UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Jon Leibowitz, Chairman**
William E. Kovacic
J. Thomas Rosch
Edith Ramirez
Julie Brill

In the Matter of **THE NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS**	**Docket No. 9343**

OPINION OF THE COMMISSION

By KOVACIC, Commissioner, for a Unanimous Commission:[1]

I. INTRODUCTION

This case presents us with an opportunity to decide whether the principles of federalism embodied in the state action doctrine shield respondent, the North Carolina State Board of Dental Examiners (the Board), from antitrust challenge to its pattern of conduct alleged to have impaired competition in the market for teeth whitening services.

The Supreme Court held nearly seventy years ago that Congress did not intend the federal antitrust laws to cover the acts of sovereign states. *Parker v. Brown,* 317 U.S. 341 (1943). Since then, a line of Supreme Court cases, which has come to form the state action doctrine, has developed to exempt acts of the sovereign from antitrust scrutiny. This doctrine does not prevent a state from delegating its sovereign ability to pursue anticompetitive market regulation to non-sovereign actors, such as cities or even private actors. Because the balance between competition policy and federalism embodied in the state action doctrine exempts only sovereign policy choices from federal antitrust scrutiny, non-sovereign defendants invoking the state action defense must clear additional hurdles to ensure that their challenged conduct truly comports with a state decision to forego the benefits of competition to pursue alternative goals. These requirements vary depending on the extent to which a tribunal is concerned that decision-makers are pursuing private rather than sovereign interests. For example, municipalities can enact anticompetitive regulations as long as they can show that their actions are consonant with a clearly articulated and affirmatively expressed state policy. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 40 (1985). Private parties that engage in anticompetitive conduct, on the

[1] Commissioner Julie Brill has not participated in this matter.

other hand, can avail themselves of the state action exemption only if they can show that their actions were both taken pursuant to a clearly articulated and affirmatively expressed state policy and actively supervised by the state itself. *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980).

In the case before us, the decisive majority of the Board, which is charged with regulating the practice of dentistry in North Carolina, earns a living by practicing dentistry. The Complaint alleges that the Board determined on its own that teeth whitening was a practice that could be performed only under the supervision of a dentist and used the imprimatur of state authority to drive lower-priced non-dentists from the relevant market. We conclude that given the Board's obvious interest in the challenged restraint, the state must actively supervise the Board in order for the Board to claim state action protection from the antitrust laws. Because we find such supervision lacking, we further hold that the Federal Trade Commission Act reaches the Board's conduct.

II. PROCEDURAL BACKGROUND

The Commission issued an administrative complaint against the respondent Board on June 17, 2010. The complaint alleges that the Board violated Section 5 of the FTC Act by classifying teeth whitening as the practice of dentistry and by enforcing this determination through cease and desist orders that were neither authorized nor supervised by the state, and that were designed to, and did, drive non-dentist teeth whiteners from the relevant North Carolina market. The evidentiary hearing before the Administrative Law Judge is currently scheduled for February 17, 2011. Before us are the Board's motion to dismiss the entire administrative complaint on the ground that its conduct is exempted from antitrust liability by the state action doctrine, and Complaint Counsel's motion for partial summary decision on the propriety of the Board's invocation of the state action doctrine as an affirmative defense. The parties have filed memoranda in support of their motions and their respective responses, replies, and supplemental filings, the latest of which was filed on January 20, 2011.[2] Pursuant to our Rules of Practice, 16 C.F.R. § 3.24(a)(1)-(2), the parties have also filed their respective statements of material facts as to which Complaint Counsel contends there is no genuine issue for trial,[3] and as to some of which the Board contends that a genuine dispute does exist.[4] Our decision here is based on our

[2] The Board filed a motion for leave to file a surreply brief, along with the surreply brief, on January 20, 2011. We note that there are no provisions in the Commission Rules to file a surreply brief. Further, the Board's brief is untimely – coming a month after the last filing by Complaint Counsel – and it does not respond to any new arguments raised by Complaint Counsel's reply brief. Nonetheless, as a matter of discretion, we have considered the Board's filing.

[3] *See* Compl. Counsel's Rule 3.24 Separate Statement of Material Facts As to Which There Is No Genuine Issue (hereinafter "CCSMF").

[4] *See* Respt's Separate Statement of Material Facts As to Which There Are and Are Not Genuine Issues (hereinafter "BSMF").

review of those statements, including their accompanying affidavits and exhibits, as well as on matters of "official or judicial notice," such as "judicial decisions, statutes, regulations, and records and reports of administrative bodies." *S.C. State Bd. of Dentistry*, 138 F.T.C. 229, 240 (2004) (internal quotation marks and citation omitted).

Under our revised Rules of Practice, "[m]otions to dismiss filed before the evidentiary hearing . . . and motions for summary decision shall be directly referred to the Commission and shall be ruled on by the Commission unless the Commission in its discretion refers the motion to the Administrative Law Judge." 16 C.F.R. § 3.22(a) (2011). The Commission issued those revisions in 2009 "in order to further expedite its adjudicative proceedings, improve the quality of adjudicative decision making, and clarify the respective roles of the Administrative Law Judge ('ALJ') and the Commission in Part 3 proceedings." 73 Fed. Reg. 58,832 (Oct. 7, 2008) (Proposed Rule Amendments); *see also* 74 Fed. Reg. 1804 (January 13, 2009) (Interim Final Rules); 74 Fed. Reg. 20205 (May 1, 2009) (Amendments Adopted As Final). Thus, "an early ruling on a dispositive motion may expedite resolution of a matter and save litigants resources where the legal issue is the primary dispute." 73 Fed. Reg. at 58,836; *see also S.C. State Bd.*, 138 F.T.C. at 231. We accordingly decide the motions here *ab initio*.

In light of the close of discovery and the fact that the motion of Complaint Counsel for partial summary decision is based on the same issue underlying the Board's motion to dismiss – the opposition to which the Board has fully briefed, supported by affidavits and other evidence – and in the interests of clarity and efficiency, we exercise our discretion to treat the Board's motion to dismiss as a motion for summary decision on the issue of its qualification for state action exemption. *See S.C. State Bd.*, 138 F.T.C. at 242 ("[T]he Commission always has discretion to consider extra-pleading material and to convert a motion to dismiss to one for summary judgment."); *see also United States v. Purdue Pharma L.P.*, 600 F.3d 319, 326 (4th Cir. 2010) (converting a motion to dismiss into one for summary judgment where the parties provided evidence and thoroughly briefed the matter at issue); *Bosiger v. US Airways, Inc.*, 510 F.3d 442, 450 (4th Cir. 2007) ("It is well settled that district courts may convert a Rule 12(b)(6) motion to dismiss into a Rule 56 motion for summary judgment, allowing them to assess whether genuine issues of material fact do indeed exist.").

