TABLE OF CONTENTS

Page

TABLE OF CONTENTS (Cont'd) **Page**

TABLE OF CONTENTS (Cont'd) **Page**

TABLE OF AUTHORITIES

Cases **Page**

Cases (Cont'd) **Page**

Cases (Cont'd) **Page**

Cases (Cont'd) **Page**

Cases (Cont'd) **Page**

Federal Statutes **Page**

State Statutes:

State Statutes (Cont'd) **Page**

Miscellaneous

Miscellaneous (Cont'd) **Page**

STATEMENT OF THE CASE

This matter involves a petition to review a final FTC cease and desist order against the Board, issued following administrative adjudication under the FTC Act, 15 U.S.C. §§ 41 *et seq.* The Commission issued its administrative complaint on June 17, 2010, charging that the Board violated Section 5 of the FTC Act, 15 U.S.C. § 45, by excluding non-dentist providers from the market for teeth whitening services in North Carolina.[1]

Trial commenced on February 17, 2011, in an administrative law judge (ALJ)

---

[1] On February 1, 2011, the Board filed a declaratory action in the United States District Court for the Eastern District of North Carolina, alleging that the FTC's complaint suffers from jurisdictional and constitutional infirmities. That court dismissed the action on jurisdictional grounds. *See* North Carolina State Bd. of Dental Examiners v. FTC, 768 F. Supp. 2d 818 (E.D.N.C. 2011). An appeal of that decision is pending in this Court (No. 11-1679).

[2] On February 3, 2011, the Commission denied the Board's motion to dismiss the complaint on jurisdictional and state action grounds. SA Op. 2.

STATEMENT OF FACTS

A. The Teeth Whitening Services Market

Since 1989, peroxide-based teeth whitening has become one of the most popular cosmetic dental services. IDF 100-104.[3] Teeth whitening is available as an in-office treatment, or take-home kits, by dentists; as over-the-counter products; and at salons, malls, and other convenient locations by non-dentists. IDF 105, 138, 149. Although all these methods employ peroxide, they vary in important respects, including immediacy of results, ease of use, necessity of repeated application, need for technical or professional support, and price. IDF 106-109. Thus, while dentists' "chair-side" services are quick and effective—usually providing results in a single visit—they are also "the most costly" alternative. IDF 118-120. At the other end of the spectrum, over-the-counter products, with relatively low concentrations of peroxide, are the least expensive, but with highly variable efficacy, as they require diligent and repeated application by consumers. IDF 129-136.

Growing demand for teeth whitening services led, around 2003, to the entry of non-dentist providers. Op. 1; IDF 137. These providers generally occupy an intermediate level—in terms of cost, convenience, and efficacy—between dentists' chair-side services and over-the-counter products. IDF 138-150. They utilize

[3] The Commission has adopted the ALJ's findings to the extent they are not inconsistent with its decision. See Op. 2.

intermediate-concentration peroxide, in a single, consumer-administered application, lasting an hour or less. IDF 140, 146, 149-150. Non-dentist services are often offered at prices hundreds of dollars less than dentists' in-office services. IDF 147-150.

As competition from non-dentists mounted, North Carolina dentists demanded that the Board "do something" about the new market entrants. See Op. 1, IDF 194-206 (dentist complaints often citing price disparity with non-dentist providers, but rarely health or safety concerns).

B. The North Carolina State Board of Dental Examiners

The Board is a state agency, charged with regulating dentistry in North Carolina, IDF 1, 87; N.C.G.S. § 90-48, but funded only by private licensees' dues and fees. IDF 13. It consists of six licensed dentists, elected directly by other state licensed dentists; one licensed dental hygienist, elected by other licensed hygienists; and one consumer member, appointed by the governor. IDF 2-4, 15. The six dentist-members must also be active practitioners to serve on the Board; thus, they provide for-profit dental services (some including teeth whitening), and have a significant financial interest in the business of their profession. IDF 6, 8, 12. They are elected to three-year, renewable terms. IDF 17, 24-25.

The Board is tasked with enforcing North Carolina's Dental Practice Act (DPA), N.C.G.S. §§ 90-22 *et seq.*, including the licensure and professional conduct

of dentists, and—together with the state's Attorney General, the various state district attorneys, and any resident citizen—id. at § 90-40.1(a)—the policing of the unauthorized practice of dentistry. IDF 33, 35, 41.[4] Like state prosecutors and private citizens, the Board's only lawful means of undertaking this latter function, however, is to institute in state court "an action in the name of the State of North Carolina to perpetually enjoin any person from so unlawfully practicing dentistry." N.C.G.S. § 90-40.1(a); see also IDF 43-45. In contrast to its authority over licensees and applicants for a license, see N.C.G.S. §§ 90-27, 90-41.1, the Board may not discipline unlicensed persons, or order non-licensees to stop violating the DPA. IDF 46-49.

C. The Board's Challenged Conduct

Starting in 2003, the Board began receiving complaints from its dentist licensees regarding teeth whitening service offerings by non-dentists at spas, salons, and trade shows. IDF 194-206. Many complainants appeared concerned that the prices of those offerings were undercutting their own. IDF 196, 200, 202; see also IDF 232 (dentist complaints attaching price advertisements by non-dentists). Few complaints referred to any consumer harm. IDF 227-31. The Board's response was to send to non-dentist teeth whiteners "numerous cease and desist orders

[4] The DPA provides that a person "shall be deemed to be practicing dentistry" by undertaking, or attempting any of the actions listed in the statute. See N.C.G.S. § 90-29(b)(1)-(b)(13); see also id. at § 90-29(c)(1)-(c)(14) (listing acts that "shall not constitute the unlawful practice of dentistry").

throughout the state'." IDF 201 (quoting Board's Chief Operating Officer, see CX404).

