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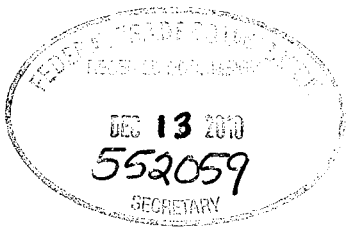

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

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

RESPONDENT'S MEMORANDUM IN OPPOSITION TO COMPLAINT COUNSEL'S MOTION FOR PARTIAL SUMMARY DECISION [CORRECTED]

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ARGUMENT

I. Introduction

A Tale of Two Agencies

As proclaimed on its webpage www.ftc.gov, the Federal Trade Commission's motto is "protecting America's consumers." The Federal Trade Commission ("Commission") is a federal agency established as the "nation's consumer protection agency." Indeed, the Commission claims that its "goal 1" is to "protect consumers." The North Carolina State Board of Dental Examiners ("State Board" or "Respondent") is also a government agency. It was established because "the practice of dentistry in the State of North Carolina is hereby declared to affect the public health, safety and welfare ..." N.C. Gen. Stat. § 90-22(a). The State Board was created "as the agency of the State for the regulation of the practice of dentistry in this State." N.C. Gen. Stat. § 90-22(b).

In 2008, a consumer had his teeth whitened at a kiosk at a mall in North Carolina.[1] The teeth whitening kiosk was operated by an individual who was not a licensed as a dentist or under the supervision of a dentist. The consumer chose the kiosk for its professional appearance. Shortly after receiving the teeth whitening, the consumer was on his honeymoon. As a result of the teeth whitening "treatment" the consumer received at the kiosk, his gum tissue was clinically burned, sloughed off, and would bleed spontaneously. He had to receive treatment from a dentist in Mexico. His long-term prognosis was that he would lose 10% of his gingival tissue.

[1] The entire transcript of the deposition testimony of this consumer is provided as an attachment to the *in camera* version of the Declaration of Alfred P. Carlton, Jr., filed in this matter on December 10, 2010.

The consumer contacted a local television station's consumer advocacy line and then filed a complaint with the State Board. The State Board began investigating the complaint and referred the consumer to a North Carolina dentist, who confirmed the consumer's injuries resulting from the kiosk teeth whitening. These events occurred in close proximity to the Commission's informing the State Board that it was the subject of an investigation into anticompetitive practices regarding teeth whitening businesses.

As a result of the Commission intrusion, the consumer's case was put on hold by the State Board. At depositions of both the consumer and the dentist who examined him after the teeth whitening incident, Complaint Counsels conducting the depositions badgered the witnesses in a fashion that would make a product-liability attorney proud. Prior to the consumer's deposition, Complaint Counsel communicated with him, at first incorrectly giving him the impression that the Commission was on the same side as the State Board and then, incorrectly telling him that because he had been "recently" identified as a witness by the State Board, he must travel to Washington, D.C. to be deposed. Commission attorneys attempted to force the examining physician to turn over the consumer's confidential medical information without his consent, despite clear federal laws to the contrary. During the dentist's deposition, State Board counsel obtained the consumer's consent to the release of the information. Again, the questioning of the dentist was antagonistic.

The State Board's mission statement is "to ensure that the dental profession merit and receive the confidence of the public and that only qualified persons be permitted to practice dentistry and dental hygiene in the state of North Carolina." *See* the State

Board's website at http://www.ncdentalboard.org/. As a state agency, the State Board's sole lawful purpose is to "protect the public." N.C. Gen. Stat. § 90-22(a).

The Commission did not protect the consumer, but attempted to thwart the State Board's efforts to protect him and other citizens of North Carolina. Because the consumer was one of many examples of consumers who have been actually physically harmed by illegal teeth whitening service providers, the Commission's attorneys threatened him, misled him, and abused him. Ironically, in a classic instance of the left hand not knowing what the right is doing, the Commission's Consumer Protection Division had entered at least two consent orders against teeth whitening businesses resolving allegations of deceptive and fraudulent marketing practices and had at least one other pending case against such operators.

The only state supreme court to consider the issue,[2] as well as several state attorneys general, determined that teeth whitening was the practice of dentistry.[3] The European Union as well as other nations has determined that the health and safety risks are so significant that teeth whitening services must be provided only by dentists. Indeed, teeth whitening kiosk operators openly market their services as "removing stains from teeth."[4] Nevertheless, the federal agency that claims its number one goal is consumer protection argues that teeth whitening is not really stain removal.

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[2] White Smile USA, Inc. v. Board of Dental Examiners of Alabama, 36 So. 3d 9 (Ala. 2009).
[3] Okla. Op. Att'y Gen. No. 03-13 (Mar. 26, 2003), 2003 Okla. AG LEXIS 13; Kan. Op. Att'y Gen. No. 2008-13 (June 3, 2008), 2008 Kan. AG LEXIS 13.
[4] Google search: "teeth whitening" "stain removal" (over 200,000 results on December 9, 2010).

B. Applicable Standard

In a motion filed on November 2, 2010, the Commission asked for a partial summary decision based on its argument that the State Board is not entitled to state action immunity. This argument raises a variety of genuine disputes of material fact, which in themselves would be enough to require a denial of the Commission's motion. However, the motion's flaws extend beyond the existence of such disputes. The Commission's Motion for Partial Summary Decision ignores Constitutional principles, congressional intent, and over two decades of federal case precedent. In an attempt to move its regulatory agenda forward, the Commission is attempting to strip the State Board of its power to protect the public by regulating the practice of dentistry in North Carolina.

Summary judgment (or here, summary decision) may only be entered "when there is no genuine issue as to any material fact and ... the moving party is entitled to such a decision as a matter of law." 16 C.F.R. § 3.24(a)(2). We will demonstrate in this memorandum that (1) the Commission's argument raises genuine disputes of material fact; and (2) as a matter of law, the Commission's argument does not entitle it to summary decision as to the question of state action immunity. To the extent the issues presented by the Motion for Partial Summary Decision are questions of law, Respondent directs the Commission's additional attention to Respondent's Memorandum in Support of Motion to Dismiss. Regarding profoundly and persistently false "Statements of Material Fact" submitted by Complaint Counsel, Respondent directs the Commission's attention to Respondent's Separate Statement of Material Facts as to Which There Are and Are Not Genuine Issues ("Counter Statement").

II. The State Board Is Not a Private Party; It Is a State Agency. Therefore, It Need Only Satisfy the First Prong of the Midcal Test.

The Commission argues that there are "three distinct modes of state action review, depending on the identity of the decision-maker." Complaint Counsel's Memorandum in Support of Its Motion for Partial Summary Decision (hereinafter "CC's Summary Decision Memorandum"), at 15. The memorandum correctly identifies these three modes as "(i) the decisions of the state as sovereign, (ii) the decisions of 'public' actors that are subordinate to and take their orders directly from the highest levels of state government, and (iii) the decisions of 'private' actors.'" Id. This is accurate; federal case law approaches state action immunity differently for these three actors. The Commission further argues that the State Board falls into category (iii), a private actor. As such, the Commission interprets the case law as requiring both prongs of the Midcal[5] test to be met: meaning that the State Board's actions must not only be taken pursuant to a clearly articulated state policy,[6] but must also be actively supervised by the state. This is where the Commission's argument breaks down. There is no relevant precedent supporting the argument that the State Board is a private actor. The State Board therefore only needs to show that it acted pursuant to a clearly articulated state policy.

This memorandum will explain why there is no legal precedent for asserting that the State Board is a private actor. Though the Commission has publicly stated its intention to make new laws that will allow it to control state agencies as though they are private actors, there is no support within the legislative or judicial branches of

[5] California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980).

[6] The Commission still argues that the North Carolina statute is not a "clear articulation," but its offer in settlement to allow the State Board to continue to enforce that statute (subject only to obtaining a pre-issuance opinion from another state official) belies the Commission's position. Indeed, the Commission has brought forth no evidence that any recipient of one of the State Board's cease and desist letters was ever required to stop doing anything that was lawful under the statute.

government for this sort of spontaneous rule-making. *See* FEDERAL TRADE COMMISSION, REPORT OF THE STATE ACTION TASK FORCE (Sept. 2003), at 55.

The Commission correctly characterizes Midcal and other cases as subjecting private parties to the more stringent two part test to establish state action immunity. However, the Commission is incorrect in its argument that the State Board is a private party. This is demonstrated by an analysis of each case the Commission cites in its argument; not a single one of these cases involves facts similar to the facts of this case, nor adheres to the most recent Supreme Court precedent on the subject.

The Commission has cited a number of cases with a re-occurring fact pattern wherein a state agency (sometimes a licensing board, sometimes not) delegates some power to private individuals (*e.g.,* the power to conduct peer reviews, or set rates or salaries). These private individuals, and sometimes by extension the state board, are accused of violating antitrust regulations. Sometimes, courts find that the state board supervised acts of these private individuals are protected by state action immunity; sometimes the courts find that they are not. Regardless of the outcome, these cares are of limited usefulness when analyzing the present facts.

The State Board's actions regarding stain removal occurred through the State Board itself; there was no quasi-independent group of private individuals involved. The letters sent to non-dentist teeth whitening service providers were sent at the direction of the State Board's officers and staff, without the involvement of third parties delegated power by the State Board. For example: the Commission cites language from Patrick v. Burget as requiring private parties' activities to be actively supervised by state officials. CC's Summary Decision Memorandum, at 17. However, in Patrick, the issue was not the

granting of state action immunity to the state board. The issue was whether the board's peer review program (private individuals) was subject to adequate state board supervision to be granted state action immunity. 486 U.S. 94, 95 (1988). The Commission's quotation of Patrick, "active supervision 'requires that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy'" refers to active supervision of the external peer review program; not the board itself. Id. at 105 (concluding that no state actor in Oregon actively supervised hospital peer-review decisions).

The Commission relies on a number of other cases similar to Patrick, and therefore not relevant to the instant facts. For example, the Commission asserts that the Court in Town of Hallie v. City of Eau Claire[7] cited Cantor v. Detroit Edison Co.[8] and Goldfarb v. Virginia State Bar[9] as examples of "private parties" claiming state action immunity. Therefore, the Commission claims that Hallie characterizes the Virginia State Bar, a state agency (in Goldfarb), as a private party. CC's Summary Decision Memorandum, at 22. It is correct that the party at issue in Cantor was a private party - a public utility commission, not a state licensing agency. In fact, the year after Cantor was decided, the Supreme Court opined that "obviously, Cantor would have been an entirely different case if the claim had been directed against a public official or public agency, rather than against a private party." Bates v. State Bar of Arizona, 433 U.S. 350, 361 (1977). However, it is flat-out wrong to assume that the Court in Hallie was calling state agencies, such as the Virginia State Bar in Goldfarb, private parties and requiring that they undergo active supervision. The exact meaning of the Hallie quote in regards to

[7] 471 U.S. 34 (1985).
[8] 428 U.S. 579 (1976).
[9] 421 U.S. 773 (1975).

