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 PRETRIAL BRIEF

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GENERAL OBJECTION

The State Board objects to a requirement to submit a pretrial brief under the circumstances that include two unresolved dispositive motions, a pending motion to compel discovery (on appeal/reconsideration), other pending discovery including the deposition of an expert. There is simply no way that Respondent's counsel could do more than guess at what the trial might be about at this time. If the State Board's dispositive motion is granted, the Respondent is entitled to State Action immunity, and there will be no trial. If the Complaint Counsel's dispositive motion is granted, the remains the separate question of whether the State Board comprised of a majority of licensees constitutes a *per se* antitrust conspiracy in the absence of any evidence of an actual conspiracy. It appears from the pleadings that the Complaint Counsel has recently abandoned its original accusation that the dentists of North Carolina had "colluded" to restrain trade, but it is impossible to discern from that new argument that the Complaint Counsel would stipulate the lack of any evidence of an actual conspiracy. The likely evidence and law regarding the Complaint Counsel's shifting theory of relevant market definition and analysis of the business of teeth whitening as part of the practice of dentistry simply cannot be anticipated when expert discovery is still being conducted. It must be noted, however, that Complaint Counsel's own expert premised the essence of his opinion upon the erroneous belief that the State Board was enforcing a rule rather than a state statute. Wherefore Respondent objects to the requirement for filing a pretrial brief while the Commission (which should be disqualified) has yet to rule on dispositive motions and while discovery is incomplete, and reserves the right to supplement this brief when the final issues are clear and joined.

INTRODUCTION

The Federal Trade Commission ("Commission") commenced this action based on the assertion that Respondent, the North Carolina State Board of Dental Examiners[1] ("State Board" or "Respondent") has violated Section 5 of the Federal Trade Commission Act (15 U.S.C. § 45). This assertion is not correct. The State Board is a state agency, and its actions were made pursuant to a state law, N.C. Gen. Stat. § 90-29(a)-(b). Under the Federal Trade Commission Act ("FTC Act") and nearly seventy years of case law on this Act, state agencies are entitled to enjoy immunity from the FTC Act so long as their actions are taken pursuant to a clearly articulated state law. Therefore, the State Board has fulfilled the only requirement it must meet to be immune from the application of the FTC Act. The Commission wishes that the law on this point was different. In fact, it has been lobbying Congress and the Courts to require state agencies comprised of a majority of licensees to be considered private actors, and therefore undergo a second test to establish immunity: demonstrating that their actions are actively supervised. While these lobbying efforts have not yet succeeded, and so the second test is not required by law, the State Board's actions do meet the active supervision requirement. Therefore, as the evidence will show, the State Board's enforcement of N.C. Gen. Stat. § 90-29(a)-(b) is entitled to state action immunity.

[1] From the beginning, the Commission demonstrated its misunderstanding of the State Board's legal status by misnaming the Respondent in its Complaint. As a state agency, the State Board is of course the "North Carolina State Board of Dental Examiners," not the "North Carolina Board of Dental Examiners," as the Commission incorrectly stated.

FACTS

A. The State Board Is a State Agency, Acting Pursuant to a State Law.

The State Board is a state agency (not a private organization or a corporation) charged with protecting the health and safety of the state's population by regulating the practice of dentistry. N.C. Gen. Stat. § 90-22(a)-(b). By law, the State Board is required to be comprised of a majority of dentists. N.C. Gen. Stat. § 90-22(b). Each Board member is a state official and is obliged under oath to uphold the laws of this state. N.C. Gen. Stat. §§ 143-555(3)-(4), 11-7. The law at issue in this action is a North Carolina state statute (not a rule, but a statute) prohibiting a person not licensed as a dentist or supervised by a licensed dentist from "remov[ing] stains, accretions or deposits from the human teeth." N.C. Gen. Stat. § 90-29(a)-(b), (c)(1).

