UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
CASE NO. _____

THE NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS, Petitioner, v. FEDERAL TRADE COMMISSION, Respondent.	)	**PETITION FOR REVIEW**

The North Carolina State Board of Dental Examiners ("State Board") hereby petitions the United States Court of Appeals for the Fourth Circuit to review and set aside the Final Order of the Federal Trade Commission ("Commission") that was entered in In re North Carolina [State] Board of Dental Examiners, Docket No. 9343, on December 2, 2011, and served upon the Petitioner and Petitioner's counsel on December 14, 2011, and the Administrative Law Judge's Initial Decision issued July 14, 2011, to the extent that it was adopted by reference in the Commission's Final Order and Opinion.

As part of this petition, the State Board assigns error to and appeals from all conclusions of law, findings of fact, and rulings by the Commission and Administrative Law Judge in the administrative proceeding below including, but not limited to, the Commission's Order in which it refused to dismiss its administrative case against the State Board based on state action immunity issued

February 3, 2011, and the Commission's Order denying the State Board's motion to disqualify the Commission for lack of Constitutional authority to decide whether it has jurisdiction over the State Board issued February 3, 2011.

A copy of the Commission's Final Order is attached hereto as Exhibit A, and the accompanying Opinion is attached as Exhibit B. The Initial Decision of the Administrative Law Judge is attached as Exhibit C. The Commission's Order denying the State Board's motion to dismiss and motion to disqualify the Commission is attached as Exhibit D. The Commission's Opinion denying the State Board's motion to dismiss is attached as Exhibit E. The Commission's Opinion denying the State Board's motion to disqualify the Commission is attached as Exhibit F.

Respectfully submitted, this the 10th day of February, 2012.

ALLEN, PINNIX & NICHOLS, P.A.

/s/ Noel L. Allen

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CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served copies of the foregoing Petition for Review and attached exhibits in the above-entitled action upon all parties to this cause by depositing copies hereof, postage prepaid, in the United States Mail, addressed as follows:

Donald S. Clark, Secretary
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Room H-113
Washington, D.C. 20580

Michael J. Bloom
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Federal Trade Commission
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This the 10th day of February, 2012.

ALLEN, PINNIX & NICHOLS, P.A.

By: /s/ Noel L. Allen
Noel L. Allen

EXHIBIT A

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

In the Matter of **The North Carolina Board of Dental Examiners**	**Docket No. 9343**

FINAL ORDER

The Commission has heard this matter upon the appeal of Respondent from the Initial Decision, and upon briefs and oral argument in support thereof and in opposition thereto. For the reasons stated in the accompanying Opinion of the Commission, the Commission has determined to sustain the Initial Decision with certain modifications:

IT IS ORDERED that the Initial Decision of the administrative law judge be, and it hereby is, adopted as the Findings of Fact and Conclusions of Law of the Commission, to the extent not inconsistent with the findings of fact and conclusions contained in the accompanying Opinion.

Other findings of fact and conclusions of law of the Commission are contained in the accompanying Opinion.

IT IS FURTHER ORDERED that the following Order to cease and desist be, and it hereby is, entered:

ORDER

I.

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

A. "Board" means the North Carolina State Board of Dental Examiners ("NCSBDE"), its officers, directors, members, employees, agents, attorneys, representatives, successors, and assigns; and the subsidiaries, divisions, groups, and affiliates controlled by it; and the respective officers, directors, members, employees, agents, attorneys, representatives, successors, and assigns of each.

B. "Communicate" or "Communicating" means exchanging, transferring, or disseminating any information, without regard to the manner or means by which it is accomplished.

C. "Communication" means any information exchange, transfer, or dissemination, without regard to the means by which it is accomplished, including, without limitation, oral or written, in any manner, form, or transmission medium.

D. "Dental Practice Act" means any legislation that is administered by the Board, including, North Carolina General Statutes, Chapter 90, Article 2 (Dentistry) (N.C. Gen. Stat. §§ 90-22 - 90-48.3 (2010)) and Article 16 (Dental Hygiene Act) (N.C. Gen. Stat. §§ 90-221 - 90-233.1 (2010)).

E. "Dentist" means any individual holding a license, issued by the Board, to practice dentistry in North Carolina.

F. "Direct" or "Directing" means to order, direct, command or instruct.

G. "Non-Dentist Provider" means any Person other than a Dentist engaged in the provision, distribution or sale of any Teeth Whitening Goods or Teeth Whitening Services.

H. "Person" means both natural persons and artificial persons, including, but not limited to, corporations, and unincorporated entities.

I. "Principal Address" means either (i) primary business address, if there is a business address, or (ii) primary residential address, if there is no business address.

J. "Teeth Whitening Goods" means any formulation containing a peroxide bleaching agent, whether or not used in conjunction with an LED light source, and any other ancillary products used in the provision of Teeth Whitening Services.

K. "Teeth Whitening Services" means whitening teeth through the use of a formulation containing a peroxide bleaching agent, whether or not used in conjunction with an LED light source.

L. "Third Party" means any Person other than NCSBDE.

II.

IT IS FURTHER ORDERED that Respondent, directly or indirectly, or through any corporate or other device, in connection with the provision of Teeth Whitening Services in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, cease and desist from:

A. Directing a Non-Dentist Provider to cease providing Teeth Whitening Goods or Teeth Whitening Services;

B. Prohibiting, restricting, impeding, or discouraging the provision of Teeth Whitening Goods or Teeth Whitening Services by a Non-Dentist Provider;

C. Communicating to a Non-Dentist Provider that: (i) such Non-Dentist Provider is violating, or has violated the Dental Practice Act by providing Teeth Whitening Goods or Teeth Whitening Services; or (ii) the provision of Teeth Whitening Goods or Teeth Whitening Services by a Non-Dentist Provider is a violation of the Dental Practice Act;

D. Communicating to a prospective Non-Dentist Provider that: (i) a Non-Dentist Provider would violate the Dental Practice Act by providing Teeth Whitening Goods or Teeth Whitening Services; or (ii) the provision of Teeth Whitening Goods or Teeth Whitening Services by a Non-Dentist Provider would violate the Dental Practice Act;

E. Communicating to a lessor of commercial property or any other Third Party that (i) the provision of Teeth Whitening Goods or Teeth Whitening Services by a Non-Dentist Provider is a violation of the Dental Practice Act, or (ii) that any Non-Dentist Provider is violating or has violated the Dental Practice Act by providing Teeth Whitening Goods or Teeth Whitening Services;

F. Communicating to an actual or prospective manufacturer, distributor, or seller of Teeth Whitening Goods used by Non-Dentist Providers, or to any other Third Party that (i) the provision of Teeth Whitening Goods or Teeth Whitening Services by a Non-Dentist Provider is a violation of the Dental Practice Act, or (ii) that any Non-Dentist Provider is violating or has violated the Dental Practice Act by providing Teeth Whitening Goods or Teeth Whitening Services; and

G. Inducing, urging, encouraging, assisting or attempting to induce, any Person to engage in any action that would violate Paragraphs II.A through II.F if such action were taken by Respondent;

Provided, however, that nothing in this Order prohibits the Board from:

(i) investigating a Non-Dentist Provider for suspected violations of the Dental Practice Act;

(ii) filing, or causing to be filed, a court action against a Non-Dentist Provider for an alleged violation of the Dental Practice Act pursuant to N.C. Gen. Stat. §§ 90-40, 90-40.1, or 90-233.1; or

(iii) pursuing any administrative remedies against a Dentist pursuant to and in accordance with the North Carolina Annotated Code;

Provided further, that nothing in this Order prohibits the Board from Communicating to a Third Party:

(i) notice of its belief or opinion regarding whether a particular method of providing Teeth Whitening Goods or Teeth Whitening Services may violate the Dental Practice Act;

(ii) factual information regarding legislation and court proceedings concerning Teeth Whitening Goods or Teeth Whitening Services provided by Non-Dentist Providers;

(iii) notice of its bona fide intention to file a court action against that Person for a suspected violation of the Dental Practice Act with regard to Teeth Whitening Goods or Teeth Whitening Services; or

(iii) notice of its bona fide intention to pursue administrative remedies with regard to Teeth Whitening Goods or Teeth Whitening Services,

so long as such Communication includes, with equal prominence, the paragraph included in Appendix A to this Order.

III.

IT IS FURTHER ORDERED that Respondent shall:

A. Within thirty (30) days from the date this Order becomes final, send a copy of this Order and the Complaint by first-class mail with delivery confirmation or electronic mail with return confirmation to:

1. each Board member; and

2. each officer, director, manager, representative, agent, attorney, and employee of the Board;

B. Distribute by first-class mail, return receipt requested, a copy of this Order and the Complaint to each individual who becomes a Board member, or an officer, director, manager, attorney, representative, agent or employee of Board, and who did not previously receive a copy of this Order and the Complaint from Respondent, within ten (10) days of the time that he or she assumes such position;

C. Within thirty (30) days from the date this Order becomes final, send a copy of the letter, on the Board's official letterhead, with the text included in Appendix B to this Order, by first-class mail with delivery confirmation or electronic mail with return confirmation to:

1. each Person, including without limitation actual or prospective Non-Dentist Providers, manufacturers of goods and services used by Non-Dentists Providers, or any other Third Party, to whom the Board Communicated a cease-and-desist order, letter, or other similar Communication;

2. each Person, including without limitation actual or prospective lessors of commercial property or any other Third Party, to whom the Board Communicated (i) that the provision of Teeth Whitening Goods or Teeth Whitening Services by a Non-Dentist Provider is a violation of the Dental Practice Act, or (ii) that any Non-Dentist Provider is violating, has violated, or may be violating the Dental Practice Act by providing Teeth Whitening Goods or Teeth Whitening Services; and

3. any other Third Party to whom, or with whom, the Board Communicated substantially the same information set forth in C.1 and C.2 of this Paragraph III;

D. Within sixty (60) days from the date this Order becomes final, Respondent shall arrange with the North Carolina Board of Cosmetic Art Examiners for the notice included as Appendix C to this Order to appear on the website of that Board for a period of six (6) months;

Provided, however, should Respondent be unable within sixty (60) days to arrange with the North Carolina Board of Cosmetic Art Examiners for such notice to appear on that Board's website, Respondent shall within ninety (90) days from the date this Order becomes final: (1) obtain from the North Carolina Board of Cosmetic Art Examiners its most current list of licensees; and (2) send the Appendix C notification by first-class mail with delivery confirmation or electronic mail with return confirmation to each licensee on that current list;

IV.

IT IS FURTHER ORDERED that Respondent shall file verified written reports within sixty (60) days from the date this Order becomes final, annually thereafter for three (3) years on the anniversary of the date this Order becomes final, and at such other times as the Commission may by written notice require. Each report shall include, among other information that may be necessary:

A. The identity, including address and telephone number, of each Non-Dentist Provider, and any other Third Party, that the Board Communicated with during the relevant reporting period regarding Teeth Whitening Goods or Teeth Whitening Services;

B. Copies of all Communications with any Non-Dentist Provider, and any other Third Party regarding the provision of Teeth Whitening Goods or Teeth Whitening Services;

C. Copies of the delivery confirmations or electronic mail with return confirmations required by Paragraph III. A and B; and

D. A detailed description of the manner and form in which Respondent has complied, and is complying, with this Order.

V.

IT IS FURTHER ORDERED that Respondent shall notify the Commission of any change in its principal address within twenty (20) days of such change in address.

VI.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and upon five (5) days' notice to NCSBDE, that NCSBDE shall, without restraint or interference, permit any duly authorized representative of the Commission:

A. Access, during office hours of NCSBDE and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and all other records and documents in the possession, or under the control, of NCSBDE relating to compliance with this Order, which copying services shall be provided by NCSBDE at its expense; and

B. To interview officers, directors, or employees of NCSBDE, who may have counsel present, regarding such matters.

VII.

IT IS FURTHER ORDERED that this Order shall terminate on December 2, 2031.

Appendix A

The Federal Trade Commission issued a Final Order on December 2, 2011, which requires the Dental Board to provide you with the following Notice. The Dental Board hereby notifies you that the opinion of the Dental Board expressed in this communication is not a legal determination. The Dental Board does not have the authority to order you to discontinue providing Teeth Whitening Goods or Teeth Whitening Services. Only a court may determine that you have violated, or are violating, any law, and, if appropriate, impose a remedy or penalty for such violation.

Further, pursuant to 21 N.C.A.C. 16N .0400 and N.C. Gen. Stat. § 150B-4, you may have the right, prior to the initiation of any court action by the Dental Board, to request a declaratory ruling regarding whether your method of providing teeth whitening goods or services is lawful.

You are further notified that any right to a declaratory ruling from the Dental Board supplements any other legal rights that you may already have to establish the legality of your teeth whitening goods or services. Complete copies of the Federal Trade Commission's Complaint and Final Order are available on the Commission's website at http:\\www.ftc.gov.

Appendix B

(Letterhead of NCSBDE)

(Name and Address of the Recipient)

Dear (Recipient):

As you may know, the Federal Trade Commission issued an Administrative Complaint in 2010 against the Dental Board challenging the legality of the Dental Board's attempts to restrict the provision of teeth whitening services by non-dentists in North Carolina. At the conclusion of that administrative proceeding, the Commission issued a Final Order requiring the Dental Board, among other things, to cease and desist from certain activities involving teeth whitening by non-dentists and to take certain remedial actions, of which this letter is one part. Complete copies of the Federal Trade Commission's Complaint and Final Order are available on the Commission's website at http:\\www.ftc.gov.

You are receiving this letter because you previously received from the Dental Board either: (1) a letter directing or ordering you to cease and desist the unlicensed provision of dental teeth whitening services, or selling dental teeth whitening goods or services to non-dentist teeth whiteners, in violation of the Dental Practice Act, N.C. Gen. Stat. §§ 90-29(b)(2), 90-40, and/or 90-40.1; or (2) a letter advising you (i) that a non-dentist would or might violate the Dental Practice Act by providing teeth whitening goods or services; or (ii) that the provision of teeth whitening goods or services by a non-dentist would or might violate the Dental Practice Act, N.C. Gen. Stat. §§ 90-29(b)(2), 90-40, and/or 90-40.1.

The Dental Board hereby notifies you that the prior letter you received from the Dental Board only expressed the opinion of the Dental Board, and that such opinion is not a legal determination. The Dental Board does not have the authority to order you to discontinue providing Teeth Whitening Goods or Teeth Whitening Services. Only a court may determine that you are violating, or have violated, any law and, if appropriate, impose a remedy or penalty for such violation. Further, you may have the right to request a declaratory ruling from the Dental Board, pursuant to 21 N.C.A.C. 16N .0400 and N.C. Gen. Stat. § 150B-4, regarding whether a particular method of providing teeth whitening goods or services is lawful. You are further notified that any right to a declaratory ruling from the Dental Board supplements any other legal rights that you may already have to establish the legality of any particular method of providing teeth whitening goods or services.

Appendix C

Teeth Whitening Notice

As you may know, the Federal Trade Commission issued an Administrative Complaint in 2010 against the Dental Board challenging the legality of the Dental Board's attempts to restrict the provision of teeth whitening services by non-dentists in North Carolina. At the conclusion of that administrative proceeding, the Commission issued a Final Order requiring the Dental Board, among other things, to cease and desist from certain activities involving teeth whitening by non-dentists and to take certain remedial actions, of which this Notice is one part. Complete copies of the Federal Trade Commission's Complaint and Final Order are available on the Commission's website at http://www.ftc.gov.

In 2007, the Cosmetology Board, at the request of the Dental Board, displayed a "Teeth Whitening Bulletin" on the Cosmetology Board's website advising cosmetologists and estheticians "that any process that 'removes stains, accretions or deposits from human teeth' constitutes the practice of dentistry . . . . Taking impressions for bleaching trays also constitutes the practice of dentistry . . . ." That Bulletin further advised that it was a misdemeanor for anyone other than a licensed dentist to provide those services.

The Dental Board hereby notifies you that the prior Bulletin, described above, only expressed the opinion of the Dental Board, and that such opinion is not a legal determination. The Dental Board does not have the authority to order you to discontinue providing Teeth Whitening Goods or Teeth Whitening Services. Only a court may determine that you have violated, or are violating, any law and, if appropriate, to impose a remedy or penalty for such violation. Further, you may have the right to request a declaratory ruling from the Dental Board, pursuant to 21 N.C.A.C. 16N .0400 and N.C. Gen. Stat. § 150B-4, regarding whether a particular method of providing teeth whitening goods or services is lawful. You are further notified that any right to a declaratory ruling from the Dental Board supplements any other legal rights that you may already have to establish the legality of any particular method of providing teeth whitening goods or services.

By the Commission, Commissioner Brill recused.

Donald S. Clark
Secretary

ISSUED: December 2, 2011

EXHIBIT B

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

Opinion of the Commission

By ROSCH, Commissioner, For A Unanimous Commission:[1]

I. INTRODUCTION[2]

This case involves the efforts of the North Carolina State Board of Dental Examiners ("Respondent" or the "Board") to prevent non-dentists from providing teeth whitening services in North Carolina. The Board is an agency of the State of North Carolina and is charged with regulating the practice of dentistry in the state. By law, six of the eight members of the Board must be practicing dentists.

In the early 1990s, dentists in North Carolina and elsewhere began offering teeth whitening services through the use of various forms of peroxide. Since then, teeth whitening has become one of the most popular cosmetic dentistry procedures and is now offered by most dentists either as an in-office procedure or as a custom-made take-home kit.

In response to the popularity of teeth whitening, non-dentists began offering teeth whitening services at locations such as mall kiosks, spas, retail stores, and salons in North Carolina in approximately 2003. These providers use techniques similar to those used by dentists to whiten teeth and, like dentists, can whiten teeth in a single session. However, non-dentist providers charge significantly less than dentists for the procedure and often offer greater convenience.

Dentists who performed teeth whitening services soon began complaining to the Board about the provision of teeth whitening services by non-dentists. These complaints often noted that these new providers charged less than dentists but rarely mentioned any public health or safety concerns. In response to these complaints, the Board issued dozens of cease and desist letters to non-dentist teeth whitening service providers and distributors of teeth whitening products and equipment. In addition, the Board sent

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[1] Commissioner Julie Brill has not participated in this matter.

[2] This opinion uses the following abbreviations for citations to the record:

Initial Decision	ID
ALJ Findings of Fact	IDF
Respondent's Appeal Brief	RAB
Complaint Counsel's Answering Brief on Appeal	CCAB
Respondent's Reply Brief on Appeal	RRB
Complaint Counsel's Exhibit	CX
Respondent's Exhibit	RX
Trial Transcript	Tr.

letters to mall owners and operators urging them not to lease space to non-dentist teeth whitening providers. The Board had no authority to issue cease and desist orders under its enabling statute.

As a result of the Board's actions, many non-dentists stopped providing teeth whitening services and several marketers of teeth whitening systems stopped selling their products and equipment in North Carolina. In addition, several mall operators refused to lease space to, or cancelled existing leases with, non-dentist teeth whitening providers.

Based on our *de novo* review of the facts and law in this matter, we conclude that the Board sought to, and did, exclude non-dentist providers from the market for teeth whitening services in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. We agree with Chief Administrative Law Judge D. Michael Chappell (the "ALJ") that Respondent's conduct constituted concerted action, that Respondent's conduct had a tendency to harm competition and in fact did harm competition, and that Respondent has failed to advance a legitimate procompetitive justification. We find liability under an abbreviated, or quick look, approach as well as under a full rule of reason analysis. We agree with the ALJ that the appropriate remedy is to prohibit the Board from directing non-dentist teeth whitening providers to cease providing their teeth whitening products or services, and we adopt (with minor changes) the Order entered below.

II. FACTUAL BACKGROUND

The following is a summary of the findings of fact of the ALJ. Except as noted, Respondent does not challenge the ALJ's findings. We adopt the ALJ's findings of fact to the extent that they are not inconsistent with this opinion.

The Board

The North Carolina State Board of Dental Examiners is an agency of the State of North Carolina and is charged with regulating the practice of dentistry in the interest of public health, safety, and welfare of the citizens of North Carolina. (IDF 1, 33, 87.) The Board has the authority to issue and renew licenses and to take disciplinary action against dentists practicing in North Carolina. (IDF 35.) The Board is funded by dues and fees paid by licensed dentists and dental hygienists in North Carolina. (IDF 13-14.)

The Board consists of eight members: six licensed dentists, one licensed dental hygienist, and one consumer member, who is neither a dentist nor a dental hygienist. (IDF 2.) Each dentist elected to the Board must be licensed and actively engaged in the practice of dentistry while serving on the Board. (IDF 6-8.) The six dentist members of the Board are elected to the Board by other licensed dentists in North Carolina and, if an election is contested, a candidate may describe his or her positions on issues that may come before the Board. (IDF 15-23.) Many Board members have provided teeth whitening services through their private practices and derived income from those services while serving on the Board. (IDF 9-12.)

The 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. General Statutes § 90-29(a); IDF 41. Under the Dental Practice Act, a person "shall be deemed to be practicing dentistry" if that person "[r]emoves stains, accretions or deposits from the human teeth." N.C. General Statutes § 90-29(b)(2); IDF 42. In the event of a suspected unlicensed practice of dentistry, the Board 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. General Statutes § 90-40.1; IDF 43, 44, 190; Response to Complaint ¶ 19; RAB at 2-3; RRB at 5. The Board does not have the authority to discipline unlicensed individuals or to order non-dentists to stop violating the Dental Practice Act. *See* N.C. General Statutes §§ 90-27, -29, -40, -40.1; IDF 45-49.

Teeth Whitening Services

There are four categories of teeth whitening products or services available in North Carolina: dentist in-office services, dentist-provided take-home kits, services provided by a non-dentist, and over-the-counter (OTC) products.[3] (IDF 105.) All four methods involve the application of some form of peroxide to the teeth using a gel or strip. (IDF 106, 151.) All four methods trigger a chemical reaction that results in whiter teeth. (IDF 106.)

Despite their similar characteristics, the four techniques vary in terms of immediacy of results, ease of use, provider support, and price. (IDF 107.) Dentist in-office services are quick, effective, and provided by a professional, but are costly compared to the other methods and require making an appointment. (IDF 108-20.) Take-home kits provided by dentists are effective and somewhat less expensive than in-office services but require the user to apply the product at home a number of times and usually require at least two trips to the dentist. (IDF 121-28.) Non-dentist services (like dentist in-office services) are quick and effective but are typically priced below dentist services and may not require an appointment.[4] (IDF 137-50.) OTC products are low cost and convenient but require diligent and repeated application by the consumer. (IDF 129-36.) Consumers' preferences with respect to efficacy, cost, and convenience vary (IDF 169, 172, 174), and there is competition among providers offering the different methods

[3] At pages 16 and 17 of Respondent's appeal brief, Respondent objects to Finding 100, which identifies various techniques to whiten teeth, because the ALJ's use of the phrase "through dental stain removal" could be interpreted—despite the ALJ's statements to the contrary (*see, e.g.*, ID at 82, 109)—as a reference to the Dental Practice Act's definition of the practice of dentistry as a person that "removes stains." N.C. General Statutes § 90-29(b)(2). Respondent's interpretation of Finding 100 is questionable, but, for clarity, we strike the phrase "through dental stain removal" from Finding 100 and otherwise affirm that finding.

[4] Respondent argues that Findings 140 and 141 are flawed because Complaint Counsel's expert, Dr. Martin Giniger, lacked foundation for his testimony concerning the bleaching process used by non-dentist teeth whitening systems. (RAB at 17.) These findings are not material to the Commission's resolution of this matter and, in any event, Dr. Giniger had an adequate foundation for this testimony. Dr. Giniger has published numerous articles in peer-reviewed publications on teeth whitening (Giniger, Tr. 88-91; CX653 at 56-59), has taught dental students about teeth whitening (Giniger, Tr. 93-94), holds nine patents related to teeth whitening (Giniger, Tr. 95; CX653 at 55), has provided consulting services to several companies making teeth whitening products including those marketed to non-dentist providers (Giniger, Tr. 98; CX653 at 2; IDF 81), and reviewed the manuals for two companies offering non-dentist teeth whitening systems (CX653 at 22).

of teeth whitening (IDF 157, 158), including through the use of comparative advertising (IDF 163-68).

The Board's Cease and Desist Letters

The Board conducts investigations of allegations that persons are engaged in the unauthorized practice of dentistry. (IDF 175.) Complaints to the Board regarding the unauthorized practice of dentistry are handled by an investigative panel consisting of a case officer, the Deputy Operations Officer, an Investigator, and sometimes the Board's legal counsel. (IDF 181-83.) The case officer, who must be one of the dentists serving on the Board, directs the investigation and is authorized by the Board to make enforcement decisions. (IDF 184-91.) The consumer member of the Board and the hygienist member of the Board did not participate in teeth whitening investigations, notwithstanding their authority to do so under the Dental Practice Act. (IDF 38-40, 59-60, 184, 192-93.)