Goldfarb is unclear. There were several parties to the case in Goldfarb, and the main action at issue was price fixing by a county-level bar association (*i.e.*, a private party). Second, the Court in Hallie held that "in cases in which the actor is a state agency, it is likely that active state supervision would also not be required." 471 U.S. at 46. If the Court really thought that the Virginia State Bar, a state agency, or another state agency was a "private party," it would have followed the standard it unanimously decided in Midcal, which the Hallie Court acknowledges requires all private parties to show active supervision. Id.

Most importantly, on the very next page of its opinion, the Court in Hallie held that "in cases in which the actor is a state agency, it is *likely that active state supervision would also not be required.*" 471 U.S. at 46 (emphasis added). If the Court really thought that the Virginia State Bar or another state agency was a "private party," why would it have included this exception for state agencies? Regardless of whether the Commission agrees with the Supreme Court's conclusion that state agencies are unlikely to need to demonstrate active supervision, it cannot dispute that in Hallie the Supreme Court distinguishes private parties from state agencies, and tends to exclude the latter from the second prong of the Midcal test. Id.

The Commission cites several other cases that supposedly equate state boards with private parties, but in fact just involve private parties acting separately from state boards, with questionable statutory justification or supervision. *See, e.g.*, City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365 (1991) (determining whether a city's ratification of a separate private party's conduct would accord that conduct state action immunity); *see also* Hoover v. Ronwin, 466 U.S. 558 (1984) (determining whether

the actions of a committee formed by the state supreme court should be accorded state action immunity); *see also* Washington State Electrical Contractors Ass'n, Inc. v. Forrest, 930 F.2d 736, 737 (9th Cir. 1991) (determining whether a state agency ratifying agreements between private parties should be accorded state action immunity). The Commission argues that these cases are evidence that the Supreme Court requires a showing of active supervision for entities other than state legislatures or state courts. However, the Court itself makes clear in its Ronwin decision that its findings in that case do not necessarily apply to state agencies: "This case does not present the issue of whether the Governor of a State stands in the same position as the state legislature and supreme court for purposes of the state-action doctrine." 466 U.S. at 569.

To support its claim that the State Board is a private individual, subject to the second prong of the Midcal test, the Commission puts forth the argument that the State Board is "financially interested." CC's Summary Decision Memorandum, at 17. The Commission claims that "Supreme Court precedent teaches that for state action purposes, a state agency is considered a private actor – in need of independent state supervision – when the agency or its controlling members have *a financial interest* in the market that is being restrained." CC's Summary Decision Memorandum, at 18, *emphasis added*. This statement is not correct; there is no such Supreme Court precedent. The Commission again cites the Supreme Court case of Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) in support of this argument. However, the facts of Goldfarb differ drastically from the instant facts. The issue in Goldfarb was price-fixing. 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), at 38 (citing Crosby v. Hospital Authority of Valdosta, 93 F.3d 1515, 1524 (11th Cir. 1996); *see also* AMERICAN BAR ASSOCIATION, STATE ACTION PRACTICE MANUAL (2d ed. 2010).[10]

To further its claim that Goldfarb provides support for its active supervision arguments, Complaint Counsel assert "the [Goldfarb] Court indicated that the Bar's anticompetitive price restraint would have been immune if it had been approved by the Virginia Supreme Court." CC's Summary Decision Memorandum, at 18. A more complete version of the same citation was included in the State Board's Memorandum in Support of Motion to Dismiss: "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." Goldfarb, 421 U.S. at 790. As shown in this complete quotation, the Supreme Court in Goldfarb was searching for some sort of statutory or rules-based authorization for the Virginia State Bar's actions, a clearly articulated state policy, not active supervision. This statutory justification would satisfy the first prong of the Midcal test (if the Midcal test had even been articulated yet; Goldfarb predates Midcal by nearly a decade). Further, as discussed in the State Board's Memorandum at page 20 *et seq.*, such clearly articulated statutory language was present in the instant case.

The Commission tries to argue that Hallie's language ("in cases in which the actor is a state agency, it is likely that active state supervision would also not be required")

[10] Price-fixing was at issue in a number of other cases that the Commission cited as support. *See, e.g.*, Arizona v. Maricopa County Medical Society, 457 U.S. 332, 350-351 (1982); California Retail Liquor Dealers Ass 'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980); FTC v. Ticor Title Insurance Co., 504 U.S. 621 (1992).

only refers to "the vast majority of state agencies [which] are comprised of members with little or no financial interest in the outcome of their decisions, and who are accountable to the public at large, not the regulated." Hallie, 471 U.S. at 46; CC's Summary Decision Memorandum, at 22. The Supreme Court included no such caveat in its blanket statement that state agencies are likely excluded from the second prong of the Midcal test, and subsequent federal case law does not support this argument.

The Commission tries to excuse the "vast majority of state agencies" from having to meet the second prong of the Midcal test, arguing that they have "little or no financial interest in the outcome of their decisions," and are "accountable to the public." CC's Summary Decision Memorandum, at 22. However, it is unclear how the North Carolina State Board of Dental Examiners could be distinguished from vast majority of dental, medical, veterinary, nursing, engineering, architecture, and accounting licensing agencies of all other states in this regard. The composition and selection of the North Carolina State Board of Dental Examiners (mostly dentists) is typical for licensing agencies in every state. The few post-Hallie cases that find state agencies not immune are distinguishable from the instant situation for reasons far more significant than the fact that many of their members practice the profession that they regulate.

A further weakness of the Commission's reliance on Goldfarb is that the standard it sets forth has evolved and changed in the thirty-five years since the case was decided. In those intervening decades, the Supreme Court has relaxed the requirements for showing authorization in state law.[11] During these decades, the Supreme Court has refrained from endorsing a hard and fast rule regarding the standards a state agency must

[11] 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, Inc. v. United States, 471 U.S. 48, 58 (1985).

meet to establish state action immunity. However, the case law on the subject is firmly established. The Supreme Court has held that for state agencies, it is "likely" that a showing of active state supervision is unnecessary. Hallie, 471 U.S. at 46.

In the years since Hallie set forth this presumption against a showing of active supervision, federal courts have again and again upheld the general principle that state agencies – especially those that are not ratifying the acts of private individuals – must only satisfy the first prong of the Midcal test. *See, e.g.,* Hass v. Oregon State Bar, 883 F.2d 1453, 1461 (9th Cir. 1989); *see also* Earles v. State Board of Certified Public Accountants of Louisiana, 139 F.3d 1033, 1041 (5th Cir. 1998); *see also* Bankers Insurance Co. v. Florida Residential Property & Casualty Joint Underwriting Ass'n, 137 F.3d 1293, 1296 (11th Cir. 1998); *see also* Gambrel v. Kentucky Board of Dentistry, 689 F.2d 612 (6th Cir. 1982); *see also* Brazil v. Arkansas Board of Dental Examiners, 593 F. Supp. 1354, 1362 (E.D. Ark. 1984), aff'd, 759 F.2d 674 (8th Cir. 1985). These are explained in more detail in the State Board's Memorandum in Support of Motion to Dismiss. They are mentioned only in passing in the Commission's Memorandum, in a footnote, where instead of being discussed or refuted, they are simply called "poorly reasoned." CC's Summary Decision Memorandum, at 25 n. 72.

Respondent has identified a number of additional cases that the Commission must also see as "poorly reasoned." In these cases, as in the cases mentioned by the Commission above, federal courts of appeals upheld state action immunity for state agencies without examining the question of active supervision. *See, e.g.,* Neo Gen Screening Inc. v. New England Newborn Screening Program, 187 F.3d 24 (1st Cir. 1999); Charley's Taxi Radio Dispatch Corp. v. SIDA of Hawaii, Inc., 810 F.2d 869 (9th

Cir. 1987); Nassimos v. N.J. Board of Examiners of Master Plumbers, No. 94-1319, 1995 U.S. Dist. LEXIS 21376, at *10 (D.N.J. Apr. 4, 1995), aff'd, 74 F.3d 1227 (3rd Cir. 1995), cert. denied, 517 U.S. 1244 (1996).

Dismissing the standards set forth in these and other cases, the Commission's argument rests heavily on a handful of pre-Hallie cases, such as Bates v. State Bar of Arizona, 433 U.S. 350 (1977). In Bates, the Court confirmed that the State Bar's actions were protected by state action immunity. The State Bar was closely tied to the Arizona Supreme Court, a fact that the Court used to distinguish the case from other cases where state action immunity was not found to exist. However, Bates's examination of active supervision does not establish a strong precedent for this case. Bates preceded Hallie; Bates reached a finding favorable to the state agency at issue; and Bates was subsequently followed by decades of cases that did not examine the second prong of the Midcal test for state agencies.

In addition to attempting to draw parallels between the instant case and the situations of state agencies acting through dramatically different structures, the Commission relies heavily on a collection of case law that does not actually involve state agencies. These cases do not involve government entities at all; in fact, state action immunity is not at issue in any of these cases. However, the Commission attempts to twist them into support for the notion that a state agency, rather than being "likely" not subject to the second half of the Midcal test, should be required to show active supervision.

Complaint Counsel cites a number of cases involving private membership organizations in an effort to show that the Supreme Court "invariably and without

preamble recognizes that professional associations are economic actors who protect their own financial interest given the opportunity." CC's Summary Decision Memorandum, at 28; *see also, e.g.,* Arizona v. Maricopa County Medical Society, 457 U.S. 332, 350-351 (1982); *see also* FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411 (1990); *see also* Kreuzer v. American Academy of Periodontology, 735 F.2d 1479 (D.C. Cir. 1984); *see also* National Society of Professional Engineers v. United States, 435 U.S. 679 (1978) (all dealing with private membership organizations, not state entities; state action immunity was not even at issue). This attack, based on cases dealing with different issues and dramatically different entities, might carry more weight if the State Board was a private membership organization, rather than a state agency.

Some of the Commission's particularly off-base cases deserve special mention. The Commission cites Asheville Tobacco Board of Trade v. FTC, 263 F.2d 502 (4th Cir. 1959), as an example of a Fourth Circuit case supporting "the need for active supervision where those who are being regulated are also doing the regulating." Unfortunately for the Commission, the court in Asheville Tobacco decided that the Tobacco Board of Trade was not actually a state agency. This conclusion was reached after an analysis of the Tobacco Board's characteristics: it was "organized primarily for the benefit of those engaged in the business; its articles of association and bylaws constitute a contract amongst the members by which each member consents to reasonable regulations pertaining to the conduct of the business." 263 F.2d at 509. The officers and directors of the board were not elected by North Carolina citizens, appointed by the State, or even "accountable to the State." The Tobacco Board was not required to comply "with a North Carolina statute which directs each State agency to file with the Secretary of State all

rules and regulations adopted by the agency for the performance of its functions." 263 F.2d at 510. In all of these characteristics, the Tobacco Board differs significantly from the Respondent.

