UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

In the Matter of	)	**PUBLIC**
	)	
THE NORTH CAROLINA [STATE] BOARD OF DENTAL EXAMINERS,	)	DOCKET NO. 9343
	)	
Respondent.	)	

MOTION TO DISMISS

Respondent, the North Carolina State Board of Dental Examiners (hereinafter "Dental Board"), hereby moves to dismiss the Complaint herein on the following grounds:

The Respondent Dental Board is immune from the present action, because the acts of the Board that are the subject of the Complaint were actions of the State of North Carolina and are therefore exempt from federal antitrust liability under the state action immunity doctrine.

This motion is based on the Memorandum in Support which is being filed herewith, the exhibits thereto, and such other matters as may be in the record and appropriate for the Commission's consideration.

This the 3rd day of November, 2010.

ALLEN AND PINNIX, P.A.

/s/ Noel L. Allen

By: ______________________________

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CERTIFICATE OF SERVICE

I hereby certify that on November 3, 2010, I electronically filed the foregoing Motion to Dismiss with the Federal Trade Commission using the FTC E-file system, which will send notification of such filing to the following:

Donald S. Clark, Secretary
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Room H-159
Washington, D.C. 20580

I hereby certify that the undersigned has this date served copies of the foregoing upon all parties to this cause by electronic mail as follows:

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I also certify that I have sent courtesy copies of the document via Federal Express and electronic mail to:

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This the 3rd day of November, 2010.

/s/ Noel L. Allen

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CERTIFICATION FOR ELECTRONIC FILING

I further certify that the electronic copy sent to the Acting Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and by the adjudicator.

/s/ Noel L. Allen

Noel L. Allen

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In the Matter of	)	**PUBLIC**
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Respondent.	)	

[PROPOSED] ORDER DISMISSING COMPLAINT

This matter comes before the Commission on Respondent's Motion to Dismiss Complaint. Having considered the motion, it is hereby

ORDERED, that the Motion to Dismiss Complaint is granted and that the complaint be dismissed.

By the Commission.

ISSUED: ________________________

____
Donald S. Clark, Secretary
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Room H-159
Washington, D.C. 20580

UNITED STATES OF AMERICA
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In the Matter of

THE NORTH CAROLINA [STATE] BOARD OF DENTAL EXAMINERS,

Respondent.

DOCKET NO. 9343

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

If a clear state law and a century of court precedence and the Tenth Amendment to the U.S. Constitution no longer allow the State of North Carolina to define the practice of dentistry and protect its citizens from illegal practice, it should be the Congress or the Supreme Court that pronounces the death of that state prerogative.

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ARGUMENT

Introduction

The Federal Trade Commission ("Commission") filed this action on June 17, 2010, alleging that Respondent, the North Carolina State Board of Dental Examiners ("State Board"), a state agency, has conspired to restrain trade by enforcing a state statute, N.C. Gen. Stat. § 90-29(b)(2). This statute (not a rule, and certainly not a rule exceeding or contravening state law), along with other subsections of N.C. Gen. Stat. § 90-29(b), clearly and unambiguously provides that a person engages in the practice of dentistry when he or she "removes stains, accretions or deposits from the human teeth." Similar and even less specific dental practice laws have been upheld by the courts and attorneys general of other states. The Complaint was filed at the end of a two-year investigation.[1] Prior to filing its unprecedented assault on a state's constitutionally-protected prerogative to protect its citizens by regulating the professions, the Commission issued a press release declaring that the State Board, the state officials who are its members and, indeed, the dentists of North Carolina, have engaged in an illegal conspiracy. According to the press release and the Complaint, the State Board's actions constituted violations of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

From the beginning, the Commission demonstrated its misunderstanding of the State Board's legal status by misnaming the Respondent in its Complaint. Indeed,

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[1] Ironically, the investigation that preceded this Complaint was apparently managed by a Commissioner who previously recused her self from tooth whitening related proceedings because a family member served as in-house counsel for a leading teeth-whitening product manufacturer. This is not to insinuate that any unlawful conduct occurred; it is only to point out one of several of the Commission's dual standards. On the one hand, the Commission deems all dentist members of the Board to be potential competitors and thus *per se* antitrust conspirators because they are enforcing a law that protects the public but coincidentally restricts competition. The same flawed perspective inevitably would lead to the conclusion that any Board action against any licensee restrains trade by reducing competition even if the conduct at issue is dangerous to the public and unlawful.

although repeatedly challenged for any authority supporting its radical theory, the Commission has offered only one case involving a private association, not a state agency. The arrogance of this assault is compounded by the facts that this case involves a non-price, non-commercial speech restriction; illegal teeth whitening services; a market definition contrived to include unlawful services and exclude the largest competitive force (over-the-counter sales of teeth whitening kits); and a theory of structural conspiracy that flies in the face of the Supreme Court's deference to state agencies on regulatory issues and presumption of State Board members' good faith.

The State Board has moved to dismiss this action, based upon its immunity under the state action doctrine and upon the Complaint's failure to allege conduct which could constitute an illegal antitrust conspiracy. In the best light, the Complaint is an unwarranted effort, without Congressional action, to stretch the jurisdiction of the Commission beyond even its wildest dreams expressed in its 2003 State Action Task Force Report. In a worse light, the Complaint is a brazen attempt to leverage threats and the expense of litigation, the personal burden of arbitrary demands for records and days of depositions, into a settlement to serve as a faux precedence it could leverage against budget-strapped state regulators throughout the country in matters far beyond the illegal practice of dentistry. If a clear state law and a century of court precedence and the Tenth Amendment to the U.S. Constitution no longer allow the State to define the practice of dentistry and protect its citizens from illegal practice, it should be the Congress or the Supreme Court that pronounces the death of that state prerogative.

FACTS OF LAW

Although the Respondent disputes most of the factual allegations of the Complaint, for purposes of this motion they are deemed true. Nevertheless, the Complaint is cluttered with legal assertions that erroneously pass as "facts." This is particularly true regarding the very name of the Respondent, the legal status of the State Board, the status of State Board members, the statutory definition of the practice of dentistry, and the direct oversight of the State Board and its members by the executive, legislative, and judicial branches of the state. Thus Respondent sets forth the following matters as facts of law for purposes of the State Board's Motion. Unless otherwise indicated, citations are *infra*.

- The Respondent is a State Board and is an official state agency.
- The State Board members are state officials sworn to uphold State statutes and prohibited by state laws from conflicts of interest.
- State Board members are presumed to be acting in the public interest in good faith.
- The State Board is enforcing a state statute rather than a rule.
- The state statute includes the offering or rendering of services to "remove stains from teeth" in the definition of the practice of dentistry.
- State statutes make it illegal for anyone to offer or render stain-removing services without a license from the State Board.

- The state statute also prohibits the unauthorized offering or rending of other services that have been associated with teeth whitening services.[2]
- Ambiguity, if any, and the interpretation of the North Carolina Dental Practice Act, is to be resolved in favor of the state agency responsible for enforcing it.
- At least one state Supreme Court and two state Attorneys General have interpreted similar statutes to prohibit teeth whitening by non-licensees.
- State statutes direct the State Board to enforce the North Carolina Dental Practice Act.
- State statutes authorize the State Board to seek to stop the illegal practice of dentistry by filing civil suits on behalf of the state.
- State statutes authorize the State Board to refer violations of the statute for criminal prosecution.
- The State Board is subject to direct executive branch oversight.
- The State Board is subject to direct legislative oversight.
- The State Board is subject to direct judicial supervision.

