UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

In the Matter of **THE NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS**	**Docket No. 9343**

OPINION DENYING RESPONDENT'S MOTION TO DISQUALIFY THE COMMISSION

By KOVACIC, Commissioner, for a Unanimous Commission: [1]

Respondent, the North Carolina State Board of Dental Examiners (the "Board"), moves the Commission, pursuant to Commission Rules 3.22(a), 3.42(g), and 4.17 (16 C.F.R. §§ 3.22(a), 3.42(g), 4.17), to "disqualify and remove itself as the adjudicator of the State Board's Motion to Dismiss, and Complaint Counsel's Motion for Partial Summary Decision." *See* Respondent's Motion to Disqualify the Commission at 1 (Jan. 14, 2011) ("Bd. Mot.").[2] The Board bases its claim on three grounds: first, the Commission "lacks the legal authority to rule on the constitutionality of its exercise of jurisdiction over the State Board;" second, the Commission "has prejudged its ability to exercise jurisdiction over the State Board;" and finally, the Commission "already has determined . . . that the State Board must satisfy the [active supervision] prong of the *Midcal* test." Bd. Mot. at 1-2. On January 27, 2011, Complaint Counsel filed a brief in opposition to the Board's motion. Having considered all arguments in support of, and opposition to, the Motion, we deny the Board's Motion to Disqualify the Commission for the reasons explained below.

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[1] The Commission approved this Opinion on February 16, 2011, with Commissioner Brill not participating by reason of recusal.

[2] Respondent also moves the Commission "to disqualify and remove itself as the Administrative Law Judge." Bd. Mot. at 1. Neither the Commission, nor any individual Commissioner, is serving as the administrative law judge in this case, so we need not consider this motion. Although rules 3.42(g)(2) and 4.17(b)(1) require motions for disqualification to be supported by "affidavits and other information setting forth with particularity the alleged grounds for disqualification," we agree with the Board that an affidavit is unnecessary in the instant matter. *See* Bd. Mot. at 2.

I. The Commission's Ability to Rule on Jurisdictional Matters

The Board first argues that the Commission lacks the constitutional authority to decide whether it has jurisdiction over the Board.[3] The Board appears to take the position that the determination of whether the Board enjoys state action exemption from the antitrust laws is a jurisdictional question posing constitutional issues that the Commission lacks legal authority to consider.[4] *See* Bd. Mot. at 4.

As a threshold matter, the Board seems to misunderstand the nature of the state action doctrine in two important ways. First, jurisdiction concerns a tribunal's "statutory or constitutional *power* to adjudicate the case." *United States v. Cotton*, 535 U.S. 625, 630 (2002) (emphasis in original); *see also Morrison v. Nat'l Bank of Australia Ltd*., 130 S.Ct. 2869, 2877 (2010) ("Subject-matter jurisdiction . . . refers to a tribunal's power to hear a case.") (quoting *Union Pac. R.R. Co. v. Locomotive Eng's & Trainmen Gen. Comm. of Adjustment, Central Region*, 130 S.Ct. 584, 596 (2009) (internal quotation marks omitted); *In re Nat'l Labor Relations Bd*., 304 U.S. 486, 494 (1938) (jurisdiction "is the power to hear and determine the controversy presented, in a given set of circumstances"). The viability of a state action exemption claim, on the other hand, concerns the reach of a federal statute; a party claiming state action exemption is arguing that Congress never intended the antitrust laws to cover the challenged conduct. *See S. C. State Bd. of Dentistry v. FTC*, 455 F.3d. 436, 445 (4th Cir. 2006) ("A party denied *Parker* protection, . . . is in much the same position as a defendant arguing that his conduct falls outside the scope of a criminal statute."); *see also Northwest Airlines, Inc. v. County of Kent,* 510 U.S. 355, 365 (1994) ("The question whether a federal statute creates a claim for relief is not jurisdictional."). Second, because the state action doctrine is rooted in statutory interpretation – the congressionally intended reach of the antitrust laws in light of our

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[3] Although crafted by Respondent as an argument to disqualify, lack of jurisdiction is not an argument for disqualification. Rather, jurisdiction regards the power of the Commission to entertain this dispute in the first instance.