Prior to the wave of dentist complaints about non-dentist teeth whiteners, the Board handled allegations of unlicensed dental practice by sending "litigation warning letters," containing no cease-and-desist boilerplate language, but warning the recipient that the Board was considering litigation for alleged DPA violations. See, e.g., CX136 (October 2000 Board letter to Ortho Depot, stating: "This is to advise you that the [Board] is considering initiating a civil suit to enjoin you from the unlawful practice of dentistry"); CX139 (December 2001 letter, stating: "It has come to the attention of the [Board] that you may be setting up a dental practice in conjunction with the Dowd Central YMCA. This is to advise you that the Board is conducting an inquiry based on this knowledge."). Failure of the recipient to respond prompted the Board to send follow-up letters, similarly devoid of any command to litigate.

"'professional teeth whitening,' which would attest that you are engaged in the unlicensed practice of dentistry," and commanded: "You are hereby ordered to CEASE AND DESIST any and all activity constituting the practice of dentistry * * *."

[5] After the Commission's investigation began, the Board modified the language of its letters slightly, although they continued to convey a purported order by the Board. The last of the letters the Board sent, in 2009, referred to "NOTICE OF APPARENT VIOLATION AND DEMAND TO CEASE AND DESIST." IDF 222-223.

some recipients, the letters' conspicuously mandatory language was understood as having the force of law. See IDF 246-256. Thus, in many cases, non-dentist providers abandoned their teeth whitening businesses. See, e.g., CX162 (salon owner writing to the Board that she would "no longer perform this business as per your order to stop"); CX50 (spa owner writing that, in response to the Board's order, she has ceased offering the service and removed the equipment from her salon); see also CX622, CX623, CX658, CX660; Hughes, Tr. 943, 946 (same).

The Board's campaign to exclude rival teeth whiteners targeted not only non-dentist providers, but also third parties with substantial influence over those providers. It told manufacturers and distributors of teeth whitening products, for example, that the provision of such services by non-dentists "constitutes, or may constitute, the unauthorized practice of dentistry in North Carolina, which is a misdemeanor." IDF 261 (citing CX100; CX122; CX371; CX

CX205; CX259 through CX263; CX323 through CX326). Mall operators thus became reluctant to lease space to non-dentist providers and some refused to lease or cancelled existing leases. See IDF 294 (citing CX255; CX525; CX629; CX647; Wyant, Tr. 876-884; Gibson, Tr. 627-28, 632-33); see also IDF 295-313. The Board's own expert witness reported that, in response to the Board's communications, mall operators "cooperated by refusing to renew leases or rent to operators of teeth whitening services." RX78 at 8.

Finally, the Board buttressed its exclusionary campaign by seeking, and receiving, the help of the North Carolina Board of Cosmetic Art Examiners—the state regulator of salons and spas—which posted website notice to its licensees, drafted by the Board, asserting that teeth whitening services constituted dentistry, thus a misdemeanor if provided by a cosmetologist. See IDF 314-323. As a result, some cosmetologists abandoned their offerings of non-dentist teeth whitening services. See IDF 324-327.

rece1Xice3 Tw.0R1-s. Tc-.08gbTD.0TDiTw[re0 -2.30TD.3e -2dd4TwbeniTc.21aminersti

any legitimate justification, and thus in violation of the FTC Act. Accordingly, the Commission issued a cease and desist Final Order against the Board.

1. The Board's State Action Defense

The Commission rejected the Board's argument that the state action doctrine shields it from federal antitrust scrutiny. SA Op. 1-2. Applying the familiar two-part test of California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980), the Commission assumed without deciding that the Board could meet the "clear articulation" element of that test (SA Op. 7 n.8), and focused instead on the "active state supervision" requirement. It concluded first that the Board must satisfy that element of the test. Id. at 8-9. Surveying Supreme Court teachings on this issue, the Commission recognized that, in determining whether active supervision is required, "the operative factor is a tribunal's degree of confidence that the entity's decision-making process is sufficiently independent from the interests of those being regulated." Id. at 9. It pointed out that the Court "has been explicit in applying the antitrust laws to public/private hybrid entities, such as regulatory bodies consisting of market participants." Id. (citing Goldfarb v. Va. State Bar, 421 U.S. 773 (1975)). It also noted that several courts of appeals, including this Court, have held that financially interested governmental boards must meet the active supervision requirement. Id. at 9-10 (citing, inter alia, Asheville Tobacco Bd. of Trade, Inc. v.

FTC, 263 F.2d 502 (4th Cir. 1959)). Given that "the decisive majority of the Board * * * earns a living by practicing dentistry," and, thus, has an "obvious interest in the challenged restraint," the Commission concluded that "the state must actively supervise the Board in order for the Board to claim state action protection." Id. at 2.

The Commission found, moreover, that such supervision was lacking. SA Op. 14-17. It noted the Supreme Court's teaching that active supervision "'mandates that the State exercise ultimate control over the challenged anticompetitive conduct'," and that "'mere presence of some state involvement or monitoring does not suffice'." Id. at 14 (quoting Patrick v. Burget, 486 U.S. 94, 101 (1988) (emphasis by the Commission)). It found no evidence, however, that an arm of the State has developed a record or rendered a decision that assessed whether the Board's challenged conduct comported with state policy. Id. at 15. It dismissed the Board's reliance on statutory reporting requirements as insufficient "generic oversight," reasoning that none of those provisions "suggest that a state actor was even aware of the Board's policy toward non-dentist teeth whitening, let alone reviewed or approved it in fulfillment of the active supervision requirement." Id. at 16.

