UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

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

In the Matter of	)	
SOUTH CAROLINA STATE BOARD OF DENTISTRY.	)	**Docket No. 9311**

RESPONDENT'S REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

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TABLE OF CONTENTS

Table of Authorities

Federal Cases:

Federal Statutes and Rules:

State Statutes and Regulations:

Other Authorities:

INTRODUCTION

The Respondent South Carolina State Board of Dentistry filed a potentially-dispositive Motion to Dismiss on October 21, 2003, as permitted by the Notice that is part of the Commission's Complaint.[1] The Board's motion was based on the grounds of mootness and related doctrines and on state action immunity pursuant to Parker v. Brown, 317 U.S. 341 (1943), and its progeny.

In Complaint Counsel's Opposition to the Board's Motion to Dismiss ("Opp. Br."), counsel's primary response to the Board's mootness argument is to assert a claim of a threat of continuing harm that is so ungrounded in fact as to be merely speculative. Counsel's claim of threatened harm is clearly disproven by undisputed facts of which the Commission may take notice.

Counsel's response to the Board's assertion of state action immunity consists primarily of an argument that counsel's interpretation of state law, specifically the 2000 statutory amendments, is correct and that the Board's interpretation of those amendments in 2001 was erroneous. Even if this assertion is correct, however, such an ordinary error of law is not the kind government action that the Supreme Court, in City of Columbia v. Omni Outdoor Advertising, 499 U.S. 365 (1991), held necessary to be shown if state action immunity is to be deemed lost. Counsel's approach both to the principles set forth in City of Columbia, as well as to a substantial portion of the mootness authorities cited by the Board, is simply to ignore them. Counsel has also asked that the Commission close its eyes to matters of fact that are not reasonably subject to dispute.

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[1] While the Board obviously contests both the need for Commission action in this matter as well as the Board's amenability to suit in this proceeding, the Board expresses its appreciation to the Commission for this opportunity to address threshold issues at the outset of the case. The Board also appreciates the opportunity to file this reply brief, as permitted by order of the Commission.

The Board requests that the Commission decline Complaint Counsel's suggestion to issue a ruling that would disregard a number of undisputed facts as well as broad areas of controlling law. The substantive result the Commission seeks already exists. Nothing will be served by a continuation of this matter. Dismissal is therefore entirely appropriate, and none of the substantive goals sought in this proceeding will be prejudiced thereby.

ARGUMENT

I. This Action Should Be Dismissed Because Of Mootness, The Absence Of Demonstrated Remedial Need, And Because Continuing This Matter Will Not Serve The Public Interest

A. The 2003 Amendments Render This Matter Moot Because They Clearly Prohibit The Complained-Of Conduct.

The first ground raised by the Board in support of mootness is that the 2003 amendments have made it legally impossible for the complained-of conduct to resume. The Board reiterates that the enactment of those amendments provides a complete and adequate reason in itself for this case to be dismissed as moot.[2] The 2003 amendments clarified South Carolina law by specifically setting forth the situations in which a preexamination by a dentist is required and those in which such a preexamination is not required. Commission Counsel raises only speculative and unfounded fears that the Board might act in violation of the 2003 amendments.

When a change in the law occurs, whether by statute, court decision, or otherwise, it is presumed that a governmental defendant will obey the changed law, rendering moot any challenge based on previous conditions.[3] Thus, for example, in Telco

[2] Complaint Counsel admits that this aspect of the Board's claim of mootness raises a purely legal issue. Comm. Br. 13.

[3] Assuming Complaint Counsel is correct is asserting that the Commission is not technically subject to the same case or controversy and mootness principles that apply to Article III courts, it is nevertheless also true that federal agencies "receive[ ] guidance from the policies that underlie

Communications, Inc. v. Carbaugh, 885 F.2d 1225 (4th Cir. 1989), cert. denied, 495 U.S. 904 (1990), a state agency had begun an investigation under a state law similar to a statute in another state that the Supreme Court subsequently held unconstitutional. After the Supreme Court's decision, state officials showed "no inclination to enforce this statute, " id. at 1231, and the court declared the action moot, declining "to indulge any presumption with respect to their conduct other than one of good faith." Id. Accord, Lovell v. Brennan, 728 F.2d 560, 564 (1st Cir. 1984)(even though defendants had previously violated a consent order and had allowed unconstitutional prison conditions to exist at times, "district court was entitled to presume that the state prison authorities would carry on their duties in compliance with the Constitution"). Complaint Counsel does not address this line of authority, discussed in the Board's opening brief at 18-21.

Similarly, it is generally presumed that a government defendant that itself changes the law during the pendency of a case will not reenact the challenged provisions as soon as the litigation ends. See, e.g., Valero Terrestrial Corp. v. Paige, 211 F.3d 112, 116 (4th Cir. 2000)(mootness not defeated by statutory change unless "a defendant openly announces its intention to reenact 'precisely the same provision'"). In the present case, of course, the Board of Dentistry cannot amend the law itself in any event, so the rule presuming that a changed statute will normally moot a case applies here a fortiori. As indicated by Valero, supra, and similar cases cited in the Board's opening brief, in a case where a statutory change eliminates the threatened harm, mootness will be avoided only in the most extreme circumstances of openly-threatened noncompliance with the changed law or openly-threatened reversal of course.

