BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

In the Matter of	)	
	)	NORTH DAKOTA'S 47 CFR § 1.41
ccAdvertising	)	MOTION TO DISMISS PETITION
	)	ON GROUNDS OF SOVEREIGN
Petition for Expedited	)	IMMUNITY OR IN THE ALTERNATIVE
Declaratory Ruling	)	TO STAY PROCEEDINGS
	)	
	)	
	)	CG Docket No. 02-278
	)	DA 04-3187
	)	

CPAT 040345.001

Todd A. Sattler, NDBN 5718
James Patrick Thomas, NDBN 6014
Assistant Attorneys General
Consumer Protection
& Antitrust Division
Office of Attorney General
4205 State Street
PO Box 1054
Bismarck, ND 58502-1054
Telephone (701) 328-5570
Facsimile (701) 328-5568

Attorneys for State of North Dakota

November 8, 2004

SUMMARY OF ARGUMENT

In order to preserve its rights as a sovereign, North Dakota brings this Motion to Dismiss FreeEats' Petition. In the alternative, given that the exact preemption issue FreeEats seeks to have adjudicated before the FCC has been briefed, argued, and is being decided by a North Dakota court, North Dakota seeks a stay pending a decision from the North Dakota court.

The doctrine of sovereign immunity bars a private litigant from forcing a State into an adjudicative proceeding before a federal administrative agency. Due to the strong interest in protecting States' dignity and respect, as embedded in the Constitution, the doctrine has enjoyed consistently broad application. The doctrine prevents private complaints regardless of the relief sought and is not concerned solely with the threat to a States' financial integrity. Rather, the doctrine has a wide sweep that includes the States' interest in preserving their governmental process.

In the instant case, the sovereign immunity doctrine applies to shield North Dakota from FreeEats' Petition and the related FCC proceedings. None of the recognized exceptions to the doctrine exist and FreeEats Petition should be dismissed.

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INTRODUCTION

FreeEats.com, Inc. dba The FreeEats Companies, ccAdvertising, ccAdvertising.biz, ccAdvertising.info, ElectionResearch.com, FECads.com, FECResearch.com (collectively "FreeEats"), has filed a Petition for Expedited Declaratory Ruling ("Petition"), asking the Federal Communications Commission ("FCC") to adjudicate FreeEats' dispute with the State of North Dakota ("North Dakota") regarding the validity of North Dakota law. The doctrine of sovereign immunity, however, prevents FreeEats from forcing North Dakota into a coercive proceeding before the FCC. North Dakota does not consent to participate in the proceeding and North Dakota's immunity is neither waived, nor abrogated by Congress. Additionally, the exact preemption issue FreeEats seeks to have adjudicated before the FCC has been briefed, argued, and is being decided by a North Dakota court. In order to preserve its rights as a sovereign and to foreclose the argument that it has waived its right to argue the merits of FreeEats' Petition, North Dakota simultaneously but separately brings this Motion to Dismiss and, with no choice but to comply, submits comment on the Petition. North Dakota's position is that the FCC should grant this motion and dismiss the Petition without consideration.

PROCEDURAL BACKGROUND

In September, 2004, North Dakota notified FreeEats that it had violated North Dakota's telemarketing statute, North Dakota Century Code § 51-28-02. FreeEats Petition, Exhibit 2. North Dakota also stated it intended to commence an enforcement action against FreeEats. Id. FreeEats responded by filing the instant Petition without

seeking North Dakota's consent and absent waiver or abrogation of North Dakota's sovereign immunity.

FreeEats seeks to invoke the authority of 5 USC § 554(e) and 47 CFR § 1.2 and asks the FCC to rule FreeEats need not defend North Dakota's enforcement action because NDCC § 51-28-02 is preempted. FreeEats Petition, pp. 12, 13. The applicable rules arguably provide the FCC with authority to rule upon FreeEats' requested relief in an adjudicative proceeding. "The Commission may, in accordance with section 5(d) of the Administrative Procedure Act, on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty." 47 CFR § 1.2. The proceedings initiated by FreeEats under 47 CFR § 1.2 are conducted pursuant to Rules of Evidence and Rules of Procedure for the federal district courts. See e.g. 47 CFR § 1.351, "Except as otherwise provided in the subpart, the Rules of Evidence governing civil proceedings in matters not involved in trial by jury in the courts of the United States shall govern formal hearings. Such rules may be relaxed if the ends of justice will be better served by so doing." The proceeding is an "adjudicative" proceeding under section 5(d) of the Administrative Procedure Act. 5 USC § 554.

In conjunction with the adjudicative proceeding commenced by FreeEats under 47 CFR § 1.2, the FCC has invoked other parts of its rules to allow for extensive, substantive non-party participation. Specifically, the FCC has invited public comments pursuant to 47 CFR §§ 1.415 and 1.419 and will allow ex parte presentations under 47 CFR § 1.1200.