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[2] Provisions of N.C. Gen. Stat. § 90-29. which directly pertain to services illegally offered or rendered by unlicensed teeth whitening services include:

§ 90-29. Necessity for license; dentistry defined; exemptions
(a) No person shall engage in the practice of dentistry in this State, or offer or attempt to do so, unless such person is the holder of a valid license or certificate of renewal of license duly issued by the North Carolina State Board of Dental Examiners.
(b) A person shall be deemed to be practicing dentistry in this State who does, undertakes or attempts to do, or claims the ability to do any one or more of the following acts or things which, for the purposes of this Article, constitute the practice of dentistry:
(2) Removes stains, accretions or deposits from the human teeth;
(7) Takes or makes an impression of the human teeth, gums or jaws;
(11) Owns, manages, supervises, controls or conducts, either himself or by and through another person or other persons, any enterprise wherein any one or more of the acts or practices set forth in subdivisions (1) through (10) above are done, attempted to be done, or represented to be done;
(13) Represents to the public, by any advertisement or announcement, by or through any media, the ability or qualification to do or perform any of the acts or practices set forth in subdivisions (1) through (10) above.

- The State Board is a quasi-judicial agency of the state.
- The State Board's enforcement of the Dental Practice Act is subject to the state constitutional prohibition against monopolies.
- State Board members are prohibited from material conflicts of interest by law.
- Congress has never expressly authorized the Commission to regulate dentistry or the business of teeth whitening.
- State law provides a variety of means for illegal teeth whitening businesses to challenge the State Board's enforcement of the statutes.
- There is no legal precedent for the Commission's position regarding the state action exemption.
- The Supreme Court consistently has held that states have the constitutional prerogative of regulating professions.
- Actions by the North Carolina Dental Society, a private association, to influence legislation or rule making is constitutionally protected as free speech and the right to redress grievances.

I. A State Agency Governed by State Officials Enforcing a Clearly Articulated State Statute Regarding Non-Price, Non-Commercial Speech Public Protection Qualifies for State Action Immunity as a Matter of Law.

The State Board's actions are immune from the application of the Federal Trade Commission Act ("FTC Act") under principles first set forth in Parker v. Brown, 317 U.S. 341 (1943). Decades of case law, starting with Parker v. Brown, have established that state agencies such as the State Board need only demonstrate that their actions are taken pursuant to a "clearly articulated and affirmatively expressed" state law in order to enjoy state action immunity. See generally, e.g., California Retail Liquor Dealers Ass'n

v. Midcal Aluminum, 445 U.S. 97 (1980); Neo Gen Screening Inc. v. New England Newborn Screening Program, 187 F.3d 24 (1st Cir. 1999); Nassimos v. N.J. Board of Examiners of Master Plumbers, No. 94-1319, 1995 U.S. Dist. LEXIS 21376 (D.N.J. Apr. 4, 1995), aff'd, 74 F.3d 1227 (3rd Cir. 1995), cert. denied, 517 U.S. 1244 (1996); Charley's Taxi Radio Dispatch Corp. v. SIDA of Hawaii, Inc., 810 F.2d 869 (9th Cir.1987). As will be set forth in this Argument, the State Board is a state agency, and the actions complained of by the Commission were undertaken pursuant to a clearly articulated and affirmatively expressed state law.

The Commission's assault on a state agency's enforcement of a state statute is a legal leap beyond the limits of Commission rulemaking authority that was at issue in California State Board of Optometry v. Federal Trade Commission, 910 F.2d 976 (D.C. Cir.1970). In that case, the Commission had sought to preempt by FTC rules a state board's restrictions on the practice of optometry. Rejecting the Commission's purported jurisdiction, the court provided that it is "clear, under the 'state action' doctrine enunciated in Parker v. Brown, that when a State acts in a sovereign rather than a proprietary capacity, it is exempt from the antitrust laws even though those actions may restrain trade." Id. at 981.

The court found nothing in the federal antitrust laws "that could be construed as an explicit congressional authorization to reach the sovereign acts of the States. This silence is especially compelling in view of Congress's more than thirty years of experience with the state action doctrine at the time it enacted section 18(a)(1)." Id. at 982. Quoting Parker, 317 U.S. at 350-51, the court further explained that:

> In holding that the Sherman Act was not intended to apply to the acts of States as sovereigns, the [Parker] Court observed that it could "find

> 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. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an **unexpressed purpose** to nullify a state's control over its officers and agents **is not lightly to be attributed** to Congress."

California State Bd. of Optometry, 910 F.2d at 981. Seventy years later, Congress' silence remains unbroken regarding the Commission's lack of jurisdiction over state agency enforcement of state statutes.

Therefore, the State Board meets the well-established requirements for a state agency to enjoy state action immunity, as such requirements have been set forth in Earles v. State Board of Certified Public Accountants of Louisiana, 139 F.3d 1033, 1041 (5th Cir. 1998), cert. denied, 525 U.S. 982 (1998) (dismissing a suit against the Louisiana State Board of Certified Public Accountants for failure to state a claim upon which relief can be granted, based on the application of the state action doctrine), and numerous other cases. Even if all the facts alleged in the Commission's complaint were proven true, the State Board still would be immune from the FTC Act. Since the State Board is immune from the FCT Act, the Commission has failed to state a claim upon which relief can be granted. Therefore, the Commission lacks the jurisdiction to force the State Board to abrogate a state statute. Fed. R. Civ. P. 12(b)(6); see also Hoover v. Ronwin, 466 U.S. 558, 566-67 (1984); Ronwin v. State Bar of Arizona, 686 F.2d 692, 694 n.1 (9th Cir. 1982), cert. denied, 461 U.S. 983 (1983) (upholding the District Court's dismissal of the case for failure to state a claim upon which relief can be granted, based on the application of the state action doctrine). The applicability of the state action immunity to the State Board easily is established as a matter of law.

The Commission contends that since the statute creating the State Board and defining the practice of dentistry was adopted almost one hundred years ago, it could not have reasonably anticipated teeth whitening business and thus should not be presumed to preclude or regulate that service. But the Sherman Antitrust Act was adopted decades before the passage of the statute creating the State Board. When the Supreme Court ruled in Parker v. Brown that "Congress never intended the Sherman Act to limit state action," the Supreme Court did not condition its opinion upon only the extant lines of business. Similarly, the Supreme Court in Dent v. West Virginia, 129 U.S. 114 (1889), did not know about teeth whitening businesses but did not so limit its holding when ruling that states have a legitimate interest in regulating professions. Likewise, when Congress in 1932 adopted Section 5 of the FTC Act it likely was not aware of the potential future business of teeth whitening.

The state of North Carolina adopted its Dental Practice Act. bearing in mind that it had a constitutional prohibition against monopolies that were deemed “contrary to the genius of a free state.” The legislature of North Carolina has never amended the Act to exempt teeth whitening from the definition of the practice of dentistry. Despite the Commission's professed policy desire to enlarge its reach and further constrict states' ability to protect their own respective citizens in their own ways, notwithstanding the Parker v. Brown decision (of over fifty years ago), the Commission has never amended the FTC Act to suggest in any way that its intent was to regulate state action.

