UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

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

COMPLAINT COUNSEL'S MEMORANDUM IN OPPOSITION TO RESPONDENT'S MOTION TO DISMISS

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Dated: November 30, 2010

COMPLAINT COUNSEL'S MEMORANDUM
IN OPPOSITION TO RESPONDENT'S MOTION TO DISMISS

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I. INTRODUCTION

Respondent North Carolina State Board of Dental Examiners (the "Board") is waging an ongoing campaign, unauthorized by state law, to exclude non-dentists from providing teeth-whitening services to consumers. The state action defense is inapplicable to the Board's anticompetitive conduct. Accordingly, the Board's motion to dismiss the Commission's Complaint should be denied.

The Complaint in this matter alleges all of the elements of an antitrust violation. The Board is a combination of dentists. The Board has excluded competition from non-dentists in the provision of teeth-whitening services. As a consequence of the Board's actions, non-dentists have exited the market, competition has been unreasonably restrained, and consumers have been harmed.

The Board's Memorandum in Support of Motion to Dismiss (hereinafter, "Board Memo") argues in substance: "We *are* the State. Therefore, we can regulate. The antitrust laws and the FTC have no role." But of course the Commission cannot accept such an assertion without scrutiny, and upon review the Board's arguments do not hold up. The Board is not the State of North Carolina. The Board is not even a disinterested public regulator. The Board is for state action purposes an arm of the dental profession: elected by dentists and dominated by dentists. Board members therefore have an incentive to serve the financial interests of dentists, rather than the governmental interests of the state. For state action purposes, the Board is properly treated as a private actor.

And as a private actor, the conduct of the Board is exempt from the antitrust laws only if both prongs of the exacting *Midcal*[1] test are satisfied. First, the Board must show that it is acting pursuant to a clearly articulated state policy to displace the antitrust laws with a regulatory regime

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

(prong 1). Second, the Board must show that the actions of the Board challenged in the Complaint are actively supervised by the state (prong 2). Together, these requirements ensure that the state action doctrine shelters only the particular anticompetitive acts of private parties that, in the judgment of the State, promote state regulatory policies, as opposed to the individual interests of private parties. *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 633-34 (1992). Neither *Midcal* requirement is satisfied here.

Nearly all of the legal issues relevant to the Board's motion to dismiss are discussed at length in Complaint Counsel's Memorandum In Support Of Its Motion For Partial Summary Decision (dated Nov. 2, 2010) (hereinafter "Complaint Counsel's Summary Decision Memorandum"). In order to avoid unnecessary repetition, we refer to (or incorporate by reference) Complaint Counsel's earlier brief.

II. STANDARD OF REVIEW

The Board's motion should be regarded as a motion to dismiss for failure to state a claim, and judged pursuant to the standard used by federal courts under Rule 12(b)(6) of the Federal Rules of Civil Procedure. *See South Carolina Bd. of Dentistry*, 136 F.T.C. 229, 232-33 (2004), *appeal dismissed*, 455 F.3d 436 (4th Cir. 2006). "This is a high standard that requires the Respondent to show that Complaint Counsel can prove no set of facts that would entitle them to relief. In evaluating whether a complaint withstands a motion to dismiss, the Commission must accept as true all of the complaint's well-pled factual allegations and must construe all inferences in the light most favorable to Complaint Counsel. Moreover, the Commission should not dismiss the complaint if the motion, or Complaint Counsel's opposition to the same, raises disputed issues of material fact." *Id.* (citations omitted).

III. THE REQUIREMENTS OF THE STATE ACTION DEFENSE DEPEND UPON THE IDENTITY OF THE DECISION-MAKER; THE TWO-PRONG *MIDCAL* STANDARD IS APPLICABLE TO A FINANCIALLY-INTERESTED STATE BOARD

Complaint Counsel's Summary Decision Memorandum explains that the state action doctrine provides for three modes of review, depending upon whether the decision-maker is the state acting in its sovereign capacity, a public actor, or a private actor.[2] Under *Midcal*, the anticompetitive conduct of private parties is exempt from the antitrust laws only if (1) the parties are acting pursuant to a "clearly articulated and affirmatively expressed" state policy to displace competition, and (2) the conduct is "'actively supervised' by the State itself." *Midcal*, 445 U.S. at 105 (*quoting City of Lafayette v. Louisiana P&G Co.*, 435 U.S. 389, 410 (1978)). These conditions serve to show that "the anticompetitive scheme is the State's own." *Ticor*, 504 U.S. at 635. The Board does not dispute any of this.