The Commission sets forth another off-base argument in its Memorandum regarding Kentucky Household Goods Carrier Ass'n, 139 F.T.C. 404 (2005). The issue in this case was whether a private membership organization met both prongs of the Midcal test by being supervised by state agency; not whether a state agency is required to meet both prongs of the Midcal test. The Commission presents this case as an example of a case where an "apparatus" is in place to provide active supervision. However, this apparatus is actually a state agency, the Kentucky Transportation Cabinet. 139 F.T.C. at 407 ("The KTC is the state agency authorized to fix or approve the rates charged by household goods carriers."). Therefore, the Commission in Kentucky Household Goods has concluded that a state agency itself may provide active supervision.

The Commission reaches further back to even earlier days in the development of the state action doctrine to create the illusion of precedent for its actions. Two decades before Midcal was even decided, the Supreme Court held that a private corporation appointed as an agent of the Canadian government was not entitled to immunity from the Sherman Act. Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 707-08 (1962). It is a mark of the Commission's complete lack of supporting case law that some of the best precedent they can come up with is a fifty year old case, preceding the active supervision notion by decades. Further, this case does not deal not with a state licensing agency, or even a U.S. state, or even a governmental body of any kind, but rather a foreign corporation. Therefore, of course, state action immunity was not once

mentioned in the Supreme Court opinion. In fact, the Court in Continental Ore Co. distinguishes the Canadian corporation's actions from the actions at issue in Parker v. Brown, 317 U.S. 341 (1943), explaining that that decision, "which sustained the validity of mandatory state or federal governmental regulations against a claim of antitrust illegality [was] wide of the mark." Continental Ore Co., 370 U.S. at 706. In Continental Ore Co., "petitioners do not question the validity of any action taken by the Canadian Government." Id. at 706. Respondent does not see how a case involving a foreign corporation acting through a foreign government to exclude competitors provides useful instruction for the hundreds of state-created, state-supervised licensing agencies that are charged with upholding state laws.

Lacking case law to support its arguments (aside from Bates and a handful of other distinguishable, pre-Hallie cases), the Commission relies on the opinions of law professors. Citing an antitrust treatise and a law review article, the Commission claims that State Board members are financially interested. *See,* e.g, CC's Summary Decision Memorandum, at 23, citing Areeda & Hoovenhamp, *Antitrust Law* and Einer Elhauge, *The Scope of Antitrust Process,* 104 Harv. L. Rev. 668 (1991). While these articles may provide the support the Commission wants, they are not cases, and so they carry minimal weight in an analysis of the issues in the instant case.

The Commission also relies on a third category of cases: in its memorandum: cases where a state agency or a municipality has failed to establish that it is entitled to state action immunity because it fails to satisfy the first prong of the Midcal test. *See, e.g.,* Community Communications Co. v. Boulder, 455 U.S. 40 (1982) (respondent municipality's actions were not undertaken pursuant to a clearly articulated, affirmatively

expressed state policy because the state was neutral on the subject at issue); *see also,* FTC v. Monahan, 832 F.2d 688 (1st Cir. 1987) (the court held that discovery should continue in a case because the state board's rules needed to be examined to determine whether they were based on clearly articulated state law); Massachusetts Board of Registration in Optometry, 110 F.T.C. 549, 1988 FTC LEXIS 34, at *36 (1988) (there was no statutory "mandate or authorization" for the Board's rules on advertising; active supervision was not even discussed in the case, "as complaint counsel and Respondent agree that the Commonwealth need not demonstrate active supervision to establish state action immunity in this case.")

The Commission's Complaint alleged that the State Board is "a state agency," yet does not cite any post-Hallie cases in which a state agency was not granted immunity for enforcing a state statute. There are no post-Hallie cases in which an actual state agency comprised of sworn state officials, enforcing a statute has been found not immune. So, naturally, there is little guidance for the characteristics of a state agency worthy of the Commission's new theory of limited immunity. Hallie dealt with a municipality (which some commentators have suggested might deserve less immunity than an agency with statewide responsibility). As explained above, the other cases mentioned by Complaint Counsel do not involve state agencies, or do involve a restrictive rule rather than a statute, and/or involve outright price fixing.

In the Motion to Dismiss, Respondent discussed California Dental v. FTC as an example of the Supreme Court's reasoning vis-à-vis an entity's financial interest in regulation. The Commission dismisses this analysis outright, because the State Board is not the type of organization at issue in California Dental. Whether the State Board is a

nonprofit is irrelevant; the discussion of California Dental is more nuanced and relevant than the Commission would like to admit. Although a state agency was not the defendant in California Dental Ass'n v. FTC, 526 U.S. 756 (1999), the Supreme Court's reasoning in that case does show how the State Board, as a state agency, is treated differently than a "corporation" which is either operating for its own profit or for the profit or benefit of its "members." *See* California Dental, 526 U.S. at 767.

At issue in California Dental was the limit to the Commission's jurisdiction over non-profit organizations. The California Dental Association was a non-profit private association helping its dues-paying members; the Court decided that based on the Association's work on behalf of members, it was subject to Commission jurisdiction. As both the Dental Board and the Commission acknowledge, the Court's analysis in California Dental is not completely determinative to the instant facts. However, it does shed light on the question of what issues the Court looks to when deciding if an organization is operating for the profit of its members, or the public. Unlike the California Dental Association, the State Board is wholly a state instrumentality. It is not a separate entity, not a person in its own right, not an association or a corporation of any sort. As it is a state agency it is expressly forbidden from engaging in for-profit activities or promoting the profit interests of anyone. The State Board is a state agency, and its members are sworn to protect the public and required by statute to avoid conflicts of interest.[12]

As the Court in California Dental explained:

> Proximate relation to lucre must appear; the FTC Act does not cover all membership organizations of profit-making corporations without more,

[12] *See* Exhibit 1, Newson Supplemental Declaration; Exhibit 2, current and former Board members Declarations, ¶¶ 4-6.

> and an organization devoted solely to professional education may lie outside the FTC Act's jurisdictional reach, even though the quality of professional services ultimately affects the profits of those who deliver them.

526 U.S. at 767. Thus, even a trade association is not automatically subject to the FTC Act. And as stated and restated, the State Board is a state agency and NOT a trade association whatsoever. Further, according to the Court in California Dental,

> the Federal Trade Commission Act ... does not require for [FTC] jurisdiction that members of an entity turn a profit on their membership, but only that the entity be organized to carry on business for members' profit; nonetheless, the United States Supreme Court, in determining whether FTC jurisdiction extends to a nonprofit association that provides substantial economic benefits to its for-profit members, will not--and on the facts in the instant case, cannot--decide whether the FTC has jurisdiction over nonprofit organizations that do not confer profit on for-profit members but do, for example, show annual income surpluses, engage in significant commerce, or compete in relevant markets with for-profit players; the court therefore does not (1) foreclose the possibility that various paradigms of profit might fall within the ambit of the Act, or (2) decide whether a purpose of contributing to profit only in a presumed sense, as by enhancing professional educational efforts, would implicate FTC jurisdiction.

526 U.S. at 768.

The U.S. Supreme Court has never parsed how the state agency in any particular case before it was populated. That is and remains a state prerogative. One must seriously doubt whether even Congress could question that. Indeed, "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." Hallie, 471 U.S. 34, 46 (1985).

The most recent example of such a case is found in South Carolina State Board of Dentistry, 136 F.T.C. 229 (2004). The Commission cites this case in its argument that the State Board has not met the Midcal requirement of a clearly articulated state policy.

However, in that case, the South Carolina Board was not just acting without a clearly articulated state policy to direct its actions; it attempted to create a rule that completely opposed a recently passed state law. 136 F.T.C. at 231.

The alleged restraint of trade at issue in the instant case is not a rule or policy but the foreseeable state agency enforcement of a statute which makes it illegal for anyone to offer or render or hold themselves out as qualified to provide the service of removing stains from teeth or making molds or dental impressions without being licensed. The State Board in all respects would be more worthy of state action immunity than the beneficiary of the exemption in Automated Salvage Transport, Inc. v. Wheelabrator Environmental Systems, Inc., 155 F.3d 59 (2d Cir. 1998). The Second Circuit explained:

> In the face of this compelling case for the application of the Parker doctrine, plaintiffs rely on language in Federal Trade Comm'n v. Ticor Title Ins. Co. [citation omitted] suggesting that "state-action immunity is disfavored)," and essentially ask us to ignore binding Supreme Court and Second Circuit precedent.

155 F.3d at 73. However, the Court determined that Ticor was not relevant, as it was a private price-fixing case that centered in the issue of active supervision of private parties: "Indeed, the Federal Trade Commission had conceded [in Ticor] that the challenged conduct was foreseeable and contested only the adequacy of the "state participation in the rate setting scheme." Id. The Court in Ticor demanded active supervision to ensure that the setting of rates and prices was accomplished by the state, not just by private actors. Id. Most significantly to the instant facts, the court in Automated Salvage concluded that the Supreme Court:

> expressly limited its holding in Ticor to private "horizontal price fixing under a vague imprimatur in form and agency inaction in fact." Id. at 639. After observing that "no antitrust offense is more pernicious than price fixing," the Supreme Court concluded: "Our decision should be read in

> light of the gravity of the antitrust offense, the involvement of private actors throughout, and the clear absence of state supervision. We do not imply that some particular form of state or local regulation is required to achieve ends other than the establishment of uniform prices."

155 F.3d at 74. Thus, the court differentiated Ticor from a case involving an actual state agency:

> Ticor has no relevance here; the present case does not involve price fixing. Nor is the close supervision test applied in Ticor applicable to state agency conduct. [citation omitted] This case is, therefore, an easy one in every respect. There is a compelling argument that CRRA should be treated in the same way as the State of Connecticut for the purposes of the Parker doctrine. ... Indeed, even under a foreseeability standard far more narrow than these cases require, the alleged anticompetitive conduct was simply conduct of a lesser magnitude than that authorized by the General Assembly.

Automated Salvage, 155 F.3d at 74.

The distinctions discussed here are not a matter of semantics. The State Board is not stretching statutory language to fit an anticompetitive purpose. Courts, attorneys general, and numerous other State Boards have similarly understood and enforce the plain meaning of statutes that include the offering or rendering of the service of "removal of stains from teeth" in the definition of the practice of dentistry. As in Automated Salvage, the alleged restraint is not price fixing; it is a state agency carrying out a statutory mission to protect the public.

The State Board's enforcement efforts are not only reasonably foreseeable, but mandated by statute. Semantics (such as claiming that the teeth whitening process did not "remove stains" but only bleached them) defy common sense as well as logic and would leave the State Board unable to enforce the same statute if unlicensed persons were offering curbside teeth cleaning services. The Legislature clearly intended to require that persons using dangerous chemicals and light equipment in consumers' mouths must have

special training and skills and be subject to the ethics and conduct standards applicable to licensees. Equally clear, by statute the State legislature explicitly authorized the State Board to enforce that statute.

The Commission's argument is that if a state regulates a profession and establishes a state agency to accomplish that public protection purpose, it cannot allow the majority of the state officials responsible for that agency to be licensees. That is an artificial *per se* position that would even prohibit a state from establishing a department of dentistry headed by a licensed dentist.