2. The ALJ's Initial Decision

The ALJ then held a hearing between Fe

and admitted over eight-hundred exhibits in evidence. Id. In the end, he concluded that concerted action by the Board to exclude non-dentists from the market for teeth whitening services in North Carolina constituted an unreasonable restraint of trade, and an unfair method of competition in violation of the FTC Act. Id. at 8-9.

3. The Commission's Merits Decision

On the Board's appeal to the Commission, the latter reviewed the entire record de novo, and—noting that, like the ALJ, it would apply the standards of Section 1 of the Sherman Act—concluded that the Board had violated the FTC Act. Op. 10, 37.

a. Concerted Action

Addressing the question whether the Board's actions were undertaken pursuant to a "contract, combination * * * or conspiracy," 15 U.S.C. § 1, the Commission first concluded that "Board members were capable of conspiring," because, as "actual or potential competitors," they constituted separate economic actors. Op. 14 (citing American Needle, Inc. v. Nat'l Football League, __ U.S. __, 130 S. Ct. 2201, 2209,

joint decisions could deprive the market of actual or potential competition." Op. 16.

Moreover, the Commission found direct and circumstantial evidence showing that the dentist Board members "had a common plan to exclude non-dentist teeth whitening providers from the market." Op. 17. It cited the Board's discussions of non-dentist teeth whitening before taking actions—such as sending cease and desist orders and contacting suppliers, mall owners, and the cosmetology board—that restrict such services. Id. at 17-18. It rejected the Board's argument that using multiple case officers precluded concerted action, recognizing instead that the use of different agents to deliver a consistent message, to different parties and over several years, tended to negate the possibility of independent action. Id.

b. Restraint of Trade

Turning to the question whether the Board's actions constituted an unreasonable restraint of trade, the Commission assessed the Board's conduct under three alternative modes of analysis under the rule of reason, each of which has been endorsed by the Supreme Court: an abbreviated analysis based on the inherently suspect nature of the restraint; an analysis assessing the restraint's likely impact in light of defendants' market power; and an analysis based on a showing of actual

anticompetitive effects. See Op. 11-13, 18 (citing FTC v. Indiana Fed'n of Dentists, 476 U.S. 447 (1986)).

First, the Commission concluded that the Board's conduct can be condemned without consideration of market power. Op. 19 (citing California Dental Ass'n v. FTC, 526 U.S. 756, 781 (1999); Polygram Holding, Inc., 136 F.T.C. 310 (2003), aff'd, Polygram Holding, Inc. v. FTC, 416 F.3d 29 (D.C. Cir. 2005)). It reasoned—citing the increasing popularity of teeth whitening,

Further, it found that, even if the Board's proffered justification were cognizable within an antitrust rule of reason analysis, contemporaneous evidence supporting its claim was lacking. Id. at 26-27. It concluded that "the record as a whole fails to substantiate [the Board's] public safety claims." Id. at 28.[6]

c. Remedy

Having concluded that the Board's conduct violated the FTC Act, the Commission issued a cease and desist order enjoining the Board from unilaterally issuing extra-judicial cease and desist orders against non-dentist providers of teeth whitening services, or communicating to those providers or to others that the provision of such services by non-dentists is a violation of the DPA. See Final Order, at 3. The Final Order explicitly provided, however, that its terms do not prohibit the Board from (i) investigating non-dentists for suspected DPA violations; (ii) filing court actions against non-dentists for alleged DPA violations; or (iii) pursuing administrative remedies authorized by state law. Id. at 4. It also excluded from its injunctive provisions the Board's communications to third parties (i) notice of its belief or opinion that a particular method of teeth whitening may violate the DPA; (ii) factual information regarding legislative or court proceedings concerning teeth

---

[6] The Commission also rejected, as not cognizable under the antitrust laws, the Board's asserted defenses that its actions were intended to promote "legal competition," and that it was acting "in good faith." Op. 28.

whitening; or (iii) notice of the Board's bona fide intention to file a court action or pursue administrative remedies in connection with teeth whitening goods or services. Id. Lastly, the Final Order included certain notice and reporting requirements, in accordance with standard agency practice. Id. at 4-6.

STANDARD OF REVIEW

"The findings of the Commission as to the facts, if supported by evidence, shall be conclusive." 15 U.S.C. § 45(c). This formulation has been accepted by the courts as referring to the "essentially identical 'substantial evidence' standard for review of agency factfinding." Indiana Fed'n, 476 U.S. at 454; accord Telebrands Corp. v. FTC, 457 F.3d 354, 358 (4th Cir. 2006). Thus, a reviewing court "must accept the Commission's findings of fact if they are supported by 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" Indiana Fed'n, 476 U.S. at 454 (quoting Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951)). It may not, however, "'make its own appraisal of the testimony, picking and choosing for itself among uncertain and conflicting inferences'." Id. (quoting FTC v. Algoma Lumber Co., 291 U.S. 67, 73 (1934)); accord United States Retail Credit Ass'n, Inc. v. FTC, 300 F.2d 212, 221 (4th Cir. 1962) ("An inference made by an administrative agency may not be set aside upon judicial review because the court would have drawn a different inference").

"The legal issues presented—that is, the identification of governing legal standards and their application to the facts found"—are reviewed de novo, "although even in considering such issues the courts are to give some deference to the Commission's informed judgment that a particular commercial practice is to be condemned as 'unfair'." Indiana Fed'n, 476 U.S. at 454; accord Asheville Tobacco, 294 F.2d at 626 ("The conclusions of the Commission in this respect are not binding upon the court but are entitled to weight since they are reached by a body which is appointed to make a study of business and economic conditions and which is deemed to be especially competent to deal with matters committed to its charge").

