UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

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

COMPLAINT COUNSEL'S RESPONSE TO RESPONDENT'S MOTION TO DISQUALIFY THE COMMISSION

Richard A. Feinstein
Director

Pete Levitas
Deputy Director

Melanie Sabo
Assistant Director

Geoffrey M. Green
Deputy Assistant Director

Bureau of Competition

Michael D. Bergman
Office of the General Counsel

Richard B. Dagen
William L. Lanning
Melissa Westman-Cherry
Steven Osnowitz
Tejasvi Srimushnam

601 New Jersey Ave, NW
Washington, D.C.
(202) 326-2628
(202) 326-3496 Facsimile
rdagen@ftc.gov

Michael J. Bloom, Assistant Director
Erika Meyers
Office of Policy & Coordination

Counsel Supporting Complaint

Dated: January 27, 2011

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

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

COMPLAINT COUNSEL'S RESPONSE TO RESPONDENT'S MOTION TO DISQUALIFY THE COMMISSION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND REGULATIONS

OTHER AUTHORITIES

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

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

COMPLAINT COUNSEL'S RESPONSE TO RESPONDENT'S MOTION TO DISQUALIFY THE COMMISSION

Respondent, the North Carolina Board of Dental Examiners ("Board"), filed a motion on January 14, 2011 to disqualify the Federal Trade Commission ("Commission" or "FTC"), pursuant to 16 C.F.R §§ 3.42(g)(2) and 4.17 ("Motion"). In its Motion, the Board requests that the Commission disqualify and remove itself as the Administrative Law Judge ("ALJ") over the administrative hearing as well as from adjudicating the pending Board's Motion to Dismiss and Complaint Counsel's Motion for Partial Summary Decision. The Board argues that the Commission should be disqualified because (1) it lacks the legal authority to rule on "the constitutionality of the exercise of jurisdiction over the Board," and (2) "it has prejudged" both the Board's state action defense and the Board's liability generally.

The Board's motion is without merit and should be denied. The Commission has jurisdiction to determine its own jurisdiction, including adjudicating the merits of the Board's

state action defense. Further, as a matter of law, the Commissioners' participation in the investigatory phase of this matter does not constitute prejudgment. The other activities identified by the Board are also not a proper basis for disqualification.

1. The Commission has the authority to rule on the pending motions and to adjudicate the applicability of the Board's state action defense

The Board first argues that the Commission lacks the authority to rule on whether the Commission has jurisdiction over the Board. Motion at 3-5. This argument is without merit.

The Board has provided no support (and we are unaware of any) that the Commission is somehow divested of jurisdiction from adjudicating the state action issue in the first instance. It has long been settled that "a court always has jurisdiction to determine its own jurisdiction." *Rosado v. Wyman*, 397 U.S. 397, 403 n.3 (1970); *accord U.S. v. United Mine Workers of America*, 330 U.S. 258, 292 n.57 (1947). This principle has been applied to administrative proceedings, permitting the agency to make the initial determination of its own jurisdiction. *See Fed. Power Comm'n v. La. Power & Light Co.*, 406 U.S. 621, 647 (1972).

Indeed, Courts of Appeals have repeatedly applied this principle to FTC proceedings, requiring the exhaustion of administrative remedies and holding that the Commission is to determine its own jurisdiction in the first instance, including adjudicating whether a respondent's conduct is protected by the state action doctrine announced in *Parker v. Brown*, 317 U.S. 341 (1943). *See, e.g., FTC v. Ernstthal*, 607 F.2d 488, 490 (D.C. Cir. 1979) ("as a general rule, the agency should make the initial determination of its own jurisdiction") (citation omitted); *California ex rel. Christensen v. FTC*, 549 F.2d 1321, 1324-25 (9th Cir. 1977) (determination of state action defense should be decided by the FTC); *FTC v. Markin*, 532 F.2d 541, 544 (6th Cir. 1976) ("We think that the applicability of *Parker v. Brown* [state action defense] should be

determined by the Commission in the first instance."); *FTC v. Feldman*, 532 F.2d 1092, 1097-98 (7th Cir. 1976) (review of state action defense premature until after final FTC order). These courts relied, in part, on the agency's expertise to determine the applicability of the state action defense and the recognition that the agency may refuse to issue a cease and desist order. *See, e.g., Christensen*, 549 F.2d at 1324-25.