[4] Respondent argues that "[i]n light of Congress' silence with regard to delegation of jurisdiction over the sovereign acts of the States to the Commission – combined with the express reservation of non-delegated powers afforded to the states by the Tenth Amendment – it is clear that the Commission lacks the legal authority to rule on the constitutionality of its own jurisdiction," citing *Parker v. Brown*, 317 U.S. 341 (1943), and incorporating by reference the arguments addressing the Board's state action exemption from the Federal Trade Commission Act found in its memoranda of law in support of the Board's motion to dismiss. Bd. Mot. at 4 n.1. *See also* Bd. Mot. at 5 ("[T]he present case requires the Commission to consider its own jurisdiction over issues of constitutional law, in absence of implied or express Congressional authority and in light of the Tenth Amendment and the limits of the Commerce Clause.") (emphasis omitted). Respondent makes jurisdictional arguments in its memoranda in support of the Board's Motion to Dismiss related to the Commission's statutorily-mandated lack of jurisdiction over not-for-profit entities. The Commission considered and rejected these arguments in its February 3, 2011 opinion. *See* Opinion of the Commission, North Carolina State Board of Dental Examiners, Dkt. No. 9343, at 5-6 (Feb. 3, 2011) ("SJ Opinion"), *available at* **http://www.ftc.gov/os/adjpro/d9343/110208commopinion.pdf**.

federalist form of government, *see FTC v. Ticor Title Ins. Co*., 504 U.S. 621, 633 (1992) (the state action doctrine "was grounded in principles of federalism") – determining whether a party enjoys state action protection does not call for a tribunal to decide constitutional questions. *See S. C. Bd.,* 455 F.3d at 444. ("Simply put, *Parker* construed a statute. It did not identify or articulate a constitutional or common law 'right not to be tried.'"); *Surgical Care Ctr. of Hammond, L.C. v. Hosp. Serv. Dist. No. 1*, 171 F.3d 231, 234 (5th Cir. 1999) ("'*Parker* immunity' is more accurately a strict standard for locating the reach of the Sherman Act . . . ."). Thus, the predicate for the Board's argument fails because the Commission's determination that the Board does not enjoy state action protection for its challenged conduct touches on neither jurisdictional nor constitutional questions. *See* SJ Opinion at 6-17.

Even if the Commission's consideration of the Board's state action exemption from the antitrust laws were properly characterized as a jurisdictional determination, the law is clear that the Commission may decide such questions in the first instance. *See FPC v. Louisiana Power & Light Co*., 406 U.S. 621, 647 (1972) (as a general rule, an agency should make the initial determination of its own jurisdiction); *see also Christensen v. FTC*, 549 F.2d 1321, 1324 (9th Cir. 1977); *FTC v. Ernstthal*, 607 F.2d 488, 490 (D.C. Cir. 1979). In *Christensen*, for example, the court embraced this principle and held, for reasons of judicial economy and agency efficiency, that the Commission, rather than a federal court, was to determine the state action question in the first instance:

> If no cease-and-desist order is entered, the courts need never concern themselves with the jurisdictional issue. The same is true if the proceeding becomes moot because of voluntary conduct or the passage of time. Also of importance is the avoidance of premature interruption of the administrative process. Such interruptions undermine both the efficiency and the autonomy of the agency.

549 F.2d at 1324 (internal quotations and citation omitted).[5] Other circuits have reached the same conclusion, finding that the FTC, rather than a federal court, should determine state action exemption issues initially. *See FTC v. Markin*, 532 F.2d 541, 544 (6th Cir. 1976); *FTC v. Feldman*, 532 F.2d 1092, 1097-98 (7th Cir. 1976); *cf. S.C. Bd*., 455 F.3d 436 (holding that a state action determination by the Commission is not immediately appealable).

Our conclusion, moreover, would not change if the state action question were characterized as a constitutional one. It is true that the Supreme Court has said that "adjudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies." *Thunder Basin Coal Co. v. Reich*, 510 U.S.

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[5] Exceptions to the presumption that an agency has the authority to determine whether it has jurisdiction "are justified only when it appears early and plainly that the agency is operating outside the scope of its authority." *Christensen*, 549 F.2d at 1324. *See*, *e.g., Leedom v. Kyne*, 358 U.S. 184 (1958) (allowing immediate appeal of a National Labor Relations Board (NLRB) decision to certify a collective bargaining unit that contained professional and non-professional employees without a poll when Congress had specifically withheld from the NLRB such power). No such circumstance exists here.

200, 215 (1994); *see also Johnson v. Robinson*, 415 U.S. 361, 368 (1974). But the Court also has explained that "[t]his rule is not mandatory," and that it may be "of less consequence" when "petitioner's statutory and constitutional claims . . . can be meaningfully addressed in the Court of Appeals." *Thunder Basin*, 510 U.S. at 215. That any Commission decision on a claim of state action exemption is fully reviewable by a Court of Appeals, *South Carolina Bd*., 455 F.3d at 445, militates allowing the FTC to consider it initially even if such a claim were properly characterized as a constitutional one.

