BRIEF FOR DEFENDANT-APPELLEE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 11-1679

NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS,

Plaintiff-Appellant,

v.

FEDERAL TRADE COMMISSION,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

BRIEF OF DEFENDANT-APPELLEE FEDERAL TRADE COMMISSION

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STATEMENT OF JURISDICTION

Plaintiff appeals the district court's dismissal of its civil action. Defendant successfully challenged the district court's subject matter jurisdiction over Plaintiff's action.

Jurisdiction to this Court is provided by 28 U.S.C. § 1291. The judgment was imposed and entered on May 9, 2011. Plaintiff filed a timely notice of appeal on June 27, 2011.

STATEMENT OF ISSUE

Whether the district court erred in dismissing Plaintiff's action based on a lack of subject matter jurisdiction.

STATEMENT OF CASE

Plaintiff North Carolina State Board of Dental Examiners ("Board") filed a complaint for declaratory judgment and for a preliminary and permanent injunction with the United States District Court for the Eastern District of North Carolina on February 1, 2011. (J.A. 8-45). The Board generally complained against and sought an injunction of administrative proceedings initiated by Defendant Federal Trade Commission ("Commission").

The Board filed a motion for a temporary restraining order on February 2, 2011. (J.A. 3, Docket Entry 5). Following briefing, the district court denied the Board's motion for a temporary restraining order on February 9, 2011. (J.A. 4, Docket Entry 13). The Commission filed a motion to dismiss based on lack of subject matter jurisdiction on February 28, 2011 (J.A. 147), and the district court stayed further proceedings pending its decision on the motion to dismiss. (J.A. 5, Docket Entry 22). Following full briefing, the district court granted the Commission's motion to dismiss on May 3, 2011. (J.A. 149-58). Judgment was entered on May 9, 2009. (J.A. 159). The Board filed a timely notice of appeal on June 27, 2011. (J.A. 160).

STATEMENT OF FACTS

Proceedings Before the Federal Trade Commission

On June 17, 2010, the Commission initiated an administrative proceeding against the Board pursuant to the Federal Trade Commission Act, 15 U.S.C. §§ 41-58. (J.A. 150). See North Carolina Bd. of Dental Examiners, Docket No. 9343 (Fed. Trade Comm'n), http://www.ftc.gov/os/adjpro/d9343/index.shtm, ("FTC Docket") (last accessed November 27, 2011). In that proceeding, the Commission alleged that the Board, a North Carolina regulatory agency composed of six licensed dentists and two non-dentists, is improperly excluding non-dentists from providing lower-cost teeth whitening services. (J.A. 150).

On November 3, 2010, the Board moved to dismiss the administrative complaint based on the state action doctrine.[1] (J.A. 150). On February 3, 2011, the Commission denied the Board's motion to dismiss the administrative action, holding that the Board had not satisfied the Supreme Court's requirement that the conduct at issue be actively supervised by the state. North Carolina Bd. of Dental Examiners, 151 F.T.C. 607 (2011). The administrative law judge (ALJ) held an evidentiary hearing between February 17, 2011, and March 16, 2011. (J.A. 151).

[1] For a discussion of the state action doctrine, see note 5, infra.

On July 14, 2011, the ALJ filed an initial decision finding that the Board violated Section 5 of the FTC Act, 15 U.S.C. § 45. North Carolina Bd. of Dental Examiners, 2011 WL 3152198 (Fed. Trade Comm'n July 14, 2011). The ALJ ordered the Board to cease and desist taking certain actions to discourage non-dentists from providing teeth-whitening services. Id. at *99. On July 28, 2011, pursuant to 16 C.F.R. § 3.52(b), the Board appealed the ALJ's initial decision to the full Commission. (Brief at 9). The Commission heard oral argument on the Board's appeal on October 28, 2011. FTC Docket. Pursuant to 16 C.F.R. § 3.52(b)(2), the Commission is required to issue its final decision within 100 days after oral argument.

Proceedings Before the District Court

On February 1, 2011–shortly before the hearing before the ALJ began–the Board filed the instant suit in district court. In general terms, the Board asserted that the Commission exceeded its authority and violated the United States Constitution in pursuing the instant administrative action.[2] (J.A. 8-92).