Starting in or around 2003, the Board began receiving complaints from dentists about non-dentist providers of teeth whitening services. (IDF 194-95.) Almost all of these complaints came from licensed dentists (IDF 227, 229-30), many of whom derived income from teeth whitening services (IDF 233). Many of these complaints noted that these non-dentist providers offered low prices (IDF 196, 232); only on rare occasion did they indicate possible consumer harm (IDF 228, 231).

The Board discussed the increasing number of complaints regarding non-dentist teeth whitening services in its meetings. (IDF 198, 206.) On several occasions, Board members informed practicing dentists that the Board was investigating complaints about non-dentist teeth whiteners and was attempting to shut down these providers.[5] (IDF 201, 205.)

Since 2006, the Board has sent at least 47 cease and desist letters to 29 non-dentist teeth whitening manufacturers and providers. (IDF 208-09, 216-18, 230, 262-83.) Starting in 2007 and at the direction of the Board's President, the Board began issuing cease and desist letters on the basis of a complaint, without any investigation. (IDF 210-15.) These letters were sent on the official letterhead of the Board and stated in capitalized lettering at the top: "NOTICE AND ORDER TO CEASE AND DESIST," "NOTICE TO CEASE AND DESIST," "CEASE AND DESIST NOTICE," or "NOTICE OF APPARENT VIOLATION AND DEMAND TO CEASE AND DESIST." (IDF 219, 220, 222, 223.) The letters go on to order the provider to cease and desist from "all activity constituting the practice of dentistry." (IDF 221-23.) Some of the letters stated that the sale or use of non-dentist teeth whitening products constituted a misdemeanor. (IDF 265-66, 280.) The Board's goal in sending these letters was to stop non-dentists from providing teeth whitening services. (IDF 234-45, 286-87.)

[5] Respondent disputes Finding 205, which states that members of the Board told dentists attending a conference that the Board was investigating complaints about non-dentist teeth whiteners. (RAB at 18.) Respondent is correct that there was conflicting testimony on this point, but the weight of evidence—including the testimony of the Board's President and official Board meeting minutes—supports this finding. (CX565 at 67 (Hardesty Dep. at 259-61); CX109 at 3.)

The Board's cease and desist letters were effective in causing non-dentists to stop providing teeth whitening services in North Carolina. (IDF 247-56.) This was due in part to the perception of some recipients that the letters carried the force of law. (IDF 246.) The Board's letters were also effective in causing manufacturers and distributors of teeth whitening products used by non-dentist providers to exit or delay entering the North Carolina market.[6] (IDF 70-72, 267-70, 272, 277-79, 281-83.)

The Board's Letters to Mall Operators and the Cosmetology Board

In November 2007, the Board sent eleven letters to mall operators warning them that kiosk teeth whiteners were violating the Dental Practice Act and requesting that they not lease space to these operators. (IDF 97, 288-93.) As a result, some mall operators refused to lease space to non-dentist teeth whiteners or cancelled existing leases. (IDF 98, 294-313.)

Based on its understanding that many of the non-dentist teeth whitening providers were salons and spas regulated by the North Carolina Board of Cosmetic Art Examiners ("cosmetology board"), the Board sought to enlist the aid of the cosmetology board in discouraging its licensees from providing teeth whitening services. (IDF 314-23.) In February 2007, the cosmetology board posted a notice on its website that was prepared by the Board suggesting that teeth whitening "constitutes the practice of dentistry" and that the "unlicensed practice of dentistry in our state is a misdemeanor." (IDF 320, 322.) As a result of the cosmetology board's posting, some cosmetologists stopped providing teeth whitening services. (IDF 324-27.)

III. PROCEDURAL HISTORY

A. PLEADINGS AND PRE-TRIAL MOTIONS

On June 17, 2010, the Commission issued a single-count Complaint in this matter against the Board. The Complaint alleged that the Board classified teeth whitening as the practice of dentistry and violated Section 5 of the FTC Act by enforcing this determination through cease and desist orders that were neither authorized nor supervised by the State, and that were designed to, and did, drive non-dentist teeth whiteners out of North Carolina.

The Complaint alleged that the Board, reacting to the competitive threat posed by non-dentist providers, sought to exclude, and did exclude, non-dentists from the market for teeth whitening services in North Carolina. (Compl. ¶¶ 13-23.) According to the Complaint, the Board sent dozens of cease and desist letters to non-dentist teeth whitening providers and distributors, discouraged prospective non-dentist providers from

[6] Respondent asserts that Finding 268, which states that WhiteScience lost all of its sales in North Carolina as a result of the Board's actions, is inconsistent with testimony of the President of WhiteScience that his company continued to do business in North Carolina. (RAB at 17-18.) In fact, WhiteScience's President testified that the company did lose all of its sales in the state in response to the Board's actions but later reentered the state after learning that the Board would handle allegations of unauthorized practice of dentistry on a case-by-case basis. (Nelson, Tr. 735-36, 785-89, 800-01, 809-11; *see also* IDF 263-70, 278.)

opening teeth whitening businesses, and sent letters to owners and operators of shopping malls to discourage their leasing space to non-dentist teeth whitening businesses. (*Id.* ¶¶ 20-22.) These actions were allegedly not authorized by statute and did not involve any oversight by the State. (*Id.* ¶ 19.) The Complaint did not challenge any attempts by the Board to commence civil or criminal proceedings against alleged violators of the North Carolina Dental Practice Act, N.C. General Statutes § 90-22 *et seq*.

The Complaint alleged that the Board's actions have had the effect of restraining competition unreasonably and injuring consumers in North Carolina by preventing and deterring non-dentists from providing teeth whitening services; depriving consumers of the benefits of price competition; and reducing consumer choice for the provision of teeth whitening services. (*Id.* ¶¶ 24-25.) The Complaint further alleged that the Board's actions do not qualify for the state action defense and are not reasonably related to any efficiencies or other benefits sufficient to justify their harmful effect on competition. (*Id.* ¶ 23.) The Notice of Contemplated Relief attached to the Complaint seeks an order that would require Respondent to discontinue the challenged conduct.

The Board filed a Response to Complaint dated July 6, 2010. The Response admitted that the Board had sent letters to non-dentists offering teeth whitening services with the caption: "Notice and Order to Cease and Desist." (Response ¶ 20; *see also id.* ¶ 19 (acknowledging that the Board had sent "cease and desist letters").) The letters "inform[ed] the recipient of the investigation, quote[d] the applicable statute, and demand[ed] that the recipient stop violating that statute." (*Id.* ¶ 20.) The Response further admitted that the Board's staff had sent letters to mall owners and property management companies requesting their "assistance in preventing *unlawful* activity on their premises," namely, "teeth whitening services by non-dentists." (*Id.* ¶ 22 (emphasis in original).) Respondent also admitted that Board staff had informed non-dentists who were considering opening teeth whitening businesses that such services could be performed only by a licensed dentist. (*Id.* ¶ 21.)

The Board's Response further admitted that "[a]ny enforcement actions by the Board against non-licensees who are providing teeth whitening services, whether civil or criminal, may only be pursued in the state's courts." (*Id.* ¶ 19; *see also id.* ("[N]o kiosk, spa or other provider of teeth whitening services by a non-dentist could actually be forced to stop operations unless the Board obtained either a court order or the cooperation of a district attorney in a criminal conviction and a court judgment.")) The Response otherwise denied the allegations of the Complaint, including the alleged product market, that concerted activity had occurred, that the cease and desist letters were orders, and that the Board's actions had caused anticompetitive effects in the purported relevant market.

As affirmative defenses, the Response asserted, among other things, that the Board is immune from suit under the state action doctrine, possesses sovereign immunity under the Eleventh Amendment, and is protected by the Tenth Amendment; that the Commission lacks subject matter jurisdiction; that the Board's actions had no substantial effect on U.S. commerce; and that the requested relief was not in the public interest. (*Id.* at 20-21.)

Prior to the start of the trial before the ALJ, Complaint Counsel and Respondent filed cross motions on the issue of the applicability of the state action doctrine to the Board's conduct. In an Opinion and Order dated February 3, 2011, the Commission rejected the Board's invocation of the state action doctrine as a basis for exempting its challenged conduct from the FTC Act. *See North Carolina Board of Dental Examiners*, 151 F.T.C. 607, 615-33 (2011). The Commission explained that because the Board is controlled by practicing dentists, the Board's challenged conduct must be actively supervised by the State for it to claim state action exemption from the antitrust laws. *Id.* at 617-28. Because the undisputed facts showed that there was no such supervision, the antitrust laws applied to the Board's conduct. *Id.* at 628-33. The Commission also concluded that it has jurisdiction over the Board because states and their regulatory bodies constitute "persons" under the FTC Act. *Id.* at 614-15.

On January 14, 2011, Respondent filed a motion to disqualify the Commission, asserting that the Commission lacks the constitutional authority to decide whether it has jurisdiction over the Board and had prejudged the issues in the proceeding. In a February 16, 2011 Opinion, the Commission denied Respondent's motion. *See North Carolina Board of Dental Examiners*, 151 F.T.C. 644 (2011). The Opinion concluded that the Commission has jurisdiction to decide whether the Board can avail itself of the state action exemption and that the Board had presented no evidence of prejudgment.

On February 1, 2011, Respondent filed a complaint for declaratory judgment and injunctive relief in the United States District Court for the Eastern District of North Carolina. The complaint alleged that the FTC lacked jurisdiction over the Board and that these proceedings violated various constitutional rights of the Board. On May 3, 2011, the District Court dismissed the action for lack of subject matter jurisdiction, explaining that "the appropriate forum for plaintiff's arguments is in the administrative proceedings, followed by a potential appeal to the Fourth Circuit Court of Appeals." *North Carolina State Board of Dental Examiners v. FTC*, 768 F. Supp. 2d 818, 822 (E.D.N.C. 2011). Appeal of the dismissal is pending before the Fourth Circuit.

During the trial, which began on February 17, 2011 and concluded on March 16, 2011, the ALJ heard testimony from twelve fact and four expert witnesses and admitted more than eight hundred exhibits into evidence. The ALJ closed the hearing record on March 30, 2011. Complaint Counsel and the Board filed concurrent post-trial briefs and proposed findings on April 25, 2011 and filed replies on May 5, 2011. The ALJ heard closing arguments on May 11, 2011.

B. INITIAL DECISION

The ALJ issued an Initial Decision ("ID") on July 14, 2011, finding that the Board's concerted action 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 Section 5 of the FTC Act. In particular, the ALJ found that dentist members of the Board had a common scheme or design, and hence an agreement, to exclude non-dentists from the market for teeth whitening services and to deter potential providers of teeth whitening services from entering the market. To

achieve this objective, dentist members of the Board caused the Board to (a) send letters to non-dentist teeth whitening providers ordering them to cease and desist from offering these services, (b) send letters to manufacturers of equipment used by non-dentist providers ordering them to cease and desist from assisting clients offering teeth whitening services, (c) send letters to dissuade persons considering opening non-dentist teeth whitening businesses, (d) send letters to owners or operators of malls to dissuade them from leasing space to non-dentist providers of teeth whitening services, and (e) elicit the help of the cosmetology board to dissuade its licensees from providing teeth whitening services. The ALJ concluded that these actions, by their nature, had the tendency to harm competition.

The ALJ found that the relevant market consists of teeth whitening services provided by dentists and non-dentists, but determined that the relevant market did not include self-administered teeth whitening products. The ALJ concluded that the Board had market power in the relevant market, as demonstrated by its ability to exclude non-dentist providers from the relevant market.

The ALJ found that the Board's concerted actions were effective in causing non-dentist teeth whitening providers to exit the relevant market, manufacturers to reduce the availability of their teeth whitening products to non-dentist providers, and mall owners and operators to stop leasing space to non-dentist providers.

The ALJ rejected the Board's proffered procompetitive justifications. The ALJ concluded that the antitrust laws do not permit a defense based on social welfare or public safety concerns, as asserted by the Board. In addition, the ALJ rejected Respondent's argument that teeth whitening services should be offered at a cost that reflects the skills of dentists as inimical to the basic policy of the antitrust laws. The ALJ also rejected Respondent's proffered justification that the Board's actions had the benefit of promoting legal competition. Finally, the ALJ observed that the Board's remaining justifications were essentially a reiteration of its state action argument, which had been rejected by the Commission.

As a remedy, the ALJ ordered the Board to cease and desist from directing a non-dentist to stop providing teeth whitening services or products, as well as from prohibiting or discouraging the provision of these goods and services. The ALJ's Order also requires the Board to cease and desist from communicating to certain third parties that non-dentist teeth whitening goods or services violate the Dental Practice Act. The ALJ's Order does not prohibit the Board from investigating, filing a court or administrative action, or communicating notice of its intent to file a court or administrative action against a non-dentist provider for an alleged violation of the Dental Practice Act.

C. APPEAL

Respondent timely filed a Notice of Appeal on July 28, 2011. Complaint Counsel did not file an appeal from the Initial Decision. The Commission heard oral argument on October 28, 2011.[7]

Respondent makes three principal claims on appeal. Respondent first argues that no contract, combination, or conspiracy to restrain trade existed. In particular, Respondent asserts that the Board is not capable of engaging in concerted action because it does not consist of independent economic actors with distinct economic interests. (RAB at 11-15, 25-26.) In addition, Respondent argues that even if the members of the Board were capable of concerted action, there was no evidence to support a finding that they did so in this case.

Respondent's second principal claim on appeal is that several procompetitive justifications outweigh any harm to competition. (RAB at 7-10, 29-34.) Respondent asserts that the ALJ failed to consider that the Board's actions were those of a state agency that intended to and did promote the public welfare and thus enhanced legal competition.

Respondent's third principal claim on appeal is that the ALJ's proposed remedy is overbroad and will prevent the Board from investigating or challenging violations of the North Carolina Dental Practice Act. (RAB at 37.) Respondent also asserts that the proposed remedy violates the Commerce Clause of and Tenth Amendment to the United States Constitution. (RAB at 39-46.)

In addition, Respondent seeks to relitigate two issues resolved in the Commission's February 3, 2011 Opinion and Order, namely the Commission's jurisdiction to hear this case and the applicability of the state action defense. (RAB at 22-24, 29-31.) We note, as an initial matter, that an appeal from an ALJ's Initial Decision is not the proper means by which to seek reconsideration of a Commission decision. In any event, Respondent has failed to identify any change in controlling law, new evidence, or a need to correct a clear error or manifest injustice that would warrant reconsidering our prior decision on either of these issues.[8]

IV. STANDARD OF REVIEW

The Commission reviews the ALJ's findings of facts and conclusions of law *de novo*, considering "such parts of the record as are cited or as may be necessary to resolve

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[7] Complaint Counsel submitted a packet of materials to the Commission a few hours before oral argument. (Oral Argument Tr. 4-5, 37-38.) In light of Respondent's inability to meaningfully review or object to these materials in advance of oral argument, the Commission has given no consideration to the packet in reaching its decision.

[8] *See also* note 20, *infra* (addressing whether the Board is a "person" under the FTC Act).

the issues presented." The Commission may "exercise all the powers which it could have exercised if it had made the initial decision."[9] Commission Rule 3.54, 16 C.F.R. § 3.54.

V. LEGAL FRAMEWORK

Although the reach of Section 5 of the FTC Act extends beyond that of Section 1 of the Sherman Act, *see FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 239 (1972), in this case we follow the standards of Section 1 to assess whether the challenged actions of the Board violate Section 5. *See California Dental Ass'n v. FTC,* 526 U.S. 756, 762 & n.3 (1999); *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 451-55 (1986); *FTC v. Cement Institute*, 333 U.S. 683, 694 (1948); *Fashion Originators' Guild of America, Inc. v. FTC*, 312 U.S. 457, 463-64 & n.4 (1941); *Realcomp II, Ltd. v. FTC,* 635 F.3d 815, 824 (6th Cir. 2011); *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 32 (D.C. Cir. 2005).

Section 1 of the Sherman Act prohibits "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States." 15 U.S.C. § 1. Despite its broad language, the ban on contracts in restraint of trade extends only to unreasonable restraints of trade, *i.e.*, restraints that impair competition. *State Oil Co. v. Khan,* 522 U.S. 3, 10 (1997). Thus, a violation of Section 1 requires proof of two elements: "(1) a contract, combination, or conspiracy; (2) that imposed an unreasonable restraint of trade." *Valuepest.com of Charlotte, Inc. v. Bayer Corp.*, 561 F.3d 282, 286 (4th Cir. 2009) (quoting *Dickson v. Microsoft Corp.*, 309 F.3d 193, 202 (4th Cir. 2002)).

The first element requires proof of some kind of agreement because "[i]ndependent action is not proscribed." *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 761 (1984). To demonstrate an agreement, a plaintiff must show that the parties "had a conscious commitment to a common scheme designed to achieve an unlawful objective." *Id.* at 768. This may be proved through "direct or circumstantial evidence." *Id.* In addition, the agreement must "deprive[] the marketplace of independent centers of decisionmaking" in order to raise Section 1 concerns. *American Needle, Inc. v. NFL*, 130 S. Ct. 2201, 2212 (2010) (quoting *Copperweld Corp v. Independence Tube Corp.*, 467 U.S. 752, 769 (1984)).

With respect to the second element, the Supreme Court has explained that "a restraint may be adjudged unreasonable either because it fits within a class of restraints that has been held to be 'per se' unreasonable, or because it violates what has come to be known as the 'Rule of Reason.'" *Indiana Federation of Dentists*, 476 U.S. at 457-58. Under per se analysis, "certain agreements or practices are so 'plainly anticompetitive,' . . . and so often 'lack . . . any redeeming virtue,' . . . that they are conclusively presumed illegal without further examination." *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 8 (1979) (citations omitted). "A court need not then inquire whether the restraint's authors actually possess the power to inflict public injury . . ., nor

[9] The *de novo* standard of review is required by the Administrative Procedure Act, 5 U.S.C. § 557(b), and the FTC Act, 15 U.S.C. § 45(b), (c), and applies to both findings of fact and inferences drawn from those facts. *See Realcomp II, Ltd.*, No. 9320, 2009 FTC LEXIS 250, *37 n.11 (2009), *aff'd*, *Realcomp II, Ltd. v. FTC*, 635 F.3d 815 (6th Cir. 2011).

will the court accept argument that the restraint in the circumstances is justified by any procompetitive purpose or effect." *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1362 (5th Cir. 1980) (citations omitted).

Complaint Counsel does not contend that the challenged conduct of the Board is unreasonable per se and instead challenges the Board's conduct under the rule of reason. When evaluating conduct under the rule of reason, the Supreme Court has called for "an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint," with the aim of reaching "a confident conclusion about the principal tendency of a restriction." *California Dental*, 526 U.S. at 781.

In *Indiana Federation of Dentists*, the Court outlined three alternative modes of analysis under the rule of reason. That case concerned a group of dentists who agreed to withhold x-rays from dental insurance companies that requested their use in benefits determination. The Court applied a rule of reason analysis and affirmed the Commission's finding that the practice violated Section 1 of the Sherman Act. In applying the rule of reason, the Court condemned the practice on two alternative grounds and endorsed the existence of a third possible route to condemnation under the rule of reason (albeit one not applicable to the facts it confronted).

First, the Court held that it was faced with a type of restraint that, by its very nature, required justification even in the absence of a showing of market power. 476 U.S. at 459-60. According to the Court, because the practice was "a horizontal agreement among the participating dentists to withhold from their customers a particular service that they desire," then "no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement." *Id.* at 459 (quoting *National Society of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978)). Accordingly, the practice "require[d] some competitive justification even in the absence of a detailed market analysis." *Id.* at 460 (quoting *NCAA v. Board of Regents*, 468 U.S. 85, 109-10 (1984)). We have previously condemned several types of restraints under this "inherently suspect" form of analysis.[10] *See, e.g.*, *Realcomp II, Ltd.*, No. 9320, 2009 FTC LEXIS 250 (2009), *aff'd on other grounds*, *Realcomp II, Ltd. v. FTC*, 635 F.3d 815 (6th Cir. 2011); *North Texas Specialty Physicians*, 140 F.T.C. 715 (2005), *aff'd*, *North Texas Specialty Physicians v. FTC*, 528 F.3d 346 (5th Cir. 2008); *Polygram Holding, Inc.*, 136 F.T.C. 310 (2003), *aff'd*, *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 32 (D.C. Cir. 2005).

Second, the Court held that even if the restriction in question was "not sufficiently 'naked' to call this principle into play, the Commission's failure to engage in detailed market analysis [was] not fatal to its finding of a violation of the Rule of Reason," because the record contained direct evidence of anticompetitive effects. 476 U.S. at 460. The Court reasoned that "[s]ince the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine

[10] Antitrust tribunals have used a variety of terms to address this approach, including "abbreviated," "truncated," or "quick look" analysis. *See California Dental*, 526 U.S. at 770-71 (collecting cases). For simplicity, we adhere to the "inherently suspect" terminology we used in *Polygram*.

adverse effects on competition, 'proof of actual detrimental effects, such as a reduction of output,' can obviate the need for an inquiry into market power, which is but a 'surrogate for detrimental effects.'" *Id.* at 460-61 (quoting 7 Areeda, *Antitrust Law* ¶ 1511, at 429 (1986)); *see also Realcomp*, 635 F.3d at 827 ("If adverse effects are clear, inquiry into market power is unnecessary.").

Third, the Court's discussion of the "proof of actual detrimental effects" prong of the analysis made clear that the traditional mode of analysis—inquiring into market definition and market power—was still available, although not applicable to the case before it because the Commission had not attempted to prove market power. Although the Court did not explore this mode of analysis in detail, it observed that "the purpose of the inquiries into market definition and market power is to determine whether an arrangement *has the potential* for genuine adverse effects on competition." *Id.* at 460 (emphasis added). Numerous lower courts have confirmed that the Court's conclusion in *Indiana Federation of Dentists* that market power is "a surrogate for detrimental effects" logically compels the result that, if the tribunal finds that the defendants had market power and that their conduct tended to reduce competition, it is unnecessary to demonstrate directly that their practices had adverse effects on competition. *See, e.g.*, *Realcomp*, 635 F.3d at 827-31; *United States v. Brown University*, 5 F.3d 658, 668-69 (3d Cir. 1993); *Flegel v. Christian Hospital*, 4 F.3d 682, 688 (8th Cir. 1993); *Gordon v. Lewistown Hospital*, 423 F.3d 184, 210 (3d Cir. 2005); *Law v. NCAA*, 134 F.3d 1010, 1019 (10th Cir. 1998); *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928, 937 (7th Cir. 2000).

The Supreme Court addressed the role of abbreviated rule of reason analysis again in *California Dental*. That case concerned a professional association's ethical canon that effectively prohibited members from advertising price discounts in most cases and entirely precluded advertising regarding the quality of services. The FTC and the Ninth Circuit had concluded that the restrictions resulting from this rule were tantamount to naked restrictions on price competition and output, 526 U.S. at 762-64, and therefore applied an "abbreviated, or 'quick look,' rule of reason analysis," and found them unlawful without a "full-blown rule of reason inquiry" or an "elaborate industry analysis." *Id.* at 763 (citing *NCAA*, 468 U.S. at 109-10 & n.39).

The Supreme Court agreed that restrictions with obvious anticompetitive effects, such as those in *Professional Engineers*, *NCAA*, and *Indiana Federation of Dentists*, do not require a "detailed market analysis" and may be held unlawful under a rule of reason framework unless the defendants proffer some acceptable "competitive justification" for the practice. Such analysis is appropriate if "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 769, 770. The Court found, however, that the particular advertising rules under review in that case might plausibly "have a procompetitive effect by preventing misleading or false claims that distort the market," particularly given the "disparities between the information available to the professional and the patient" and the "inherent asymmetry of knowledge" about the service. *Id.* at 771-72, 778 (quotation omitted). Thus, while "it is also . . . possible that the restrictions might in the final analysis be anticompetitive[,] . . .

[t]he obvious anticompetitive effect that triggers abbreviated analysis has not been shown." *Id.* at 778.

While the Court accordingly called, in that case, for a "more sedulous" market analysis, *id.* at 781, it took pains to add that its ruling did "not, of course, necessarily . . . call for the fullest market analysis. . . . [I]t does not follow that every case attacking a less obviously anticompetitive restraint (like this one) is a candidate for plenary market examination." *Id.* at 779. Rather, the Court stated, "[w]hat is required . . . is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint." *Id.* at 781.

In this Opinion, we analyze Respondent's conduct under the three modes of analysis endorsed in *Indiana Federation of Dentists*. It is important to note, however, that we could have selected just one of these modes of analysis and, if this approach had supported a finding that the Board's conduct is unlawful, it would have been unnecessary to engage in any further analysis. The fact that all three modes of inquiry under *Indiana Federation of Dentists* lead to the same result reinforces our conclusion that the conduct at issue is anticompetitive.

