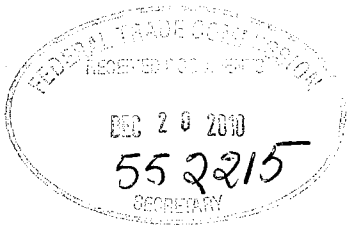
ORIGINAL



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 REPLY MEMORANDUM
IN SUPPORT OF MOTION TO DISMISS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Cases (cont.)

Constitutional Authority

Statutes

Statutes (cont.)

Rules

Other Authority

ARGUMENT

I. INTRODUCTION.

Respondent the North Carolina State Board of Dental Examiners ("State Board") is a state agency charged with regulating the practice of dentistry in North Carolina to protect the health and safety of the state's population. N.C. Gen. Stat. § 90-22(a). At issue is the State Board's enforcement of a North Carolina statute prohibiting the removal of stains from teeth by a person not licensed as a dentist or supervised by a licensed dentist. N.C. Gen. Stat. § 90-29(a)-(b), (c)(1). As these actions were taken pursuant to a clearly articulated state law, they are immune from federal antitrust legislation.

This immunity is established by several decades of case law, beginning with principles first set forth in Parker v. Brown, 317 U.S. 341 (1943) and restated by the U.S. Supreme Court more recently in Town of Hallie v. City of Eau Claire: "In cases in which the actor is a state agency, it is likely that active state supervision would also not be required." Hallie, 471 U.S. 34 at 46 (1985).

The Federal Trade Commission ("Commission" or "FTC") bases its attack on the State Board on a new theory of law, articulated by the Commission and by a handful of commentators, but not by the U.S. Supreme Court. The Commission argues that the State Board is financially interested in the regulation of dentistry, and therefore is a private party, subject to a second test to prove state action immunity. Beyond evincing a "clearly articulated state statute," the Commission wants the State Board, and presumably nearly every other state licensing agency in the country, to prove that its actions were "actively supervised" by other state officials. However, as stated in this brief and in previous Respondent briefs, there is no legal basis for this requirement. It is contrary to decades of

clear and well-reasoned case law, the U.S. Constitution, and Congressional intent in the drafting of federal antitrust law.

Nearly all of the cases and commentary relevant to this brief are discussed in detail in the Respondent's Memorandum in Support of Motion to Dismiss ("State Board's Memo in Support of MTD") and Memorandum in Opposition to Complaint Counsel's Motion for Partial Summary Decision [Corrected] ("State Board's Memo in Opposition to MPSD"). Therefore, in order to avoid repetition, these briefs are referred to and incorporated by reference.

II. STANDARD OF REVIEW.

The Commission misstates the standard of review by which the State Board's Motion to Dismiss must be considered. Namely, the Commission disregards the Supreme Court's recent articulation for reviewing challenges to the sufficiency of complaints in light of a motion to dismiss for failure to state a claim upon which relief may be granted under Fed. R. Civ. P. 12(b)(6).[1]

In Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 563 (2007), the Supreme Court **rejected** the argument that a motion to dismiss under Fed. R. Civ. P. 12(b)(6) may be granted only if the defendant can show that the plaintiff "can prove no set of facts in support of his claim which would entitle him to relief." Under the proper standard of review, the adjudicator must determine whether the plaintiff's complaint contains sufficient factual allegations that consist of "more than labels and conclusions," as a "formulaic recitation of the elements of a cause of action will not do." Id. at 555.

---

[1] As the Commission admits on page 2 of its Memorandum in Opposition to Respondent's Motion to Dismiss, the Federal Rules of Civil Procedure and the federal courts' application of those Rules is the standard by which this Motion to Dismiss should be considered.

In Ashcroft v. Iqbal, 129 S. Ct. 1937, 1951 (2009), the Supreme Court clarified the proper standard of review of a motion to dismiss under Fed. R. Civ. P. 12(b)(6), as set forth in Twombly. First, the Court provided that, in considering a motion to dismiss under Fed. R. Civ. P. 12(b)(6), an adjudicator must not afford a plaintiff's conclusory legal allegations any "presumption of truth." Second, the Court provided that an adjudicator only may deem the factual allegations sufficient under a "plausibility" standard, whereby said allegations amount to "more than a sheer possibility that a defendant acted unlawfully." Id. at 1949.