Such a drastic change in antitrust doctrine simply should not and cannot be made by Commission whim without hearing and without direct congressional authorization. The State Board's enforcement of a clear state's statute is not an overt imposition on

interstate commerce. The promoters of teeth whitening businesses have many options: (1) to conduct their business lawfully by operating their kiosks through licensed dentists; (2) to seek a declaratory ruling following the procedures set out in the North Carolina Administrative Procedures Act; (3) to challenge either the State Board's enforcement by supporting an appeal of one of the court cases in which the State Board sought civil or criminal sanctions against violators; (4) to challenge the statute through administrative proceedings and a declaratory judgment action; or (5) to pursue state legislative change. Instead, the illegal teeth whitening business promoters have invoked the aid of the Commission and eight staff attorneys to prejudge the State Board and its present and former members as "conspirators" guilty of illegal conduct that is subject to criminal sanctions under federal and state laws. At a known time of state budget crisis, the Commission has attempted to extort a settlement[3] by conducting dozens of depositions; serving dozens of interrogatories; serving dozens of requests for admissions; demanding production of thousands of documents; and serving over 30 *subpoenas duces tecum* to third-party witnesses, while steadfastly refusing to cite a single authority for its unprecedented attack.[4]

A. The North Carolina State Board of Dental Examiners Is a State Agency, an Instrumentality of the State, and Is Barred by State Law from Engaging in Any Conduct Intended to Profit Private Parties.

The Complaint so completely mischaracterizes the state statutory and constitutional framework within which the State Board functions, that it actually gets the name of the State Board wrong. The Commission introduces the State Board as the

[3] Attorneys for the Commission attempted in several depositions to quiz present and even former Board members on why they would not agree to the Commission's draft settlement agreement.

[4] The Commission even refused to answer the State Board's Request for Admission #1: "Admit that the U.S. Supreme Court has never held that a state agency enforcing a clear articulated state statute regarding non-price restraints must prove active state supervision in order to qualify for state action immunity."

"North Carolina Board of Dental Examiners." Complaint p. 1. Naturally, as a state agency, the respondent is actually the "North Carolina *State* Board of Dental Examiners." N.C. Gen. Stat. § 90-22(b). This mistake reflects the Commission's wider misunderstanding of the State Board and its members' mandate and role in the regulation of the practice of dentistry. The State Board is not a trade organization created to protect dentists' interests. It is a state agency and, like other state licensing boards, is an "instrumentality of the state."

The State's right to regulate professions through state agencies such as the State Board is well-established.

> The legislature was not dealing with traders in commodities, but with the vital interest of public health, and with a profession treating bodily ills and demanding different standards of conduct from those which are traditional in the competition of the market place. The community is concerned with the maintenance of professional standards which will insure not only competency in individual practitioners, but protection against those who would prey upon a public peculiarly susceptible to imposition through alluring promises of physical relief.

Semler v. Oregon State Bd. of Dental Exam'rs, 294 U.S. 608, 612 (1935); see also Dent v. West Virginia, 129 U.S. 114 (1889).

The fact that the State Board is exempt can be seen by comparison to the defendant in California Dental Ass'n v. Federal Trade Commission, 526 U.S. 756 (1999). In that case, the Supreme Court articulated limits on Commission jurisdiction over certain nonprofit organizations; by this standard, the State Board should not be subjected to the FTC Act. At issue in California Dental Ass'n was whether the California Dental Association ("CDA"), a private association (not a state agency) should be subject to the Commission's jurisdiction. The Commission's attempt to regulate several CDA policies was appealed up to the Supreme Court; that Court held that the Commission in fact did

have jurisdiction over the CDA. However, the Court drew clear limits to the Commission's jurisdiction over non-profit organizations.

The Supreme Court has recognized that the Commission does not have jurisdiction over truly non-profit organizations. Commission jurisdiction over the CDA was based on the fact that the CDA, while organized as a non-profit association, did provide benefits for its members. These benefits included insurance, financing, and assistance with lobbying, litigation, and marketing campaigns. Id. at 760. Additionally, the CDA had some for-profit subsidiaries. Id. These facts led the Supreme Court to conclude that there was a "proximate relation" to member profit; therefore, Commission jurisdiction was proper. Id. at 767-68.

In contrast, the State Board is dedicated solely to the regulation of the practice of dentistry, to protect the public interest. N.C. Gen. Stat. § 90-22(a) & (b). Courts have held that the "whole purpose and tenor" of the Dental Practice Act "is to protect the public against the unprofessional, improper, unauthorized, and unqualified practice of dentistry and to secure the services of competent, trustworthy practitioners." In re Hawkins, 17 N.C. App. 378, 194 S.E.2d 540, cert. denied and appeal dismissed, 283 N.C. 393, 196 S.E.2d 275, cert. denied, 414 U.S. 1001 (1973). Indeed, the State Board, like North Carolina's Department of Human Resources and the Mental Health Council, "are creatures of the State of North Carolina. The functions they serve are concededly public functions of the state." Hawkins v. North Carolina Dental Soc'y, 355 F.2d 718, 720 (4th Cir. 1966).

To that end, the State Board is charged with licensing, monitoring, and regulating dentists. N.C. Gen. Stat. § 90-22. As a constitutionally permitted quasi-judicial agency,

the law empowers the president of the State Board and its secretary-treasurer "to administer oaths, issue subpoenas requiring the attendance of persons and the production of papers and records before said Board in any hearing, investigation or proceeding conducted by it." N.C. Gen. Stat. § 90-27. The State Board is empowered, in its own name, to "maintain an action in the name of the State of North Carolina to perpetually enjoin any person from so unlawfully practicing dentistry." N.C. Gen. Stat. § 90-40.1(a). The State Board cannot provide insurance to dentists, or financing. It is prohibited by law from using its funds to lobby. N.C. Gen. Stat. § 93B-6. It does not have any for-profit subsidiaries. It does not assist licensed dentists with marketing. Unlike the CDA, it does not "carry on business for its own profit or that of its members." California Dental Ass'n, 526 U.S. at 765.

On the other hand, the only legal authority ever tendered to this date by the Commission has been National Society of Professional Engineers v. United States, 435 U.S. 679 (1978).[5] However, this case is irrelevant to the instant facts in two basic ways. First, the National Society of Professional Engineers ("Society") was not a state agency; it was private membership organization. See generally id. at 679. Therefore, it was not -- in any way -- a state agency. Second, the Society was not seeking state action immunity, since of course it would not be eligible for such immunity. The Court's rejection of a health and safety rationale for regulation was tied to the Court's analysis of an entirely different doctrine, the rule of reason. Id. at 681. The Court concluded that the rule of reason is applied to determine whether a restraint will reasonably or unreasonably impact competition -- not on why the restraint was enacted (or whether that justification was

[5] Complaint counsel attempted to argue that the Supreme Court "has held that health and safety concerns are not cognizable justifications for conduct that would otherwise violate the antitrust laws." Pretrial Conference Hr'g Tr. p. 33.

reasonable). Id. at 694-95. Unfortunately for the Commission, a case involving a private actor and a completely different theory of law is similarly irrelevant to the instant case.

Unlike a trade association, an extra-governmental agency or a non-profit organization, the State Board is prohibited by state statutes, state constitutional provisions, and state case law from engaging in business or aggrandizing private parties. By law, its only permissible purpose is public protection. Indeed, there is a constitutional prohibition against private emoluments. By the Supreme Court's standard, there is no basis for Commission jurisdiction over a statutorily-established, state agency such as the State Board, which is neither a for-profit nor non-profit "organization," and barred by state law from aiding private persons. The Board does not provide the benefits for its members that "plainly fall within the object of enhancing its members' 'profit.'" California Dental Ass'n, 526 U.S. at 767.

