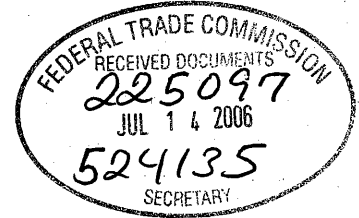


UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS: Deborah Platt Majoras, Chairman  
Pamela Jones Harbour  
Jon Leibowitz  
William E. Kovacic  
J. Thomas Rosch



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In the Matter of )  
 )  
SOUTH CAROLINA STATE BOARD OF DENTISTRY )  
 )  
\_\_\_\_\_)

Docket No. 9311

FEDERAL TRADE COMMISSION  
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MINUTES SECTION

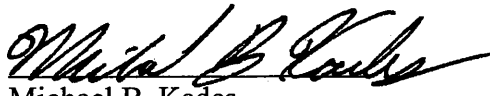
**COMPLAINT COUNSEL'S RESPONSE TO RESPONDENT'S MOTION TO STAY  
PROCEEDINGS PENDING PETITION FOR CERTIORARI REVIEW**

This case is in a unique procedural posture. The Commission has denied South Carolina State Board of Dentistry's motion to dismiss, holding that state action does not protect the Board's actions. The Board appealed the decision immediately. Normally, a denial of a motion to dismiss is not immediately appealable. *See Fed. Trade Comm'n v. Standard Oil Co. of Cal.*, 449 U.S. 232, 246 (1980) (holding that only final agency action may be appealed); *see also* 28 U.S.C. § 1291 (courts of appeals have jurisdiction over final orders of district courts). An exception exists for orders that meet the criteria for the collateral order doctrine. *Id.* at 246. The collateral order doctrine generally applies to immunities from suit. *See, e.g., Mitchell v. Forsyth*, 472 U.S. 511, 534-30 (1985) (denial of qualified immunity, which is an immunity from suit, is immediately appealable). In taking an immediate appeal to the Court of Appeals for the Fourth Circuit, the Board argued that state action is an immunity from suit, not just an immunity from liability.

Before the Fourth Circuit, the Commission argued that the state action doctrine is not an immunity from suit; rather, the state action doctrine is a defense to liability. On May 1, 2006, the Fourth Circuit, agreeing with the Commission, dismissed the appeal and ruled that a denial of the state action defense does not fall within the collateral order doctrine. On June 27, 2006, the Fourth Circuit denied the Board's motion for rehearing. The Board intends to file a petition for Supreme Court review. The Board, however, is not seeking review of the substantive antitrust issues in the case or whether state action protects against any liability arising from the factual allegations in the complaint. Rather, the Board is seeking review on the issue of whether the denial of its motion to dismiss based on state action is immediately appealable. As the Board correctly points out, four circuits have split evenly on the issue. The Fifth and Eleventh Circuits have held the a denial of a state action defense is immediately appealable, but the Fourth and Sixth Circuit have held that the collateral order doctrine does not apply to a denial of a state action defense: If the Board were correct that state action was an immunity from suit, a stay of the proceedings pending an appeal of the Commission's denial of state action would be appropriate. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (approving stay in the context of qualified immunity).

Complaint counsel is prepared to move forward with this litigation if the Commission were to deny Respondent's motion. Twice before, the Board has filed an unopposed motion for a stay of discovery (first, during the pendency of its motion to dismiss before the Commission and second, during the pendency of its appeal before the Fourth Circuit) based on the same argument

it raises here – that state action is an immunity from suit. In both cases, the Commission granted the motion. In this instance, we again take no position on the Board’s motion for a stay.

By:   
Michael B. Kades  
Complaint Counsel  
Federal Trade Commission  
601 New Jersey Avenue, NW  
Room 7225  
Washington, DC 20001  
202-326-3681

Dated: July 14, 2006

**CERTIFICATE OF SERVICE**


I, Garth W. Huston, hereby certify that on July 14, 2006, I caused one original and twelve copies of Complaint Counsel's Response to Respondent's Motion to Stay Proceedings Pending Petition for Certiorari Review to be served by hand delivery, and one copy to be served by electronic mail, upon the following:

Office of the Secretary  
Federal Trade Commission - Room 135  
600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20580

I also caused a copy of Complaint Counsel's Response to Respondent's Motion to Stay Proceedings Pending Petition for Certiorari Review to be served by electronic mail and FedEx upon the following:

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\_\_\_\_\_  
Garth W. Huston