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[2] Specifically, the Board's complaint asserted: that the Commission does not have "antitrust jurisdiction over the State Board's enforcement of the Dental Practice Act" (Count I) (J.A. 37, ¶ 74); that the Commission is barred from forcing "the State of North Carolina" to be tried in a tribunal that is not the Supreme Court "or a lesser tribunal established by Congress . . . ." (Count II) (J.A. 37, ¶ 79); that the Commission is barred from "attempting to preempt North Carolina's statutorily mandated composition of a State Board . . . ." (Count III) (J.A. 39, ¶ 86); that the Commission "does not have the authority to consider or (continued...)

The Commission moved to dismiss the Board's complaint on February 28, 2011. (J.A. 147). The Commission argued, among other things, that the Board could not collaterally challenge a pending administrative action and that it could ultimately seek review of a final cease and desist order through a direct appeal to this Court. (J.A. 151).

On May 3, 2011, the district court granted the Commission's motion to dismiss. (J.A. 149-58).[3] The court held that it is "well-settled that this court lacks jurisdiction to enjoin ongoing administrative enforcement proceedings such as the one at issue here." (J.A. 153) (citing, among other sources, Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594, 598 (1950)). The district court also noted that the Commission had not yet issued a final order subject to review. (J.A. 153) (citing FTC v. Standard Oil Co. of Cal., 449 U.S. 232, 241-42 (1980)).

The district court held further that this Court had already rejected the idea that a party could immediately appeal or challenge

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[2](...continued)
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) (J.A. 39-40, ¶ 90); that the Commission's assertion of jurisdiction and its administrative process violates the Administrative Procedure Act (Count V) (J.A. 42, ¶¶ 101-02); 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) (J.A. 43, ¶ 107).

[3] The district court also denied a motion for leave to file an amicus curiae brief filed by several "State Boards." (J.A. 157-58).

the Commission's decision denying the state action defense. (J.A. 153) (citing South Carolina State Bd. of Dentistry v. FTC, 455 F.3d 436 (4th Cir. 2006)). The district court also rejected the Board's argument that South Carolina Board of Dentistry did not apply because the Board had filed a direct federal suit in district court rather than an interlocutory appeal. (J.A. 154).

The district court emphasized that, if the Commission issues a final cease and desist order, the Board may appeal that order exclusively to this Court. (J.A. 154-55). 15 U.S.C. § 45(c). The district court also rejected the Board's argument that the Commission was acting in brazen defiance of its statutory authorization. (J.A. 155-156). Finally, the district court rejected the Board's argument that the Commission was violating its constitutional rights. (J.A. 156-57). On June 27, 2011, the Board filed a timely notice of appeal. (J.A. 160).

SUMMARY OF ARGUMENT

The district court did not err in dismissing the Board's claim. The Board cannot seek to enjoin an ongoing administrative proceeding. The Board also cannot immediately challenge—without a final order from the Commission—issues regarding the state action defense. Congress has already established that the Board may appeal a final cease and desist order and may raise issues relating to the state action defense by filing a direct appeal with this Court. For these same reasons, the Board's complaint is also not ripe for adjudication. Finally, the Board cannot meet the high standard that would be needed to justify a departure from normal exhaustion standards, such as actions in brazen defiance of the Commission's jurisdiction or actions in clear violation of the Board's constitutional rights.

ARGUMENT

THE DISTRICT COURT DID NOT ERR IN DISMISSING PLAINTIFF'S COMPLAINT.

A. Standard of Review.

This Court reviews de novo the district court's dismissal of an action pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction. Vulcan Materials Co. v. Massiah, 645 F.3d 249, 261 (4th Cir. 2011).

B. Discussion of Issue.

The district court properly held that it could not enjoin a pending administrative proceeding.[4] The Board may advance its state action defense[5] arguments before the Commission. If the

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[4] The Board claims that "[t]he State Board is not required to exhaust all administrative remedies prior to seeking judicial relief when the Commission has acted outside of its limited authority and violated the State Board's constitutional rights." (Brief at 18). These arguments are addressed in Section B.4, infra.

