review of those statements, including their accompanying affidavits and exhibits, as well as on matters of "official or judicial notice," such as "judicial decisions, statutes, regulations, and records and reports of administrative bodies." S.C. State Bd. of Dentistry, 138 F.T.C. 229, 240 (2004) (internal quotation marks and citation omitted).

Under our revised Rules of Practice, "[m]otions to dismiss filed before the evidentiary hearing . . . and motions for summary decision shall be directly referred to the Commission and shall be ruled on by the Commission unless the Commission in its discretion refers the motion to the Administrative Law Judge." 16 C.F.R. § 3.22(a) (2011). The Commission issued those revisions in 2009 "in order to further expedite its adjudicative proceedings, improve the quality of adjudicative decision making, and clarify the respective roles of the Administrative Law Judge ('ALJ') and the Commission in Part 3 proceedings." 73 Fed. Reg. 58,832 (Oct. 7, 2008) (Proposed Rule Amendments); see also 74 Fed. Reg. 1804 (January 13, 2009) (Interim Final Rules); 74 Fed. Reg. 20205 (May 1, 2009) (Amendments Adopted As Final). Thus, "an early ruling on a dispositive motion may expedite resolution of a matter and save litigants resources where the legal issue is the primary dispute." 73 Fed. Reg. at 58,836; see also S.C. State Bd., 138 F.T.C. at 231. We accordingly decide the motions at the initial stage.

In light of the close of discovery and the fact that the motion of Complaint Counsel for partial summary decision is based on the same issue underlying the Board's motion to dismiss – the opposition to which the Board has fully briefed, supported by affidavits and other evidence – and in the interests of clarity and efficiency, we exercise our discretion to treat the Board's motion to dismiss as a motion for summary decision on the issue of its qualification for state action exemption. See S.C. State Bd., 138 F.T.C. at 242 ("[T]he Commission always has discretion to consider extra-pleading material and to convert a motion to dismiss to one for summary judgment."); see also United States v. Purdue Pharma, L.P., 600 F.3d 319, 326 (4th Cir. 2010) (converting a motion to dismiss into one for summary judgment where the parties provided evidence and thoroughly briefed the matter at issue); Bosiger v. US Airways, Inc., 510 F.3d 442, 450 (4th Cir. 2007) ("It is well settled that district courts may convert a Rule 12(b)(6) motion to dismiss into a Rule 56 motion for summary judgment, allowing them to assess whether genuine issues of material fact do indeed exist.").

III. APPLICABLE STANDARD OF REVIEW

We review the parties' motions pursuant to Rule 3.24 of our Rules of Practice, whose "provisions are virtually identical to the provisions of Fed. R. Civ. P. 56, governing summary judgment in the federal courts." Polygram Holding, Inc., 136 F.T.C. 310, 2002 WL 31433923, at *1 (FTC Feb. 26, 2002); see also 16 C.F.R. § 3.24(a)(2) ("If the Commission . . . determines that there is no genuine issue as to any material fact regarding liability or relief, it shall issue a final decision and order."). Such a motion or an opposition thereto may be supported by affidavits, depositions, answers to interrogatories, or other appropriate evidence not in dispute, but "a party opposing the motion may not rest upon the mere allegations or denials of his or her pleading; the response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue of material fact for trial." 16 C.F.R. § 3.24(a)(3). Thus, "[t]he mere existence of a factual dispute will not in and of itself defeat an otherwise

properly supported motion. Polygram, 2002 WL 31433923, at *1 (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986)). Once the moving party has adequately supported its motion, the nonmoving party must "do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). It must instead establish "specific facts showing that there is a genuine issue for trial." Id. at 587 (internal citations and quotation marks omitted); see also 16 C.F.R. § 3.24(a)(3). And "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" Matsushita, 475 U.S. at 587.