The State Board's actions in this case were aimed at persons engaged in the unauthorized practice of dentistry, where there was *prima facie* evidence that they were offering teeth whitening/stain removal services without the supervision of a licensed dentist. The teeth whitening services brought to the State Board's attention sometimes involved serious hygiene failures or multiple violations of the N.C. Dental Practice Act. For example:

- A salon makeup artist making impressions of teeth in violation of N.C. Gen. Stat. § 90-29(b)(7). She was not wearing gloves or following any sterilization procedures, and she had a poison ivy rash on her hands.
- A former dental assistant (who therefore should have known the law) performing teeth whitening procedures at a spa, with spa employees using

an LED light and sometimes polishing persons teeth in advance of the procedure.

- A salon advertising that its whitening procedures would penetrate the interior of teeth, with stains never reappearing. Also, the salon made impressions of clients' teeth in violation of N.C. Gen. Stat. § 90-29(b)(7).

North Carolina State Board of Dental Examiners, Response to Complaint ("Complaint Response") at 10-11.

By law, the State Board is empowered to investigate violations of the Dental Practice Act. N.C. Gen. Stat. § 90-41(d). Therefore, in response to these violations, the State Board opened investigations and sent "cease and desist" warning letters to the owners of illegal teeth whitening establishments and sometimes the owners of the commercial properties they leased. For a line-by-line examination of the truth and legality of these letters, see Complaint Response at 16. The letters did not have any further legal effect than to warn persons of their illegal conduct; therefore, they were not "extra-judicial" as the Commission claims. Any impact beyond a warning would require the State Board to obtain a court order. A party receiving a cease and desist letter could choose to ignore the letter. Or, if the State Board sought an injunction, the party could claim that its activities do not constitute the practice of dentistry. Or, they could seek a declaratory ruling or judgment on the issue of whether their activities constituted the practice of dentistry. N.C. Gen. Stat. § 150B-4.

The Cease and Desist Letters Are Not Evidence of a Conspiracy to Monopolize or restrain trade: (1) The letters were only sent when there was *prima facie* evidence of a violation; (2) The letters did not direct anyone to cease and desist "teeth whitening; IN

FACT, the cease and desist orders did not mention the words "teeth whitening." (3) The letters were truthful. (4) There is no evidence that any recipient of a Cease and Desist "Order" ever stopped doing anything that was not the statutorily defined practice of dentistry. (5) The letters are typical of those commonly used by state and federal agencies and are well within the scope of a state agency's prerogative to attempt to resolve *prima facie* violations of statutes informally without forcing the violator into civil or criminal court. (6) There is no statutory or case law to support the allegation that the State Board lacked the authority to send Cease and Desist Orders. (7) There is no evidence that the Board attempted to enforce the letters by instigating contempt proceedings. (8) If a recipient disagreed with the Cease and Desist, they could simply ignore it. Unlike the FTC, the State Board did not issue press releases falsely accusing anyone of violating the law. If a recipient ignored the letter, and the State Board received evidence of an ongoing violation, it had to initiate a civil or criminal court proceeding. In several cases, the State Board did so successfully.

B. The Dangers of Teeth Whitening Services by Unlicensed Persons Are Well-Established in Scientific Literature and Widely Recognized by Other Governments.

While the facts set forth above, establishing that the State Board is a state agency acting pursuant to a clearly articulated state law, are the only relevant facts in this case, this statement of facts also seeks to explain the well-established concerns over the danger of non-dentist supervised teeth whitening/stain removal services.

The motives behind the State Board's enforcement of state law in this matter are not relevant to establishing the Board's entitlement to immunity in this matter. However, there is a plethora of scientific evidence available to support the state's requirement that

teeth whitening service providers have a dental license. Scientific journals, the Food and Drug Administration (FDA), and numerous reports by investigative journalists all express concern about the dangers of teeth whitening by unlicensed, unsupervised non-dentists. See, e.g., an FDA report regarding the concentrations of the chemicals commonly used in teeth whitening. Dept. of Health and Human Services, Food and Drug Administration, *Oral Health Care Drug Products for Over-the-Counter Human Use*; 21 CFR Part 356; see also Michel Goldberg, M. Grootveld, and E. Lynch, *Undesirable and Adverse Effects of Tooth-Whitening Products: A Review*, CLINICAL ORAL INVESTIGATIONS (Feb. 6, 2009).