III. APPLICABLE STANDARD OF REVIEW

We review the parties' motions pursuant to Rule 3.24 of our Rules of Practice, whose "provisions are virtually identical to the provisions of Fed. R. Civ. P. 56, governing summary judgment in the federal courts." *Polygram Holding, Inc.*, 136 F.T.C. 310, 2002 WL 31433923, at *1 (FTC Feb. 26, 2002); *see also* 16 C.F.R. § 3.24(a)(2) ("If the Commission . . . determines that there is no genuine issue as to any material fact regarding liability or relief, it shall issue a final decision and order."). Such a motion or an opposition thereto may be supported by affidavits, depositions, answers to interrogatories, or other appropriate evidence not in dispute, but "a party opposing the motion may not rest upon the mere allegations or denials of his or her pleading; the response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue of material fact for trial." 16 C.F.R. § 3.24(a)(3). Thus, "[t]he mere existence of a factual dispute will not in and of itself defeat an otherwise

properly supported motion." *Polygram*, 2002 WL 31433923, at *1 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986)). Once the moving party has adequately supported its motion, the nonmoving party must "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). It must instead establish "specific facts showing that there is a genuine issue for trial." *Id.* at 587 (internal citations and quotation marks omitted); *see also* 16 C.F.R. § 3.24(a)(3). And "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Matsushita*, 475 U.S. at 587.

IV. UNDISPUTED FACTS

No facts material to the antitrust exemption questions before us are in genuine dispute. For purposes of summary judgment on the state action defense issue, we need not determine whether the Board's activities violate the relevant antitrust laws. Instead we focus only on whether the Board's conduct is exempt from antitrust scrutiny.[5]

The Board is an agency of the State of North Carolina, tasked with regulating the practice of dentistry in that state. N.C. Gen. Stat. § 90-22(a)-(b). It consists of six licensed dentists, one licensed dental hygienist, and one consumer member, who is neither a dentist nor a dental hygienist. N.C. Gen. Stat. § 90-22(b); CCSMF at 1, ¶¶ 1-2; BSMF at 6, ¶¶ 1-2. The licensed dentists of North Carolina elect dentist members to the Board for a three-year term. N.C. Gen. Stat. § 90-22(b); CCSMF at 1, ¶¶ 3-4; BSMF at 6, ¶¶ 3-4. During their tenure, Board members may continue to provide for-profit dental services, including teeth whitening. *See* [redacted] Each Board member must submit annual financial disclosures to the Ethics Commission, which list their assets and liabilities, state that they are engaged in the practice of dentistry, and identify the professional associations to which they belong and businesses other than their dental practices. N.C. Gen. Stat. § 138A-22(a); CCSFM at 22-23, ¶¶ 75-76; Newson Decl. at 5, ¶ 11; CX0395; CX0396. The Board must submit an annual report to the Secretary of State, the State Attorney General, and the Joint Legislative Administrative Procedure Oversight Committee (JLAPOC), which provides, *inter alia*, aggregate information on the number and disposition of investigations by type. N.C. Gen. Stat. § 93B-2; CX0085; CX0086; CX0088; CX0089; CX0091. The Board also must comply with North Carolina's Public Records Act (N.C. Gen. Stat. § 132-1 *et seq*.), Administrative Procedure Act (N.C. Gen. Stat. § 150B-1 *et seq.*), and open meetings law (N.C. Gen. Stat. §143-318.9 *et seq*.). BSMF at 53, ¶ 72. Further, the JLAPOC has the power "[t]o review the activities of the State occupational licensing boards

[5] Throughout the opinion we use the following abbreviations for the parties' filings: Board's Memorandum in Support of Motion to Dismiss (Corrected) ("Bd. Memo"); Board's Memorandum in Opposition to Complaint Counsel's Motion for Summary Judgment ("Bd. Opp."); Board's Reply Memorandum in Support of Motion to Dismiss ("Bd. Reply"); Complaint Counsel's Memorandum in Support of Motion for Summary Judgment ("CC Memo"); Complaint Counsel's Memorandum in Opposition to Respondent's Motion to Dismiss ("CC Opp.").

to determine if the boards are operating in accordance with statutory requirements." N.C. Gen. Stat. § 120-70.101(3a).

The complaint's allegations concern the market for teeth whitening services in North Carolina. Compl. ¶ 7. Teeth whitening services are offered both by dentists, as an in-office procedure or a take-home kit, and by non-dentists, in salons, retail stores, and mall kiosks. CCSMF at 3-4, ¶ 16; BSMF at 10-11, ¶ 16. Dentist and non-dentist teeth whiteners differ in terms of the strength of the solution used, the time involved, and the procedures used. *See generally* CCSMF at 4-7, ¶¶ 17-26; BSMF at 11-16, ¶¶ 17-26. The price for non-dentist teeth whitening typically is less than teeth whitening performed by dentists in their offices. CCSMF at 5,7, ¶¶ 19, 25; BSMF at 12, 15, ¶¶ 19, 25.

The complaint charges that the Board, reacting to the competitive threat by non-dentist providers, sought to exclude, and did exclude, non-dentists from the market for teeth whitening services in North Carolina. Compl. ¶¶ 13-23. The undisputed facts show that the Board on numerous occasions sent letters to non-dentist providers, alleging that those recipients were engaging in the unauthorized practice of dentistry in violation of North Carolina laws, and ordering the recipients to cease and desist from providing teeth-whitening services in North Carolina. CCSMF at 17-18, ¶¶ 55, 60; BSMF at 37, 44, ¶¶ 55, 60. The Board also has sent letters to some mall operators asserting that teeth whitening services offered at mall kiosks are illegal, and asking these mall operators to refrain from leasing space to non-dentist teeth whiteners. CCSMF at 19, ¶ 61; BSMF at 44-45, ¶ 61. The complaint does not challenge any attempts by the Board to bring civil or criminal proceedings against alleged violators of the North Carolina Dental Practice Act (N.C. Gen. Stat. § 90-22 *et seq*.).