IV. UNDISPUTED FACTS

No facts material to the antitrust exemption questions before us are in genuine dispute. For purposes of summary judgment on the state action defense issue, we need not determine whether the Board's activities violate the relevant antitrust laws. Instead we focus only on whether the Board's conduct is exempt from antitrust scrutiny.[5]

The Board is an agency of the State of North Carolina, tasked with regulating the practice of dentistry in that state. N.C. Gen. Stat. § 90-22(a)-(b). It consists of six licensed dentists, one licensed dental hygienist, and one consumer member, who is neither a dentist nor a dental hygienist. N.C. Gen. Stat. § 90-22(b); CCSMF at 1, ¶¶ 1-2; BSMF at 6, ¶¶ 1-2. The licensed dentists of North Carolina elect dentist members to the Board for a three-year term. N.C. Gen. Stat. § 90-22(b); CCSMF at 1, ¶¶ 3-4; BSMF at 6, ¶¶ 3-4. During their tenure, Board members may continue to provide for-profit dental services, including teeth whitening [redacted]

Each Board member must submit annual financial disclosures to the Ethics Commission, which list their assets and liabilities, state that they are engaged in the practice of dentistry, and identify the professional associations to which they belong and businesses other than their dental practices. N.C. Gen. Stat. § 138A-22(a); CCSMF at 2-3, ¶¶ 75-76; Newson

155 (1983); Lafayette v. La. Power & Light Co., 435 U.S. 389, 395 (1978); Georgia v. Evans, 316 U.S. 159, 162 (1942). Consistent with this precedent, and recognizing that the antitrust statutes should be construed together, the Commission has many times exercised jurisdiction over state boards as "persons" under the FTC Act. See, e.g., Va. Bd. of Funeral Dirs. & Embalmers, 138 F.T.C. 645 (2004); S.C. State Bd., 138 F.T.C. 229; Mass. Bd. of Registration in ,

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1. The Board Must Meet Both Prongs of Midcal

In its motion, the Board argues that its challenged conduct is exempt from the federal antitrust laws because, as an instrumentality of the State of North Carolina, its actions are protected by the state action doctrine. See Bd. Memo at 7. More specifically, the Board argues that, to qualify for state action protection, its conduct need only meet, and as a matter of law

Whatever the case may be with respect to state agencies generally, however, the Court has been explicit in applying the antitrust laws to public/private hybrid entities, such as regulatory bodies consisting of market participants. The Court's jurisprudence in this area leads us to conclude that when determining whether the state's 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. As the Court emphasized repeatedly, the "real danger" in not insisting on the state's active supervision is that the entity engaged in the challenged restraint turns out to be "acting to further [its] own interests, rather than the governmental interests of the State." *Hallie*, 471 U.S. at 47; *Patrick*, 486 U.S. at 100.

Thus, in *Goldfarb v. Virginia State Bar*, a fee schedule for real estate title searches that was enforced by the Virginia state bar was found to violate the antitrust laws, even though the enforcement agency was "a state agency by law." 421 U.S. 773, 783, 790 (1975). The Court's reasoning in that case is particularly illuminating. The Court rejected the state action defense, in part, because the state bar's enforcement of the unlawful fee schedule – via its issuance of ethical opinions – was deemed to be undertaken "for the benefit of its members," and, equally significantly, "there was no indication . . . that the Virginia Supreme Court approves the [ethical] opinions." Id. at 790-91. We draw two conclusions from *Goldfarb*. First, as the Court reasoned, "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." Id. at 791 (emphasis added). Thus, the inquiry into the public/private character of the governmental entity's challenged conduct should focus not on the formalities of state law (after all, the subject entity in *Goldfarb* was "a state agency by law," *id.* at 790), but rather on the realities of the decision-maker0(therge9(o s1.15 Td i0(tthejudncy)3f th Court a)9(r therge9(o orc)10(ement of the)9()1

violate the antitrust laws'") (quoting Asheville Tobacco Bd. of Trade, Inc. v. FTC, 263 F.2d 502, 509 (4th Cir. 1959)); Asheville Tobacco Bd., 263 F.2d at 509 ("[T]he state may regulate that 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.") (citation omitted).

Leading antitrust commentary supports this view. In their antitrust treatise, for example, Professors Areeda and Hovenkamp also reject the formalities of a governmental body's status under state law in determining whether active supervision should be deemed necessary. They conclude that it is good policy to classify as "private" for state action purposes "any organization in which a decisive coalition (usually a majority) is made up of participants in the regulated market." Phillip E. Areeda & Herbert Hovenkamp, 1A ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 227b, at 501 (3d ed. 2009); see also id. ¶ 224a, at 500 ("Without reasonable assurance that the body is far more broadly based than the very persons who are to be regulated, outside supervision seems required."). Professor Elhauge, moreover, concludes that "financially interested action is always 'private action' subject to antitrust review." Einer Richard Elhauge, The Scope of Antitrust Process, 104 H