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

The question in this matter is not whether the state of North Carolina is scientifically justified in outlawing the provision of stain removal services by unlicensed dentists. Nor is the question whether other similarly situated governments have

concluded that teeth whitening services should only be provided with the supervision of a licensed dentist. However, the answer to both of these questions is "yes." The only determinative question, addressed both in the statement of facts and in greater depth in the argument below, is whether the State Board has acted pursuant to a clearly articulated state law banning teeth whitening services unsupervised by licensed dentists. The answer to this question is "yes" as well.

ARGUMENT

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

The Commission is prosecuting the State Board for an alleged violation of Section 5 of the Federal Trade Commission Act. However, the FTC Act only gives the Commission authority in matters concerning private persons and corporations. 15 U.S.C. § 45. Congressional intent in enacting the law, as well as nearly seventy years of case law, have clearly established that states are immune from the FTC Act so long as they are acting pursuant to a clearly articulated state statute.

Therefore, the State Board asserts that it is a state agency, not a private actor. Its purpose and its members' conduct is aimed at protecting the public health and enforcing state law, not engaging in conduct to benefit private parties. In its actions against non-dentist supervised teeth whitening services providers, the State Board is enforcing a clearly articulated and affirmatively expressed state statute. Therefore, the State Board does not need to demonstrate active supervision in order to qualify for state action immunity; but even if it did, such supervision exists. Further, to draw back and examine the Commission's larger agenda with regards to this action: the fact that the State Board

is required by law to be comprised of a majority of licensees does not make the Board a *per se* antitrust conspiracy.

A. The State Board Is a State Agency, Not a Private Actor.

By law, federal antitrust legislation is aimed at violations by non-state actors; state actors are exempt from these laws. This distinction was established in 1943 when the U.S. Supreme Court granted a state government program immunity from prosecution under the Sherman Act, based on the principle of state action immunity. Parker v. Brown, 317 U.S. 341 (1943). The Parker Court based its decision on the legislative history of the Sherman Antitrust Act, concluding from the Congressional record that the Act was not intended to apply to state government actions.

> We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.

Id. at 350-51. Courts have concluded that the same logic holds true of the Federal Trade Commission Act. For example, see Calif. State Bd. of Optometry v. FTC, 910 F.2d 976, 981-82 (D.C. Cir. 1990).

Since Parker, Congress has had nearly seventy years to amend antitrust laws to include states (or even just state agencies) within the ambit of federal antitrust legislation; it has not done so. It has chosen to eliminate state sovereign immunity in other circumstances, but not for state agencies. See, e.g., Genentech, Inc. v. Regents of the Univ. of Cal., 143 F.3d 1446, 1449 (1998); see also 137 Cong. Rec. 53930-02 (daily ed. Mar. 21 1991) (citing Public Law 102-560, enacted in 1992, "for the purpose of

abrogating Eleventh Amendment immunity in patent cases, to close a 'sovereign immunity loophole'").

Federal courts have spent the past nearly seven decades settling the question of what standards a state must meet to qualify for state action immunity. As the Supreme Court held 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." 471 U.S. 34,6 (1985). In the twenty-five years since this decision was handed down, no state agency has been required to demonstrate active supervision in order to qualify for state action immunity. In case after case, federal courts have examined whether a state agency acted pursuant to a clearly articulated state statute; if it did, then the agency was immune from the application of federal antitrust law. 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).

