedom analysis after deciding that the "case law setting the parameters of that agency's authority is presently unsettled"). As Defendant has offered a "plausible" interpretation of its enabling statute, Plaintiff has not satisfied the first requirement. Long Term, 516 F.3d at 234.

Second, Plaintiff has not shown that the pending Commission proceedings "wholly deprive [Plaintiff] of a meaningful and adequate means of vindicating its statutory rights." Id. at 236. Pursuant to the Commission's enabling statute, Plaintiff may seek review of a cease and desist order (if one is issued) with a federal court—the Fourth Circuit. See Board of Governors of Federal Reserve System v. MCorp Financial, Inc., 502 U.S. 32, 43-44 (1991) (distinguishing from Leedom a situation where, as a result of the enabling statute, a party would "have, in the Court of Appeals, an unquestioned right to review of both the regulation and its application").<sup>5</sup>

---

<sup>5</sup> Moreover, Plaintiff's primary arguments rest on constitutional claims rather than statutory rights. Consequently, the exceptions contained in Long Term Care Partners and Leedom do not provide the kind of direct support Plaintiff asserts.



CERTIFICATE OF SERVICE

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

Noel L. Allen  
Alfred P. Carlton, Jr.  
M. Jackson Nichols  
Catherine E. Lee  
Allen and Pinnix, PA  
Post Office Drawer 1270  
Raleigh, NC 27602  
Email: [nallen@allen-pinnix.com](mailto:nallen@allen-pinnix.com)  
[acarlton@allen-pinnix.com](mailto:acarlton@allen-pinnix.com)  
[mjn@allen-pinnix.com](mailto:mjn@allen-pinnix.com)  
[Clee@allen-pinnix.com](mailto:Clee@allen-pinnix.com)

Brian C. Vick  
Keith Kapp  
Williams Mullen  
301 Fayetteville St., Suite 1700  
P. O. Box 1000  
Raleigh, NC 27601  
Email: [bvick@williamsmullen.com](mailto:bvick@williamsmullen.com)  
[kkapp@williamsmullen.com](mailto:kkapp@williamsmullen.com)

/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