Finally, the Commission has "broad discretion" in fashioning an effective and

The principal underlying facts in this case are not in contention. The Board does not dispute that six of its eight members are (and, by state law, must be) licensed dentists, elected by other licensed dentists in the state, and actively engaged in the practice of dentistry while serving on the Board. It also does not seriously dispute that it sent dozens of extra-judicial cease and desist letters to non-dentist providers of teeth whitening services, causing many of them to forgo participating in that market, when state law authorizes the Board only to seek judicial orders to that effect. Nor does it deny sending communications to suppliers of teeth whitening products, operators of retail malls, and other third parties, asserting (without judicial support) that the provision of teeth whitening services by non-dentists is unlawful, thus causing many of those recipients to cease offering such support or retail space to non-dentist providers of such services.

Nor does the Board challenge the Commission's findings concerning a prima facie violation of the antitrust laws. The Board does not challenge the relevant market, or that—by virtue of its statutory authority to regulate and discipline dentists—it has the power to exclude competition within that market. Nor does it challenge the findings that, as a result of its actions, many non-dentist providers of teeth whitening services forwent marketplace participation or were denied access to teeth whitening products and retail space.

Thus, this petition for review boils down, principally, to the Board's assertion of state action defense, dispute of the Commission's finding of concerted action, and challenging the Commission's rejection of its purported justifications. The Board's arguments on these issues (and amici's arguments on other, adjunct issues) are without merit.

First, the Board's perfunctory challenge to the Commission's jurisdiction over it as a "person" under the FTC Act, pressed principally by amici, has no basis in either the statutory text or legislative history, both of which point to Congress's intent to

Binding precedent, and sound antitrust policy mandate that this Court affirm the Commission's ruling on this issue.

Third, the Commission's finding of concerted action in this case is supported by substantial record evidence. The dentist Board members, who indisputably control the Board and actively maintain their dental practices while serving on it, are capable of concerted action because, as actual or potential competitors, they have distinct and potentially competing economic interests (a "personal stake" in the challenged restraint on trade), and thus form "independent centers of decisionmaking." Direct and circumstantial evidence demonstrate, moreover, that the dentist Board members implemented a calculated campaign to exclude their non-dentist rivals from the teeth whitening services market. The Board's contrary arguments misapprehend the nature of the conduct condemned by the Commission. The conduct challenged here is not the enforcement of state law, but the unilateral issuance of extra-judicial cease and desist orders, and the unsupported assertions to third parties that non-dentist teeth whitening is illegal.

Finally, the Board's purported justifications for its exclusionary conduct—that it was acting to safeguard legal competition or to maintain the professional reputation of dentists—are neither cognizable under the antitrust laws, nor borne out by the

to protect public health. States are free, within the bounds of the state action doctrine, to displace competition in order to further such public policies. But, where the Board acts without the protection of the state action defense, it may not itself determine that competition in the market for teeth whitening services is incompatible with the public interest. In any event, the Commission correctly determined that the Board's claim on this point is unsupported by the record.

ARGUMENT

I. THE COMMISSION HAS JURISDICTION OVER THE BOARD

The Board makes the perfunctory argument that the Commission lacks jurisdiction over it, on the ground that it is "not a person, partnership, or corporation," within the meaning of the FTC Act. See Br. 23 (citing Parker v. Brown, 317 U.S. 341, 350-51 (1943); California State Bd. of Optometry v. FTC, 910 F.2d 976, 981 (D.C. Cir. 1990)). Neither of those cases has any bearing on the Board's jurisdictional

---

[7] In California Bd. of Optometry, the D.C. Circuit did pose the question "whether a State acting in its sovereign capacity is a 'person' * * * under section 5(a)(2) of the [FTC] Act," 910 F.2d at 979, but it apparently answered that question in the affirmative, before deciding the case on state action grounds. After concluding that neither the text nor legislative history of the FTC Act was decisive on the "state as person" question, it turned to the "dispositive" rules of statutory construction, observing that "several Supreme Court decisions hold that a state is a person for purposes of the antitrust laws." Id. at 980 (emphasis original). Then, having reached

that answer, it turned to the eventually decisive state action issue. See id. ("Although a State may be a 'person' for purposes of the antitrust laws, it is equally clear, under the 'state action' doctrine * * * it is exempt from the antitrust laws * * *"); see also id. ("properly framed, the question before us is not simply whether a State is a person under section 5(a)(2) of the Act, but whether a State acting in its sovereign capacity is subject to the Act"). At any rate, unlike California Bd. of Optometry, this case does not challenge any state legislation. As we show below, the Commission challenged only the exclusionary but unsupervised acts of the Board—a state agency, to be sure, but not itself sovereign.

[8] Jefferson County is particularly instructive here. In holding state agencies and subdivisions not exempt from the Robinson-Patman Act, the Supreme Court reasoned that (1) the statute "by its terms does not exempt

Dirs. & Embalmers, 138 F.T.C. 645 (2004); South Carolina State Bd. of Dentistry, 138 F.T.C. 229 (2004); Massachusetts Bd. of Registration in Optometry, 110 F.T.C. 549 (1988). Contrary to amici's arguments, the Commission's construction of its organic statute is supported by both the text and legislative history of that Act.