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the 'case or controversy' requirement of Article III." Climax Molybendum Co. v. Sec'y. of Labor, 703 F.2d 447, 451 (10th Cir. 1983).

Complaint Counsel argues that state law was as clear under the 2000 amendments as it is under the 2003 amendments, and that if they Board saw fit to impose a preexamination requirement after the 2000 amendments, it would be just as likely to do so after the 2003 amendments. The difference between South Carolina law as it stood after the 2000 amendments and as it stood after the 2003 amendments, however, is that the 2003 amendments state much more clearly when preexaminations are required and when they are not. As a result, a state court could and did hold that it was a reasonable exercise of the Board's authority to require preexaminations as it did under the 2000 amendments. Exhibit 8, pp. 3-7. The 2003 amendments, on the other hand, resolve any doubt about when a preexamination is required. As a result, the 2003 amendments not only changed the substance of the law, but also did so with sufficient clarity that if the Board were now to require preexaminations in public health settings, no court could hold that such an action would be reasonable under the amended statute. Contrary to the arguments of Complaint Counsel, the 2003 amendments therefore made a substantial change in the "Board's ability to repeat its [alleged] misconduct" (Opp. Br. 16) by substantially clarifying when preexaminations may be required and when they may not be required.

Fears similar to those expressed by Complaint Counsel were accorded no weight in Native Village of Noatak v. Blatchford, 38 F.3d 1505 (9th Cir. 1994). The plaintiff in that case argued that statutory amendments did not foreclose the possibility that the agency might promulgate similar regulations under the new statute. The court rejected this speculative suggestion:

> [T]here is no reasonable expectation that the alleged injury will recur. Because the relevant statute has been repealed,

> the Commissioner cannot promulgate or enforce regulations under that statute. Even if the Commissioner has discretion under the new statute to create new regulations to which Noatak might also object, that in itself is not sufficient to create a reasonable expectation of recurrence. Noatak fears only the possibility that the state's allegedly discriminatory policy will manifest itself under the new statute. Federal courts are not authorized to address such theoretical possibilities. If in the future the Commissioner does implement regulations or policies which Noatak finds objectionable, Noatak can challenge them at that time.

38 F.3d at 1510.

As Noatak indicates, when a statute eliminates the ability of the government actor to commit the alleged harm, the appropriate disposition of the matter is to dismiss the action, the court recognizing that in the unlikely event of resumption of the conduct under the new statute, the plaintiff could always file a new action. See also, e.g., Jews for Jesus, Inc. v. Hillsborough County Aviation Authority, 162 F.3d 627, 630 (11th Cir. 1998)(if challenged policies were resumed, "the courthouse door is open to [plaintiff] to reinstate its lawsuit"); Lovell v. Brennan, supra, 728 F.2d at 564.

In view of this adequate remedy for conduct that is unlikely in any event, it would be pointless for the Commission to enjoin the Board from taking actions similar to those it once took (and subsequently discontinued on its own) under a now-repealed statute. It would likewise be unnecessary for the Commission to enjoin Board actions that are now clearly prohibited by existing state law and have no reasonable chance of recurring.[4]

[4] In the alternative, the Board submits that the reasoning of In the Matter of the City of Minneapolis, 105 F.T.C. 304 (1985) is appropriate here. In that case, based on amendments to a municipal ordinance, the Commission concluded that "continuing this matter would not serve the public interest, and . . . the complaint should be withdrawn." There is likewise no reasonable indication that continuing the present action will do anything to serve the public interest, and the Board would be content with a dismissal that holds no more than that.

B. The Complaint Does Not Allege Sufficient Grounds For Holding That The Board Might Reinstate A Policy Now Clearly Barred By Statute.

1. The Expiration And Voluntary Withdrawal Of The 2001 Regulations Moots Any Claim Of Unlawful Conduct Based On Those Regulations.

The Complaint alleges only two specific instances of Board conduct that are claimed to have constituted anticompetitive conduct. The first occurred in the summer of 2001, when the Board adopted the emergency regulation and promulgated the proposed permanent regulation. Complaint, Paragraphs 25 and 30. The only other specific allegation, found in Paragraph 38 of the Complaint, is based on Complaint Counsel's inference from a single statement in the minutes of the Board's March 6, 2003, meeting. Reading the Complaint in conjunction with undisputed matters of which the Commission may take notice, it is apparent that neither of these two allegations alleges any reasonable likelihood the Board will seek to impose preexamination requirements in public health settings. In ruling on a motion to dismiss, a court, and presumably the Commission, may take judicial notice of matters of public record without converting the motion into a motion for summary judgment. See, e.g., Anderson v. Simon, 217 F.3d 472 (7th Cir. 2000): United States v. Ritchie, 342 F.3d 903, 908 (9th Cir. 2003). The Board's minutes constitute the type of record that may be so noticed.

The emergency regulation expired in early 2002, and the proposed permanent regulation was withdrawn shortly thereafter in March 2002. Complaint Counsel offers no reason why any issues about the expired or withdrawn regulations are not now moot. Complaint Counsel apparently tacitly concedes that there is no need for injunctive relief pertaining to those regulations, because counsel does not address at all the Board's argument on pp. 19-20 of its opening brief that any claim for relief based on the 2001

emergency regulation is mooted by the expiration of that emergency regulation in early 2002. Complaint Counsel also does not address or otherwise challenge the cases cited by the Board in support of that argument.