Complaint Counsel's Summary Decision Memorandum goes on to explain that the Supreme Court distinguishes public actors from private actors based upon the decision-making incentives of the actor. A private party is one that has, or represents those who have, a financial interest in restraining competition. Accordingly, for state action purposes, a financially interested

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[2] The actions of the state as sovereign necessarily represent the policy of the state; no further inquiry is required. *California State Bd. of Optometry v. FTC*, 910 F.2d 976 (D.C. Cir. 1990), stands for the proposition that when the state acts in its sovereign capacity it is exempt from the FTC Act. Accordingly, the FTC may not declare that state laws constitute unfair acts or practices.

In the present case, the Complaint does not challenge a state law, but rather the actions of the Board. The Board does not and cannot claim that it is the sovereign. This term refers to a state legislature and the state's highest court. The Board's claim that it is merely enforcing a statute does not convert Board action into sovereign action. *See* Complaint Counsel's Summary Decision Memorandum at 15.

state board is properly considered to be a private actor, and the two-prong *Midcal* standard governs the analysis.[3]

The Board offers a different test for distinguishing a public actor (active supervision not required) from a private actor (supervision required): look to the status of the defendant under state law. In the Board's view, if a trade association, cartel, or guild is designated by the legislature as an official "state agency," then the state's responsibility to supervise anticompetitive activity is thereby discharged – consumers have no remedy under the antitrust laws. This would be an absurd result, and it cannot be the law because it contravenes the Supreme Court's seminal state action decision *Parker v. Brown*, 317 U.S. 341, 351 (1943) ("[A] state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful."). *See also Ticor*, 504 U.S. at 633 ("[A] State may not confer antitrust immunity on private persons by fiat, it may displace competition with active state supervision if the displacement is both intended by the State and implemented in its specific details."); *Goldfarb v. Virginia State Bar*, 421 U.S. 733 (1975).

Overall, the Board's analysis of the state action case law is incomplete and wholly unconvincing. For example, *Midcal* is cited by the Board for the proposition that active supervision (prong 2) is inapplicable to a state agency. Board Memo at 12-13. In reality, *Midcal* is silent on this issue. Next, the Board describes *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978), as both "irrelevant" to state action (Board Memo at 19), and also the source of "an important state action immunity principle" (Board Memo at 24). Irrelevant

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[3] Because a public actor (*e.g.*, a municipality) lacks a financial incentive to restrain competition, there is a lesser danger that its actions will fail to promote state policy. For this reason, the actions of a municipality are generally exempt from antitrust liability when the municipality acts pursuant to a clearly articulated state policy (prong 1). Prong 2 (active supervision) is not also required. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 41 (1985).

to state action is closer to the truth; this Supreme Court opinion does not even mention the state action doctrine.

Further, the Board's analysis ignores several of the leading Supreme Court cases that address the public/private dichotomy, including *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985) (a municipality is a public actor because it is not a market participant and generally lacks the incentive to engage in private anticompetitive activity), and *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962) (financially-interested corporation exercising governmental authority treated as a private actor). Although the Board concentrates its attack on *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), its critique misses the mark.

In *Goldfarb*, the Court held that the state action defense was inapplicable to a financially interested state agency, the Virginia State Bar Association, that acted – without supervision – to eliminate price competition among attorneys. The Court recognized that the composition and nature of this state agency – lawyers regulating lawyers – created a substantial risk that the State Bar would "foster anticompetitive practices for the benefit of its members." *Id.* at 791-92. Thus, when assessing the State Bar's state action defense, the Court applied not the more lenient standard applicable to "public actors," *cf. Town of Hallie,* 471 U.S. 34 (1985), but the truly rigorous standard applicable to "private actors," *cf. Ticor*, 504 U.S. 621 (1992).

The Board asserts that the state action defense failed in *Goldfarb* only because the fee schedule adopted by the State Bar was not authorized by state law. This is a misreading of the opinion. The Court recognized that the State Bar was authorized by the state to issue ethical opinions (prong 1 was satisfied). What was lacking was active supervision by a disinterested state actor – specifically, the approval of the Virginia Supreme Court. Thus, in each of two later cases where the actions of a state bar are approved by that state's highest court, the state action

defense is upheld. *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *Hoover v. Ronwin*, 466 U.S. 558, 572 n.20 (1984) ("*Goldfarb* involved procedures that were not approved by the State Supreme Court or the state legislature. In contrast, petitioners here performed functions required by the Supreme Court Rules and that are not effective unless approved by the court itself."). The Board ignores *Bates*, and has nothing substantive to say about *Hoover*.