Since the issuance of Twombly and Iqbal, federal courts have applied the standard of review set forth in those decisions to Fed. R. Civ. P. 12(b)(6) challenges brought against complaints filed by the Commission. *See, e.g.*, FTC v. Swish Marketing, No. C 09-03814, 2010 U.S. Dist. LEXIS 15016, at *10-12 (N.D. Cal. Feb. 22, 2010).

III. THE TWO-PRONG *MIDCAL* STANDARD DOES NOT APPLY TO A STATE AGENCY.

To support its argument that both prongs of the Midcal test apply to the State Board, Complaint Counsel attempts to construct a new state action immunity doctrine. As in previous briefs, this argument is based on reliance on a handful of outdated cases and the dismissal of the many more recent and relevant cases as "poorly reasoned." With a lack of supporting case law, the Commission also relies heavily on citations to its own writings, and commentators' opinions on what they think the law should be, rather than what it is.

Complaint Counsel's argument rests on their proposal that state agencies whose membership is comprised largely of members of the profession they regulate are all financially interested private parties and must therefore satisfy both prongs of the Midcal

test to enjoy state action immunity. Complaint Counsel's Memorandum in Opposition to Respondent's Motion to Dismiss ("CC's Memo in Opposition to MTD") at 3. This is despite the fact that the State Board is a quasi-judicial agency, an arm of the State, comprised of state officials, acting based on a clearly articulated state law, and with a range of safeguards in place to ensure the neutrality and ethical approach of its officials.

As explained in the State Board's Memo in Support of MTD and State Board's Memo in Opposition to MPSD, the last two decades of case law on state action immunity do not support the Commission's desired change to antitrust law. In the original state action immunity case, Parker v. Brown, the Supreme Court found that there is:

> [N]othing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.

317 U.S. 341 at 350-351. The Court in Parker, and courts in many other state action immunity cases since then, recognize that: (1) Congress did not intend antitrust legislation to apply to the states; (2) the state is defined as including the state legislature, state courts, and state agencies;[2] and (3) the only question that remains is the extent to which a state's immunity protects the decisions of third parties who are acting with varying degrees of state involvement. In the decades since the Parker decision, Congress has not passed a law contradicting this interpretation of federal antitrust laws. Although two national antitrust study commissions, one in the late 1970s and one in the late 1990's

---

[2] As stated in previous briefs in this case, the Supreme Court has held that "in cases in which the actor is a state agency, it is likely that active state supervision would also not be required." Town of Hallie v. City of Eau Claire, 471 U.S. at 46.

examined at the state action immunity issue, Congress has chosen to leave Parker and its progeny intact.

The Commission's proposal to change the application of the state action immunity doctrine is in contradiction to decades of case law. Requiring active supervision of the actions of state agencies that are comprised of members of the profession that they regulate would upend the procedures of hundreds of state licensing agencies. These agencies currently enforce state laws and regulations without having each and every decision micromanaged by already over-burdened and under-resourced state officials.

Without clear case law supporting its arguments, CC's Memo in Opposition to MTD relies heavily on a few cases where courts addressed active supervision of alleged state agencies. *See* Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975); Hoover v. Ronwin, 466 U.S. 558 (1984); Washington State Elect. Contractors Ass'n v. Forrest, 930 F.2d 736 (9th Cir. 1991); Asheville Tobacco Bd. of Trade v. FTC, 236 F.2d 502 (4th Cir. 1959); CC's Memo in Opposition to MTD, at 4-9. In previous briefs, Respondent distinguished the facts of cases such as these from the instant facts, as they involve the acts of private individuals, not state agencies. *See e.g.* State Board's Memo in Opposition to MPSD, at 14-15 and 20.