In summary, we reject the Board's arguments that the Commission lacks the authority to determine whether the Board is exempt from the Federal Trade Commission Act under the state action doctrine.

II. Prejudgment

FTC Rule 4.17 provides that a party may move to disqualify a Commissioner from a proceeding. 16 C.F.R. § 4.17 (b). The standard for disqualification based on prejudgment is an exacting one. *See Whole Foods Mkt., Inc*., Dkt. No. 9324, 2008 WL 4153583, at *2 (Sept. 5, 2008). A party moving for disqualification must show that "a disinterested observer may conclude that [the agency] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it." *Cinderella Career & Finishing Schools, Inc.. v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970). The moving party must demonstrate that the minds of the Commission members "are irrevocably closed" with regard to the legality of the conduct at issue in the adjudication. *FTC v. Cement Institute*, 333 U.S. 683, 701 (1948). In this case, the Board points to four alleged sources of prejudgment: the 2003 Report of the State Action Task Force ("State Action Report"); a 2010 speech by Commissioner J. Thomas Rosch; the FTC's decision to issue an administrative complaint against the Board; and the FTC's press release concerning that decision. As we explain below, none of these examples evidences prejudgment.

We note at the outset that the Board's motion is not timely. Rule 4.17 requires a party to bring a motion to disqualify "at the earliest practicable time after the participant learns, or could reasonably have learned, of the alleged grounds for disqualification." 16 C.F.R. § 4.17 (b)(2). The Board's alleged grounds for disqualification consist of the State Action Report, which the Board has been aware of at least since preparing its response to the administrative complaint, which the Board filed on July 7, 2010 (*see* Bd. Response to Compl. at 8 (July 7, 2010), *available at* **http://www.ftc.gov/os/adjpro/d9343/100707dentalexamcmpt.pdf**), over six months prior to the Board's instant filing; a speech made by Commissioner Rosch on August 5, 2010, over five months prior to the Board's instant filing; the legal standard the Commission employed to issue the administrative complaint; and a press release accompanying the administrative complaint, which was issued on June 17, 2010, seven months prior to the Board's instant filing. The Board either had actual knowledge, or reasonably should have had knowledge of these grounds well before the instant filing on January 14, 2011. Whether on timeliness grounds, however, or on the merits of the Board's arguments, we reach the same conclusion to deny the motion.

A. Report of the State Action Task Force

The Board contends that certain statements in the State Action Report are indicative of "bias and prejudgment." Bd. Mot. at 7. Specifically, the Board points to the Report's call for the FTC to engage in litigation as a means to clarify the state action doctrine, and its observation that the doctrine is "a serious impediment to achieving national competition policy goals." Bd. Mot. at 5-6 & n.3. We disagree with the Board's contentions.

First, the State Action Report is a report by members of the staff of the FTC. Though the Commission voted to release it publicly, the State Action Report is not a statement by the Commission or any individual Commissioner. *See* State Action Report at 1. Further, even if the content of the State Action Report were properly attributable to the Commission, it would not support a finding of prejudgment. The courts have been clear that members of regulatory commissions can form views about laws and policy on the basis of their experience. *See Cement Institute*, 333 U.S. 683; *American Med. Ass'n v. FTC*, 638 F.2d 443 (2d Cir. 1980). For example, in *Cement Institute*, parties moved to disqualify the Commission from adjudicating a base-point pricing conspiracy case because the Commission had issued reports and given testimony contending that the challenged practice was illegal under the antitrust laws. 333 U.S. at 700. The Supreme Court upheld the Commission's refusal to disqualify itself, explaining that "prior ex parte investigations [by the Commission] did not necessarily mean that the minds of its members were irrevocably closed on the subject of the respondents' basing point practices." *Id.* at 701. Similarly, in *American Medical Ass'n*, petitioners argued that the Chairman of the FTC should be disqualified from the adjudication for publicly expressing opinions about the misuse of licensing procedures to restrain competition. The Second Circuit disagreed, noting that "it is not improper for members of regulatory commissions to form views about law and policy on the basis of their prior adjudications of similar issues which may influence them in deciding later cases." *American Med. Ass'n*, 638 F.2d at 448 n.4.