VI. ANALYSIS

A. CONCERTED ACTION

The ALJ concluded that "the Board had a common scheme or design, and therefore an agreement, to prevent or eliminate non-dentist teeth whitening services in North Carolina." (ID at 77-79.) The ALJ concluded that this agreement could be inferred from the Board's course of conduct in issuing cease and desist letters and other communications designed to discourage non-dentist teeth whitening. (ID at 78-79.) In addition, the ALJ concluded that even though the Board was a single legal entity, it was legally capable of concerted action because it was controlled by dentists with competing economic interests. (ID at 71-76.)

Respondent argues that the concerted action required by Section 1 of the Sherman Act has not been shown because the Board's members are not separate economic actors capable of a conspiracy. Respondent further argues that there is no evidence that members of the Board in fact engaged in concerted action. We find both of these arguments to be without merit.

Section 1 of the Sherman Act requires a "contract, combination . . . or conspiracy" that unreasonably restrains trade. 15 U.S.C. § 1. "Independent action is not proscribed." *Monsanto Co. v. Spray-Rite Service Co.*, 465 U.S. 752, 761 (1984); *see also Copperweld*, 467 U.S. at 767-68 ("Section 1 . . . does not reach conduct that is wholly unilateral" (quotation omitted)); *Virginia Vermiculite, Ltd. v. Historic Green Springs, Inc.*, 307 F.3d 277, 280 (4th Cir. 2002) ("It is incontestable that 'concerted action' in restraint of trade lies at the heart of a Sherman Act section 1 violation.").

In its recent *American Needle* decision, the Supreme Court explained that "concerted action under § 1 does not turn simply on whether the parties involved are

legally distinct entities." *American Needle, Inc. v. NFL*, 130 S. Ct. 2201, 2209 (2010); *see also id.* at 2211 ("the question is not whether the defendant is a legally single entity or has a single name"). Instead, the "relevant inquiry . . . is whether there is a 'contract, combination . . . or conspiracy' amongst separate economic actors pursuing separate economic interests, such that the agreement deprives the marketplace of independent centers of decisionmaking, and therefore of diversity of entrepreneurial interests, and thus of actual or potential competition." *Id.* at 2212 (quotations and citations omitted).

For example, a parent corporation and its wholly-owned subsidiary "are incapable of conspiring with each other for purposes of § 1 of the Sherman Act." *Copperweld*, 467 U.S. at 777. Although a parent corporation and its wholly-owned subsidiary are legally separate entities, they lack "independent centers of decisionmaking" necessary to raise Section 1 concerns. *Id.* at 769. Likewise, "an internal agreement to implement a single, unitary firm's policies does not raise the antitrust dangers that § 1 was designed to police." *Id.* Nevertheless, the Court has "repeatedly found instances in which members of a legally single entity violated § 1 when the entity was controlled by a group of competitors and served, in essence, as a vehicle for ongoing concerted activity." *American Needle*, 130 S. Ct. at 2209 (listing cases).

The Fourth Circuit has similarly recognized that corporate agents are capable of a Section 1 conspiracy when they have independent personal stakes in the object of the conspiracy. *See American Chiropractic v. Trigon Healthcare*, 367 F.3d 212, 224 (4th Cir. 2004) ("We have continued to recognize . . . the independent personal stake exception."); *Greenville Publishing Co. v. Daily Reflector, Inc.*, 496 F.2d 391, 399-400 (4th Cir. 1974) (corporation found capable of conspiring with president of corporation because the officer had "an independent personal stake in achieving the corporation's illegal objective"). The "personal stake" principle is relevant only where the officers with the independent interests exercise some degree of control over the firm's decisionmaking process. *See Oksanen v. Page Memorial Hospital*, 945 F.2d 696, 705 (4th Cir. 1991) (en banc) ("If the officer cannot cause a restraint to be imposed and his firm would have taken the action anyway, then any independent interest is largely irrelevant to antitrust analysis.").

In the instant case, the ALJ correctly found that Board members were capable of conspiring because they are actual or potential competitors. As required by Section 90-22(b) of the Dental Practice Act, dentist Board members continued to operate separate dental practices while serving on the Board (IDF 6-8), giving them distinct and potentially competing economic interests. *Cf. American Needle*, 130 S. Ct. at 2213 (NFL teams are "potentially competing suppliers"). At oral argument, Respondent appeared to acknowledge that members of the Board are potential competitors. (Oral Argument Tr. 9-10 ("they are potential competitors").)

In addition, Board members had a personal financial interest in excluding non-dentist teeth whitening services. *Id.* at 2215 ("Agreements made within a firm can constitute concerted action covered by § 1 when the parties to the agreement act on interests separate from those of the firm itself . . . ."). At least eight of the ten dentist Board members serving from 2005 to 2010 (Drs. Allen, Burnham, Feingold, Hardesty,

Holland, Morgan, Owens, and Wester) provided teeth whitening services in their private practices. (IDF at 6-9; *see also* IDF 32 (identifying Board members).) For example, during their tenures on the Board, one Board member earned over $75,000 from teeth whitening services, while another earned over $40,000.[11] (IDF 10-11, 32.) The dentist members of the Board therefore stood to benefit financially from the challenged restrictions. (Baumer, Tr. 1856; *see also* IDF 102 (noting growth in dentist-provided teeth whitening).) In addition, all dentist Board members were elected to the Board by other licensed dentists, many of whom also have a financial interest in limiting the practice of teeth whitening to dentists. (IDF 15-23.) Thus, as the ALJ concluded, "Board members have a significant, nontrivial financial interest in the business of their profession, including teeth whitening." (IDF 12.)

Respondent's economic expert acknowledged that Board members have a financial interest in the challenged restrictions.[12] Respondent's economist testified that state regulatory boards can be, and have been, used to exclude competition and augment the income of licensed practitioners. (Baumer, Tr. 1763 (referring to CX822 at 19), 1848-50, 1855-56, 1884, 1896-98, 1901-03, 1911-13, 1915; RX078 at 8.) He also acknowledged that the Board's decision to ban non-dentist teeth whitening may have been "influenced by the impact on the bottom line." (Baumer, Tr. 1859-62; *see also* Baumer, Tr. 1781 (similar).)

Our finding that Board members have a capacity to conspire is buttressed by the significant degree of control exercised by dentist members of the Board with respect to the challenged restraints. A majority of the members of the Board had a personal financial interest in excluding non-dentist teeth whitening. (IDF 2, 6-11.) Furthermore, all of the key decisionmakers in teeth whitening matters had a personal stake in the conspiracy because dentists were the only Board members involved in teeth whitening investigations (the consumer and dental hygienist Board members were excluded). (IDF 40, 59-60, 184, 192-93.)

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[11] Respondent asserts that Findings 9, 10, 11, 104, and 233 exaggerate the financial interest of the Board and other dentists in teeth whitening by including income from forms of teeth whitening services outside the ALJ's relevant market. (RAB at 11-15.) In light of our conclusion that the relevant market is broader than that found by the ALJ (*see* Section VI.B.2.a, *infra*), Respondent's objections to these findings are moot. Respondent also objects to a citation to Dr. Baumer's testimony in Finding 12 but not the finding itself. (RAB at 15-16.) Even without the disputed citation, we would affirm Finding 12 based on the other evidence cited by the ALJ.

[12] The following exchange with Respondent's economist, Dr. Baumer, occurred at page 1856 of the trial transcript:

> Q. Now . . . you believe that the board, the North Carolina State Board of Dental Examiners, is concerned about the financial interest of dentists in North Carolina; correct?
> A. Yes. I think they are.
> Q. And you believe that dentists in North Carolina do have a financial interest in excluding non-dentist teeth whitening; correct?
> A. There is a financial aspect to that. Correct.
> Q. And that they have a financial interest in excluding the non-dentist teeth whiteners; correct?
> A. Yes.

Respondent nevertheless argues that dentist board members lack a financial interest in the challenged restraints because there is not a "significant degree" of competition between dentist-provided teeth whitening and non-dentist provided teeth whitening. (RRB at 3-4.) This assertion is contradicted not only by the testimony of Respondent's own economic expert, who stated that there is a high cross-elasticity between these two forms of teeth whitening (Baumer, Tr. 1842-45), but also by Respondent's acknowledgement that these two services are in the same relevant market (RAB at 10-11, 27; *see also* Baumer, Tr. 1711; *cf.* Kwoka, Tr. 994-1002 (testimony of Complaint Counsel's expert)).

Thus, despite the general principle that joint action by corporate officers is usually "not the sort of 'combination' that § 1 is intended to cover," *American Needle*, 130 S. Ct. at 2212, here the evidence shows that the dentist members of the Board were separate economic actors pursuing separate economic interests whose joint decisions could deprive the marketplace of actual or potential competition. Because their agreement joined together "independent centers of decisionmaking" *id.* at 2209, 2211, 2212, 2213, 2214 (quoting *Copperweld*, 467 U.S. at 769), the Board members were capable of conspiring under Section 1.

In a similar case, the board of directors of a nationwide moving company adopted a policy restricting its local affiliates' ability to offer interstate carriage. The Court of Appeals for the D.C. Circuit concluded that the directors had formed a Section 1 conspiracy because nine of the eleven board members were "actual or potential competitors" and stood to personally benefit from the challenged restriction. *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 215 (D.C. Cir. 1986).

Our conclusion is also consistent with our disposition of the *Massachusetts Board* case. That matter involved a challenge to a state agency's restrictions on the use of truthful advertising by its optometrist licensees. We concluded that the members of the optometry board were separate legal entities capable of conspiring in restraint of trade because each optometrist on the board was engaged in the private practice of optometry and stood to benefit from the restraints in question. *See Massachusetts Board of Registration in Optometry*, 110 F.T.C. 549, 610-11 (1988).

We turn next to the issue of whether the element of concerted action has been satisfied. *See Oksanen*, 945 F.2d at 706 (even if there is a "capacity to conspire," a court must determine whether a conspiracy actually exists).

A plaintiff alleging conspiracy must demonstrate that the parties "had a conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto*, 465 U.S. at 768; *Thompson Everett, Inc. v. National Cable Advertising, L.P.*, 57 F.3d 1317, 1324 (4th Cir. 1995) (same). *Monsanto* requires "something more" than independent action, and must rise to the level of "a unity of purpose or a common design and understanding, or a meeting of minds." *Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, Inc.*, 878 F.2d 801, 805 (4th Cir. 1989).

A plaintiff may demonstrate an agreement by "direct or circumstantial evidence." *Monsanto*, 465 U.S. at 768; *see also American Chiropractic*, 367 F.3d at 225-26 ("A plaintiff can offer direct or circumstantial evidence to prove concerted action."); *Laurel Sand & Gravel, Inc. v. CSX Transp., Inc.*, 924 F.2d 539, 542 (4th Cir. 1991) ("An agreement to restrain trade may be inferred from other conduct."). But care must be taken with respect to inferences drawn from circumstantial evidence because "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986). For example, "mere contacts and communications, or the mere opportunity to conspire . . . is insufficient evidence from which to infer an antitrust conspiracy." *Oksanen*, 945 F.2d at 706 (quoting *Cooper v. Forsyth County Hospital Authority*, 789 F.2d 278, 281 (4th Cir. 1986)).

The concerted action requirement can be satisfied even where one or more of the co-conspirators had differing motives or goals or "acted unwillingly, reluctantly, or only in response to coercion"; it is sufficient to show that the co-conspirators "acquiesced in an illegal scheme." *Dickson*, 309 F.3d at 205 (quotation and citation omitted); *see also Virginia Vermiculite*, 156 F.3d at 541 ("[I]t is not necessary that HGSI have shared Grace's alleged anticompetitive motive in entering into a proscribed restraint; it is sufficient that HGSI, regardless of its own motive, merely acquiesced in the restraint with the knowledge that it would have anticompetitive effects."); *Duplan Corp. v. Deering Milliken Inc.*, 594 F.2d 979, 982 (4th Cir. 1979) ("Where, as here, the [defendants] were knowing participants in a scheme whose effect was to restrain trade, the fact that their motives were different from or even in conflict with those of the other conspirators is immaterial.").

Here, there is direct evidence demonstrating that the dentist members of the Board had a common plan to exclude non-dentist teeth whitening providers from the market. On several occasions, the Board discussed teeth whitening services provided by non-dentists and then voted to take action to restrict these services. (IDF 264, 276, 289, 317, 318, 321.) For example:

- At the Board's February 2007 meeting, the Board discussed the increase in complaints involving spas offering teeth whitening procedures and voted to send a letter to the cosmetology board with the goal of discouraging this practice. (IDF 317-18, 321, 323.) The Board's then-Secretary and Treasurer testified that there was "consensus" on the Board to send the letter and that "nobody had any objections." (CX565 at 62 (Hardesty Dep. at 240).)

- At its August 2007 Board meeting, the Board directed its staff to send letters to two teeth whitening manufacturers with the intention of discouraging or preventing the companies from providing products and equipment to non-dentist teeth whitening service providers in North Carolina. (IDF 264, 276, 286.)

- In late 2007 the Board unanimously voted to send letters to mall operators to dissuade them from leasing space to non-dentist teeth whiteners. (IDF 289, 292.)

There is also a wealth of circumstantial evidence tending to show that the members of the Board had a common scheme to exclude non-dentist teeth whiteners. In particular, members of the Board engaged in a consistent practice of discouraging non-dentist teeth whitening services by sending dozens of cease and desist letters and other communications to providers of these services (IDF 207-45), manufacturers and distributors (IDF 261-80), mall owners and operators (IDF 288-93), the cosmetology board (IDF 317-22), and potential entrants (IDF 284). These communications were similar, regardless of the recipient (IDF 208-26, 262, 288, 320), and they had a common objective of discouraging non-dentist teeth whitening (IDF 234-45, 286-87, 293, 323). These cease and desist letters were on Board letterhead, indicated that the directives came from the Board, and stated that responses should be directed to the Board. (IDF 219 (listing exhibits).) Respondent acknowledged that the Board's case officers, all of whom were dentist Board members (IDF 184), were acting within their delegated authority when they sent the cease and desist letters. (Oral Argument Tr. 11-12.) The Board never took any steps to repudiate the actions of its case officers.

We agree with the ALJ that the consistency and frequency of the Board's message regarding non-dentist teeth whitening, over the course of several years and across the tenures of varying Board members (IDF 32), constitute probative circumstantial evidence of an agreement among Board members. (ID at 78.) We also find significant that on at least three occasions, members of the Board or Board counsel informed third parties that the Board was taking action against non-dentist teeth whitening kiosks. (IDF 201, 205; CX254 at 1; *see also* CX369 (noting that the Board had a "strategy" for addressing teeth whitening kiosks).) For example, after receiving an inquiry from a dentist about a teeth whitening kiosk in 2008, the Board's Chief Operations Officer responded that "we are currently going forth to do battle" with "bleaching kiosks" and that "[w]e've sent out numerous cease and desist orders throughout the state." (IDF 201; CX404 at 1-2.)

Respondent argues that the Board's use of multiple case officers and case-specific recommendations when investigating teeth whitening complaints demonstrates that Board members were acting independently when they sent the cease and desist letters. (RAB at 26.) To the contrary, the fact that multiple agents of the Board delivered a consistent message over a period of several years to numerous and various types of third parties with no repudiation by the Board tends to negate the possibility that they were acting independently and reinforces our conclusion that the Board's representatives were acting pursuant to the Board's agreement and plan to exclude non-dentist teeth whiteners.

B. RESTRAINT OF TRADE

In this Section, we review the challenged conduct of the Board under the rule of reason using the three alternative modes of analysis described in *Indiana Federation of Dentists*. We find that the inherently suspect nature of the conduct, the indirect evidence, and the direct evidence all indicate that the Board's concerted action is anticompetitive.

We also find that Respondent has failed to advance a legitimate procompetitive justification for its conduct.

1. The Board's Conduct under *Polygram*'s "Inherently Suspect" Framework

As discussed in Section V above, "not all trade restraints require the same degree of fact-gathering and analysis." *Polygram*, 136 F.T.C. at 327 (citing *Standard Oil Co. v. United States*, 221 U.S. 1, 65 (1911)); *see also California Dental*, 526 U.S. at 781 ("What is required . . . is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint"). Thus, in *Polygram*, we held that in a limited category of cases—when "the conduct at issue is inherently suspect owing to its likely tendency to suppress competition"—our "scrutiny of the restraint itself . . . without consideration of market power" is sufficient to condemn the restraint, unless the defendant can articulate a legitimate justification for that restraint. 136 F.T.C. at 344; *see also Oksanen*, 945 F.2d at 709 ("a detailed inquiry into a firm's market power is not essential when the anticompetitive effects of its practices are obvious"); *North Texas Specialty Physicians*, 528 F.3d at 362 (physicians group's collective negotiations of fee-for-service contracts "bear a very close resemblance to horizontal price fixing" such that inherently suspect analysis was appropriate); *Realcomp*, 2009 FTC LEXIS 250, at *55-73 (finding that restrictions imposed by real estate multiple listings service were inherently suspect because they "were, in essence, an agreement among horizontal competitors to restrict the availability of information" to consumers and that restricted "the ability of low-cost, limited service" rivals to compete).

a. The Board's Conduct is Inherently Suspect

Applying *Polygram*'s "inherently suspect" framework, we conclude that the challenged conduct of the Board can reasonably be characterized as "giv[ing] rise to an intuitively obvious inference of anticompetitive effect." *California Dental*, 526 U.S. at 781; *see also Continental Airlines, Inc. v. United Airlines, Inc.*, 277 F.3d 499, 509 (4th Cir. 2002) ("the anticompetitive impact . . . is clear from a quick look"). Both accepted economic theory and past judicial experience with analogous conduct support our finding that "the experience of the market has been so clear . . . about the principal tendency" of this conduct so as to enable us to draw "a confident conclusion" that—absent any legitimate justification advanced by Respondent—competition and consumers are harmed by the Board's challenged practices. *California Dental*, 526 U.S. at 781.

The challenged conduct is, at its core, concerted action excluding a lower-cost and popular group of competitors. The Board not only foreclosed non-dentist providers from access to equipment suppliers and customers, but also directly excluded these providers from the market by sending them cease and desist letters.

Teeth whitening is one of the most popular cosmetic dentistry procedures, resulting in significant income to North Carolina dentists, including those on the Board. (IDF 9-12, 104, 233.) In response to the popularity of teeth whitening, non-dentists began offering teeth whitening services in North Carolina at mall kiosks and other

locations. (IDF 137-38.) These providers charged significantly less than dentists despite achieving similar results. (IDF 117, 147, 150)

Dentists soon began complaining to the Board about the lower prices offered by non-dentists for teeth whitening services. (IDF 194-96, 232.) Members of the Board likewise recognized that proliferation of non-dentist teeth whitening operations would adversely affect the income of dentists. (IDF 159-61.)

In response to the complaints, the Board issued dozens of cease and desist letters to non-dentist teeth whitening service providers and distributors of teeth whitening equipment. (IDF 208-09, 216-18, 230, 262-83.) Some of the letters stated that the sale or use of non-dentist teeth whitening products constituted a misdemeanor. (IDF 265-66, 280.) The Board viewed these letters as having the force of law and recipients of these communications had a similar understanding. (IDF 240-46.) In addition, the Board warned potential entrants not to offer teeth whitening services unless supervised by a dentist (IDF 284-85), sent letters to mall owners and operators urging them not to lease space to non-dentist teeth whitening providers (IDF 97, 288-93), and enlisted the assistance of the cosmetology board to warn its licensees that providing teeth whitening services could be a misdemeanor. (IDF 314-23.) The goal and effect of sending these letters and other communications was to stop non-dentists from providing teeth whitening services. (IDF 234-57, 286-87.)

No advanced degree in economics is needed to recognize that exclusion of products from the marketplace that are desired by consumers is likely to harm competition and consumers, absent a compelling justification. Users of the excluded product are made worse off because they must either shift to other, less desirable types of products, or forgo making a purchase entirely. (Kwoka, Tr. 1008-13, 1016; Baumer, Tr. 1720-21, 1724; CX822 at 10.) Consumers of similar non-excluded products are also likely to be harmed because suppliers of those products will face less competition and therefore have a greater ability to raise prices or reduce service. (Kwoka, Tr. 1013-17; Baumer, Tr. 1700, 1763, 1781; CX822 at 10-11.) Excluding a rival product from the marketplace not only eliminates current competition from those providers, but also eliminates prospective competition from future entrants. (Kwoka, Tr. 1017-18; CX822 at 12.) These future competitors could offer additional sources of supply for the product, as well as new product innovations. (Kwoka, Tr. 1011, 1017-18.)

Respondent's economic expert acknowledged that the challenged conduct would tend to restrict supply and cause higher prices. (Baumer, Tr. 1700, 1719-21, 1724, 1726-27 (referring to CX822 at 13), 1763, 1781, 1839-41.) He testified on several occasions that this conclusion was a matter of "Econ 101," meaning that it required no more than a rudimentary level of economic analysis. (Baumer, Tr. 1721, 1724, 1763, 1781, 1840.) He explained that product exclusion would harm competition and consumers in terms of both price and choice.[13] (Baumer, Tr. 1841.)

[13] Dr. Baumer qualified this testimony by noting that consumers might not be harmed by higher prices and fewer competitive options if they "felt like the market was safer" and, as a result, increased their

Agreements to exclude an entire class of competitors from the marketplace by foreclosing access to suppliers, customers, or the market itself have long been treated as per se illegal or presumptively illegal under the antitrust laws. In these cases, the methods of exclusion have varied but the holdings are consistent in condemning such conduct with little, if any, consideration of any purported defenses.

In *Fashion Originators' Guild of America, Inc. v. FTC*, 312 U.S. 457 (1941), manufacturers of women's garments, working through an industry association, boycotted retailers that sold copies of their original designs. The Supreme Court affirmed the FTC's conclusion that this scheme was an unfair method of competition, notwithstanding the organization's claim that the copying of garment designs was a tortious act. The Court explained that the association's policy "has both as its necessary tendency and as its purpose and effect the direct suppression of competition." *Id.* at 465. The Court was particularly concerned that the scheme, if successful, would have eliminated an entire class of competitors—as the Court called it, a "rival method of competition"—from the marketplace. *Id.* at 467. The Court concluded that the manufacturers' prevention-of-torts defense was not cognizable under the antitrust laws: "even if copying were an acknowledged tort under the law of every state, that situation would not justify petitioners in combining together to regulate and restrain interstate commerce in violation of federal law." *Id.* at 468.

The Supreme Court addressed exclusion of a class of competitors again in *United States v. General Motors Corp.*, 384 U.S. 127 (1966). In that case, a group of Chevrolet automobile dealers successfully pressured General Motors not to sell to dealers that resold their inventory through discounters. The conspiring dealers then established a monitoring venture to ensure compliance. The Court found that the "[e]xclusion of traders from the market by means of combination or conspiracy is . . . inconsistent with the free-market principles embodied in the Sherman Act" and per se illegal. *Id.* at 146. The Court was especially troubled that one of the purposes of the concerted effort "was to protect franchised dealers from real or apparent price competition." *Id.* at 147. Consistent with the *Fashion Originators' Guild* case, the Court declined to consider the parties' asserted justification—in this case, that sales to discounters violated the dealers' franchise agreements. *Id.* at 139-40.

The Supreme Court has likewise held that agreements to exclude a single competitor are per se illegal or presumptively illegal. For example, in *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961), a manufacturer alleged that an industry association refused to grant a "seal of approval" to its ceramic gas burner because of the influence of competitors in the association. As a result of the association's action, the manufacturer's burner was "effectively excluded from the market." *Id.* at 658. The Court held that the plaintiff had alleged a per se illegal boycott because of its "monopolistic tendency," notwithstanding that the victim was limited to a single

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consumption of the remaining products in the market. (Baumer, Tr. 1724; *see also id.* at 1727.) However, Dr. Baumer did not offer an opinion, and Respondent has not identified any evidence, that (a) safety concerns currently inhibit some consumers from whitening their teeth or (b) that prohibiting non-dentist teeth whitening would lead to the perception that teeth whitening is a safer practice, thereby increasing overall demand for teeth whitening products.

manufacturer. *Id.* at 660 (quoting *Klor's, Inc. v. Broadway-Hale Stores*, 359 U.S. 207, 213 (1959)).