[5] Although, as discussed infra, the Court should not address the merits of the Board's state action defense, a brief summary of that doctrine is included here. 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 developed what has become known as the "state action" doctrine. This doctrine permits a state's delegating to others (including private parties) its sovereign power to pursue anticompetitive policies. Because the careful balance between competition policies and federalism concerns underlying the doctrine exempts only sovereign policy choices from federal antitrust scrutiny, however, non-sovereign defendants must clear additional hurdles to qualify for that exemption. These hurdles vary depending on the likelihood that the decision-makers may be pursuing non-sovereign interests. See Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975). Thus, for (continued...)

Commission issues a final cease and desist order, the Board may appeal that final order to this Court. 15 U.S.C. § 45(c). Second, as this Court has already held, South Carolina State Bd. of Dentistry v. FTC, 455 F.3d 436, 441 (4th Cir. 2006), the Board may not challenge a non-final order of the Commission, including an order rejecting its state action defense. Third, the Board may also not seek relief from the Federal courts at this time due to ripeness concerns. Finally, contrary to the Board's arguments, there is no extraordinary basis here for a departure from the normal standards regarding the exhaustion of administrative remedies. (Brief at 29-49).

1. The District Court Correctly Held That the Board Cannot Enjoin These Ongoing Administrative Enforcement Proceedings.

As the Board's complaint improperly attempted to enjoin the Commission's ongoing administrative enforcement action, the district court correctly dismissed it for lack of subject matter

[5](...continued)
example, municipalities can enact anticompetitive regulation if they can show that their actions are consonant with a "clearly articulated and affirmatively expressed" state policy. Town of Hallie v. City of Eau Claire, 471 U.S. 34, 39-40 (1985). By contrast, private parties that engage in anticompetitive conduct can avail themselves of the state action exemption only if they can show that their actions were both taken pursuant to a "clearly articulated and affirmatively expressed" state policy and "actively supervised" by the state itself. California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980). Whether hybrid bodies such as state regulatory boards that are controlled by private actors (as the case is here with the Board) qualify for the Parker exemption has not been settled by the courts.

jurisdiction. Those subject to an enforcement action–including administrative proceedings–may not file a separate collateral challenge to that action in Federal courts. Rather, they 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) (holding that the district court was "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 lacked jurisdiction to enjoin administrative enforcement proceedings both because no final agency decision existed and because jurisdiction to review a final agency decision rests exclusively with the courts of appeal).[6]

[6] See also, e.g., X-Tra Art v. Consumer Prod. Safety Comm'n, 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) ("The 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 seeking "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).

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. As the Supreme Court held in Ewing:

> [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;[7] 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 state law issues is pending" in another tribunal, "a district

[7] The Board argues that "in Ewing, Congress expressly provided the FDA the authority to determine probable cause as to whether an article may mislead the public. In this case, Congress has granted no such authority as to the Commission's unlawful actions against the State Board." (Brief at 28). For reasons discussed infra Section B.4, the Board has not met the high bar of showing that the Commission has acted in brazen defiance of its enabling statute or the Constitution. As a result, the Board must completely exhaust its arguments before the Commission and receive a final cease and desist order before it may pursue a direct appeal in this Court.

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)).[8]

Here, the Board raised the claims alleged in its complaint as defenses and arguments in the ongoing administrative proceeding before the Commission. Specifically, the Board argued to the Commission that the state action doctrine deprived the Commission of jurisdiction. (J.A. 8-45, 150). The Commission denied the Board's motion to dismiss in a detailed opinion that analyzed the undisputed facts, allegations, and applicable law. North Carolina Bd. of Dental Examiners, 151 F.T.C. 607 (2011).

Although the Commission rejected the Board's arguments (Brief at 8-9) and although the ALJ has issued an initial decision (Brief at 9), the Commission has not issued a final decision regarding antitrust liability. The Commission will review the ALJ's decision de novo. 16 C.F.R. § 3.54(a) (stating that, upon review, the Commission "will, to the extent necessary or desirable, exercise all the powers which it could have exercised if it had made the initial decision"). Once that final order is issued, the Board may

[8] The Board cites seven cases in support of the proposition that "federal courts have repeatedly granted state agencies immunity from federal antitrust legislation." (Brief at 28-29). Notably, none of those opinions required a court to intervene in a pending matter before the Commission. Instead, they all appear to be direct actions filed by private parties directly in district court. Consequently, they do not address the Commission's arguments in this appeal.

seek judicial review in this Court, as provided by statute. Because the only appropriate forum at this time for the issues raised in the Board's complaint is in the ongoing administrative enforcement action, the district court correctly held that it lacked jurisdiction over the Board's complaint.