Amici argue that the FTC Act's use of the term "persons" in conjunction with "partnerships, or corporations" means that that term "must refer to natural persons," lest the other terms become surplusage. ADA Br. 4.[9] But such a reading is compelled by neither precedent nor reason.[10] First, the conjunction of "persons" with other terms does not, in itself, limit the meaning of that term to "natural persons." In Union Pacific R.R. Co. v. United States, for example, the Supreme Court—holding that a municipality was a "person"—rejected such a reading of Section 1 of the Elkins Act, 49 U.S.C. § 41, which made it unlawful for "any person, persons, or corporations" to

---

[9] Section 5 of the FTC Act provides, in relevant parts:

> The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, savings and loan institutions * * *, Federal credit unions * * *, common carriers * * *, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act * * *, from using unfair methods of competition in or affecting commerce * * *.

15 U.S.C. § 45(a)(2).

[10] States themselves have intervened in Commission proceedings on the ground that they are "persons" under the FTC Act. E.g., Indiana Fed'n of Dentists, 93 F.T.C. 231, n.1 (1979).

give or receive rebates in connection with the transportation of property in interstate commerce. 313 U.S. 450 (1941). Moreover, Congress has used the term "natural person(s)" in other antitrust statutes, indicating that, in those instances, it had intended such a limitation on the meaning of "persons." See, e.g., 15 U.S.C. §§ 15c(a)(1) ("Any attorney general of a State may bring a civil action in the name of such State, as parens patriae on behalf of natural persons residing in such State"); 1311(f) ("the term 'person' means any natural person, partnership, corporation, association, or other legal entity."). But Congress chose not to do so in the FTC Act.

Nor does the conjunction render the term "partnerships, or corporations" surplusage. These terms are subject to specific definitions and exemptions in another section of the statute, so it was necessary for Congress to separate them from the more generally applicable term "persons." See 15 U.S.C. § 44 (defining "corporations" as entities "organized to carry on business for its own profit or that of its members," but excepting "partnerships" from that definition); see also Community Blood Bank of Kansas City Area, Inc. v. FTC, 405 F.2d 1011, 1017 (8th Cir. 1969) ("Congress intended to exclude some corporations from the Commission's jurisdiction"). Of course, to the extent that the statutory text is deemed ambiguous, the Commission is entitled to deference in reasonably interpreting its organic statutes. See National Fed'n of the Blind v. FTC, 420 F.3d 331, 337 (4th Cir. 2005) ("Chevron instructs that we

first review the statute to see if the intent of Congress is clear. If Congress has not

matter by whom committed"). After the Senate language was adopted in conference, the sponsor of the House version (a member of the conference committee) described the newly expansive language as "embrac[ing] within the scope of that section every kind of person, natural or artificial, who may be engaged in interstate commerce." 51 CONG. REC. 14928 (Sept. 11, 1914) (Statement of Mr. Covington).

Thus, neither the text nor legislative history of the FTC Act limits the Commission's jurisdiction over the Board. As we discuss next, the state action doctrine limits the exercise of such jurisdiction, but only where the restraints are effected in accordance with established requirements for that defense.[11]

[11] Amici's argument that exercising jurisdiction over the Board somehow "renders incorrect or meaningless prior positions by the FTC" is also without merit. ADA Br. 7-8. Where a Commission investigation targets a business entity, the agency asserts jurisdiction under the "partnerships, or corporations" prong, as the cases cited by amici illustrate. Id. But the Commission has never claimed "persons" jurisdiction over entities that otherwise would fall within an expressed exemption to the terms "partnerships, or corporations."

II. THE COMMISSION PROPERLY HELD THAT THE BOARD'S

satisfy Midcal's active supervision prong. Id. at 46. It explained that, unlike private parties, in the case of a municipality, "[t]he only real danger is that it will seek to further purely parochial public interests at the expense of more overriding state goals," a danger ameliorated by satisfying the clear articulation requirement. Id. at 47. The Court then speculated that if "the actor is a state agency, it is likely that active state supervision would also not be required, though we do not here decide that issue." Id. at 46 n.10. But, it emphasized in the next footnote, "[w]here state or municipal regulation by a private party is involved, * * active state supervision must be shown, even where a clearly articulated state policy exists." Id. (citing Southern Motor Carriers Rate Conf., Inc. v. United States, 471 U.S. 48, 62 (1985)).

Here, noting that the Board "is an agency of the State of North Carolina," SA Op. 4, the Commission concluded that because the Board is controlled decisively by private, financially interested actors, it must satisfy Midcal's active supervision prong, but that such supervision is lacking.[12] The Commission's conclusions are

[12] The Commission assumed, without deciding, that the Board's conduct satisfied the clear articulation prong. SA Op. 7 n.8. Thus, although the Board argues that it satisfies this requirement, Br. 25-30, the issue is not properly before this Court. Likewise, amici's arguments regarding the application of City of Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365 (1991)—decided on clear articulation grounds—are inapposite. See ADA Br. 11; AMA Br. 18 n.6; NABP Br. 20-23; FSBPT Br. 8-14.

supported by binding precedent and substantial record evidence, and are securely moored to the policies animating the state action doctrine.

A. The Board Must Show Active State Supervision in Order to Qualify for State Action Exemption

The Supreme Court has explained that the active supervision requirement serves to ensure that "the State has exercised sufficient independent judgment and control so that the details of the [restraint] have been established as a product of deliberate state intervention." Ticor, 504 U.S. at 634 (emphasis added); see also Patrick, 486 U.S. at 100 (requiring active supervision "stems from the recognition that 'where a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State'.") (quoting Hallie, 471 U.S. at 47). Accordingly, the Court has required active state supervision—and applied the federal antitrust laws in its absence—whenever the actor lacked such "sufficient independent judgment and control." E.g., Goldfarb; Midcal; Patrick; Ticor. The Court has not confronted directly the question whether a state regulatory agency controlled by private market participants (such as the Board) must be actively supervised in order to qualify for the Parker exemption. But its reasoning in cases in which such bodies were denied the antitrust exemption leaves no doubt that the operative factors in demanding active supervision have to do not with the formalities

of constituting the regulator as a “state agency,” but with the degree of independent judgment and control that it exercises over the relevant market.

