PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 12-1172

THE NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

AMERICAN DENTAL ASSOCIATION; AMERICAN OSTEOPATHIC ASSOCIATION; AMERICAN VETERINARY MEDICAL ASSOCIATION; AMERICAN ACADEMY OF PEDIATRIC DENTISTRY; AMERICAN ACADEMY OF PERIODONTOLOGY; AMERICAN ASSOCIATION OF ORTHODONTISTS; AMERICAN ASSOCIATION OF DENTAL BOARDS; FEDERATION OF STATE MEDICAL BOARDS; AMERICAN MEDICAL ASSOCIATION; NORTH CAROLINA MEDICAL SOCIETY; SOUTH CAROLINA MEDICAL ASSOCIATION; MEDICAL SOCIETY OF VIRGINIA; WEST VIRGINIA STATE MEDICAL ASSOCIATION; NATIONAL ASSOCIATION OF BOARDS OF PHARMACY; NORTH CAROLINA BOARD OF PHARMACY; THE FEDERATION OF STATE BOARDS OF PHYSICAL THERAPY; THE FEDERATION OF ASSOCIATIONS OF REGULATORY BOARDS; THE ASSOCATION OF SOCIAL WORK BOARDS; THE AMERICAN ASSOCIATION OF VETERINARY STATE BOARDS; THE FEDERATION OF CHIROPRACTIC LICENSING BOARDS; THE FEDERATION OF STATE MASSAGE THERAPY BOARDS; INTERNATIONAL CONFERENCE OF FUNERAL SERVICE EXAMINING BOARDS, INCORPORATED; THE NATIONAL ASSOCIATION OF LONG TERM CARE ADMINISTRATOR BOARDS; THE NATIONAL BOARD FOR CERTIFICATION IN OCCUPATIONAL THERAPY,

Amici Supporting Petitioner,

AMERICAN ANTITRUST INSTITUTE,

Amicus Supporting Respondent.

On Petition for Review of an Order of the Federal Trade Commission. (No. 9343)

Argued: December 5, 2012 Decided: May 31, 2013

Before SHEDD, KEENAN, and WYNN, Circuit Judges.

SHEDD, Circuit Judge:

The North Carolina State Board of Dental Examiners (the Board) petitions for review of the Federal Trade Commission (FTC) order finding that the Board violated the FTC Act, 15 U.S.C. § 45, by engaging in unfair competition in the market for teeth-whitening services in North Carolina. For the following reasons, we deny the petition.

I.

The Board is a state agency, N.C. Gen. Stat. § 90-48, created because the "practice of dentistry" in North Carolina affects "the public health, safety and welfare," N.C. Gen. Stat. § 90-22(1)(a). The eight-member Board is comprised of six licensed dentists, one licensed dental hygienist, and one consumer member. N.C. Gen. Stat. § 90-22(b). Dentists elect the six dental members, and dental hygienists elect the hygienist member. Id. § 90-22(c). If an election ends in a tie, the candidates are allowed to describe their positions on issues that will come before the Board before a revote is held. The Governor appoints the consumer member. The Board is funded by fees paid by licensed dentists and dental hygienists in North Carolina. Board members—other than the consumer member—are required to maintain an active dentistry practice while serving, and during the relevant time frame, several Board members provided teeth-whitening services.

North Carolina's Dental Practice Act provides that it is unlawful for an individual to practice dentistry in North Carolina without a license from the Board. See N.C. Gen. Stat. § 90-29(a). Under the Dental Practice Act, a person "shall be deemed to be practicing dentistry" if that person, inter alia, "[r]emoves stains, accretions or deposits from the human teeth." N.C. Gen. Stat. § 90-29(b)(2). The Board has the "power" to (1) refuse to issue a license to practice dentistry; (2) refuse to renew a license; (3) revoke or suspend a license; or (4) take other disciplinary measures "against a licensee as it deems fit and proper." N.C. Gen. Stat. § 90-41. If the Board suspects an individual of engaging in the unlicensed practice of dentistry, it may bring an action to enjoin the practice in North Carolina Superior Court or may refer the matter to the District Attorney for criminal prosecution. See N.C. Gen. Stat. § 90-40.1. This power is hardly unique, however, because such actions may also be maintained by the "Attorney General for the State of North Carolina, the district attorney of any of the superior courts," or "any resident citizen." Id. Moreover, the Board does not have the authority to discipline unlicensed individuals or to order non-dentists to stop violating the Dental Practice Act.