2. The Board Has Not Challenged a Final Commission Order.

Additionally, as the Board's complaint challenges a non-final agency action, the district court lacked jurisdiction over this matter. The Supreme Court has specifically held that the key administrative action complained about by the Board here–the issuance of an administrative complaint that begins the administrative proceedings–does not constitute a "final" agency action.

In FTC v. Standard Oil Co. of Ca., the Court held that, as the Commission's complaint was only a determination that adjudicatory proceedings would commence, it was not "final" and subject to immediate challenge in an Federal court. 449 U.S. 232 (1980). The Court held that the "effect of the judicial review sought . . . is likely to be interference with the proper functioning of the agency and a burden for the courts." Id. at 242. The Court also reasoned that permitting judicial review of the Commission's complaint prior to the completion of administrative proceedings would lead to "piecemeal review which at the least is inefficient and upon completion of the agency process might prove to have been

unnecessary." Id. (citations omitted). Moreover, "every respondent to a Commission complaint could make the claim that [plaintiff] had made." Id. at 242-43. 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 through the administrative process could be "substantial," such burden did not constitute irreparable injury. Id. at 244.

Thus, Standard Oil prohibits judicial interference in the administrative process until the Commission issues a final cease and desist order (if it issues one at all).[9] The Commission is currently reviewing de novo the ALJ's Initial Decision and has not yet issued a final determination on antitrust liability. Consequently, the Board's complaint and this subsequent appeal are premature.

Moreover, the Board's arguments regarding its state action defense do not allow it to proceed directly to a Federal court.

[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 Commission 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.

This Court has considered and rejected as premature an attempt to challenge a pending Commission matter based on the Commission's rejection of a state action defense. South Carolina State Bd. of Dentistry, 455 F.3d at 441. In South Carolina, the dental board brought an interlocutory appeal of the Commission's denial of the Board's motion for protection pursuant to Parker v. Brown, 317 U.S. 341 (1943). The Board relies on Parker to argue it is shielded from Commission jurisdiction. (J.A. 16, ¶ 26).[10]

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, this Court 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. As a result, the Board must first make any arguments along those lines before the Commission

[10] In support of its argument that it should be able to challenge jurisdiction in Federal court, the Board cites New England Motor Rate Bureau v. FTC, 908 F.2d 1064 (1st Cir. 1990). (Brief at 18-19). As the Board concedes, the respondent in that case went to Federal court through the appeal process provided in 15 U.S.C. § 45(c). (Brief at 18 n.3). As discussed throughout this brief, the Commission agrees that the Board may appeal a final adverse decision–if any–through that statute. The Board may not, however, ignore that statute by seeking to enjoin a pending, non-final administrative matter. Even putting aside that critical distinction, however, the Supreme Court rejected the First Circuit's application of the state action doctrine in FTC v. Ticor Title Ins. Co., 504 U.S. 621, 631-32 (1992).

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, this Court in South Carolina concluded that the board could not pursue such a remedy prior to the completion of the administrative proceedings.

Rather, the panel held 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. (citation and internal quotation marks omitted). "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).

This Court 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 cease and desist order from the Commission before it may bring a challenge in Federal Court. The Board alleges that South Carolina and this case differ based on the facts and procedurally-that is, the Board asserts that, unlike the plaintiff in South Carolina, it has not filed an interlocutory appeal. (Brief at 20, 23-25). The Board also attempts to narrow the reach of South Carolina so that it only applies to reject the specific argument that plaintiff in that appeal made to this Court. (Brief at 25). The South Carolina opinion, however, does not suggest that its reach is so narrow. Rather, it holds that a rejection of the Parker defense does not

entitle a party to step outside of the regular administrative process. Just as the plaintiff in South Carolina could not step out of the administrative process by filing an interlocutory appeal, the Board here cannot step outside of the administrative process by trying to enjoin ongoing administrative proceedings before the Commission.