On September 17, 2004, North Dakota proceeded with its enforcement action and served FreeEats with a Complaint venued in Burleigh County, North Dakota. The

action, State of North Dakota ex rel. Stenehjem v. FreeEats.com, Inc., Civil No. 08-04-C-01694 (the "Action"), is currently pending before the Honorable Gail H. Hagerty. In response to the Complaint, on September 24, 2004, FreeEats moved to dismiss the complaint and scheduled a hearing before Judge Hagerty for October 18, 2004. Attached hereto as **Exhibit 1**, and incorporated by reference, are true and correct copies of Notice of Motion to Dismiss Complaint and Motion to Dismiss Complaint. By bringing the motion, and citing Consolidated Tele. Coop. v. Western Wireless Corp., 637 N.W.2d 699, 709 (N.D. 2001), FreeEats acknowledged competence of the North Dakota District Court to determine the preemption issue. FreeEats submitted a supporting brief; North Dakota submitted a timely response brief and moved for summary judgment; FreeEats submitted a timely reply brief. Oral argument on the motions, including preemption issues, occurred on October 18, 2004. Judge Hagerty took the matter under advisement and, on October 29, 2004, issued an order that denied FreeEats' motion to dismiss but reserved the issue of preemption pending decision of the summary judgment motion. Attached hereto as **Exhibit 2**, and incorporated by reference, is a true and correct copy of the Order.

MOTION TO DISMISS PETITION OR, IN THE ALTERNATIVE, STAY DETERMINATION

In furtherance of its sovereign immunity argument, and without waiving the same, North Dakota brings this motion pursuant to 47 CFR § 1.41 seeking dismissal of the Petition on grounds of sovereign immunity. In the alternative, North Dakota seeks to stay additional comment and determination of the issues presented in the Petition until a decision by the North Dakota courts on the merits of the preemption argument.

Sovereign immunity dictates that the Petition should be dismissed altogether. If however, the Commission determines otherwise, or concludes it is not the proper forum to decide such an issue, it should, in the alternative, stay proceedings to allow the subject matter to be addressed by a court of competent jurisdiction. The issues presented in the Petition -- including the preemption question -- have already been briefed and argued by FreeEats and North Dakota and a decision is pending from the District Court in Burleigh County, North Dakota. A decision allowing FreeEats to proceed on its FCC Petition would serve no legitimate purpose. FreeEats requested an expedited calendar because it wanted a decision prior to election day, November 2, 2004. Petition at 10-11. The FCC expedited the Petition, but set the deadline for initial comments six days after the election, November 8, 2004, with reply comments due more than two weeks after the election, on November 17, 2004. In contrast, petitions seeking declaratory orders on the preemptive effect of the TCPA on Florida and New Jersey law, though filed in July and August, were scheduled for comment after the North Dakota Petition deadlines.

There is no pressing need for this Petition to go forward; it should be stayed pending a final decision by the North Dakota courts on the merits of the preemption argument. The risk of inconsistent results and promotion of judicial and administrative economy dictate the FCC should wait for the North Dakota result.

ARGUMENT

I. NORTH DAKOTA IS IMMUNE FROM FREEEATS' PETITION AND THE RELATED FCC PROCEEDINGS.

Plaintiff North Dakota is a sovereign State of the United States of America, admitted to the Union on November 2, 1889. States' sovereign immunity extends beyond the text

of the Eleventh Amendment and is implicit throughout the structure of the Constitution. The central purpose of the doctrine is to accord the States the respect owed to them as joint sovereigns. As such, the doctrine enjoys broad application in order to prevent the indignity of subjecting any State to the coercive process of judicial tribunals at the instance of a private party. The doctrine is enforced regardless of whether the action seeks monetary damages or some other type of relief. In the instant proceeding, FreeEats seeks to subject North Dakota to the coercive process of the FCC, hoping to prohibit North Dakota from enforcing its own law. The doctrine of sovereign immunity applies to prevent such action.[1]

A. The sovereign immunity doctrine is applied broadly to preserve dignity and respect owed to the States as joint sovereigns.

The recent Supreme Court decision in Federal Maritime Comm'n v. South Carolina State Ports Auth., 535 U.S. 743, 122 S. Ct. 1864, 152 L. Ed. 2d 962 (2002)

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[1] While this matter is not yet pending in a federal court, the abstention principles of Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed. 2d 669 (1971) are instructive, and may come directly into play, depending on the outcome of this proceeding.

> Younger v. Harris, supra, and its progeny espouse a strong federal policy against federal-court interference with pending state judicial proceedings absent extraordinary circumstances. The policies underlying Younger abstention have been frequently reiterated by this Court. The notion of "comity" includes "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." Id., at 44, 91 S.Ct., at 750. [FN10] Minimal respect for the state processes, of course, precludes any presumption that the state courts will not safeguard federal constitutional rights.

Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 431, 102 S.Ct. 2515, 73 L.Ed.2d 116 (1982)(emphasis in original).

extends the sovereign immunity doctrine to administrative proceedings, preventing federal agencies like the FCC from using adjudicative procedures to determine the merits of a private-party action against a non-consenting State. "Given both this interest in protecting States' dignity and the strong similarities between FMC proceedings and civil litigation, we hold that state sovereign immunity bars the FMC from adjudicating complaints filed by a private party against a non-consenting State." Id. 122 S. Ct. at 1874. Federal Maritime Comm'n is on point with the instant proceeding and requires dismissal of FreeEats' Petition. A preliminary discussion of Federal Maritime Comm'n progeny is offered as a background for appropriate application of the sovereign immunity doctrine.

Federal Maritime Comm'n is the most recent in a line of Supreme Court decisions expanding State sovereign immunity beyond the literal text of the Eleventh Amendment in deference to a broader pre-ratification immunity. In 1795, Congress ratified the Eleventh Amendment, which reads: "[T]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const., Amend. XI. A literal reading of the amendment provided immunity only where the State was sued by a citizen of another State or a foreign state. Supreme Court case law after ratification emphasizes State sovereign immunity is neither derived from, nor limited by the Eleventh Amendment. These cases establish a broad State immunity, consistent with the history and structure of the Constitution.

In Hans v. Louisiana, 134 U.S. 1, 11 (1890), Louisiana resident Hans sued to recover damages for an unpaid contract and the State of Louisiana claimed immunity. Id. at 3. The Court ruled in favor of Louisiana, holding the doctrine of sovereign immunity barred suits against a State brought by citizens of the State as well as citizens of other States. Id. at 20-21. The Court understood the literal text of the Eleventh Amendment was inapplicable ("It is true the amendment does so read, and, if there were no other reason or ground for abating his suit, it might be maintainable. . . ."), but recognized a broader constitutional sovereign immunity ("The truth is that the cognizance of suits and actions unknown to the law, and forbidden by the law, was not contemplated by the constitution when establishing the judicial power of the United States. . . . The suability of a state, without its consent, was a thing unknown to the law.") Id. at 10, 15-16. The Court emphasized that the Constitution's ratification was not intended to disturb the "presumption that no anomalous and unheard-of proceedings or suits were intended to be raised up by the constitution – anomalous and unheard of when the constitution was adopted." Id. at 18.

A trio of Supreme Court decisions have helped define the broader constitutional sovereign immunity identified in Hans and applied most recently in Federal Maritime Comm'n. First, in Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 72-3 (1996), the Court ruled Congress had no general power under Article I to abrogate State sovereign immunity. The case involved the Indian Gaming Regulatory Act ("IGRA"), passed by Congress to regulate gambling on Native American lands. (See, 25 USCA § 2701(3)(4) (West Supp. 1998). Under IGRA, if a State failed to negotiate gaming activities in good faith, a tribe could sue the State in federal court to require the State to negotiate.

Seminole Tribe, 517 U.S. at 47. The Court invalidated IGRA and clarified that only the Fourteenth Amendment confers congressional abrogation to override the Eleventh Amendment. Id. at 65-67.

In reaching its decision, the Court emphasized the rule that the relief sought by a private plaintiff suing a State is irrelevant to the question of whether the suit is barred by the doctrine of sovereign immunity. Petitioner Seminole Tribe had argued sovereign immunity did not apply because IGRA authorized only prospective injunctive relief as opposed to retroactive monetary relief. The Court rejected the Tribe's argument, stating:

> But we have often made it clear that the relief sought by a plaintiff suing a State is irrelevant to the question whether the suit is barred by the Eleventh Amendment. See, e.g., Cory v. White, 457 U.S. 85, 90, 102 S. Ct. 2325, 2329, 72 L. Ed. 2d 694 (1982) ("It would be a novel proposition indeed that the Eleventh Amendment does not bar a suit to enjoin the State itself simply because no money judgment is sought").

Id. at 58. Thus, while sovereign immunity is aimed in part at "the prevention of federal-court judgments that must be paid out of a State's treasury," Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 48 (1994), Seminole Tribe makes certain that is not its sole -- or even most significant -- concern. Rather, on a more fundamental level, the doctrine of sovereign immunity, "serves to avoid 'the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.'" Seminole Tribe, 517 U.S. at 58 (quoting Puerto Rico Aqueduct & Sewer Author. v. Metcalf & Eddy, Inc., 506 U.S.139, 146 (1993)).

One year after Seminole Tribe, the Court issued its decision in Idaho v. Coeur d'Alene Tribe, 521 U.S. 261 (1997). In Coeur d'Alene, a Native American tribe claimed ownership of submerged lands in Idaho and sued the State of Idaho seeking a

declaratory judgment of the tribe's ownership. Id. at 265. The Court ruled Idaho's sovereign immunity shielded it from the lawsuit.

The Court again relied upon the dignity and status of Idaho's statehood and, significantly, emphasized the availability of a state forum to resolve the dispute. Id. at 287-88 ("The dignity and status of its statehood allow Idaho to rely on its Eleventh Amendment immunity and to insist upon responding to these claims in its own courts, which are open to hear and determine the case."). Regarding Idaho's dignity and respect, the Court explained:

> [T]he dignity and respect afforded a State, which the immunity is designed to protect, are placed in jeopardy whether or not the suit is based on diversity jurisdiction. As a consequence, suits invoking the federal-question jurisdiction of Article III courts may also be barred by the Amendment. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996).

Id. at 268. Regarding the importance of an available state forum, the Court emphasized the States' interest in having their own courts decide cases brought against them by private parties.

> [I]t is acknowledged that States have real and vital interests in preferring their own forums in suits brought against them, interests that ought not to be disregarded based upon a waiver presumed in law and contrary to fact. See, e.g., Edelman v. Jordan, 415 U.S., at 673, 94 S. Ct., at 1360-1361. In this case, there is neither warrant nor necessity to adopt the Young device to provide an adequate judicial forum for resolving the dispute between the Tribe and the State. Idaho's courts are open to hear the case, and the State neither has nor claims immunity from their process or their binding judgment.

Id. at 274. The Court flatly rejected any notion that State courts are inadequate to enforce and interpret federal law.

> While we can assume there is a special role for Article III courts in the interpretation and application of federal law in other instances as well, we do not for that reason conclude that state courts are a less than adequate

> forum for resolving federal questions. . . . Interpretation of federal law is the proprietary concern of state, as well as federal, courts. It is the right and duty of the States, within their own judiciaries, to interpret and to follow the Constitution and all laws enacted pursuant to it, subject to a litigant's right of review in this Court in a proper case.

Id. at 276.

In Alden v. Maine, 527 U.S. 706 (1999), decided two years after Coeur d'Alene, the Court solidified and expounded upon its rationale for broadening the sovereign immunity doctrine. Confirming the portion of the Hans decision regarding the scope of sovereign immunity, the Court stated:

> [T]he sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment. Rather, as the Constitution's structure, its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today (either literally or by virtue of their admission into the Union upon an equal footing with the other States) except as altered by the plan of the Convention or certain constitutional Amendments.

Id. at 713. Regarding the dignity and respect owed to states as members of the federation, the Court again recognized the doctrine of State sovereign immunity is not concerned solely with the threat to their financial integrity, but rather has a broader sweep, including States' interest preserving their political process. The Court stated:

> "The principle of immunity from litigation assures the states and the nation from unanticipated intervention in the processes of government." Great Northern Life Ins. Co. v. Read, 322 U.S., at 53, 64 S. Ct. 873. When the States' immunity from private suits is disregarded, "the course of their public policy and the administration of their public affairs" may become "subject to and controlled by the mandates of judicial tribunals without their consent, and in favor of individual interests." In re Ayers, supra, at 505, 8 S. Ct. 164. While the States have relinquished their immunity from suit in some special contexts--at least as a practical matter--see Part III, infra, this surrender carries with it substantial costs to the autonomy, the decisionmaking ability, and the sovereign capacity of the States.

Id. at 750. Thus, Coeur d'Alene and Alden show that, apart from the financial burden a State might experience, sovereign immunity is most important as a shield against intervention into the States' governmental process -- including the ability to have their own courts decide their own cases.

B. The broad sovereign immunity doctrine shields North Dakota from FreeEats' Petition and the coercive FCC proceeding.

In the instant case, sovereign immunity shields North Dakota from FreeEats' Petition and the related adjudicative proceedings before the FCC. A recent Supreme Court decision that is factually and procedurally on point with the instant case, Federal Maritime Comm'n, provides dispositive precedent to bar the instant proceeding. None of the recognized exceptions to the sovereign immunity doctrine are available to FreeEats and its Petition should be dismissed.

1. The recent Supreme Court decision in Federal Maritime Comm'n requires dismissal of FreeEats' Petition.

In Federal Maritime Comm'n the Supreme Court extended to administrative proceedings the broad sovereign immunity established in Hans, Seminole Tribe, Coeur d'Alene, and Alden. Maritime Services ("Maritime) filed a complaint with the Federal Maritime Commission ("FMC") contending the South Carolina State Ports Authority ("South Carolina") had violated the Shipping Act of 1984 ("Shipping Act"). Id. at 747-48. Maritime claimed the violation occurred when South Carolina prohibited it from docking a cruise ship at the Port of Charleston and sought both retrospective money damages and prospective injunctive relief from the FMC. Id. at 747-49.

South Carolina filed a motion to dismiss on sovereign immunity grounds. Id. at 749. The FMC, relying on Seminole Tribe, granted South Carolina's motion. Id. at 749-

50. Then, on its own motion, the FMC reversed its decision, holding sovereign immunity did not bar it from adjudicating private complaints against state-run ports. Id. at 750.

South Carolina filed a petition for review and the Fourth Circuit Court of Appeals reversed FMC's ruling, remanding the case with instructions to dismiss. South Carolina State Ports Auth. v. Federal Maritime Comm'n, 243 F.3d 165, 179 (4th Cir. 2001). Focusing on the Supreme Court's decisions in Seminole Tribe and Alden, the court observed that, "any proceeding where a federal officer adjudicates disputes between private parties and unconsenting states would not have passed muster at the time of the Constitution's passage nor after the ratification of the Eleventh Amendment. . . . " Id. at 743.

The Supreme Court granted FMC's petition for certiorari and affirmed the Fourth Circuit's decision. Federal Maritime Comm'n v. South Carolina State Ports Auth., 535 U.S. 743, 122 S. Ct. 1864, 1870, 152 L. Ed. 2d 962 (2002). The Court's opinion began by noting "[d]ual sovereignty is a defining feature of our Nation's constitutional blueprint" and that the states "entered the Union 'with their sovereignty intact.'" Federal Mar. Comm'n, 122 S. Ct. at 751 (citing Blatchford v. Native Village of Noatak, 501 U.S. 775, 779 (1991). The Court confirmed that the sovereignty enjoyed by States includes an immunity from private suits not necessarily based upon, nor defined by, the Eleventh Amendment. Id. at 751-53.

The Court then moved to the question of whether the State sovereign immunity "embedded in our constitutional structure" extends to administrative proceedings. Id. at 754. In order to determine if the presumption from Hans -- that the Constitution was not

intended to endorse proceedings against the States that were unheard of when the Constitution was adopted -- applied, the Court analyzed the FMC proceedings. Id. at 755-56 (quoting Hans, 134 U.S. at 18). Finding that the proceedings, "are the type of proceedings from which the Framers would have thought the States possessed immunity" the Court affirmed South Carolina's immunity from the proceedings. Id. at 755, 760.

The Court reasoned that the affront to a State's dignity is not lessened when the adjudication occurs before an administrative agency as opposed to an Article III court. Id. at 760. In fact, the Court suggested that an even greater affront occurs with the involvement of an administrative agency as opposed to a court of competent jurisdiction.

> One, in fact, could argue that allowing a private party to haul a State in front of such an administrative tribunal constitutes a greater insult to a State's dignity than requiring a State to appear in an Article III court presided over by a judge with life tenure nominated by the President of the United States and confirmed by the United States Senate.

Id. at 760, n. 11.

Finally, the Court addressed two reasons offered by FMC as to why State sovereign immunity should not apply. Id. at 761. First, FMC argued its adjudication was not self-executing, thus suggesting that a party alleged to have violated the Shipping Act is not coerced to participate in the FMC proceedings. Id. at 762. The Court rejected the proffered distinction as meaningless:

> A State seeking to contest the merits of a complaint filed against it by a private party must defend itself in front of the FMC or substantially compromise its ability to defend itself at all. . . . [A]ny party, including a State, charged in a complaint by a private party with violating the Shipping Act is faced with the following options: appear before the Commission in a bid to persuade the FMC of the strength of its position or stand

> defenseless once enforcement of the Commission's nonreparation order or assessment of civil penalties is sought in federal district court. . . To conclude that this choice does not coerce a State to participate in an FMC adjudication would be to blind ourselves to reality.

Id. at 762-63.

Second, FMC argued that because the relief sought by Maritime was primarily a prospective nonreparations order, South Carolina's financial integrity was not threatened and sovereign immunity should not apply. Id. at 765. The Court responded that FMC's argument reflected a "fundamental misunderstanding of the purposes of sovereign immunity." Id. Relying on its decisions from Seminole Tribe and Alden, the Court stated:

> While state sovereign immunity serves the important function of shielding state treasuries and thus preserving "the States' ability to govern in accordance with the will of their citizens," Alden, supra, at 750-751, 119 S. Ct. 2240, the doctrine's central purpose is to "accord the States the respect owed them as" joint sovereigns. See Puerto Rico Aqueduct and Sewer Author. v. Metcalf & Eddy, Inc., 506 U.S. 139, 146, 113 S. Ct. 684, 121 L. Ed. 2d 605 (1993); see Part III-C, supra. It is for this reason, for instance, that sovereign immunity applies regardless of whether a private plaintiff's suit is for monetary damages or some other type of relief. See Seminole Tribe, 517 U.S., at 58, 116 S. Ct. 1114 ("[W]e have often made it clear that the relief sought by a plaintiff suing a State is irrelevant to the question whether the suit is barred by the Eleventh Amendment").

Id. at 765-6. Having dispensed with FMC's arguments, the Supreme Court affirmed the Fourth Circuit ruling that Maritime could not force South Carolina into an adjudication at the FMC.

In the instant case, FreeEats' attempt to force North Dakota into an adjudication before the FCC can be no more successful than Maritime's attempt to force South Carolina into an adjudication before the FMC. The fact that FreeEats' vehicle to accomplish its coercion is a petition for declaratory ruling rather than a complaint does

not distinguish Federal Maritime Comm'n. In each case, the State must defend itself in front of the Commission or compromise its ability to defend itself at all. The States' options in each case are the same: Appear before the Commission in an attempt to persuade it, or stand defenseless once enforcement of the Commission's ruling is sought in federal district court. The result sought by FreeEats is an impermissible coercion that subverts the dignity and respect commanded by the history and structure of the Constitution. The doctrine of sovereign immunity shields North Dakota from the instant proceedings. FreeEats' Petition should be dismissed.

2. None of the exceptions apply to save FreeEats' Petition.

The case law generally provides for three limited exceptions to application of the sovereign immunity doctrine: abrogation, waiver and the "Young fiction." None of these limited exceptions exist here and sovereign immunity bars FreeEats' Petition and the related proceedings.

i. Sovereign immunity has been neither waived nor abrogated.

One situation where a private party may avoid dismissal of its case against a State is when Congress has abrogated sovereign immunity with legislation under section 5 of the Fourteenth Amendment. Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976). Here, there is no suggestion that Congress attempted to abrogate sovereign immunity in connection with its telemarketing laws. Also, a State may explicitly waive its immunity. College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 680-82 (1999). There is no claim in this case that North Dakota has waived its immunity.

ii. The Ex Parte Young doctrine does not apply.

In addition to abrogation and waiver, the legal fiction from Ex Parte Young is sometimes applied as an exception to sovereign immunity. In 1908, in Ex Parte Young, 209 U.S. 123 (1908), the Supreme Court ruled that the Eleventh Amendment does not bar lawsuits that seek prospective equitable relief to discontinue an ongoing violation of federal law by State officers. The holding is based on the legal fiction that State officers who act contrary to the Constitution or federal law strip themselves of their official capacity and, thereby, any derivative immunity. Id. The Supreme Court, therefore, has required federal courts be confident that the State official is the "real, substantial party in interest." Ford Motor Co. v. Dep't of Treasury, 323 U.S. 459, 464 (1945); See also In re Ayers, 123 U.S. 443, 491 (1887)(while State is "actual party," Court recognizes State can only appear by consent); Louisiana ex rel. Elliot v. Jumel, 107 U.S. 711, 758 (1882) (finding that "State should be made a party if it can be done," and in absence of State, Court can proceed against individual State officers).

The Ex Parte Young fiction does not save FreeEats' Petition. It was the North Dakota Legislature that enacted the statute at issue. FreeEats does not name any individual and does not claim any North Dakota official has violated the Constitution or federal law. Rather, FreeEats' Petition alleges the North Dakota telemarketing law is preempted. The legal fiction necessary for application of the doctrine simply does not exist in the instant case. The real party in interest -- the State of North Dakota -- has not consented to FreeEats' Petition and it should be dismissed.

The instant proceeding simply is not the type of action that allows for application of the Ex Parte Young fiction. In Federal Maritime Comm'n -- a case that is procedurally

and factually on all fours with the instant case -- the Court applied the sovereign immunity doctrine absent any reference whatsoever to Ex Parte Young. Instead, consistent with the rulings in Seminole Tribe and Alden, the Court held that, "the relief sought by a plaintiff suing a State is irrelevant to the question whether the suit is barred by the Eleventh Amendment." Fed. Mar. Comm'n, 122 S. Ct. 1864, 1879 (2002) (quoting Seminole Tribe 517 U.S. at 58. The Ex parte Young fiction did not apply in Federal Maritime Comm'n and does not apply to the instant proceeding.

Finally, the availability of a court in North Dakota that currently is deciding the preemption issue prevents application of the Ex Parte Young fiction. As the Supreme Court stated in Coeur d'Alene, "There is neither warrant nor necessity to adopt the Ex Parte Young device to provide an adequate judicial forum for resolving the dispute between the Tribe and the State. Idaho's courts are open to hear the case, and the State neither has nor claims immunity from their process or their binding judgment." In the instant case, not only are the North Dakota courts open and available, but an actual case already exists where a state judge is deciding the exact same issue FreeEats purports to present here to the FCC. The Ex Parte Young fiction does not apply to give FreeEats two bites at the apple. Its Petition should be dismissed.

CONCLUSION

For the reasons stated, the Petition filed by FreeEats should be dismissed. In the alternative, the FCC should stay additional comment and any determination of the issues until a decision by the North Dakota courts on the merits of the preemption argument.

Dated this 8th day of November, 2004.

STATE OF NORTH DAKOTA
Wayne Stenehjem
Attorney General

By: _____

Todd A. Sattler, NDBN 5718
James Patrick Thomas, NDBN 6014
Assistant Attorneys General
Consumer Protection
& Antitrust Division
Office of Attorney General
4205 State Street
PO Box 1054
Bismarck, ND 58502-1054
Telephone (701) 328-5570
Facsimile (701) 328-5568

Attorneys for State of North Dakota

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STATE OF NORTH DAKOTA

COUNTY OF BURLEIGH

IN DISTRICT COURT

SOUTH CENTRAL JUDICIAL DISTRICT

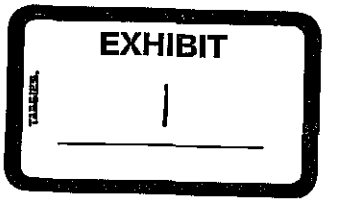
CASE NO. 08-04-C-01694

State of North Dakota ex rel. Wayne Stenehjem, Attorney General, Plaintiff, -vs- FreeEats.com, Inc. dba The FreeEats Companies, ccAdvertising, ccAdvertising.biz, ccAdvertising.Info, ElectionResearch.com, FECads.com, and FECResearch.com, Defendant.	)	**NOTICE OF MOTION TO DISMISS COMPLAINT**

TO: PLAINTIFF AND ITS ATTORNEY JAMES PATRICK THOMAS

PLEASE TAKE NOTICE that the defendant FreeEats.com, Inc. dba ccAdvertising's ("ccAdvertising") Motion to Dismiss Complaint, served and filed herewith, is made as a motion submitted for hearing and determination pursuant to Rule 3.2 NDROC. You are hereby notified that upon filing of briefs or upon the expiration of the time for filing briefs, the motion is deemed submitted and taken under advisement by the Court.

A hearing has been scheduled in this matter for Monday, October 18, 2004, at 1:30 P.M. in the Burleigh County Courthouse, Bismarck, North Dakota.



Dated this 29th day of September, 2004.

Lawrence E. King ID#04997
ZUGER KIRMIS & SMITH
PO Box 1695
Bismarck, ND 58502-1695
701-223-2711

AND

David H. Bamberger
Emilio W. Cividanes
James P. Rathvon
PIPER RUDNICK L.L.P.
1200 Nineteenth Street, NW
Washington, DC 20036-2430
202-861-3900

ATTORNEYS FOR DEFENDANT

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STATE OF NORTH DAKOTA

COUNTY OF BURLEIGH

IN DISTRICT COURT

SOUTH CENTRAL JUDICIAL DISTRICT

CASE NO. 08-04-C-01694

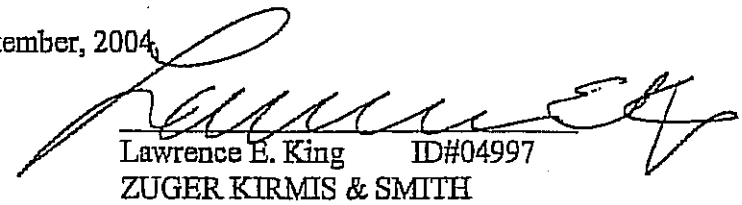
State of North Dakota ex rel. Wayne Stenehjem, Attorney General, Plaintiff, -vs- FreeEats.com, Inc. dba The FreeEats Companies, ccAdvertising, ccAdvertising.biz, ccAdvertising.Info, ElectionResearch.com, FECads.com, and FECResearch.com, Defendant.	)	**MOTION TO DISMISS COMPLAINT**

Defendant FreeEats.com, Inc. dba ccAdvertising ("ccAdvertising") submits this Motion to Dismiss the Complaint of plaintiff State of North Dakota ex rel. Wayne Stenehjem, Attorney General, pursuant to Rule 12(b)(vi), N.D. R. Civ. P.