interest is if the state is politically accountable for any resulting anticompetitive conduct; when conduct subject to political review is not in the public interest, it can be stopped at the ballot box. Decisions that are made by private parties who participate in the market that they regulate are

the challenged restraint, but rather the fact that the Board is controlled by participants in the dental market. North Carolina dentists stand to reap economic gains when the Board takes actions to exclude non-dentists from competing to provide certain services. Second, although our holding is not predicated on the Board members' actual financial interests, the undisputed facts show that many of the Board members do perform teeth whitening in their private practice. See

Third, Respondent's reference to conflicts of interest is misplaced. The complaint allegations here, and the policies underlying the Midcal test for antitrust exemption, do not concern issues of official misconduct or unethical behavior – which might be addressed by a state ethics law – but rather target the incumbent dentists' efforts to exclude their competitors from a particular economic market.[14] That alleged conduct lies at the heart of the federal antitrust laws, and is the only conduct with which we deal here.

The Board points to the various ways in which the State of North Carolina purportedly

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not exert "any significant control over" the terms of the restraint); Midcal, 445 U.S. at 105-06 (California system for wine pricing fails the active supervision requirement because "[t]he State does not . . . engage in any 'pointed reexamination' of the program"); Parker, 317 U.S. at 352 (stressing that the challenged marketing plan could not take effect unless approved by state board).

On prior occasions, the Commission has explained that it would consider the following elements in determining whether a state has actively supervised private anticompetitive conduct: (1) the development of an adequate factual record; (2) a written decision on the merits; and (3) a specific assessment – both quantitative and qualitative – of how the private action comports with the substantive standards established by the legislature. See Opinion of the Commission, Kentucky Household Goods Carriers Ass'n, 139 F.T.C. 405, 420-21 (2005), aff'd sub nom. Kentucky Household Goods Carriers Ass'n v. FTC, 199 Fed. Appx. 410, 2006 WL 2422843 (6th Cir. 2006); see also Analysis of Proposed Order to Aid Public Comment, Indiana Household Movers and Warehousemen, Inc., 135 F.T.C. 535, 555-561 (2003); FEDERAL TRADE COMMISSION, OFFICE OF POLICY PLANNING, REPORT OF THE STATE ACTION TASK FORCE 55 (Sept. 2003). Although no single one of these elements is necessarily a prerequisite for active supervision, the Board has presented no evidence that any of these elements are satisfied here. The lack of any evidence that an arm of the State of North Carolina developed a record, or rendered a decision that assessed the extent to which the Board's policy toward non-dentist teeth whitening comported with North Carolina state policy, strongly suggests a lack of state supervision.

Respondent cites a litany of North Carolina statutes and constitutional provisions as evidence that the Board's actions are subject to review by various state entities. See, e.g., BSMF at 51-53, ¶ 72. Most of these laws are irrelevant to the active supervision inquiry.[15] Other, potentially more relevant provisions of North Carolina law that the Board highlights as evidence of active supervision include requirements that: each Board member submit detailed financial disclosures to the Ethics Commission; the Board submit an annual report to the Secretary of

financial report. *See* Bd. Opp. at 29; BSMF at 51-53, ¶ 72. This sort of generic oversight, however, does not substitute for the required review and approval of the "particular anticompetitive acts" that the complaint challenges. *Patrick*, 486 U.S. at 101 (emphasis added). For instance, the Board's annual reports provide only aggregate information on the number and disposition of investigations by type, providing no hint as to the underlying substance of any of these matters, let alone a discussion of the Board's policy toward non-dentist teeth whitening. *See* CCSMF at 22, ¶ 74; CX0085; CX0086; CX0088; CX0089; CX0091. Board members' financial disclosures to the Ethics Commission list only their assets and liabilities, state that they are engaged in the practice of dentistry, and identify the professional associations to which they

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VI. CONCLUSION

For the reasons discussed above, we deny the Board's motion to dismiss (which we have treated as a motion for summary decision) based on a claim of state action exemption from the antitrust laws, and we grant Complaint Counsel's motion for partial summary decision on the same issue. We issue herewith an order rejecting the Board's invocation of the state action doctrine as a basis for exempting its challenged conduct from the federal antitrust laws.