V. DISCUSSION AND CONCLUSIONS OF LAW

A. Jurisdiction

Citing *California Dental Ass'n v. FTC*, 526 U.S. 756 (1999), the Board argues that it is not subject to the Commission's jurisdiction. *See* Bd. Memo at 17. We disagree. *California Dental* is inapposite in this case where jurisdiction is asserted over a "person," not a "corporation." The complaint in this case, consistent with this established precedent, asserted jurisdiction because "[t]he Dental Board is a 'person' within the meaning of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45." Compl. ¶ 5. Under Section 5 of the FTC Act, the FTC may exercise jurisdiction over "persons, partnerships, or corporations," with certain exceptions not relevant here. 15 U.S.C. § 45(a)(2). The jurisdictional question at issue in *California Dental* concerned the scope of the statutory definition of "corporation" and, in particular, whether an entity formally organized as a non-profit could nonetheless be subject to the Commission's jurisdiction as a "corporation" if it were "organized to carry on business for its own profit or that of its members." 526 U.S. at 765-66 (quoting 15 U.S.C. § 44). *California Dental*'s test for jurisdiction over "corporations," therefore, has no relevance to this case.

The Supreme Court has held that states and their regulatory bodies constitute "persons" under the antitrust laws. *See, e.g., Jefferson Cnty. Pharm. Ass'n v. Abbott Labs.*, 460 U.S. 150,

155 (1983); *Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 395 (1978); *Georgia v. Evans*, 316 U.S. 159, 162 (1942). Consistent with this precedent, and recognizing that the antitrust statutes should be construed together, the Commission has many times exercised jurisdiction over state boards as "persons" under the FTC Act. *See, e.g.*, *Va. Bd. of Funeral Dirs. & Embalmers*, 138 F.T.C. 645 (2004); *S.C. State Bd.*, 138 F.T.C. 229; *Mass. Bd. of Registration in Optometry*, 110 F.T.C. 549 (1988).[6]

B. The State Action Doctrine

In our "dual system of government, . . . the states are sovereign." *Parker*, 317 U.S. at 351. As such, with "nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature," the Supreme Court concluded that when "[t]he state itself exercises its legislative authority in making the regulation and in prescribing the conditions of its application," it is exempt from the prohibitions of the Sherman Act. *Id*. at 350-52. Thus, anticompetitive regulation is allowed to withstand antitrust challenge as long as a court is satisfied that the restraint at issue is truly state action. *See Hoover v. Ronwin*, 466 U.S. 558, 574 (1984) (the litmus test of the state action exemption has always been whether the conduct at issue can be deemed to be "that of the State acting as a sovereign") (internal quotation marks and citation omitted).

When non-sovereign entities engage in conduct that otherwise would violate the antitrust laws, they too can avail themselves of state action protection as long as the sovereign has put into place sufficient safeguards to assure that non-sovereign actors are pursuing state goals rather than their own. *See id.* at 568 (when the activity at issue is carried out by someone other than the sovereign, "closer analysis is required" because "it becomes important to ensure that the anticompetitive conduct of the State's representative was contemplated by the State."). For example, in *Midcal*, the Supreme Court held that private parties can use the state action doctrine

[6] In *Massachusetts Bd. of Registration in Optometry*, the Commission reasoned that because the Supreme Court had held local governments, as agents of the state, to be persons within the meaning of the Sherman Act and the Clayton Act, so too should they be considered persons under the FTC Act. 110 F.T.C. 549, 608-09 (1988) (citing *United States v. American Bldg. Maintenance Indus.*, 422 U.S. 271, 277-78 (1975)). The Commission also noted that its holding was consistent with Commission precedent, including *Indiana Fed'n of Dentists*, 93 F.T.C. 231 n.1 (1979), and the Statement of Basis and Purpose for the Trade Regulation Rule on Advertising of Ophthalmic Goods and Services, 43 Fed. Reg. 23992, 24004 (1979). The Commission found its holding further supported by the legislative history of the FTC Act. *Mass. Bd.*, 110 F.T.C. at 609 n.19. The D.C. Circuit's decision in *California State Bd. of Optometry v. FTC*, 910 F.2d 976 (D.C. Cir. 1990), is not contrary to the general rule that for purposes of jurisdiction, states and their agents are "persons" under the FTC Act. That decision merely holds that the FTC is not authorized to reach the "'acts or practices'" of States acting in their sovereign capacity. *Id*. at 980 (citations omitted). Because we conclude that the Board is not acting as a sovereign, *California State Bd. of Optometry* has no bearing on this case.

as a shield to avoid antitrust liability if they can show that the challenged restraint is (1) pursuant to a "clearly articulated and affirmatively expressed [] state policy;"and (2) "actively supervised by the State itself." 445 U.S. at 105 (internal quotation marks omitted).

Although "[a] municipality must demonstrate that it is engaging in the challenged activity pursuant to a clearly expressed state policy" before it is entitled to state action exemption from the antitrust laws, *Town of Hallie*, 471 U.S. at 40, municipalities are not subject to *Midcal*'s active supervision prong. *Id.* at 46. As the Court explained, "the requirement of active state supervision serves essentially an evidentiary function: it is one way of ensuring that the actor is engaging in the challenged conduct pursuant to state policy." *Id.* Accordingly, municipalities should be subject to a lower evidentiary threshold, because unlike the case of a private party where "there is a real danger that he is acting to further his own interests, . . . there is little or no danger that [a municipality] is involved in a *private* price-fixing agreement." *Id.* at 47 (emphasis in original); s*ee also id.* at 45 ("We may presume, absent a showing to the contrary, that the muncipality acts in the public interest. A private party, on the other hand, may be presumed to be acting primarily on his or its own behalf.").

The Board in this matter is not the sovereign.[7] The questions before us now are whether the Board must meet both of *Midcal*'s requirements to qualify for state action protection, and, if so, whether the Board has met them as a matter of law. We conclude that the Board must meet both prongs of the *Midcal* test and that it has failed to show sufficient state supervision.[8] Complaint Counsel is therefore entitled to partial summary judgment dismissing the state action doctrine as an affirmative defense.[9]

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[7] The Supreme Court has held that the legislature and the state's highest court acting in its regulatory capacity are sovereign, but has left open the possibility that the executive may also be sovereign. *See Hoover*, 466 U.S. at 568 & n.17. It is undisputed that the Board is not an arm of the North Carolina legislature or the North Carolina Supreme Court. Moreover, as discussed below, the Board functions in a manner that makes it wholly inappropriate to treat its actions as presumptively sovereign, even if actions of the Governor or executive agencies subject to plenary gubernatorial control might be.