This case involves the market for teeth-whitening services in North Carolina. Teeth-whitening is a popular cosmetic dental

states, in several forms, including as an in-office dental treatment, as dentist-provided take-home kits, as over-the-counter products, and as services provided by non-dentists at salons, mall kiosks, and other locations. Each of these teeth-whitening services involves applying peroxide to the teeth by means of a gel or strip, which triggers a chemical reaction that results in whiter teeth. The services differ, however, in the immediacy of the results, the ease of use, the necessity of repeat applications, the need for technical support, and price. Not surprisingly, in-office dentist whitening procedures are fast, effective, and usually do not require repeated applications, but they are also the "most costly" offering. (J.A. 146). In contrast, over-the-counter whitening products typically contain lower concentrations of peroxide and may require multiple applications to achieve results, but they cost far less.

Beginning in the 1990s, dentists started providing whitening services throughout North Carolina. In about 2003, non-dentists also started offering teeth-whitening services, often at a significantly lower price than dentists. Shortly thereafter, dentists began complaining to the Board about the non-dentists' provision of these services.

Relevant here, a

contacted the North Carolina Board of Cosmetic Art Examiners to request that the Cosmetic Board inform its members and licensees

State Bd. of Dental Examiners v. FTC, 768 F. Supp.2d 818 (E.D.N.C. 2011).

The ALJ then held a merits trial and issued an opinion finding that the Board violated the FTC Act. On appeal, the FTC—applying a de novo standard of review—affirmed and entered a final order against the Board that included a cease-and-desist order enjoining the Board from, inter alia, continuing to unilaterally issue extra-judicial orders to teeth-whitening providers in North Carolina. In re North Carolina State Bd. of Dental Exam'rs, 2011-2 Trade Cases P 77705, 2011 WL 6229615, at *2-5 (FTC December 7, 2011) (Final Order).

The Board petitions for review of the FTC's final order, raising three arguments: that it is exempt from the antitrust laws under the state action doctrine; that it did not engage in concerted action under § 1 of the Sherman Act; and that its activities did not unreasonably restrain trade under § 1. We address each in turn.

II.

A.

We begin with the Board's contention that it is exempt from the antitrust laws under the "state action" doctrine.[2] Under

[2] The Board also argues that the FTC lacked jurisdiction over it because it is not a "person" under the FTC Act, 15 U.S.C. § 45(a)(2). We find this argument to be without merit. (Continued)

this doctrine, the antitrust laws do "not apply to anticompetitive restraints imposed by the States 'as an act of government.'" City of Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365, 370 (1991) (quoting Parker v. Brown, 317 U.S. 341, 352 (1943)). In Parker, the Supreme Court announced this

"ipso facto are exempt" from the antitrust laws.[3] Hoover v. Ronwin, 466 U.S. 558, 568 (1984). Second, private parties can claim the Parker exemption if acting pursuant to a "clearly articulated and affirmatively expressed as state policy" and their behavior is "actively supervised by the State itself." California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980) (internal quotation marks omitted). Third, as the Supreme Court recently reaffirmed, municipalities and "substate governmental entities do receive immunity from antitrust scrutiny when they act pursuant to state policy to displace competition with regulation or monopoly public service." FTC v. Phoebe Putney Health Sys., Inc., 133 S.Ct. 1003, 1010 (2013) (internal quotation marks omitted). Municipalities are not required to show the active-supervision prong of the Midcal test, because, "[w]here the actor is a municipality, there is little or no danger that it is involved

[3] The Board repeatedly asserted at oral argument that it is "sovereign" within the meaning of Parker. The Supreme Court has recognized two entities as "sovereign" under Parker—the state legislature and the statevtstat0tcCourd when/a<10(entities aw -4lature and>

is implementing anticompetitive policies authorized by the state.”

antitrust laws to public/private hybrid entities, such as regulatory bodies consisting of market participants" like the Board. Interlocutory Order, 151 F.T.C. at 619. The FTC explained that 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," and that, because a decisive majority of the Board was elected by dentists, it was required to meet the active-supervision requirement. Id. The FTC found this conclusion was supported by the policies underlying the state action doctrine:

> Decisions that are made by private parties who participate in the market that they regulate are not subject to these political constraints unless these decisions are reviewed by disinterested state actors to assure fealty to state policy. Without such review, "there is no realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests." Patrick v. Burget, 486 U.S. 94, 101 (1988). Therefore, allowing the antitrust laws to apply to the unsupervised decisions of self-interested regulators acts as a check to prevent conduct that is not in the public interest.

Id. at 622.