The Board next argues that *Goldfarb* governs price fixing among competitors, and not (as here) the exclusion of rivals. But there is no suggestion in the opinion that the requirements of the state action defense turn on the precise violation alleged (*e.g.*, price fixing, tying, exclusive dealing), and no sound reason to think that it does. Not surprisingly, the Board cites no case for its novel proposition of law. Indeed, the Supreme Court has applied the *Midcal* test in a consistent manner without regard to the nature of the violation. In *Patrick v. Burget*,[4] *Cantor v. Detroit Edison*,[5] *City of Lafayette*,[6] and *Boulder*,[7] the Supreme Court rejected the state action defense even though each case involved non-price conduct. In sum, the breadth of the state action exemption is not related to the type of restraint at issue.

The Board's final contention is that *Goldfarb* would be decided differently today. But this is speculation without any basis. To the contrary, the Supreme Court has cited *Goldfarb* with approval in several recent decisions, including *American Needle, Inc. v. National Football League*, 130 S. Ct. 2201, 2210 n. 3 (2010).

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[4] 466 U.S. 84 (1988).

[5] 428 U.S. 579 (1976).

[6] 435 U.S. 389 (1977).

[7] *Comty Communications Co. v. City of Boulder*, 455 U.S. 40 (1982) (imposition of three month moratorium on entry).

With no support for its argument from the Supreme Court, the Board relies upon a select group of lower court cases – cases that conclude that a financially interested state agency may be considered a public actor (and thus not requiring active supervision) if it is bound by certain procedural niceties commonly observed by municipalities, such as public hearings, public notice, and prescribed ethical requirements. As discussed in Complaint Counsel's Summary Decision Memorandum, the leading case in this line, *Hass v. Oregon State Bar*, 883 F.2d 1453 (9th Cir. 1989), is poorly reasoned and is not appropriately deferential to the Supreme Court precedents. The same is true of *Earles v. State Bd. of Certified Public Accountants*, 139 F.3d 1033 (5th Cir. 1988).[8]

The Board also misstates the conclusions of the Report of the State Action Task Force (September 2003). The Task Force did not conclude that active supervision "is neither relevant or necessary" to finding that the restraints of a financially interested board are covered by the state action defense (Board Memo at 31). In fact, the Task Force was quite critical of those circuit court decisions (including *Hass* and *Earles*) that use a "laundry list" of factors to determine whether a hybrid, quasi-governmental entity should be subject to the active supervision requirement: "A number of these factors, which reflect the governmental attributes of the entity,

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[8] The *Earles* court wrongly asserts that its "conclusion comports with our prior [9th Circuit] precedent and that of other courts of appeals." 139 F.3d at 1041-42. In fact, the defendants in the precedents cited by *Earles* bear no resemblance to the financially interested accountants in *Earles* or the Board here. *See Benton, Benton & Benton v. Louisiana Pub. Facilities Auth.*, 897 F.2d 198, 203 (5th Cir. 1990) (Public Facilities Authority governed by a seven member Board of Trustees, selected by the Governor, comprised of "professional, business and community leaders from across the state"); *Porter Testing Lab. v. Bd. of Regents*, 993 F.2d 768, 771 (10th Cir. 1993) (Oklahoma State University, a nonprofit educational institution); *Cine 42nd Street Theater Corp. v. Nederlander Org.*, 790 F.2d 1032, 1047 (2d Cir. 1986) (nine member Urban Development Corporation consisting of the superintendent of banking and the chairman of the State Science and Technology Foundation, with remaining members named by Governor with advice and consent of the state senate).

are not necessarily probative of whether there is a danger that private actors/members will pursue their own economic interests rather than the state's policies." Task Force Report at 55. Instead, the Task Force recommended two similar approaches to quasi-governmental entities, in which the financial interest of the decision-maker is either the sole or predominant factor in determining whether active state supervision is required:

> First, the Commission could assert that the active supervision prong of *Midcal* should apply to any entity consisting in whole or in part of market participants. Support for this approach is found in Areeda and Hovenkamp, who "would presumptively classify as 'private' any organization in which a decisive coalition (usually a majority) is made up of participants in the regulated market.'" To protect against "capture" or conspiratorial involvement of governmental representatives within the entity, a further requirement should be that the active supervision be performed by a governmental official/entity outside the entity in question.
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> A second approach would entail a more rigorous, case-by-case analysis of whether there is an appreciable risk that the challenged conduct is the result of private actors pursuing their private interests rather than state policy. This approach would look to such factors as the entity's structure, membership, decision-making apparatus, and openness to the public. It could also incorporate the suggestion of Professors Areeda and Hovenkamp that "the strongest criterion for identifying the relevant actor" should be the degree of discretion private actors had to make the challenged decision.