The connection between the State Action Report and the instant action is much more tenuous than the connection between the reports or speeches at issue in *Cement Institute* and *American Med. Ass'n* and the adjudicatory matters in those cases. FTC staff released the State Action Report nearly seven years before the Commission issued the administrative complaint against the Board, and accordingly the State Action Report has no mention of the specific facts of this case. Further, none of the current FTC Commissioners were Commissioners when the FTC authorized the release of the State Action Report. Although the State Action Report does discuss some of the legal policy issues surrounding the state action doctrine that are relevant to the instant action, to require the Commission to disqualify itself from adjudicating matters that involve legal issues similar to those it may have considered in prior reports would mean that "experience gained from their work as commissioners would be a handicap instead of an advantage." *Cement Institute*, 333 U.S. at 702. Congress could not have intended such a result when it established the FTC as a body that would develop and apply expertise in exercising its authority to proscribe unfair trade practices. *See id*.

We conclude that Commission authorization of the release of the State Action Report in 2003 does not suggest the Commission has "adjudged the facts as well as the law of [this] particular case," *Cinderella*, 425 F.2d at 591, and hence does not provide grounds for disqualification.

B. Speech by Commissioner J. Thomas Rosch

The second source alleged by the Board to evidence prejudgment is an August 5, 2010 speech by Commissioner J. Thomas Rosch, in which he discusses FTC litigation activity in the recent past, and remarks that the FTC "is suing and litigating as an active prosecutor should." Bd. Mot. at 6 (quoting Commissioner J. Thomas Rosch, "So I Serve as Both Prosecutor and Judge – What's the Big Deal?," Am. Bar Ass'n Ann. Meeting at 2 (Aug. 5, 2010)). The Board contends that this statement is "indicative of the bias and prejudgment with which the Commission has approached this present litigation." *Id*. at 7.

Although courts have found that public remarks given by FTC Commissioners that touch on the facts of specific cases can give rise to an appearance of prejudgment, *see, e.g., Cinderella*, 425 F.2d at 591, this is not the case here. The Board's asserted link between Commissioner Rosch's remarks and any facet of the instant case does not exist; the speech never mentions the state action doctrine, the complaint issued against the Board, or any legal or factual issues relevant to the instant case. Rather, the speech merely informed the public generally about the Commission's litigation efforts. The law is clear that such general statements about FTC activity are not grounds for disqualification. In *American Medical Ass'n*, for example, the FTC had sued the AMA for an alleged antitrust violation involving licensing restrictions. The AMA moved to disqualify the Chairman on the basis of a speech that discussed the use of licensing procedures to restrain competition, without any specific mention of the case, and another that mentioned the AMA case as one of many activities undertaken by the FTC in the medical field. *Am. Med. Ass'n* 683 F.2d at 448. The Second Circuit held that such statements were not grounds for disqualification, remarking that "[a]t most, the public statements . . . indicate that the chairman was informing the Congress and the public as to FTC's activities and policies in general, including those in the medical field." *Id*. at 449 (citation omitted). Similarly, *Kennecott Copper Corp. v. FTC*, 467 F.2d 67, 80 (10th Cir. 1972), concerned claims that an interview by an FTC Commissioner using the allegations of a complaint against the plaintiff to illustrate how the FTC analyzes mergers evidenced prejudgment. The Tenth Circuit rejected this argument, holding that merely discussing the complaint in a specific matter, without more, was insufficient to show that the Commissioner had "prejudged the central issue of the case." *Id*. The connection between Commissioner Rosch's speech and the legal and factual issues in the instant case is nowhere near that between the cases and the public statements at issue in *Cinderella* or *Kennecott*.

We can see no way in which Commissioner Rosch's speech could lead a "disinterested observer" to conclude that he had "in some measure adjudged the facts as well as the law" in this case. *Cinderella,* 425 F.2d at 591. Consequently, we reject this ground for disqualifying Commissioner Rosch or the Commission as a whole.

C. The Issuance of the Administrative Complaint

The Board also argues that the Commission's issuance of an administrative complaint against the Board in this matter is evidence of prejudgment. Specifically, the Board points to the Complaint's allegation that the Board "'acted without any legitimate justification or defense, including the 'state action' defense.'" Bd. Mot. at 8-9 (quoting Compl. at 1). The Board maintains that by voting to issue the administrative complaint, the Commission has "reached the legal conclusion that the State Board was subject to, and had violated, the FTC Act." *Id*. at 9.