[8] For purposes of this motion, we have assumed, but not decided, that the Board has satisfied the clear articulation requirement. *Cf. Patrick v. Burget*, 486 U.S. 94, 100 (1988) ("We need not consider the clear articulation prong of the *Midcal* test because the active supervision requirement is not satisfied.") (internal quotation marks omitted).

[9] The Board makes fleeting reference to the *Noerr-Pennington* doctrine in the memorandum supporting its Motion to Dismiss. *See* Bd. Memo at 39-40 (citing *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965); *E. R.R. Presidents' Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961)). Such perfunctory recitation of authority, without development, fails to constitute a colorable basis to dismiss the complaint. Accordingly, we do not address this issue.

1. The Board Must Meet Both Prongs of *Midcal*

In its motion, the Board argues that its challenged conduct is exempt from the federal antitrust laws because, as an instrumentality of the State of North Carolina, its actions are protected by the state action doctrine. *See* Bd. Memo at 7. More specifically, the Board argues that, to qualify for state action protection, its conduct need only meet, and as a matter of law does meet, the first prong of the Supreme Court's standard, enunciated in *Midcal* – that "the challenged restraint must be one clearly articulated and affirmatively expressed as state policy." 445 U.S. at 105 (internal quotation marks and citation omitted). The Board argues, moreover, that even if the second prong of that test – that "the policy must be 'actively supervised' by the State itself," *id*. – applies in this case, then North Carolina's "structural legal oversight" of the Board is sufficient as a matter of law to satisfy that condition. *See* Bd. Memo at 34-37.

Complaint Counsel argues that the Board is financially interested in the exclusion of non-dentists from the market for teeth whitening services, and also is beholden to the industry it purports to regulate, by virtue of the fact that it is controlled by its dentist members, who are privately elected by North Carolina's licensed dentists. Therefore, says Complaint Counsel, the Board must meet both of *Midcal*'s prongs in order to qualify for state action exemption. *See* CC Memo at 17-29. Further, Complaint Counsel argues that the North Carolina Dental Practice Act, through which the Board was constituted and from which it derives its authority, does not authorize the Board to order non-dentist teeth whitening providers to cease and desist from providing such services, nor to communicate with prospective providers and third parties that the provision of teeth whitening services by dentists is unlawful. Rather, the Dental Act merely authorizes the Board to petition the North Carolina courts for relief relating to any allegedly unauthorized practice of dentistry. Accordingly, argues Complaint Counsel, the Board cannot satisfy either of the *Midcal* prongs, and thus does not qualify for antitrust exemption. *See* CC Memo at 29-34.

Midcal's active supervision requirement serves to ensure that "the State has exercised sufficient independent judgment and control so that the details of the [challenged restraint on competition] have been established as a product of deliberate state intervention." *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 634 (1992); *see also Burget*, 486 U.S. at 100 (noting that the active supervision requirement "stems from the recognition that 'where a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State.'") (quoting *Hallie*, 471 U.S. at 47). The Court has held that the active supervision requirement applies to private parties (*e.g., Midcal*; *Patrick*; *Ticor*), and does not apply to political subdivisions of the State such as municipalities (*e.g., Hallie*). Respondent argues, however, that the Court has never ruled directly on the question of whether state agencies must be supervised too, and therefore we should take our guidance from a footnote suggesting they need not[10] and from lower court cases in accord.

[10] Bd. Memo at 30 n.7 (quoting *Hallie*, 471 U.S. at 46 n.10).

Whatever the case may be with respect to state agencies generally, however, the Court has been explicit in applying the antitrust laws to public/private hybrid entities, such as regulatory bodies consisting of market participants. The Court's jurisprudence in this area leads us to conclude that when determining whether the state's active supervision is required, the operative factor is a tribunal's degree of confidence that the entity's decision-making process is sufficiently independent from the interests of those being regulated. As the Court emphasized repeatedly, the "real danger" in not insisting on the state's active supervision is that the entity engaged in the challenged restraint turns out to be "acting to further [its] own interests, rather than the governmental interests of the State." *Hallie*, 471 U.S. at 47; *Patrick*, 486 U.S. at 100.

Thus, in *Goldfarb v. Virginia State Bar*, a fee schedule for real estate title searches that was enforced by the Virginia state bar was found to violate the antitrust laws, even though the enforcement agency was "a state agency by law." 421 U.S. 773, 783, 790 (1975). The Court's reasoning in that case is particularly illuminating. The Court rejected the state action defense, in part, because the state bar's enforcement of the unlawful fee schedule – via its issuance of ethical opinions – was deemed to be undertaken "for the benefit of its members," and, equally significantly, "there was no indication . . . that the Virginia Supreme Court approves the [ethical] opinions." *Id*. at 790-91. We draw two conclusions from *Goldfarb*: First, as the Court reasoned, "that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices *for the benefit of its members*." *Id*. at 791 (emphasis added). Thus, the inquiry into the public/private character of the governmental entity's challenged conduct should focus not on the formalities of state law (after all, the subject entity in *Goldfarb* was "a state agency by law," *id*. at 790), but rather on the realities of the decision-maker's independent judgment. The state bar's enforcement of a minimum fee schedule was deemed clearly for the benefit of its member lawyers, not the general public. Second, it seems reasonable to conclude that had the state's supervisory role, in the form of the Virginia Supreme Court's approval of the state bar's ethical opinions, been more vigorous, the Court's conclusion on the application of the state action doctrine may well have been different. Instead, the Court's analysis strongly suggests that such active supervision is crucial, even for a state agency, in circumstances where the state agency's decisions are not sufficiently independent from the entities that the agency regulates.