Task Force Report at 55-56.

Also inaccurate is the Board's claim that "there is no precedent for requiring a state agency" to satisfy the active supervision prong of the state action doctrine (Board Memo at 29). In addition to the Supreme Court cases described above, several lower courts have held that active supervision is required where the members of a state agency have a financial interest in the challenged restraint. These cases are discussed in Complaint Counsel's Summary Decision Memorandum at 23-25. *See Washington State Elect. Contractors Ass'n, v. Forrest*, 930 F.2d 736, 737 (9th Cir. 1991); *FTC v. Monahan*, 832 F.2d 688, 690 (1st Cir. 1987); *Goldfarb v. Virginia*

State Bar, 497 F.2d 1, 11 (4th Cir. 1974), *rev'd on other grounds*, 421 U.S. 773 (1975); *Asheville Tobacco Bd. of Trade v. FTC*, 263 F.2d 502, 510 (4th Cir. 1959).

IV. THE BOARD IS A PRIVATE ACTOR BECAUSE ITS MEMBERS HAVE A FINANCIAL INTEREST IN EXCLUDING NON-DENTISTS AND RESTRAINING COMPETITION

The Complaint alleges that the Board and its constituents compete with non-dentist providers of teeth-whitening services. Complaint ¶ 13. Because of this competition, and because non-dentists typically charge much lower prices than dentists for similar services (Complaint ¶ 11), the Board and its constituents have an obvious financial interest in excluding non-dentists from providing teeth whitening services. For purposes of the present motion, these allegations must be accepted as true.

The Board responds that it is prohibited by state law from "aggrandizing private parties." Board Memo at 20. In a similar vein, it adds that Board members "are bound by ethics laws, banned from having conflicts of interest, and are presumed to be acting in good faith . . . ." Board Memo at 40.

These contentions do not disprove the Board's financial interest in excluding non-dentists. It is not Complaint Counsel's burden to show that the members of the Board have acted in bad faith, or have consciously pursued a private interest, or have violated an oath of office. For this motion to dismiss, it is sufficient that the Board has a financial interest in the challenged restraints. Complaint ¶¶ 2, 7, 11, 13.

Moreover, the financial interest of the Board and its constituents cannot be erased by North Carolina legislation directing Board members to ignore that financial interest. The Supreme Court has held repeatedly that, to invoke the state action defense, the state must guard against private anticompetitive activity by supervising the conduct of the private parties. The

state may not simply instruct these private parties to act in the public interest, and then stand aside.

V. THE REQUIREMENTS OF *MIDCAL* HAVE NOT BEEN ESTABLISHED

A. The State of North Carolina Has Not Clearly Articulated A Policy Of Permitting The Board To Exclude Non-Dentists

The Board purports to find authority to restrain competition in its organic statute, the Dental Practice Act, N.C. Gen. Stat. § 90-20 et seq. ("Dental Act").

Complaint Counsel's Summary Decision Memorandum explains that the Dental Act does not authorize the Board to issue Cease and Desist Orders to non-dentists. In fact, the Dental Act does not authorize the Board, acting on its own authority, to take any actions that impede the competitive activity of non-dentists. The Board acknowledges this limitation upon its authority: "State Board enforcement actions against unauthorized practice by statute must be pursued in court, either by civil injunction or criminal prosecution." Board Memo at 33.

Thus, only the courts of North Carolina are empowered to exclude persons engaged in the unauthorized practice of dentistry. The legislature could not have intended or foreseen that the Board would ignore the clear language of the statute and usurp the authority expressly granted to the judiciary.

The Board offers a number of rebuttals. First, without expressly denying the allegation, the Board implies that it did not order non-dentists to cease and desist from providing teeth-whitening services. The Board characterizes its behavior instead as "writ[ing] letters warning that teeth whitening is stain removal and thus the practice of dentistry." Board Memo at 22. But again, the Board cannot secure dismissal of this action by contradicting or disputing the allegations of the Complaint (allegations that, in Complaint Counsel's motion for partial summary decision, are supported by extensive evidence). The Commission must assume, for

purposes of this motion, that the Board did in fact issue Cease and Desist Orders (Complaint ¶ 20), which leaves the issue of where the Board finds the authority to so act.