In reviewing the issue of whether the Board's voluntary discontinuance of the challenged action in early 2002 has rendered this matter moot, it must be remembered that such discontinuance is now almost two years old, and that it occurred before the Commission had contacted the Board about this matter. The Board's statements at the time, moreover, revealed an intent to modify its position in the future. Far from indicating a desire to clarify the statute only so as to reaffirm its position taken in the summer of 2001, the Board's minutes instead show a desire to resolve the issue by seeking an acceptable legislative compromise with the dental hygienists. Thus in March 2002, when the Board decided not to continue pursuing its proposed regulation requiring prior examinations by dentists, it specifically stated that it planned to meet with all interested parties and entities "to come up with a proposal concerning general supervision and authorization of dental hygienists that will be agreeable to all." Exhibit 11 (Minutes of the South Carolina State Board of Dentistry, meeting of March 2, 2002, p. 2). This conciliatory approach came to fruition a little over a year later, when the 2003 statutory amendments were enacted and the law was changed so that it clearly described situations in which no preexamination could be required. It is undisputed that the Board took no action to reinstate the preexamination requirement during the interim between March 2002 and June 2003, when the 2003 amendments took effect, further indicating the absence of any intent to reimpose the preexamination requirement. It is likewise undisputed that the Board has taken no such action since then.

2. The Complaint Alleges No Other Reasonable Grounds For Holding That The Board Might Reinstate A Policy Now Clearly Barred By Statute.

Because it is apparently undisputed that any challenge to the 2001 regulations would be moot, the only remaining allegation in the Complaint suggesting in any way that this case is not moot is the following allegation in Paragraph 38:

> 38. Nonetheless, when the Board in March 2003 considered the statutory revisions that the General Assembly later enacted, it maintained that in all settings where a dental hygienist provides treatment—whether public health or private practice—a licensed dentist has to see the patient and provide a treatment plan.

Complaint Counsel virtually concedes that the only basis for this allegation is a statement in the Board minutes of March 6, 2003. Opp. Br. 9-10. In reviewing a complaint on a motion to dismiss, a tribunal may consider "documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the [plaintiff's] pleading." In re Silicon Graphics Securities Litigation, 183 F.3d 970, 986 (9th Cir. 1999). It is therefore appropriate to review not only Paragraph 38, but also the underlying information that forms the sole basis for that paragraph.

The allegations of Paragraph 38 are not supported by their claimed basis in the March 6, 2003 minutes. To read those minutes as imputing such an intent to the Board would give them a meaning completely at odds with every action the Board has taken since March 2002, when it decided to pursue a compromise legislative approach to the issues in this case. In order to make it clear that the Board was disavowing Complaint Counsel's misreading of its March 2003 minutes, the Board took the simplest and most direct approach of enacting a resolution on October 16, 2003 that in effect so states. That

resolution will be discussed below. Rather surprisingly, however, Complaint Counsel claims that there is still a reasonable question of fact about whether the Board will attempt at some point to impose a preexamination requirement in public health settings. As a result, while the Board reiterates below its contention that the Board's October 2003 resolution provides an additional basis for a finding of mootness, the Board also submits that Paragraph 38, read in conjunction with the minutes on which it is based, is not sufficient to state a claim for relief. In other words, the allegations of Paragraph 38 are insufficient to state a claim, whether read only in conjunction with the March 6, 2003 Board minutes, or whether the October 16, 2003 Board resolution is taken into account as well.

The following paragraph from the Board minutes of its March 6, 2003 meeting forms the sole basis for Paragraph 38 of the Complaint:

> Discussion followed as to whether or not a dentist sees a patient in a public health setting. Mr. Alvey explained the Board's position as stated in a letter written by a past President, Dr. Barrett, that indicated that in all settings, regardless of whether it was public health or in a private practice setting, whether direct supervision or general supervision, that a licensed dentist has to diagnose and provide a treatment plan which requires a dentist to see the patient. Mr. Alvey asked if any of the Board members felt any differently. The Board members indicated that they agreed.[5]

This discussion occurred during the Board's review of the possible 2003 amendments, but there is no indication whatsoever in the minutes that this specific point of discussion concerned anything other than the Board's view of the then-existing state of the law. The "Board's position" was said to be as set forth in a letter written by its President at some earlier time, and clearly was a position based on then-current law rather

[5] Exhibit 13, Attachment B, p. 4 (Minutes of March 6, 2003 meeting).

than under any possible future changes. The minutes make use of language in the present tense as well as referring to a past position statement in the earlier letter, but the minutes contain no language suggesting that this would be the Board's position in the future if the amendments were to pass. To read this language as referring to the Board's view of the matter in the future if the statutes were to change is therefore simply to make a reading without foundation. Such a reading is also inconsistent with the Board's entire approach to this issue beginning in March 2002, now nearly two years ago, and continuing through the present.