The State of North Carolina has not delegated regulation of the practice of dentistry to a "guild." It has seen the value of empowering a panel of experts to regulate this field in much the same manner as a state might choose to do so with regard to the practice of law (the practice is governed by a State Bar and State Courts which are panels of experts).

Nevertheless, in North Carolina, because of state constitutional requirements, the state has gone to great lengths to be sure that the dentists on the State Board are not private actors while serving in their capacities as members of the Board. They are state officials and are affirmatively required to act in the public interest.

The state has also established a complex, vital, and active system of safeguards to assure that the licensee members of the State Board serve the public and not their private interests through their actions on the Board. Aside from direct statutory controls on the individual Board members, there are other safeguards including a requirement that before anyone is restrained or enjoined from the unauthorized practice of dentistry, they must

have their day in court in the county in which they reside.[13] Additionally, the Legislature has a special committee whose charge is to monitor and assure that state boards do not exceed their statutory authority.[14]

Indeed, the State has proactively ensured that licensees put aside their private interests and enforce the Dental Practice Act for public purposes. The state has done so by requiring an oath of each Board member,[15] requiring initial and annual detailed financial disclosures to a state Ethics Commission,[16] limiting expenditures,[17] prohibiting the use of funds for lobbying,[18] and subjecting the State Board as a state agency to all of the requirements that any other state agency has, including the open meetings law,[19] the Public Records Act,[20] and the Administrative Procedure Act.[21] The State also requires that each State Board member receive regular Ethics Act training.[22] A State Board member who fails to comply is subject not only to potential for removal from office, but also criminal prosecution.[23] Despite a fishing expedition of monumental proportions, the Commission has not found a single scrap of evidence that any State Board member has ever "colluded" or voted in their private rather than public interests.

The State Board is complaint-driven. It has never sent out investigators looking for teeth whitening kiosks. The State Board has never interpreted or enforced the Dental Practice Act as prohibiting over the counter sales of teeth whitening products. The State

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[13] N.C. Gen. Stat. § 7A-3.
[14] N.C. Gen. Stat. § 120-70.101.
[15] N.C. Gen. Stat. § 128-5.
[16] N.C. Gen. Stat. § 138A-22(a).
[17] N.C. Gen. Stat. §§ 93B-2(b) (annual financial report) and 93B-4 (audit requirement).
[18] N.C. Gen. Stat. § 93B-6.
[19] N.C. Gen. Stat. § 143-318.9 *et seq.*
[20] N.C. Gen. Stat. § 132-1 *et seq.*
[21] N.C. Gen. Stat. § 150B-1 *et seq.*
[22] N.C. Gen. Stat. § 138A-14.
[23] N.C. Gen. Stat. § 138A-45(b).

Board's enforcement of the Dental Practice Act is not a naked restraint of trade but a public protection measure based upon actual evidence of harm.

Federal antitrust laws do not empower the Commission to require a state to establish two separate state agencies to regulate a professional practice. As explained in case after case, if the defendant is a private party hiding behind a claim of state action, the private party has more to prove in order to benefit from the immunity provided to the states. In that sense, the "state action doctrine" is derived from the constitutionally guaranteed immunity that states (and state agencies and state officials) have as a matter of right under the U.S. Constitution, Tenth and Eleventh Amendments. Arguably, Congress could legislatively extend the Commission's jurisdiction to include teeth whitening services. Congress has not done so.

Indeed, in Patrick v. Burget, 486 U.S. 94 (1988), the Supreme Court pointed out that the entire purpose of the two-prong Midcal test was to address state supervision of private conduct.

> Although Parker involved a suit against a state official, the Court subsequently recognized that Parker's federalism rationale demanded that the state-action exemption also apply in certain suits against private parties. ... If the Federal Government or a private litigant always could enforce the Sherman Act against private parties, then a State could not effectively implement a program restraining competition among them. The Court, however, also sought to ensure that private parties could claim state-action immunity from Sherman Act liability only when their anticompetitive acts were truly the product of state regulation. We accordingly established a rigorous two-pronged test to determine whether anticompetitive conduct engaged in by private parties should be deemed state action and thus shielded from the antitrust laws. [*citing* MidCal] ... Only if an anticompetitive act of a private party meets both of these requirements is it fairly attributable to the State.

Patrick, 486 U.S. at 99-100. The State Board is a state agency, or a private party acting based on the delegation of state power. Each step the State Board takes as a state agency must be done in compliance with laws that apply to any other state agency.

Section Four of the Federal Trade Commission Act gives the Commission authority in certain matters regarding "persons" and "corporations." The term "corporation" is broadly and well defined and discloses the intent of the legislation by requiring that although a "corporation" can be merely an association, incorporated or unincorporated, it must be "organized to carry on business for its own profit or that of its members." 15 U.S.C. § 44.

The State Board is barred by state statute from carrying on business for its own profit or for that of its members under the State Government Ethics Act, N.C. General Statutes Chapter 138A. "It is further declared to be a matter of public interest and concern that the dental profession merit and receive the confidence of the public and that only qualified persons be permitted to practice dentistry in the state of North Carolina. This Article shall be liberally construed to carry out these objects and purposes." N.C. Gen. Stat. § 90-22(a). Indeed, the title of this particular section of the statute is "Practice of Dentistry Regulated in Public Interest." N.C. Gen. Stat. § 90-22.

The statute also states, "the practice of dentistry in the state of North Carolina is hereby declared to affect public health, safety and welfare, and to be subject to regulation and control in the public interest." N.C. Gen. Stat. § 90-22(a). Further, "the practice of dentistry by any person who has not been duly licensed ... is hereby declared to be inimical to public health and welfare and to constitute a public nuisance." N.C. Gen.

Stat. § 90-40.1(a). Per N.C. Gen. Stat. § 90-48, the State Board "shall be and is hereby vested as an agency of the state with full power and authority..."

The Tenth Amendment as well as the Separation of Powers Clause of the U.S. Constitution prevents the Commission from usurping clearly articulated state statutes without clearly articulated authorization from Congress. The Tenth Amendment, adopted in 1791, provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." U.S. CONST. amend. X.

III. The Commission Cannot Stretch Its Congressional Authorization to Directly Encroach Upon State Prerogatives to Not Only Regulate Professions but to Use Independent, Panels of Experts.

In the Federal Trade Commission Act ("FTC Act"), Congress did not clearly articulate an intention to extend the Commission's jurisdiction over state agencies. First, the State Board is not any entity as described in the FTC Act. It is not, and cannot be either by statute or state constitution, "organized to carry on business for its own profit or that of its members." 15 U.S.C. § 44 (defining "corporation"). Per Section 45, "[t]he Commission is hereby empowered and directed to prevent persons, partnerships, or corporations ... from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(2). *Also see* 15 U.S.C. § 57b(a)(1) ("If any person, partnership, or corporation violates any rule under this Act respecting unfair or deceptive acts or practices . . . then the Commission may commence a civil action against such person, partnership, or corporation for relief under subsection (b) in a United States district court or in any court of competent jurisdiction of a State.") "Corporation" is defined to include "any company,

trust, so-called Massachusetts trust, or association, incorporated or unincorporated, without shares of capital or capital stock or certificates of interest, except partnerships, which is organized to carry on business for its own profit or that of its members." 15 U.S.C. § 44.

The Commission's extra-congressional effort to extend its jurisdiction without legislative approval is unconstitutional. Federal laws will only preempt state laws or regulation if: (1) Congress specifically provides for preemption; (2) Congressional intent is to occupy the field in question; or (3) there is "actual conflict" between federal and state provisions. AMERICAN BAR ASSOCIATION, ANTITRUST LAW DEVELOPMENTS (5th ed. 2002), at 815. None of those criteria are satisfied in the instant case.

IV. There Is No Evidence That Licensee Board Members Were Ever Functioning as Private Actors.

There are no private actors in the instant case. State law prohibits the members of the State Board from acting privately. There are no private actors named as defendants in this action. The State Board members have at most a nominal financial interest in the effect of their enforcement of a state law on stain removal. Nothing in the entirety of the Commission's "evidence" indicates more than a miniscule interest of zero to less than one percent of overall revenue being derived from teeth whitening revenue for present or former dentist board members. To rule otherwise would undermine an important presumption that the Commission, itself, has relied upon.

The members of the State Board are not private parties as a matter of law. They are repeatedly, explicitly barred from self-aggrandizement or "private action."[24] A state's statutory decision to regulate dentistry through a state agency compromised of a majority

[24] *See* Exhibit 2, Declarations of present and former State Board Members.

of licensees is entitled to state action immunity. As more fully explained in the Respondent's Memorandum in Support of Its Motion to Dismiss, the state of North Carolina proactively bans any such private interest through a state constitution prohibition,[25] through a separate Ethics Commission empowered to enforce bans on conflicts of interest,[26] through criminal sanctions, through oaths of office, through mandatory ethics courses, and regular financial disclosure requirements. For purposes of North Carolina law, as well as for the federal antitrust laws, the licensee members are public officials and must conduct themselves accordingly in all State Board matters. And, as iterated in Respondent's Motion to Dismiss Memorandum, such State Board members deserve the presumptions as set out in Withrow v. Larkin, 421 U.S. 35, 47 (1975) (presumptions of honesty and integrity). Yet without any evidence of self-dealing or bad faith, the Commission alleged conspiracy and collusion. The Commission has not met any part of its burden to overcome the Withrow presumptions.

V. The Commission's Position Hinges Upon *Per Se* Illegality of Majority Licensee Boards.

This instant case is a collateral attack on a state prerogative to determine the most effective means for protecting its citizens. The question posed in the case is who gets to decide how a state agency is comprised? Historically, the state itself has the power to establish a state agency, and build into that agency structure the necessary safeguards to protect it from bias and other undesirable conduct. By attacking the composition of the State Board, the Commission is trying to take the power of establishing state licensing boards away from the states.

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[25] N.C. CONST. art. I, § 34. This provision has been used in the state's Supreme Court to strike down entire licensing board statutes. Indeed, North Carolina adopted its antitrust act in 1889, a year before the Sherman Act.

[26] *See* Exhibit 1, Newson Supplemental Declaration.

The Commission cannot skate past its burden of proof in this matter by ignoring the presumption of the board members' good faith, not to mention their compliance with numerous statutes and constitutional requirements, and offer that merely because a member is a dentist, he or she must be acting privately for their own benefit. Taken to its logical conclusion, the Commission's argument renders all licensee majority licensing boards as *per se* illegal.

VI. The Cease And Desist Letters Were Truthful, Lawful, Commonplace Administrative Tools Based Upon *Prima Facie* Evidence and Never Shown to Deter a Single Lawful Teeth Whitening Business.

As documented in the Respondent's Counter Statement, the cease and desist documents were sent only when there was *prima facie* evidence of a violation. Sometimes the evidence was marketing material; sometimes it was an eye witness complaint. Further, the letters were sent as a result of third-party complaints. The State Board staff did not look for violations on their own accord.