Similarly, in *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556 (1982), the dominant fuel cutoff manufacturer used its influence in ASME, a standards organization, to prevent the organization from approving a rival's alternative design. ASME's standards were so influential that, according to the Court, it was "in reality an extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce." *Id.* at 570 (quoting *Fashion Originators' Guild*, 312 U.S. at 465). The jury found ASME liable under Section 1, and the Court affirmed. While the issue before the Court was whether a standards organization could be liable for the acts of its agents, the Court nevertheless commented that the "anticompetitive practices of ASME's agents are repugnant to the antitrust laws." *Id.* at 574. Participants in standards organizations have "the power to frustrate competition in the marketplace . . . [and] to harm their employers' competitors through manipulation of [the standards organization's] codes." *Id.* at 571.

In its most recent decision addressing competitor exclusion, the Court, citing to *Fashion Originators' Guild*, *General Motors*, and *Radiant Burners*, held that certain concerted refusals to deal or group boycotts remain per se violations of the Sherman Act . *See Northwest Wholesale Stationers v. Pacific Stationary & Printing Co.*, 472 U.S. 284, 290 (1985); *see also Oksanen*, 945 F.2d at 708 ("Certain forms of agreements, such as varieties of group boycotts, have been classified as per se violations."). Where competitors "cut off access to a supply, facility, or market necessary to enable the boycotted firm to compete," *Northwest Wholesale Stationers*, 472 U.S. at 294, the conduct may be conclusively presumed to be anticompetitive, at least when it does not "enhance overall efficiency and make markets more competitive." *Id.* In contrast, courts apply the rule of reason to competitor exclusions if the restraints are imposed by a joint venture that lacks market power or exclusive access to an element essential to effective competition. *See id.* at 295-96.

Here, the challenged conduct consists of concerted action denying non-dentist teeth whiteners access to both suppliers and customers (by foreclosing access to retail space), as well as to the market itself. As such, the Board's conduct bears a close resemblance to conduct that the Supreme Court has condemned as per se illegal and that the Court continues to treat as conclusively anticompetitive under *Northwest Wholesale Stationers*. *Cf. North Texas Specialty Physicians*, 528 F.3d at 362 (inherently suspect analysis appropriate where restraints "bear a very close resemblance to horizontal price fixing"). Furthermore, as discussed below, this is not a case involving conduct plausibly designed to enhance competition for teeth whitening products or services.

Respondent contends that *Fashion Originators' Guild*, *General Motors*, *Radiant Burners*, *Hydrolevel*, and *Northwest Wholesale Stationers* are inapposite because they involved private organizations, such as professional associations, rather than state licensing boards. (RRB at 16-17.) We disagree. The competitive concern in both of these contexts is that an organization with the power to exclude is used to facilitate or enforce an anticompetitive agreement among private parties. If anything, state agencies,

such as the Board, are likely to have greater ability to enforce restrictions than private organizations. The Court has noted the significant potential for competitive injury stemming from concerted conduct among private parties enforced by state agencies. *See, e.g.*, *Hydrolevel*, 456 U.S. at 570-74 (condemning an agreement among private actors that was enforced by state agencies); *Allied Tube & Conduit Corp. v. Indian Head*, 486 U.S. 492, 500 (1988) (an agreement to manipulate a vote of a standard setting organization whose codes were routinely adopted by state and local governments raises a "serious potential for anticompetitive harm").

Furthermore, as conceded by Respondent's economic expert, state licensing boards, including dental boards, have a history of enforcing restrictions designed to enhance the income of their licensees at the expense of consumers, even though members of these organizations had taken oaths to protect the public health.[14] (Baumer, Tr. 1847-54, 1855 ("self-interest definitely had an impact"), 1884, 1896-1901, 1912-17; CX826 at 11 ("The public lost at the expense of the professional.") (Baumer, Dep. at 36-37)). Some medical boards and other professional healthcare boards continue to engage in these anticompetitive practices. (Baumer, Tr. 1898, 1901-04, 1911-12; CX826 at 12, 36 (Baumer Dep. at 39, 136).) As a result, "when there's licensing taking place, my ears go up, . . . [and] we look very carefully for evidence of anticompetitive behavior." (Baumer, Tr. 1897.) This testimony reinforces our conclusion that a more deferential standard should not be applied to concerted activity enforced through a state agency controlled by financially interested actors than through a private body.

In sum, the challenged conduct—an agreement among competitors to exclude other competitors from the market by preventing their access to suppliers, customers, and the market itself—bears a close resemblance to conduct condemned by the Supreme Court as per se illegal. As conceded by Respondent's economic expert, such conduct has an obvious tendency to suppress competition, increase prices, and harm consumers of teeth whitening products and services. In particular, the restraints alleviate downward price pressure on dentists and eliminate an entire class of product desired by some consumers. We therefore conclude that the challenged conduct is inherently suspect under *Polygram* and thus presumptively unreasonable unless Respondent can produce a legitimate justification.

b. The Board's Proffered Justifications

Although the Board's actions had a clear tendency to suppress competition and harm consumers, the *Polygram* framework requires consideration of whether Respondent can overcome this presumption of unreasonableness by showing that the practice has "some countervailing procompetitive virtue." *Indiana Federation of Dentists*, 476 U.S. at 459; *see also Northwest Wholesale Stationers*, 472 U.S. at 294 (practices can be "justified by plausible arguments that they were intended to enhance overall efficiency and make markets more competitive"); *Continental Airlines*, 277 F.3d at 510 ("even

[14] Respondent's expert acknowledged that some of these concerns are presented by this case. In particular, Dr. Baumer observed that the Board is concerned about the financial interests of North Carolina dentists and that those interests could have affected the Board's decision to exclude non-dentist teeth whitening providers. (Baumer, Tr. 1856-62.)

when a court eschews a full rule-of-reason analysis and so forgoes detailed examination of the relevant market, it must carefully consider a challenged restriction's possible procompetitive justifications").

A cognizable justification is ordinarily one that stems from measures that increase output or improve product quality, service, or innovation. *See Indiana Federation of Dentists*, 476 U.S. at 459 (procompetitive justifications include "creation of efficiencies in the operation of a market or the provision of goods and services"); *Broadcast Music*, 441 U.S. at 19-20 (courts should examine whether the practice will "increase economic efficiency and render markets more, rather than less, competitive" (quotation and citation omitted)); *Paladin Associates v. Montana Power Co.*, 328 F.3d 1145, 1157 (3d Cir. 2003) ("improving customer choice" and reducing costs are procompetitive justifications); *Polygram*, 136 F.T.C. at 345-46.

A plausible justification is one that "cannot be rejected without extensive factual inquiry." *Polygram*, 136 F.T.C. at 347. "The defendant, however, must do more than merely assert that its purported justification benefits consumers . . . [rather,] it must articulate the specific link between the challenged restraint and the purported justification." *Id.*; *see also North Texas Specialty Physicians*, 528 F.3d at 368 ("some facial plausibility" of purported justification insufficient to rebut liability under abbreviated rule of reason analysis).

If a justification is not only cognizable but also plausible, then further examination of the restraint's effect on competition is warranted. Otherwise, "the case is at an end and the practices are condemned." *Polygram*, 136 F.T.C. at 345.

Respondent offers three justifications for its conduct, all of which were rejected by the ALJ.[15] Respondent's first asserted defense is that its actions were intended to promote public health and welfare. Respondent asserts that there are health and safety risks when teeth whitening is performed by a non-dentist and that the ALJ erred by not making any findings as to the safety of non-dentist teeth whitening. (RAB at 7-10, 39.) Similarly, Respondent urges that we recognize a defense, separate and apart from the state action defense, based on a state agency's enforcement of a state statute. (RAB at 29-34, 39.)

Courts have rejected social welfare and public safety concerns as cognizable justifications for restraints on competition. In *Professional Engineers*, the Supreme Court reviewed a trade association ethics rule that effectively prohibited engineers from engaging in competitive bidding. The association asserted as a defense that "awarding engineering contracts to the lowest bidder, regardless of quality, would be dangerous to

[15] Respondent also asserts as a justification that its conduct constituted state action, an argument that the Commission rejected in its February 3, 2011 decision. *See North Carolina Dental*, 151 F.T.C. at 615-33. In the proceedings below, Respondent asserted that permitting non-dentists to perform teeth whitening could result in the production of an inferior service. The ALJ rejected that argument, explaining that such a claim was tantamount to an assertion that competition itself is harmful (ID at 108-09), and Respondent does not contest the ALJ's resolution of that issue here.

public health, safety, and welfare." *Professional Engineers*, 435 U.S. at 685. The Court held that such a defense was not cognizable under the Sherman Act:

> The Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services. . . . The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain—quality, service, safety, and durability—and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers. . . . . The fact that engineers are often involved in large-scale projects significantly affecting the public safety does not alter our analysis. Exceptions to the Sherman Act for potentially dangerous goods and services would be tantamount to a repeal of the statute. In our complex economy, the number of items that may cause serious harm is almost endless . . . .

Id. at 695. The association's defense that competition would lead consumers to choose dangerous and inferior quality services was therefore rejected as a matter of law.

Similarly, in *Indiana Federation of Dentists*, the Court held that a health and safety defense was not available for an alleged Sherman Act violation in the dental field. In that case, a group of dentists agreed not to submit x-rays to insurers, asserting that "the provision of x-rays might lead the insurers to make inaccurate determinations of the proper level of care and thus injure the health of the insured patients." 476 U.S. at 452. Accepting this argument, according to the Court, would have been "nothing less than a frontal assault on the basic policy of the Sherman Act." *Id.* at 463 (quoting *Professional Engineers*, 435 U.S. at 695). The Court explained that prevention of "unwise and even dangerous choices" was not a cognizable justification for collusion. *Id.* at 463.

In *Virginia Academy of Clinical Psychologists v. Blue Shield of Virginia*, 624 F.2d 476 (4th Cir. 1980), two health plans controlled by physicians agreed not to pay for services rendered by clinical psychologists unless those services were billed through a physician. The Fourth Circuit, reversing the district court, found that the policy would reduce "consumer and provider alternatives" and increase costs. *Id.* at 486. The court rejected the health plan's argument that physician supervision of psychologists was necessary for optimum health outcomes, explaining that "we are not inclined to condone anticompetitive conduct upon an incantation of 'good medical practice.'" *Id.* at 485; *see also Wilk v. AMA*, 719 F.2d 207, 228 (7th Cir. 1983) ("[A] generalized concern for the health, safety and welfare of members of the public . . ., however genuine and well-informed such a concern may be, affords no legal justification for economic measures to diminish competition with [chiropractors] by [some medical doctors].")

Respondent contends that the preceding line of cases is distinguishable because the cases do not involve a state agency acting pursuant to a state statute. Respondent asserts that a valid defense to a Sherman Act claim exists where a state agency is "promoting the public health and enforcing state law," even where the requirements of

the state action doctrine are not satisfied. (RAB at 32.) Although Respondent asserts that such a defense is consistent with a line of lower court cases allegedly justifying conduct based on "public service or ethical norms" (RAB at 31-32), Respondent does not cite to any cases on point and we are aware of no authority for such a defense.

To the extent that Respondent's claims are premised on principles of federalism and a concern with state prerogatives, the Supreme Court has already defined the contours for such a defense. *See Parker v. Brown*, 317 U.S. 341 (1943). Almost 70 years ago, the Supreme Court created the state action defense for state or private actors acting pursuant to a state regulatory program. As we concluded in our February 3, 2011 decision, that defense requires a showing of both "clear articulation" and "active supervision" for state boards controlled by financially interested members, such as Respondent. *See North Carolina Dental*, 151 F.T.C. at 617-28. Respondent's proposal would substantially weaken these requirements. As we understand Respondent's position, it would only have to show "articulation" to make out a defense, rather than both "clear articulation" and "active supervision." Given that the Supreme Court has already established a defense for Sherman Act claims based on the actions of state officials and that Respondent's proposed "enforcement of state law" defense has the potential to seriously undermine the state action doctrine, we see no reason to recognize Respondent's proposed new defense.

To the extent that Respondent's defense is meant to invoke a competitive analysis, Respondent has failed to explain why the Board's status as a state agency changes the likely competitive impact of its conduct and therefore renders the relevant case law rejecting health and safety defenses inapplicable. There is nothing in those decisions to suggest that they turned on this distinction. To the contrary, the Court rejected the notion of a health or safety defense because it was extraneous to an analysis of competitive effects, not because of the private nature of the actors. *See Professional Engineers*, 435 U.S. at 695; *Indiana Federation of Dentists*, 476 U.S. at 463.

Respondent's public safety defense fails for another reason: the challenged actions of the Board are not consistent with its enforcement mandates under the Dental Practice Act. The Complaint does not challenge the Board's enforcement of the Dental Practice Act against non-dentist teeth whiteners in the state courts, which is the only way the Board is authorized to enforce the Act (other than referring a case to a state prosecutor). *See* N.C. General Statutes § 90-40.1; IDF 43, 44, 190; Response to Complaint ¶ 19; RAB at 2-3; RRB at 5. Rather, this proceeding challenges actions, including sending cease and desist letters to non-dentists, that were not authorized by the Dental Practice Act. *See* N.C. General Statutes §§ 90-27, -29, -40, -40.1; IDF 45-49, 190.

Finally, even if a public safety defense were cognizable under the antitrust laws, we would find that Respondent had failed to introduce sufficient evidence to establish such a justification.[16] Although several Board members identified a number of

[16] Respondent asserts that because Complaint Counsel did not file an appeal from the ALJ's Initial Decision, under FTC Rule of Practice 3.52(b), 16 C.F.R. § 3.52(b), the Commission may not make any new factual findings or legal conclusions requested by Complaint Counsel. (RRB at 1, 9.) Rule 3.52(b)

theoretical risks from non-dentist teeth whitening, none was able to cite to any clinical or empirical evidence validating any of these concerns. (Response to RFA 21, 38, 39; *see also* Hardesty, Tr. 2818, 2829; CX565 at 38 (Hardesty Dep. at 145); CX554 at 26 (Allen Dep. at 95-96); CX555 at 16, 26 (Brown Dep. at 55-56, 97); Wester, Tr. 1313-15, 1402, 1405-06; CX560 at 65-66 (Feingold Dep. at 252-54); CX567 at 37 (Holland Dep. at 138-40); CX564 at 16 (Hall Dep. at 55-56); Owens, Tr. 1664.) Likewise, Respondent's expert witness, Dr. Haywood, testified that he was unaware of any scientific evidence demonstrating any consumer injury from non-dentist teeth whitening.[17] (Haywood, Tr. 2696, 2713-14, 2729; CX402 at 5 ("The effects on pulp have . . . no clinical consequence other than immediate but transient sensitivity."))

Respondent points to four alleged instances of possible consumer injury caused by non-dentist teeth whitening that were brought to the Board's attention. (RAB at 10.) However, we question whether four anecdotal reports of harm over a multi-year period based on products considered safe by the FDA (Giniger, Tr. 155, 250, 256) and used over a million times over the last twenty years (Giniger, Tr. 122, 257) could constitute adequate evidence of a potential health or safety risk. (Kwoka, Tr. 1078.) Compounding this concern is the lack of any investigation or medical documentation with respect to two of the four reports of injury. (RX17 at 1, 2.) In the third case, a dentist's examination revealed that the patient suffered from bone loss and infection unrelated to the teeth whitening procedure and that any discomfort from the teeth whitening procedure would be temporary and treatable. (CX575 at 15-24 (Hasson Dep. at 53-89).) The fourth reported case of harm is somewhat more compelling, but even in this case, the reported injuries do not appear to have been permanent and may have been caused by a preexisting pathology. (Runsick, Tr. 2136; Giniger, Tr. 274-77.)

The lack of contemporaneous evidence that the challenged conduct was motivated by health or safety concerns reinforces our rejection of Respondent's public safety defense on the merits. Respondent has not identified any evidence that the Board concluded prior to embarking on the challenged conduct that non-dentist teeth whitening was an unsafe practice. Indeed, Respondent was unable to point us to any such evidence at oral argument. (Oral Argument Tr. 17-19, 21-22, 33-34.) Moreover, the Board began issuing cease and desist letters two years before it received any reports of consumer injury. (*Compare* CX38 at 1 (first cease and desist letter, dated January 11, 2006), *with* CX476 at 1 (first complaint claiming injury, dated February 20, 2008); *see also* Respondent's Proposed Finding of Fact 459 (acknowledging that the Board received the

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contains no such limitation; furthermore, under Rule 3.54, 16 C.F.R. § 3.54, the Commission can conduct a *de novo* review of the entire record and make factual findings and conclusions of law to the same extent as the ALJ.

[17] Dr. Haywood's principal concern with non-dentist teeth whitening is that it may mask a pathology. (Haywood, Tr. 2950; CX823 at 20 (Haywood Dep. at 70)). However, as Dr. Giniger testified, it is highly unlikely that non-dental teeth bleaching would make a tooth so white as to make a pathology undetectable by a dentist or for a pathology not to present other symptoms such as swelling, purulence, pain, or redness. (Giniger, Tr. 301-20, 356, 437-38). Furthermore, there are no studies or case reports identifying an incident of masked pathology from any form of teeth bleaching (Giniger, Tr. 301-02, 319-20; Haywood, Tr. 2734-35, 2928-32), despite the tens of millions of instances of over-the-counter teeth whitening (CX585 at 9).

first complaint of injury "in or about 2008").) Indeed, with just two possible exceptions—the cease and desist letters to Port City Tanning and Lite Bright—none of the challenged conduct of the Board appears to have been motivated by even the pretext of specific health or safety concerns. (CX59 (cease and desist letter to Port City Tanning); RX21 at 3-7 (complaint of injury regarding Port City Tanning); CX388 (cease and desist letter to Lite Bright); RX17 at 1, 2 (complaints of injury regarding Lite Bright)).

In contrast, there was a wealth of evidence presented at trial suggesting that non-dentist provided teeth whitening is a safe cosmetic procedure. (Giniger, Tr. 121-24, 134-35, 145-47, 155-57, 212-30, 239-65, 354-56, 445-47, 453-55; Nelson, Tr. 771; Osborn, Tr. 664-65; Valentine, Tr. 547.) Despite the millions of teeth whitening procedures performed by non-dentists, Respondent points to no studies suggesting any health risks (other than transient sensitivity) from the procedure. (*Cf.* Giniger, Tr. 121-23, 147, 217-19, 257-58, 355-56, 453-55 (asserting that there are no studies indicating a health risk from non-dental teeth whitening).) Consequently, the record as a whole fails to substantiate Respondent's public safety claims.

Respondent's second defense is that its actions were intended to promote "legal competition." (RAB at 20, 31.) As an initial matter, however, North Carolina courts have never concluded that teeth whitening services provided by non-dentists are unlawful. (ID at 8, 109; Oral Argument Tr. 49.) More significantly, the Supreme Court has repeatedly rejected this argument as a matter of antitrust doctrine. In *Indiana Federation of Dentists*, a group of dentists attempted to justify their withholding of x-rays from insurance companies by arguing that an insurance company's review of dental x-rays would constitute the unauthorized practice of dentistry under state law. The Court dismissed this argument: "That a particular practice may be unlawful is not, in itself, a sufficient justification for collusion among competitors to prevent it." 476 U.S. at 465. Likewise, in *Fashion Originators' Guild*, the Court held that even if the sale of the excluded products was tortious, "that situation would not justify petitioners in combining together to regulate and restrain interstate commerce in violation of federal law." 312 U.S. at 468. In both of these cases, the Court found it unnecessary to decide whether the excluded product or practice actually violated state law. Accordingly, we do not credit this defense.

Respondent's third defense is that it acted "in good faith." (RAB at 32.) This is not a valid defense under the antitrust laws. The Supreme Court has held that "good motives will not validate an otherwise anticompetitive practice." *NCAA*, 468 U.S. at 101 n.23; *see also United States v. Griffith*, 334 U.S. 100, 105-06 (1948) (practice may be condemned even if respondent "had no intent or purpose unreasonably to restrain trade"); *Associated Press v. United States*, 326 U.S. 1, 16 n.15 (1945) ("the Sherman Act cannot 'be evaded by good motives. The law . . . cannot be set up against it in a supposed accommodation of its policy with the good intention of parties . . . .'" (quoting *Standard Sanitary Manufacturing Co. v. United States*, 226 U.S. 20, 49 (1912))); *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918) (rejecting notion that "a good intention will save an otherwise objectionable regulation").

Accordingly, under *Polygram*'s "inherently suspect" framework, we conclude that the Board's conduct is unreasonable and violates both Section 1 of the Sherman Act and Section 5 of the FTC Act. We next consider whether a more elaborate rule of reason analysis, encompassing considerations of market power and effects, provides an alternative basis for our conclusion that the Board's conduct is anticompetitive.

2. The Board's Conduct under the Full Rule of Reason

In this section, we evaluate the Board's conduct under a more fulsome rule of reason analysis and again conclude that the Board's conduct violates the antitrust laws. As indicated in Section V, *supra*, a plaintiff can establish an affirmative case in either of two ways. It can do so indirectly by demonstrating the defendant's market power, which, when combined with the anticompetitive nature of the restraints, provides the necessary confidence to predict the likelihood of anticompetitive effects. Or, the plaintiff can provide direct evidence of "actual, sustained adverse effects on competition" in the relevant markets, which would be "legally sufficient to support a finding that the challenged restraint was unreasonable"—whether or not the plaintiff has made any showing regarding market power. *Indiana Federation of Dentists*, 476 U.S. at 461; *see also Realcomp*, 635 F.3d at 825 ("If [Respondent's] challenged policies are shown to have anticompetitive effect, or if [Respondent] is shown to have market power and to have adopted policies *likely* to have an anticompetitive effect, then the burden shifts to [Respondent] to provide procompetitive justifications for the policies."); *Tops Markets, Inc. v. Quality Markets, Inc.*, 142 F.3d 90, 96 (2d Cir. 1998) (plaintiff has "two independent means by which to satisfy the adverse-effect requirement"—direct proof of "actual adverse effect on competition" or "indirectly by establishing . . . sufficient market power to cause an adverse effect on competition"); *Law*, 134 F.3d at 1019 ("plaintiff may establish anticompetitive effect indirectly by proving that the defendant possessed the requisite market power within a defined market or directly by showing actual anticompetitive effects"); *Brown University*, 5 F.3d at 668 (similar).

Under this full rule of reason analysis, we find support in the record for a conclusion that the Board's agreement is anticompetitive, which shifts the burden to Respondent to produce a legitimate countervailing justification in order to avoid condemnation. Since Respondent has failed to assert a legitimate, procompetitive justification, we conclude that the Board's concerted action violates Section 1 of the Sherman Act and Section 5 of the FTC Act.

a. The Board Possesses Market Power in the Market for Teeth Whitening Products and Services

At this stage of the proceeding, the parties do not dispute that the relevant market consists of four types of teeth whitening: dentist in-office services, dentist take-home kits,

non-dentist service providers, and over-the-counter products.[18] (RAB at 10-11, 27; CCAB at 32.) All four of these products perform the same function (teeth whitening) using a similar technique (application of a form of peroxide to the teeth). (IDF 106-50.) *See Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962) (the "boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it"); *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956); *Greenville Publishing Co. v. Daily Reflector, Inc.*, 496 F.2d 391, 399 (4th Cir. 1974) (a relevant market is defined by the scope of "reasonable interchangeability").

The record shows that market participants view themselves as offering comparable services, recognize that substantial price and non-price competition exists between them, and target their advertising toward consumers who may be considering using a different type of teeth whitening service. (IDF 157-69.) Respondent's economic expert testified that the four types of teeth whitening are differentiated products within an overall teeth whitening market. (Baumer, Tr. 1711.) He also testified that there is a high cross-elasticity among the four types of teeth whitening products. (Baumer, Tr. 1842-45.) Complaint Counsel's economic expert, while disclaiming an opinion on the relevant market, did not dispute Respondent's expert in this respect and further testified that "these alternative methods are in fact very much in competition with one another." (Kwoka, Tr. 997-1000.) The parties also agree that the relevant geographic market is North Carolina. (ID at 64.)

The ALJ concluded, and Respondent does not dispute,[19] that the Board has market power based on the Board's power to exclude competition. *See du Pont*, 351 U.S. at 391 ("Monopoly power is the power to control prices or exclude competition."); *Hydrolevel*, 456 U.S. at 570-71 (finding that standard setting organization had market power based on power to exclude). We agree.

The Board, as the agency with power to enforce the Dental Practice Act, has the authority to regulate and discipline dentists in North Carolina. *See* N.C. General Statutes §§ 90-30, -31, -34, -40, -40.1, -41, -42; *cf. Massachusetts Board of Optometry*, 110 F.T.C. at 588 (state optometry board possessed market power on account of its ability to regulate the business of optometry and "to impose sanctions on any optometrist who fails to obey its rules and regulations"). In addition, the Board was able to use its perceived authority to exclude non-dentists from providing teeth whitening services in North Carolina. (IDF 240-56, 324-27). Respondent's expert agreed, noting that the Board has "the power to exclude competition" (CX826 at 36 (Baumer Dep. at 136-37); *see also*

[18] In light of the parties' agreement on the relevant market, we have no need to consider whether same-day teeth whitening services (dentist in-office services and non-dentist providers) constitute an additional relevant market, as found by the ALJ. (ID at 63-71.)