This judicial analysis was already well-established prior to the Supreme Court's conclusion in Hallie. The handful of examples of cases preceding Hallie where courts addressed active supervision in regards to state agencies are easily distinguishable from this case. For example, in its filings, the Commission has relied heavily on the Supreme Court's 1975 decision in Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975). The Commission considers Goldfarb to (1) define state agencies as private parties and (2)

require these agencies, as private parties, to show active supervision to obtain state action immunity. Complaint Counsel Memorandum in Reply to Respondent's Corrected Memorandum in Opposition to Complaint Counsel's Motion for Partial Summary Judgment at 9. Complaint counsel is incorrect on both of these points. Absolutely nowhere in the Goldfarb decision does the Court call the state agency a "private party"; though it does refer to its co-respondent, a county bar association, as engaging in private activities. 421 U.S. at 792. Further, the issue in Goldfarb was the state bar's ratification of the price-fixing scheme concocted by the county bar association (a private actor) without a clearly articulated state law justifying it. Id. at 790-91. To apply this holding to the instant facts would be more useful if instead of following a clearly articulated state law, the State Board was ratifying a private organization's stain removal policy.

The Commission's argument that the State Board is a private actor, not a state agency, is based on the premise that State Board members have "an obvious financial interest in excluding non-dentists from providing teeth whitening services." Complaint Counsel's Memorandum in Opposition to Respondent's Motion to Dismiss at 9. However, the state has put a number of safeguards in place to counter whatever financial or other interests state board members, like other public officials, may have.

- 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(a).
- State Board members are banned from having conflicts of interest that would compromise this oath and are required to take mandatory ethics courses and file regular financial disclosures to prevent such conflicts of

interest. N.C. Gen. Stat. §§ 138A-14(b), 93B-5(g), 138A-21 through 138A-27).

- State Board members may 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, 138A-31, 138A-34, 138A-45(g).
- 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. N.C. Gen. Stat. § 90-22(a).
- 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.

It is a well-established legal principle that the State Board, as a state agency lead by a majority licensee Board, is entitled to state action immunity, given its status as a state actor enforcing a clearly articulated state policy.

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

The State Board, as a state agency, is immune from federal antitrust law for its enforcement of a "clearly articulated and affirmatively expressed" state policy to restrain

trade. Earles v. State Board of Certified Public Accountants of Louisiana, 139 F.3d 1033, 1041 (5th Cir. 1998). The state statute at issue limits the practice of dentistry to dentists, and defines dentistry as undertaking, attempting, or claiming the ability to "remove[ ] stains, accretions, or deposits from the human teeth." N.C. Gen. Stat. § 90-29(b)(3). Based upon the facts set forth in this brief, the State Board was acting pursuant to state law, and its efforts were directed at enforcing a clear statute rather than an attempt to limit the provision of teeth whitening.

By limiting certain activities to dentists, the statute at issue meets the requirement, set forth through decades of federal case law, that suppression of competition be its "foreseeable result." City of Columbia v. Omni Outdoor Adver., 499 U.S. 365, 372-73 (1991); see also Complaint Counsel's Opposition to the South Carolina State Board of Dentistry's Motion to Dismiss at 28, In the Matter of South Carolina State Bd. of Dentistry, No. 9311 (F.T.C. Nov. 25, 2003) ("a legislature also articulates a policy to displace competition when it expressly authorizes conduct that would 'foreseeably' result in anticompetitive effects"). Further satisfying the "clear articulation" standard, the statute demonstrates that the state "contemplated the kind of action complained of" by delegating to the State Board the authority to "operate in a particular area." Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 415 (1978), overruled on other grounds by Hallie, 471 U.S. 34); see also, e.g., First Amer. Title Co. v. South Dakota Land Title Ass'n, 714 F.2d 1439, 1451 (8th Cir. 1983); Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48, 60 (1985).