B. The State Board Is Enforcing a North Carolina Statute That Is a Clearly Articulated and Affirmatively Expressed State Policy to Restrain Trade.

The State Board, as a state agency, is immune from federal antitrust law for its enforcement of a "clearly articulated and affirmatively expressed" state policy to restrain trade. Earles, 139 F.3d at 1041. The state statute at issue limits the practice of dentistry to dentists, and defines dentistry as undertaking, attempting, or claiming the ability to "remove[ ] stains, accretions, or deposits from the human teeth." N.C. Gen. Stat. § 90-29(b)(3). Based upon the above facts which are established as a matter of law, the State Board, as a state agency, was acting pursuant to state law, and its efforts were directed at enforcing a clear statute rather than an attempt to limit the provision of teeth whitening

services by non-dentists. The State Board's actions are thus immune from the federal antitrust laws and from enforcement jurisdiction of the Commission.

The Commission alleges that the State Board "has decided that the provision of teeth whitening services by non-dentists constitutes [the unauthorized practice of dentistry]." To the contrary, the applicable statute, not the State Board, clearly determines that the removal of stains from teeth is the practice of dentistry, and may only be done by licensed dentists or dental hygienists under the direct supervision of licensed dentists. N.C. Gen. Stat. § 90-29(a)-(b), (c)(1). On its face, this authorization, set forth by state law rather than by a board rule, is a "clearly articulated and affirmatively expressed state policy." See Earles, 139 F.3d at 1041. By limiting certain activities to dentists, the statute meets the requirement of the Commission (and the Supreme Court) that suppression of competition be the "foreseeable result" of the statute. City of Columbia v. Omni Outdoor Adver., 499 U.S. 365, 372-73 (1991); see also Complaint Counsel's Opposition to the South Carolina State Board of Dentistry's Motion to Dismiss at 28, In the Matter of South Carolina State Bd. of Dentistry, No. 9311 (F.T.C. Nov. 25, 2003) ("a legislature also articulates a policy to displace competition when it expressly authorizes conduct that would 'foreseeably' result in anticompetitive effects"). Further satisfying the "clear articulation" standard, the statute demonstrates that the state "contemplated the kind of action complained of" by delegating to the State Board the authority to "operate in a particular area." Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 415 (1978) (citing Lafayette v. Louisiana, 532 F.2d 431, 434 (5th Cir. 1976), overruled on other grounds by Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985)); see also, e.g., First Amer. Title Co. v. South Dakota Land Title Ass'n, 714 F.2d

1439, 1451 (8th Cir. 1983); Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48, 60 (1985).

Since the State Board is not a private actor, the state's clearly articulated policy does not have to explicitly grant State Board members the power to write letters warning that teeth whitening is stain removal and thus the practice of dentistry. Town of Hallie v. City of Eau Claire, 471 U.S. 34, 46 (1985) ("Requiring express authorization for every action that an agency might find necessary to effectuate state policy would diminish, if not destroy, its usefulness"); see also Complaint Counsel's Opposition to the South Carolina State Board of Dentistry's Motion to Dismiss at 40, In the Matter of South Carolina State Bd. of Dentistry v. Federal Trade Comm'n, No. 9311 (F.T.C. Nov. 25, 2003), citing Town of Hallie, 471 U.S. at 42-43 (if the legislature has "delegated 'express authority to take action that foreseeably will result in anticompetitive effects' … it [does] not need to expressly state that it anticipated anticompetitive results from such conduct").

The State Board's power to act against non-dentist teeth whitening service providers "may be inferred 'if the challenged restraint is a necessary or reasonable consequence of engaging in the authorized activity.'" Gold Cross Ambulance & Transfer v. Kansas City, 705 F.2d 1005, 1013 (8th Cir. 1983); see also Brazil v. Arkansas State Bd. of Dental Exam'rs, 607 F. Supp. 193 (E.D. Ark. 1984), aff'd, 759 F.2d 674 (8th Cir. 1985) (holding that a similar statute to the one at issue in the present case, preventing non-dentists from providing a number of services related to the construction of dentures, was sufficient proof of a clearly articulated state policy); see also Federal Trade Commission, REPORT OF THE STATE ACTION TASK FORCE (Sept. 2003) at 51, n.220. It is

sufficient that the State Board's authority "suggest[ ] that the legislature contemplated that the entity might invoke such authority to restrain trade." Brazil at 1362 (citing First Amer. Title Co., 714 F.2d at 1451 and Town of Hallie, 700 F.2d at 381).

Giving further weight to the State Board's interpretation of state law in this case is the fact that there have been no legal challenges to the state law, with the exception of the Commission's complaint. The State Board's understanding of the law should have "great persuasive weight." Gambrel v. Kentucky Bd. of Dentistry, 689 F.2d 612, 619 (6th Cir. 1982); see also, e.g., Yeager's Fuel, Inc. v. Pennsylvania Power & Light Co., 22 F.3d 1260, 1268-69 (3rd Cir. 1994); see also, e.g., Nugget Hydroelectric, L.P. v. Pacific Gas & Elec. Co., 981 F.2d 429, 434 (9th Cir. 1992). The State Board's interpretation is not arbitrary or self-serving, but a conclusion based on the plain wording as well as years of experience with the practice of dentistry, and in accordance with the statute's own directions regarding interpretation. According to the state statute itself, the North Carolina Dental Practice Act and the regulations promulgated thereunder are to be "liberally construed to carry out [its] objects and purposes." N.C. Gen. Stat. § 90-22(a). Further, dental boards of many other states have reached the identical conclusion that teeth whitening is the practice of dentistry; and that conclusion has been upheld by other states' courts and attorneys general, as discussed below.

The state law that has allowed only dentists and their supervised staff to remove stains from teeth has been in effect, unchanged, for decades. This distinguishes the instant case from a recent case brought by the Commission against the South Carolina State Board of Dentistry, as discussed above. In that case, the South Carolina Board enacted a rule preventing dental hygienists from conducting certain procedures

unsupervised, immediately following the passage of a completely contrary state statute. South Carolina State Bd. of Dentistry, 455 F.3d at 436. In contrast, the North Carolina statute has been preserved unchanged for years.[6] The State Board's interpretation of it developed naturally based on relatively recent concerns that have arisen with the proliferation of non-dentist stain removal.

The Court in National Society of Professional Engineers, as discussed earlier, reiterated an important state action immunity principle: "by their nature, professional services may differ from other business services, and accordingly, the nature of the competition in such services may vary. Ethical norms may serve to regulate and promote this competition, and thus fall within the Rule of Reason." 435 U.S. at 694. The Supreme Court reached a similar conclusion in Goldfarb v. Virginia State Bar, a state action immunity case:

> the fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act … The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently.

