
faced by the state of North Carolina, the State Board, and the public warrant a stay of the Commission's Order pending the finality of all appeals in this matter.

III. ARGUMENT

- A. The State Board Is Not Required to Convince the Commission that Its Appeal Will "Likely" Succeed Because Such a Satisfying Requirement Would Render the Commission's Rule Regarding Stays Pointless.

Contrary to Complaint Counsel's arguments, the State Board does not have the burden of demonstrating a "great likelihood of success on appeal." Opposition at 2. Moreover, an applicant for a stay must "assess the likelihood of the applicant's success on appeal"—not prove that success is more likely than not. 16 C.F.R. 3.56(c); see Wash. Metro. Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977) (providing that likelihood of success is not a mathematical probability requiring proof of 50% or more). Complaint Counsel claims that the State Board's likelihood of success depends on the amount of injury the Board will suffer if a stay is not granted, arguing that little or no injury will occur. *Id.* However, as discussed *infra*, the State Board will suffer irreparable injury as a result of constitutional violations if a stay is not granted. Further, as acknowledged in North Texas Specialty Physicians, an administrative proceeding which Complaint Counsel cites in support of its argument, harm to the public absent a stay and public interest in a stay must also be considered. North Texas Specialty Physicians

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The State Board's likelihood of success appeal is high because its appeal is founded on firmly established case law and federal statutes. Even the case cited by Complaint Counsel in its Opposition as evidence that the State Board will not prevail on its state action defense, Asheville Tobacco Board of Trade, Inc. v. FTC, implicitly concluded that state agencies are immune from Commission jurisdiction. Opposition at 3, citing quid c000s inleSpan <</MCID 2 >>BDC (Ashev6licit)8(l)co

to perform the challenged action' and that, 'through statutes, the state has clearly articulated a state policy authorizing anticompetitive conduct"). The Eleventh Circuit further opined:

The Commission would have us approach the state-action issue differently. It argues that this case involves no "genuine state action" at all . . . In the absence of genuine state action, the Commission insists, we can dispose of the immunity issue without even reaching the question whether the state authorized the transaction and clearly articulated a policy to displace competition. . . . We may not "look behind" governmental actions for "perceived conspiracies to restrain trade." . . . We may not deconstruct[] . . . the governmental process or prob[e] . . . the official "intent" to determine whether the government's decision-making process has been usurped by private parties.

Id. at *14-*15 (internal citations omitted). In another recent decision, the Eleventh Circuit held that a state has a "compelling interest in the practice of professions within its boundaries and broad power to establish standards for licensing practitioners and regulating the practice of professions." Locke v. Shore, 634 F.3d 1195, 1196, cert. denied

The State Board has demonstrated that it is a high likelihood of success on appeal. It has shown that the costs of denying a stay are also high, both for itself and the public. It has demonstrated the complexity of the legal issues involved. Therefore, a stay should be granted.

B. The State of North Carolina, the State Board, and the Public Will Continue to Suffer Irreparable Harm Absent a Stay.

Complaint Counsel summarily overlooks the grave harm that would be perpetrated if a stay is not granted. The State Board has discussed the substantial and irreparable harms that will result if the Commission declines to stay the enforcement of its Order. This harm centers on a violation of the constitutional rights of the state of North Carolina, the State Board, and the citizens of the state. Complaint Counsel has failed to provide any substantive response to the State Board's discussion of the true harms in this matter. Thus, given the substantial legal questions regarding the Commission's novel theories about its own authority discussed below, the irreparable harm in this case warrants the grant of a stay. Even assuming *arguendo*, that there was a possibility of a circuit court upholding the Commission's theories, the potential that irreparable harm that would continue to be experienced by a state and its citizens, as a

Application for Stay, that the Commission's actions are unconstitutional and a breach of the constitutional rights of states and the State Board constitutes irreparable harm. Application for Stay at 5; see also A.A. Needville Indep. School Dist., 701 F. Supp. 2d 863 (S.D. Tex 2009) (violation of plaintiff's constitutional rights constituted irreparable harm); Ginorio v. Gomez 301 F. Supp. 2d 122, 133-34 (S.D. Tex. 2009) (same). The Commission has violated and continues to violate the State Board's constitutional rights, and it has put forth no authority to do so. California State Board of Optometry, the

Enforcement of the Order presents irreparable harm because it would prevent the State Board from fulfilling its legislative mandate. The Order states that the State Board is prohibited from: “[d]irecting a non-dentist provider to cease providing teeth whitening goods or teeth whitening services, [c]ommunicating to a non-dentist provider that . . . the provision of teeth whitening goods or teeth whitening services by a non-dentist provider is a violation of the Dental Practice Act, and [p]rohibiting, restricting, impeding or discouraging the provision of teeth whitening goods or services by a non-dentist provider.” Order at 3. But, the Order also states that “nothing in this Order prohibits the Board from: “investigating a non-dentist provider suspected violations of the Dental Practice Act . . .” or “filing, or causing to be filed, a court action against a non-dentist provider for an alleged violation of the Dental Practice Act” Order at 4. These conflicting statements would have the effect of prohibiting the State Board from fulfilling

prohibits the Board” from enforcing the Dental Practice Act does nothing to remedy this substantial violation of a state’s rightstorchange the facts in this case.