The general form of the cease and desist letters was a customary and widely accepted method of enforcing prohibitions on unauthorized practices and was consistent with administrative agency practices in North Carolina and throughout the country. Such orders are common among state and federal agencies and even private parties. The cease and desist letters stated only that the recipient is to cease and desist "any and all activity constituting the practice of dentistry or dental hygiene" and then provided verbatim the relevant part of the statute. The vast majority of cease and desist letters do not mention "teeth whitening" nor state that all teeth whitening is illegal. Further, the Commission has not presented evidence of a single instance in which anyone receiving such a letter stopped doing anything that was not prohibited by law.

The legislature has given the State Board the authority to "liberally construe" the Dental Practice Act to protect the public and to enforce the unauthorized practice provision: N.C. Gen. Stat. § 90-22(a). The statutes offer at least as much authority to the State Board to issue cease and desist orders to *prima facie* violators (*see, e.g.*, N.C. Gen. Stat. §§ 90-41.1(c),[27] 90-43,[28] 90-48,[29] and 90-28,[30]) as the Commission possesses to issue a press release falsely accusing State Board members of conspiracy, or later to approve a baseless complaint alleging that the dentists entered into secret arrangements to defraud the public[31] without a scrap of evidence even before it filed the complaint in this matter. *See*, generally, Respondent's Counter Statement.

The Commission has cited no authority that such a cease and desist document, which merely orders people to stop violating the law, is an antitrust violation -- or, for that matter, a violation of any state or federal law. In the worst light, the State Board's cease and desist and shopping mall letters pale in comparison to the intended effect a Commission press release and false complaint can have on a state agency and state officials serving in good faith.

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[27] "The Board is hereby authorized and empowered to issue such orders, commissions, notices, subpoenas, or other process as might be necessary or proper to effect the purposes of this subsection; provided, however, that no member of the Board shall be subject to examination hereunder."

[28] "The Board is authorized and empowered to expend from funds collected hereunder such additional sum or sums as it may determine necessary in the administration and enforcement of this Article."

[29] "The North Carolina State Board of Dental Examiners shall be and is hereby vested, as an agency of the State, with full power and authority to enact rules and regulations governing the practice of dentistry within the State, provided such rules and regulations are not inconsistent with the provisions of this Article."

[30] "The North Carolina State Board of Dental Examiners shall have the power to make necessary bylaws and regulations, not inconsistent with the provisions of this Article, regarding any matter referred to in this Article and for the purpose of facilitating the transaction of business by the Board."

[31] *Black's Law Dictionary* defines "collusion," the term used in the Commission's June 17, 2010, press release and in its Complaint to mean: "A secret arrangement between two or more persons, whose interests are apparently conflicting, to make use of the forms and proceedings of law in order to defraud a third person, or to obtain that which justice would not give them, be deceiving a court or its officers. A secret agreement between two persons that one should institute a suit judicial tribunal for some sinister purpose." Black's Law Dictionary 331 (4th ed. 1968).

VII. Conclusion

The Federal Trade Commission, a creature of the United States Congress, has asserted a breathtaking expansion of its statutory jurisdiction by seeking to override seventy years of settled case law and to abrogate several constitutional limits on federal authority. Therein, without explicitly stating so, the Commission seeks to expand its (statutory) federal jurisdiction through a Commission initiated and Commission adjudicated proceeding and in complete disregard of the commerce and supremacy clauses of the Tenth and Eleventh Amendments to the United States Constitution.

It bears noting that the United States Constitution is not a grant of expandable powers bestowed upon the various entities comprising our (federal) "Government by the People." It is a grant to that federal government of limited powers, designed to limit the reach of the "sovereign" so that the People will not be subject to arbitrary, capricious, and unlawful attempts to subjugate the citizens and the several sovereign states to extralegal federal authority. Fortunately, the Constitution, in establishing the Third Branch, created an independent judiciary to enforce limits on the reach of federal government authority in those cases where it is clear that there is an extralegal attempt to assert federal authority. This is just such a case.

This the 13th day of December, 2010.

ALLEN AND PINNIX, P.A.

/s/ Noel L. Allen

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that on December 13, 2010, I electronically filed the foregoing 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.
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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:

The Honorable D. Michael Chappell
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This the 13th day of December, 2010.

/s/ Noel L. Allen

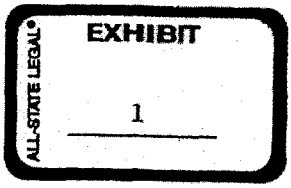
Noel L. Allen

CERTIFICATION FOR ELECTRONIC FILING

I further certify that the electronic copy sent to the 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



UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

SUPPLEMENTAL DECLARATION OF PERRY Y. NEWSON

Pursuant to 28 U.S.C. § 1746, I hereby make the following statement:

1) I am a citizen and resident of Wake County, North Carolina, am over the age of 18, have never been adjudged incompetent, suffer from no mental or emotional illness, and make this Declaration of my own free will, stating facts of which I have personal knowledge.

2) I was contacted via telephone by attorneys from the Federal Trade Commission and signed a Declaration on October 12, 2010.

3) In Paragraph 15 of the Declaration, I responded to what I was told by FTC counsel was the Dental Board's position on the scope of the Ethics Commission's regulatory authority over the Board. At that time, I had not spoken with counsel for the Board and took at face value the representation that it was claimed that the Commission actively supervises the Dental Board's conduct.

4) In that context, I understood active supervision of the Dental Board's conduct to mean direct, regulatory review of or involvement with the Board's substantive actions and decisions independent of how those actions or decisions impacted or were covered by the Ethics Act, Lobbying Law, or other laws over which the Commission has jurisdiction; in other words, somehow acting as a "court of appeals" as to the Board's substantive operations and decisions. That is not the Commission's role.

5) However, the Commission could and would investigate, review, and act upon Board members' substantive actions as they impact or are relevant to enforcement of the Ethics Act or other relevant laws.

6) For example, if the Ethics Commission were to receive a complaint alleging "unethical conduct" by a member of the N.C. State Board of Dental Examiners, it would conduct an inquiry into the allegations of the complaint, as required by N.C.G.S. § 138A-12(b) into any of the following: (1) The application or alleged violation of this Chapter; (2) For legislators, the application of alleged violations of Part 1 of Article 14 of Chapter 120 of the General Statutes; (3) An alleged violation of the criminal law by a covered person in the performance of that individual's official duties; or (4) An alleged violation of G.S. 126-14.

7) If the Commission, in its review of a valid complaint, learned that there was an allegation that a dentist member of the N.C. State Board of Dental Examiners engaged in improper official action, as defined and established by applicable provisions of the Ethics Act, by:

   (1) Issuing a Cease & Desist Order in order to obtain a financial benefit or gain a competitive advantage for any reason, including preventing a competitor or potential competitor from engaging in permissible teeth whitening activities; or

   (2) Directing the Board staff to file a lawsuit for injunctive relief; or

   (3) Being biased in his or her official decision-making against a competitor or potential competitor who was engaging in permissible teeth whitening activities,

   then the Commission would conduct in inquiry, as required by N.C.G.S. § 138A-12.

8) If, after conducting an appropriate inquiry, the Commission determined that the complaint was substantiated and ultimately that there was probable cause to believe that the covered official had committed a violation over which the Commission has jurisdiction, then the Commission would conduct an open, public hearing against the public servant member of the Board, unless a settlement was approved per N.C.G.S. § 138A-12(j).

9) After any such hearing involving a public servant,

   (1) If the Commission finds substantial evidence of an alleged violation of a criminal statute, the Commission shall refer the matter to the Attorney General for investigation and referral to the district attorney for possible prosecution;

(2) If the Commission finds that the alleged violation is not established by clear and convincing evidence, the Commission shall dismiss the complaint;

(3) If the Commission finds that the alleged violation of this Chapter is established by clear and convincing evidence, the Commission shall either issue an admonishment or refer the matter to the appointing authority for appropriate action.

10) Primarily in the Commission's role of reviewing Statements of Economic Interest ("SEI") filed pursuant to Article 3 of Chapter 138A, but also potentially through a complaint or other means, the Commission could determine that a Board member has a "disqualifying conflict of interest." Under N.C.G.S. § 138A-39(a), "[w]ithin 30 days of notice of the Commission's determination that a public servant has a disqualifying conflict of interest, the public servant shall eliminate the interest that constitutes the disqualifying conflict of interest or resign from the public position."

11) If the Board member did not eliminate the interest or resign from the Board, and if the members of the Dental Board are appointed by virtue of their election and not subject to appointment by another authority, then the Commission could "exercise the discretion whether to remove the offending public servant." *See* N.C.G.S. § 138A-45(b). Normally, appointing authorities (like the Governor, Speaker of the House, or President Pro Tempore of the Senate) have the power to remove their appointees pursuant to N.C.G.S. § 138A-45.

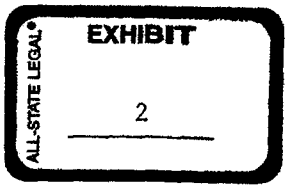
12) Covered officials under the Ethics Act, including public servants, must exercise their authority honestly, fairly, and free from undue influence, specifically including any undue *financial* influence. The Ethics Act is intended to help such officials identify and avoid undue conflicts between their personal and public interests. In furtherance of this objective, each member of the Dental Board must not only file initial and annual financial disclosures in the form of Statements of Economic Interest, but also attend mandatory ethics education seminars.

13) Therefore, as outlined above, the Commission could exercise regulatory or "supervisory" authority over Dental Board members in the context of compliance with the Ethics Act or other laws over which the Commission has jurisdiction.

Further, the Declarant sayeth not.

This the 10th day of December, 2010.

(SEAL)
Perry Y. Newson



UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

DECLARATION OF STANLEY L. ALLEN, DDS

Pursuant to 28 U.S.C. §1746, I hereby make the following statement:

1) My name is Stanley L. Allen, DDS. I am a citizen and resident of Guilford County, North Carolina, am over the age of 18, have never been adjudged incompetent, suffer from no mental or emotional illness, and make this Declaration of my own free will.

2) All statements in this declaration are based upon my personal knowledge and experience as a member of the N.C. State Board of Dental Examiners ("State Board").

3) I served as a member of the State Board from August 1, 2001 to July 31, 2007.

4) I am/was a member of the State Board and took an oath of office upon becoming a State Board member.

5) As a sworn member of the State Board, I am/was a Public Official of the State of North Carolina.

6) As a sworn member of the State Board, I am/was always aware that my paramount duty was to serve the public and to protect the health, safety, and welfare of the public.

7) As part of my orientation and training as a sworn member of the State Board, I was informed that as a Public Official of the State of North Carolina I was protected by the law of sovereign immunity for actions taken in good faith in my capacity as a member of the State Board.

8) Neither I nor, to the best of my knowledge, anyone with whom I have served as a State Board member has colluded to act in an anti-competitive matter.

9) I have reviewed the Complaint of the FTC and the Motion for Partial Summary Decision of the FTC and categorically deny that either myself or any other State Board member, or the Board acting as a Board, has excluded lawful competition from non-dentists and is acting independent of the Courts.

10) Since January 1, 2007, I have received training and have been informed that I am prohibited by N. C. state law from voting as a Board member where I have a conflict of interest. Specifically, I am aware that the State Government Ethics Act, N.C.Gen.Stat. §138A, Article 1, requires that I announce any conflict of interest and abstain from voting or deliberating on matters on which I may have a conflict of interest.