Having reached this conclusion, the FTC then easily determined that the Board was not actively supervised because it pointed only to "generic oversight" that did "not substitute for the required review and approval of the 'particular anticompetitive acts' that the complaint challenges." Id. at 630 (quoting Patrick, 486 U.S. at 101).

C.

In its petition for review, the Board renews its contention that, as a state agency, it is only required to show clear articulation. Alternatively, the Board contests the FTC's conclusion that its conduct was not actively supervised. We disagree with the Board on both counts.

First, we agree with the FTC that state agencies "in which a decisive coalition (usually a majority) is made up of participants in the regulated market," who are chosen by and accountable to their fellow market participants, are private actors and must meet both Midcal prongs. Phillip E. Areeda & Herbert Hovenkamp, 1A Antitrust Law: An Analysis of Antitrust Principles and Their Application ¶ 227b, at 501 (3d ed. 2009). See also Einer Richard Elhauge, The Scope of Antitrust Process, 104 Harv. L. Rev. 667, 689 (1991) (concluding that "financially interested action is . . . 'private action' subject to antitrust review"). This result accords with Supreme Court precedent as well as our own.

For example, in Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975), the Court addressed an ethical opinion enforced by the Virginia State Bar Association that required attorneys to abide by a minimum fee schedule. The Bar was a "state agency by law," id. at 790, with the "power to issue ethical opinions,"

id. at 791. The Court still denied the Parker exemption to the Bar, concluding that:

> The fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members. Cf. Gibson v. Berryhill, 411 U.S. 564, 578-579 (1973). The State Bar, by providing that deviation from County Bar minimum fees may lead to disciplinary action, has voluntarily joined in what is essentially a private anticompetitive activity, and in that posture cannot claim it is beyond the reach of the Sherman Act.

Id. at 791-92.

The key, according to the Goldfarb Court, was that the Parker exemption did not permit the state agency to "foster anticompetitive practices for the benefit of its members." When a state agency and its members have the attributes of a public body—such as a municipality—and are subject to public scrutiny such that "there is little or no danger that [they are] involved in a private price-fixing arrangement," active supervision is not required. Hallie, 471 U.S. at 47. However, when a state agency appears to have the attributes of a private actor and is taking actions to benefit its own membership

pharmacy board's status as public or private "depends upon how the Board functions in practice, and perhaps upon the role

authorizes price setting and enforces the prices established by private parties"; (2) "neither establishes prices nor reviews the reasonableness of the price schedules"; (3) does not "regulate the terms of fair trade contracts"; (4) and does not "monitor market conditions or engage in any 'pointed reexamination' of the program." Midcal, 445 U.S. at 105–06. The Court reinforced that our national policy in favor of robust competition "cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement." Id. at 106. As the Court later noted, "[t]he mere presence of some state involvement or monitoring does not suffice." Patrick, 486 U.S. at 101.

North Carolina has done far less "supervision" in this case than the Court found wanting in Midcal. Here, the cease-and-desist letters were sent without state oversight and without the required judicial authorization. The Board has pointed to certain reporting provisions and "good government" provisions in North Carolina law, but those fall far short of the type of supervision in Midcal that was nonetheless considered deficient. As the FTC explained, "[t]his sort of generic oversight, however, does not substitute for the required review and approval of the 'particular anticompetitive acts'" challenged by the FTC. Interlocutory Order, 151 F.T.C. at 630 (quoting Patrick, 486 U.S. at 101).

III.

We next turn to the question of whether the FTC properly found that the Board's behavior violated the FTC Act. The FTC's factual findings are conclusive if supported by substantial evidence, Telebrands Corp. v. FTC, 457 F.3d 354, 358 (4th Cir. 2006), and, while we review legal issues de novo, we "give some deference to the Commission's informed judgment that a particular commercial practice is to be condemned as 'unfair,'" FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 454 (1986). "The [FTC Act] forbids a court to '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)).

The FTC Act makes unlawful "[u]nfair methods of competition." 15 U.S.C. § 45(a)(1). In this case, the FTC determined that the Board's conduct violated § 45(a)(1) because it was a violation of § 1 of the Sherman Act, which we have previously recognized is a "species" of "unfair competition." South Carolina Bd. of Dentistry, 455 F.3d at 443 n.7. Accordingly, because the FTC limited its review to whether the Board's conduct violated § 1, we do the same. Section 1 of the Sherman Antitrust Act prohibits "[e]very contract, combination . . ., or conspiracy, in restraint of trade." 15 U.S.C. § 1. To establish a § 1 antitrust violation, a plaintiff must prove "(1)

a contract, combination, or conspiracy; (2) that imposed an unreasonable restraint of trade." Dickson v. Microsoft Corp., 309 F.3d 193, 202 (4th Cir. 2002). Here, the Board challenges both of these requirements, arguing that, under the intracorporate immunity doctrine, see Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 771 (1984), it is incapable of conspiring with itself, and that, to the extent that doctrine does not apply, the FTC failed to prove a combination or conspiracy that imposed an unreasonable restraint of trade.