The Board's argument regarding interlocutory appeals is also unpersuasive. Indeed, this Court's decision in South Carolina applies even more strongly in this proceeding. In South Carolina, the petitioner at least challenged the Commission in the proper forum—namely, this Court. 15 U.S.C. § 45(c). By contrast, the Board here originally attempted to challenge the Commission's pending proceedings in a court–the district 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, the Board's premature challenge to a non-final order of the Commission should fail.[11]

3. This Matter Is Not Ripe for Review.

General principles of ripeness also show why the Board's complaint is premature.[12] 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, Inc. v. Sierra Club, 523 U.S. 726, 732-33 (1998) (citation and internal quotation marks omitted); Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 200 (1983); Retail Industry Leaders Ass'n v. Fielder, 475 F.3d 180, 188 (4th Cir. 2007).

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[11] See also Ukiah Valley Med. Ctr. v. FTC, 911 F.2d 261, 264-65 (9th Cir. 1990) (holding that issuance of administrative complaint was not final agency action subject to judicial review); cf. General Finance Corp. v. Fed. Trade Comm'n, 700 F.2d 366, 368 (7th Cir. 1983) (finding no Federal court jurisdiction to enjoin the Commission 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").

[12] Although the district court did not reach a decision on this issue, this Court "can affirm [the district court's dismissal] on any basis fairly supported by the record." Eisenberg v. Wachovia Bank, N.A., 301 F.3d 220, 222 (4th Cir. 2002).

In making a ripeness determination, this Court analyzes both of the following questions: "'(1)[is] the issue[ ] fit for judicial review and (2) will hardship fall to the parties upon withholding court consideration?'" West Virginia Highlands Conservancy, Inc. v. Babbitt, 161 F.3d 797, 800 (4th Cir. 1998) (alternations in original) (quoting Arch Mineral Corp. v. Babbitt, 104 F.3d 660, 665 (4th Cir. 1997)). In order for the Board's district court complaint to be ripe, it must succeed on both of these questions. New York State Ophthalmological Soc. v. Bowen, 854 F.2d 1379, 1394 (D.C. Cir. 1988).

As to the first question, "[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.'" Retail Industry Leaders Ass'n, 475 F.3d at 188 (quoting Texas v. United States, 523 U.S. 296, 300 (1998)).[13] As this Court has held "[r]egarding administrative agency 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 F. App'x 161, 163 (4th Cir. 2006) (unpublished)

[13] 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 F. App'x 276, 282 (4th Cir. 2008) (unpublished) (quoting MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 138 (2007)).

(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.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 to issue a cease and desist order against the Board. The Board's arguments regarding the state action doctrine of Parker v. Brown and its progeny, supra note 5, 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.

Indeed, as in South Carolina State Bd. of Dentistry, discussed supra, many courts have held that, where an administrative proceeding has commenced, the Commission 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.[14] Although the Commission has rejected the Board's arguments regarding the state action defense, no final decision on antitrust liability has been reached. If the Commission ultimately issues an adverse final ruling regarding antitrust liability, the Board may petition this Court (and, in turn, the Supreme Court), for review. 15 U.S.C. § 45(c); Ukiah Adventist Hosp. v. FTC, 981 F.2d 543, 549 (D.C. Cir. 1992).[15] Consequently, Plaintiff's complaint is not fit for review at this time.

Similarly, as to the second question, withholding consideration in the district court will not place hardship on the

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[14] See, e.g., 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 Commission); FTC v. Markin, 532 F.2d 541, 543-44 (6th Cir. 1976) ("We [the Court] 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) (holding that review of state action defense is premature until after final Commission 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) (holding that the agency is to make the initial determination of its own jurisdiction).

[15] The Board challenges the district court's citation to Ukiah by arguing that it has filed a direct district court action rather than an interlocutory appeal and that Ukiah did not address whether a district court could entertain a constitutional challenge to a pending matter. 981 F.2d at 549. (Brief at 26-27). As discussed supra in reference to the South Carolina State Bd. of Dentistry case, the "direct action" argument fails. For reasons discussed infra Section B.4.b, the Board's constitutional arguments do not qualify for any exception to the regular administrative process.