As already explained by the State Board, case law such as Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) and Bates v. State Bar of Arizona, 433 U.S. 350 (1977) must be distinguished from the instant facts for an additional reason: they predate the 1985 Supreme Court decision in Town of Hallie v. City of Eau Claire, where that court held that it was "likely" that state agencies would not have to meet the active supervision

requirement to obtain state action immunity. *See* CC's Memo in Opposition to MTD, at 4-7; Goldfarb, 421 U.S. 773; Bates v. State Bar of Arizona, 433 U.S. 350 (1977); State Board's Memo in Opposition to MPSD, at 15-16 and 19. Respondent has already cited a number of cases that postdate Hallie, where federal courts granted state agencies, including a number of state licensing boards, state action immunity without applying an active supervision analysis. *See, e.g.*, Hass v. Oregon State Bar, 883 F.2d 1453, 1461 (9th Cir. 1989); 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); 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).

As in previous briefs, the Commission cites several new cases in its Memorandum that are easily distinguished from the instant facts. For example, American Needle, Inc. v. NFL, is cited as proof that the Supreme Court still relies on Goldfarb as good precedent. American Needle, Inc., 130 S. Ct. 2201, 2210 (2010); CC's Memo in Opposition to MTD, at 7. However, this case does not even address state action immunity or a state agency or active supervision. Goldfarb was cited in American Needle, Inc. as evidence in a discussion of whether members of a "single entity" (*e.g.*, a bar association") could be considered engaged in a concerted activity. Complaint Counsel also cites 324 Liquor Corp. v. Duffy as evidence that a state's ethics oversight of a state agency is inadequate to meet the active supervision requirement. 479 U.S. 335 (1987); CC's Memo in Opposition to MTD, at 13. However, this case, like many others that the Complaint Counsel relies on, is a price-fixing case.

The Commission dismisses several cases where state licensing agencies were granted state action immunity without addressing active supervision in the State Board's favor as "poorly reasoned." Among these is Earles v. State Bd. of Certified Public Accountants. 139 F.3d 1033 (5th Cir. 1998); CC's Memo in Opposition to MTD, at 7. The Commission argues that Earles is bad precedent because the defendants in subsequent cases which cited to Earles "bear no resemblance" to the financially interested accountants in Earles. *See* CC's Memo in Opposition to MTD, at 7, *citing* Benton, Benton & Benton v. Louisiana Pub. Facilities Auth., 897 F.2d 198 (5th Cir. 1990); Cine 42nd Street Theater Corp. v. Nederlander Org., 790 F.2d 1032 (2d Cir. 1986); Porter Testing Lab v. Bd. of Regents, 943 F.2d 768 (10th Cir. 1993). These three cases do indeed support the State Board's argument that state agencies need not show active supervision to enjoy state action immunity. Further, Respondent once again refers to the number of cases where state licensing agencies were found to be immune from the application of federal antitrust law without a discussion of active supervision. *See supra*, at 10.

Complaint Counsel criticizes Respondent's discussions distinguishing state action immunity cases involving price-fixing and rate setting from the instant case. They claim that "the Board cites no case for its novel proposition of law." CC's Memo in Opposition to MTD, at 6. This is incorrect. Respondent has cited supportive case law, expert commentary, and the Commission's own State Action Task Force Report to support this conclusion. *See* State Board's Memo in Opposition to MPSD, at 15-16.

Given a lack of supporting case law, the Commission's argument rests heavily on the contents of its own State Action Task Force Report, and the opinions of

miscellaneous commentators. CC's Memo in Opposition to MTD, at 7-8. As Respondent has stated in previous briefs, such opinions do not carry the weight of judicial precedent; however, Respondent can also cite non-judicial authority supporting its position.[3]

IV. THE STATE BOARD IS A STATE AGENCY, NOT A PRIVATE ACTOR.

Complaint Counsel attempts to argue that, because the State Board members are dentists and because dentists may provide teeth-whitening services, the State Board has "an obvious financial interest in excluding non-dentists from providing teeth whitening services." CC's Memo in Opposition to MTD, at 9. Complaint Counsel allege that, for purposes of this Motion to Dismiss, they does not have to show that the State Board members acted in bad faith, consciously pursued a private interest, or violated an oath of office. CC's Memo in Opposition to MTD, at 9.