421 U.S. 773, 788 n.17 (1975).

In Goldfarb, the Court did not grant state action immunity for the Virginia State Bar; however, the facts of the case can be distinguished from the instant facts in several

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[6] Commission counsel has alleged that the statutory language at issue was promulgated "in the late 1800s … long before teeth whitening, as we knew it, existed[.]" Pretrial Conference H'rg Tr. pp.29-30. The Commission argues that because the statute is so old, and because it was enacted before current teeth whitening practices were in existence, it should not be relied on. There are several flaws to this argument. The portion of the statute at issue, N.C. Gen. Stat. § 90-29, was promulgated in 1935, not the 1800s. Further, teeth whitening procedures have changed little in the past 125 years. Dr. Van B. Haywood, *A Comparison of At-Home and In-Office Bleaching,* DENTISTRY TODAY (2000) pp. 44-53 (In-office bleaching of teeth has been in use for approximately 125 years, with little change in science or technique during that time). *Id.* Regardless of when it was promulgated, it is the law, and the State Board is bound by it. By the Commission's flawed logic, the Sherman Antitrust Act should not be followed in the instant case, since it is even older than the relevant portions of the N.C. Dental Practice Act.

important ways. First, the issue in Goldfarb was price-fixing: the State Bar was essentially ratifying a fee schedule that had been adopted by a county-level bar association. 421 U.S. at 791. Price-fixing is viewed with greater skepticism by the courts than practices such as those at issue in this case. Id. at 792; see also Federal Trade Commission, REPORT OF THE STATE ACTION TASK FORCE (Sept. 2003) (hereinafter "Task Force Report"), at 38 (citing Crosby v. Hosp. Auth. of Valdosta, 93 F.3d 1515, 1524 (11th Cir. 1996)); *see also* AMERICAN BAR ASSOCIATION STATE ACTION PRACTICE MANUAL. Second, the State Bar's enforcement of the fee schedule was not authorized by any state law. Id. at 790-91 ("Respondents have pointed to no Virginia statute requiring their activities; state law simply does not refer to fees . . . although the Supreme Court's ethical codes mention advisory fee schedules they do not direct either respondent to supply them, or require the type of price floor which arose from respondents' activities."). Third, the Supreme Court subsequently has relaxed the strict requirements for showing authorization by state law in Goldfarb.[7] Therefore, Goldfarb does not provide a useful model for the instant case. Unlike the State Bar in Goldfarb, the State Board did not ratify a private price-fixing arrangement. Further, the actions of the State Board at issue here were clearly articulated by state law, and thus, meet the one requirement for a state agency to obtain state action immunity.

In cases much more analogous to the present facts than National Society of Professional Engineers, courts have weighed health and safety considerations and health and safety restrictions in deciding on the application of the Sherman Antitrust Act. For example, in Nara v. American Dental Ass'n, the court distinguished the discipline of a

[7] The current standard for clear articulation is not that a state statute must compel the anticompetitive conduct, but that the state permits the conduct to occur. See Southern Motor Carriers Rate Conference, 471 U.S. at 58.

dentist for employment of unlicensed assistants and misleading advertising from the Society's efforts to restrain competition among members of an association. 526 F. Supp. 452, 458 (W.D. Mich. 1981) ("The present case is distinguishable from National Society of Professional Engineers in that the regulation in the latter was clearly economic and tended to restrain competition among members of the association. The regulation in this case is non-economic in nature and is designed to benefit the public"). The court in Gambrel also distinguished the facts of that case, involving the Kentucky Board of Dentistry's restriction of certain activities to licensed dentists, based on Kentucky's regulatory interest in the restriction, as "a matter which is of vital interest to the health and safety of citizens." Gambrel, 689 F.2d at 618.

The statute's "clear articulation" is bolstered by its unequivocal public protection purpose. Similarly, the Board's enforcement of the statute is, and must be, for public protection rather than restraint of competition. The Commission's Complaint is based upon the premise that the State Board's enforcement of state regulations will unreasonably restrain competition and injure consumers. Complaint, p. 4. Two of the three alleged "injuries" simply refer to the removal of non-dentist teeth whitening service providers from the marketplace ("preventing and deterring non-dentists from providing teeth whitening services" and "reducing consumer choice … for the provision of teeth whitening services.") These "injuries" are in fact the desired result of a state law aimed at protecting public health and safety. See N.C. Gen. Stat. § 90-22(a). As stated, the fundamental issue in this case is state action immunity, not whether the state was correct in banning teeth whitening services by non-dentists. However, Respondent is troubled by the Commission's assumption that there is no need to regulate teeth whitening services

provided by non-dentists. This assumption runs counter to the serious concerns raised by scientific and legal sources.

However, even in the dimmest light most favorable to the Commission's theory, there is ample authority regarding the potential and actual consumer harms addressed by the statute. Scientific journals, the Food and Drug Administration (FDA), and numerous reports by investigative journalists all express concern about the dangers of teeth whitening by unlicensed, unsupervised non-dentists. See, for example, an FDA report regarding the concentrations of the chemicals commonly used in teeth whitening. Dept. of Health and Human Services, Food and Drug Administration, *Oral Health Care Drug Products for Over-the-Counter Human Use*; 21 CFR Part 356. <u>See also</u> Michel Goldberg, M. Grootveld, and E. Lynch, *Undesirable and Adverse Effects of Tooth-Whitening Products: A Review*, CLINICAL ORAL INVESTIGATIONS (Feb. 6, 2009). The potential of public harm is underscored by the Commission's own Consent Orders with national teeth-whitening marketers, condemning deceptive marketing practices. Indeed, the Commission's Consumer Protection Division apparently has an investigation currently open into similar allegations regarding teeth-whitening. Of course, the Commission's Competition Bureau either has overlooked those grounds for the State Board's enforcement, or has, without Congressional authorization or Commission rulemaking, unilaterally declared public protection regarding illegal local teeth-whitening to be to be exclusively the province of the federal government.

Many states' legislatures, dental boards, attorneys general, and courts, as well as the governments of the United Kingdom and other European Union countries have acted to limit the provision of teeth whitening services to licensed dentists in order to protect

the public. See, e.g., White Smile USA, Inc. v. Bd. of Dental Exam'rs of Alabama, 36 So. 3d 9, 13 (Ala. 2009) (affirming a lower court's holding that teeth whitening should be regulated as the practice of dentistry because of safety concerns); see also Okla. Op. Att'y Gen. No. 03-13 (Mar. 26, 2003), 2003 Okla. AG LEXIS 13, at *7-8; Kan. Op. Att'y Gen. No. 2008-13 (June 3, 2008), 2008 Kan. AG LEXIS 13 at 8; Mo. Ann. Stat. § 332.366 (all defining teeth whitening services as the practice of dentistry); see also Scientific Committee on Consumer Products, European Commission Health & Consumer Protection Directorate-General, Doc. No. SCCO/1129/07, OPINION ON HYDROGEN PEROXIDE, IN ITS FREE FORM OR WHEN RELEASED, IN ORAL HYGIENE PRODUCTS AND TOOTH WHITENING PRODUCTS (European Commission 2007).

That teeth whitening services provided without dentist supervision are inherently dangerous is a well-established fact. The State Board is charged with protecting the health and safety of the public. N.C. Gen. Stat. § 90-22(a). If the State Board had not enforced the state statute limiting the practice of dentistry (including stain removal) to licensed dentists, it would not only be failing its obligation to enforce state law, but it also would be failing in its stated mission of protecting the public. By preventing non-dentists from providing teeth whitening services, the State Board did not injure consumers; it protected them. The Commission does not have preemptive expertise in this arena and Congress has not adopted any signal that it intends to abandon the state action doctrine and deputize the Commission to micro-engineer states' licensing laws. The statute is plainly worded. Unauthorized teeth whitening service providers routinely market their services as "removal of stains from teeth." It is sufficiently clearly articulated that courts as well as other legal authorities have consistently understood that teeth whitening

removes stains from teeth. There is no legal ambiguity, but the interpretation of any theoretical ambiguity in the Dental Practice Act is within the province of the State Board established by law to do just that.