11) I am required to submit an annual Statement of Economic Interest disclosing personal and business financial information so that the Ethics Commission may evaluate whether I have conflicts of interest.

12) Subsequent to my election as a State Board member and before taking my oath of office, I received a letter from the Ethics Commission informing me that as a licensee on an occupational licensing board, I had a "potential conflict of interest" and should be alert to such matters.

13) I am aware that for as long as I am on the State Board, I am required to receive formal ethics training every two years from the N.C. Ethics Commission; and that my conduct as a member of the State Board and my compliance with the State Government Ethics Act are subject to review and oversight by the N. C. Ethics Commission and otherwise subject to the sanctions provided under the State Government Ethics Act."

14) As a practicing dentist, less than one percent of my annual professional revenue is derived from teeth whitening services and products. Teeth whitening services and products are not a material part of my practice.

15) It is my belief based on public protection grounds that teeth whitening, properly administered, is the practice of dentistry and requires a standard of care and practice that can be delivered only by a licensed dentist.

16) As a practicing dentist, I do not compete in any way for teeth whitening business. It is largely a service I provide as a convenience to my existing patients.

17) I do not have a financial interest in excluding non-dentists from delivering teeth whitening services and in restraining competition in the delivery of those services.

18) As a sworn Public Official and a member of the State Board, I have a duty to see that the provisions of the Dental Practice Act, N.C.Gen.Stat. § 90-22, with respect to the unauthorized practice of dentistry are enforced.

19) Therefore, I have not and do not regard any regulatory activity by the Board and myself with regard to teeth whitening to be a professional or financial conflict of interest.

20) In any matter in which I have participated or voted to regulate unlicensed persons with regard to teeth whitening, my actions were taken to protect the members of the public from the potential injury to their health and safety with regard to teeth whitening practices.

21) In any matter in which I have participated or voted to regulate unlicensed persons with regard to teeth whitening, I determined that the Board was in good faith enforcing the provisions of the N. C. Dental Practice Act with respect to the unauthorized practice of dentistry.

22) I categorically deny any collusion to exclude, prevent, or deter non-dentists from engaging in teeth-whitening services; to affect the prices of such services or products; or to reduce consumer choice.

Further more, the witness sayeth not.

NAME

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

DECLARATION OF BENJAMIN W. BROWN, DDS

Pursuant to 28 U.S.C. §1746, I hereby make the following statement:

1) My name is Benjamin W. Brown. I am a citizen and resident of Wake County, North Carolina, am over the age of 18, have never been adjudged incompetent, suffer from no mental or emotional illness, and make this Declaration of my own free will.

2) All statements in this declaration are based upon my personal knowledge and experience as a member of the N.C. State Board of Dental Examiners ("State Board").

3) I served as a member of the State Board from 1998-2001 and from 2003-2006.

4) I was a member of the State Board and took an oath of office upon becoming a State Board member.

5) As a sworn member of the State Board, I was a Public Official of the State of North Carolina.

6) As a sworn member of the State Board, I was always aware that my paramount duty was to serve the public and to protect the health, safety, and welfare of the public.

7) As part of my orientation and training as a sworn member of the State Board, I was informed that as a Public Official of the State of North Carolina I was protected by the law of sovereign immunity for actions taken in good faith in my capacity as a member of the State Board.

8) Neither I nor, to the best of my knowledge, anyone with whom I have served as a State Board member has colluded to act in an anti-competitive matter.

9) I have reviewed the Complaint of the FTC and the Motion for Partial Summary Decision of the FTC and categorically deny that either myself or any other State Board member, or the Board acting as a Board, has excluded lawful competition from non-dentists and is acting independent of the Courts.

10) Since January 1, 2007, I have received training and have been informed that I am prohibited by N. C. state law from voting as a Board member where I have a conflict of interest. Specifically, I am aware that the State Government Ethics Act, N.C.Gen.Stat. §138A, Article 1, requires that I announce any conflict of interest and abstain from voting or deliberating on matters on which I may have a conflict of interest.

11) I am required to submit an annual Statement of Economic Interest disclosing personal and business financial information so that the Ethics Commission may evaluate whether I have conflicts of interest.

12) Subsequent to my election as a State Board member and before taking my oath of office, I received a letter from the Ethics Commission informing me that as a licensee on an occupational licensing board, I had a "potential conflict of interest" and should be alert to such matters.

13) I am aware that for as long as I am on the State Board, I am required to receive formal ethics training every two years from the N.C. Ethics Commission; and that my conduct as a member of the State Board and my compliance with the State Government Ethics Act are subject to review and oversight by the N. C. Ethics Commission and otherwise subject to the sanctions provided under the State Government Ethics Act."

14) As a practicing dentist, less than one percent of my annual professional revenue is derived from teeth whitening services and products. Teeth whitening services and products are not a material part of my practice.

15) It is my belief based on public protection grounds that teeth whitening, properly administered, is the practice of dentistry and requires a standard of care and practice that can be delivered only by a licensed dentist.

16) As a practicing dentist, I do not compete in any way for teeth whitening business. It is largely a service I provide as a convenience to my existing patients.

17) I do not have a financial interest in excluding non-dentists from delivering teeth whitening services and in restraining competition in the delivery of those services.

17) I do not have a financial interest in excluding non-dentists from delivering teeth whitening services and in restraining competition in the delivery of those services.

18) As a sworn Public Official and a member of the State Board, I have a duty to see that the provisions of the Dental Practice Act, N. C. Gen. Stat. § 90-22, with respect to the unauthorized practice of dentistry are enforced.

19) Therefore, I have not and do not regard any regulatory activity by the Board and myself with regard to teeth whitening to be a professional or financial conflict of interest.

20) In any matter in which I have participated or voted to regulate unlicensed persons with regard to teeth whitening, my actions were taken to protect the members of the public from the potential injury to their health and safety with regard to teeth whitening practices.

21) In any matter in which I have participated or voted to regulate unlicensed persons with regard to teeth whitening, I determined that the Board was in good faith enforcing the provisions of the N. C. Dental Practice Act with respect to the unauthorized practice of dentistry.

22) I categorically deny any collusion to exclude, prevent, or deter non-dentists from engaging in teeth-whitening services; to affect the prices of such services or products; or to reduce consumer choice.

Further more, the witness sayeth not.

Benjamin W. Brown, DDS

Benjamin W. Brown, DDS

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

DECLARATION OF Joseph S. Burnham DDS

Pursuant to 28 U.S.C. §1746, I hereby make the following statement:

1) My name is Joseph Burnham. I am a citizen and resident of Forsyth County, North Carolina, am over the age of 18, have never been adjudged incompetent, suffer from no mental or emotional illness, and make this Declaration of my own free will.

2) All statements in this declaration are based upon my personal knowledge and experience as a member of the N.C. State Board of Dental Examiners ("State Board").

3) I served as a member of the State Board from 2003 to 2009.

4) I ~~am~~/was a member of the State Board and took an oath of office upon becoming a State Board member.

5) As a sworn member of the State Board, I ~~am~~/was a Public Official of the State of North Carolina.

6) As a sworn member of the State Board, I ~~am~~/was always aware that my paramount duty was to serve the public and to protect the health, safety, and welfare of the public.

7) As part of my orientation and training as a sworn member of the State Board, I was informed that as a Public Official of the State of North Carolina I was protected by the law of sovereign immunity for actions taken in good faith in my capacity as a member of the State Board.

8) Neither I nor, to the best of my knowledge, anyone with whom I have served as a State Board member has colluded to act in an anti-competitive matter.

9) I have reviewed the Complaint of the FTC and the Motion for Partial Summary Decision of the FTC and categorically deny that either myself or any other State Board member, or the Board acting as a Board, has excluded lawful competition from non-dentists and is acting independent of the Courts.

10) Since January 1, 2007, I have received training and have been informed that I am prohibited by N. C. state law from voting as a Board member where I have a conflict of interest. Specifically, I am aware that the State Government Ethics Act, N.C.Gen.Stat. §138A, Article 1, requires that I announce any conflict of interest and abstain from voting or deliberating on matters on which I may have a conflict of interest.

11) I am required to submit an annual Statement of Economic Interest disclosing personal and business financial information so that the Ethics Commission may evaluate whether I have conflicts of interest.

12) Subsequent to my election as a State Board member and before taking my oath of office, I received a letter from the Ethics Commission informing me that as a licensee on an occupational licensing board, I had a "potential conflict of interest" and should be alert to such matters.

13) I am aware that for as long as I am on the State Board, I am required to receive formal ethics training every two years from the N.C. Ethics Commission; and that my conduct as a member of the State Board and my compliance with the State Government Ethics Act are subject to review and oversight by the N. C. Ethics Commission and otherwise subject to the sanctions provided under the State Government Ethics Act."

14) As a practicing dentist, less than one percent of my annual professional revenue is derived from teeth whitening services and products. Teeth whitening services and products are not a material part of my practice.

15) It is my belief based on public protection grounds that teeth whitening, properly administered, is the practice of dentistry and requires a standard of care and practice that can be delivered only by a licensed dentist.

16) As a practicing dentist, I do not compete in any way for teeth whitening business. It is largely a service I provide as a convenience to my existing patients.

17) I do not have a financial interest in excluding non-dentists from delivering teeth whitening services and in restraining competition in the delivery of those services.

18) As a sworn Public Official and a member of the State Board, I have a duty to see that the provisions of the Dental Practice Act, N.C.Gen.Stat. § 90-22, with respect to the unauthorized practice of dentistry are enforced.

19) Therefore, I have not and do not regard any regulatory activity by the Board and myself with regard to teeth whitening to be a professional or financial conflict of interest.

20) In any matter in which I have participated or voted to regulate unlicensed persons with regard to teeth whitening, my actions were taken to protect the members of the public from the potential injury to their health and safety with regard to teeth whitening practices.

21) In any matter in which I have participated or voted to regulate unlicensed persons with regard to teeth whitening, I determined that the Board was in good faith enforcing the provisions of the N. C. Dental Practice Act with respect to the unauthorized practice of dentistry.

22) I categorically deny any collusion to exclude, prevent, or deter non-dentists from engaging in teeth-whitening services; to affect the prices of such services or products; or to reduce consumer choice.

Further more, the witness sayeth not.

Joseph S Burnham DDS.

NAME

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

DECLARATION OF Clifford O. Feingold, DDS

Pursuant to 28 U.S.C. §1746, I hereby make the following statement:

1) My name is Clifford O. Feingold, DDS. I am a citizen and resident of Buncombe County, North Carolina, am over the age of 18, have never been adjudged incompetent, suffer from no mental or emotional illness, and make this Declaration of my own free will.

2) All statements in this declaration are based upon my personal knowledge and experience as a member of the N.C. State Board of Dental Examiners ("State Board").

3) I served as a member of the State Board from August, 2005 to August, 2008.

4) I was a member of the State Board and took an oath of office upon becoming a State Board member.