The Board argues that its authority to "act" to prevent non-dentist teeth whitening "may be inferred" because such action is a "reasonable and necessary consequence" of its authority to file suit in state court to enjoin the illegal practice of dentistry. Board Memo at 22. In other words, the Board argues that the Board's *express* authority to seek redress in court conveys to the Board an additional *inferred* authority to bypass the court and to impose the desired remedy unilaterally – thereby denying the alleged wrong-doer all the protections of due process, including access to an independent, financially disinterested decision-maker. This is not a foreseeable extension of express authority; it is a usurpation of that authority.

In sum, the Board has taken actions well beyond the authority granted to it by the state; in fact, it has gone so far as to exercise authority that was knowingly and deliberately withheld from the Board by the state legislature. The requirements of prong 1 have not been satisfied.

B. The State of North Carolina Does Not Actively Supervise The Exclusionary Conduct Engaged In By The Board

Active supervision requires that state officials both have and exercise "power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy." *Patrick v. Burget*, 486 U.S. 94, 101 (1988). The Board's state action defense satisfies neither element.

The Board asserts that various and sundry activities engaged in by the Board are subject to direct state oversight, including: filing civil lawsuits (reviewed by courts), pursuing criminal prosecution (reviewed by courts), and adopting rules (reviewed by a joint legislative committee). But the existence of any such oversight is irrelevant, because these activities are not challenged by the Complaint.

In contrast, the Board does *not* assert that the specific exclusionary conduct challenged in the Complaint is subject to state supervision. This omission is fatal to the Board's state action defense.[9] For example, no statute provides that, before the Board orders a non-dentist teeth-whitening provider to cease and desist, an independent state actor shall review the Board's determination that the target has in fact engaged in the unlawful practice of dentistry. Similarly, there is no mechanism in place for state supervision of the Board's efforts to deter mall owners from permitting teeth-whitening kiosks in shopping malls.

Even if there were a statutory or other procedure capable of providing active supervision of the challenged restraints, this would not suffice. The Board is also required to establish that the procedure was in fact implemented.[10] Such factual determinations are generally not an appropriate inquiry in the context of a motion to dismiss. In any event, there is no evidence of any such oversight. The Board does not recite a single fact tending to show that the state is actually reviewing the elements of the Board's anticompetitive scheme that are at issue, and disapproving those elements that fail to accord with state policy. The Board suggests that if Board members act unethically, then they are subject to removal by the North Carolina Ethics Commission. Even a very strong ethical regime of this type cannot constitute adequate supervision for two reasons – it is not specific to the challenged restraints, and it does not adequately ensure that the Board acts in conformity with state policy. *See City of Lafayette v.*

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[9] *Patrick*, 486 U.S. at 101 ("Absent such a program of supervision, there is no realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests.").

[10] *Ticor*, 504 U.S. at 638 ("[T]he party claiming the [state action] immunity must show that state officials have undertaken the necessary steps to determine the specifics of the price-fixing or ratesetting scheme. The mere potential for state supervision is not an adequate substitute for a decision by the State.").

Louisiana P&L Co., 435 U.S. 389, 406 (1978) (after-the-fact recourse to legislature is inadequate active supervision); *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 345 n.7 (1987) ("Neither the 'monitoring' by the SLA [State Liquor Authority], nor the periodic reexamination by the state legislature, exerts any significant control over retail liquor prices or markups. Thus, the State's involvement does not satisfy the second requirement of *Midcal*.").[11]

The Board cites *Gambrel v. Kentucky Bd. of Dentistry*, 689 F.2d 612 (6th Cir. 1982), for the proposition that where a state policy is clearly articulated it is also, by definition, actively supervised. This conflation of authorization and active supervision is flatly inconsistent with *Midcal*. *Gambrel* was a 2-1 decision, and the critique advanced by the dissenting judge is correct: "It does not do justice to the cardinal point that the [*Midcal*] test includes two parts." *Id.* at 621.

VI. THE MISCELLANEOUS CONTENTIONS OF THE BOARD DO NOT ESTABLISH A BASIS FOR DISMISSING THE COMPLAINT

The Board Memo advances numerous other claims and allegations that are plainly inaccurate and/or irrelevant to the underlying motion to dismiss.

1. The Board cites *California Dental Ass'n v. FTC*, 526 U.S. 756 (1999), for the proposition that the Federal Trade Commission lacks jurisdiction over certain nonprofit organizations. Board Memo at 17. However, the Board then goes on to acknowledge that it is not a nonprofit organization. Board Memo at 20. So *California Dental Ass'n* does not provide a basis for dismissal.