In Goldfarb

analysis might well have been different. See 421 U.S. at 791. But absent such active supervision, and where the state agency is not sufficiently independent from private interests, even "a state agency by law" would not be exempt from the antitrust laws. Id. at 790.

Likewise, this Court has found the absence of active state supervision determinative in denying exemption to a state regulatory board comprising market participants. Asheville Tobacco concerned the conduct of a local board, authorized by state law "to make reasonable rules and regulations for * * * the sale of leaf tobacco at auction." 263 F.2d at 505. "[O]nly warehousemen or their general managers [were] eligible for membership" on "* * * the governing body of the [tobacco] Board." Id. Defending against allegations of market allocation, the tobacco board claimed antitrust exemption as "an administrative agency of the State of North Carolina, exercising powers delegated to it by the legislature." Id. at 508. This Court denied the exemption, explaining that "the State may regulate [an] industry in order to control or, in a proper case, to eliminate competition therein. It may even permit persons subject to such control to participate in the regulation, provided their activities are adequately supervised by independent state officials." Id. at 509. This Court also affirmed the Commission's finding that independent supervision was lacking, because—like the Board here—"[t]he State bears no part of the expense of operating

Like the market in *Asheville Tobacco*, dentistry in North Carolina is effectively a self-regulated market, with governmental power enforcing private Tob6t9 Tc1g by

[14] *Continental Ore Co. v. Union Carbide and Carbon Corp.*, 370 U.S. 690 (1962), held that an alleged antitrust conspir- ator, "acting as an arm of the Canadian Government," *id.* at 704, was not exempt by *Parker*, *id.* at 706, because the governmental agent, and other alleged co-conspirators, "were engaged in private commercial activity," *id.* at 707, with no evidence that "any other official within the structure of the Canadian Government approved" the agent's conduct. *Id.* at 706.

market with regulation, our insistence on real compliance with both parts of the Midcal test will serve to make clear that the State is responsible for the [restraint] it has sanctioned and undertaken to control"); Asheville Tobacco, 263 F.2d at 510 (public accountability part of state supervision calculus).

Prominent antitrust commentators agree. Professors Areeda and Hovenkamp have concluded in their leading treatise, for example, that conduct of "any organization in which a decisive coalition (usually a majority) is made up of participants in the regulated market" should be treated as private conduct for state action purposes, in which case "outside supervision seems required." See Phillip E. Areeda & Herbert Hovenkamp, 1A ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶227b at 208, ¶224a at 93 (3d ed. 2009). Likewise, Professor Elhauge has reported, after reviewing the Supreme Court's state action cases, that "financially interested action is always 'private action' sub-

---

[15] The Board also cites Bates v. State Bar of Ariz., 433 U.S. 350 (1977), but the Court there held merely that the "the affirmative command of the Arizona Supreme Court," which is ipso facto sovereign in nature, was exempt from antitrust scrutiny. Id. at 361. That decision has no application here, where the Board does not (and cannot) claim that its actions are ipso facto sovereign.

relevant here—whether state regulatory bodies must show active supervision when dominated by private market participants with economic incentives to restrain trade—elevate form over substance, in contravention of the Supreme Court's teachings in *Goldfarb* and *American Needle*. *See* SA Op. 11-12 (distinguishing specific cases). As the Commission correctly concluded, those decisions ignore the functional realities of state entities, and wrongly instead on formalistic

[16] The Board's argument that active supervision is satisfied when "a state agency acts pursuant to state law, within the powers legislatively granted to it," impermissibly conflates the two Midcal prongs. See Br. 39 (citing Gambrel v. Kentucky Bd. of Dentistry

its communications to third parties, that non-dentist teeth whitening was unlawful, were not grounded in any judicial decision holding such services unlawful. Nor was there any "pointed reexamination" of the Board's actions by any other state official. See Midcal, 445 U.S. at 106; Bates, 433 U.S. at 362.

To be sure, there were other means available to the Board, by which to exclude non-dentists from performing teeth whitening. Promulgating a formal Board rule or binding interpretation of the DPA concerning teeth-whitening-as-dentistry would be subject to the state's Administrative Procedure Act and to review by legislative committees. N.C.G.S. §§ 150B-21.2(g), 120-70.100. And a lawsuit based on such determination, to enjoin allegedly illegal teeth whitening, must then be brought in state court. N.C.G.S. §§ 90-40 & 40.1. Thus, as the Commission correctly pointed out (see SA Op. 17), even if ex-post judicial, legislative, or executive review of the Board's classification of teeth whitening as dentistry were to constitute adequate state supervision,[17] the Board did not exercise any of those options. Instead, it chose to evade independent review altogether, by proceeding directly to issuing extra-judicial

[17] Neither the Supreme Court, see Patrick, 486 U.S. at 103-04, nor the Commission in this case, has addressed this issue.

cease and desist orders that purport to enforce its unilateral, unsupervised classification of teeth whitening as dentistry.[18]

C. Requiring Active State Supervision of the Board's Exclusionary Conduct Is Consistent with the Policies Underlying *Parker*

The alarm bells sounded by the Board and amici, foretelling dire consequences from demanding that the Board's conduct be actively supervised, ring hollow. *See* Br. 40-41; ADA Br. 19-20; AMA Br. 16-21; NABP Br. 23-29; FSBPT Br. 20-24. The Commission's decision is firmly grounded in the policies underlying *Parker*, and its practical effect, both in North Carolina and elsewhere, is likely to be narrow.