As an initial matter, the Commission's failure to allege **any** facts that could establish the State Board members acted with a private financial interest necessitates dismissal as a matter of law. *See* Twombly, 550 U.S. at 555 (holding conclusory allegations without sufficient factual allegations insufficient to survive motion to dismiss); *see* Iqbal, 129 S. Ct. at 1953 (finding that the pleading standards set forth in

---

[3] *See, e.g.*, C. Douglas Floyd, *Plain Ambiguities in the Clear Articulation Requirement for State Action Antitrust Immunity: The Case of State Agencies*, 41 B.C. L. REV. 1059 (2000):

> [A]gencies frequently do possess authority, as a matter of state law, to prescribe competition policy for the state as a whole under general delegations of authority from the state legislature. Accordingly, the agency's clear articulation of state policy within the scope of its delegated authority should suffice in itself to satisfy the clear articulation component of the *Parker* doctrine. This theory has been recognized by an emerging trend of authority in the courts of appeals.

Id. at 1136. *See also* John E. Lopatha & William H. Page, *State Action and the Meaning of Agreement Under the Sherman Act: An Approach to Hybrid Restraints*, 20 YALE J. ON REG. 269, at 276 (2003) ("Municipalities and independent agencies need only satisfy the first prong of Midcal. They must act pursuant to a clear state policy, but their actions need not be actively supervised.").

Twombly are "especially important" in cases involving qualified immunity of government officials). In Twombly, the Supreme Court dismissed the plaintiffs' antitrust claims because the plaintiffs failed to allege any facts showing that the defendants engaged in an antitrust conspiracy. Id. at 546-65. Like the plaintiffs in Twombly, the Commission—in this proceeding—has made insufficient conclusory allegations with regard to the State Board members' financial interest in the performance of their official state duties.

The Commission's pleading deficiencies are further compounded by the presumption recognized by the Supreme Court that State Board members are "assumed to be men [and women] of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances." Withrow v. Larkin, 421 U.S. 35, 55 (1976) (internal citation omitted).

Under this presumption—and using the same logic of the Commission—the State Board clearly is a state agency, and not a private actor, because:

- State Board members are public officials sworn to uphold the Dental Practices Act, which provides that the State Board shall regulate the practice of dentistry "in the public interest" (N.C. Gen. Stat. § 90-22);
- State Board members are banned from having conflicts of interest that would compromise this oath (N.C. Gen. Stat. §§ 138A-2; 22(a)), and are required to take mandatory ethics courses and file regular financial disclosures to prevent such conflicts of interest;

- State Board members face criminal penalties and removal from the State Board if they willfully omit, neglect, or refuse to discharge any of the duties of [their] office" (N.C. Gen. Stat. § 14-230);
- the State Board's only statutory purpose is to regulate the practice of dentistry "in the public interest," and its engagement in any other activity would be in contravention to its duly-delegated legislative authority;
- the North Carolina Constitution prohibits the State Board from engaging in antitrust activities (N.C. Const. art I, § 34); and
- the State has provided for the defense of the State Board in this proceeding, which it could not have done if the State Board members had acted with "obvious financial interests" in the exercise of their official activities (N.C. Gen. Stat. §§ 143-300.2, 143-300.4).

The Commission has failed to set forth **any** factual allegations that "raise a right to relief above the speculative level" that would show the State Board is a private actor with an "obvious" financial interest in enforcing the North Carolina Dental Practice Act. *See* Twombly, 550 U.S. at 555. Because it alleges only that the State Board Members could have behaved improperly as private actors, by virtue of their profession, the Commission' claims must be dismissed. *See* Swish Marketing, U.S. Dist. LEXIS 15016, at *13-14 (rejecting FTC's argument that defendant's status as CEO, standing alone, warranted the inference of unlawful involvement in antitrust activities, and dismissing FTC's complaint under the pleading standards set forth in Twombly and Iqbal).