Although the courts of appeals have been less than consistent on this issue, there is ample support for the proposition that financially interested governmental bodies must meet the active supervision prong of *Midcal*. *See, e.g.*, *Wash. State Elec. Contractors Ass'n, Inc. v. Forest*, 930 F.2d 736, 737 (9th Cir. 1991) (whether an entity must show active supervision depends on the realities of its structure, such as having private members who "have their own agenda which may or may not be responsive to state . . . policy"); *FTC v. Monahan*, 832 F.2d 688, 689-90 (1st Cir. 1987) (Breyer, J.) ("[W]hether any 'anticompetitive' Board activities are 'essentially' those of private parties" – and hence subject to active supervision – "depends upon how the Board functions in practice, and perhaps upon the role played by its members who are private pharmacists."); *Norman's on the Waterfront, Inc. v. Wheatley*, 444 F.2d 1011, 1018 (3rd Cir. 1971) (in determining whether state action exemption applies to a state regulatory board, "the relevant distinction is between genuine governmental action controlling the anticompetitive practice, and an attempt by government officials to 'authorize individuals to perform acts which

violate the antitrust laws'") (quoting *Asheville Tobacco Bd. of Trade, Inc. v. FTC*, 263 F.2d 502, 509 (4th Cir. 1959)); *Asheville Tobacco Bd.*, 263 F.2d at 509 ("[T]he state may regulate that industry in order to control or, in a proper case, to eliminate competition therein. It may even permit persons subject to such control to participate in the regulation, provided their activities are adequately supervised by independent state officials.") (citation omitted).

Leading antitrust commentary supports this view. In their antitrust treatise, for example, Professors Areeda and Hovenkamp also reject the formalities of a governmental body's status under state law in determining whether active supervision should be deemed necessary. They conclude that it is good policy to classify as "private" for state action purposes "any organization in which a decisive coalition (usually a majority) is made up of participants in the regulated market." Phillip E. Areeda & Herbert Hovenkamp, 1A ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 227b, at 501 (3d ed. 2009); *see also id.* ¶ 224a, at 500 ("Without reasonable assurance that the body is far more broadly based than the very persons who are to be regulated, outside supervision seems required."). Professor Elhauge, moreover, concludes that "financially interested action is always 'private action' subject to antitrust review." Einer Richard Elhauge, *The Scope of Antitrust Process*, 104 HARV. L. REV. 667, 689 (1991); *see also id.* at 696 ("[A]n anticompetitive restraint is immune from antitrust liability whenever a financially disinterested and politically accountable actor controls and makes a substantive decision in favor of the terms of the restraint.").

Lastly, requiring active supervision by the state itself in circumstances where the state agency in question has a financial interest in the restraint that the agency seeks to enforce, especially when the state agency is not accountable to the public but rather to the very industry it purports to regulate, is entirely consistent with the policies underlying the *Parker* doctrine. The Supreme Court created the state action doctrine in recognition that states, in their sovereign capacities, may choose to supplant competition to effect other policy goals. A state decision to take action that contravenes the antitrust laws in theory represents a choice by citizens of that state to forego the benefits of competition in favor of alternative ends. If a state legislature adopts a policy that restricts competition against the wishes of its citizens, it faces political consequences. The Court has explained that the rationale behind the *Midcal* requirements is to assure political accountability:

> States must accept political responsibility for actions they intend to undertake. . . . Federalism serves to assign political responsibility, not to obscure it. Neither federalism nor political responsibility is well served by a rule that essential national policies are displaced by state regulations intended to achieve more limited ends. For States which do choose to displace the free market with regulation, our insistence on real compliance with both parts of the *Midcal* test will serve to make clear that the State is responsible for the price fixing it has sanctioned and undertaken to control.

Ticor, 504 U.S. at 635. Accordingly, if a state permits private conduct to go unchecked by market forces, the only assurance the electorate can have that private parties will act in the public

interest is if the state is politically accountable for any resulting anticompetitive conduct; when conduct subject to political review is not in the public interest, it can be stopped at the ballot box. Decisions that are made by private parties who participate in the market that they regulate are not subject to these political constraints unless these decisions are reviewed by disinterested state actors to assure fealty to state policy. Without such review, "there is no realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests." *Patrick v. Burget*, 486 U.S. 94, 101 (1988). Therefore, allowing the antitrust laws to apply to the unsupervised decisions of self-interested regulators acts as a check to prevent conduct that is not in the public interest; absent antitrust to police their actions, unsupervised self-interested boards would be subject to neither political nor market discipline to serve consumers' best interests.

Although requiring active supervision of state regulatory bodies that are controlled by private market participants may impose additional costs on states, we believe that this rule is faithful to the Supreme Court's decisions striking the correct balance between our national policy in favor of competition, on the one hand, and principles of federalism on the other. As discussed above, the risk to competition posed by regulatory bodies comprising private market participants is greater than the risk posed by elected representatives, who are accountable directly to the public. At the same time, deference to policy-making by private parties who occasionally are cloaked in a modicum of state authority does not vindicate federalism to the same degree as granting the state sovereign itself wide berth to regulate markets.

We find unconvincing the Board's arguments that a regulatory body controlled by private market participants should not be asked to show active state supervision of its exclusionary conduct. The Board first relies on certain decisions of the courts of appeal that found state agencies need not show active supervision, even in circumstances where the Board's independent judgment and control are not manifest. *See* Bd. Opp. at 18 (citing *Earles v. State Bd. of Certified Public Accountants of Louisiana,* 139 F.3d 1033, 1041 (5th Cir. 1998); *Bankers Ins. Co. v. Florida Residential Property & Casualty Joint Underwriting Ass 'n*, 137 F.3d 1293, 1296-97 (11th Cir. 1998); *Hass v. Oregon State Bar*, 883 F.2d 1453, 1460 (9th Cir. 1989); *Gambrel v. Kentucky Board of Dentistry*, 689 F.2d 612 (6th Cir. 1982)). These decisions, however, appear in large part to be based on those courts' examination of a laundry list of attributes of the respective governmental entities (e.g., open records, general financial and ethical oversight) to determine the extent to which they resembled the municipality in *Hallie*, rather than an inquiry into whether the challenged restraint was effected by a body controlled by market participants who stood to benefit from the regulatory action. *See, e.g.*, *Earles*, 139 F.3d at 1041 (examining a list of factors and concluding that "the Board is functionally similar to a municipality"); *Hass*, 883 F.2d at 1460 (state law provisions governing its public records and meetings, financial audits, and ethical conduct "leave no doubt that the Bar is a public body, akin to a municipality, for the purposes of the state action exemption."). The Eleventh Circuit in *Bankers Insurance*, moreover, appeared to find the fact that the members of the underwriting association *did not* compete in the market that they regulated key to its decision not to require active supervision. 137 F.3d at 1297 ("This impossibility of competition is an indicator that the