The Board submits that while the Commission can find the allegations of the Complaint insufficient based solely on the Complaint itself and the March 6, 2003 minutes on which the Complaint relies, the Commission may also appropriately consider the Board's statements and resolution at its October 16, 2003 called meeting as further supporting this conclusion. Complaint Counsel does not argue that the Commission should exclude from consideration the Board's October 16, 2003 actions, although counsel does argue that these statements at most raise questions of fact that are inappropriate for resolution at this stage of the case.[6] These statements support this result whether accepted as true in themselves, or whether they are accepted not for the truth of the matters asserted therein, but simply because of their existence.

Complaint Counsel has provided no suggestion about how a reasonable issue of fact might arise about the truth of the Board's October 16, 2003 statements. Normally, when a party claims that a question of fact may exist, the party offers some suggestion of what facts might develop that would contradict those offered in support of a dispositive

[6] The information about the Board's actions in October 2003 is contained in Exhibit 13 and attachments thereto. This Exhibit is not in the Appendix listing the exhibits to which Complaint Counsel has objected.

motion. Such a suggestion would be especially appropriate in the present case, where Commission staff has already conducted extensive informal discovery with the cooperation of the Board. However, counsel offers no indication of what might be expected to be discovered that would raise an issue of fact. Absent an issue of fact, that is, if the Board's October 16, 2003 statements are accepted as true, they clearly provide ample reason for dismissing this case as moot.

Nevertheless, even if only accepted only for its existence, as opposed to being used to prove the truth of the matters asserted therein, the October 16, 2003 resolution renders this matter moot as a practical matter. The Board's October 16, 2003 resolution does more than merely declare the Board's intent not to seek to require preexaminations in public health settings in the future. The resolution also states the Board's view of the law, that is, that the 2003 amendments permit hygienists to perform the procedures in question in public health settings without a preexamination by a dentist, as well as the Board's view that it is statutorily bound to take no action inconsistent with that view of the law. In view of these positions taken in its October 16, 2003 resolution, the Board "would be hard pressed to later defend, and perhaps be estopped from later defending" any subsequent action it might take to the contrary. Walker v. San Francisco Unified School District, 46 F.3d 1449, 1463 (9th Cir. 1995). The Board has clearly made a statement from which it cannot plausibly retreat, in the process indicating that it harbors no hidden agenda to do so.

To conclude on the issue of mootness, the Board must note that it remains unclear why Complaint Counsel insists on seeking to have this matter continue. The suggestion that further discovery is necessary from the Board on the issue of future intent is

somewhat surprising, given that the Board has voluntarily provided the Commission with everything the Commission has requested over the course of a lengthy investigation. If this investigation has produced no indication of recurrence of the alleged wrongful acts other than a single misconstrued statement in the Board minutes prior to the 2003 amendments, it is difficult to see what purpose would be served by additional discovery on the issue.

The Board has taken steps that effectively foreclose it from having the option of renewing the complained-of conduct. Its decision to take those steps was consistent with its course of action ever since March 2002. No practical need exists for the relief sought in this proceeding, and Complaint Counsel does not suggest any reason why this case should continue, much less a need for any kind of injunctive relief.[7] This case should accordingly be dismissed based on mootness, the lack of demonstrated remedial need, and on the basis that continuing this matter will not serve the public interest.

Ii. The Board's Challenged Actions Are Protected By State Action Immunity.

A. Complaint Counsel Cannot Make The Strong Showing Required By City Of Columbia V. Omni Outdoor Advertising, 499 U.S. 365 (1991) To Abrogate State Action Immunity.

In presenting this part of the argument, the Board assumes without conceding that there is some aspect of this case which retains vitality as a live controversy. However, the Board submits that even if this case does have such an aspect to it, the Board is immune from this Commission action because of state action immunity principles.

In arguing that state action immunity does not attach to the acts of the Board in this case, Complaint Counsel primarily relies on (a) counsel's own persistent and

[7] As to the absence of a showing of a need for injunctive relief, see the Board's opening brief at 22, setting forth yet another line of argument and citation of authorities that Complaint Counsel simply does not address.

dogmatic assertion that the Board's 2001 actions were not authorized by state law as it existed at that time, and (b) counsel's assertion that if the Board misconstrued its authority under the law existing in 2001, the Board for that reason cannot possess state action immunity for its actions taken under such alleged misconstruction, no matter how close the issue may be as a question of state law. This line of argument can only be made by overlooking the federalism principles set forth in City of Columbia v. Omni Outdoor Advertising, 499 U.S. 365 (1991), and that is what Complaint Counsel has done. City of Columbia and its progeny set forth an analytical framework that provides for the retention of state action immunity for state actors in all cases except those in which the state actor has done something in gross disregard for the limits of its power and jurisdiction, as opposed to merely making an error of law. The response of Complaint Counsel to this standard is simply to ignore it.

As to the first issue above, that is, whether the Board's actions in 2001 were based on a correct construction of state law at the time, Complaint Counsel cannot show plain error, even assuming that such a showing of legal error would strip the Board of state action immunity. Complaint Counsel's argument about the "plainness" of the Board's alleged erroneous construction of the statute takes seven pages to elaborate. Opp. Br. 30-37. In contrast, in In the Matter of Massachusetts Board of Registration in Optometry, 110 F.T.C. 549 (1988), the statutory mandate that had been contravened by the Massachusetts board was so clear that the Commission needed only to quote the statute itself.[8]

[8] Commission Opinion, Part II(D)(2). The ALJ decision in the case, Part III(D), reaches the same conclusion with equal ease and brevity.