V. THE STATE BOARD ACTED PURSUANT TO A CLEARLY ARTICULATED STATE POLICY, SUBJECT TO ACTIVE SUPERVISION.

A. The State of North Carolina Has a Clearly Articulated Statutory Mandate That Teeth Stain Removal and Other Dental Services Performed by Teeth Whitening Services Providers Must Be Offered and Rendered by Licensed Dentists and Those Supervised by Licensed Dentists.

As discussed elsewhere in this brief, the State Board's Memo in Support of MTD, and the State Board's Memo in Opposition to MPSD, the State Board has acted pursuant to a clearly articulated state policy to restrict the provision of stain removal services to licensed dentists. The Commission takes issue with the State Board's decision to send warning letters prior to engaging in actual litigation; however, this is quite common among state agencies throughout the country. There is a general practice of issuing a warning letter to private parties prior to initiating litigation, explaining their board's legal position, and asking for a cessation of the complained-of behavior. This avoids the unnecessary waste of time and resources that often occurs during the adjudication of a dispute. This type of behavior is commonplace and in no way is indicative of antitrust violations. The Commission has cited no legal authority to the contrary. Therefore, Complaint Counsel have failed to satisfy the pleading standard set forth in Twombly and Iqbal, to show facts establishing that the State Board did anything more than engage in lawful communications, prior to seeking judicial relief against non-dentist teeth whitening providers. On this basis, the Commission's claims fail.

B. The State of North Carolina Actively Supervises the State Board's Actions.

While a showing of active supervision is not necessary to establish state action immunity for the State Board, its conduct also was subject to active supervision. Any discussion of active supervision of state agency actions is made more difficult by the fact

that the legal standards for that test are aimed at private parties, not state entities. Complaint Counsel argues that an "independent state actor" must oversee the State Board's "determination that the target has in fact engaged in the unlawful practice of dentistry."

North Carolina courts provide the State Board with the means of resolving civil lawsuits and pursuing criminal prosecution. As discussed in other briefs, if the State Board seeks to enjoin illegal teeth whitening services, it must do so in court. N.C. Gen. Stat. § 90-40.1. If the State Board pursues criminal prosecution, it must do so in court. N.C. Gen. Stat. § 90-40. However, as explained, it is the general practice of state agencies to send warning letters to parties explaining state rules and regulations and asking for compliance, prior to devoting the resources to litigation. To submit this practice to closer state supervision than it already undergoes would mean changing the general practices of hundreds of state agencies. This change would contradict existing case law, widespread state practice, and congressional intent.

VI. REPLY TO MISCELLANEOUS ARGUMENTS SET FORTH IN THE COMMISSION'S MEMORANDUM.

1. As explained on pages 23-25 of the State Board's Memo in Opposition to MTD, the Supreme Court's decision in California Dental Ass'n v. FTC, 526 U.S. 756 (1999) supports the State Board's position that it is not subject to the Commission's jurisdiction. In California Dental Ass'n, the FTC brought a complaint against the California Dental Association ("CDA"), a voluntary nonprofit association of local dental societies that existed, in part, to provide economic benefits to its for-profit members' businesses. Finding that the CDA was subject to the Commission's jurisdiction, the Supreme Court noted that, for such jurisdiction to exist:

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

Id. at 766 (emphasis added). Thus, as jurisdiction hinges on whether the entity's organizational purpose is intended to improve its members' profits, the State Board is not subject to jurisdiction because, by virtue of the North Carolina statute under which it is organized, its only purpose is to protect the public interest. N.C. Gen. Stat. § 90-22; *see* In re Hawkins, 17 N.C. App. 378, 194 S.E.2d 540, cert. denied and appeal dismissed, 283 N.C. 393, 196 S.E.2d 275, cert. denied, 414 U.S. 1001 (1973).