The Board will have the opportunity to raise its state action defense on judicial review of a final cease and desist order (if any) in the Court of Appeals if it believes that it has not obtained a fair hearing on its state action defense, that the Commission has decided this issue improperly, or that the Commission is not even empowered to decide that issue. *See* 15 U.S.C. § 45(c); *see also S.C. State Bd. of Dentistry v. FTC*, 455 F.3d 436 (4th Cir. 2006) (dismissing interlocutory appeal of agency denial of state action defense).[1]

Finally, the Board's attempt to distinguish *FTC v. Cement Institute*, 333 U.S. 683, 690-93 (1948), fails. *See* Motion at 4-5. The language quoted by the Board addresses whether the Commission lacks jurisdiction "to institute proceedings or to issue an order" under Section 5 of the FTC Act where the same conduct also violates the Sherman Act. The Supreme Court held that the Commission had such administrative jurisdiction. *See* 333 U.S. at 692-93. Nowhere in *Cement Institute* did the Supreme Court suggest that the Commission lacked jurisdiction to adjudicate the applicability of certain defenses to FTC Act liability.

---

[1] While the state action doctrine is a judicially created doctrine derived from federalism, raising it as a defense does not amount to "the adjudication of the constitutionality of congressional enactments" that sometimes have been considered beyond the jurisdiction of administrative agencies. *See, e.g., Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 215 (1994) (citation omitted). In any event, the rule described in *Thunder Basin* is "not mandatory" and permits administrative review even for constitutional claims where there is adequate judicial review. *See id.*

2. **The Commission has not prejudged the state action issue or engaged in any other conduct requiring disqualification**

The Board next asserts that the Commission has prejudged the applicability of the Board's state action defense in this case, citing certain publications, speeches, and conduct by Commission staff or members. *See* Motion at 5-7. In administrative litigation, a party may seek disqualification by a good faith filing "of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee." 5 U.S.C. § 556(b); *see also* 16 C.F.R. § 3.42(g) (movant support disqualification of ALJ with affidavit); 16 C.F.R. § 4.17(b)(1) (movant must support disqualification of Commissioner with affidavit). The Board's motion must be denied because it did not support its motion with any supporting affidavit. While the Board asserts that no supporting affidavit is required in this case, Motion at 2, the Commission's administrative rules provide for no exception from the affidavit requirement. For this reason alone, the Board's motion must be denied. *See Gibson v. FTC*, 682 F.2d 554, 565 (5th Cir. 1982) (requirement for submitting affidavits serves important purposes and must not be taken "lightly") (citation omitted).

Even were the Commission to consider the Board's motion on the merits, it must be denied. The burden on a respondent seeking recusal is "high," and is only justified where the agency has "adjudged the facts as well as the law of a particular case in advance of hearing it." *See In re Whole Foods Market, Inc*., No. 9324, 2008 FTC LEXIS 123 (Sept. 5, 2008) (*citing Cinderella Career and Finishing Schs., Inc. v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970)). Nothing cited by the Board shows any prejudgment that justify disqualification in this case.

Case law has long held that the sorts of materials relied upon by the Board here – or the mere fact that the Commission investigated and issued a complaint finding "reason to believe"

that the Board had violated the FTC Act – fall far short of showing any sort of Commission bias. For example, in *Cement Institute*, the Supreme Court held that the fact that members of the Commission had previously testified before Congress that a pricing system employed in the cement industry was equivalent to price fixing, did not disqualify the Commissioners from providing a fair tribunal in a subsequent investigation of the same parties involving similar conduct. 333 U.S. at 700-03. The Court explained that the earlier Commission testimony "did not necessarily mean that the minds of its members were irrevocably closed on the subject of respondent's basing point practices." 333 U.S. at 701. *Cement Institute* thus rejected disqualification even "where the Commission had made statements in the course of its designated responsibilities that were factually related to a later adjudication." *See In re Whole Foods*, 2008 FTC LEXIS at *5.