The State Board's clearly articulated policy does not have to explicitly grant State Board members the power to write letters warning that teeth whitening/stain removal is

the practice of dentistry. Hallie, 471 U.S. at 46 ("Requiring express authorization for every action that an agency might find necessary to effectuate state policy would diminish, if not destroy, its usefulness"); see also Complaint Counsel's Opposition to the South Carolina State Board of Dentistry's Motion to Dismiss at 40, In the Matter of South Carolina State Bd. of Dentistry v. Federal Trade Comm'n, No. 9311 (F.T.C. Nov. 25, 2003), citing Hallie, 471 U.S. at 42-43 (if the legislature has "delegated 'express authority to take action that foreseeably will result in anticompetitive effects' ... it [does] not need to expressly state that it anticipated anticompetitive results from such conduct."). It is sufficient that North Carolina state law restricts stain removal services to licensed dentists and those supervised by licensed dentists.

The State Board's power to act against non-dentist teeth whitening service providers "may be inferred 'if the challenged restraint is a necessary or reasonable consequence of engaging in the authorized activity.'" Gold Cross Ambulance & Transfer v. Kansas City, 705 F.2d 1005, 1013 (8th Cir. 1983); see also Brazil v. Arkansas State Bd. of Dental Exam'rs, 607 F. Supp. 193 (E.D. Ark. 1984), aff'd, 759 F.2d 674 (8th Cir. 1985) (holding that a similar statute to the one at issue in the present case, preventing non-dentists from providing a number of services related to the construction of dentures, was sufficient proof of a clearly articulated state policy); see also Federal Trade Commission, REPORT OF THE STATE ACTION TASK FORCE (Sept. 2003) at 51, n.220. The minute details of the State Board's day-to-day enforcement activities do not need to be spelled out by law.

Further, the State Board's interpretation of its authorizing statute should have "great persuasive weight." Gambrel, 689 F.2d at 619; see also, e.g., Yeager's Fuel, Inc. v.

Pennsylvania Power & Light Co., 22 F.3d 1260, 1268-69 (3rd Cir. 1994); see also, e.g., Nugget Hydroelectric, L.P. v. Pacific Gas & Elec. Co., 981 F.2d 429, 434 (9th Cir. 1992). According to the state statute itself, the North Carolina Dental Practice Act and the regulations promulgated thereunder are to be "liberally construed to carry out [its] objects and purposes." N.C. Gen. Stat. § 90-22(a).

The Commission has also criticized the statutory language as being outdated, promulgated "in the late 1800s ... long before teeth whitening, as we knew [sic] it, existed[.]" Pretrial Conference Hearing Transcript pp.29-30. There are several flaws to this argument. The portion of the statute at issue, N.C. Gen. Stat. § 90-29, was promulgated in 1935, not the 1800s. Further, basic teeth whitening procedures have changed little in the past 125 years. Dr. Van B. Haywood, *A Comparison of At-Home and In-Office Bleaching,* DENTISTRY TODAY (2000) pp. 44-53 (In-office bleaching of teeth has been in use for approximately 125 years, with little change in science or technique during that time). Id. Regardless of when it was promulgated, it is the law, and the State Board is bound by it. Further, as discussed previously in this brief, the State Board is not alone in concluding that providing teeth whitening services equates to practicing dentistry: courts and attorney generals in other states have reached the same conclusion.

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

There is no precedent for requiring a state agency to prove "active supervision" of its enforcement of a clearly articulated and affirmatively expressed state law. The State Board is a state agency. N.C. Gen. Stat. § 90-22(b); see also Gambrel, 689 F.2d at 618 n.2; see also Nassimos, No. 91-1319, 1995 U.S. Dist. LEXIS 21376 (D.N.J. Apr. 4,

1995); see also Brazil, 593 F. Supp. at 1362-63 ("[w]here an entity is designated to serve as the state's administrative adjunct for purposes of regulating a licensed profession, the entity is considered a state agency for purposes of the 'state-action exemption' to the federal antitrust laws."). The Commission cannot point to any cases where a state agency was required to show active supervision to establish immunity since the 1985 Supreme Court decision in Hallie (which, as already discussed, held that active supervision was "likely" not required of state agencies). Hallie, 471 U.S. at 46.