The second part of Complaint Counsel's implied syllogism is that any error of state law by the Board, no matter how close the issue, is sufficient to strip the Board of state action immunity. The Board reiterates that for the Commission to adopt this view would be to do exactly what the Supreme Court in City of Columbia instructed antitrust tribunals not to do, that is, to

> become[ ] the standard reviewer not only of federal agency activity but also of state and local activity whenever it is alleged that the governmental body, though possessing the power to engage in the challenged conduct, has actually exercised its power in a manner not authorized by state law.

499 U.S. at 372.

Such restraint by a federal antitrust tribunal is particularly appropriate in a case such as this, where the ultimate issues about the situations where dental preexaminations are necessary are quintessentially state law questions. This is in contrast to such cases as In the Matter of Massachusetts Board of Registration in Optometry, 110 F.T.C. 549 (1988), where a federal constitutional interest (First Amendment) was implicated in addition to the normal interests in competition protected by the Commission. Clearly, state legislatures are free to allocate the responsibilities of dentists and dental hygienists in any way the legislatures believe will best promote the public interest in dental health. The health policy decisions of states about whether a given procedure is more properly done by one profession or another are decisions that normally do not implicate federal antitrust concerns. Nor should such concerns be implicated in the present case, where the most that can be alleged is an error by the Board in construing its authority. Such alleged "[e]rroneous acts or decisions are subject to reversal by superior tribunals because unauthorized," rather than being subject to review by federal antitrust tribunals. City of Columbia, supra, 499 U.S. at 371-72. The Board accordingly reiterates its position on the

appropriate standard of review to be applied by a federal antitrust tribunal in determining whether a state agency possesses state action immunity. Board's opening brief 28-31.

Complaint Counsel does make one oblique reference to the above standard of review, arguing in effect that immunity can be retained if the challenged state action was procedurally defective under state law, but maintaining that if the action was substantively defective, immunity is lost. Opp. Br. 37-39. No authority is cited for such a distinction, and in any event it is precluded by the City of Columbia standard, which expressly mentions both substantive and procedural authorization under state law as matters that are not subject to review by federal antitrust tribunals. 499 U.S. at 371.

With respect to the correctness of the Board's interpretation of the 2000 amendments, the Board reiterates its position set forth at pp. 2-8 and 27-28 of its opening brief. As set forth therein, the most reasonable construction of those amendments, even if based only on the text of the statute and without extrinsic material, is that no change in the law regarding the preexamination requirement (as opposed to the physical presence requirement) was intended. This view of the statute, which Complaint Counsel disputes, is nevertheless the view adopted in the contemporaneous practical construction given those provisions both by state government officials and by the hygienists who were both directly involved in lobbying efforts regarding the amendments, and who were directly affected by the amendments after they took effect. Such statements, regarded not as interpretations themselves but as the expressing the views of interested parties, are entitled to substantial weight:

> The statement of a representative of a special interest group, ordinarily an unreliable indication of the purpose of a statute, can be used where the statements are not in

> conformity with the interests or the goals of a special interest group.

2A N. Singer, Sutherland Statutory Construction, § 48:11, at 461 (6th ed. 2000). The same treatise also notes that "[t]he meaning attached by people affected by an act may have an important bearing on how it is construed." Id., Vol. 2B, § 49.06, at 94.

Complaint Counsel has objected to some of the exhibits submitted by the Board to show contemporaneous construction. The Board submits that these exhibits are proper subjects of judicial notice under Fed. R. Evid. 201, and that the consideration of materials subject to judicial notice does not require the conversion of a motion to dismiss into a motion for summary judgment. See, e.g., United States v. Ritchie, supra; In re Silicon Graphics Securities Litigation, supra. The Board has offered these exhibits not for the truth of the matters asserted therein, but to show the existence of certain statements and the absence of other statements by persons directly involved in the statute's enactment and directly affected by its provision. The fact that these statements were made is not subject to reasonable dispute.[9]

Even if these exhibits are not considered, however, the text of the statute clearly supports the Board's position. If the Board is ultimately shown to be in error on this point, the Board nevertheless submits that the appropriate place for such a holding is in the ordinary course of review by state courts rather than by a federal antitrust tribunal.

Finally, Complaint Counsel has characterized the Board's position as arguing that "a state agency is always immune when its actions violate state law." Opp. Br. 39. Nothing in the Board's opening brief supports such a description. The Board instead has argued that the standard for finding that state action immunity has been lost is a very high

[9] The Board's item-by-item responses to these and other exhibits to which Complaint Counsel has objected are set forth in Appendix A to this Memorandum.

one, comparable to the "clear absence of all jurisdiction" standard found in Stump v. Sparkman, 435 U.S. 349 (1978), cited for this point in City of Columbia, 499 U.S. at 372. The standard cannot be described with much more precision that this, because no case in the twelve years following City of Columbia has held that a state agency does not enjoy state action immunity. The Board has cited the state court order still in effect in the pending state litigation,[10] Ex. 8 to Opening Br., in part to show that the Board's position is correct, but also to show that the high threshold for loss of immunity is unlikely to be crossed in a case where a court has approved the Board's exercise of authority.