A.

explained, "substance," not "form" determines whether an "entity is capable of conspiring under § 1," and the key inquiry is "whether there is a conspiracy between 'separate economic actors pursuing separate economic interests, such that the agreement deprives the marketplace of independent centers of decision making.'" Robertson v. Sea Pines Real Estate Co., 679 F.3d 278, 285 (4th Cir. 2012) (quoting American Needle, 130 S.Ct. at 2212).

Applying American Needle, the FTC concluded that "Board members were capable of conspiring because they are actual or potential competitors." Final Order, 2011 WL 6229615, at *20. Specifically, the FTC found that "Board members continued to operate separate dental practices while serving on the Board," and that the "Board members had a personal financial interest in excluding non-dentist teeth whitening services" because many of them offered teeth-whitening services as part of their practices. Id. The FTC continued by noting its conclusion was "buttressed by the significant degree of control exercised by dentist members of the Board with respect to the challenged restraints." Id. at *21.

We uphold the FTC's finding that the Board has the capacity to conspire under § 1. As American Needle made clear, concerted action is satisfied when an agreement exists between "separate economic actors" such that any agreement "deprives the

marketplace of independent centers of decision making." American Needle, 130 S.Ct. at 2212 (internal quotation marks omitted). The Board members—apart from the consumer member—are active dentists who are required, by the Dental Practice Act, N.C. Gen. Stat § 90-22(b), to be actively engaged in dentistry during their Board tenure. As even the Board's own expert recognized,[7] the Board members' active-service requirement can create a conflict of interest since they serve on the Board while they remain "separate economic actors" with a separate financial interest in the practice of teeth whitening. Cf.

Moreover, the Board's status as a single entity is not dispositive because "[c]ompetitors 'cannot simply get around'

of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of a restriction will follow from a quick (or at least a quicker) look, in place of a more sedulous one." Id. at 781. In applying this abbreviated analysis, however, a court "must carefully consider a challenged restriction's possible procompetitive justifications." Continental Airlines, 277 F.3d at 510.

In this case, the FTC determined that the Board's conduct violated § 1 under both a quick-look analysis[11] and a full rule of reason. Final Order, 2011 WL 6229615, at *18 (noting the FTC analyzed the Board's behavior under "the . . . modes of analysis endorsed in Indiana Federation of Dentists," including the quick look approach and the rule of reason). Applying the quick look approach, the FTC first concluded that the conduct was "inherently suspect" because "[t]he challenged conduct is, at its core, concerted action excluding a lower-cost and popular group of competitors," id. at *25, and "[n]o advanced degree in economics is needed to recognize" that the behavior "is likely

[11] The FTC referred to the quick look analysis as the "inherently suspect" approach, consistent with its earlier ruling in In re Polygram Holding, Inc., 136 F.T.C. 310 (2003), aff'd Polygram Holding, Inc. v. FTC, 416 F.3d 29 (D.C. Cir. 2005).

to harm competition and consumers, absent a compelling justification," id. at *26.

We affirm the FTC's mode of analysis and find that its conclusion that the Board's behavior was likely to cause significant anticompetitive harms is supported by substantial evidence. See Fashion Originators' Guild of Am., Inc. v. FTC, 312 U.S. 457, 465 (1941) (holding that manufacturer's boycott of certain retailers "has both as its necessary tendency and as its purpose and effect the direct suppression of competition"); Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284, 294 (1985) (internal quotation marks omitted) (noting "likelihood of anticompetitive effects is clear" in group boycotts involving "joint efforts . . . to disadvantage competitors by either directly denying or persuading or coercing suppliers or customers to deny relations the competitors need in the competitive struggle"). The Court has made clear that practices like group boycotts are amenable to the quick look approach—cases in which "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets." California Dental, 526 U.S. at 770. It is not difficult to understand that forcing low-cost teeth-whitening

providers from the market has a tendency to increase a consumer's price for that service.[12]