Board. "'[T]he purpose of the 'hardship to the parties' analysis is to ascertain if the harm that deferring review will cause the petitioner[ ] outweighs the benefits it will bring the agency and the court.'" West Virginia Highlands Conservancy, Inc., 161 F.3d at 801 (quoting Eagle-Picher Indus., Inc. v. EPA, 759 F.2d 905, 918 (D.C. Cir. 1985)). In order for a court to find that this second question is satisfied, "postponing review must impose a hardship on the [Board] that is immediate, direct, and significant." Id. (internal quotation marks omitted).

As in West Virginia Highlands Conservancy, the Board has not shown that "'irremediable adverse consequences may flow from a determination that this case is not currently ripe for review,'" or that "'no review will ever be possible'" if the Board's claim is found not to be ripe. Id. (quoting International Union, UAW v. Brock, 783 F.2d 237, 250 (D.C. Cir. 1986)). Rather, the Commission has not issued a final cease and desist order. If the Court agrees that the Board's claim is not ripe and if the Commission ultimately issues a final cease and desist order, the Board will still have the ability to appeal that final order to this Court.

4. The Board Has Not Shown That It is Entitled to an Exception to the Exhaustion Requirement.

The Board argues that the district court had jurisdiction over its complaint because two exceptions to the regular exhaustion requirements apply. (Brief at 14-15). First, the Board argues that the Commission acted in brazen defiance of its jurisdiction. (Brief at 29-38). Second, the Board argues that the Commission has acted in violation of the Commerce Clause and the Tenth Amendment. (Brief at 38-49). The district court correctly rejected both of these arguments. (J.A. 155-157). As neither of these exceptions applies, the district court correctly held that the Board must continue to litigate its arguments before the Commission.

a. The Commission Did Not Act in Brazen Defiance of its Statutory Jurisdiction.

As an initial matter, the Commission has not acted in "brazen defiance" of its statutory authorization. To satisfy this exception, the Board must "show that the [Commission's] actions clearly exceeded its statutory authority." Philip Morris, Inc. v. Block, 755 F.2d 368, 370 (4th Cir. 1985) (emphasis added) (internal quotation marks omitted).

The only "actions" that the Commission has taken against the Board thus far are the issuance of the administrative complaint, the Commission's rejection of the Board's state action defense, and the ALJ's Initial Decision. These steps are neither final actions nor ones "clearly exceed[ing]" the Commission's statutory

authority. The administrative complaint, issued pursuant to the Federal Trade Commission Act, charged that the Board is a "person," within the meaning of Section 5 of that statute, 15 U.S.C. § 45, and that its acts and practices are "in commerce or affect commerce," within the meaning of Section 4 of that Act, 15 U.S.C. § 44. (J.A. 48, ¶¶ 5-6). The ALJ agreed with these claims in its Initial Decision. North Carolina Bd. of Dental Examiners, 2011 WL 3152198 (Fed. Trade Com'n July 14, 2011). 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 Inc. 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 the Board, as "persons" under the FTC Act. See, e.g., Virginia Bd. of Funeral Dirs. & Embalmers, 138 F.T.C. 645 (2004); South Carolina State Bd. of Dentistry, 138 F.T.C. 229 (2004); Massachusetts Bd. of Registration in Optometry, 110 F.T.C. 549 (1988).

Nor has the Board shown that the Commission "clearly exceeded" the "in commerce" requirement of its jurisdiction. The administrative 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." (J.A. 48, ¶6). The complaint charged further that the Board's actions "deter persons from other states from providing teeth whitening services in North Carolina." (J.A. 48, ¶ 6).

Similarly, the Board'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), for the district court to have jurisdiction over its complaint. First, the Board 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. Even if the law is uncertain regarding the Commission's authority, however, the Board is not entitled to the Leedom exception. North Carolina State Bd. of Registration for Prof'l Eng'rs and Land Surveyors v. FTC, 615 F. Supp. 1155, 1161 (E.D.N.C. 1985) (rejecting a plaintiff's argument that the Commission's rejection of state action immunity satisfied the first prong of the Leedom analysis).