2. Complaint Counsel argue that teeth whitening is not the practice of dentistry and that, even if it were, the State Board has violated the FTC Act through its "*ultra vires* efforts to eliminate assertedly 'illegal' competition." CC's Memo in Opposition to MTD, at 14. The cases cited by Complaint Counsel in support of this argument—FTC v. Indiana Fed'n of Dentists, 476 U.S. 447 (1986) and Fashion Originators' Guild of Amer., Inc. v. FTC, 312 U.S. 457 (1941)—are distinguishable because the defendants in those cases: 1) were private actors, not entities created by state statute for the purpose of undertaking the actions of which the Commission complained; and 2) had members who colluded with one another to realize a clear and immediate financial gain by undertaking the allegedly unlawful actions.

By contrast, the Commission has failed to sufficiently plead that the State Board has acted as a private actor with a "proximate relation to lucre" or that the State Board members have engaged in *ultra vires* "collusion"—for the good reason that no such facts exist.

3. Complaint Counsel's forecast of evidence that they plans to introduce into evidence at trial with regard to the safety of teeth whitening is irrelevant for purposes of this Motion to Dismiss and for purposes of this proceeding, as a whole. By attempting to challenge a state statute that expressly limits the practice of dentistry (including stain removal) to licensed dentists, the Commission is grossly exceeding its Congressionally-delegated authority in violation of the Tenth Amendment.

4. The Commission has pleaded in a conclusory fashion that "the Dental Board has engaged in extra-judicial activities aimed at preventing non-dentists from providing teeth whitening services in North Carolina." Compl., ¶ 19. Specifically, the Commission alleges that the State Board has communicated to both non-dentist teeth whitening providers and to other third parties that the provision of teeth whitening services must be performed by a licensed dentist and "ordered" non-dentist teeth whitening providers to stop providing teeth whitening services. Compl., ¶¶ 20-22. Based on that allegation, the Complaint Counsel argues that those extra-judicial activities circumvent the system set up by the North Carolina legislature to provide oversight to the State Board's activities. Complaint Counsel admits that, but for the State Board's allegedly "extra-judicial activities," the State Board would be entitled to state action immunity. CC's Memo in Opposition to MTD, at 15.

However, as discussed earlier in this brief, it is the general practice of state agencies to communicate with private parties prior to initiating litigation, explaining their legal position and asking for a cessation of the complained-of behavior. Complaint Counsel has cited no legal authority to the contrary.

5. Complaint Counsel attempt to argue that the State Board has engaged in concerted activity. Even if the State Board had engaged in activities that fall within the definition of concerted activity under antitrust law—which the State Board denies—such activities by the State Board have not been unlawful. *See* Earles, 139 F.3d at 1041). Further, the mere fact that the State Board is comprised of a majority of dentists does not make the State Board a *per se* antitrust conspiracy. This composition is required by state law and is replicated in hundreds of state licensing boards across the country. *See* State Board's Memo in Support of MTD, at 37. The State Board and its duly sworn, public official members have not and cannot advance private competitive interests. In this context of numerous direct state statutory controls, the composition of the State Board is *per se* legal.

VII. CONCLUSION.

The Commission does not enjoy a monopoly in the arena of public enforcement of antitrust laws. A half century before the creation of the FTC, the North Carolina Constitution banned monopolies as "contrary to the genius of a free state." N.C. Const. art. I, § 34. Of similar import, N.C. Constitution Article I, Section 32 limits state agency grants of exclusive privileges. These Constitutional prohibitions are not just interesting history; these provisions have been held to set a finite limit on commercial restraints imposed by state agencies. In re Certificate of Need for Aston Park Hosp., Inc., 282 N.C. 542, 193 S.E.2d 729 (1973) (striking down certain certificate of need requirements); State v. Harris, 216 N.C. 746, 6 S.E.2d 854 (1940) (statute for licensing cleaning and pressing business held unconstitutional). As then State Supreme Court Justice (later U.S. Senator) Sam Ervin explained in State v. Ballance, 229 N.C. 764, 51 S.E. 2d 731 (1949):

> If a statute is to be sustained as a legitimate exercise of the police power, it must have a rational, real, or substantial relation to the public health, morals, order, or safety, or the general welfare. In brief, it must be reasonably necessary to promote the accomplishment of a public good, or to prevent the infliction of a public harm.