B. The Board's Authorizing Statutes Provide The Requisite Clear Articulation Of State Policy.

The Board's position that its actions were taken pursuant to a clearly articulated state policy to authorize anticompetitive conduct is set forth at pp. 32-34 of its opening brief. Complaint Counsel admits that "South Carolina has clearly articulated a policy to displace certain types of competition in the practice of dentistry and dental hygiene. . . ," Opp. Br. 29, but argues that the 2000 amendments, at least as construed by Complaint Counsel, remove the clearly articulated state policy in the specific area involved in this case. In other words, Complaint Counsel's "clear articulation" argument simply collapses back into its argument that the Board erred in its construction of the 2000 amendments. Complaint Counsel therefore practically concedes that but for the 2000 amendments, the Board's governing statutes would constitute the requisite "clear articulation."[11] The only

[10] Health Promotion Specialists, et al. v. South Carolina Board of Dentistry, et al. (No. 01-CP-40-3148, Richland County Court of Common Pleas, filed July 31, 2001)

[11] If Complaint Counsel is actually arguing that the Board's enabling legislation without regard to the 2000 amendments (or counsel's interpretation thereof) would still not amount to clear articulation, counsel has cited no pertinent authority in support of such an argument. The cases cited in notes 79 and 80, Opp. Br. 28 are readily distinguishable because they involve actions far beyond the scope of the state agency's authority. Goldfarb v. Virginia State Bar, 421 U.S. 773

ground offered by counsel for distinguishing Earles v. State Board of Certified Public Accountants, 139 F.3d 1033 (5th Cir.), cert. denied, 525 U.S. 982 (1998), is that the statute in Earles contained no provisions comparable to the 2000 amendments, as construed by counsel. Opp. Br. 27. As in Earles, however, the South Carolina Dental Practice Act

> is a broad grant of authority which includes the power to adopt rules that might have anticompetitive effects. [Footnote omitted] It is thus the "foreseeable result" of enacting such a statute that the Board may actually promulgate a rule that has anticompetitive effects. . . . [T]he state rejected pure competition among public accountants in favor of establishing a regulatory regime that inevitably has anticompetitive effects.

Earles, 139 F.3d at 1043-44. The Louisiana statute in Earles was functionally no different from the South Carolina Dental Practice Act in its general provisions concerning regulation of a profession by a board consisting primarily of members of that profession. Complaint Counsel does not contend otherwise.

Finally, the Supreme Court has warned against requiring much detail in the authorizing statutes for state regulatory agencies:

> If more detail than a clear intent to displace competition were required of the legislature, States would find it difficult to implement through regulatory agencies their anticompetitive policies. Agencies are created because they are able to deal with problems unforeseeable to, or outside the competence of, the legislature. Requiring express authorization for every action that an agency might find necessary to effectuate would diminish, if not destroy, its usefulness.

(1975)(authority to regulate legal ethics was not a mandate for price fixing, especially where the Virginia Supreme Court had explicitly directed lawyers not to be controlled by minimum-fee schedules). Cantor v. Detroit Edison Co., 428 U.S. 579, 584 (1976)("[t]he distribution of electric light bulbs in Michigan is unregulated. The statute creating the [Michigan Public Service] Commission contains no direct reference to light bulbs").

Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48, 64 (1985)(quoted in Earles, 139 F.3d at 1044).[12]

C. The Trend Of Authority Supports A Finding Of State Action Immunity For State Executive Agencies.

Complaint Counsel also argues that the Board, as an executive agency of the state, is not by that reason alone entitled to state action immunity. Complaint Counsel cites no case in support its position that is not at least fifteen years old.[13] Other than acknowledging the existence of cases adopting an ipso facto rule, Opp. Br. 25, n.75, counsel makes no effort to discuss or distinguish those cases, characterized by counsel as "a distinct minority of lower court decisions." Opp. Br. 24. In fact, however, no case at any level of the federal court system that has considered the ipso facto rule in the past fifteen years has rejected it. Moreover, even in cases where the ipso facto approach was either not raised by the parties or not reached by the courts, there has been no case in the same fifteen-year timeframe that has denied state action immunity to a state agency. In view of the high threshold placed in the way of such a holding by City of Columbia, the Board submits that the present case should not be the one to break company with this unanimity of results in recent years favoring state action immunity.

[12] While the Board submits that an examination of the details of the Dental Practice Act is probably not necessary, Appendix B, attached to this Reply Memorandum, discusses the details of the Act as well as details concerning the Board's regulations.

[13] Complaint Counsel also argues that the Board is in some fashion less than a full executive agency of the state because it is composed in part of practitioners in the field it regulates. Opp. Br. 24. This argument was rejected in Earles, supra, 139 F.3d at 1041.

CONCLUSION

For the foregoing reasons, the South Carolina State Board of Dentistry respectfully submits that this action should be dismissed by the Commission in its entirety.

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December ___, 2003

APPENDIX A:

BOARD'S RESPONSE TO COMPLAINT COUNSEL'S OBJECTIONS TO CERTAIN EXHIBITS

Exhibit 1: Affidavit of Dr. Raymond F. Lala, with Attachments A-C.

Board Response: The information in the Affidavit and the attachments thereto is not reasonably subject to dispute and is appropriately noticeable. However, the Affidavit and exhibits were submitted primarily for the purpose of providing background information.

Exhibit 3: Affidavit of H. Rion Alvey dated August 9, 2001 (and Exhibits A & part of C attached thereto).