C. The State Board Does Not Need to Demonstrate Active Supervision to Qualify for State Action Immunity.

There is no precedent for requiring a state agency under these circumstances to prove "active supervision" of its enforcement of a clearly articulated and affirmatively expressed state law. The North Carolina State Board of Dental Examiners is a state agency. Complaint, p. 1; see also N.C. Gen. Stat. § 90-22(b); see also Gambrel, 689 F.2d at 618 n.2; see also Nassimos, No. 91-1319, 1995 U.S. Dist. LEXIS 21376 (D.N.J. Apr. 4, 1995), aff'd, 74 F.3d 1227 (3d Cir. 1995), cert. denied, 517 U.S. 1244 (1996); Brazil, 593 F. Supp. at 1362-63 ("[w]here an entity is designated to serve as the state's administrative adjunct for purposes of regulating a licensed profession, the entity is considered a state agency for purposes of the 'state-action exemption' to the federal antitrust laws"). For decades, state agencies have been granted state action immunity in all but one quite distinguishable case before the Supreme Court and other federal courts. Despite repeated pleas, the Commission has cited no authority for its radical position except In re South Carolina State Board of Dentistry, 136 F.T.C. 229 (2004). In that case, the court denied immunity to the South Carolina Board because the rule at issue was passed immediately following the enactment of a completely contradictory state law. In North Carolina, the State Board is enforcing a plainly worded, long-standing public protection prohibition against the unauthorized practice of dentistry. There is no case to support the Commission nor any clearly articulated act of Congress.

Disregarding all precedent, the Commission alleges that the State Board should be subject to a two-prong test to qualify for immunity; and it further alleges that the State Board will not satisfy this test. Pretrial Conference H'rg Tr. p. 33 *et seq.* First, the Commission claims that the restraint on trade must be a "clearly articulated and affirmatively expressed" state policy. Second, the Commission claims that the state must "actively supervise" the action at issue. Pretrial Conference H'rg Tr. p. 33 *et seq.*; see also Midcal, 445 U.S. 97, 106. This two-prong test is contrary to the standard used in the vast majority of cases involving state agencies to date.

The Supreme Court has not yet had the occasion to hold that state agencies are *ipso facto* immune under Parker.[8] However, the Supreme Court and federal courts from every circuit almost uniformly require that state agencies only meet, at most, the first prong of the Midcal test. This is the "clearly articulated and affirmatively expressed" prong. See, e.g., Earles, 139 F.3d at 1040 ("fortunately for the defendants, the [State Board of Certified Public Accountants] is functionally similar to a municipality and is also exempted from the active-supervision prong."); see also Brazil, 539 F. Supp. at 1361 (holding that if a nexus between a state agency and "state policies designed to quell competition" exists, then the agency's acts "take on the aura of state action and therefore evade antitrust scrutiny"); Neo Gen Screening Inc. v. New England Newborn Screening Program, 187 F.3d 24 (1st Cir. 1999); Nassimos, 1995 U.S. Dist. LEXIS 21376 at *10,

[8] The Supreme Court has also refrained from actually stating that only "clear articulation" and not "active supervision" is required.

From Town of Hallie v. City of Eau Claire, 471 U.S. 34, 46 (1985):

"In cases in which the actor is a state agency, it is likely that active state supervision would also not be required, although we do not here decide that issue. Where state or municipal regulation by a private party is involved, however, active state supervision must be shown, even where a clearly articulated state policy exists."

aff'd, 74 F.3d 1227 (3rd Cir. 1995), cert. denied, 517 U.S. 1244 (1996); Charley's Taxi Radio Dispatch Corp. v. SIDA of Hawaii, Inc., 810 F.2d 869 (9th Cir. 1987).

The second prong of the Midcal test is reserved for situations similar to Midcal: where private parties (in Midcal, a group of liquor retailers) are engaging in price-fixing arrangements with some degree of state supervision. 445 U.S. 97; see also Brazil, 539 F. Supp. at 1362 (citing Gold Cross Ambulance & Transfer, 705 F.2d at 1013-14 ("[t]he Supreme Court has required active state supervision of [a] challenged restraint only in cases in which the defendants were private entities or individuals"). The only conceivable way that the second prong of the Midcal test could be relevant to the instant case is if the State Board members acted as private individuals, engaging in a private price-fixing arrangement. Therefore, the Commission has insinuated that the State Board's dentist members acted "as a group of competitors" to restrict non-dentists from providing teeth whitening services. Pretrial Conference H'rg Tr. p. 70.

There is no legal support for the idea that the State Board members acted as private individuals. There is nothing in the factual record to suggest that price-fixing occurred. The State Board is a state agency; there are no private individuals named in this case, and there has not been any activity remotely resembling private or public price-fixing. Therefore, according to the cases cited above, and the Commission's own writings, an active supervision inquiry is neither relevant nor necessary. Task Force Report at 38, citing Crosby, 93 F.3d at 1524 ("[the] general test to determine whether active supervision is required examines whether the nexus between the State and the [entity in question] is sufficiently strong that there is little real danger that the [entity] is involved in a *private* price-fixing arrangement.") (emphasis in original).

According to the Commission, the fact that the State Board is composed mainly of dentists is another reason to require the State Board to demonstrate active supervision. Complaint, pp. 1-2; Task Force Report at 3. It is true that by law a majority of the State Board must be dentists. N.C. Gen. Stat. § 90-22(b). This is true in every state, not just North Carolina. However, the idea that a state licensing agency comprised of members of the licensed profession does not benefit from state action immunity has been put forth and rejected in numerous cases. In Earles, the court concluded that "[d]espite the fact that the State Board is composed entirely of CPAs who compete in the profession they regulate, the public nature of the State Board's actions means that there is little danger of a cozy arrangement to restrict competition." 139 F.3d at 1041.

The State Board also demonstrates the characteristics to which federal courts have looked in establishing that an entity does not require active supervision. In Hass v. Oregon State Bar, the court examined the characteristics of the state agency, concluding that:

> [T]he records of the Bar, like those of other state agencies and municipalities are open for public inspection. The Bar's accounts and financial affairs, like those of all state agencies, are subject to periodic audits by the State Auditor. The Board, like the governing body of other state agencies and municipalities, is required to give public notice of its meetings, and such meetings are open to the public. Members of the Board are public officials who must comply with the Code of Ethics enacted by the State legislature to guide the conduct of all public officials. These requirements leave no doubt that the Bar is a public body, akin to a municipality for the purpose of the state action exemption.

883 F.2d 1453, 1460 (9th Cir. 1989). The Commission's State Action Task Force Report also notes that various federal circuit courts have looked to issues such as "open records, tax exemption, exercise of government functions, lack of possibility of private profit, and the composition of the entity's decision-making structure" when determining whether

active supervision is required. Federal Trade Commission, REPORT OF THE STATE ACTION TASK (Sept. 2003) at 38 (citing Bankers Ins. Co. v. Florida Residential Prop. & Cas. Joint Underwriting Ass'n, 137 F.3d 1293, 1296-97 (11th Cir. 1998).

The State Board fully satisfies the requirements set forth in Hass and Bankers Insurance. The State Board's funds are public funds, and are subject to the oversight of the State Auditor. N.C. Gen. Stat. § 93B-6. The State Board's meetings, including those in which enforcement actions may be discussed, are subject to statutes governing the conduct of state government. N.C. Gen. Stat. § 143-318.9 *et seq.*; N.C. Gen. Stat. Chapter 132. As public officials, State Board members are sworn to uphold the North Carolina Dental Practice Act, and to comply with the state and federal constitutions. N.C. CONST. art. VI, §7. As a state agency, the State Board is exempt from the application of federal and state taxes, and cannot earn a private profit. State Board enforcement actions against unauthorized practice by statute must be pursued in court, either by civil injunction or criminal prosecution. N.C. Gen. Stat. § 90-41(a). Even disciplinary cases against licensees and declaratory rulings are subject to judicial review although they fall within the State Board's administrative jurisdiction. N.C. Gen. Stat. §§ 150B-4(a), 150B-43. In short, the State is heavily involved in the State Board's proceedings, by regulating its structure, funds, and overseeing its regulatory actions.