Complaint Counsel suggests that the Stat

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are not susceptible to the type of immediate injury that the Board, and indeed our constitutional system of government, would suffer should it be deemed a state entity”).

This case is not just about the loss of money or cancellation of contracts if the Order at issue is enforced (contrary to the reasoning in the two above-cited cases). Nor is this case about a private party attempting to advance the interests of its shareholders. Rather, this case is about whether a state has the right to regulate the professions within its borders, especially where public safety concerns are involved. See Locke, 634 F.3d at 1196. To analogize the harm faced by the State Board to that of a private actor concerned about taking a hit to its bottom line belies the Tenth Amendment to and the Commerce Clause of the Constitution, the Federal Trade Commission Act, as well as longstanding jurisprudence.

Finally, Complaint Counsel advances its own convoluted interpretation of a North Carolina statute in response to the State Board's demonstration of how the Order runs contrary to North Carolina law. Complaint Counsel states that “[n]othing in the language [of N.C. General Statute § 90-43] prohibits the Board from incurring and expending monies for Order compliance.” Opposition at 5. But, the clear language of the state statute only permits the State Board “to expend . . . such additional sum or sums as it may determine necessary in the administration and enforcement of this Article” Administering and enforcing the Dental Practice Act does not entail expending money or resources to comply with the extra-judicial orders of an independent federal agency.

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harm that the State Board has and will continue to suffer in the absence of a stay of the Commission's Order.

C. The Public Interest Will Be Advanced by Granting a Stay.

The public interest weighs heavily in favor of granting a stay because there is no harm to the Commission or any other party if a stay be granted. On the other hand, the State Board, the state of North Carolina, and its citizens would suffer substantial and irreparable harm in the absence of a stay. Complaint Counsel does not provide any examples of harm that could flow to the Commission should a stay be granted. Then, without providing any support, Complaint Counsel states that there are "clear and substantial harms to the public that would persist if a stay were to be granted." Opposition at 7. This unsupported claim is ~~true~~ and it masks the fact that the State Board and the public would suffer substantial and irreparable harm if a stay is not granted. In addition, as the State Board has ~~consistently~~ maintained throughout the course of this administrative proceeding, there ~~can~~ be no "harm" to, nor legal competition with, illegal providers of services that are ~~statutorily~~ defined as the practice of dentistry.

The Administrative Law Judge, in his Initial Decision, and the Commission, in its Final Opinion, both ruled that social ~~welfare~~ and public safety concerns are not justifications for restraints on competition. Opinion at 24-26. Ironically, a substantial component of the factors to be considered in the evaluation of whether a stay should be granted is whether there is a potential for harm if the stay is not granted. Indeed, public protection is a necessary, important ~~consideration~~ when evaluating whether a stay is warranted.

The State Board's enforcement of the North Carolina Dental Practice Act was necessitated by serious and well-known concerns over the dangers of unsupervised teeth whitening. Evidence offered by the State Board shows that teeth whitening services are safer when provided under dental supervision than when not. Respondent's Proposed Findings of Fact ("RPFof") 376-88. Dentists have a professional obligation to protect their patients' safety; they fulfill this obligation by taking far greater safety precautions than non-dentist teeth whitening service providers. Id. Dentists perform a thorough medical examination of potential teeth-whitening candidates and ensure that sanitation, sterilization, and safety procedures are followed. RPFof 385-388, 428. Dentists also cannot evade personal liability for their own malpractice, thereby protecting patients who would otherwise be required to sign liability-absolving waivers as customers of non-dentist providers. See e.g., RPFof 425, 631-32; see N.C. Gen. Stat. § 55B-9.

In contrast, numerous health hazards are present at non-dentist teeth whitening kiosks, which often do not have running water. RPFof 376-84, 434-44, 440-42, 680. Kiosk employees are therefore unable to wash their hands, and can clean equipment only by wiping it down with Lysol wipes. RPFof 438-44. The State Board received reports of kiosk employees working without gloves or masks. RPFof 440. Furthermore, although spas and salons typically have running water and must operate pursuant to the sanitation regulations of the North Carolina Board of Cosmetic Art Examiners, such facilities do not have to meet the strict sterilization rules of the American Dental Association, as adopted by reference to the State Board's rules. RPFof 436-37.

Beyond sanitation and sterilization concerns, teeth whitening industry representatives themselves admit the immediate medical dangers of teeth whitening.

jurisdiction is not necessary,

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attention of the circuit court on appeal. Until the appeals in this case are completed, a stay of the Commission's Order is warranted because the State Board has demonstrated all four factors considered when evaluating together to grant a stay, even though a stay should be granted if the State Board demonstrate any one of the four factors.

For all the foregoing reasons, the Commission should stay the effect and enforcement of its Order pending final disposition of the State Board's appeals.

This the 26th day of January, 2012.

Respectfully submitted,

ALLEN, PINNIX & NICHOLS, P.A.

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CERTIFICATE OF SERVICE

I hereby certify that on January 26, 2012, I electronically filed the foregoing with the Federal Trade Commission using the FTCE system, which will send notification of such filing to the following:

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I further certify that I sent twelve hard copies of the foregoing for the Commission's use to Secretary Clark at the above address via Federal Express.

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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