Association represents public interests, rather than competing private interests.").[11] *Gambrell*, a case on which the respondent relies heavily, is also distinguishable from the instant case. There, the Kentucky Board of Dentistry was enforcing a clear, unambiguous legislative prohibition on denture producers taking orders from anyone other than licensed dentists. 689 F.2d at 618 (defendant's conduct "emanates directly from the mandate of the state law in a well-developed and long-established statutory scheme. It is not left to the private sector to decide what the policy is and whether it is to be complied with."). Here, by contrast, the Board has exercised discretion to implement a policy to exclude non-dentists from a market in which they compete against North Carolina dentists. Accordingly, with the possible exception of *Earles*, which we decline to follow, we do not read these cases to be contrary to our holding here.[12]

The Board also argues that *Goldfarb* and *Bates* predate *Hallie*'s dicta that state agencies likely would not be required to show active state supervision, and thus those cases should not be accorded much weight in our analysis. Bd. Reply at 10. We disagree. First, *Midcal*'s two-pronged test itself was extracted from the Court's prior state-action decisions, including *Goldfarb*. *See* 445 U.S. at 104-05 ("These decisions establish two standards for antitrust immunity under *Parker v. Brown*") (referring to *Goldfarb*; *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976); and *New Vehicle Motor Bd. of Cal. v. Orrin W. Fox Co.*, 439 U.S. 96 (1978)). A Supreme Court decision that is directly on point here should not be ignored because of a subsequent passing comment by the Court, especially when the *Hallie* Court made it amply clear that it was not deciding the state agency issue. *See Hallie*, 471 U.S. 46 n.10. Second, the dicta in footnote 10 of *Hallie* must be reconciled with the Court's other language and reasoning in that same decision. The *Hallie* Court distinguished *Goldfarb* and *Cantor* on the basis that those cases "concerned private parties – not municipalities." *Id*. at 45. The party claiming the state action exemption in *Goldfarb* was the Virginia State Bar, explicitly acknowledged by the Court to be "a state agency by law." *See Goldfarb*, 421 U.S. at 789-90. Yet, the *Hallie* Court distinguished the Virginia State Bar from a municipality, on the ground that the latter "is an arm of the State" and thus is presumed to "act[] in the public interest," while "[a] private party, on the other hand, may be presumed to be acting primarily on his or its own behalf." 471 U.S. at 45. Thus, the Court clearly did not view state regulatory bodies such as the Virginia State Bar as equivalent to

[11] Further, the rule at issue in *Hass* required participation in a malpractice insurance pool; the challenged regulation did not implicate competition among the regulators themselves. Although the *Hass* court did not focus on this fact as a ground for its decision, the absence of such competition suggests that there was limited danger that private parties were "further[ing their] own interests, rather than the governmental interests of the State." *Town of Hallie*, 471 U.S. at 47.

[12] As Complaint Counsel points out in its opposition memorandum, *see* CC Opp. at 7 n.8, the *Earles* court's reliance on cases it perceived as relevant precedents, but which do not in fact involve regulatory bodies controlled by private market participants, confirms our view that the court's holding there is not squarely on point with the allegations here. Moreover, unlike the Board here, the *Earles* Board members "are chosen by the governor . . . and they must be confirmed by the state senate," 139 F.3d at 1035, thus providing some of the political accountability lacking in this case.

municipalities with respect to their incentives to pursue public as opposed to private ends – and therefore excused from *Midcal*'s active supervision requirement – as the Board would have us read footnote 10 of the *Hallie* opinion. The *Hallie* Court based its public/private distinction on the realities of the specific economic interests involved, as we do here.

We accordingly hold that a state regulatory body that is controlled by participants in the very industry it purports to regulate must satisfy both prongs of *Midcal* to be exempted from antitrust scrutiny under the state action doctrine.[13] We further conclude that the Board is such a state regulatory body. Because North Carolina law requires that six of the eight Board members be North Carolina licensed dentists, the Board is controlled by North Carolina licensed dentists. *See* CCSMF at 1, ¶ 1; BSMF, at 6, ¶ 1; N.C. Gen. Stat. § 90-22(b). Although there may be some factual dispute over the relative importance of teeth whitening revenues to a dental practice's total revenues, the undisputed facts show that North Carolina dentists – including some of those dentists who complained to the Board about non-dentist teeth whitening – perform teeth whitening in their private practices. *See* CCSMF at 11-12, ¶¶ 37-40; BSMF at 21-23, ¶¶ 37-40. Non-dentists also provide teeth whitening services in North Carolina, and advertise themselves as a lower-priced alternative for dentist teeth whitening. CCSMF at 6, 9, ¶¶ 23, 30; BSMF at 14, 18, ¶¶ 23, 30. Under these circumstances, "common sense and economic theory, upon both of which the FTC may rely," *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 456 (1986), dictate the conclusion that Board actions in this area could be self interested. Absent some form of state supervision, we lack assurance that the Board's efforts to exclude non-dentists from providing teeth whitening services in North Carolina represent a sovereign policy choice to supplant competition rather than an effort to benefit the dental profession.

Our conclusion that the Board must meet the active supervision requirement is reinforced by the Board's accountability to North Carolina's licensed dentists; the six dentist members of the Board are elected directly by their professional colleagues, the other licensed dentists in North Carolina. N.C. Gen. Stat. § 90-22(b); *see also* CCSMF at 1, ¶¶ 1-3; BSMF at 6, ¶¶ 1-3. The dentist members of the Board can run for reelection, and some of them have served two or more terms. CCSMF at 1, ¶ 4; BSMF at 6-7, ¶ 4. The Board's judgment under such economic and political pressures can hardly be characterized as sufficiently independent that the Board may bypass active supervision by the state, yet still enjoy the antitrust exemption accorded only to a state's sovereign acts.