Subsequently, in *Withrow v. Larkin*, 421 U.S. 35 (1975), the Supreme Court upheld a state agency's power to investigate and adjudicate the same matter, holding that "the initial charge or determination of probable cause and the ultimate adjudication have different bases and purposes. The fact that the same agency makes them in tandem and that they relate to the same issue does not result in a procedural due process violation." *Id.* at 58. According to the Court, the "risk of bias or prejudgment in this sequence of functions has not been considered to be intolerably high or to raise a sufficiently great possibility that adjudicators would be so psychologically wedded to their complaints that they would consciously or unconsciously avoid the appearance of having erred or changed position." *Id.* at 57.

Similarly, in *Kennecott Copper Corp. v. FTC*, 467 F.2d 67 (10th Cir. 1972), the Court held that the Commission could give a fair hearing to the respondent notwithstanding the

Commission's prior contacts with Congress on the subject matter under review, and the fact that the FTC was permitted to combine the functions of investigator, prosecutor, and judge did not amount to a due process violation. *Id*. at 79. The Court added that there was no prejudgment even where the Commission received communications from congressmen and other interested groups seeking action in same industry, and where one Commissioner held a public interview on the case. *Id.* at 80; *see also* 5 U.S.C. § 554(d)(2)(C); *FTC v. Cinderella Career & Finishing Schs., Inc*., 404 F.2d 1308, 1315 (D.C. Cir. 1968) ("it is well settled that a combination of investigative and judicial functions within an agency does not violate due process."); *Skelly Oil Co. v. Federal Power Comm'n*, 375 F.2d 6, 17-18 (10th Cir. 1967) (no basis for disqualification of agency even where one agency member entered the proceeding with advance views on the important economic matters at issue), *aff'd in part, rev'd in part, on other grounds sub nom. In re Permian Basin Area Rate Cases*, 390 U.S. 747 (1968).

Applying this precedent, it is clear that in this case neither the Commission nor any of its members have approached the sorts of conduct that would justify disqualification. First, the 2003 State Action Task Force Report merely reflects the views of, and "suggestions" by, the Task Force staff members and does not reflect the official views of the Commission or any individual Commissioner. *See* Motion, Ex. A. Indeed, the Board does not object to any statement or recommendation by the Task Force regarding the scope of the state action doctrine, the active supervision prong, or its applicability to state regulatory boards. There is simply no suggestion that the staff views in the Task Force Report amount to any prejudgment by the Commission adjudicating the applicability of the state action defense in this case.

Likewise, the views of Commissioner Rosch – stated in his individual capacity and not

reflecting the views of other members of the Commission – advocating that the Commission litigate its competition cases more aggressively, do not reflect any Commission bias. Commissioner Rosch's statement is entirely unrelated to the state action defense and does not suggest that either he or the Commission in its adjudicatory capacity have prejudged any state action issues in this case. *See* Motion at 6; Motion Ex. B. Indeed, even *if* Commissioner Rosch had expressed prior views generally on the scope of the state action defense, disqualification would be inappropriate as "it is not improper for members of regulatory commissions to form views about law and policy on the basis of their prior adjudications of similar issues which may influence them in deciding later cases." *American Med. Ass'n, v. FTC*, 638 F.2d 443, 449 n.4 (2d Cir. 1980); *see also Texaco, Inc. v. FTC*, 336 F.2d 754, 764 (D.C. Cir. 1964) (FTC Commissioner can hear case even "after he had expressed an opinion as to whether certain types of conduct were prohibited by law").

