

Interlocutory Orders, Etc.

THE NORTH CAROLINA BOARD OF DENTAL EXAMINERS

Docket No. 9343. Order, February 15, 2011

Order denying respondent's motion to stay the administrative proceedings pending the resolution of a parallel federal court action.

ORDER DENYING RESPONDENT'S EXPEDITED MOTION FOR STAY OF
PROCEEDINGS

The Federal Trade Commission issued the Administrative Complaint in this proceeding on June 17, 2010. The Complaint provides – consistent with Commission Rule 3.11(b)(4), 16 C.F.R. § 3.11(b)(4) – that the administrative hearing in this matter shall begin on February 17, 2011. On February 1, 2011, Respondent filed a Complaint for Declaratory Judgment and Preliminary and Permanent Injunction against the Federal Trade Commission in the United States District Court for the Eastern District of North Carolina (Western Division), and on February 2, 2011, Respondent filed a Motion for Temporary Restraining Order and Other Equitable Relief in that Court. On February 9, 2011, the District Court issued an Order which, *inter alia*, denied that motion, stating in relevant part:

Upon careful consideration of the issues raised, the undersigned concludes that plaintiff has failed to satisfy the requirements for a temporary restraining order. Among other things, plaintiff has failed to show that the threatened harm is sufficiently immediate so as to warrant the extraordinary remedy of a temporary restraining order. . . . Substantive issue of or relating to the likelihood of plaintiff's success on the merits looms large concerning whether plaintiff seeks this court improperly to enjoin ongoing administrative enforcement proceedings. The present showing is not

Interlocutory Orders, Etc.

sufficient to warrant a temporary restraining order. Plaintiff's request for temporary restraining order is DENIED.¹

The District Court also requested a briefing schedule on the request for a preliminary injunction within two weeks. The court thus did not seek to prohibit or delay the evidentiary hearing in this administrative proceeding from beginning as scheduled on February 17, 2011.

On February 10, 2011, Respondent filed in this proceeding an Expedited Motion for Stay of Proceedings Pending Outcome of a Motion for Preliminary and Permanent Injunction in the federal court action². We understand from Respondent's filing that Complaint Counsel intends to oppose this motion. Commission Rule 3.41(f) provides that "[t]he pendency of a collateral federal court action that relates to the administrative adjudication shall not stay the proceeding unless a court of competent jurisdiction, or the Commission for good cause, so directs." *See also* 74 Fed. Reg. 1816 ("the granting of a stay [under 3.41(f)] is likely to implicate public interest considerations . . ."). Respondent has failed to demonstrate good cause to depart from the usual rule that the pendency of a collateral

¹ *North Carolina State Board of Dental Examiners, Plaintiff, v. Federal Trade Commission, Defendant* (Eastern District of North Carolina, Western Division), No. 5:11-CV-49-FL, Order (February 9, 2011) (denying plaintiff's motion for a temporary restraining order and directing filing of joint report and plan on case scheduling matters within fourteen days).

² This is Respondent's fourth motion to the Commission seeking a delay of these proceedings. On November 15, 2010, the Commission denied Respondent's Motion For Stay of Proceeding. *Commission Order Denying Motion For Stay of Proceeding* (November 15, 2010). On January 19, 2011, Respondent filed an Expedited Motion for a Later Hearing Date. On January 21, 2011, the Commission issued an Order ("January Order") denying that motion. *Commission Order Denying Expedited Motion For A Later Hearing Date* (January 21, 2011). On January 24, 2011, Respondent filed a motion for reconsideration of the January Order ("Respondent's Motion"), and on February 9, 2011, the Commission issued an Order denying that motion as well. *Commission Order Denying Motion to Reconsider Respondent's Motion for A Later Hearing Date* (Feb. 9, 2011).

Interlocutory Orders, Etc.

proceeding in federal court does not constitute a basis for staying FTC administrative proceedings³. More generally, the Commission's Rules of Practice encourage an expeditious resolution of administrative proceedings. The Rules governing these proceedings begin by articulating the Commission's policy that administrative proceedings shall be conducted "expeditiously." 16 C.F.R. § 3.1. In addition, "counsel for all parties shall make every effort at each stage of a proceeding to avoid delay." *Id.* The District Court's denial of Respondent's motion for a temporary restraining order strongly supports the Commission's determination that good cause to ignore the foregoing principles and delay the beginning of the evidentiary hearing has not been established.

Respondent asserts that the pendency of the collateral District Court proceeding likely will result in "duplicative and unnecessary litigation efforts by both Complaint Counsel . . . and the State Board." Motion at 3. Respondent, however, provides no support for that assertion, and the District Court order refutes it. Indeed, Respondent's motion appears to be little more than an attempt to relitigate the temporary restraining order motion it filed in District Court, and the District Court refused to grant that relief. Moreover, Respondent's claims of undue burden ring hollow, given that Respondent initiated the district court proceeding and waited to do so until three weeks before the administrative proceeding was scheduled to begin. To allow respondents to stay FTC proceedings based on the pendency of collateral federal court actions that they themselves have initiated would create perverse incentives to attempt to create duplicative proceedings, and would place respondents,

³ Over the past few years, the Commission has denied similar motions where the Commission was in federal court under Section 13(b) of the FTC Act to secure preliminary injunctions in merger cases. *See* Whole Foods Market, Inc., *Order Amending Scheduling Order and Denying Respondent's Motion to Stay Proceeding* (Dec. 19, 2008); INOVA Health System Foundation, *Order Denying Respondents' Motion to Stay Administrative Proceedings* (May 29, 2008).

Interlocutory Orders, Etc.

rather than the Commission, in control of the administrative proceedings schedule.

Neither the date on which the evidentiary hearing will begin nor the place at which it will be conducted has changed since the Complaint was issued more than seven months ago on June 17, 2010. The pendency of a collateral proceeding in federal district court does not provide the requisite showing of good cause to change the evidentiary hearing date. In short, as the foregoing discussion establishes, Respondent has not made the requisite showing of good cause for the Commission to stay the administrative proceedings. Accordingly,

IT IS ORDERED THAT Respondent's Expedited Motion for Stay of Proceedings Pending the Outcome of a Motion for Preliminary and Permanent Injunction in U.S. District Court for the Eastern District of North Carolina be, and it hereby is, **DENIED**.

By the Commission.