Exhibit A: Letter from Dr. Bobby E. McBride dated December 11, 2000.
Exhibit C: Letter from John Holtzee dated August 3, 2001. [The remainder of Exhibit C is not contested]

Board Response: The information in the Affidavit and the attachments thereto is not reasonably subject to dispute and is appropriately noticeable. The Affidavit and exhibits were submitted primarily for the purpose of providing background information, except for Exhibit A (McBride letter), which the Board submits is noticeable as a record kept by the Board and whose existence cannot be reasonably questioned. The McBride letter, at a minimum, should be considered even if not for the truth of the matters asserted therein.

Exhibit 4: Affidavit of Tammi O. Byrd dated August 9, 2002 (and Exhibits 2 & 6 attached thereto).

Exhibit 2: Health Promotion Specialists Brochure and attached School-Based Oral Health Programs.

Exhibit 6: Letter from Speech Clinicians of Newberry County Schools addressed to the Honorable Denny W. Neilson dated December 3, 1999

Board Response: Affidavit: The Board included the Affidavit as an exhibit only because of the attachments, and did not rely on any specific assertion in the Byrd Affidavit itself. To the extent it may matter, the existence of the Affidavit cannot be reasonably disputed.

Exhibits 2 and 6: The existence of the both letters, submitted not for the truth of the matters asserted therein, cannot be reasonably disputed, and the Board should consider these letters.

Exhibit 5: Web page of South Carolina Dental Hygiene Association on Legislation, 5/16/01.

Board Response: Same as Exhibits 2 and 6 to Ex. 4: The existence of this web page, submitted not for the truth of the matters asserted therein, cannot be reasonably disputed, and the Board should consider this information.

Exhibit 6: Letter of Dr. Bobby E. McBride, D.D.S., dated April 18, 2001.

Board Response: This letter is noticeable is a record of the Board. It is submitted not for the truth of the matters asserted therein, its existence cannot be reasonably disputed, and the Board should consider this information.

Exhibit 7: Letter of Charles B. Maxwell, President, South Carolina Board of Dentistry, July13, 2001.

Board Response: This letter is noticeable is a record of the Board, but was submitted primarily as background information.

APPENDIX B:

SUMMARY OF SOUTH CAROLINA DENTAL PRACTICE ACT AND REGULATIONS THEREUNDER

The Dental Practice Act embodies a comprehensive regulatory scheme governing the provision of dental and dental hygiene services in South Carolina, and establishes the Board to supervise the practice of dentistry and dental hygiene and the performance of dental technological work in the State of South Carolina. S.C. CODE ANN. § 40-15-10. By law, the Board is comprised of seven dentists, one dental hygienist and one lay member, § 40-15-20, demonstrating a state policy of delegating the supervision of the practice of dentistry and dental hygiene to professionals familiar with the practice areas. Consistent with this state policy, the Dental Practice Act mandates that the Board "adopt rules and regulations not inconsistent with this chapter for its own organization and for the practice of dentistry and dental hygiene and the performance of dental technological work in this State, and for carrying out the provisions of this chapter, and may amend, modify and repeal any rules and regulations from time to time." § 40-15-40.

In addition to delegating supervision of the practice of dentistry and dental hygiene to the professionals on the Board, the Dental Practice Act itself evinces the policy of the State of South Carolina to displace competition with regulation in the provision of dental services in the State. The Dental Practice Act contains numerous provisions that restrict the ability of individuals to provide dental services in South Carolina, necessarily curtailing competition among those seeking to provide such services. For example, the Dental Practice Act makes it unlawful for any person to

engage in the practice of dentistry in South Carolina without a license from the Board, except as may otherwise be provided in the Act. § 40-15-100. The Dental Practice Act further makes it a criminal misdemeanor, punishable by a fine of up to $1000.00 and/or imprisonment up to six months, for anyone to practice or attempt or offer to practice dentistry or dental hygiene in South Carolina without having been licensed by the Board, or to practice or attempt or offer to practice dentistry or dental hygiene when such a license has been suspended or revoked. § 40-15-100. The Dental Practice Act provides that all applicants for a license to practice dentistry or dental hygiene in South Carolina must undergo an examination by the Board, and must produce evidence satisfactory to the Board that he or she possesses good moral character. § 40-15-140.

The Dental Practice Act empowers the Board to receive and investigate any complaints against licensed dentists or dental hygienists and file a formal accusation against a dentist or dental hygienist if it sees fit to do so. § 40-15-180. The Dental Practice Act contains an extensive list of nineteen activities that constitute permissible grounds for the Board to discipline dentists and dental hygienists, including but not limited to: an inability to practice dentistry or dental hygiene with reasonable skill and safety by reason of illness or disability; employing or permitting an unlicensed person to practice dentistry or dental hygiene; failing to provide and maintain reasonable sanitary facilities or conditions; failing to provide adequate radiation safeguards; violating the principles of ethics in the practice of dentistry as promulgated in the regulations of the Board; representing in a false or misleading manner the care being rendered to a patient or the fees being charged for providing that care; using a false, fraudulent, deceptive or misleading statement in claims for reimbursement from third parties connected to the

practice of dentistry; obtaining a fee or reimbursement through dishonesty or under false or misleading circumstances; failing to meet the standards of care in the practice of dentistry or dental hygiene; violating any provision of the Dental Practice Act regulating the practice of dentistry or dental hygiene; and violating any regulation promulgated by the Board. § 40-15-190(A). The Board has the authority to discipline any dentist or dental hygienist who engages in any of these activities, including the revocation or suspension of his or her license. § 40-15-200.