The Board argues that Complaint Counsel has presented no evidence that the individual dentist members of the Board have a financial conflict of interest or that they derived substantial revenues in their private practice from teeth whitening services. *See, e.g.,* Bd. Memo at 38, 40; Bd. Reply at 13-14. We find this argument unpersuasive. First, we hold that the determinative factor in requiring supervision is not the extent to which individual members may benefit from

[13] Because the Board is so clearly controlled by market participants, we need not consider the extent to which the active supervision prong should apply to state regulatory bodies comprising other types of private actors, where the risk of harm to competition and the level of political accountability might be balanced differently.

the challenged restraint, but rather the fact that the Board is controlled by participants in the dental market. North Carolina dentists stand to reap economic gains when the Board takes actions to exclude non-dentists from competing to provide certain services. Second, although our holding is not predicated on the Board members' actual financial interests, the undisputed facts show that many of the Board members do perform teeth whitening in their private practice. *See*

Third, Respondent's reference to conflicts of interest is misplaced. The complaint allegations here, and the policies underlying the *Midcal* test for antitrust exemption, do not concern issues of official misconduct or unethical behavior – which might be addressed by a state ethics law – but rather target the incumbent dentists' efforts to exclude their competitors from a particular economic market.[14] That alleged conduct lies at the heart of the federal antitrust laws, and is the only conduct with which we deal here.

The Board points to the various ways in which the State of North Carolina purportedly "is heavily involved in the State Board's proceedings," and argues that the Board thus meets the criteria articulated in *Hass* and *Bankers Insurance* that would allow it to bypass the active supervision requirement. Bd. Memo at 32-33. As discussed above, however, rather than formalities such as financial audits of Board funds and taking oaths to uphold the state law, the most salient factor to consider in determining whether active state supervision ought to be required is that the Board is controlled by members who continue to participate in the private market that the Board is charged with regulating. This latter factor, bolstered in this case by the fact that the Board members are selected by other North Carolina dentists, strongly suggests a lack of judgment and control independent of the regulated industry, which are the hallmarks of the *Midcal* active supervision test.

Accordingly, we conclude that for the Board to succeed in its claim of antitrust exemption under the state action doctrine, it must show that it satisfies both prongs of *Midcal*.

2. The Board's Conduct Was Not Actively Supervised

The Board argues that even if it were subject to *Midcal*'s active supervision requirement, the state of North Carolina's oversight of the Board would be sufficient to confer state action protection. *See* Bd. Memo at 34; Bd. Reply at 16-17. We disagree. As discussed above, the active supervision requirement exists to guarantee that self-interested parties are restricting competition in a manner consonant with state policy. In this manner, the active supervision converts private conduct, which is subject to antitrust review, into a sovereign policy choice, which is not. Toward this end, the active supervision requirement "mandates that the State *exercise* ultimate control over the challenged anticompetitive conduct[;] . . . [t]he mere presence of some state involvement or monitoring does not suffice." *Burget*, 486 U.S. at 101 (emphasis added); *see also 324 Liquor Corp. v. Duffy*, 479 U.S. 335, 345 n.7 (1987) (holding that certain forms of state scrutiny of a private restraint did not constitute active supervision because they did

[14] As discussed *infra*, the Ethics Commission review for financial conflicts of interest does not include an examination of substantive Dental Board policies.

not exert "any significant control over" the terms of the restraint); *Midcal*, 445 U.S. at 105-06 (California system for wine pricing fails the active supervision requirement because "[t]he State does not . . . engage in any 'pointed reexamination' of the program"); *Parker*, 317 U.S. at 352 (stressing that the challenged marketing plan could not take effect unless approved by state board).

On prior occasions, the Commission has explained that it would consider the following elements in determining whether a state has actively supervised private anticompetitive conduct: (1) the development of an adequate factual record; (2) a written decision on the merits; and (3) a specific assessment – both quantitative and qualitative – of how the private action comports with the substantive standards established by the legislature. *See* Opinion of the Commission, *Kentucky Household Goods Carriers Ass'n*, 139 F.T.C. 405, 420-21 (2005), *aff'd sub nom. Kentucky Household Goods Carriers Ass'n v. FTC*, 199 Fed. Appx. 410, 2006 WL 2422843 (6th Cir. 2006); *see also Analysis of Proposed Order to Aid Public Comment*, *Indiana Household Movers and Warehousemen, Inc.*, 135 F.T.C. 535, 555-561 (2003); FEDERAL TRADE COMMISSION, OFFICE OF POLICY PLANNING, REPORT OF THE STATE ACTION TASK FORCE 55 (Sept. 2003). Although no single one of these elements is necessarily a prerequisite for active supervision, the Board has presented no evidence that any of these elements are satisfied here. The lack of any evidence that an arm of the State of North Carolina developed a record, or rendered a decision that assessed the extent to which the Board's policy toward non-dentist teeth whitening comported with North Carolina state policy, strongly suggests a lack of state supervision.

Respondent cites a litany of North Carolina statutes and constitutional provisions as evidence that the Board's actions are subject to review by various state entities. *See, e.g.,* BSMF at 51-53, ¶ 72. Most of these laws are irrelevant to the active supervision inquiry.[15] Other, potentially more relevant provisions of North Carolina law that the Board highlights as evidence of active supervision include requirements that: each Board member submit detailed financial disclosures to the Ethics Commission; the Board submit an annual report to the Secretary of State, the State Attorney General, and the JLAPOC; and the Board submit an annual audited

[15] *See, e.g.*, N.C. Gen. Stat. § 6-19.1 (attorney's fees to parties appealing or defending against agency decision); N.C. Gen. Stat. § 7A-3 (judicial power, transition provisions); N.C. Gen. Stat. § 50-13.12(a)(1) (forfeiture of licensing privileges for failure to pay child support or for failure to comply with subpoena issued pursuant to child support or paternity establishment proceedings); N.C. Gen. Stat. § 55B-2(3) (definition of professional corporation); N.C. Gen. Stat. §§ 66-58(a) & (e) (sale of merchandise by government units); N.C. Gen. Stat. §§ 66-68(a) & (e) (certificate to be filed; contents; exemption of certain partnerships and limited liability companies engaged in rendering professional services; withdrawal or transfer of assumed name); N.C. Gen. Stat. § 114-8.2 (charges for legal services); N.C. Gen. Stat. §115C-457.1 (creation of civil penalty forfeiture fund; administration); N.C. Gen. Stat. §115D-89 (state board of community colleges to administer Article; issuance of diplomas by schools; investigation and inspection; rules); N.C. Gen. Stat. § 147-69.3 (administration of State Treasurer's investment programs); N.C. Gen. Stat. §§ 153A-134, 160A-194 (regulating and licensing businesses).