[19] Respondent briefly contests the ALJ's finding of market power in its reply brief (RRB at 15) but failed to address this issue in its opening brief, thereby waiving the argument. Rule 3.52, 16 C.F.R. § 3.52 ("The Commission will not consider new arguments or matters raised in reply briefs that could have been raised earlier in the principal briefs."). As noted in the text, even absent a waiver, we would find that the Board had market power.

Baumer, Tr. 1722 ("The board has the power to exclude.")) and the power to impose entry barriers (Baumer, Tr. 1840).

b. Indirect Evidence of Anticompetitive Effects

The ALJ's uncontested finding of market power, coupled with our earlier determination that the challenged conduct would tend to suppress competition, provides "indirect" evidence that those policies have or likely will have anticompetitive effects. *See Craftsmen Limousine, Inc. v. Ford Motor Co.*, 491 F.3d 380, 388 (8th Cir. 2007); *Law*, 134 F.3d at 1019; *Tops Markets*, 142 F.3d at 96; *Levine v. Central Florida Medical Affiliates, Inc.*, 72 F.3d 1538, 1551 (11th Cir. 1996); *Brown University*, 5 F.3d at 669; *Realcomp*, 2009 FTC LEXIS 250, at *95. As the Sixth Circuit recently explained, "[m]arket power and the anticompetitive nature of the restraint are sufficient to show the potential for anticompetitive effects under a rule-of-reason analysis, and once this showing has been made, [Respondent] must offer procompetitive justifications." *Realcomp*, 635 F.3d at 827; *see also id.* at 827 n.6 (observing that "[o]ther circuits have permitted an inference of adverse effects based on a showing of market power and anticompetitive tendencies.").

In light of the Board's market power and the facially restrictive nature of the policies at issue, no additional analysis is required under the rule of reason to support our conclusion that the Board's restraints are unreasonable because they will predictably result in harm to competition.

c. Direct Evidence of Anticompetitive Effects

The ALJ found, and we agree, that the Board's concerted action resulted in the exclusion of non-dentist providers from the market and the prevention of new entry by potential suppliers, both of which injured competition and consumers. (ID at 97-104.) This finding of actual anticompetitive effects—which Respondent does not dispute in its appeal to the Commission—is by itself sufficient to shift the burden to Respondent to produce a procompetitive justification. *See Realcomp*, 635 F.3d at 827 ("If adverse effects are clear, inquiry into market power is unnecessary."); *Law*, 134 F.3d at 1019 ("showing actual anticompetitive effects" satisfies plaintiff's initial burden); *Brown University*, 5 F.3d at 668 (plaintiff can meet its initial burden under the rule of reason "by proving the existence of actual anticompetitive effects, such as reduction of output, increase in price, or deterioration in quality of goods or services" (citation omitted)).

The undisputed evidence shows that, as a result of the Board's actions—including sending cease and desist letters to providers and manufacturers, sending letters to mall operators, and posting a warning on the cosmetology board's website—numerous non-dentist teeth whitening providers in North Carolina stopped offering teeth whitening services. (IDF 246-56, 324-27; *see also* IDF 284-85 (potential entrants discouraged from entering).) The Board's actions also cut off access to leading suppliers of teeth whitening products and retail space used by non-dentist providers. (IDF 70-72, 98, 267-70, 272, 277-83, 294-313.) Respondent's economic expert acknowledged that "[n]ot surprisingly, the actions of the State Board were effective and many kiosk and spa operator[s] . . .

ceas[ed] their actions." (RX78 at 8; *see also* Baumer, Tr. 1720 ("we know that post-exclusion non-dentist teeth whitening is reduced"); Kwoka, Tr. 1136 ("the letters were effective").)

The parties' experts agreed that the Board's exclusion of non-dentist providers led to higher prices, although they disputed the extent of the price increase. (Kwoka, Tr. 1029-32 (there is "a substantial price effect"); Baumer, Tr. 1732 ("I can't disagree" with the claim that "there's a small impact" on price), 1815 (the Board's actions caused "maybe slightly higher prices"); RX140 at 11). In reaching these conclusions neither party's economic expert prepared a quantitative analysis of the price effects of the Board's restraints.

In light of the restraints' obvious disruption of the "proper functioning of the price-setting mechanism of the market," a precise quantification of the price increase was unnecessary. *Indiana Federation of Dentists*, 476 U.S. at 461-62; *see also United States v. Microsoft Corp.*, 253 F.3d 34, 79 (D.C. Cir. 2001) (when dealing with emerging competition, no showing of actual harm is required; the proper test is whether "the exclusion of nascent threats [would be] . . . reasonably capable of contributing significantly to a defendant's continued monopoly power."); *Realcomp*, 2009 FTC LEXIS 250, at *46 ("elaborate econometric proof that [the restraint] resulted in higher prices" is unnecessary (quotation omitted)). This is particularly true in this case, given the parties' agreement that data were not available to do a study of price effects. (Kwoka, Tr. 1029-39, 1187; Baumer, Tr. 1978-79; CX822 at 15.)

In addition to increasing prices, the Board's conduct deprived consumers of choice. *Realcomp*, 2009 FTC LEXIS 250, at *111 (liability under rule of reason appropriate if respondent's practices "narrow consumer choice or hinder the competitive process"). The Board deprived consumers of the option of going to a mall, salon, or spa for teeth whitening services. In addition, consumers can no longer obtain same-day teeth whitening services (unless their local dentist provides walk-in teeth whitening service). The courts recognize that the elimination of products desired by consumers reduces consumer welfare. *Indiana Federation of Dentists*, 476 U.S. at 459 (absent a procompetitive virtue, "an agreement limiting consumer choice . . . cannot be sustained under the Rule of Reason"); *Conwood Co. v. U.S. Tobacco Co.*, 290 F.3d 768, 789 (6th Cir. 2002) (defendant's "actions caused higher prices and reduced consumer choice, both of which are harmful to competition"). Both parties' experts agree. (Kwoka, Tr. 1031-33, 1102, 1181-82; Baumer, Tr. 1776 (referring to CX822 at 29); 1974-76; CX822 at 16.)

d. Procompetitive Justifications

Notwithstanding our finding that the Board's conduct is anticompetitive under a more fulsome rule of reason analysis, Respondent may be able to defeat a finding of liability if its practices can be "justified by plausible arguments that they were intended to enhance overall efficiency and make markets more competitive." *Northwest Wholesale Stationers*, 472 U.S. at 294.

As discussed at length in Section VI.B.1.b above, however, Respondent's proffered justifications fail to satisfy those standards. Respondent asserts that its effort to exclude non-dentist providers of teeth whitening services would promote public safety and protect "legal competition" for teeth whitening services. Under Supreme Court precedent, these are not valid justifications for anticompetitive conduct. Furthermore, the asserted defenses do not appear to be plausibly related to any goal of the antitrust laws, such as increasing output or innovation. Accordingly, Respondent has failed to overcome the anticompetitive effects of its conduct with any legitimate, procompetitive justifications. We therefore conclude that the Board's actions also violated the antitrust laws under a full rule of reason analysis.

VII. REMEDY

To remedy Respondent's violation of Section 5, the ALJ issued an Order prohibiting the Board from directing non-dentists to cease providing teeth whitening products and services. (ID at 110-17, 123-30.) The Order also requires the Board not to communicate to any current or prospective non-dentist provider, lessor of commercial property, or actual or prospective distributor of teeth whitening products that a non-dentist's teeth whitening products or services violate the Dental Practice Act. (ID at 112, 124.) However, the ALJ's Order expressly carves out certain Board actions from these prohibitions (to which we make one addition). The Order does not prohibit the Board from investigating and prosecuting suspected violations of the Dental Practice Act. Further, the Order permits the Board to communicate its opinion that certain teeth whitening products or services may violate the Dental Practice Act, and its bona fide intention to seek court action or to seek administrative remedies for suspected violations of the Act so long as such communications include a prescribed statement notifying the recipient that the Board cannot make legal determinations or order the recipient to discontinue providing teeth whitening products or services. Finally, the ALJ ordered the Board to send notices to parties affected by the Order, as well as various ancillary relief, including reporting and record keeping requirements to enable the Commission to verify compliance with the Order. (ID at 114-15, 125-27.)

The Commission is "clothed with wide discretion" to determine the type of order necessary to remedy a violation of FTC Act. *Chicago Bridge & Iron Co. v. FTC*, 534 F.3d 410, 441 (5th Cir. 2008); *see also Jacob Siegel Co. v. FTC*, 327 U.S. 608, 611 (1946); *American Medical Association*, 94 F.T.C. 701 (1979). The Commission has wide latitude to extend the order as needed to prevent future violations and remediate past harms. "Having established a violation, the Commission must 'be allowed effectively to close all roads to the prohibited goal, so that the order may not be by-passed with impunity.'" *American Medical Association*, 94 F.T.C. at 1010-11 (citing *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952)). However, the Commission's discretion is not unlimited; its remedy must be reasonably related to the violation. *Ruberoid*, 343 U.S. at 473; *Jacob Siegel*, 327 U.S. at 613.

The Commission has determined to issue a Final Order very similar to the ALJ's proposed remedy. The Final Order is reasonably tailored to remediating the effects of the Board's past violations and preventing future violations. Moreover, it provides an

effective remedy for Respondent's illegal conduct without impeding the Board's ability to fulfill its statutory role in the regulation of dentists and the practice of dentistry in North Carolina.

As discussed above and in the ALJ's opinion, the Board's illegal activity centered on enforcing its determination that non-dentists providing any teeth whitening services violated the Dental Practice Act by sending out various communications, including cease and desist letters, that exceeded its statutory authority. Section II of the Final Order prevents the Board from continuing these unlawful practices. It prohibits the Board from directing a non-dentist provider to stop providing teeth whitening products and services (Final Order § II, ¶ A), or impeding or discouraging non-dentist providers from providing teeth whitening products and services (Final Order § II, ¶ B).

Section II of the Final Order also requires the Board to cease and desist from communicating to any non-dentist provider that it is a violation of the Dental Practice Act for a non-dentist to provide teeth whitening goods and services, or that such provider's provision of teeth whitening products or services violates the Act. (Final Order § II, ¶ C.) The Final Order further prohibits the Board from making similar communications to third parties, including prospective providers of teeth whitening goods and services, current or prospective lessors of commercial property, and manufacturers or distributors of teeth whitening products. (Final Order § II, ¶¶ D-F.) The Final Order thus prohibits the types of communications that the Board used to exclude non-dentist providers from the provision of teeth whitening goods and services. Accordingly, these restrictions are reasonable and necessary to prevent future illegal activity by the Board. Further, the Board can effectively carry out its statutory responsibilities without such communications. Indeed, as the facts illustrate here, communications of the type prohibited by the Final Order may confuse recipients as to the actual role and authority of the Board. (IDF 246.)

To ensure the Board cannot indirectly accomplish what it has been barred from doing directly, Section II.G of the Final Order also prohibits the Board from inducing or assisting any other person in discouraging the provision of teeth whitening by non-dentist providers. This type of prohibition is well within the authority of the Commission. *See Ruberoid*, 343 U.S. at 473 (FTC orders need not be restricted to the "narrow lane" of the respondent's violation, but rather may "close all roads to the prohibited goal, so that its order may not be by-passed with impunity"); *Toys "R" Us*, 221 F.3d at 940 ("[T]he FTC is not limited to restating the law in its remedial orders. Such orders can restrict the options for a company that has violated § 5, to ensure that the violation will cease and competition will be restored."). This prohibition is substantively identical to the analogous provision in the ALJ's Order but incorporates a clarifying edit.

The final portion of Section II of the Final Order ensures that the Board will be able to carry out its legitimate statutory duties by excluding certain acts from the scope of the prohibitions contained in the Section. Specifically, it states that nothing in the Final Order prohibits the investigation and prosecution of non-dentists for alleged violations of the Dental Practice Act. Further, it ensures that the Final Order will not be read to

prevent the Board from communicating its opinion regarding whether a particular method of teeth whitening violates the Dental Practice Act or from providing notice of its bona fide intention to bring a legal proceeding against a person for violating the Dental Practice Act.

We add an additional provision to this portion of the Final Order to make it clear that the Board may also communicate factual information regarding changes to North Carolina statutes or future legal proceedings in North Carolina regarding teeth whitening services provided by non-dentist providers. (Final Order § II, second subsection (ii).) To ensure that these communications are not misleading as to the statutory authority and role of the Board, or otherwise violate the prohibitions contained in Section II, the Final Order requires the Board to include in the communications the disclosure set forth in Appendix A of the Final Order. We also clarify in the first subsection (iii) of Section II of the Final Order that nothing in the Final Order prohibits the use of administrative proceedings against dentists for alleged violations of the Dental Practice Act. This change is necessary because administrative remedies are only available against dentists. (IDF 46, 48.)

Section III of the Final Order requires the Board to send notices and other disclosures to parties affected by the Final Order. Such notices are within the Commission's remedial authority. *See Realcomp*, 2009 FTC LEXIS 250, at *129 (requiring respondent to provide a copy of the Commission's order to affected persons). In particular, Section III requires the Board to send copies of the Complaint and Final Order to all present and future members, employees, and agents of the Board. This will facilitate compliance with the Final Order. Section III also requires the Board to send certain disclosures to each person to whom the Board previously sent a cease and desist letter or similar communication regarding the legality of non-dentist teeth whitening. Such disclosures will help rectify the Board's prior illegal conduct by correcting the impressions created by the Board's communications. *Cf. Novartis Corp. v. FTC*, 223 F.3d 783, 786 (D.C. Cir. 2000) (upholding order requiring corrective advertising); *Southwest Sunsites, Inc. v. FTC*, 785 F.2d 1431, 1439 (9th Cir. 1986) (same).

Finally, the Final Order imposes limited requirements on the Board to facilitate the Commission's ability to monitor the Board's compliance with the terms of the Final Order. The Board is required to provide an initial compliance report, followed by annual reports thereafter, containing specified information and to provide Commission representatives with reasonable access to information and personnel as needed to verify compliance with the Final Order. (Final Order §§ IV-VI.) Such ancillary provisions are common in Commission orders. *See, e.g.*, *Realcomp*, 2009 FTC LEXIS 250, at *130 (requiring compliance reports); *Advocate Health Partners*, No. C-4184, 2007 FTC LEXIS 17, at *26-28 (2007) (requiring compliance reports and reasonable inspection).

Respondent does not appeal any specific provision of the ALJ's Order but argues that the ALJ's Order, taken as a whole, would restrict the Board's ability to conduct bona fide investigations into possible violations of the North Carolina Dental Practice Act, would prevent the Board from enforcing the Act, and would violate the Commerce

Clause of and Tenth Amendment to the U.S. Constitution. We find these arguments to be without merit.

Respondent argues first that the "Order clearly restricts the State Board's ability to conduct a bona fide investigation into possible violations of the North Carolina Dental Practice Act, as it renders useless the State Board's ability to prevent unlicensed teeth whitening services." (RAB at 40.) To the contrary, as discussed above, the Final Order is much more limited and specifically states that "nothing in this Order prohibits the Board from . . . investigating a Non-Dentist Provider for suspected violations of the Dental Practice Act." (Final Order § II.) The Final Order explicitly permits the Board to bring (or cause to be brought) judicial proceedings against non-dentist providers, to bring administrative proceedings against dentists, and to send bona fide litigation warning letters to targets of investigations. (*Id.*) Since the Board's authority to enforce the Dental Practice Act against non-dentists is limited to seeking recourse from the North Carolina courts or referring a matter to a District Attorney (N.C. General Statutes § 90-40.1; IDF 43, 44, 190; Response to Complaint ¶ 19; RAB at 2-3; RRB at 5), the Final Order will not prevent or impede the Board from carrying out its enforcement duties. Indeed, the Board's Chief Operating Officer testified that the Board's ability to enforce the Act would not be affected if it sent litigation warning letters instead of cease and desist letters. (IDF 258; *see also* IDF 259-60 (no cease and desist language in Board letters from 2000 to 2002).)

Respondent also argues that the ALJ's Order would violate the Tenth Amendment to the U.S. Constitution by directing the actions of state officials. Respondent relies on *New York v. United States*, 505 U.S. 144 (1992) and *Printz v. United States*, 521 U.S. 898 (1997). In these cases, the Supreme Court held that Congress may not enact a law that would direct the functioning of the states' executives or legislatures but may enact laws of general applicability that incidentally apply to state governments. *See Printz*, 521 U.S. at 932 ("the incidental application to the States of a federal law of general applicability" is lawful); *New York*, 505 U.S. at 160 (Congress may "subject state governments to generally applicable laws"); *see also Kennedy v. Allera*, 612 F.3d 261, 269 (4th Cir. 2010) ("[T]he Tenth Amendment prohibits the federal government from commandeering state officers by compelling them to enforce a federal regulatory program."). It is undisputed that the FTC Act is a statute of general applicability and is not directed at states or state officials. Accordingly, the Court's line of cases prohibiting the commandeering of state officials is inapplicable.

Alternatively, Respondent asserts that under *California State Board of Optometry v. FTC*, 910 F.2d 976 (D.C. Cir. 1990), the Tenth Amendment prevents the FTC from imposing restrictions on a state's regulatory scheme.[20] Respondent overreaches by trying

[20] Respondent also asserts that *California State Board of Optometry* held that a state cannot be a "person" for purposes of jurisdiction when it acts in its sovereign capacity. (RAB at 24.) That decision, even under Respondent's reading, is inapposite because the Board is not a sovereign, and the challenged practices exceeded what the North Carolina legislature authorized. In addition, the Commission's jurisdiction to hear this matter was resolved in the Commission's February 3, 2011 decision, and Respondent did not dispute that it is a "person" before the ALJ. (ID at 59.)

to stretch that case to include activity that is outside the scope of the regulatory scheme of the Dental Practice Act. In *California State Board of Optometry*, the D.C. Circuit reviewed an FTC trade regulation rule, passed pursuant to the Magnuson-Moss Amendments to the FTC Act, declaring that certain state laws restricting the practice of optometry constituted unfair acts or practices. The court held that state regulation of the practice of optometry is a quintessentially sovereign act and therefore rejected the rule as an improper attempt to regulate state action. In contrast, this case does not involve a challenge to a state law or regulation, but rather a challenge to conduct by the Board that went beyond its statutory mandate. Furthermore, the Commission has already concluded that the Board's conduct in question does not satisfy the requirements of the state action defense. *See North Carolina Dental*, 151 F.T.C. at 615-33.

Finally, Respondent argues, without citation to any case law, that the ALJ's Order would violate the Commerce Clause of the U.S. Constitution because it regulates the practice of dentistry in North Carolina. To the contrary, however, the Final Order neither regulates the practice of dentistry nor violates the Commerce Clause of the Constitution. The Constitution grants Congress the power to "regulate Commerce . . . among the several states." U.S. Constitution, art. I, § 8, cl. 3. Pursuant to this authority, Congress passed the FTC Act and gave the agency the authority to prevent, *inter alia*, "[u]nfair methods of competition in or affecting commerce." 15 U.S.C. § 45(a). The jurisdictional reach of the Commission extends as far as the Commerce Clause. (ID at 59-62.) The ALJ found, and Respondent does not dispute in this appeal, that the Board's acts have a substantial effect on interstate commerce and are therefore in or affecting commerce. (ID at 62.) Furthermore, as described above, the Final Order does not regulate the practice of dentistry in North Carolina. The Commission has declined to address whether teeth whitening constitutes stain removal under the Dental Practice Act, and the Final Order does not interfere with the ability of the Board to fulfill its statutory obligations. Rather, the Final Order is limited to ensuring that the Board does not violate the antitrust laws through anticompetitive acts and practices that are not authorized or required by the Dental Practice Act.

VIII. CONCLUSION

Based on a *de novo* review of the facts and law in this matter, the Commission concludes that the Board has violated Section 5 of the FTC Act, 15 U.S.C. § 45. The Commission has therefore issued a Final Order to remedy the Board's violations and to prevent their recurrence.

EXHIBIT C

PUBLIC

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

DOCKET NO. 9343

In the Matter of

THE NORTH CAROLINA BOARD OF DENTAL EXAMINERS

Respondent.

INITIAL DECISION

D. Michael Chappell
Chief Administrative Law Judge

Date: July 14, 2011

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I. INTRODUCTION

A. Summary of the Complaint and Answer

The Commission issued an administrative complaint against the North Carolina State Board of Dental Examiners ("Respondent" or "the Board") on June 17, 2010 ("Complaint").[1] The Complaint alleges that "[t]he combination, conspiracy, acts and practices" by Respondent to exclude non-dentists from competing with dentists in the provision of teeth whitening services violates Section 5 of the Federal Trade Commission Act ("FTC Act"). Complaint, ¶ 26. Specifically, the Complaint alleges that the Board, without proper authority, engaged in various types of activities aimed at preventing non-dentists from providing teeth whitening services in North Carolina, including issuing cease and desist orders and other communications to existing and potential non-dentist teeth whitening service providers, manufacturers of products and equipment used by non-dentist providers, and mall owners and operators, asserting that non-dentist teeth whitening services are illegal. Complaint ¶¶ 18-22. The Complaint also alleges that the relevant market in which to evaluate the conduct of the Board is the provision of teeth whitening services in North Carolina and charges that Respondent has and exercises market power to exclude non-dentists from competing in the relevant market. Complaint ¶¶ 7, 14. The Complaint further charges that the challenged conduct has had, and will have, the effect of restraining competition unreasonably and injuring consumers by preventing and deterring non-dentists from providing teeth whitening services in North Carolina; depriving consumers of the benefits of price competition; and reducing consumer choice in North Carolina for the provision of teeth whitening services. Complaint ¶ 25. The Notice of Contemplated Relief attached to the Complaint seeks an order, including, but not limited to, requiring Respondent to cease and desist from the challenged conduct.

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[1] The caption of the Complaint issued by the Federal Trade Commission ("Commission") refers to Respondent as "The North Carolina Board of Dental Examiners," and, because there has been no motion to change the title of the caption, Respondent is referred to as "The North Carolina Board of Dental Examiners," in the caption of this Initial Decision. However, the Commission, in its 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, and Opinion in support thereof, has referred to Respondent as "The North Carolina State Board of Dental Examiners." *In re North Carolina Board of Dental Examiners*, Docket 9343, 2011 WL 549449 (Feb. 8, 2011). In addition, Complaint Counsel agrees that the correct title for Respondent is "The North Carolina State Board of Dental Examiners." (Feb. 17, 2011 Transcript of Final Prehearing Conference, at 63-64).

In its Answer, filed on July 7, 2010, Respondent asserts that the Board is a state agency enforcing a North Carolina statute which makes it illegal for non-dentists to provide the service of "removal of stains" from teeth, and that there is no collusion, conspiracy or agreement. Answer, p. 1. Further, Respondent avers, the Board's actions with regard to non-dentist teeth whitening services were taken to enforce North Carolina law, in order to protect the public, and not to suppress competition. Answer, pp. 8-17. In addition, Respondent denies that the Board is acting as a competitor in the teeth whitening market and states that the real competition for teeth whitening services offered by non-dentists comes from over-the-counter ("OTC") sales of teeth whitening kits, which are not regulated by the Board. Answer, pp. 6-8. Respondent charges that the contemplated relief exceeds the FTC's authority and would unconstitutionally impair the ability of the State of North Carolina to protect its citizens under the Tenth and Eleventh Amendments to the Constitution. Answer, pp. 18-21.

B. Procedural History

Prior to the start of trial, Respondent filed with the Federal Trade Commission ("Commission") a Motion to Dismiss based on a claim that its conduct is exempted from antitrust liability by the state action doctrine. Complaint Counsel also filed with the Commission a Motion for Partial Summary Decision on the propriety of the Board's invocation of the state action doctrine as an affirmative defense. The Commission, on February 3, 2011, issued an Opinion and Order resolving these and related motions. *In re North Carolina Board of Dental Examiners*, Docket 9343, 2011 WL 549449, at *5 (Feb. 8, 2011) (hereinafter "State Action Opinion").[2]

In its State Action Opinion, the Commission decided that although the Board is a state regulatory body, the undisputed facts showed that the Board is controlled by North Carolina licensed dentists, and that North Carolina dentists – including the Board's dentist members – perform teeth whitening services. 2011 WL 549449, at *13. The Commission also decided

[2] The Commission, in 2009, amended its Rules of Practice to require that motions to dismiss filed before the evidentiary hearing and motions for summary decision shall be directly referred back to the Commission, rather than to the Administrative Law Judge assigned to adjudicate the complaint 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).

that, because of the possibility that the Board would act in self-interest, pursuant to *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980), active state supervision of the Board's activities must be demonstrated in order for state action immunity to apply. *Id.* The Commission further determined that the undisputed facts showed that the state did not actively supervise the Board's conduct, and, therefore, state action immunity did not apply. *Id.* at *15-17. The Commission concluded: "[B]ecause the Board is controlled by practicing dentists, the Board's challenged conduct must be actively supervised by the state for it to claim state action exemption from the antitrust laws. Because we find no such supervision, we hold that the antitrust laws reach the Board's conduct." *Id.* Also in its State Action Opinion, the Commission rejected the Board's argument that the Board is not subject to the Commission's jurisdiction. *Id.* at *5.

