

**UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION**

**COMMISSIONERS:**        **Timothy J. Muris, Chairman**  
                                 **Mozelle W. Thompson**  
                                 **Orson Swindle**  
                                 **Thomas B. Leary**  
                                 **Pamela Jones Harbour**

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**In the Matter of** )  
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**SOUTH CAROLINA STATE BOARD OF DENTISTRY.** )     **Docket No. 9311**  
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**UNOPPOSED MOTION TO STAY DISCOVERY PENDING  
JUDICIAL REVIEW**

Respondent, the South Carolina State Board of Dentistry, hereby moves to stay the 90-day discovery period set in this matter by the Commission’s Order dated July 28, 2004, pending the resolution of the petition for judicial review which the Respondent is filing with the Court of Appeals for the Fourth Circuit simultaneously with the filing of the present motion for stay.

Undersigned counsel for the Respondent has conferred about this Motion to Stay with Michael B. Kades, Complaint Counsel for the Commission in this matter, and Mr. Kades has stated that he does not oppose this motion. While not opposing this motion, Complaint Counsel takes no position on the legal arguments set forth below with respect to the collateral order doctrine. However, Complaint Counsel does request that the Commission issue its ruling as soon as possible because of the limited discovery period.

The bases for this motion are as follows: The Order of the Commission denying the Board of Dentistry’s motion to dismiss on state action grounds is essentially a refusal

to dismiss the case based on the immunity or exemption of the respondent State Board of Dentistry from suit. Such decisions are typically regarded as appealable under the “collateral order doctrine.” The leading case in the context of immunities from suit is *Mitchell v. Forsyth*, 472 U.S. 511 (1985). An analogous case involving a petition for judicial review of administrative action is *Meredith v. Federal Mine Safety and Health Review Commission*, 177 F.3d 1042 (D.C. Cir. 1999)(permitting judicial review of administrative decision that had denied immunity from suit claimed by employees of Mine Safety and Health Administration and had remanded the case to an ALJ for factfinding). As *Meredith* explains, an immunity from suit is more than a defense to the action, it is instead “a right to avoid suit altogether.” 177 F.3d at 1051. This right “is effectively lost if a case is erroneously permitted to go to trial.” *Mitchell, supra*, 472 U.S. at 526.

The state action doctrine has been regarded by at least two circuits as creating an immunity, and one to which the collateral order doctrine applies. *Martin v. Memorial Hospital at Gulfport*, 86 F.3d 1391, 1395-96 (5th Cir. 1996); *Earles v. State Bd. of Certified Public Accountants of Louisiana*, 139 F.3d 1033, 1040 (11th Cir. 1998)(“[s]tate action is properly treated as an immunity from suit”). For these reasons, the Board of Dentistry will argue that the state action issue is presently reviewable by a Court of Appeals.

It has been held that the filing of a nonfrivolous notice of appeal following a denial of an immunity of suit divests a district court of jurisdiction, meaning that the lower court proceedings must not go forward. *See, e.g., Williams v. Brooks*, 996 F.2d 728, 730 (5th Cir. 1993), and authorities cited therein. There is no principled reason why

a nonfrivolous appeal from an administrative agency's denial of immunity would be any different. Similarly, the governing statute, Section 15(d) of the FTC Act, 45 U.S.C. § 45(d), provides that the court of appeals has exclusive jurisdiction of cases upon petition for judicial review, but only “[u]pon the filing of the record with it. . . .” Rule 17(a) of the Federal Rules of Appellate Procedure permits the agency to file the record up to 40 days after service of the petition for review. In practical effect, the process of filing the petition for judicial review (which is being filed only about a week into the 60-day period permitted for such filings) and of getting the record to the Court of Appeals in the present case could consume at least half of the 90-day discovery period set by the Commission.

Based on the factors set forth above, the Board submits that it would be appropriate for the Commission to stay further proceedings before it at present. This stay is necessary to preserve the asserted right of the Board to be free from this litigation, and is also necessary to spare both sides the necessity of beginning a discovery process that may ultimately become unnecessary. In effect, this motion asks for a stay for the same reasons that supported its earlier request for a stay, granted by the Commission on October 23, 2003. Finally, a stay would insure that if the case eventually returns to the Commission from the Court of Appeals, both parties will have most or all of the full 90 days in which to conduct discovery, and will prevent the need for taking discovery that might become stale if the case is ultimately remanded back to the Commission.

For these reasons, the Respondent respectfully requests that discovery be stayed in this matter pending the resolution of the petition for judicial review which the Respondent is filing with the Fourth Circuit Court of Appeals simultaneously with the filing of the present motion for stay.

Respectfully submitted,

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August 9, 2004

**UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION**

**COMMISSIONERS:**       **Timothy J. Muris, Chairman**  
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**ORDER GRANTING UNOPPOSED  
MOTION TO STAY DISCOVERY PENDING JUDICIAL REVIEW**

This matter is before the Commission on Respondent’s Unopposed Motion to Stay Discovery Pending Judicial Review. Respondent filed a Petition for Review with the United States Court of Appeals for the Fourth Circuit on or about August 10, 2004.

After consideration of Respondent’s motion, and noting the absence of opposition from Complaint Counsel, the Commission hereby grants Respondent’s Motion to Stay Discovery. Accordingly,

**IT IS HEREBY ORDERED THAT** all discovery in this matter is stayed pending the final resolution of the petition for judicial review.

By the Commission.

Donald S. Clark  
Secretary

ISSUED: