IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

Case No. 3:12-cv-00336-MOC-DSC

STEVE COOKSEY, Plaintiff, v. MICHELLE FUTRELL, *et al.*, Defendants.	)	**DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION**

NOW COME all of the named Defendants, by and through the undersigned counsel of record, and submit this Memorandum of Law in Opposition to Plaintiff's Motion for a Preliminary Injunction.

INTRODUCTION

Plaintiff Cooksey instituted this action against the named defendants in their official capacities as members of the North Carolina Board of Dietetics/Nutrition ("Board"), seeking broad-sweeping declaratory and injunctive relief "against the enforcement of the North Carolina Dietetics/Nutrition Practices Act, N.C. Gen. Stat. §§ 90-350 *et seq.*, regulations promulgated pursuant to that Act, 21 N.C.A.C. § 17.0101 *et seq*., and against the practices and policies of the North Carolina Board of Dietetics/Nutrition, that deny his First Amendment right to communicate his opinions and advice on diet and nutrition to the general public and to individuals." (D.E. #1, ¶ 2.) Although Plaintiff Cooksey attempts to cast his Complaint as a First Amendment case challenging the Board's "censorship of ordinary advice on an age-old topic: What is the healthiest food to eat?" – the reality is far different. If Plaintiff was only

interested in discussing his views on the healthiest foods to eat, this matter would not be before the Court. Plaintiff Cooksey, however, seeks a ruling that would invalidate the Dietetics/Nutrition Practice Act ("Act") and allow him, among other things, to individually counsel diabetics on the diet they should be consuming given their specific health condition. The Act was created to address that very situation – "to safeguard the public health, safety and welfare and to protect the public from being harmed by unqualified persons by providing for the licensure and regulation of persons engaged in the practice of dietetics/nutrition and by the establishment of educational standards for those persons." N.C. Gen. Stat. § 90-351 (2012).

PERTINENT FACTS

On or about January 13, 2012, a complaint was submitted to the Board that indicated Plaintiff Cooksey was practicing dietetics/nutrition without a license. The Board is required to investigate any complaint that it receives. (Burill Aff., ¶ 3, attached as Ex. 1.) On January 18, 2012, Charla Burill, the Executive Director/Executive Secretary of the Board, reviewed Plaintiff Cooksey's website located at www.diabetes-warrior.net. Plaintiff Cooksey's website indicated, among other things, that he was providing "Diabetes Support" services for a fee. (Burill Aff., ¶ 4.) Ms. Burill spoke by telephone to Plaintiff that same day, and specifically told Mr. Cooksey that he was free to comment and speak about the Paleolithic diet he supports. He was simply prohibited under the law from providing nutrition care services without a license. (Burill Aff., ¶ 7.) The Act prohibits an unlicensed individual from offering "nutrition care services," defined as any, part or all of the following:

a. Assessing the nutritional needs of individuals and groups, and determining resources and constraints in the practice setting.

b. Establishing priorities, goals, and objectives that meet nutritional needs and are consistent with available resources and constraints.

c. Providing nutrition counseling in health and disease.

d. Developing, implementing, and managing nutrition care systems.

e. Evaluating, making changes in, and maintaining appropriate standards of quality in food and nutrition services.

N.C. Gen. Stat. § 90-352(4) (2012).

In the course of his discussion with Ms. Burill, Plaintiff Cooksey volunteered to take down his "Diabetes Support" services page – services which he now refers to in his Complaint as a type of "life coaching." (Burill Aff., ¶ 8.) Ms. Burill did not request that the page be taken down. Plaintiff Cooksey indicated it was not a "money maker" for him, and that he had only had one paying client. He further stated that he does not push diabetes support, but rather focuses on providing information. (Burill Aff., ¶ 8.) Ms. Burill did not get into any specific discussions with Plaintiff about what services he was attempting to provide through his "Diabetes Support" page. (Burill Aff., ¶ 9.) Plaintiff Cooksey also agreed to post his disclaimer that he is not a licensed nutritionist more prominently on his site. (Burill Aff., ¶ 10.)

In that same call, Plaintiff was informed that the Complaint Committee of the Board would review his website to see if there were any other issues of concern, and he indicated he was looking forward to any feedback that might be provided. (Burill Aff., ¶¶ 11-12, 14.) In fact, Plaintiff Cooksey stated that he "welcomed the opportunity to discuss his website." (Burill Aff., ¶ 12.) Just minutes after speaking with Ms. Burill, Plaintiff emailed her to say that the "Diabetes Support" page was down and that he had made his disclaimer more prominent. He noted he "did enjoy our conversation and I look forward to discussing my website's compliance . . . and content with you. :)" (D.E. #1-5; Burill Aff., ¶ 14.)

On January 27, 2012, Ms. Burill emailed Plaintiff to let him know that the Complaint Committee had reviewed his website, as discussed in their prior phone call. That email stated:

> Please find attached a document containing pages from your website with areas of concern noted. Given our discussion, I believe our comments should make sense, however, should you disagree, I am happy to discuss. Please feel free to contact me with any questions you may have. Should you agree with our comments, we would ask that you make any necessary changes to your site, and moreover, going forward, align your practices with the guidance provided. Again, please contact me with any questions, and please update me as changes are made.

(D.E. # 1-5; Burill Aff., ¶ 15.) Other than indicating he was disappointed with the review, Plaintiff Cooksey never contacted Ms. Burill with any questions or to discuss matters further. Ms. Burill was under the impression that if Mr. Cooksey had any concerns, he would contact her to discuss those further. (Burill Aff., ¶ 16.) On April 9, 2012, Plaintiff Cooksey was notified that the Board was closing its investigation. (Burill Aff., ¶ 17.)

At no point did the Board ever issue any official decision as to whether Plaintiff Cooksey was in violation of any statute or regulation governing the practice of dietetics/nutrition. In fact, the Board did not even take the matter under consideration given that Plaintiff voluntarily chose to address the issues that originally appeared to be of concern. (Burill Aff., ¶ 18.) The comments provided to Plaintiff Cooksey in relation to his website were a part of the feedback discussed during his conversation with Ms. Burill. That January 18th conversation was the only time Ms. Burill spoke to Mr. Cooksey. (Burill Aff., ¶ 19.) The comments she provided following that phone conversation were not a part of any official Board action or decision directed towards Mr. Cooksey. The Board never ordered Plaintiff to make any changes to his website, and no legal action has ever been taken or threatened against Plaintiff Cooksey by the Board. (Burill Aff., ¶¶ 19, 21.) Further, Plaintiff never requested any decision or declaratory ruling from the Board regarding whether or not he was in violation of the statutes and regulations governing the practice of dietetics/nutrition. There is no active complaint or action against Plaintiff on file with the Board. (Burill Aff., ¶¶ 20-21.)

As pointed out by Plaintiff Cooksey, under the Act and related regulations, the Board has the authority "to enforce the Act, promulgate regulations governing the practice of dietetics, investigate potential violations of the statute and regulations, conduct various administrative proceedings, and bring injunctive actions to halt violation of the statute." (D.E. #1, ¶ 92.) Notably, Plaintiff Cooksey cannot show that the Board exercised any of its enforcement authority under the Act. In fact, Plaintiff Cooksey can point to no official decision made by the Board with regard to his website. There is no allegation that the Board conducted any administrative proceeding wherein a decision was reached regarding his actions. There is no allegation that the Board decided to or took any steps whatsoever related to obtaining an injunction against Plaintiff. Indeed, there has been no action by the Board against Plaintiff, other than the opening of investigation in response to a complaint.

PRELIMINARY INJUNCTION STANDARD

"A preliminary injunction is an extraordinary remedy afforded prior to trial at the discretion of the district court that grants relief *pendent lite* of the type available after the trial." *Real Truth About Obama, Inc. v. Federal Election Com'n*, 575 F.3d 342, 345 (4th Cir. 2009), *vacated on other grounds,* —— U.S. ——, 130 S.Ct. 2371 (2010), *reissued in part,* 607 F.3d 355 (4th Cir.2010), *overruling Blackwelder Furniture Co. of Statesville v. Seilig Mfg. Co.,* 550 F.2d 189 (4th Cir.1977). As set forth by the Supreme Court in *Winter v. Natural Resources Defense Council, Inc.*, in order to obtain a preliminary injunction a plaintiff must establish: "[1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." 555 U.S 7, 20 (2008). In order to succeed on a motion for a preliminary

injunction, all four requirements must be satisfied. *See Real Truth About Obama, Inc.* 575 F.3d at 346.

ARGUMENT

I. Plaintiff Cannot Show A Likelihood Of Success On The Merits.

"Because a preliminary injunction affords, on a temporary basis, the relief that can be granted permanently after trial, the party seeking the preliminary injunction must demonstrate by 'a clear showing' that, among other things, it is likely to succeed on the merits." *Real Truth About Obama, Inc.*, 575 F.3d at 345 (citation omitted) (emphasis added). Plaintiff is unable to make such a showing for several reasons. The initial hurdle Plaintiff faces is the lack of justiciability of his claim. As set forth below, Plaintiff cannot show that he has standing to pursue such a claim, nor is the matter ripe for review given the lack of any Board action against Plaintiff. Even if Plaintiff were able to make such a showing, Plaintiff would still fail in his claim given, among other things, the long-standing case law regarding the validity of the type of professional regulation at issue.

A. Plaintiff Has Suffered No Injury Which Would Provide Him With Standing To Bring Suit.

Under Article III of the Constitution, the jurisdiction of the federal courts is limited to the adjudication of "cases" and "controversies." *See Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 153-54 (4th Cir. 2000). Whether a case or controversy exists is governed, in part, by whether or not the individual has standing to bring his claim. The requirement of standing serves important functions. It ensures not only that "a plaintiff has a sufficient personal stake in a dispute to render judicial resolution appropriate," but also that "the legal questions presented to the court will be resolved, not in the rarefied atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the

consequences of judicial action." *Id.* (quoting *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982)).

To have standing, a party must show (1) that he personally suffered some actual or threatened injury as a result of the alleged illegal conduct of the defendant, (2) that his injury fairly can be traced to the challenged action, and (3) and that his injury is likely to be redressed by a favorable decision. *See Valley Forge Christian College*, 454 U.S. at 472 (citations omitted). The first element – the existence of an injury in fact – requires the party to show that he suffered "an invasion of a legally protected interest which is (a) concrete and particularized and (b) 'actual or imminent, not 'conjectural' or 'hypothetical'." *Kemler v. Poston*, 108 F.Supp.2d 529, 534 (E.D.Va. 2000) (citations omitted). Even in First Amendment cases, where standing requirements may be more relaxed, the plaintiff must still present "a claim of specific present objective harm or a threat of specific future harm." *Id.* at 537 (quoting *Laird v. Tatum*, 408 U.S. 1, 14 (1972)). In this case, Plaintiff presents at best, allegations of possible future injury that are insufficient to satisfy standing requirements.

The case of *Kemler v. Poston* is instructive. In that case, two substitute judges brought suit alleging that an advisory opinion issued by the Judicial Ethics Advisory Committee ("JEAC"), which was subject to enforcement by the Judicial Inquiry and Review Commission ("JIRC") and the Virginia Supreme Court, violated their rights under the First and Fourteenth Amendments. *Id.* at 530. Although recognizing that standing requirements may be relaxed where First Amendment claims are at issue, the court noted that such relaxation "in no way erode[s] the established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained, or is immediately in danger of sustaining, a direct injury as a result of the action." *Id.* at 536.

In the *Kemler* case, the plaintiffs were unable to make such a showing where they did not establish that they had been compelled to do, or refrain from doing anything. JEAC opinions were merely advisory, and there was no showing that the JIRC had threatened imminent enforcement of the JEAC opinion. As noted by the court, there were a multitude of contingencies upon which their theory of injury depended, including, whether JIRC counsel would present the charge to the JIRC as an inquiry, and if so, whether the JIRC would dismiss the charge as lacking merit or proceed with a formal hearing.

Similarly, in this case, Plaintiff is unable to show an injury in fact because he is unable to show that he was compelled to take any action or forced to refrain from taking any action. Plaintiff hinges his First Amendment claims on the "red-pen" review provided to him in an email by Charla Burill. However, Ex. 4 to Plaintiff's Complaint evidences that the comments provided to him were in no way any official act of the Board:

> Mr. Cooksey:
>
> Thank you for your patience. I have reviewed your website with the Complaint Committee. Please find attached a document containing pages from your website with areas of concern noted. Given our discussion, I believe our comments should make sense, however, should you disagree, I am happy to discuss. Please feel free to contact me with any questions you may have. Should you agree with our comments, we would ask that you make any necessary changes to your site, and moreover, going forward, align your practices with the guidance provided. Again, please contact me with any questions, and please update me as changes are made.

(D.E. #1-5, p. 2, emphasis added.) Plaintiff Cooksey never bothered to address any disagreement he had with the "areas of concern" noted by Ms. Burill, nor did he ever bother to obtain a decision from the Board regarding his website material. The red-pen review was not an official act of the Board nor did it require any action on Plaintiff's part. There has been no showing that the Board considered any imminent enforcement, or that the Board would even hold Plaintiff in

violation of the Act. As in *Kemler*, there are a multitude of contingencies upon which any actual injury to Plaintiff hinges. Because Plaintiff cannot show any injury, he has no standing to pursue his claims.

B. Plaintiff's Claims Are Not Ripe For Review.

Closely tied to the concept of standing is that of ripeness. "Justiciability implicates not only the standing of litigants to assert particular claims, but also the appropriate timing of judicial intervention in the dispute presented by the claim." *Kemler*, 108 F.Supp.2d at 533 (citing *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943)). In order for a case to be ripe for judicial review, it must involve "an administrative decision [that] has been formalized and its effects felt in a concrete way by the challenging parties." *Charter Fed. Sav. Bank v. Office of Thrift Supervision*, 976 F.2d 203, 208 (4th Cir. 1992) (citing *Pacific Gas & Elec. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190 (1983)). "Strict application of the ripeness doctrine prevents federal courts from rendering impermissible advisory opinions and wasting resources through review of potential or abstract disputes." *Nat'l Adver. Co. v. City of Miami*, 402 F.3d 1335, 1339 (11th Circ. 2005).

The Eastern District of North Carolina addressed the ripeness requirement in a case very similar to the one before this Court. In *The Int'l Acad. of Oral Med. & Toxicology v. The North Carolina State Bd. of Dental Exam'rs*, the plaintiff brought suit alleging that the Dental Board was "violating the free speech guarantees of the United States Constitution through their alleged regulation of North Carolina dentists' speech concerning mercury-related dental practices." 451 F.Supp.2d 746, 748 (E.D.N.C. 2006). The plaintiff specifically sought declaratory and injunctive relief:

> prohibiting defendants from the "operation and enforcement of the imminent express and implicit threats to prosecute dentists" who (a) communicate that they

> practice "mercury-free dentistry" or "metal-free dentistry"; (b) inform patients or the public that persons should eliminate their exposure to mercury; (c) inform patients or the public that silver fillings contain mercury that may leak and cause health problems; or (d) inform patients or the public that mercury fillings can be harmful.

Id. The plaintiff's claim stemmed from a "do's and don'ts" article in a Dental Board publication regarding advertising. The article advised dentists that they should not advertise they practice mercury-free or metal-free dentistry, or that patients should eliminate exposure to mercury, or that silver fillings contain mercury and might leak into the body and cause health problems, or make any reference that mercury fillings are harmful. The article noted that failure to comply with advertising rules would result in disciplinary action. *Id.* at 749. The court concluded that the free speech issue was not ripe for adjudication, and dismissed the claim.

In reaching its decision, the court noted: "Ripeness is a justiciability doctrine designed 'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.'" *Id.* at 749 (quoting *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 807-808 (2003)(additional citations omitted)). The court used the two part test laid out in *Nat'l Park Hospitality Ass'n* in evaluating whether the matter was ripe for review – "(1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration." *Id.*

As to the first factor, a case is fit for judicial decision only where "the issues to be considered are purely legal ones and where the agency rule or action giving rise to the controversy is final and not dependent upon future uncertainties or intervening agency rulings" *Id.* at 750 (quoting *Charter Fed. Sav. Bank*, 976 F.2d at 208). The court concluded that the case

was not fit for judicial decision given that the article in question was, at most, a Dental Board employee's "informal interpretation of the governing regulations on advertising." *Id.* The Dental Board's official policy relating to communications in advertising or directly to patients regarding mercury was not final, but rather was uncertain and dependent upon intervening agency interpretations of its own statutes and regulations. *See id.* at 751 (also discussing as persuasive *Pittman v. Cole*, 267 F.3d 1269 (11th Cir. 2001) (holding informal opinion issued by the Alabama State Bar was not ripe for review given the lack of an important factual issue – what the actual policy of the Bar was regarding the conduct in question)). Postponing consideration of the plaintiff's claim would allow the Dental Board to construe its statutes and regulations – the outcome of which could "materially alter the question to be decided." *Id.* at 751-52. Further, the fact that investigations of two dentists had been initiated had no bearing on the uncertainty of the Dental Board's policy on the speech at issue – the Board had not voted to take any action against the dentists nor had any determination been issued that violations had occurred. *Id.* at 752.

In this case, there has been no official policy or decision by the Board regarding whether Plaintiff Cooksey is in violation of the Act. At most, Plaintiff Cooksey has received informal feedback regarding "areas of concern" – with a specific indication that if he did not agree with the feedback, he should contact Ms. Burill to discuss matters further. Only if he was in agreement with the comments, was Plaintiff asked to make changes to his website. There is no final decision from the Board relating to Plaintiff's conduct. If the Board had been given the opportunity to construe its statutes in the context of the activities of Mr. Cooksey, such decision could very well materially alter the question before this Court.

The second factor – hardship to the parties of withholding court consideration – "is measured by the immediacy of the threat and the burden imposed on the petitioner who would be

compelled to act under threat of enforcement of the challenged law." *Charter Federal*, 976 F.2d at 208-09. In *Int'l Acad.*, although the Dental Board article arguably indicated how the Board might interpret its regulations, and could produce a chilling effect on the actions of dentists, other mitigating factors existed. For example, Dental Board regulations permitted a dentist to seek a declaratory ruling regarding the Board's interpretation of its statutes or regulations as to proposed advertising practices and communications. Such official interpretation would serve to clarify the Dental Board's position and "formulate a controversy specific enough for a court to adjudicate." *Id.* at 753.

Similarly, in this case, Plaintiff has an avenue to seek a determination as to whether or not his actions constitute a violation of the Act or related regulations. N.C. Gen. Stat. § 150B-4 (2011) provides that upon request of an aggrieved party, "an agency shall issue a declaratory ruling as to the validity of a rule or as to the applicability to a given state of facts of a statute administered by the agency or of a rule or order of the agency." As noted above, the Board never issued a decision regarding any violation of the Act, nor did Plaintiff request any ruling under §150B-4, or otherwise, regarding the Board's position on his activities. Plaintiff Cooksey's impatience here has precluded the formation of a concrete case or controversy. *See Digital Properties, Inc. v. City of Plantation*, 121 F.3d 586, 590-91 (11th Cir. 1997) (even assuming zoning scheme could potentially hamper the plaintiff's First Amendment rights, the plaintiff, by waiting only long enough to have one non-supervisory employee "confirm" a business would be prohibited, "in its haste to preserve its perceived First Amendment rights, failed to present a mature claim for review").

Plaintiff has raised only a potential dispute, dependent upon a finding by the Board that Plaintiff has engaged in the unlicensed practice of dietetics/nutrition. Before pursuing his claim,

it was incumbent upon Plaintiff Cooksey to obtain a conclusive response from the Board regarding the application of its statutes and regulations. *See id.* ("At a minimum, [Plaintiff] had the obligation to obtain a conclusive response from someone with the knowledge and authority to speak for the City regarding the application of the zoning scheme to [Plaintiff]'s proposal. . . . In order for the city to have 'applied' the ordinance to [Plaintiff], a city official with sufficient authority must have rendered a decision regarding [Plaintiff]'s proposal.") While "areas of concern" have been noted informally by Ms. Burill, no decision has been rendered by the Board, and this matter is not ripe for adjudication.

C. Plaintiff Cannot Succeed On His Claims.

Even assuming that Plaintiff satisfied justiciability concerns, Plaintiff cannot succeed on his First Amendment claims. Plaintiff correctly points out in his Motion for Preliminary Injunction that Defendants will rely, among other things, on *Accountant's Soc. of Virginia v. Bowman*, 860 F.2d 602 (4th Cir. 1988) in defending this matter. The case is binding precedent and directly on point.

Plaintiff has mounted First Amendment challenges to the Act and regulations promulgated pursuant to the Act, erroneously concluding that strict scrutiny applies to the alleged content-specific restrictions imposed. (D.E. #1, pp. 22, 26-27.) Plaintiff ignores, however, long-standing case law that "[p]rofessional regulation is not invalid, nor is it subject to first amendment strict scrutiny, merely because it restricts some kinds of speech." *Accountant's Soc. of Virginia v. Bowman*, 860 F.2d at 604 (1988) (citing *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456-57 (1978)). "A statute that governs the practice of an occupation is not unconstitutional as an abridgment of the right to free speech, so long as 'any inhibition of that

right is merely the incidental effect of observing an otherwise legitimate regulation.'" *Id.* 604 (quoting *Underhill Assoc. v. Bradshaw*, 674, F.2d 293, 296 (4th Cir. 1982)).

The Fourth Circuit has followed the direction of Justice White in *Lowe v. S.E.C.*, 472 U.S. 181, 211 (1985) (White, J., concurring) in evaluating the point at which the regulation of a profession turns into regulation of speech. *See id.* "The key to distinguishing between occupational regulation and abridgment of first amendment liberties is in finding 'a personal nexus between professional and client.'" *Id.* (quoting *Lowe*, 472 U.S. at 232.) According to Justice White:

> One who takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in the light of the client's individual needs and circumstances is properly viewed as engaging in the practice of a profession. . . . If the government enacts generally applicable licensing provisions limiting the class of persons who may practice the profession, it cannot be said to have enacted a limitation on freedom of speech or the press subject to First Amendment scrutiny.

Lowe, 472 U.S. at 232 (1985) (White, J., concurring). In *Accountant's Soc. of Virginia*, the Fourth Circuit was called upon to consider whether or not unlicensed CPAs could validly be prohibited from using certain terms in documents they prepared for their clients, including giving "assurances" as defined by statute and describing the "principles" and "standards" related to preparation of financial statements. *Accountant's Soc. of Virginia*, 860 F.2d at 603. The Fourth Circuit found a "personal nexus between professional and client" because the non-CPAs exercised their professional judgment in making individualized assessments of each client's financial situation. *Id.* at 604.

Plaintiff Cooksey attempts to distinguish this case by arguing that one relies upon a CPA to substitute their judgment for one's own and to conduct an actual accounting. In contrast, according to Plaintiff, he merely answers questions about what people should eat, and when they

go to the grocery store, they "are free to use or ignore" Plaintiff Cooksey's advice. Plaintiff then states the fiduciary or quasi-fiduciary relationship of a CPA and client is "a far cry from Plaintiff Cooksey's advice to readers and friends about what to buy at the grocery store." (D.E. #4-1, p. 22.)

Plaintiff's argument is troubling to say the least. CPAs provide advice to individuals that impact only the finances and business of an individual. The purpose of the Act challenged by Plaintiff is specifically to protect the public health and welfare and to protect the public from unqualified persons. Loss of money is important, but can be remedied. Loss of physical health can be life threatening. Dietary counseling to diabetics impacts the very health of the individuals, surely of greater import than mere financial considerations. Further, the fact that the individual may "use or ignore" such advice has no bearing. Individuals may use or ignore all professional advice, whether it be from an accountant, a medical doctor, or an attorney, but that does not change the fact that those professionals and their conduct, even speech, can validly be regulated. *See, e.g., Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456-57 (1978) (attorneys); *Nat'l Assoc'n for the Advancement of Psychoanalysis v. California Bd. of Psychology*, 228 F.3d 1043 (9th Cir. 2000) (psychologists); *Underhill Assoc. v. Bradshaw*, 674 F.2d 293 (4th Cir. 1982) (securities broker-dealers); and *Locke v. Shore*, 634 F.3d 1185 (11th Cir. 2011) (interior designers).

The standard set forth by Justice White, and recognized by the Fourth Circuit in *Accountant's Soc. of Virginia*, is that "[o]ne who takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in the light of the client's individual needs and circumstances is properly viewed as engaging in the practice of a profession." If Plaintiff Cooksey is providing advice to individuals regarding their dietary needs, and advising

them in light of their individual health condition, it is difficult to see how he is not considered "[o]ne who takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in the light of the client's individual needs and circumstances." Any inhibition of Plaintiff's right to provide nutrition counseling is merely an incidental effect of observing an otherwise legitimate regulation enacted for the protection of the public.

II. Plaintiff Cannot Show Any Irreparable Harm.

Our courts have recognized that "chilling speech constitutes irreparable injury." *See Real Truth About Obama, Inc.*, 575 F.3d at 351. However, as discussed above, there is no impermissible chilling of any protected speech, and therefore Plaintiff cannot show any irreparable harm supporting the issuance of a preliminary injunction.

III. Plaintiff Cannot Show That The Balance Of Equities Tips In His Favor Or That An Injunction Is In The Public Interest.

Plaintiff is not likely to succeed on the merits of his claim, and given the State's interest in safeguarding the public health, safety and welfare and protecting the public from being harmed by unqualified persons, the balance of equities tips in the Board's favor. The consideration given by the State as to the importance to the public of the regulation of the nutrition and dietetics practice is also well-established given the manner in which the Board was created.

In 1987, an act was passed to establish the Legislative Committee on New Licensing Boards ("Committee"). *See* N.C. Gen. Stat. § 120-149.1 *et seq.* (1987). The statute was enacted because the General Assembly of North Carolina found that the number of licensed occupations and professions had substantially increased, and that on occasion licensing boards had been established "without a determination that the police power of the State [was] reasonably exercised by the establishment of such licensing boards." N.C. Gen. Stat. § 120-149.1 (1987).

For that reason, the statute provided that no new licensing board could be established without the following strict criteria being met:

> (1) The unregulated practice of the profession or occupation can substantially harm or endanger the public health, safety or welfare, and the potential for such harm is recognizable and not remote or dependent upon tenuous argument;
>
> (2) The profession or occupation possesses qualities that distinguish it from ordinary labor;
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> (3) Practice of the profession or occupation requires specialized skill or training;
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> (4) A substantial majority of the public does not have the knowledge or experience to evaluate whether the practitioner is competent; and
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> (5) The public is not effectively protected by other means; and
>
> (6) Licensure will not have a substantial adverse economic impact upon consumers of the practitioner's goods or services.

Id. No legislative proposal for the establishment of a new licensing board, or even a study of the need to establish a new board, could be considered unless a final assessment report regarding the need for and fiscal impact of the proposed board had been issued by the Committee. N.C. Gen. Stat. § 120-149.3 (1987).

The Committee was required to make specific findings as to the six criteria listed above. N.C. Gen. Stat. § 120-149.4(b) (1987). The entity seeking to establish the new board had the burden of demonstrating to the Committee that the six criteria were met, as well as furnishing information to show, *inter alia*, that the group in question had an established code of ethics, a voluntary certification program or other measures to ensure a minimum quality of service; that other states have similar regulatory provisions; how the public would benefit from the regulation of the occupation; the purpose of the proposed regulation; and that any educational requirement for licensure were fully justified. N.C. Gen. Stat. § 120-149.4(a) (1987). In short, prior to the

establishment of any new licensing board, significant efforts were made to determine whether the public interest was burdened in such a way so as to justify such regulation.

This inquiry and evaluation applied to the creation of the North Carolina Board of Dietetics/Nutrition, which was established in 1991. (*See* Final and Preliminary Assessment Reports on the Licensure of Dieticians and Nutritionists, June 18, 1991, Legislative Committee on New Licensing Boards, attached as Exhibit 2.) The Committee specifically found that evidence had been presented of "medical abuse by incompetent practitioners giving unsound and dangerous advice on weight loss, cholesterol reduction, and diets, and promoting unsafe food products and unsafe health practices." (Final Assessment, p. 1.) Another factor considered by the Committee was that the U.S. House of Representatives' Subcommittee on Regulation, Business Opportunities, and Energy had investigated the diet industry and expressed concern over the inadequate credentials of many that were giving dietetic advice. (Final Assessment, p. 1.) Ultimately, the Committee recommended licensing of dieticians and nutritionists to prevent "incompetent and unqualified practitioners from providing dietetic and nutritional services and care to the citizens of North Carolina," noting there were "no other means by which to effectively protect the public." (Final Assessment, pp. 1-2.) The Act itself summarizes its purpose – "to safeguard the public health, safety and welfare and to protect the public from being harmed by unqualified persons by providing for the licensure and regulation of persons engaged in the practice of dietetics/nutrition and by the establishment of educational standards for those persons." N.C. Gen. Stat. § 90-351 (2012).