Id. at 769-70, 51 S.E.2d at 735 (holding a board for licensing photographers to be unconstitutional).

The North Carolina Dental Practice Act requirement that only authorized persons may offer or render stain removal or other dental services included in the business of teeth whitening, as well as the composition of the State Board with a majority of licensees, and the authorization of the State Board to protect the public by enforcing the Act, must be presumed to have satisfied the state constitutional requirements. But this state assures the State Board is a fully public agency by imposing tight controls banning conflicts of interest, banning use of funds for lobbying, mandating routine reports from individual board members and the State Board itself, and requiring compliance with the state's open meetings law, public records law, administrative procedures act, and ethics act. The State Board is not some "guild" or cartel, private association, or facade for private actors. Every injunction must be rendered by a state court. Every hearing is subject to the Administrative Procedures Act and must be public. Every rule must be approved by a Rules Review Commission established by the legislature. Every conflict of interest is subject to the scrutiny of an independent Ethics Commission. Every decision is subject to direct review by the courts. The very existence of the State Board is subject to Article I, Sec. 34. These mandates are far more rigorous than the ethereal expectations of "active supervision" to be exercised over a private actor or entity. These

are examples of the high degree of oversight required as a matter of state law of true public agencies.

The Commission does not have *carte blanche* to preempt state public protection with an unauthorized, unprecedented jurisdiction theory that would radically alter the way states regulate professions. The State Board has cited numerous Supreme Court precedents in support of its position. By contrast, Complaint Counsel has relied upon such authorities as a 13 year old outdated supplement to a treatise, while backhanding applicable Court precedent as "not well reasoned." In the same fashion, Complaint Counsel has not cited, much less considered, applicable state statutes. For the reasons set forth above, as well as those iterated and reiterated in its Memorandum in Support of Respondent's Motion to Dismiss and Respondent's Memorandum Opposing the Motion for Partial Summary Decision, the Commission has failed to sufficiently plead a claim upon which relief may be granted and lacks jurisdiction to pursue this action against the State Board. Thus, this action must be dismissed.

This the 20th day of December, 2010.

ALLEN AND PINNIX, P.A.

/s/ Noel L. Allen

Noel L. Allen
Alfred P. Carlton, Jr.
M. Jackson Nichols
Catherine E. Lee
Brenner A. Allen, of counsel (licensed in DC)
Attorneys for Respondent
Post Office Drawer 1270
Raleigh, North Carolina 27602
Telephone: 919-755-0505
Facsimile: 919-829-8098
Email: nallen@allen-pinnix.com

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of December, 2010, I electronically filed the foregoing with the Federal Trade Commission using the Federal Trade Commission E-file system, which will send notification of such filing to the following:

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

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

William L. Lanning
Bureau of Competition
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Room NJ-6264
Washington, D.C. 20580
wlanning@ftc.gov

Steven L. Osnowitz
Bureau of Competition
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Room NJ-6264
Washington, D.C. 20580
sosnowitz@ftc.gov

Melissa Westman-Cherry
Bureau of Competition
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Room NJ-6264
Washington, D.C. 20580
westman@ftc.gov

Tejasvi Srimushnam
Bureau of Competition
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Room NJ-6264
Washington, D.C. 20580
tsrimushnam@ftc.gov

Michael J. Bloom
Bureau of Competition
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Room H-374
Washington, D.C. 20580
mjbloom@ftc.gov

Richard B. Dagen
Bureau of Competition
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Room H-374
Washington, D.C. 20580
rdagen@ftc.gov

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

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue N.W.
Room H-113
Washington, D.C. 20580
oalj@ftc.gov

This the 20th 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