Pre-Hallie cases cited by the Commission are almost universally distinguishable as involving private actors, not state agencies. In building its argument, the Commission relies heavily on case law involving private membership organizations, corporations, and private actors answering to state agencies. See e.g., Complaint Counsel's Memorandum In Opposition to Respondent's Motion to Dismiss at 14 (discussing FTC v. Indiana Federation of Dentists, 476 U.S. 447 (1986)); see also Complaint Counsel's Memorandum in Support of their Motion for Partial Summary Decision at 18-19 and at 8 (discussing a Canadian government-supported corporation at issue in Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962); also discussing a state agency ratifying the conduct of private parties in Washington State Electrical Contractors Ass'n, Inc. v. Forrest, 930 F.2d 736, 737 (9th Cir. 1991)).

One particularly off-base example of a case involving non-agency can be found in Asheville Tobacco Board of Trade v. FTC, 263 F.2d 502 (4th Cir. 1959). The Commission cited this case as an example of the principle that there is a "need for active supervision where those who are being regulated are also doing the regulating." However, the Court in that case reached its conclusion based on the decision that the

Tobacco Board of Trade was not a state agency. It 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. Its officers and directors were not accountable to the state, and "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." Id. at 509. In these ways, the Tobacco Board of Trade's structure and functions are easily distinguishable from the State Board's.

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

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

883 F.2d at 1460. As the State Board meets the criteria set forth in Hass, it is state entity, not a private actor. The State Board's funds are public funds and are subject to the oversight of the State Auditor. N.C. Gen. Stat. § 93B-6. The State Board's meetings, including those in which enforcement actions may be discussed, are subject to statutes governing the conduct of state government. N.C. Gen. Stat. § 143-318.9 *et seq.*; N.C. Gen. Stat. Chapter 132. As a state agency, the State Board is exempt from the application of federal and state taxes, and cannot earn a private profit. State Board enforcement

actions against unauthorized practice by statute must be pursued in court, either by civil injunction or criminal prosecution. N.C. Gen. Stat. § 90-41(a). Even disciplinary cases against licensees and declaratory rulings are subject to judicial review although they fall within the State Board's administrative jurisdiction. N.C. Gen. Stat. §§ 150B-4(a), 150B-43. As a state agency, acting pursuant to clearly articulated state policy, the State Board is entitled to state action immunity without a showing of active supervision.

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

The State Board is not required to show active supervision of its activities because it is a state agency forbidden by state law from directly serving private interests, rather than a private entity exercising delegated state authority. As the Commission itself has acknowledged, there is no settled case law establishing what "kind of state review of private actions ... would constitute 'active' supervision, in terms of either the kind of scrutiny required by the state official or procedural requirements." Task Force Report at 52-53. This is because for over twenty-five years, federal courts have not required discussions of state supervision of state agencies.

Case law discussing the issue of active supervision almost universally presumes that private parties are involved, or in the case of state agencies, assumes active supervision is synonymous with clearly articulated state law. See, e.g., Gambrel, 689 F.2d 612 at 621 (finding no dispute regarding active supervision, as the Board's actions were taken pursuant to a clearly articulated state law). This makes it difficult to apply case law to the instant facts, with even the Commission itself admitting that the Board is a state agency. See, e.g., Patrick v. Burget, 486 U.S. 94, 100-01 (1988); see also, e.g., FTC v. Ticor Ins. Co., 504 U.S. 621, 634-35 (1992); see also e.g., Indiana Fed'n of

Dentists, 476 U.S. 447, 465. To satisfy the active supervision test, the Commission has opined that a "non-financially interested state actor" must actively supervise day-to-day activities of the State Board. Complaint Counsel's Memorandum in Opposition to Respondent's Surreply Motion for Leave to File Limited Surreply Brief at 4. For example, the Commission calls for the courts or legislature or attorney general or the state department of public health to review specific Board activities.