As a threshold matter, it has long been decided that an administrative agency can combine investigative and adjudicatory functions. *See Withrow v. Larkin*, 421 U.S. 35, 57 (1975); *Gibson v. FTC*, 682 F.2d 554, 560 (5th Cir. 1982); *Kennecott*, 467 F.2d at 79; *FTC v. Cinderella Career & Finishing Schools, Inc*., 404 F.2d 1308, 1315 (D.C. Cir. 1968); *see also* 5 U.S.C. § 554(d)(2)(C) (prohibition on a person engaged in the investigation functions of a matter from acting as an adjudicator in the same matter does not apply to FTC Commissioners). Thus, any challenge to the fact that FTC Commissioners approve the issuance of an administrative complaint and also act as adjudicators in the same matter fails as a matter of law.

That the Commission found sufficient justification to issue the administrative complaint against the Board in this matter is also legally insufficient to establish prejudgment. The Commission issues a complaint when it has "reason to believe" that a violation of the FTC Act has occurred. 15 U.S.C. § 45(b). This legal standard is distinct from the ultimate determination required to find liability or to reject a defense to the Federal Trade Commission Act. As the Supreme Court has explained:

> [J]ust as there is no logical inconsistency between a finding of probable cause and an acquittal in a criminal proceeding, there is no incompatibility between the agency filing a complaint based on probable cause and a subsequent decision, when all the evidence is in, that there has been no violation of the statute.

Withrow, 421 U.S. at 57. Thus, merely finding reason to believe that the Board does not have a viable state action defense does not mean that the Commission had prejudged the case. Accordingly, we reject this ground for disqualification.

D. The Press Release

Finally, the Board argues that that the press release issued in conjunction with the issuance of the administrative complaint is evidence of prejudgment. *See* Bd. Mot. at 7 (the press release announcing the FTC complaint against the Board "constitutes the Commission's public views on the matter and speaks for itself with respect to the Commission's prejudgment of its ability to fairly prosecute the complaint and to fairly exercise jurisdiction over the State Board.").

This ground for disqualification is also without merit. In *FTC v. Cinderella Career & Finishing Schools, Inc*., for example, the defendant argued that the issuance of a press release "constitutes an alignment, or appearance of alignment, of the Commission with the prosecution, resulting in a prejudgment . . . of the merits of a complaint prior to hearing." 404 F.2d at 1312-13. The D.C. Circuit rejected this contention, explaining that the Commission has the authority to issue factual press releases to inform "the widely spread public" of practices that it has reason to believe violate the FTC Act, and that exercising this authority does not result in prejudgment or bias that would deprive a defendant of due process in a subsequent administrative proceeding on the merits. *Id*. at 1314-15; *see also American Med. Ass'n*, 638 F.2d at 448-49 (holding that public statements mentioning a specific trial were merely "informing Congress and the public as to the FTC's activities," and did not evidence prejudgment).

The press release in question merely informed the public that the Commission had found reason to believe that the Board's challenged actions had violated the FTC Act, and that the Board did not have a viable state action defense. The press release also contained specific language explaining that by issuing the complaint, the Commission had not found the Board in violation of the antitrust laws:

> The Commission issues or files a complaint when it has "reason to believe" that the law has been or is being violated, and it appears to the Commission that proceeding is in the public interest. The complaint is not a finding or ruling that the named parties have violated the law. The administrative complaint marks the beginning of a proceeding in which the allegations will be ruled upon after a formal hearing by an administrative law judge.

Federal Trade Commission Press Release, *Federal Trade Commission Complaint Charges Conspiracy to Thwart Competition in Teeth-Whitening Services* (June 17, 2010), *at* **http://www.ftc.gov/opa/2010/06/ncdental.shtm**.

Accordingly, we reject the Board's argument that the press release announcing the complaint against it shows prejudgment.

III. Conclusion

We find no merit to the Board's arguments that the Commission should disqualify itself. The Commission has jurisdiction to decide whether the Board can avail itself of the state action exemption, and the Board has presented no evidence of prejudgment. Accordingly, we deny the Board's motion to disqualify the Commission. [6]

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[6] The Commission issued the Order denying the Board's Motion to Disqualify the Commission on February 3, 2011. *See* Order Denying Respondent's Motion to Dismiss, Granting Complaint Counsel's Motion for Partial Summary Decision, Denying Respondent's Motion to Disqualify the Commission, and Granting Respondent's Motion for Leave to File Limited Surreply Brief, *available at* **http://www.ftc.gov/os/adjpro/d9343/110208commorder.pdf**.