The Commission's State Action Task Force even admits that though "a particular instrumentality is not 'the state itself,' it may be enough like the state that courts will require only clear articulation and not active supervision." Federal Trade Commission, REPORT OF THE STATE ACTION TASK FORCE (Sept. 2003) at 19 n.70. For twenty years, federal courts have held that licensing boards are state agencies, and are entitled to state

action immunity. Based on the State Board's characteristics as a state agency, an inquiry into active supervision is not necessary to establish this immunity.

D. Even if Active Supervision Were at Issue, North Carolina's Structural Legal Oversight of This State Board Is Sufficient as a Matter of Law.

An evidentiary showing of active supervision of the State Board's actions is not required; nevertheless, the State Board's activities were actively supervised as a matter of law. The State Board is not required to show active supervision of its activities because it is a state agency forbidden by state law from directly serving private interests, rather than a private entity exercising delegated state authority. In fact, cases where courts even attempted to analyze active supervision for state agencies are few and far between. As the Commission itself has acknowledged, there is no settled case law establishing what "kind of state review of private actions … would constitute 'active' supervision, in terms of either the kind of scrutiny required by the state official or procedural requirements." Task Force Report at 52-53.

Case law discussing the issue of active supervision almost universally presumes that private parties are involved. This makes it difficult to translate to the instant facts, where the Commission itself has admitted that the Board is a state agency. Complaint, p. 1; see also, e.g., Patrick v. Burget, 486 U.S. 94, 100-01 (1988); see also, e.g., Federal Trade Comm'n v. Ticor Ins. Co., 504 U.S. 621, 634-35 (1992); see also e.g., Federal Trade Comm'n v. Indiana Fed'n of Dentists, 476 U.S. 447, 465 (1986). The Commission's State Action Task Force has settled on the requirement that states "have and exercise power to actually review particular anticompetitive acts." Task Force Report at 2. The State Board demonstrates active state supervision of its enforcement

actions against non-dentist teeth whitening service providers by the above-argued fact that it was acting pursuant to state law.

Even under the Commission's own unexplained and untested standard[9], the State Board shows, as a matter of law, that all of the purported market restrictions are subject to direct state oversight. If the State Board seeks to enjoin an illegal teeth whitening service, it must do so in court in the county in which the defendant resides or the conduct occurred. N.C. Gen. Stat. § 90-40.1. If the State Board pursues criminal prosecution, it must do so in Court. N.C. Gen. Stat. § 90-40. If the State Board adopts a rule on teeth whitening, it must do so pursuant to the state's Administrative Procedure Act, N.C. Gen. Stat. Ch. 150B; subject to the approval of the legislature's Rules Review Commission, N.C. Gen. Stat. § 150B-21.2(g); and subject to direct objection by the joint legislative Administrative Procedure Oversight Committee, N.C. Gen. Stat. § 120-70.100. If the State Board issues a binding interpretation of the statutes on teeth whitening it must do so pursuant to the Administrative Procedure Act. N.C. Gen. Stat. § 150B-4(a). If members of the State Board attempt to use it to directly advance their own economic interests, they are subject to removal by the North Carolina Ethics Commission. N.C. Gen. Stat. § 138A-31. Indeed, if the State Board were to engage in unreasonable restraints of trade or monopolization, it could be limited or declared unconstitutional pursuant to North Carolina's Constitution, Article I, Sec. 34.

In the few cases in which courts have even discussed the existence of active supervision for state agency actions, conclusions uniformly have been favorable to the situation of the State Board in this case. In a very similar case to this one, Gambrel v.

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[9] Nowhere in its State Action Task Force Report does the Commission specify any "active supervision" criteria.

Kentucky Board of Dentistry, the Sixth Circuit affirmed summary judgment to the defendant Board of Dentistry and dentists, upon a finding that they were immune from suit under the Sherman Antitrust Act. Gambrel, 689 F.2d at 621. When discussing active supervision, the Sixth Circuit concluded that there was no dispute on the issue, since the actions at issue in the case were undertaken directly pursuant to state law. Seeing the existence of a clearly articulated state policy as evidence of active supervision, the court concluded:

> First, the policy [at issue] emanates directly from the language of a state statute and not from any agreements by private individuals as in Midcal. Secondly, the powers of enforcement are expressly conferred upon the Board of Dentistry, and it appears that historically the Board has indeed acted to uphold and enforce the regulatory scheme. In fact, the enforcement of the statute by the Board against [the plaintiff] and others has been one of the impelling reasons for the commencement of this action.

Id. at 620. The issue in Gambrel was private individuals' (dentists') practice of refusing to give patients denture prescriptions, instead transferring those prescriptions directly to dental laboratories. The court found that this practice was based directly on a clearly articulated state law limiting the creation of dentures to persons licensed to practice dentistry. Id. at 614; see also Ky. Rev. Stat. § 313.010(2).

The court's conclusion in Gambrel is instructive to the instant case in several ways. First, it should be noted that the only reason that active supervision was even an issue in the case was because private dentists' actions were being challenged. In the instant case, the complaint is against the State Board itself; the individual dentists in North Carolina are not acting to shut down non-dentist teeth whitening service providers. Second, the court's conclusions regarding the issue of active supervision in Gambrel demonstrate just how irrelevant the issue is to the instant facts. The court recognized that

there was "no dispute" over whether active supervision exists. Id. at 620. This was because, as is true in this case, "the policy emanate[d] directly from the language of the state statute." Id. The policy was not invented by an agreement among private dentists. Most telling, the court in Gambrel held that since the policy to displace competition was enforced by a state licensing board (like the State Board in this matter), active supervision was present.

In Gambrel, the court found that the very fact that enforcement of a clearly articulated state statute occurred was sufficient to establish state action immunity. Similarly, the North Carolina State Board of Dental Examiners is a state agency, enforcing a clearly articulated state law that does not address price-fixing or commercial speech. Additionally, as a state agency, the State Board is subject to various forms of oversight by North Carolina. Therefore, the State Board does meet the Midcal active supervision requirement, though that requirement is not necessary to establish state action immunity.

II. The Statute Requiring the Majority of State Board Members To Be Dentists Does Not Make the Board a Per Se Antitrust Conspiracy.