The administrative trial in this matter began on February 17, 2011. On February 28, 2011, Complaint Counsel rested and Respondent, on the record at trial, made an oral motion to dismiss at the close of Complaint Counsel's evidence, pursuant to Commission Rule 3.22(a).[3] Complaint Counsel stated its opposition to the motion to dismiss on the record at trial on February 28, 2011.[4] By Order dated March 30, 2011, immediately after the hearing record was closed, Respondent's motion to dismiss made at the close of the evidence was denied on the ground that Respondent failed to demonstrate that the Complaint should be dismissed for failure to establish a prima facie case. The March 30, 2011 Order advised the parties that the issues raised by Respondent's motion to dismiss, to the extent necessary or appropriate in regard to a determination of the merits for the Initial Decision in this case, and to the extent briefed by the parties in their post-trial briefs, would be addressed in the Initial Decision when issued. Those issues have been decided against Respondent, as fully discussed herein.

[3] Respondent's arguments in support of its Motion are set forth in the transcript of the hearing on February 28, 2011, pages 1418-1424.

[4] Complaint Counsel's arguments in Opposition to the Motion are set forth in the transcript of the hearing on February 28, 2011, pages 1424-1432.

The administrative trial concluded on March 16, 2011 and the record was closed on March 30, 2011.[5] Over 800 exhibits were admitted, 16 witnesses testified, either live or by deposition, and there are 3,047 pages of trial transcript. The parties' proposed findings of fact, replies to proposed findings of fact, post-trial briefs, and reply briefs total 1,501 pages.

Rule 3.51(a) of the Commission's Rules of Practice states that "[t]he Administrative Law Judge shall file an initial decision within 70 days after the filing of the last filed initial or reply proposed findings of fact, conclusions of law and order . . ." 16 C.F.R. § 3.51(a). The parties filed concurrent post-trial briefs and proposed findings of fact on April 25, 2011. The parties filed replies to the other's proposed findings and briefs on May 5, 2011. Pursuant to Commission Rule 3.41(b)(6), closing arguments were held on May 11, 2011. This Initial Decision is filed in compliance with the timeframe required in Commission Rule 3.51(a).

C. Evidence

This Initial Decision is based on the exhibits properly admitted into evidence, the transcripts of testimony at trial, and the briefs and proposed findings of fact and conclusions of law, and the replies thereto, submitted by the parties. Citations to specific numbered findings of fact in this Initial Decision are designated by "F."[6]

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[5] On the record at trial on March 16, 2011, the parties made a joint motion seeking an order holding open the hearing record until March 30, 2011, in order to allow the parties to submit a written filing in connection with designations and counter-designations of deposition testimony, and objections to designated testimony ("Joint Motion"). On March 16, 2011, on the record at trial, the Joint Motion was granted and the record was held open for purposes of receiving deposition testimony.

[6] References to the record are abbreviated as follows:
CX – Complaint Counsel's Exhibit
RX – Respondent's Exhibit
JX – Joint Exhibit
Tr. – Transcript of testimony before the Administrative Law Judge
Dep. – Transcript of Deposition
IHT – Investigational Hearing Transcript
CCB – Complaint Counsel's Post-Trial Brief
CCRB – Complaint Counsel's Post-Trial Reply Brief
CCFF – Complaint Counsel's Proposed Findings of Fact
RB – Respondent's Post-Trial Brief
RRB – Respondent's Reply Brief
RFF – Respondent's Proposed Findings of Fact

This Initial Decision is also based on a consideration of the whole record relevant to the issues and addresses the material issues of fact and law. Proposed findings of fact not included in this Initial Decision were rejected, either because they were not supported by the evidence or because they were not dispositive or material to the determination of the allegations of the Complaint or the defenses thereto. The Commission has held that Administrative Law Judges are not required to discuss the testimony of each witness or all exhibits that are presented during the administrative adjudication. *In re Amrep Corp.*, No. 9018, 102 F.T.C. 1362, 1670, 1983 FTC LEXIS 17, *566-67 (Nov. 2, 1983). Further, administrative adjudicators are "not required to make subordinate findings on every collateral contention advanced, but only upon those issues of fact, law, or discretion which are 'material.'" *Minneapolis & St. Louis Ry. Co. v. United States*, 361 U.S. 173, 193-94 (1959). *Accord Stauffer Labs., Inc. v. FTC*, 343 F.2d 75, 89 (9th Cir. 1965). *See also Borek Motor Sales, Inc. v. National Labor Relations Bd.*, 425 F.2d 677, 681 (7th Cir. 1970) (holding that it is adequate for the Board to indicate that it had considered each of the company's exceptions, even if only some of the exceptions were discussed, and stating that "[m]ore than that is not demanded by the [Administrative Procedure Act] and would place a severe burden upon the agency").

Under Commission Rule 3.51(c)(1), "[a]n initial decision shall be based on a consideration of the whole record relevant to the issues decided, and shall be supported by reliable and probative evidence." 16 C.F.R. § 3.51(c)(1); *see In re Chicago Bridge & Iron Co.*, No. 9300, 138 F.T.C. 1024, 1027 n.4, 2005 FTC LEXIS 215, at *3 n.4 (Jan. 6, 2005). Under the Administrative Procedure Act ("APA"), an Administrative Law Judge may not issue an order "except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence." 5 U.S.C. § 556(d). All findings of fact in this Initial Decision are supported by reliable, probative, and substantial evidence.

D. Burden of Proof

The parties' burdens of proof are governed by Federal Trade Commission Rule 3.43(a), Section 556(d) of the Administrative Procedure Act ("APA"), and case law. Pursuant

to Commission Rule 3.43(a), "[c]ounsel representing the Commission . . . shall have the burden of proof, but the proponent of any factual proposition shall be required to sustain the burden of proof with respect thereto." 16 C.F.R. § 3.43(a). Under the APA, "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof." 5 U.S.C. § 556(d). The APA, "which is applicable to administrative adjudicatory proceedings unless otherwise provided by statute, 'establishes . . . [the] preponderance-of-the evidence standard.'" *In re Rambus Inc.*, 2006 FTC LEXIS 101, at *45 (Aug. 20, 2006) (quoting *Steadman v. SEC*, 450 U.S. 91, 95-102 (1981)), *rev'd on other grounds,* 522 F.3d 456 (D.C. Cir. 2008), *cert. denied*, 129 S. Ct. 1318 (2009). *See In re Automotive Breakthrough Sciences, Inc.*, No. 9275, 1998 FTC LEXIS 112, at *37 n.45 (Sept. 9, 1998) (holding that each finding must be supported by a preponderance of the evidence in the record); *In re Adventist Health System/West*, No. 9234, 1994 FTC LEXIS 54, at *28 (Apr. 1, 1994) ("Each element of the case must be established by a preponderance of the evidence.").

E. Summary of Initial Decision

The Commission, who issued the Complaint in this case, has determined in the State Action Opinion that the Respondent has no defense under the state action doctrine. Accordingly, in this Initial Decision, the Administrative Law Judge will conduct no analysis nor provide any Findings of Fact or Conclusions of Law regarding that issue, including whether or not teeth whitening services provided by non-dentists violates North Carolina law.

Complaint Counsel has demonstrated by a preponderance of the evidence that dentist members of the Board had a common scheme or design, and hence an agreement, to exclude non-dentists from the market for teeth whitening services and to deter potential providers of teeth whitening services from entering the market. To achieve this objective, dentist members of the Board agreed, expressly and/or implicitly, to cause the Board to: (a) send letters to non-dentist teeth whitening providers, ordering them to cease and desist from offering teeth whitening services; (b) send letters to manufacturers of products and equipment used by non-dentist providers, and other potential entrants, either ordering them to cease and desist from assisting clients offering teeth whitening services, or otherwise attempting to dissuade them from participating in the teeth whitening services market; (c) send letters to owners or

operators of malls to dissuade them from leasing to non-dentist providers of teeth whitening services; and (d) elicit the help of the North Carolina Board of Cosmetic Art Examiners to dissuade its licensees from providing teeth whitening services. The evidence further shows that dentists and non-dentists compete with one another in the relevant market for teeth whitening services in North Carolina, and that the Board's concerted action to exclude non-dentist provided teeth whitening services from the market constitutes an agreement to exclude rivals, which by its nature has the tendency to harm competition.

Complaint Counsel further proved by a preponderance of the evidence that the Board had the power to exclude non-dentists from the teeth whitening services market in North Carolina by using its apparent authority as a state agency to declare the practice illegal and direct non-dentists to stop that practice. The Board's power to exclude was also demonstrated by evidence that, as a result of the Board's conduct, non-dentist providers did, in fact, exit the market and mall owners and operators refused to lease space to non-dentist teeth whiteners.

Complaint Counsel also demonstrated by a preponderance of the evidence that the Board's concerted actions to exclude non-dentist teeth whitening in North Carolina resulted in anticompetitive effects, which include: (1) non-dentist teeth whitening providers exited the North Carolina market; (2) consumer choice was limited, by the exclusion of non-dentist teeth whitening providers; (3) manufacturers of products used by non-dentist providers of teeth whitening services lost sales in North Carolina; and (4) mall owners and operators stopped leasing to non-dentist providers.

Based on the foregoing, absent a valid procompetitive justification, the Board's conduct constitutes an unreasonable restraint of trade and an unfair method of competition, in violation of Section 5 of the FTC Act. None of the procompetitive justifications proffered by Respondent is valid under applicable antitrust law.

Respondent's proffered procompetitive justification that, in acting to restrict non-dentist teeth whitening, the Board was acting as a state agency enforcing the North Carolina Dental Practice Act ("Dental Practice Act"), to protect the public interest, and not to promote economic self-interest, is essentially a reiteration of Respondent's claim that the Board's

conduct is exempt from antitrust liability by the state action doctrine, which has been decided against Respondent by the Commission. State Action Opinion, 2011 WL 549449, at *1, 17.

Respondent's proffered procompetitive justification that the Board's actions to exclude non-dentist provided teeth whitening services were intended to promote social welfare and/or public safety, *inter alia* by protecting consumers from dangerous or unsafe teeth whitening services, is also not a valid justification under applicable antitrust law. A restraint on competition cannot be justified solely on the basis of social welfare concerns, including concerns about health hazards. Accordingly, this Initial Decision will not analyze, or provide any Findings of Fact or Conclusions of Law regarding, whether or not non-dentist teeth whitening is harmful or unsafe for consumers.

Another of Respondent's proffered procompetitive justifications, that the restraints the Board placed upon non-dentist teeth whitening are procompetitive because they will ensure that teeth whitening services are offered at a cost that reflects the higher skills of dentist-providers, rather than at a cost reflecting the assertedly lower skills of non-dentists, is also rejected as invalid under applicable antitrust law. The risk that an inferior product will be marketed to, and chosen by, consumers is inherent in the nature of competition. To justify a restraint on the ground that competition itself is harmful contradicts the basic policy of the antitrust laws.

Finally, Respondent's proffered procompetitive justification that the Board's restraints on non-dentist provided teeth whitening services are procompetitive because they will promote legal competition between dentists in the teeth whitening services market, rather than the allegedly illegal practice of non-dentist teeth whitening services, is without merit. Respondent cites no case holding that non-dentist teeth whitening is a violation of North Carolina law, and this Initial Decision need not and does not decide that issue. Moreover, that a particular practice may be unlawful is not, in itself, a sufficient justification for collusion among competitors to prevent it.

Accordingly, because Respondent's proffered procompetitive justifications are invalid under applicable antitrust law, the Board's concerted action to exclude non-dentists from the

market for teeth whitening services in North Carolina, in which North Carolina dentists and dentist Board members compete, constitutes an unreasonable restraint of trade and an unfair method of competition in violation of Section 5 of the FTC Act. The Board's arguments that the relief sought in this case violates the Tenth Amendment to the United States Constitution and exceeds the federal government's Commerce Clause powers are rejected. Having found such violation, an order will be entered, the provisions of which are designed to ensure an end to the unlawful conduct, rectify past violations, and prevent reoccurrence, and are reasonably related to the violations found to exist.

II. FINDINGS OF FACT

A. The North Carolina State Board of Dental Examiners

1. The North Carolina State Board of Dental Examiners (the "Board") is an agency of the State of North Carolina and is charged with regulating the practice of dentistry in the interest of the public health, safety, and welfare of the citizens of North Carolina. The Board is organized, exists, and transacts business under and by virtue of the laws of the State of North Carolina. Its principal office and place of business is located at 507 Airport Blvd., Suite 105, Morrisville, NC 27560. (Joint Stipulations of Law and Fact ¶ 1).

1. Composition and election/selection of Board members

a. Composition of the Board

2. The Board consists of eight members: six licensed dentists, one licensed dental hygienist, and one consumer member. The consumer member is neither a dentist nor a dental hygienist. (CX0019 at 001, N.C. Gen. Stat. § 90-22(b) (hereafter "Dental Practice Act § __"); Joint Stipulations of Law and Fact ¶ 2; White, Tr. 2194).

3. The dental hygienist member of the Board is elected to the Board by the licensed dental hygienists of North Carolina. (CX0019 at 001, Dental Practice Act § 90-22(b); White, Tr. 2242-2243).

4. The consumer member of the Board is appointed by the Governor. (Joint Stipulations of Law and Fact ¶ 3; White, Tr. 2243).

5. The consumer member was added to the Board to look out for the welfare of the consumer and to ensure that dentist Board members act in the public interest, even when such action may be unpopular with dentists. (CX0449 at 005; CX0219 at 005; CX0242 at 005; CX0028 at 005; CX0559 at 008 (Efird, Dep. at 23)).

b. Dentist members of the Board are practicing dentists

6. Each dentist elected to the Board must be licensed and actively engaged in the practice of dentistry while serving on the Board. (CX0019 at 001, Dental Practice Act § 90-22(b); CX0574 at 007 (White, IHT at 25)).

7. Since June 2002, all dentists serving on the Board have been full-time practicing dentists in North Carolina. (CX0563 at 003-004, 010 (Goode, IHT at 9-10, 34)). Board members Allen, Burnham, Brown, Feingold, Hardesty, Holland, Morgan, Owens, and Wester (more fully defined in Section II.B.1 *infra*) were actively practicing when they served on the Board. (CX0554 at 006 (Allen, Dep. at 17); CX0555 at 004 (Brown, Dep. at 8); CX0556 at 004 (Burnham, Dep. 9); CX0560 at 004 (Feingold, Dep. at 9); Hardesty, Tr. 2760-2761; CX0567 at 006 (Holland, Dep. at 14); CX0569 at 004 (Morgan, Dep. at 9); Owens, Tr. 1435; CX0572 at 004 (Wester, Dep. at 7)).

8. During their tenure as Board members, dentist Board members continue to provide for-profit dental services, including teeth whitening services. (CX0560 at 48 (Feingold, Dep. at 183-184); CX0567 at 017 (Holland, Dep. at 58); CX0572 at 009 (Wester, Dep. 26-28); CX0554 at 007 (Allen, Dep. at 18-19)).

9. Many of the dentist Board members provide teeth whitening services through their private practices and derive income from it. (CX0467 at 001 (Dr. Owens); CX0340 at 002 (Dr. Morgan); CX0606 at 005 (Dr. Burnham); CX0614 at 001 (Dr. Wester); CX0554 at 006 (Allen, Dep. at 18); CX0556 at 038 (Burnham, Dep. at 145-146); CX0560 at 004-005 (Feingold, Dep. at 9-10); CX0564 at 011 (Hall, Dep. at 33-34); CX0565 at 005 (Hardesty, Dep. at 15); CX0567 at 017 (Holland, Dep. at 56-58); CX0569 at 009 (Morgan, Dep. at 27-30); CX0572 at 009 (Wester, Dep. at 20-21, 26-27)).

10. Dr. Owens and his partner earned over $75,000 from teeth whitening services from 2005 through 2010. (CX0467 at 001; Owens, Tr. at 1589-1590). Dr. Owens earned revenue from teeth whitening during the period of time when he assigned teeth whitening investigations to himself, in his capacity as Secretary-Treasurer of the Board. (Owens, Tr. 1579). Dr. Owens is also the case officer on most of the teeth whitening cases. (White, Tr. 2224).

11. Dr. Hardesty earned over $40,000 from teeth whitening services from 2005 through 2010. (CX0378 at 012).

12. Board members have a significant, nontrivial financial interest in the business of their profession, including teeth whitening. (F. 9-11; Kwoka, Tr. 1114; CX0826 at 029 (Baumer, Dep. at 106-107) (Board members "may well be influenced by the impact on the bottom line," including the financial interest of dentists, in deciding whether to ban non-dentist teeth whitening)). They are in a position to enhance their incomes and

their constituents' incomes. (Kwoka, Tr. 1115-1116; F. 13-15, 101-104, 108 (dentists earn income from teeth whitening services)).

c. The Board is funded by licensees

13. The Board is funded by the dues or fees paid by licensed dentists and dental hygienists in North Carolina. (CX0577 at 009 (Oyster, Dep. at 26); CX0556 at 061 (Burnham, Dep. at 237)).

14. The operating budget for the Board comes from license fees paid by North Carolina dentists and hygienists. (Joint Stipulations of Law and Fact ¶ 11).

d. Dentists elect dentists for positions on the Board

15. The six dentist members of the Board are elected to the Board directly by other licensed dentists in North Carolina. (CX0019 at 001, Dental Practice Act § 90-22(b), (c); Joint Stipulations of Law and Fact ¶ 6; White, Tr. 2242).

16. Only licensed dentists from North Carolina are eligible voters in Board elections of dentists. (Joint Stipulations of Law and Fact ¶ 4).

17. Board members seek support from other dentists when they run for a position on the Board. (CX0574 at 008 (White, IHT at 28-29); Hardesty, Tr. 2796-2798).

18. If an election is contested, candidates may distribute letters and make speeches that discuss the reasons they want to serve on the Board, including their positions on issues that may come before the Board. (Joint Stipulations of Law and Fact ¶ 9). An election is "contested" when there are more candidates running for election than there are available Board positions. (Joint Stipulations of Law and Fact ¶ 8).

19. Board member Dr. Hardesty's efforts to get elected included sending a letter to all the licensed dentists in the state and asking for their vote, and meeting and talking with dentists at local dental society meetings. (CX0566 at 009 (Hardesty, IHT at 32-33)).

20. Board member Dr. Feingold sent a letter to all licensed dentists in North Carolina expressing his desire to be elected to the Board and solicited support for his election to the Board at the three-day annual convention of the North Carolina Dental Society ("NCDS"). (CX0560 at 011 (Feingold, Dep. at 34-35)).

21. Board member Dr. Burnham sent letters to all of the licensed dentists in North Carolina each time that he ran for a Board position telling them that he would appreciate their vote. (CX0556 at 017-018 (Burnham, Dep. at 61-62)).

22. Board member Dr. Brown sent a letter to dentists in North Carolina stating that he was interested in continuing the Board's practice of dentists' governing themselves when he ran in his first contested election. (CX0555 at 037 (Brown, Dep. at 140-141)).

23. Board member Dr. Stanley Allen sent letters to North Carolina dentists during his campaigns for a Board position in which explained his qualifications and why he should be elected. (CX0554 at 017 (Allen, Dep. at 58-59)).

e. Board member terms

24. The dentist members of the Board are elected for three-year terms and can run for reelection, but no person shall be nominated, elected, or appointed to serve more than two consecutive terms on the Board. (CX0019 at 001, Dental Practice Act § 90-22(b); Joint Stipulations of Law and Fact ¶ 7).

25. Some of the dentist members of the Board have served two or more terms. Drs. Allen, Brown, Burnham, Hardesty, and Owens have served two terms on the Board. (CX0554 at 004 (Allen, Dep. at 7); CX0555 at 004 (Brown, Dep. at 9); CX0556 at 007 (Burnham, Dep. at 20); CX0565 at 007 (Hardesty, Dep. at 20-21); CX0570 at 005 (Owens, Dep. at 11-12)). Drs. Morgan and Holland have served three or more terms on the Board. (CX0569 at 004-005 (Morgan, Dep. at 9-12); CX0567 at 005 (Holland, Dep. at 10-11)).

f. Members of the Board from 2005 through 2010

26. The officers of the Board are elected by the Board members. (White, Tr. 2202).

27. For the Board term year starting in August 2005, the Board consisted of Stanley L. Allen (President), Benjamin W. Brown (Immediate Past President), Joseph S. Burnham, (Secretary-Treasurer), Neplus H. Hall (Dental Hygienist Member), Zannie Poplin Efird (Consumer Member), Clifford O. Feingold, W. Stan Hardesty, and Ronald K. Owens. (CX0086 at 002, Annual Report to the Governor – 2006).

28. For the Board term year starting in August 2006, the Board consisted of Joseph S. Burnham (President), Stanley L. Allen (Immediate Past President), W. Stan Hardesty (Secretary-Treasurer), Neplus H. Hall (Dental Hygienist Member), Zannie Poplin Efird (Consumer Member), Clifford O. Feingold, C. Wayne Holland, and Ronald K. Owens. (CX0088 at 002, Annual Report to the Governor, 2007).

29. For the Board term year starting in August 2007, the Board consisted of W. Stan Hardesty (President), Joseph S. Burnham (Immediate Past President), Ronald K. Owens (Secretary-Treasurer), Neplus H. Hall (Dental Hygienist Member), Zannie Poplin Efird (Consumer Member), Clifford O. Feingold, C. Wayne Holland, and Brad C. Morgan. (CX0089 at 002, Annual Report to the Governor, 2008).

30. For the Board term year starting in August 2008, the Board consisted of Ronald K. Owens (President), W. Stan Hardesty (Immediate Past President), C. Wayne Holland (Secretary-Treasurer), Jennifer A. Sheppard (Dental Hygienist Member), Zannie

Poplin Efird (Consumer Member), Joseph S. Burnham, Brad C. Morgan, and Millard W. Wester. (CX0091 at 002, Annual Report to the Governor, 2009).

31. For the Board term year starting in August 2009 and ending in July 2010, the Board consisted of C. Wayne Holland (President), Ronald K. Owens (Immediate Past President), Brad C. Morgan (Secretary-Treasurer), Jennifer A. Sheppard (Dental Hygienist Member), James B. Hemby, Jr. (Consumer Member), W. Stan Hardesty, Kenneth M. Sadler, and Millard W. Wester. (CX0091 at 002-005, Annual Report to the Governor – 2009).

32. The following chart shows the Board members from 2005 to July 2010. (F. 27-31).

BOARD OF DENTAL EXAMINERS	Term 2005-06	Term 2006-07	Term 2007-08	Term 2008-09	Term 2009-10
President	Allen	Burnham	Hardesty	Owens	Holland
Immediate Past President	Brown	Allen	Burnham	Hardesty	Owens
Secretary-Treasurer	Burnham	Hardesty	Owens	Holland	Morgan
Dentist Members	Feingold Hardesty Owens	Feingold Holland Owens	Feingold Holland Morgan	Burnham Morgan Wester	Hardesty Wester Sadler
Hygenist Member	Hall	Hall	Hall	Sheppard	Sheppard
Consumer Member	Efrid	Efird	Efird	Efrid	Hemby

2. The authority and duties of the Board

33. The Board is authorized and empowered by the Legislature of North Carolina to enforce the provisions of the Dental Practice Act. (Joint Stipulations of Law and Fact ¶ 12).

34. The Board generally meets once a month for three days. (White, Tr. 2194; CX0562 at 004 (Friddle, IHT at 12)).

a. The Board's authority over North Carolina dentists

35. The Board is the sole licensing authority for dentists in North Carolina. (CX0019 at 007, Dental Practice Act § 90-29(a)). The Board has the authority to issue licenses, renew licenses, and take disciplinary actions against dentists practicing in North Carolina. (CX0019 at 013, 015, 020, 021, Dental Practice Act §§ 90-30, 31, 34, 40, 40.1, 41).

36. The dental hygienist member and consumer member of the Board cannot participate or vote on Board matters concerning the issuance, renewal, or revocation of a dentist's license. The consumer member of the Board cannot participate or vote on Board matters concerning the issuance, renewal, or revocation of a dental hygienist's license. (CX0019 at 001, Dental Practice Act § 90-22(b)).