Plaintiff Cooksey argues that the Defendants "will suffer no harm, financial or otherwise, if he is allowed to speak during the pendency of this case" and that the "public has no interest in the unconstitutional suppression of speech." (D.E. # 4-1, p. 22.) However, according to his

Motion, Plaintiff does not seek a preliminary injunction just as to his speech during the case. Instead, Plaintiff seeks "to enjoin the enforcement of the North Carolina Dietetics/Nutrition Practice Act, N.C. Gen. Stat. §§ 90-350 *et seq.*, during the pendency of this case." (D.E. #4.) This sweeping request for injunctive relief would, in effect, eviscerate the ability of the Board to uphold the law as to any individual or licensee. Indeed, Plaintiff Cooksey himself has indicated North Carolina may have an interest in "regulating dietary advice in clinical settings such as hospitals . . . or in institutional settings such as schools and prisons." In fact, Plaintiff Cooksey does not challenge one statutory definition of "nutrition care services" that relates to the practice of dietetics in a clinical context. (D.E. #4-1, p. 12.) Despite this apparent recognition that the Act serves legitimate purposes, Plaintiff Cooksey's request for preliminary injunctive relief would have the Board enjoined from enforcing the Act in any context.

Plaintiff can simply not show under the circumstances that the balance of equities tips in his favor or that an injunction is in the public interest. As emphasized by the Supreme Court, "[i]n exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Winter*, 555 U.S. at 24. In this case, the public consequences of prohibiting enforcement of the Act are severe. The requirements of the Act help to ensure that those providing nutrition counseling services have the necessary educational background to appreciate and manage specific dietary needs of individuals. (Ross Aff., ¶ 9, attached as Ex. 3.) Indeed, the necessity of this education was emphasized by the Committee in recommending licensing of dieticians:

> Minimum competency in the practice of dietetics and nutrition requires appropriate academic work in specified curricula at the bachelors or masters levels, supervised experience and training, successful completion of an examination, and completion of continuing education requirements.

(Final Assessment, p. 1.)

For example, individuals with diabetes are significantly more likely to experience future health problems due to the impacts of the illness and are pre-disposed toward kidney disease and kidney failure, heart disease and heart failure, loss of eyesight and numbness in the extremities. (Ross Aff., ¶ 7.) The dietary needs of diabetics can be complex, involving the regulation of not just protein load, but also sodium, potassium, phosphorus and calcium under certain circumstances. (Ross Aff., ¶¶ 8, 11.) The failure to appropriately understand the individual's history and health condition, and to counsel diabetics in collaboration with other licensed professionals, poses serious dangers. (Ross Aff., ¶ 12.)

The Act, and enforcement of the same by the Board, is necessary to prevent incompetent and unqualified practitioners from providing dietetic and nutritional services to the citizens of North Carolina. An injunction prohibiting the Board from enforcing the Act would jeopardize the health, safety and welfare of citizens of North Carolina and cannot be countenanced.

CONCLUSION

Plaintiff Cooksey has not and cannot satisfy all four requirements necessary for the issuance of a preliminary injunction, and his quest for sweeping injunctive relief poses substantial threats to the public health and safety. For these reasons, and as set forth more fully herein, Plaintiff's Motion for Preliminary Injunction should be denied.

This the 2nd day of July, 2012.

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CERTIFICATE OF SERVICE

This is to certify that I have this day electronically filed the foregoing Memorandum of Law in Opposition to Plaintiff's Motion for a Preliminary Injunction with the Clerk of Court using the CM/ECF system which will serve notification of such filing on the following:

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