In North Carolina State Board, the district court held that "the law [with respect to state action immunity] is presently rather unsettled. Moreover, this case does not present a situation analogous to that found in Leedom, in which an explicit and unambiguous statutory prohibition was clearly violated." Id. The Board has not shown how the Commission's interpretation of its own enabling statute and the state action doctrine satisfy the first Leedom requirement. Long Term, 516 F.3d at 234.[16]

Second, the Board has not shown that the proceedings before the Commission "wholly deprive [Plaintiff] of a meaningful and adequate means of vindicating its statutory rights." Id. at 236. Pursuant to the Commission's enabling statute, the Board may seek review of a cease and desist order (if one is issued) with this Court. See Bd. of Governors of Fed. 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

[16] Additionally, in the administrative complaint, the Commission expressly discussed the jurisdictional basis for the complaint. (J.A. 48, ¶¶ 5-6). The Commission also explained why any state action defense would fail: "[T]he Dental Board has engaged in extra-judicial activities aimed at preventing non-dentists from providing teeth whitening services in North Carolina. These activities are not authorized by statute and circumvent any review or oversight by the state." (J.A. 50, ¶ 19).

party would "have, in the Court of Appeals, an unquestioned right to review of both the regulation and its application").[17]

b. The Commission Has Not Clearly Violated the Constitutional Rights of the Board.

The Commission also has not "clearly violated the constitutional rights" of the Board under either the Commerce Clause or the Tenth Amendment of the United States Constitution. Philip Morris, 755 F.2d at 371. In arguing that the Commission has violated the Commerce Clause, the Board relies upon cases in which parties have sought judicial restraints upon state regulatory activities under the "dormant" Commerce Clause. (Brief at 39). 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 within Congress' Commerce Clause authority.[18] The Board 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

[17] Moreover, the Board'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 the Board asserts.

[18] In invoking that authority, the Commission is not attempting "to preempt North Carolina's laws on the regulation of the practice of dentistry." (Brief at 43). Indeed, the Board's authority to regulate dentistry is not contested before the Commission. At issue, instead, are the Board's actions, including issuance of its own cease and desist orders, that resulted in a restraint of competition for teeth whitening services, without any active state supervision.

effort to avoid the limitations of that doctrine and short-circuit the statutorily-prescribed path for resolution of that question.

The principles of federalism underlying the Tenth Amendment have been enshrined by the courts, insofar as the Commission's jurisdiction is concerned, in the state action doctrine. See Parker v. Brown, 317 U.S. 341 (1943); California Retail Liquor Dealers Ass'n, 445 U.S. 97 (1980). Consequently, the Board's arguments of direct Tenth Amendment violations appear to be merely an attempt to avoid the limits on that doctrine. Those limits led the Commission to deny the Board's motion to dismiss the administrative complaint on state action grounds.

The Board's claim that the Commission has violated the Tenth Amendment does 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. 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 the necessary active supervision

by the State. Such a charge can hardly be viewed as a "clear" constitutional violation.[19]

Additionally, the mere fact that a party raises a constitutional challenge to an administrative proceeding does not allow it to escape exhaustion. As this Court has held, "'exhaustion is particularly appropriate when the administrative remedy may eliminate the necessity of deciding constitutional questions.'" Thetford Properties IV Ltd. Partnership v. HUD, 907 F.2d 445, 448 (4th Cir. 1990) (quoting Am. Fed. of Gov't Employees, 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 Board, no court will need to address any perceived constitutional questions. Even if, however, the Commission enters an order adverse to the Board and, for the sake of argument, violates one of the constitutional principles that the Board raises, this Court 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

[19] As noted previously, the Commission rejected the Board's state action doctrine arguments after a careful and thorough examination of the facts of this case and applicable precedent. See North Carolina Bd. of Dental Examiners, 151 F.T.C. 607 (2011). Of course, even if the Board's position had some basis in the law, and even if eventually it might prove successful on review by this Court, such an outcome, without more, would not show that the Commission had "clearly" exceeded its statutory authority.

allow the courts to have benefit of an agency's talents through a fully developed administrative record." Id. Thus, the Board must exhaust the administrative proceedings and receive a final order from the Commission before it may come to this Court.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the district court.

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

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