5) As a sworn member of the State Board, I was a Public Official of the State of North Carolina.

6) As a sworn member of the State Board, I was always aware that my paramount duty was to serve the public and to protect the health, safety, and welfare of the public.

7) As part of my orientation and training as a sworn member of the State Board, I was informed that as a Public Official of the State of North Carolina I was protected by the law of sovereign immunity for actions taken in good faith in my capacity as a member of the State Board.

8) Neither I nor, to the best of my knowledge, anyone with whom I have served as a State Board member has colluded to act in an anti-competitive matter.

9) I have reviewed the Complaint of the FTC and the Motion for Partial Summary Decision of the FTC and categorically deny that either myself or any other State Board member, or the Board acting as a Board, has excluded lawful competition from non-dentists and is acting independent of the Courts.

10) Since January 1, 2007, I have received training and have been informed that I am prohibited by N. C. state law from voting as a Board member where I have a conflict of interest. Specifically, I am aware that the State Government Ethics Act, N.C.Gen.Stat. §138A, Article 1, requires that I announce any conflict of interest and abstain from voting or deliberating on matters on which I may have a conflict of interest.

11) I am required to submit an annual Statement of Economic Interest disclosing personal and business financial information so that the Ethics Commission may evaluate whether I have conflicts of interest.

12) Subsequent to my election as a State Board member and before taking my oath of office, I received a letter from the Ethics Commission informing me that as a licensee on an occupational licensing board, I had a "potential conflict of interest" and should be alert to such matters.

13) I am aware that for as long as I am on the State Board, I am required to receive formal ethics training every two years from the N.C. Ethics Commission: and that my conduct as a member of the State Board and my compliance with the State Government Ethics Act are subject to review and oversight by the N. C. Ethics Commission and otherwise subject to the sanctions provided under the State Government Ethics Act."

14) As a practicing dentist, less than one percent of my annual professional revenue is derived from teeth whitening services and products. Teeth whitening services and products are not a material part of my practice.

15) It is my belief based on public protection grounds that teeth whitening, properly administered, is the practice of dentistry and requires a standard of care and practice that can be delivered only by a licensed dentist.

16) As a practicing dentist, I do not compete in any way for teeth whitening business. It is largely a service I provide as a convenience to my existing patients.

17) I do not have a financial interest in excluding non-dentists from delivering teeth whitening services and in restraining competition in the delivery of those services.

18) As a sworn Public Official and a member of the State Board, I have a duty to see that the provisions of the Dental Practice Act, N.C.Gen.Stat. § 90-22, with respect to the unauthorized practice of dentistry are enforced.

19) Therefore, I have not and do not regard any regulatory activity by the Board and myself with regard to teeth whitening to be a professional or financial conflict of interest.

20) In any matter in which I have participated or voted to regulate unlicensed persons with regard to teeth whitening, my actions were taken to protect the members of the public from the potential injury to their health and safety with regard to teeth whitening practices.

21) In any matter in which I have participated or voted to regulate unlicensed persons with regard to teeth whitening, I determined that the Board was in good faith enforcing the provisions of the N. C. Dental Practice Act with respect to the unauthorized practice of dentistry.

22) I categorically deny any collusion to exclude, prevent, or deter non-dentists from engaging in teeth-whitening services; to affect the prices of such services or products; or to reduce consumer choice.

Further more, the witness sayeth not.

Clifford O. Feingold, DDS

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

DECLARATION OF WILLIS STANTON HARDESTY, JR., DDS

Pursuant to 28 U.S.C. §1746, I hereby make the following statement:

1) My name is Willis Stanton Hardesty, Jr., DDS. I am a citizen and resident of Wake County, North Carolina, am over the age of 18, have never been adjudged incompetent, suffer from no mental or emotional illness, and make this Declaration of my own free will.

2) All statements in this declaration are based upon my personal knowledge and experience as a member of the N.C. State Board of Dental Examiners ("State Board").

3) I served as a member of the State Board from August 1, 2004 to July 31, 2010.

4) I was a member of the State Board and took an oath of office upon becoming a State Board member.

5) As a sworn member of the State Board, I was a Public Official of the State of North Carolina.

6) As a sworn member of the State Board, I was always aware that my paramount duty was to serve the public and to protect the health, safety, and welfare of the public.

7) As part of my orientation and training as a sworn member of the State Board, I was informed that as a Public Official of the State of North Carolina I was protected by the law of sovereign immunity for actions taken in good faith in my capacity as a member of the State Board.

8) Neither I nor, to the best of my knowledge, anyone with whom I have served as a State Board member has colluded to act in an anti-competitive matter.

9) I have reviewed the Complaint of the FTC and the Motion for Partial Summary Decision of the FTC and categorically deny that either myself or any other State Board member, or the Board acting as a Board, has excluded lawful competition from non-dentists and is acting independent of the Courts.

10) Since January 1, 2007, I have received training and have been informed that I am prohibited by N. C. state law from voting as a Board member where I have a conflict of interest. Specifically, I am aware that the State Government Ethics Act, N.C.Gen.Stat. §138A, Article 1, requires that I announce any conflict of interest and abstain from voting or deliberating on matters on which I may have a conflict of interest.

11) I am required to submit an annual Statement of Economic Interest disclosing personal and business financial information so that the Ethics Commission may evaluate whether I have conflicts of interest.

12) Subsequent to my election as a State Board member and before taking my oath of office, I received a letter from the Ethics Commission informing me that as a licensee on an occupational licensing board, I had a "potential conflict of interest" and should be alert to such matters.

13) I am aware that for as long as I am on the State Board, I am required to receive formal ethics training every two years from the N.C. Ethics Commission; and that my conduct as a member of the State Board and my compliance with the State Government Ethics Act are subject to review and oversight by the N. C. Ethics Commission and otherwise subject to the sanctions provided under the State Government Ethics Act."

14) As a practicing dentist, less than one percent of my annual professional revenue is derived from teeth whitening services and products. Teeth whitening services and products are not a material part of my practice.

15) It is my belief based on public protection grounds that teeth whitening, properly administered, is the practice of dentistry and requires a standard of care and practice that can be delivered only by a licensed dentist.

16) As a practicing dentist, I do not compete in any way for teeth whitening business. It is largely a service I provide as a convenience to my existing patients.

17) I do not have a financial interest in excluding non-dentists from delivering teeth whitening services and in restraining competition in the delivery of those services.

18) As a sworn Public Official and a member of the State Board, I had a duty to see that the provisions of the Dental Practice Act, N.C.Gen.Stat. § 90-22, with respect to the unauthorized practice of dentistry were enforced.

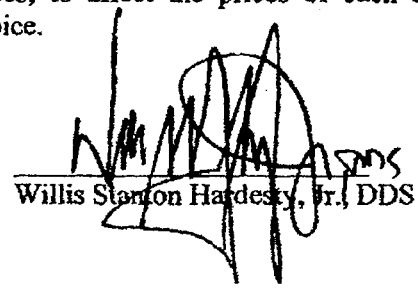
19) Therefore, I have not and do not regard any regulatory activity by the Board and myself with regard to teeth whitening to be a professional or financial conflict of interest.

20) In any matter in which I had participated or voted to regulate unlicensed persons with regard to teeth whitening, my actions were taken to protect the members of the public from the potential injury to their health and safety with regard to teeth whitening practices.

21) In any matter in which I had participated or voted to regulate unlicensed persons with regard to teeth whitening, I determined that the Board was in good faith enforcing the provisions of the N. C. Dental Practice Act with respect to the unauthorized practice of dentistry.

22) I categorically deny any collusion to exclude, prevent, or deter non-dentists from engaging in teeth-whitening services; to affect the prices of such services or products; or to reduce consumer choice.

Further more, the witness sayeth not.



Willis Stanton Hardesty, Jr., DDS

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

DECLARATION OF Charles Wayne Holland, D.D.S.

Pursuant to 28 U.S.C. §1746, I hereby make the following statement:

1) My name is Charles Wayne Holland, D.D.S. I am a citizen and resident of Wilson County, North Carolina, am over the age of 18, have never been adjudged incompetent, suffer from no mental or emotional illness, and make this Declaration of my own free will.

2) All statements in this declaration are based upon my personal knowledge and experience as a member of the N.C. State Board of Dental Examiners ("State Board").

3) I served as a member of the State Board from 1999 to 2005 and 2006 to Present.

4) I am a member of the State Board and took an oath of office upon becoming a State Board member.

5) As a sworn member of the State Board, I am a Public Official of the State of North Carolina.

6) As a sworn member of the State Board, I am always aware that my paramount duty was to serve the public and to protect the health, safety, and welfare of the public.

7) As part of my orientation and training as a sworn member of the State Board, I was informed that as a Public Official of the State of North Carolina I was protected by the law of sovereign immunity for actions taken in good faith in my capacity as a member of the State Board.

8) Neither I nor, to the best of my knowledge, anyone with whom I have served as a State Board member has colluded to act in an anti-competitive matter.

9) I have reviewed the Complaint of the FTC and the Motion for Partial Summary Decision of the FTC and categorically deny that either myself or any other State Board member, or the Board acting as a Board, has excluded lawful competition from non-dentists and is acting independent of the Courts.

10) Since January 1, 2007, I have received training and have been informed that I am prohibited by N. C. state law from voting as a Board member where I have a conflict of interest. Specifically, I am aware that the State Government Ethics Act, N.C.Gen.Stat. §138A, Article 1, requires that I announce any conflict of interest and abstain from voting or deliberating on matters on which I may have a conflict of interest.

11) I am required to submit an annual Statement of Economic Interest disclosing personal and business financial information so that the Ethics Commission may evaluate whether I have conflicts of interest.

12) Subsequent to my election as a State Board member and before taking my oath of office, I received a letter from the Ethics Commission informing me that as a licensee on an occupational licensing board, I had a "potential conflict of interest" and should be alert to such matters.

13) I am aware that for as long as I am on the State Board, I am required to receive formal ethics training every two years from the N.C. Ethics Commission; and that my conduct as a member of the State Board and my compliance with the State Government Ethics Act are subject to review and oversight by the N. C. Ethics Commission and otherwise subject to the sanctions provided under the State Government Ethics Act."

14) As a practicing dentist, less than one percent of my annual professional revenue is derived from teeth whitening services and products. Teeth whitening services and products are not a material part of my practice.

15) It is my belief based on public protection grounds that teeth whitening, properly administered, is the practice of dentistry and requires a standard of care and practice that can be delivered only by a licensed dentist.

16) As a practicing dentist, I do not compete in any way for teeth whitening business. It is largely a service I provide as a convenience to my existing patients.

17) I do not have a financial interest in excluding non-dentists from delivering teeth whitening services and in restraining competition in the delivery of those services.

18) As a sworn Public Official and a member of the State Board, I have a duty to see that the provisions of the Dental Practice Act, N.C.Gen.Stat. § 90-22, with respect to the unauthorized practice of dentistry are enforced.

19) Therefore, I have not and do not regard any regulatory activity by the Board and myself with regard to teeth whitening to be a professional or financial conflict of interest.