Of note here, the Supreme Court has cautioned that we should be hesitant to quickly condemn the actions of professional organizations because "certain practices by members of a learned profession might survive scrutiny . . . even though they would be viewed as a violation of the Sherman Act in another context." Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 686 (1978). See also Goldfarb, 421 U.S. at 788 n.17 ("The fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act."). That is, "[t]he public service

[12] The Board argues that FTC failed to consider its justification, that it "acted pursuant to state law," and was "motivated by public protection concerns." (Appellant's Br. at 57). The FTC found that, even assuming these were appropriate justifications for anticompetitive behavior, the Board failed to adduce factual support. The FTC recounted that the Board members pointed to "theoretical" risks of teeth-whitening services without "any clinical or empirical evidence validating" the risks and that the Board could only point to four anecdotal cases of consumer injury "over a multi-year period based on products considered safe by the FDA and used over a million times over the last twenty years." Final Order, 2011 WL 6229615, at *33. The FTC likewise noted the "lack of contemporaneous evidence that the challenged conduct was motivated by health or safety concerns." Id. We find this conclusion supported by substantial evidence.

aspect" of a profession "may require that a particular practice . . . be treated differently." Goldfarb, 421 U.S. at 788 n.17.

The Supreme Court has likewise made pellucid, however, that anticompetitive acts are not immune from § 1 because they are performed by a professional organization. See, e.g., Arizona v. Maricopa Cnty. Med. Soc'y, 457 U.S. 332, 347-51

private actor under the antitrust laws, there is no federalism issue. To that end, we note that Board is represented by private counsel and the State has never intervened in the proceedings on the Board's behalf. Cf. Maryland Stadium Auth. v. Ellerbe Beckett, Inc., 407 F.3d 255, 264-65 (4th Cir. 2005) (noting representation by state Attorney General was factor in determining state control). At the end of the day, this case is about a state board run by private actors in the marketplace taking action outside of the procedures mandated by state law to expel a competitor from the market. Attorney GM 0 beh.sef

BARBARA MILANO KEENAN, Circuit Judge, concurring:

I am pleased to concur in the majority's opinion. I write

I further observe that subjecting the Board to Midcal's active supervision prong does not impose an onerous burden on either the Board or the state. The Supreme Court explained that "the requirement of active state supervision serves essentially an evidentiary function: it is one way of ensuring that the actor is engaging in the challenged conduct pursuant to state policy." Town of Hallie v. City of Eau Claire, 471 U.S. 34, 46 (1985) (emphasis added). Accordingly, if a state creates an agency and directs that the members of that agency be selected in a manner similar to the process employed here, the agency may still enjoy antitrust immunity if, for example, the state "monitor[s] market conditions or engage[s] in [a] 'pointed reexamination'" of the agency's actions, Midcal, 445 U.S. at 106, or if the agency's actions have been authorized by the state's judiciary or are subject to judicial enforcement proceedings, Bates v. State Bar of Arizona, 433 U.S. 350, 361-62 (1977).

In this case, I do not doubt that the Board was motivated substantially by a desire to eliminate an unsafe medical practice, namely, the performance of teeth whitening services by unqualified individuals under unsanitary conditions. The Board was aware that several consumers had suffered from adverse side effects, including bleeding or "chemically burned" gums, after receiving teeth-whitening services from persons not licensed to

practice dentistry. Additionally, the Board was aware that many of the "mall kiosks" where such teeth-whitening services are performed lack access to running water. The Board also received reports that non-licensed persons performed teeth-whitening services without using gloves or masks, thereby increasing the risk of adverse side effects. Accordingly, in my view, the record supports the Board's argument that there is a safety risk inherent in allowing certain individuals who are not licensed dentists, particularly mall-kiosk employees, to perform teeth-whitening services.

North Carolina is entitled to make the legislative judgment that the benefits of prohibiting non-dentists from performing dental services related to stain removal outweigh the harm to competition that results from excluding non-dentists from that market. That kind of legislative judgment exemplifies the very basis of the state action immunity doctrine. However, because "state-action immunity is disfavored," Phoebe Putney, 133 S. Ct. at 1010, when the state makes such a judgment, the state must act as the state itself rather than through private actors only loosely affiliated with the state.

Here, the fact that the Board is comprised of private dentists elected by other private dentists, along with North Carolina's lack of active supervision of the Board's activities, leaves us with little confidence that the state itself, rather

than a private consortium of dentists, chose to regulate dental health in this manner at the expense of robust competition for teeth whitening services. Accordingly, the Board's actions are those of a private actor and are not immune from the antitrust laws under the state action doctrine. With these observations, I am pleased to join the majority opinion.