Finally, the Board's argument that a Commission press release issued when the complaint was filed in this case shows Commission bias is entirely frivolous. *See* Motion at 6-7; Motion Ex. C. The press release simply summarizes the allegations in the complaint, states that the complaint "alleges" and "charges" certain anticompetitive conduct, and expressly notes that "[t]he complaint is not a finding or ruling that the named parties have violated the law. The administrative complaint marks the beginning of a proceeding in which the allegations will be ruled upon after a formal hearing by an administrative law judge." Motion Ex. C. That the press release was issued when the complaint was filed but prior to service, or that it was issued by the Commission's Office of Public Affairs, *see* Motion at 6-7, are entirely irrelevant. It has long been settled that the Commission does not prejudge a complaint or violate a party's due process

rights simply by issuing a press release following the filing of a complaint, because "Congress has, as a general practice, vested administrative agencies with both the specified power to act in an accusatory capacity through the initiation of an action designed to enforce compliance with or prevent further violation of a statutory provision and with the responsibility of ultimately determining the merits of the charges so presented." *Cinderella,* 404 F.2d at 1315.

The Board also errs that when it asserts that the Commission has prejudged that the Board has violated the FTC Act because it "initiated an investigation" of the Board, issued a subpoena *duces tecum* in the course of that investigation, and then issued a complaint alleging that the Board's actions violate the FTC Act (and that the Board's action does not qualify for a state action defense). *See* Motion at 8-9. *Cement Institute, Withrow,* and its progeny, cited above, make clear that there is no improper prejudgment where Commission staff conducts an investigation, the Commission issues a complaint finding there to be "reason to believe" there was a law violation (and no available defense), and subsequently considers the issues and facts in an adjudicatory capacity. For similar reasons, Judge Chappell's characterization of the Commission's position as to the applicability of the state action defense, *see* Motion at 9, is irrelevant, as the Commission may issue a complaint and then sit in an adjudicatory capacity in the same proceeding.

Finally, there is no bias even if Commission has determined that state regulatory bodies may in certain circumstances be subject to the active supervision prong of the *Midcal* test. *See* Motion at 2. Such a position does not amount to unfair "prejudgment" as the Commission may properly form views about particular legal or policy issues on the basis of prior adjudications of similar issues. *See, e.g., AMA,* 638 F.2d at 449 n.4; *Texaco,* 336 F.2d at 760.

CONCLUSION

For the foregoing reasons, the Board's Motion to Disqualify the Commission should be denied.

Respectfully submitted,

s/ Michael D. Bergman
Michael D. Bergman
Richard B. Dagen
600 Pennsylvania Ave., NW
Washington, DC 20580
(202) 326-3184
mbergman@ftc.gov

Counsel Supporting Complaint

January 27, 2011

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

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

[PROPOSED] ORDER DENYING RESPONDENT'S MOTION TO DISQUALIFY THE COMMISSION

On January 14, 2011, Respondent submitted its Motion to Disqualify the Commission.

On January 27, 2011, Complaint Counsel submitted its Response to Respondent's motion to Disqualify the Commission.

Upon consideration of the points raised in the motion and the opposition thereto, Respondent's motion is DENIED. The Commission declines to disqualify itself from this matter.

ORDERED:

_____
Donald S. Clark
Secretary

Date:

CERTIFICATE OF SERVICE

I hereby certify that on January 27, 2011, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-159
Washington, DC 20580

I also certify that I delivered via electronic mail and hand delivery a copy of the foregoing document to:

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., NW
Washington, DC 20580

I further certify that I delivered via electronic mail a copy of the foregoing document to:

Noel Allen
Allen & Pinnix, P.A.
333 Fayetteville Street
Suite 1200
Raleigh, NC 27602
nla@Allen-Pinnix.com

Counsel for Respondent
North Carolina State Board of Dental Examiners

CERTIFICATE FOR ELECTRONIC FILING

I 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 the adjudicator.

January 27, 2011

By: s/ Michael D. Bergman
Michael D. Bergman