The Dental Practice Act also restricts the manner in which dentists may advertise their services and use trade names. § 40-15-130. The Dental Practice Act prohibits dentists from advertising their services in a manner that "attempt[s] to create any impression, unsupported by fact, of superior skills or qualifications of those who practice thereunder." Id. In addition, "[e]very dentist practicing under a trade name and every dentist practicing as an employee of another licensed dentist or a partnership or of a professional association shall cause his name and licensed area of practice to be conspicuously displayed and kept so displayed in a conspicuous place at the entrance of the place where the practice is conducted." Id.

The Dental Practice Act imposes additional requirements on dentists who seek to engage in specialized areas of practice, as recognized by the American Dental Association. § 40-15-220. In addition to a standard license to practice dentistry in South Carolina, specialists must obtain a special license from the Board, a condition of which is an examination by the Board. §§ 40-15-220 - 260. The Board may only issue such a license upon satisfactory proof that an applicant satisfies the current educational

requirements for the specialty set forth by the American Dental Association and has satisfied all other requirements of the Board. § 40-15-260.

Perhaps of greater significance, the Dental Practice Act clearly articulates the state policy governing the professional relationship between dentists and dental hygienists. The Dental Practice Act imposes a variety of restrictions on the ability of dentists to use dental hygienists and other dental auxiliaries in the provision of dental services. These restrictions necessarily have the effect of curtailing competition among dentists with respect to the use of dental hygienists and other dental auxiliaries, or between dentists and dental hygienists or other dental auxiliaries. For example, the Dental Practice Act provides that only a licensed dentist may control the use of dental equipment or material while it is being used to provide dental services in a dental office, regardless of whether the services themselves are being provided by a dentist, a dental hygienist, a dental assistant or a dental auxiliary. § 40-15-135(A). Moreover, the statute expressly provides that only a dentist -- not dental hygienists or other dental auxiliaries -- may exercise control over the selection of a course of treatment of a patient, the procedures or materials to be used as part of the course of treatment, the manner in which the course of treatment is carried out, or the maintenance of patient records. § 40-15-135(B)(1) and (2).

As already noted, the Dental Practice Act contains detailed requirements about the exercise of direct or general supervision of dental hygienists by dentists. At the same time, the act makes it clear it "is not intended to establish independent dental hygiene practice." § 40-15-80(F).

Consistent with both the role envisioned for it by the General Assembly and the Dental Practice Act's displacement of competition with regulation in the provision of dental services, the Board has promulgated numerous regulations -- all reviewed by the General Assembly under South Carolina's rulemaking process -- that have the effect of further curtailing competition among those seeking to provide dental services in South Carolina.

For example, Regulation 39-1 requires applicants for a license to practice dentistry to be at least twenty-one years old, present evidence of good moral character, and present evidence of graduation from a dental college approved by the Commission on Accreditation of Dental and Dental Auxiliary Education Programs of the American Dental Association. Applicants must also successfully complete an examination before they may be licensed to practice dentistry in South Carolina. Regulation 39-2 requires applicants for a dental hygiene license to satisfy similar requirements. In addition, Regulation 39-4 requires applicants for both the general dentistry examination and the dental hygiene examination to have passed the National Board of the Joint Commission on National Dental Examinations within the previous fifteen years.

Regulation 39-11 imposes ethical principles on dentists that, among other requirements: prevent dentists from refusing to provide dental services because of a patient's race, creed, color, sex or national origin; require dentists to make reasonable arrangements for emergency care to patients not of record and, after providing such services, return the patient to his or her regular dentist unless the patient expressly reveals a different preference; require specialists or consulting dentists to return a patient to the referring dentist or the patient's dentist of record unless the patient expressly reveals a

different preference; and require dentists to prescribe and supervise the work of all dental auxiliaries working under their direction and control. A violation of any of these ethical principles constitutes statutory grounds for discipline by the Board. See S.C. Code Ann. § 40-15-190(A)(9) (violation of the principles of ethics as promulgated in the regulations of the Board constitutes grounds for discipline of a dentist).

Other regulations delineate the procedures that may be performed by dental auxiliaries, by implication preventing dental auxiliaries from performing procedures that are not expressly authorized. For example, Regulation 39-12 lists procedures that may be performed by dental assistants and Regulation 39-13 lists procedures that may be performed by expanded duty dental assistants. Regulation 39-14 provides that, in addition to the procedures identified in S.C. Code Ann. § 40-15-80, licensed dental hygienists may also perform the procedures listed in Regulation 39-12 and Regulation 39-13.

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of	)	
SOUTH CAROLINA STATE BOARD OF DENTISTRY.	)	**Docket No. 9311**

CERTIFICATE OF SERVICE

I, Kenneth P. Woodington, one of the attorneys for the Respondent hereby certify that service of the Respondent's Reply Memorandum in Support of Motion to Dismiss, in the above-referenced action was made upon the following persons by US Mail as set forth below:

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