37. The Dental Practice Act provides that the consumer member and the dental hygienist member are excluded from participating or voting on matters involving the "issuance, renewal or revocation of the license to practice dentistry," and, in the case of the consumer member, the license to practice dental hygiene. (CX0019 at 001, Dental Practice Act § 90-22(b)).

38. The Dental Practice Act does not prohibit the consumer member or the hygienist member from serving as the case officer in a non-dentist teeth whitening investigation. (Hardesty, Tr. 2838).

39. The Dental Practice Act does not prohibit the consumer member or the hygienist member from participating in investigations of unlicensed practice of dentistry by non-dentist teeth whiteners. (Wester, Tr. 1334-1335).

40. Despite the facts set forth above in F. 37-39, the dental hygienist member and consumer member of the Board were excluded from participating in investigations of the unlicensed practice of dentistry, including investigations of non-dental teeth whitening. (Hardesty, Tr. 2838) (case officer assignments in teeth whitening investigations are reserved for dentists); CX0554 at 013 (Allen, Dep. at 44) (Dr. Allen never appointed the consumer member or the hygienist member to be on an investigative panel for an unauthorized practice of dentistry investigation); CX0559 at 008 (Efird, Dep. at 23) (consumer member of the Board did not participate in unauthorized practice of dentistry matters); CX0564 at 005 (Hall, Dep. at 12-13) (dental hygienist member did not participate in unlicensed practice of dentistry investigations).

b. The Board's authority relating to non-dentists

41. The Dental Practice Act provides that it is unlawful for an individual to practice dentistry in North Carolina without a current license to practice dentistry issued by the Board. (CX0019 at 007, 020, Dental Practice Act § 90-29(a), 40, 40.1(a)).

42. The Dental Practice Act sets forth practices that constitute the practice of dentistry. (CX0019 at 007-008, Dental Practice Act § 90-29(b)). Under the Dental Practice Act, a person shall be deemed to be practicing dentistry if that person "[r]emoves stains, accretions or deposits from the human teeth." (CX0019 at 007-008, Dental Practice Act § 90-29(b)(2)).

43. Under the Dental Practice Act, the North Carolina State Board of Dental Examiners may bring an action to enjoin the practice of dentistry by any person who has not been duly licensed in the superior court of any county in which the acts occurred or in which the defendant resides. (CX0019 at 020-021, Dental Practice Act § 90-40.1(c)).

44. The Dental Practice Act states that in the event of suspected instances of the unlicensed practice of dentistry: the Board may petition a state court for an injunction, (CX0019 at 020-021, Dental Practice Act § 90-40.1). The Board may not prosecute criminally for unlicensed practice of dentistry; however, it may refer matters to the District Attorney for criminal prosecution. (CX0581 at 021-022 (Bakewell, Dep. at 76-79)).

45. The Board has no authority over non-dentists, and its only authorized recourse against non-dentists engaged in what the Board believes to be the practice of dentistry is to go through the courts. (CX0554 at 034 (Allen, Dep. at 129); CX0019 at 006, 007, 020-021, Dental Practice Act § 90-27, 29, 40, 40.1).

46. The Board's authority to hold administrative hearings under the Dental Practice Act is limited to addressing conduct of its licensees or applicants for such a license. (CX0019 at 023, Dental Practice Act § 90-41.1(a)). The Board's authority to hold administrative hearings under the Dental Practice Act does not include claims that a non-licensee is engaging in the unlicensed practice of dentistry. (CX0019 at 023, Dental Practice Act § 90-41.1(a)).

47. The Board does not conduct hearings for unlicensed practice of dentistry matters. (CX0554 at 013 (Allen, Dep. at 43); CX0574 at 011 (White, IHT at 39)).

48. The Board does not have authority to discipline unlicensed individuals. (Owens, Tr. 1443, 1516).

49. The Board does not have the legal authority to order anyone to stop violating the Dental Practice Act. (White, Tr. 2284-2288).

B. The Witnesses

1. Fact witnesses

50. Set forth below, in alphabetical order, are the identities of the witnesses who testified either in person at the hearing or through deposition testimony:

Dentist Board members

51. Dr. Stanley L. Allen, Jr. served two three-year terms on the Board, from August 2001 through July 2007. Dr. Allen has also been a member of the NCDS since he arrived in North Carolina. (CX0554 at 004-006 (Allen, Dep. at 7-8, 13-14)).

52. Dr. Benjamin W. Brown served two terms on the Board and was President from 2005 through 2006. He has also held the position of Board Secretary/Treasurer twice and was the chair of the sedation and general anesthesia committee for the Board. Dr. Brown has been in practice since 1967 and has a specialty in endodontics. (CX0555 at 003-005 (Brown, Dep. at 7-12)).

53. Dr. Joseph S. Burnham, Jr., a general dentist who has been in practice for 42 years, was first elected to the Board in 2003 for a three-year term. Dr. Burnham ran for a second term on the Board in 2006, was reelected, and served another three-year term. (CX0556 at 004-005, 007, 009 (Burnham, Dep. at 9-10, 20-21, 28)). While he was a member of the Board, Dr. Burnham would give reports about what the Board was doing to the Second District Dental Society's executive meetings as an ex-officio member. Dr. Burnham has occasionally sat as a delegate in the house of representatives at the NCDS. (CX0556 at 005 (Burnham, Dep. at 12)).

54. Dr. Clifford Feingold is a general dentist who has been in practice for 34 years. Dr. Feingold became a Board member in August 2005 and served through August 2008. (CX0560 at 004-005 (Feingold, Dep. at 9, 12)).

55. Dr. Willis Stanton Hardesty, Jr. is a licensed dentist in Raleigh, North Carolina. He served two terms on the Board, from August 2004 through July 2010. He served as President of the Board from August 2007 through August 2008. (Hardesty, Tr. 2759, 2761-2762; CX0565 at 007 (Hardesty, Dep. at 20-21)). Dr. Hardesty was a member of the Academy of General Dentistry, the North Carolina Academy of General Dentistry, and the American Academy of Cosmetic Dentistry. At the North Carolina Academy of General Dentistry, Dr. Hardesty held "every office beginning with a delegate through presidency and on to the past presidency", and was a delegate to the House of Delegates of the Academy of General Dentistry. The North Carolina Academy of General Dentistry has as one of its purposes the furthering of interest of dentists in the dental profession. There was a multi-year overlap between Dr. Hardesty's service in officer positions at the North Carolina Academy of General Dentistry and a delegate to the House of Delegates of the Academy of General Dentistry and Dr. Hardesty's service on the Board. (Hardesty, Tr. 2798-2800).

56. Dr. Bradley C. Morgan is currently serving on the Board and has had a general dentistry practice in Canton, North Carolina since December 1981. Dr. Morgan also has been a member of the American Dental Association and the NCDS. Dr. Morgan believes he served on the legislation committee and the dental education committee of the NCDS. (CX0569 at 004-007 (Morgan, Dep. at 9-10, 16-19, 21)).

57. Dr. Ronald K. Owens is a general dentist who has been licensed in the State of North Carolina since 1996. His dental practice is currently located in Winston-Salem, North Carolina. Dr. Owens has been a member of the Board since August 2005 and is the current President of the Board until his term expires on July 31, 2011. (Owens, Tr. 1434-1435, 1439-1440).

58. Dr. Millard W. Wester III is a general dentist practicing in Henderson, North Carolina. He became licensed to practice dentistry in North Carolina in August 1980. Dr. Wester has been a member of the Board since 2008, and became Secretary-Treasurer in August 2010. His first term will expire in July 2011. (Wester, Tr. 1276-1278, 1281, 1315-1316).

Non-dentist Board members

59. Ms. Zannie Poplin Efird was the Consumer Representative on the Board from August 2003 until August 2009, serving two terms. (CX0559 at 004 (Efird, Dep. at 7)). Although she was a voting member of the Board, she did not vote on disciplinary matters involving dentists and hygienists, did not participate in any Board matters relating to the unlicensed practice of dentistry, and did not participate in any votes on teeth whitening matters. (CX0559 at 004-008 (Efird, Dep. at 7, 16, 23)).

60. Ms. Neplus S. Hall was the dental hygiene representative of the Board from 2002 through 2008. Ms. Hall did not participate in any discussions relating to teeth whitening and was not involved in any manner with the Board's investigations of teeth whitening. (CX0564 at 005 (Hall, Dep. at 12-13)).

Other witnesses associated with the Board

61. Ms. Carolin Bakewell has served as outside counsel to the Board through her own firm, Carolin Bakewell PLLC, since January 2010. Previously, from September 2006, Ms. Bakewell was in-house counsel for the Board. (CX0581 at 005 (Bakewell, Dep. at 10)).

62. Ms. Casie Smith Goode is the Assistant Director of Investigations for the Board, and has held this position since approximately 2004. She began working for the Board in June 2002 as an executive assistant. As Assistant Director of Investigations, Goode assists the director of investigations, Terry Friddle (F. 64), in overseeing investigations. Goode sets up files, drafts correspondence, makes copies, and communicates with case officers (*see* F. 178). (CX0563 at 003-004 (Goode, IHT at 9-10)). Goode and Friddle both work with three of the six dentist Board members in their roles as case officers. (CX0563 at 004, 027-028 (Goode, IHT at 10-11, 105-107)).

63. Mr. William Linebaugh Dempsey has been employed as an investigator with the Board since June 2003. Mr. Dempsey investigates teeth whitening complaints by observing the kiosk or salon at which the teeth whitening services are performed. (*See* F. 186, 188). He often takes pictures and may write notes on topics including, if chairs or LED lights were set up, or if providers were wearing lab coats. (CX0557 at 004, 009 (Dempsey, Dep. at 8, 28-29); CX0558 at 003 (Dempsey, IHT at 7)).

64. Ms. Terry W. Friddle is the Deputy Operations Officer for the Board and has worked for the Board for 29 years. As Deputy Operations Officer she is "second in

command" at the Board and considers herself the director of investigations. Ms. Friddle reports to both the Board's Chief Operating Officer ("COO") Bobby White and the individual Board members. She oversees the investigative process and makes preparations for the Board's meetings. (CX0561 at 004-005, 006 (Friddle, Dep. at 8-10, 15); CX0562 at 006 (Friddle, IHT at 18)).

65. Dr. Larry Tilley practices general dentistry in Raleigh, North Carolina. Dr. Tilley has worked as a paid consultant for the Board for about twenty years. Dr. Tilley evaluates complaints, examines complainants, and reports back to the Board. Dr. Tilley acts as a consultant for the Board two or three times a year, on issues such as dentures, decay, crowns, and general dental procedures. Dr. Tilley has consulted for the Board on one teeth whitening complaint. (Tilley, Tr. 1997, 2004-2007).

66. Mr. Bobby White is the Chief Operating Officer of the Board. He has had this position since February 2004. He is a licensed attorney in North Carolina. Mr. White's duties include human resources, payroll, insurance, contract negotiations, and advising the Board with regard to disciplinary and legal matters. As part of his duties, he has been designated as the media contact for the Board, and the Board's representative with the North Carolina legislature and serves as liaison with the NCDS. (White, Tr. 2189-2190, 2256-2257; CX0574 at 004, 020 (White IHT at 11-12, 77)).

Other dentists

67. Dr. William M. Litaker has practiced dentistry for 25 years. He is a member of the NCDS, and acts as an NCDS delegate to the American Dental Association and also is a member of the NCDS legislative committee. Dr. Litaker was a trustee of the NCDS from 1999 through 2005. Additionally, from 2006 through 2009, in successive one-year terms, he was Secretary/Treasurer, President-elect, President, and Past President of the NCDS. (CX0576 at 004-005 (Litaker, Dep. at 7, 11)).

68. Dr. Gary D. Oyster has practiced general dentistry for 37 years. Dr. Oyster's practice is located in Raleigh, North Carolina. Dr. Oyster has been the chairman of the legislative committee of the NCDS since approximately 1996. As chairman of the NCDS legislative committee, Dr. Oyster works with the committee to construct an agenda, which is for presentation to the NCDS board of trustees, and enlists the political priorities of the NCDS. (CX0577 at 004-006, 027 (Oyster, Dep. at 7-8, 13-15, 99)).

69. Dr. M. Alec Parker practiced general dentistry from 1979 through 2007. Dr. Parker ceased his dental practice in 2007 and became an employee of the NCDS. He initially acted in an associative or assistive position to the NCDS executive director until January 2008, when he became executive director. Dr. Parker remains the executive director of the NCDS. (CX0578 at 004-005 (Parker, Dep. at 9-13)).

Teeth whitening manufacturers or marketers

70. Mr. George Nelson is the President of WhiteScience, a teeth whitening manufacturing and marketing business located in Alpharetta, Georgia. WhiteScience manufactures and sells a teeth whitening system called SpaWhite. SpaWhite is principally marketed to spas, salons, fitness centers, trade shows, and mall locations. WhiteScience also sells a teeth whitening product to dentists called Artiste. (Nelson Tr. 721-722, 725-726, 729, 800).

71. Ms. Joyce Osborn is the president and founder of BEKS, Inc., which manufactures and distributes the BriteWhite Teeth Whitening System ("BriteWhite System"). BEKS, Inc., is located in Jasper, Alabama and has been in operation since 2004. Ms. Osborn is also the President of the Council for Cosmetic Teeth Whitening ("CCTW"), created in 2007 and incorporated in 2008, which is a trade association that promotes the cosmetic teeth whitening industry and provides a self-administered teeth whitening protocol for use by manufacturers and distributors of non-dentist teeth whitening systems. In addition, Ms. Osborn has operated a beauty salon and spa for more than 26 years. (Osborn, Tr. 646-647, 675, 687).

72. Mr. James Valentine is a co-founder of WhiteSmile USA, a manufacturer and marketer of teeth whitening products, founded in 2007. By 2008, WhiteSmile USA earned revenues of ten million dollars, had 125 to 130 employees, and operated in more than 60 Sam's Club stores across the United States. In its first three years of operation, WhiteSmile oversaw more than 100,000 in-store bleachings. (Valentine, Tr. 515, 546-548, 574-575).

Kiosk or salon operators

73. Mrs. Margie Hughes has been a licensed esthetician since 2005. Mrs. Hughes' training as an esthetician has included a 600-hour course at Central Carolina Community College in Sanford, North Carolina, and continuing education courses of at least eight hours per year. Mrs. Hughes operates her business as SheShe Skin, currently located within the Hair Republic Salon in Dunn, North Carolina. (Hughes, Tr. 928-933).

74. Mr. Brian Wyant opened a WhiteScience kiosk in 2007 after asking questions about the business over the phone and traveling to WhiteScience's headquarters in Atlanta for training. He received training on the protocol relating to teeth whitening, product information, issues relating to documentation, utilizing a consent form, and procedures for safety and cleanliness. (Wyant, Tr. 860, 864-866, 876-884, 892; CX0629 at 001-003).

Mall owner

75. Mr. John Gibson is a partner and Chief Operations Officer of Hull Storey Gibson Companies, L.L.C., also known as HSG. Mr. Gibson oversees the operations of HSG,

a retail property management company that owns and operates 11.5 million square feet of retail space in seven states, including the management of five enclosed malls in North Carolina. (Gibson, Tr. 613-615).

Consumer

76. Mr. Brian Runsick is a consumer who underwent teeth bleaching at the BleachBright facility at Crabtree Valley Mall in February 2008. He testified regarding a complaint he filed with the Board in which he claimed injury as a result of the teeth bleaching. (Runsick, Tr. 2105-2106).

2. Expert witnesses

a. Complaint Counsel's expert witnesses

(i) Dr. John Kwoka, Ph.D.

77. Dr. John Kwoka is a Professor of Economics at Northeastern University. He has a bachelor's degree in economics from Brown University and a Ph.D. in economics from the University of Pennsylvania. Dr. Kwoka has taught economics, at various institutions, for over 30 years. (Kwoka, Tr. 969-972).

78. Dr. Kwoka worked for six years in the Bureau of Economics at the Federal Trade Commission, and one year each in the Antitrust Division of the Department of Justice and as a Special Assistant to the Director of the Common Carrier Bureau of the Federal Communications Commission. (Kwoka, Tr. 972-973).

79. Dr. Kwoka offered these opinions, in summary: that dentist and non-dentist providers of teeth whitening services compete with one another in the provision of teeth whitening services and are close substitutes for each other; that the Board represents licensed dentists in North Carolina and that such dentists have a material interest in prohibiting non-dentist teeth whitening; that the Board acted to prohibit non-dentist teeth whitening services in North Carolina; that exclusion of non-dentist teeth whitening service providers is harmful to consumers because it denies some consumers of options they prefer and likely increases the prices of the remaining options; that complete exclusion is not justified by any economic argument of the Board; that the Board's claims of harm from non-dentist teeth whitening have little evidentiary support; and that if such problems of harm do exist, they can be resolved through less restrictive remedies than exclusion of teeth whitening service providers. (CX0654 at 001; Kwoka, Tr. 982, 994, 996-997, 998, 1001-1002, 1114-1116).

(ii) Dr. Martin Giniger

80. Dr. Martin Giniger has been a licensed dentist since 1984. He also has a master's degree in oral medicine and a Ph.D. in biomedical science, specializing in oral

biology. (Giniger, Tr. 78-79). Dr. Giniger has also been a teacher and researcher. (CX0653 at 001-002).

81. Dr. Giniger has worked and consulted for numerous oral care companies, and has been involved in developing and/or testing the safety and effectiveness of a variety of oral care products, including teeth bleaching products. Dr. Giniger has been involved in the development of teeth bleaching products such as Colgate's Whitening Toothpastes and Systems, Discus' Dental NiteWhite with ACP at-home teeth whitening product, and Discus' Dental Zoom2 teeth whitening system for in-office use. (Giniger, Tr. 96-98; CX0653 at 002-003).

82. Dr. Giniger offered these opinions, in summary: that teeth bleaching, also commonly known as teeth whitening, is safe and effective regardless of whether it is provided by dentists or non-dentists; that teeth whitening is not the same thing as stain removal; that the Board's materials submitted as supporting exclusion of non-dentist teeth whitening service providers for reasons of actual or potential harm were not persuasive; that the operating protocols for non-dentist teeth whitening establishments that he reviewed indicated that there was no reason that appropriate sanitary conditions could not be maintained, even absent running water; that there is no evidence that non-dentist provided teeth whitening poses any greater risk than dentist provided teeth whitening; that consumers benefit from having a variety of safe alternatives for teeth whitening; and that the actions of the Board in excluding non-dentists from teeth whitening has needlessly harmed consumers. (CX0653 at 006-009).

b. Respondent's expert witnesses

(i) Dr. Van B. Haywood

83. Dr. Van B. Haywood has a D.M.D. from the Medical College of Georgia School of Dentistry, where he is now a professor of oral rehabilitation. He practiced dentistry for seven years in Georgia, and also taught at the University of North Carolina School of Dentistry before moving to the Medical College of Georgia. Dr. Haywood is also the director of continuing education at the Medical College of Georgia School of Dentistry. Dr. Haywood has researched and published on the safety and effects of tray bleaching, including the use of Nightguard Vital Bleaching at-home tray bleaching. (RX0077 at 002-003).

84. Dr. Haywood offered these opinions, in summary: that for safety reasons teeth whitening should always be preceded by a proper dental examination to determine the cause of discoloration or staining; that teeth whitening involves bleaching, which constitutes stain removal from teeth; that non-dentist teeth whiteners present themselves as health professionals with the requisite training and skill to diagnose and treat dental conditions; that the safety and quality of certain teeth whitening products is unknown; that teeth whitening without a prior dental exam may be wasteful, result in the masking of a clinical problem, or create an unsightly asthetic; and that teeth

whitening is the practice of dentistry, and is illegal under the North Carolina Dental Practice Act. (RX0077 at 004-006; Haywood, Tr. 2398, 2403-2404, 2545, 2571-2573).

(ii) Dr. David L. Baumer, Ph.D.

85. Dr. David L. Baumer has a Ph.D. in economics from the University of Virginia and a J.D. from the University of Miami. He is a Professor and Head of the Business Management Department at North Carolina State University, College of Management. He also has a consulting practice related to academics. Most of his work has been in the area of governmental regulation. Dr. Baumer was retained to review the expert report of Dr. John Kwoka. (RX0078 at 002, 005-006; Baumer, Tr. 1693-1694).

86. Dr. Baumer offered these opinions, in summary: Dr. Kwoka's opinions that the Board has a material interest in prohibiting non-dentist teeth whitening and that the Board's conduct has harmed consumers would apply to virtually every federal, state, or local professional and occupational licensing board; that a cartel model is an inappropriate method for evaluating governmental licensing boards; that the cartel model ignores evidence that licensing requirements curb fraud and protect public health and safety by preventing consumer harm at the hands of unqualified practitioners; and that Dr. Kwoka cites no evidence that prices charged by dentists for teeth whitening were or are being affected by the non-availability of non-dentist teeth whitening. Dr. Baumer also opined, in summary, that there is a rational basis for regulating the dental profession based on the health and safety of North Carolina citizens and for North Carolina law to require the majority of Board members to be practicing dentists; that restricting the unlicensed practice of dentistry is an obvious and desirable consequence of regulation; and that the Board is not a cartel, but rather excludes unqualified practitioners. (RX0078 at 002-005; Baumer, Tr. 1708; 1696-1697).

C. Jurisdictional Issues

87. The Board is an agency of the State of North Carolina, and is charged with regulating the practice of dentistry in the interest of the public health, safety, and welfare of the citizens of North Carolina. (Joint Stipulations of Law and Fact ¶ 1).

88. Manufacturers of teeth whitening equipment and products used by dentist and non-dentist teeth whiteners are located outside the State of North Carolina. *See* Joint Stipulations of Law and Fact ¶ 21 (non-dentist teeth whiteners in North Carolina bought brand name products, including WhiteSmileUSA, BriteWhite, Beyond White Spa, Beyond Dental & Health, and SpaWhite) and ¶ 25 (dentist teeth whiteners in North Carolina used products by Zoom and Bright Smile); (F. 89-92).

89. WhiteSmile sells and licenses a teeth whitening system manufactured by DaVinci in California, and once operated in North Carolina. (Valentine, Tr. 520, 561, 567).

90. WhiteScience, a manufacturer of non-dentist teeth whitening systems located in Alpharetta, Georgia, sells its products nationally, and has sold some of its products into North Carolina. (Nelson, Tr. 733-734). WhiteScience operates in over 40 states. (Nelson, Tr. 800).

91. BriteWhite, a manufacturer of non-dentist teeth whitening systems located in Jasper, Alabama, sells its products nationally, and has sold some of its products into North Carolina. BriteWhite's products have been sold to customers in Florida, California, New York, Illinois, Ohio, Indiana, Texas, North Carolina and other states. (Osborn, Tr. 645, 668-670).

92. Board member Dr. Hardesty purchased the Zoom in-office teeth whitening system from Discus Dental, headquartered in Culver City, California, in 2002 or 2003, although he no longer uses this product in his office. (CX0535 at 001; CX0565 at 027 (Hardesty, Dep. at 98-100)).

93. Dentist and non-dentist teeth whiteners in North Carolina use instrumentalities of interstate communication in the conduct of their businesses, including without limitation, the telephone and the internet to communicate with manufacturers of teeth whitening equipment and products located outside the State of North Carolina. (*E.g.*, CX0268 at 001-002; CX0313 at 001-002; CX0605 at 003-004; CX0610 at 001-005; CX0036 at 003; CX0119 at 001-002; CX0620 at 001; CX0045 at 003; CX0054 at 006; CX0281 at 001; CX0312 at 001; Hughes, Tr. 934-936; Wyant, Tr. 861, 863-866).

94. Dentist and non-dentist teeth whiteners in North Carolina purchase and receive products and equipment that are shipped across state lines by manufacturers and suppliers located outside the State of North Carolina. (CX0050 at 001; CX0565 at 027 (Hardesty, Dep. at 98-100); Osborn, Tr. 668-670; Nelson, Tr. 733-734; Hughes, Tr. 934-936; CX0655 at 001-003; Wyant, Tr. 861, 863-864, 868-869, 891).

95. Dentist and non-dentist teeth whiteners in the State of North Carolina transfer money and other instruments of payment across state lines to pay for teeth whitening equipment and products received from manufacturers located outside the State of North Carolina. (CX0050 at 001; CX0565 at 027 (Hardesty, Dep. at 98-100); Osborn, Tr. 668-670; Nelson, Tr. 733-734; Wyant, Tr. 861, 863-864, 868-869, 891).