20) In any matter in which I have participated or voted to regulate unlicensed persons with regard to teeth whitening, my actions were taken to protect the members of the public from the potential injury to their health and safety with regard to teeth whitening practices.

21) In any matter in which I have participated or voted to regulate unlicensed persons with regard to teeth whitening, I determined that the Board was in good faith enforcing the provisions of the N. C. Dental Practice Act with respect to the unauthorized practice of dentistry.

22) I categorically deny any collusion to exclude, prevent, or deter non-dentists from engaging in teeth-whitening services; to affect the prices of such services or products; or to reduce consumer choice.

Further more, the witness sayeth not.

NAME: Charles Wayne Holland D.D.S.

Charles Wayne Holland, D.D.S.

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

DECLARATION OF Brad C. Morgan D.D.S.

Pursuant to 28 U.S.C. §1746, I hereby make the following statement:

1) My name is Brad C. Morgan. I am a citizen and resident of Haywood County, North Carolina, am over the age of 18, have never been adjudged incompetent, suffer from no mental or emotional illness, and make this Declaration of my own free will.

2) All statements in this declaration are based upon my personal knowledge and experience as a member of the N.C. State Board of Dental Examiners ("State Board").

3) I served as a member of the State Board from Aug. 1999 to Aug. 2005 and from Aug. 2007 to present.

4) I am a member of the State Board and took an oath of office upon becoming a State Board member.

5) As a sworn member of the State Board, I am a Public Official of the State of North Carolina.

6) As a sworn member of the State Board, I am and was, always aware that my paramount duty was to serve the public and to protect the health, safety, and welfare of the public.

7) As part of my orientation and training as a sworn member of the State Board, I was informed that as a Public Official of the State of North Carolina I was

8) Neither I nor, to the best of my knowledge, anyone with whom I have served as a State Board member has colluded to act in an anti-competitive matter.

9) I have reviewed the Complaint of the FTC and the Motion for Partial Summary Decision of the FTC and categorically deny that either myself or any other State Board member, or the Board acting as a Board, has excluded lawful competition from non-dentists and is acting independent of the Courts.

10) Since January 1, 2007, I have received training and have been informed that I am prohibited by N. C. state law from voting as a Board member where I have a conflict of interest. Specifically, I am aware that the State Government Ethics Act, N.C.Gen.Stat. §138A, Article 1, requires that I announce any conflict of interest and abstain from voting or deliberating on matters on which I may have a conflict of interest.

11) I am required to submit an annual Statement of Economic Interest disclosing personal and business financial information so that the Ethics Commission may evaluate whether I have conflicts of interest.

12) Subsequent to my election as a State Board member and before taking my oath of office, I received a letter from the Ethics Commission informing me that as a licensee on an occupational licensing board, I had a "potential conflict of interest" and should be alert to such matters.

13) I am aware that for as long as I am on the State Board, I am required to receive formal ethics training every two years from the N.C. Ethics Commission; and that my conduct as a member of the State Board and my compliance with the State Government Ethics Act are subject to review and oversight by the N. C. Ethics Commission and otherwise subject to the sanctions provided under the State Government Ethics Act."

14) As a practicing dentist, less than one percent of my annual professional revenue is derived from teeth whitening services and products. Teeth whitening services and products are not a material part of my practice.

15) It is my belief based on public protection grounds that teeth whitening, properly administered, is the practice of dentistry and requires a standard of care and practice that can be delivered only by a licensed dentist.

16) As a practicing dentist, I do not compete in any way for teeth whitening business. It is largely a service I provide as a convenience to my existing patients.

17) I do not have a financial interest in excluding non-dentists from delivering teeth whitening services and in restraining competition in the delivery of those services.

18) As a sworn Public Official and a member of the State Board, I have a duty to see that the provisions of the Dental Practice Act, N.C.Gen.Stat. § 90-22, with respect to the unauthorized practice of dentistry are enforced.

19) Therefore, I have not and do not regard any regulatory activity by the Board and myself with regard to teeth whitening to be a professional or financial conflict of interest.

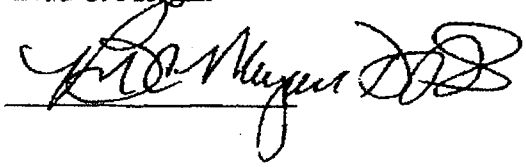
20) In any matter in which I have participated or voted to regulate unlicensed persons with regard to teeth whitening, my actions were taken to protect the members of the public from the potential injury to their health and safety with regard to teeth whitening practices.

21) In any matter in which I have participated or voted to regulate unlicensed persons with regard to teeth whitening, I determined that the Board was in good faith enforcing the provisions of the N. C. Dental Practice Act with respect to the unauthorized practice of dentistry.

22) I categorically deny any collusion to exclude, prevent, or deter non-dentists from engaging in teeth-whitening services; to affect the prices of such services or products; or to reduce consumer choice.

Further more, the witness sayeth not.

Brad C. Morgan



UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

DECLARATION OF Ronald K. Owens, DDS

Pursuant to 28 U.S.C. §1746, I hereby make the following statement:

1) My name is Ronald K. Owens, DDS. I am a citizen and resident of Davie County, North Carolina, am over the age of 18, have never been adjudged incompetent, suffer from no mental or emotional illness, and make this Declaration of my own free will.

2) All statements in this declaration are based upon my personal knowledge and experience as a member of the N.C. State Board of Dental Examiners ("State Board").

3) I served as a member of the State Board from August 1, 2005 to present.

4) I am a member of the State Board and took an oath of office upon becoming a State Board member.

5) As a sworn member of the State Board, I am a Public Official of the State of North Carolina.

6) As a sworn member of the State Board, I am always aware that my paramount duty was to serve the public and to protect the health, safety, and welfare of the public.

7) As part of my orientation and training as a sworn member of the State Board, I was informed that as a Public Official of the State of North Carolina I was protected by the law of sovereign immunity for actions taken in good faith in my capacity as a member of the State Board.

8) Neither I nor, to the best of my knowledge, anyone with whom I have served as a State Board member has colluded to act in an anti-competitive matter.

9) I have reviewed the Complaint of the FTC and the Motion for Partial Summary Decision of the FTC and categorically deny that either myself or any other State Board member, or the Board acting as a Board, has excluded lawful competition from non-dentists and is acting independent of the Courts.

10) Since January 1, 2007, I have received training and have been informed that I am prohibited by N. C. state law from voting as a Board member where I have a conflict of interest. Specifically, I am aware that the State Government Ethics Act, N.C.Gen.Stat. §138A, Article 1, requires that I announce any conflict of interest and abstain from voting or deliberating on matters on which I may have a conflict of interest.

11) I am required to submit an annual Statement of Economic Interest disclosing personal and business financial information so that the Ethics Commission may evaluate whether I have conflicts of interest.

12) Subsequent to my election as a State Board member and before taking my oath of office, I received a letter from the Ethics Commission informing me that as a licensee on an occupational licensing board, I had a "potential conflict of interest" and should be alert to such matters.

13) I am aware that for as long as I am on the State Board, I am required to receive formal ethics training every two years from the N.C. Ethics Commission; and that my conduct as a member of the State Board and my compliance with the State Government Ethics Act are subject to review and oversight by the N. C. Ethics Commission and otherwise subject to the sanctions provided under the State Government Ethics Act."

14) As a practicing dentist, less than one percent of my annual professional revenue is derived from teeth whitening services and products. Teeth whitening services and products are not a material part of my practice.

15) It is my belief based on public protection grounds that teeth whitening, properly administered, is the practice of dentistry and requires a standard of care and practice that can be delivered only by a licensed dentist.

16) As a practicing dentist, I do not compete in any way for teeth whitening business. It is largely a service I provide as a convenience to my existing patients.

17) I do not have a financial interest in excluding non-dentists from delivering teeth whitening services and in restraining competition in the delivery of those services.

18) As a sworn Public Official and a member of the State Board, I have a duty to see that the provisions of the Dental Practice Act, N.C.Gen.Stat. § 90-22, with respect to the unauthorized practice of dentistry are enforced.

19) Therefore, I have not and do not regard any regulatory activity by the Board and myself with regard to teeth whitening to be a professional or financial conflict of interest.

20) In any matter in which I have participated or voted to regulate unlicensed persons with regard to teeth whitening, my actions were taken to protect the members of the public from the potential injury to their health and safety with regard to teeth whitening practices.

21) In any matter in which I have participated or voted to regulate unlicensed persons with regard to teeth whitening, I determined that the Board was in good faith enforcing the provisions of the N. C. Dental Practice Act with respect to the unauthorized practice of dentistry.

22) I categorically deny any collusion to exclude, prevent, or deter non-dentists from engaging in teeth-whitening services; to affect the prices of such services or products; or to reduce consumer choice.

Further more, the witness sayeth not.

Ronald K. Owens, DDS

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of THE NORTH CAROLINA [STATE] BOARD OF DENTAL EXAMINERS, Millard W Wester III	)	DOCKET NO. 9343

DECLARATION OF Millard W Wester III

Pursuant to 28 U.S.C. §1746, I hereby make the following statement:

1) My name is Millard W Wester III. I am a citizen and resident of Vance County, North Carolina, am over the age of 18, have never been adjudged incompetent, suffer from no mental or emotional illness, and make this Declaration of my own free will.

2) All statements in this declaration are based upon my personal knowledge and experience as a member of the N.C. State Board of Dental Examiners ("State Board").

3) I serve as a member of the State Board from August 2008 to the present time.

4) I am a member of the State Board and took an oath of office upon becoming a State Board member.

5) As a sworn member of the State Board, I am a Public Official of the State of North Carolina.

6) As a sworn member of the State Board, I am always aware that my paramount duty was to serve the public and to protect the health, safety, and welfare of the public.

7) As part of my orientation and training as a sworn member of the State Board, I was informed that as a Public Official of the State of North Carolina I am protected by the law of sovereign immunity for actions taken in good faith in my capacity as a member of the State Board.

8) Neither I nor, to the best of my knowledge, anyone with whom I have served as a State Board member has colluded to act in an anti-competitive matter.

9) I have reviewed the Complaint of the FTC and the Motion for Partial Summary Decision of the FTC and categorically deny that either myself or any other State Board member, or the Board acting as a Board, has excluded lawful competition from non-dentists and is acting independent of the Courts.

10) Since January 1, 2007, I have received training and have been informed that I am prohibited by N. C. state law from voting as a Board member where I have a conflict of interest. Specifically, I am aware that the State Government Ethics Act, N.C.Gen.Stat. §138A, Article 1, requires that I announce any conflict of interest and abstain from voting or deliberating on matters on which I may have a conflict of interest.

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21) In any matter in which I have participated or voted to regulate unlicensed persons with regard to teeth whitening, I determined that the Board was in good faith enforcing the provisions of the N. C. Dental Practice Act with respect to the unauthorized practice of dentistry.

22) I categorically deny any collusion to exclude, prevent, or deter non-dentists from engaging in teeth-whitening services; to affect the prices of such services or products; or to reduce consumer choice.

Further more, the witness sayeth not.

Millard W Wester III