The Commission alleges that since the majority of State Board members are dentists engaged in the business of teeth whitening, they are *per force* co-conspirators in a plot to restrain trade. Assuming for a moment that all of the present and former dentists on the State Board are engaged render teeth whitening services,[10] the conscious decision of the state legislature to mandate that a majority of the members are actual or potential competitors is the result of clearly articulated statutes and thus immune from the antitrust

[10] Although not essential to this Motion to Dismiss, the fact is that the Commission's dozens of depositions and subpoenas *duces tecum* of present and former Board members revealed that none have had more than a *de minimus* teeth whitening business, with some having none and others deriving less than one percent of their revenues from teeth whitening services.

laws. N.C. Gen. Stat. § 90-22(b) requires that the eight member board shall include "six dentists who are licensed to practice dentistry in North Carolina." As discussed further below, a second statute, N.C. Gen. Stat. § 138A-38(a) expressly allows such competitors to participate in board business even if it directly their own business so long as the competitive benefits to the members are "no greater than that which could reasonably be foreseen to accrue to all members of that profession…" The Complaint does not mention that statute, much less question whether is a clear articulation of a state policy restricting trade. Fatally, the Commission has failed to allege that present or former dentist members of the State Board had more of an interest in teeth whitening business than the profession at large. More fatally, the Commission has pled the opposite: "Dentists in North Carolina, acting through the instrument of the North Carolina Board of Dental Examiners [sic], are colluding to exclude non-dentists from competing with dentists in the provision of teeth whitening services." Inasmuch as the statutes explicitly sanction the very "conspiracy" which the Commission alleges, the Complaint fails as a matter of law under Parker v. Brown for the reasons stated earlier in this memo.

The Commission's conspiracy also fails as a matter of law because there are no allegations (nor any evidence) that the dentist members of the State Board have done anything other than interpret and enforce in good faith a state statute. In the light most favorable to the Commission, the Complaint deems all dentist members of the Board to be teeth whitening competitors and thus *per se* antitrust conspirators illegally restraining trade when they enforce a public protection law that coincidentally restricts the unauthorized practice of dentistry. The logical extension the Commission's conspiracy theory would inevitably would lead to the conclusion that any Board action against any

licensee restrains trade by reducing competition even if the conduct at issue is dangerous to the public and unlawful. Yet another logical extension would be to criminalize hundreds of state boards throughout the country if the majority of board members are licensees. Such a drastic measure surely requires at least a sliver of Congressional authority and at least a hint of one Supreme Court precedent. There are none.

The members of the State Board who are engaged in the practice of dentistry are also public officials, and are bound by law to only take enforcement actions to protect the public. See, e.g., N.C. Gen. Stat. § 14-230. State law requires members to disclose material conflicts of interest at any meeting and annually in financial reports.[11] N.C. Gen. Stat. § 138A-38(a) explains that merely being a practicing dentist on the State Board is not *ipso facto* a violation of the Ethics Act, nor, obviously, is the member a *per se* antitrust conspirator. As part of its *active supervision* of the State Board, the legislature has provided that a State Board member:

> may participate in an official action [if] the only interest or reasonably foreseeable benefit or detriment that accrues …is no greater than that which could reasonably be foreseen to accrue to all members of that profession, occupation, or general class.

N.C. Gen. Stat. § 138A-38(a)(1).

Further, the Commission's allegation that "Dentists in North Carolina, acting through the instrument" of the State Board are colluding in violation of the antitrust laws

[11] Ironically, the investigation that preceded the Commission's Complaint was apparently managed by a Commissioner who previously recused her self from tooth whitening related proceedings because a family member served as in-house counsel for a leading teeth-whitening product manufacturer. This is not to insinuate that any unlawful conduct occurred; it is only to point out one of several of the Commission's dual standards. The Commission deems all dentist members of the Board to be *per se* conspirators in violation of the antitrust laws merely because they might be enforcing a law that protects the public but coincidentally restricts competition. The same flawed perspective inevitably would lead to the conclusion that any Board action against any licensee restrains trade by reducing competition even if the conduct at issue is dangerous to the public and unlawful. It is likely that under the state's Ethics Act, such participation in a case would have constituted a conflict of interest.

conveniently overlooks well established doctrines that recognize to First Amendment rights of citizens and trade associations. These allegations in the light most favorable to the Commission are no more than unjustified, unauthorized and unsubstantiated attempts to make an antitrust conspiracy out of constitutionally protected efforts of trade associations to influence legislation or even agency policy. The Supreme Court has *clearly articulated* and consistently upheld the rights of those organizations to attend, to communicate with, to influence and even to lobby state agencies. See Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 135 (1961); United Mine Workers v. Pennington, 381 U.S. 657, 670 (1965); California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972) (holding that the Sherman Act does not apply to concerted efforts to influence the government regardless of intent or purpose). The Complaint has pled not agreement between private parties and the State Board and, in particular, has failed to assert that anything the "Dentists in North Carolina" have done is a sham.

As a state agency, the State Board's members are bound by ethics laws, banned from having conflicts of interest, and are presumed to be acting in good faith absent clear and convincing evidence to the contrary. See N.C. Gen. Stat. § 138A-2; N.C. Gen. Stat. § 138A-22(a); Withrow v. Larkin, 421 U.S. 35, 55 (1975). This is a presumption that should be familiar to the Commission, as it has served to protect the Commission's decisions on occasion. See, e.g., Federal Trade Comm'n v. Cement Institute, 333 U.S. 683 (1948). The State Board members understand that while serving on the State Board that they are under oath to uphold the Dental Practice Act. The law states: "The practice of dentistry in the State of North Carolina is hereby declared to affect the public health,

safety and welfare and to be subject to regulation and control in the public interest." The Commission's structural "conspiracy" theory ignores applicable state laws, Supreme Court precedence, the oaths that the State Board members have taken and the well-established presumption that licensing board members serve in good faith. As a matter of law, the Commission has failed to allege any contract, combination or conspiracy cognizable under federal antitrust laws. Moreover, the Complaint, on its face, pleads only conduct that is lawful.

CONCLUSION

All public protection occupational licensing laws coincidentally restrict trade. Without case law authority or Congressional authorization but contrary to clearly articulated state statutes and long-standing Constitutional principles, the Commission has consciously embarrassed, threatened and pilloried public officials for simply doing their sworn duty in good faith.

In the Commission's proposed relief, it seeks to force the State Board to ignore its own common sense understanding of the plain language in statutory definition of the practice of dentistry ("remove stains ... from teeth"), and adopt an additional review mechanism for its decisions outside the statutory framework. Such unauthorized meddling interposes the Commission's unauthorized judgment for that of the state legislature as well as the state judiciary and the executive branch. It is beyond the boundaries of the Commission's own authority, and well over the line of the Tenth Amendment to the U.S. Constitution. The Tenth Amendment line is frequently all that stands between a largely unaccountable federal entity wielding no Congressional authorization and sovereign states' ability to protect their citizens. If the State Board's

enforcement of the Dental Practice Act can be so easily undone, can any state occupational licensing agency continue to protect the public from unauthorized practice? What would the Commission do with the power to second guess state statutory definitions of every licensed occupation? Would licensing boards for attorneys, architects, doctors, professional engineers, cosmetologists, barbers, psychologists, nurses, or general contractors be able to stop unlicensed persons from engaging in unlicensed practice? The chilling effect is clear and premeditated.

For these reasons, the North Carolina State Board of Dental Examiners respectfully submits that this action should be dismissed in its entirety.

This the 3rd day of November, 2010.

ALLEN AND PINNIX, P.A.

/s/ Noel L. Allen

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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of November, 2010, I electronically filed the foregoing Memorandum in Support of Motion to Dismiss with the Federal Trade Commission using the Federal Trade Commission E-file system, which will send notification of such filing to the following:

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I hereby certify that the undersigned has this date served copies of the foregoing upon all parties to this cause by electronic mail as follows:

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I also certify that I have sent courtesy copies of the document via Federal Express and electronic mail to:

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This the 3rd day of November, 2010.

/s/ Noel L. Allen

Noel L. Allen

CERTIFICATION FOR ELECTRONIC FILING

I further certify that the electronic copy sent to the Acting Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and by the adjudicator.

/s/ Noel L. Allen

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