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[11] Moreover, according to the Board, state ethics rules permit a Board member to participate in Board decisions affecting his private business so long as the benefits to the member are "no greater than that which could reasonably be foreseen to accrue to all members of the profession." Board Memo at 38-39. Thus, North Carolina ethics rules do not provide for review of a Board member's anticompetitive conduct when that conduct also benefits the persons who elected him.

2. The Board argues at length that "teeth whitening is the practice of dentistry." Board Memo at 23. This conclusion is predicated upon a host of disputed facts.[12] And even if correct, in the absence of a valid state action defense, the Board's *ultra vires* efforts to eliminate assertedly "illegal" competition is not immune from antitrust sanctions. *See FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 465 (1986) ("[That the] unauthorized practice of dentistry . . . [is] unlawful is not, in itself, a sufficient justification for collusion among competitors to prevent it."); *Fashion Originators' Guild of America, Inc. v. FTC*, 312 U.S. 457, 468 (1941).

3. The Board argues that the provision of teeth whitening services by non-dentists is "inherently dangerous." Board Memo at 28. Again, the Board has strayed into the realm of disputed facts, which is not permissible at this stage. If relevant, Complaint Counsel will show at trial that non-dentist teeth whitening is reasonably safe, and that the actions of the Board are unnecessary to protect public health.

Certainly, disputed health and safety assertions cannot be a basis for dismissing the Complaint. The Board seems to concede this point: "As stated, the fundamental issue in this case [motion] is state action immunity, not whether the state was correct in banning teeth whitening services by non-dentists." Board Memo at 26.

4. Notwithstanding the Board's contrary representation, it is not Complaint Counsel's contention that "public protection regarding illegal local teeth-whitening . . . [is] exclusively the province of the federal government." Board Memo at 27. There are a myriad of ways in which a state may, consistent with the federal antitrust laws, regulate teeth whitening. By way of

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[12] In particular, Complaint Counsel will show at trial that teeth-whitening procedures are distinct from stain removal procedures, which are covered by the Dental Act. Specifically, teeth whitening does not remove stains from teeth, but rather lightens the color of the stain. Teeth whitening does not fall within the statutory definition of the practice of dentistry.

example, the state may confer regulatory authority upon a financially disinterested state agency. Or the state may actively supervise the discretion granted to a financially interested state agency. (Indeed, the North Carolina legislature intended for the courts to supervise the Board, but the Board is circumventing this oversight.) What a state may not do, consistent with the federal antitrust laws, is confer upon one group of competitors unsupervised authority to exclude their rivals and thereby injure consumers.

It is also incorrect to assert that the liability theory advanced here would "criminalize hundreds of state boards throughout the country" (Board Memo at 39). Complaint Counsel does not allege that respondent is guilty of a criminal violation, nor do we contemplate disbanding the respondent. Instead, we seek limited modifications on the operation of the Board. *See* Notice of Contemplated Relief. The proposed relief would not force the Board "to abrogate a state statute" (Board Memo at 14); to the contrary, it would compel the Board to abide by the state statute.

5. The Board asserts that provisions of the Dental Act mandating that the Board consist predominantly of licensed dentists is not a "per se antitrust conspiracy." Board Memo at 37. It appears that the Board is denying concerted conduct. *See also* Board Memo at 31 (seemingly denying that the Board is controlled by a group of competitors). This argument is unsound. Where legally or economically independent competitors control an association, including a governmental entity such as a regulatory board, the conduct of the association is considered concerted action within the meaning of Sherman Act Section 1.[13]

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[13] *E.g.*, *Goldfarb*, 421 U.S. at 781 (finding a conspiracy among the members of the Virginia State Bar); *Massachusetts Bd. of Registration in Optometry,* 110 F.T.C. 549, 610-11 (1988) ("Respondent members have separate economic identities and thus engage in a combination when they act together on the Board.").

If instead the Board is denying that its conduct is per se unlawful, that contention is irrelevant to the Board's motion to dismiss.

VII. CONCLUSION

The Board's conduct is not exempt from antitrust review under the state action defense. The Board's motion to dismiss should therefore be denied.

Respectfully submitted,

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November 30, 2010

CERTIFICATE OF SERVICE

I hereby certify that on November 30, 2010, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

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Secretary
Federal Trade Commission
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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
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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.

November 30, 2010

By: s/ Richard B. Dagen
Richard B. Dagen