Parker and its progeny represent a careful balance between judicial respect for the principles of federalism and, otherwise, strict adherence to a national policy "of such a pervasive and fundamental character" in favor of competition. *Ticor*, 504 U.S. at 632. Moreover, because it exempts conduct that otherwise would be illegal under federal law, the state action doctrine is "disfavored" and must be narrowly construed. Id. at 636. State regulatory bodies, such as the Board, can wield enormous market power by virtue of their inherent ability to order the markets they regulate, including

---

[18] Before the Commission, the Board argued that state reporting provisions provided the requisite supervision. *See* SA Op. 15-17. But generic oversight cannot be deemed approval of the "particular anticompetitive acts" at issue. *Patrick*, 486 U.S. at 101. And, as the Commission noted (SA Op. 16), none of those provisions suggests that other state officials were even aware of the Board's actions, much less approved them. The Board appears to have abandoned this argument.

[19] In West Virginia, for example, the dental board can only propose rules, to be adopted by the legislature. See

(53 of 58) are not set up like the Board, whose members are accountable only to its regulated market participants. See CCPFF ¶¶46-47 (summarizing composition of the

[20] In truth, it appears that state law did not

[21] A violation of Section 1 of the Sherman Act requires the showing of a "contract, combination * * * or conspiracy

768, 764 (1984); *see Oksanen v. Page Mem'l Hosp.*, 945 F.2d 696, 702 (4th Cir. 1991) (en banc) (Section 1 "applies only to concerted action; unilateral conduct is excluded from its purview"). Recent decisions from the Supreme Court and this Court confirm that the dentist members of the Board are capable of such concerted action.

In *American Needle*, the Supreme Court held unanimously that conduct of the National Football League Properties (NFLP)—a separately incorporated joint venture

[22] Indeed, this Court has long recognized a "personal stake" exception to Copperweld's intra-firm immunity.

[23] Board counsel acknowledged at oral argument before the Commission that Board members "are potential competitors." Oral Arg. Tr. 9-10. Indeed, some Board members even provided teeth whitening services. IDF at 6-9, 32. And all dentist members are elected by other dentists, who too have a financial interest in limiting the practice of teeth whitening to dentists. IDF 15-23. Moreover, only dentist Board members decided teeth whitening matters. IDF 40, 59-60, 184, 192-93.

the capacity to conspire as a matter of law." The Board's contrary arguments are unpersuasive.

The Board argues that its members cannot collude because they are "required to comply with a number of statutory safeguards to remove any potential financial interests." Br. 44. First, the Board does not explain how those statutory provisions—related to ethics-in-government

the practice of teeth-whitening to dentistry." Tr. 45. But the Legislature did not define teeth whitening as "dentistry." The Board took it upon itself, instead, to construe state law as having made that determination, then proceeded to issue its own, extra-judicial cease and desist orders to exclude non-dentist providers from that market.[25]

2. The Board Members Engaged in Concerted Campaign to Exclude Rival Non-Dentists from the Teeth Whitening Services Market

Monsanto's "something more" requirement has been formulated by the Court as making a showing of "conscious commitment to a common scheme designed to achieve an unlawful objective," which, the Court added, may be established either by "direct or circumstantial evidence." Monsanto, 465 U.S. at 768; see Thompson Everett, Inc. v. National Cable Adv., L.P., 57 F.3d 1317, 1324 (4th Cir. 1995) (same); Laurel Sand & Gravel, Inc. v. CSX Transp., Inc., 924 F.2d 539, 542 (4th Cir. 1991) ("agreement to restrain trade may be inferred from other conduct").

---

[25] The Board's letters cited no judicial authority construing the DPA as prohibiting teeth whitening by non-dentists. Instead, they quoted the DPA's "removal of stains" language (see N.C.G.S. § 90-29(b)), with the clear purpose of conveying the (false) implication that the statute includes teeth whitening within the definition of dentistry. The Commission declined to rule on whether teeth whitening constitutes "dentistry" under the DPA, as irrelevant to determining whether the Board's conduct violated the FTC Act. Op. 3 nn.3-4; see ID at 82, 109 (ALJ concluding likewise). But evidence was adduced before the ALJ that teeth whitening does not fit the statutory definition of "dentistry." See, e.g., Giniger, Tr. 111-118 (industry expert testifying that teeth whitening is not "stain removal" as envisioned by the North Carolina legislature); see also CCPFF ¶¶159-173 (summarizing prevailing "stain removal" methods at the time of DPA's enactment).

[27] Parkway Gallery Furniture v. Kittinger/Penn. House Group, Inc., 878

Br. 51. But the record does not support this assertion. Only one dentist complaint even made reference to such concerns—and then only in connection with her non-dentist rivals' prices. See CX278 (dentist complaining that $99 prices at teeth

tended to, was likely to, and in fact did, restrain competition. *See Robertson*, 679 F.3d at 286 ("the power of [] board members to pass restrictive membership rules can also threaten economic harm to nonmembers and undermine the [] market of the competitive forces that are at the heart of our national economic policy'.") (quoting *Professional Engineers*, 435 U.S. at 695).