The Commission has pointed to examples of such supervision, e.g. the New Jersey attorney general's power to review and set aside state licensing agency rules, orders, and other decisions. Id. at 4; N.J. Stat. Ann. 45:1-3.1; 45:1-17. However, the North Carolina courts, North Carolina Rules Review Commission, and the joint legislative Administrative Procedure Oversight Committee have the same powers with regard to the State Board's enforcement actions and rules. N.C. Gen. Stat. § 90-40.1; N.C. Gen. Stat. § 90-40; N.C. Gen. Stat. § 150B-21.2(g); N.C. Gen. Stat. § 120-70.100. If the State Board issues a binding interpretation of the statutes on teeth whitening it must do so pursuant to the Administrative Procedure Act. N.C. Gen. Stat. § 150B-4(a). If the State Board were to engage in unreasonable restraints of trade or monopolization, it could be limited or declared unconstitutional pursuant to North Carolina's Constitution, Article I, Sec. 34. It is unclear what further supervision could occur without reorganization and redrafting of the State Board's authorizing statute. As will be discussed in greater detail in the next section; compliance with the Commission's inconsistent demands would require a massive reworking of state law regarding licensing agencies.

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

The Commission alleges that since the majority of State Board members are dentists engaged in the business of teeth whitening, they are *per se* co-conspirators in a plot to restrain trade. Assuming for a moment that all of the present and former dentists on the State Board render teeth whitening services,[2] the state legislature's conscious decision to mandate that a majority of the members are actual or potential competitors is the result of clearly articulated statutes and thus immune from the antitrust laws. N.C. Gen. Stat. § 90-22(b) requires that the eight member board shall include "six dentists who are licensed to practice dentistry in North Carolina."

However, according to the Commission, it is not enough that a state licensing agency comprised of a majority of the members of the profession it regulates show that it is acting pursuant to a clearly articulated state policy. If the Commission prevails, the widespread state agency practice of sending warning letters and investigating unauthorized practice will be permissible only with the case-specific permission of a state court or state legislature. The Commission's basis for this unjustified expansion of its regulatory power is not found in case law, or legislative intent, or even any study it has conducted to prove that state agencies are selfish and unreliable actors. Instead, the Commission declares its position to be based on "common sense": "the exclusion of non-dentists may result in Board members and the Board's constituents obtaining higher prices for teeth whitening and a greater volume of teeth whitening procedures." Complaint Counsel Reply at 13.

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[2] Although not essential to this brief, the fact is that the Commission's dozens of depositions and subpoenas *duces tecum* of present and former Board members revealed that none have had more than a *de minimus* teeth whitening business, with some members having no teeth whitening business and others deriving less than one percent of their revenues from teeth whitening services.

To the State Board, and the vast majority of state licensing agencies in the country, this is not "common sense." A majority-dentist dental board can be trusted to implement clearly articulated state law. Dentists will carry out state law just as well as non-dentists. And just because one is not a dentist, or because one is a member of the attorney general or health department's staff, does not necessarily mean that one is unaffected by the teeth whitening industry. If it is within the power of the federal government to change widespread regulatory practices and well-settled state laws in this case,[3] then these are changes that Congress must make; not an executive branch agency working to advance its own agenda.

CONCLUSION

In the Commission's proposed relief, it seeks to force the State Board to ignore its own common-sense understanding of the plain language in statutory definition of the practice of dentistry, and forces the state of North Carolina to redraft its laws regarding majority licensee board composition or oversight. The Commission seeks this relief without any statutory authorization, or legislative intent hinting at such authorization, and in defiance of decades of contrary case law. This breathtaking assertion of jurisdiction where none exists defies the rule of law at every level. State statutes, federal laws, and the U.S. Constitution are all put aside, just so the Commission can achieve its lobbied-for goal: jurisdiction over majority licensee state agencies where both the federal legislative and judicial branches have denied it.

[3] The State Board is *not* admitting that this is within the federal government's power.

This the 27th day of January, 2011.

Respectfully submitted.

ALLEN AND PINNIX, P.A.

/s/ Noel L. Allen

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CERTIFICATE OF SERVICE

I hereby certify that on January 27, 2011, 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:

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

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This the 27th day of January, 2011.

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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

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