financial report. *See* Bd. Opp. at 29; BSMF at 51-53, ¶ 72. This sort of generic oversight, however, does not substitute for the required review and approval of the "*particular* anticompetitive acts" that the complaint challenges. *Patrick*, 486 U.S. at 101 (emphasis added). For instance, the Board's annual reports provide only aggregate information on the number and disposition of investigations by type, providing no hint as to the underlying substance of any of these matters, let alone a discussion of the Board's policy toward non-dentist teeth whitening. *See* CCSMF at 22, ¶ 74; CX0085; CX0086; CX0088; CX0089; CX0091. Board members' financial disclosures to the Ethics Commission list only their assets and liabilities, state that they are engaged in the practice of dentistry, and identify the professional associations to which they belong and businesses other than their dental practices. *See* CCSMF at 22-23, ¶¶ 75-76; Newson Decl. at 5, ¶ 11; CX0395; CX0396. The declaration of the Executive Director of the North Carolina Ethics Commission states that "the Commission . . . has not assessed whether Dental Board members have sought to regulate or restrict the business practices of non-dentist providers of teeth whitening services." Newson Decl. at 6, ¶ 14; *see also id.* at 6, ¶ 15 ("The Commission's primary focus is on the avoidance of unlawful conflicts of interest by individual members of covered Boards and other entities; not on the specific substantive actions taken by covered boards."). Similarly, the Board's audited financial statements include no information regarding the Board's actions generally, or its policy regarding non-dentist teeth whitening, specifically. *See* CCSMF at 22, ¶ 73.

In sum, none of these legislative provisions suggest that a state actor was even aware of the Board's policy toward non-dentist teeth whitening, let alone reviewed or approved it in fulfillment of the active supervision requirement.

The Board also points to requirements that it comply with North Carolina's Public Records Act, Administrative Procedure Act, and open meetings law when conducting its business, *see* Bd. Opp. at 29, and to the JLAPOC's power "[t]o review the activities of the State occupational licensing boards to determine if the boards are operating in accordance with statutory requirements." N.C. Gen. Stat. § 120-70.101(3a).[16] The Board, however, presents no evidence that any state actor became aware of the Board's non-dentist teeth whitening policy pursuant to these, or any other, provisions of North Carolina law. Even had these provisions made a disinterested state actor aware of the Board's non-dentist teeth whitening policy, moreover, the Board provides no evidence that the JLAPOC, or any other state actor, reviewed or approved the Board's challenged conduct. For state action purposes, silence on the part of the state does not equate to supervision. In *Ticor*, for example, the Supreme Court rejected the argument that private conduct was adequately supervised when the state merely was made aware

[16] It is unclear whether the JLAPOC even has the ability to review the Board's non-dentist teeth whitening policy to the extent that the Board's actions were classified as "individual disciplinary actions." *See* N.C. Gen. Stat. § 120-70.101(3a) (JLAPOC review "shall note include decisions concerning . . . individual disciplinary actions."). Further, the open records requirement does not guarantee that enforcement actions regarding the unauthorized practice of dentistry will not be addressed in closed session. *See* Board's Resp. and Objections to Compl. Counsel's First Set of RFAs at 17, ¶ 44.

of privately-set rates and took no action, holding that "[t]he mere potential for state supervision is not an adequate substitute for a decision by the State." 504 U.S. at 638. Rather, to satisfy the active supervision standard, a state official must "have *and* exercise power to review particular anticompetitive acts." *Patrick*, 486 U.S. at 101 (emphasis added). Further, the Supreme Court has made clear that ex-post consideration of a restraint via the political process is also insufficient to satisfy *Midcal*'s active supervision requirement. *See Lafayette*, 435 U.S. at 406; *Duffy*, 479 U.S. at 345. Accordingly, the mere fact that the Board's decisions possibly could have been discovered by the public or subject to review by the JLAPOC is not active supervision for state action purposes.

The Board also argues that several other means by which it could exclude non-dentists from performing teeth whitening are subject to state supervision. *See* Bd. Memo at 35. For example, a criminal suit or civil suit to enjoin illegal teeth whitening must be brought in a North Carolina court; a rule on teeth whitening is subject to the state's Administrative Procedure Act and subject to review by legislative committees; and a binding interpretation of the Dental Practice Act regarding teeth whitening must be made pursuant to the state's Administrative Procedure Act. *Id.* Even if ex-post review by a North Carolina court of the Board's decision to classify teeth whitening as the practice of dentistry were to constitute adequate supervision – an issue on which the Supreme Court has yet to decide, *see Burget*, 504 U.S. at 104, and which we do not address – the Board did not choose this path. Rather, the Board evaded judicial review of its decision to classify teeth whitening as the practice of dentistry by proceeding directly to issue cease and desist orders purporting to enforce that unsupervised decision.[17] Similarly, although ex-post judicial, legislative, or executive review of a formal rule making or binding interpretation of the Dental Practice Act might constitute adequate supervision for state action purposes in some circumstances, the Board chose to forgo these formal means to address non-dentist teeth whitening.

In the end, the Board has presented no evidence to suggest that its decision to classify teeth whitening as the practice of dentistry and to enforce this decision with cease and desist orders was subject to any state supervision, let alone sufficient supervision to convert the Board's conduct into conduct of the state of North Carolina.

* * *

We conclude that because the Board is controlled by practicing dentists, the Board's challenged conduct must be actively supervised by the state for it to claim state action exemption from the antitrust laws. Because we find no such supervision, we hold that the antitrust laws reach the Board's conduct.

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[17] Our holding is not meant to suggest that the Board must always proceed directly to court against individuals whom it suspects may be involved in the unauthorized practice of dentistry. For example, the Board may be authorized to send warning letters as incidental to its authority to bring civil actions. We hold only that for the Board to enjoy state action exemption from the antitrust laws, the state of North Carolina must supervise the Board's actions that restrain competition.

VI. CONCLUSION

For the reasons discussed above, we deny the Board's motion to dismiss (which we have treated as a motion for summary decision) based on a claim of state action exemption from the antitrust laws, and we grant Complaint Counsel's motion for partial summary decision on the same issue. We issue herewith an order rejecting the Board's invocation of the state action doctrine as a basis for exempting its challenged conduct from the federal antitrust laws.