The Board does not seriously challenge any of these Commission findings and conclusions. *See* Br. 54-57. Its sole argument is that the Commission had "no support for the application of a truncated analysis" because "no court has ever applied a rule of reason analysis to a state agency acting pursuant to state law." *Id.* at 55, 56. As an initial matter, the Board misapprehends the proper role of its status as a state agency in an antitrust analysis—truncated or not. Whether certain conduct has the potential to harm, or the effect of harming, competition does not turn on the public- or private nature of the actor in question. The public status of the actor may become relevant to the antitrust analysis, but only as a defense (as within the state action exemption, discussed above). But the fact that anticompetitive conduct was undertaken by a state agency does not, in itself, mean that such conduct is procompetitive or even competitively harmless. Relatedly, whether certain conduct is inherently suspect can be based on "close family resemblance" to conduct already judged to be anticompetitive, regardless of the public/private nature of the actors involved. The

Commission was correct, therefore, in not to precedent that condemned the market exclusion of lower-cost rivals in order to conclude that the Boar

The Board argues, for example, that its conduct is justified because it "acted pursuant to state law," or because "state legislatures * * * may restrain competition." Br. 57, 59. These arguments are merely a reformulation of the Board's state action defense, properly rejected by the Commission, and do not constitute efficiencies that can even be considered as procompetitive justifications under the rule of reason. *See* *Indiana Fed'n*, 476 U.S. at 459 (procompetitive justification is one that leads to the "creation of efficiencies in the operation of a market or the provision of goods and services"); *Broadcast Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 19-20 (1979) (cognizable justifications "increase economic efficiency and render markets deu

The Board also argues that its conduct should be excused either because its

[28] In some circumstances, restrictive agreements may be justified as efficiency-enhancing to the extent that they facilitate the offering of products that are superior in terms of health or safety enhancements provided to consumers. See generally Continental Airlines, Inc. v. United Airlines, Inc., 277 F.3d 499, 514 (4th Cir. 2002). But the Board has proffered no such efficiencies. On the contrary, its actions simply seek to squelch competition by depriving consumers of the ability to choose a lower-cost and (ostensibly) lower-quality product. This Court has rightly rejected attempts to justify restrictions of this sort "upon an incantation of 'good medical practice'." See Virginia Acad. of Clinical Psychologists, 624 F.2d at 485.

Professional Engineers, 435 U.S. at 695). A state could, of course, choose to prioritize such concerns over competition, by enacting a state regulatory scheme that satisfies the requirements of the state action exemption from federal antitrust scrutiny. But, as shown above, that is not what happened in this case.

In any event, the Board's public health and safety claims also lack factual support. The Commission found no credible evidence supporting the Board's claims of threats to public health and safety. See Op. 26-28. On the contrary, as the Commission found, "there was a wealth of evidence presented at trial suggesting that non-dentist provided teeth whitening is a safe cosmetic procedure." Op. 28 (citations omitted). For this reason, other states have permitted non-dentist teeth whitening (e.g., California, Florida, Illinois, Indiana, New York, Ohio, Tennessee, Texas, and Wisconsin). See Nelson, Tr. 769; CX419; CX488 at 49; CX649; Osborn, Tr. 668-69; CX650; CX651.

More important, the record reflects that the Board itself had no basis for any such safety claims, nor was there any indication that such concerns actually prompted the challenged actions. None of the Board's testifying members, nor its own expert witness, could cite any clinical or empirical evidence to validate the claim that non-dentist teeth whitening causes consumer injury. See Hardesty, Tr. 2818, 2829; CX565 (Hardesty Dep.) at 38; CX554 (Allen Dep.) at 26; CX555

Wester, Tr. 1313-15, 1402, 1405-06; CX560 (Feingold Dep.) at 65-66; CX567 (Holland Dep.) at 37; CX564 (Hall Dep.) at 16; Owens, Tr. 1664; Haywood, Tr. 2696, 2713-14, 2729; CX402 at 5. Indeed, as the Commission detailed, *see* Op. 27-28, the Board began sending the cease and desist letters two years before it became aware of any claim of consumer injury. *Compare* CX38 at 1 (first cease and desist letter, dated January 11, 2006) *with* CX476 at 1 (first complaint alleging injury, dated February 20, 2008). Moreover, only two of the Board cease and desist orders appear to have been related to allegations of specific health and safety concerns. *Compare* CX59, CX388 (Board orders) *with* RX21 at 3-7, RX17 at 1-2 (complaints about possible consumer injuries).

What the record evidence shows is that the Board responded to dentist complaints without any reference to harm. *See, e.g.*, CX36 at 2-4 (dentist complaints about Edie's Salon Panache's offering $149 teeth whitening as lower than dentists' prices); CX365 at 2 (dentist complaint about teeth whitening kiosk, noting the latter's advertised price of $100); CX278 (dentist complaint about kiosk's price of $99); *see also* IDF 232 (listing dentist complaints that referenced or attached advertisements of prices by non-dentists).

Accordingly, the Commission properly rejected those justifications as neither cognizable under the antitrust laws, nor supported by the record evidence in this case.

CONCLUSION

For the reasons set forth above, the petition for review should be denied.

STATEMENT REGARDING ORAL ARGUMENT

This Court likely will benefit from counsel's oral argument. Accordingly, the Commission requests that oral argument be scheduled in this case.

Respectfully submitted,

RICHARD A. FEINSTEIN
Director

RICHARD B. DAGEN
WILLIAM L. LANNING
Attorneys

BUREAU OF COMPETITION

June 27, 2012

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because it contains 9,139 words, excluding the parts thereof exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Local Rule 32(b).

CERTIFICATE OF SERVICE

I certify that on June 27, 2012, I filed the foregoing brief using the court of appeals's CM/ECF system, and the same was served electronically on all counsel of record.

/s Imad Abyad
Imad D. Abyad
Counsel for
FEDERAL TRADE COMMISSION