The Complaint asserts a violation of Section 51-28-02, N.D. Cent. Code, as it relates to ccAdvertising's noncommercial interstate political polling calls. The plaintiff's attempted application of this statute to ccAdvertising's polling calls is preempted by the federal Telephone Consumer Protection Act and, thus, the Complaint fails to state a claim against ccAdvertising.

This motion is supported by the accompanying brief.

Dated this 29th day of September, 2004.



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202-861-3900

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STATE OF NORTH DAKOTA

COUNTY OF BURLEIGH

IN DISTRICT COURT

Case No. 04-C-1694

State of North Dakota ex rel.
Wayne Stenehjem, Attorney General,

Plaintiff,

vs.

Freeeats.com, Inc., d.b.a.
The FreeEats Companies,
ccAdvertising, ccAdvertising.biz,
ccAdvertising.info,
ElectionResearch.com, FECads.com
and FECResearch.com

Defendant

ORDER

The North Dakota Attorney General's office, Consumer Protection & Antitrust Division (the State) filed the complaint in this action on September 17, 2004. The complaint alleges Freeeats.com, Inc. (Freeeats), the defendant, violated Section 51-28-02 of the North Dakota Century Code by contacting, or attempting to contact, residents of North Dakota by telephone using an automatic dialing-announcing device (ADAD) which contained a pre-recorded "polling" voice message. *Compl.*, ¶ 8.

It is alleged the telephone messages were wholly automated, no "live" human being was on the calling end of the telephone. *Id.*, ¶ 10. It is also alleged the North Dakota telephone subscribers did not knowingly request, consent to, or authorize the automated message from Freeeats. *Id.*, ¶ 11. The complaint asserts the messages were not from "school districts to students, parents, or employees, messages to subscribers with whom

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FreeEats had a current business relationship, or messages advising employees of work schedules." *Id.*, ¶ 13.

The State requests injunctive relief, civil penalties, and attorney fees and costs pursuant to North Dakota law. *Id.*, ¶ 14.

Freeeats responded by filing a motion to dismiss for failure to state a claim on which relief can be granted, N.D.R. Civ. P. 12(b)(vi). It admits the calls were placed using ADAD technology without the consent of the North Dakota telephone subscribers. *Brief in Sup. of Mot. to Dismiss Compl.*, p. 1. Freeeats instead asserts because (1) the calls were placed outside of North Dakota, in Virginia, and (2) the calls were noncommercial in nature, North Dakota law is preempted by the federal Telephone Consumer Protection Act (TCPA). *Id.*, p. 2.

In its brief in opposition to the motion to dismiss, the State argues the two rationales given by Freeeats for dismissal under Rule 12(b)(vi) are factual in nature and rely on facts that have not been asserted in the complaint. *Pl. Brief in Opp. To Mot. to Dismiss*, p. 3-4. The State also argues the North Dakota law prohibiting most pre-recorded phone messages is not preempted by the TCPA. *Id.*, p. 12.

Rule 12(b)(vi) is a procedural means for quick disposal of frivolous lawsuits. The rule states, in pertinent part: ". . . the following defenses at the option of the pleader may be made by motion: . . . (vi) failure to state a claim upon which relief can be granted . . . ." If matters are presented that are outside the pleadings, the Court may exclude them and proceed. However, if the Court does not exclude the materials it must treat the motion as a Rule 56 motion for summary judgment. In this instance, the Court will consider only the pleadings and will reserve deciding the federal preemption arguments until summary judgment motions are decided.

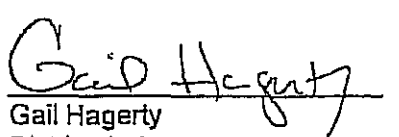
At this point, the Court will construe the complaint most favorably to the State. ***Vandall v. Trinity Hosps.***, 2004 ND 47, ¶ 5, 676 N.W.2d 88. The Court will accept the well-pleaded allegations of the complaint as true. *Id.* A complaint should not be dismissed *unless* "it is disclosed with certainty the impossibility of proving a claim upon which relief can be granted." *Id.* (citations omitted).

In this case, the State's allegations are taken as true. It is not alleged in the complaint where the telephone "polling" calls were placed by Freeeats. It is possible the calls were placed in North Dakota. It is not alleged the calls were commercial or noncommercial in nature. It is possible they were commercial in nature. These factual determinations have not been made by the Court at this time, nor need they be for a motion to dismiss. The allegations are simply Freeeats placed pre-recorded automated polling calls to North Dakota telephone subscribers in violation of Section 51-28-02 of the North Dakota Century Code. Taking these allegations in the complaint as true, the Court finds it is possible relief could be granted on the State's claims.

Freeeats' motion to dismiss is **DENIED**.

Dated October 29, 2004.

BY THE COURT:



Gail Hagerty
District Judge