96. The Board sent at least 40 cease and desist letters to non-dentist teeth whiteners in North Carolina that contained various headings directing non-dentists to cease and desist offering teeth whitening services. (Joint Stipulations of Law and Fact ¶ 30; CX0042 at 001 to 041; Kwoka, Tr. 990; RX0078 at 008; CX0050 at 002-003; CX0069 at 001-002; CX0074 at 001-002; CX0077 at 001-002; CX0096 at 001-002; CX0097 at 001-002; CX0153; CX0155; CX0156; CX0386 at 001-002). Some recipients of cease and desist letters sent copies of those letters to their out-of-state suppliers of products, equipment, or facilities. (CX0119 at 001-002).

97. The Board sent at least eleven letters to third parties, including out-of-state property management companies that indicated that teeth whitening services offered at mall kiosks that are not supervised by a licensed North Carolina dentist is illegal. (Joint Stipulations of Law and Fact ¶ 31; CX0203 at 001; CX0204 at 001 (CBL & Associates, Chattanooga, Tennessee); CX0260 at 001 (General Growth Properties, Chicago, Illinois); CX0261 at 001 (Hendon Properties, Atlanta, Georgia); *see also* CX0205 at 001; CX0259 at 001; CX0260 at 001; CX0262 at 001; CX0263 at 001; CX0323 at 001; CX0324 at 001; CX0325 at 001).

98. The eleven letters referred to in F. 97 impacted out-of-state mall operators' decisions whether to rent kiosks or stores to non-dentist teeth whiteners in North Carolina. (Gibson, Tr. 627-628, 632-633; Wyant, Tr. 876-884; CX0629 at 001-002; CX0525 at 001).

99. The Board sent letters titled Notice to Cease and Desist to out-of-state manufacturers of teeth whitening products used by non-dentist teeth whiteners in North Carolina. (CX0100 at 001 (December 4, 2007, Notice to Cease and Desist to WhiteScience, Roswell, GA); CX0122 at 001-002 (October 7, 2008, Notice and Order to Cease and Desist to Florida WhiteSmile in Orlando, FL)).

D. The Relevant Market is Dentist Provided and Non-Dentist Provided Teeth Whitening Services

1. Teeth whitening services generally

100. Teeth whitening can be achieved in one of three methods: (1) bleaching or lightening, through the application of some form of peroxide - hydrogen peroxide or carbamide peroxide; (2) through the use of aesthetic or prosthetic dental restorations, such as crowns, caps or veneers; and (3) through dental stain removal, either through the application of toothpaste or by going to the dentist to have stains scraped off, including by the use of rotary instruments to polish teeth. (Giniger, Tr. 128-132).[7]

101. A 1989 article publicized the discovery that the use of low level concentrations of hydrogen peroxide, if held against the teeth in a tray or other mechanism, could whiten teeth. A few years later, various companies started developing products for the purpose of whitening teeth and dentists began using this method to whiten patients' teeth. (Giniger, Tr. 149-150; CX0653 at 024; CX0550 at 002-003; CX0392 at 002).

102. The American Academy of Cosmetic Dentistry ("AACD") reported in 2004 and the American Dental Association's ("ADA") Counsel for Scientific Affairs reported in 2009 that teeth whitening or bleaching has become one of the most popular esthetic dental treatments over the past two decades. The AACD reported in 2004 that teeth

[7] The Complaint challenges conduct relating only to the first method of teeth whitening. Complaint ¶¶ 8, 10. The term "teeth whitening" is used herein to refer to the first method of teeth whitening, bleaching or lightening through the application of some form of peroxide.

whitening or bleaching is the number one requested cosmetic dentistry procedure, and had increased more than 300% since 1996. (CX0397 at 001; CX0392 at 002).

103. A 2008 national Gallup Poll reported that over 80% of dentists nationwide engage in the practice of teeth whitening. (CX0513 at 007).

104. Some dentists in North Carolina earned thousands of dollars annually in revenue from the provision of teeth whitening procedures during the period from 2005 through August of 2010. (CX0599 at 003; CX0605 at 003; CX0616 at 021; CX0601 at 008; CX0608 at 002; CX0602 at 002; CX0600 at 003; CX0603 at 003).

2. Teeth whitening products and services methods

105. There are four categories of teeth whitening services or products available in North Carolina: (1) dentist in-office teeth whitening services; (2) dentist provided take-home teeth whitening products; (3) over-the-counter ("OTC") teeth whitening products; and (4) non-dentist teeth whitening services in salons, retail stores, and mall kiosks. (Kwoka, Tr. 981-984, 1168; Baumer, Tr. 1845; CX0392 at 002; CX0053 at 004-005; Osborn, Tr. 650; Valentine, Tr. 515).

106. The four alternative methods of teeth whitening (F.105) have a number of common characteristics. All of the methods use some form of peroxide - hydrogen peroxide or carbamide peroxide - and all involve application of that chemical in gel or strip form directly onto the teeth. All of the methods trigger the same chemical process that results in whiter teeth. (Kwoka, Tr. 997; Baumer, Tr. 1925-1926).

107. The four alternative methods of teeth whitening (F. 105) differ in ways that are important to consumers, including immediacy of results, ease of use, provider support, and price. (Giniger, Tr. 118-121; Haywood Tr. 2915-2917; Kwoka, Tr. 994-995; CX0653 at 005).

a. Dentist in-office teeth whitening services

108. Dentists offer and provide teeth whitening services in North Carolina. (CX0467 at 001; CX0578 at 007 (Parker Dep. at 12-14); CX0566 at 003 (Hardesty, IHT at 9); CX0576 at 005 (Litaker, Dep. at 11-12); CX0577 at 009 (Oyster, Dep. at 28); Wester, Tr. 1289; CX0554 at 007 (Allen, Dep. at 18-19); CX0641 at 001-067).

109. The teeth whitening products used by dentists for in-office teeth whitening generally have a higher concentration of the active ingredients hydrogen peroxide or carbamide peroxide than that typically available in non-dentist teeth whitening. Dentist provided in-office bleaching typically uses highly concentrated hydrogen peroxide (25% to 35%), applied multiple times during a single office visit. (Joint Stipulations of Law and Fact ¶ 24; Giniger, Tr. 169, 172; CX0653 at 021; RX0078 at 006).

110. Dental chair-side bleaching is performed by a dentist or supervised assistant in a dental chair at the dentist's office. The procedure includes a dental exam by the dentist to identify whether or not a patient is an appropriate candidate for teeth whitening services. (Giniger, Tr. 179-180; Haywood, Tr. 2472; CX0653 at 039).

111. During a preparatory time of up to 30 minutes, the patient's teeth are exposed using cheek retractors. Due to the high concentration of peroxide used in professional bleaching products (up to 38%), a protective barrier is applied to prevent the gums from burning. (Joint Stipulations of Law and Fact ¶ 24; Giniger, Tr. 168-169; Haywood Tr. 2692). The peroxide solution is thereafter painted directly on the teeth and a curing light is often placed in front of the teeth to activate the bleaching gel or expedite the whitening effect. After 30 minutes, the gel is usually suctioned off the teeth using a dental vacuum. The gel is reapplied, the light (if used) is set again, and the treatment is repeated up to two more times for a total of 60-120 minutes of actual bleaching time. (CX076 at 007 (Parker, Dep. at 21); CX0596 at 002; Giniger, Tr. 164-172; CX0653 at 040).

112. Dental chair-side bleaching can be done with or without the use of an accelerator light, which emits heat and ultra-violet radiation (UV) to accelerate whitening. (Giniger, Tr. 169; CX0653 at 021, 027).

113. To complement the accelerator light, dental chair-side formulations may also contain a photo or thermal activator, a chemical designed to interact with the light or heat to cause the peroxide to break down more quickly. (Giniger, Tr. 169, 172; CX0653 at 021; CX0809A; CX0809B).

114. Many dentists today use lights, such as light emitting diode (LED) lights, which generate neither appreciable UV nor heat, above the ambient temperature. (Giniger, Tr. 187-188; CX0632 at 011).

115. Patients having in-office teeth whitening wear protective glasses to prevent eye injury from the spatter of hydrogen peroxide as it is applied directly to the teeth or from UV in the event the dentist uses a UV-emitting light. (Giniger, Tr. 181-191).

116. Dentist in-office teeth whitening services provide results in one to three hours. (CX0601 at 026; CX0598 at 001; CX0641 at 040).

117. Dentist in-office teeth whitening services range widely in price, but charges between $400 and $500 are common. (Kwoka, Tr. 982; RX0078 at 006-007; CX0560 at 048 (Feingold Dep. at 183 ($500)); CX0053 at 001-002 ($400); CX0108 at 008 ($400-$900); CX0096 at 004 ($400-$600); Hardesty, Tr. at 2805-2806 ($675-$750); CX0578 at 005 (Parker, Dep. at 12-13 ($350)); CX0601 at 009 ($550); CX0609 at 002 (regularly $350); CX0611 at 004 ($400); CX0616 at 034 (averaged $537 for in-office bleaching); CX0653 at 040 ($500 to $800); CX0570 at 043-044 (Owens, Dep. at 167-168) (approximately $500)).

118. Dentist provided chair-side bleaching is the most costly bleaching alternative, of the four options described in F. 105, often costing between $400 and $700. (Giniger, Tr. 119-120).

119. The principal benefits of dentist in-office teeth whitening are that it is quick and effective, providing immediate results in one visit to the dentist. Additional benefits include professional service, guidance, and support. (Giniger, Tr. 180-181; Kwoka, Tr. 981-982).

120. The disadvantages to dentist in-office teeth whitening are that it is relatively expensive compared to the alternatives, and it requires making an appointment with the dentist that may not be at a convenient time for the consumer. (Kwoka, Tr. 981-982).

b. Take-home kits provided by dentists

121. Dentists in North Carolina also offer take-home teeth whitening kits that consumers self-administer after a consultation with the dentist. (Giniger, Tr. 119-121; CX0652 at 019-020; CX0571 at 006 (Owens, IHT at 20-21); CX0570 at 023 (Owens, Dep. at 84); CX0560 at 004-005, 048 (Feingold, Dep. at 9-10; 183); Hardesty, Tr. at 2775; CX0565 at 006 (Hardesty, Dep. at 15); CX0578 at 005 (Parker, Dep. at 11-12); CX0580 at 006-007 (Tilley, Dep. at 14-15, 19); CX0641 at 001-067).

122. Take-home kits provided by dentists include a custom-made whitening tray and whitening gel. The tray is created either by the dentist, hygienist or technician, and takes roughly 30 to 45 minutes to fabricate. (CX0580 at 006 (Tilley, Dep. at 14); CX0554 at 007 (Allen, Dep. at 18-19); CX0566 at 003 (Hardesty, IHT at 9); CX0566 at 019 (Hardesty, IHT at 72); Wester, Tr. 1289; Giniger, Tr. 200).

123. Take-home kits provided by dentists can either be used as a follow-up to in-office treatment or as the sole teeth whitening service. (Joint Stipulations of Law and Fact ¶ 26).

124. Take-home kits provided by dentists usually require at least two visits to the dentist. Typically, in the first visit, the dentist examines the patient and takes an impression used to make a customized teeth whitening tray. Usually, in the second visit, the dentist delivers the tray and whitening solution, and provides instructions for whitening to the patient. (Joint Stipulations of Law and Fact ¶ 28).

125. Take-home kits provided by dentists typically use low concentrations of hydrogen peroxide or carbamide peroxide and require the consumer to reapply the whitening solution to his or her own teeth multiple times over a period of weeks or months. (Joint Stipulations of Law and Fact ¶ 27; Giniger, Tr. 119-121; CX0571 at 006 (Owens, IHT at 20-21)).

126. Take-home kits provided by dentists typically cost hundreds of dollars, in part because the dentist performs a diagnostic examination, charges to fabricate the custom tray,

provides instruction on its use, and supplies the whitening product and kit. (CX0576 at 005-006 (Litaker, Dep. at 16-17 ($380 per arch/$760 for full mouth)); CX0577 at 009 (Oyster, Dep. at 29 ($300)); CX0578 at 005 (Parker, Dep. at 12-13 ($250))).

127. Take-home kits provided by dentists are usually more expensive than any non-dentist provided products. (Compare CX0653 at 043 (non-dentist take home product costs between $40 and $80) with Giniger, Tr. 201 (typical price of dentist provided take home kit is $350 to $500)).

128. Take-home kits provided by dentists are less expensive than the dentist in-office procedure and are also relatively effective at whitening teeth. On the other hand, the consumer is required to apply the product at home a number of times without assistance. (Kwoka, Tr. 982-983; CX0654 at 004).

c. Over-the-counter products

129. Manufacturers recently developed unique trayless methods for over-the-counter ("OTC") at-home bleaching. Available OTC products include gels, rinses, chewing gums, trays, and strips. In a 2006 report, NBC's *Today* correspondent Janice Liebennan reported that in 2005, the U.S. market for OTC products was $41.4 billion. (CX0653 at 041; Joint Stipulations of Law and Fact ¶ 22).

130. OTC products typically use relatively low concentrations of hydrogen peroxide or carbamide peroxide, that are applied daily for an extended period of time. OTC products are sold in a variety of locations including pharmacies, groceries, over the internet, and even by dentists. (Giniger, Tr. 204-207).

131. Crest Whitestrips from Proctor and Gamble (P&G) was one of the first OTC teeth bleaching products on the market, and it remains the number one selling product today. When first made available to consumers in 2001, Whitestrips contained approximately 5% hydrogen peroxide. Now, the most popular Whitestrips contain a greater concentration of bleaching agents. Other manufacturers have also developed generic whitening strips as well, and the concentration of hydrogen peroxide in these strips has also increased significantly over the years. (CX0653 at 041; CX0566 at 016 (Hardesty, IHT at 58-59); CX0555 at 019 (Brown Dep.at 67); CX0560 at 030 (Feingold, Dep. 111-112); CX0570 at 020 (Owens, Dep. 71-72)).

132. Consumers self-apply the OTC strips directly to their teeth. (Kwoka, Tr. 983; CX0654 at 004).

133. In order to whiten teeth, OTC strips must be reapplied multiple times over multiple days. (Joint Stipulations of Law and Fact ¶ 29).

134. OTC strips and trays typically cost between $15 and $50, depending on brand, quantity, and concentration. (CX0382 at 001 (Crest 3D - $43.97); CX0394 at 001 (Crest 3D White Strips Professional Effects - $47.99, Plus White 5 Minute Speed

Whitening System - $10.99, DenTek Complete White Professional Whitening - $14.99)).

135. The whitening results with OTC strips are highly variable because user compliance is variable. A great many consumers will not complete the whitening regimen, which may require up to 30 days of daily use. (CX0653 at 041-042).

136. The OTC strips have the advantages of the convenience of at-home treatment as well as low cost compared to the other alternatives. The OTC strips are effective when used over a period of days or weeks. The disadvantage is that OTC strips require diligent and repeated application by the consumer. (Kwoka, Tr. 983; CX0654 at 004).

d. Non-dentist teeth whitening service providers

137. Teeth whitening services are offered by non-dentists, including in North Carolina, and have been offered since approximately 2003 or 2004. (Hughes, Tr. 934-936; Nelson, Tr. 733-734; Osborn, Tr. 646-47, 668-670; Wyant Tr., 860-63, 870-871; Valentine, Tr. 567).

138. Teeth whitening services by non-dentists are offered in kiosks, spas, retail stores, and salons. (Hughes, Tr. 934-936; Nelson, Tr. 733-734; Osborn, Tr. 668-670; Valentine, Tr. 519-520; Wyant Tr. 870-871).

139. Teeth whitening products used by non-dentists fall under many brand names, including WhiteSmile USA, BriteWhite, Beyond White Spa, Beyond Dental & Health, and SpaWhite. (Joint Stipulations of Law and Fact ¶ 21).

140. Non-dentist teeth whitening providers typically use a mid-level hydrogen peroxide or carbamide peroxide concentration, typically equating to 16% or less of hydrogen peroxide. The product is usually applied once during a single visit. (Giniger, Tr. 182-183; CX0653 at 021).

141. A gingival barrier is not required in a non-dentist bleaching procedure because the concentration of peroxide used is non-caustic, and often the delivery system, such as a sponge in the mouthpiece that is pre-impregnated with peroxide, prevents unwanted dispersal of peroxide into the oral cavity. (Giniger, Tr. 192; CX0653 at 020-021).

142. Typically, but not always, a non-dentist provider will follow a protocol provided by a teeth whitening manufacturer or distributor. While each protocol is slightly different, all require the operator to provide the customer with literature, and some require the customer to answer questions before the procedure begins. (CX0108 at 009; CX0049 at 056-067; Valentine, Tr. 545-546; Osborn, Tr. 653, 707; Nelson, Tr. 796-797).

143. In a typical non-dentist bleaching procedure, the operator generally will: (1) have the client sit in a chair; (2) put on protective gloves; (3) place a bib around the client's neck; (4) take a tray from a sealed package, which is either pre-filled with peroxide

solution or which the operator fills with the peroxide solution, and hand it to the customer, who places the tray into his or her mouth; (5) adjust the light, if used; and (6) start the timer. At the end of the procedure, the customer will remove the tray and hand it to the provider, who disposes of it. (Giniger, Tr. 188-189; CX0108 at 010-012; CX0049 at 056-067; Osborn, Tr. 653, 655, 707-708; Nelson, Tr. 750, 757, 770, 796-797; Valentine, Tr. 533-534).

144. Non-dentist bleaching centers may use lights during the procedure. However, unlike dentists, these facilities use LED lights, which produce no UV radiation and little heat above the ambient temperature. (Giniger, Tr. 182-183, 479; CX0653 at 021).

145. Most manufactures use a tray delivery system, which is often pre-impregnated with peroxide. (Giniger, Tr. 187, 385).

146. Teeth whitening services offered in kiosks, spas, retail stores, and salons typically take one hour or less to whiten the customer's teeth. (Nelson, Tr. 740 (whitening process took 20 minutes using SpaWhite); Osborn, Tr. 653-656 (whitening process took 20 minutes after placement of the BriteWhite whitening tray); Valentine, Tr. 532-533 (once a customer had a tray inside his mouth, the session with the light would last 15 minutes with WhiteSmile)).

147. The cost of non-dentist teeth whitening varies, but ranges between $75 and $150. (Kwoka, Tr. 984; CX0654 at 004).

148. Non-dentist teeth whitening services are typically priced below dentist provided services ($400 to $500 (F. 117)) and above OTC teeth whitening products ($15 to $50 (F. 134)). (Baumer, Tr. 1926; CX0826 at 034 (Baumer, Dep. at 128)).

149. Non-dentist chair-side bleaching is accessible, located most often in large shopping malls, and does not require an appointment. (CX0653 at 042; Valentine, Tr. 532; Tilley, Tr. 1973).

150. Non-dentist teeth whitening can be completed in a single bleaching session. It is effective at whitening teeth but with a significantly lower cost in comparison to in-office dentist teeth whitening. (Kwoka, Tr. 983-984; CX0654 at 004).

3. Dentist and non-dentist provided teeth whitening services are a relevant market

a. Dentist and non-dentist provided teeth whitening services are reasonable substitutes for one another

151. Non-dentist and dentist teeth whitening services have common characteristics, including quick and efficient service, provision of instruction, provision of a tray, loading of the peroxide, and use of a light activator. (*Compare* F. 109-114 *with* F. 140-146).

152. If a consumer wants effective "one-shot" teeth whitening, the only ways to achieve such immediate results would be to go to a dentist or a non-dentist provider of teeth whitening services, such as those located in mall kiosks. (Kwoka, Tr. 982-984, 998; CX0560 at 048 (Feingold, Dep. at 184); Nelson, Tr. 766-767).

153. If a consumer wants teeth whitening within 24 hours, and has not previously made an appointment with a dentist, he or she would turn to a non-dentist provider of teeth whitening services because they have similar attributes as dentist provided services. (Baumer, Tr. 1975-1976; CX0826 at 034 (Baumer, Dep. at 126-27)).

154. Cross-elasticity is an economic term measuring the degree of substitution between alternative products, defined as the percentage change in quantity and demand of one product as the price of a different product changes. (Kwoka, Tr. 999-1000).

155. There is substantial cross-elasticity between dentist and non-dentist teeth whitening services. (Kwoka, Tr. 999; Baumer, Tr. 1842).

156. Dentist provided and non-dentist provided teeth whitening services are reasonable substitutes for one another. (F. 151-155).

b. Dentists and non-dentists compete with one another

157. Dentists are aware that there is commonality and substitution between the methods of teeth whitening. (Kwoka, Tr. 997-998; CX0392 at 002).

158. Dentists and non-dentist teeth whiteners in North Carolina compete to provide teeth whitening services to consumers in North Carolina. (Kwoka, Tr. 994-998; RX0078 at 010).

159. Dr. Burnham discussed with other Board members that consumers may choose to go to a kiosk teeth whitener to get their teeth whitened rather than to a dentist. (CX0556 at 040 (Burnham, Dep. at 152)).

160. A non-dentist teeth whitener operating within two miles of a dentist could affect the volume of teeth whitening services provided by the dentist. (CX0565 at 024 (Hardesty, Dep. at 87)).

161. A dental practice that sought to perform teeth whitening as an important part of its revenue stream might react to the price charged by a nearby non-dentist teeth whitener by reducing its own prices for teeth whitening. (CX0565 at 024 (Hardesty, Dep. at 87-88)).

162. Dr. Baumer agrees that a reduction in supply of teeth whitening services will have an upward impact on price. (Baumer, Tr. 1700).

163. Dentists in North Carolina have made claims in advertisements that they practice "Cosmetic Dentistry," including the provision of teeth whitening services. (CX0641 at 001-002, 004, 013, 015-018, 020, 024-027, 029-032, 039, 043-044, 048-049, 052, 059-060, 063-067).

164. Non-dentist providers of teeth whitening services target advertisements to consumers who would or are considering going to the dentist for teeth whitening. The advertisements boast similar results as dentists but for a lower price, indicating a belief that consumers will substitute between these two alternatives. (Kwoka, Tr. 999).

165. Non-dentist providers of teeth whitening services in North Carolina have advertised that they charge lower prices for their services than dentists charge for their teeth whitening services. (Kwoka, Tr. 999; CX0556 at 040 (Burnham, Dep. at 151-152); *see also* CX0096 at 004; CX0103 at 014-015; CX0043 at 005; CX0108 at 009; CX0054 at 006; CX0198 at 002).

166. Non-dentist providers of teeth whitening services in North Carolina have compared their services to teeth whitening provided by dentists with respect to efficacy. (CX0041 at 006-007; CX0096 at 004; CX0108 at 008-009).

167. Non-dentist teeth whiteners in North Carolina have compared themselves to dentists in terms of time and convenience. (CX0108 at 009).

168. Non-dentist providers of teeth whitening services have advertised that they can whiten teeth in one hour or less. (CX0308 at 007; CX0043 at 002; CX0078 at 002; CX0108 at 008; CX0054 at 006; CX0103 at 009).

169. Discus Dental, the largest manufacturer of whitening products for dentists, maker of Zoom and BriteSmile, has included salon/mall operations in its consumer surveys, indicating industry recognition of non-dentist competition. The survey found that on several different attributes, including convenience, value, and pain, consumers rate these non-dentist teeth whitening operations between OTC products and dentist provided products. (CX0489 at 013, 031-032, 044-045, 050, 052).

4. The relevant market does not include self administered teeth whitening products

170. Take-home products do not contain as much hydrogen peroxide as contained in the products used by dentists and non-dentists providing teeth whitening services. (Giniger, Tr. 204-205; CX0653 at 020, 041).

171. Take-home products require numerous bleaching sessions over many days or weeks. By contrast, chair-side bleaching, whether provided by dentists or non-dentists, is usually limited to a single session. (Giniger, Tr. 118-119; CX0653 at 005).

172. The amount of time it takes to whiten the teeth is important to some consumers of teeth whitening services or products. (Hardesty, Tr. 2812-2813; Nelson, Tr. 766).

173. OTC products come only with instructions. By comparison, dentists provide professional service, support, and advice and non-dentists typically provide service based on training provided to them by the manufacturers of the bleaching products/services and their own experience. (Giniger, Tr. 119; CX0653 at 005).

174. OTC products ($20-$60) are the least expensive alternative for consumers. These products are good for cost-conscious consumers who are willing to self-apply bleaching products over several days or weeks aided only by written instructions. However, they are not a good substitute for chair-side teeth bleaching for those consumers intent on quick results or wary about self-application of OTC products without supervision or support. (Giniger, Tr. 120-121; CX0653 at 005-006).

E. The Board's Cease and Desist Letters[8]

1. Background

a. The Board's process for handling complaints and investigations of unauthorized practice of dentistry

175. The Board conducts investigations of allegations that persons are engaged in the unauthorized practice of dentistry. (CX0236 at 001-002; Owens, Tr. 1440-1441; 21 N.C.A.C. 16 U.0101; 21 N.C.A.C. 16 U.0102 (21 N.C.A.C. 16 *et seq.* contains the Board's Rules)).

176. The Board's process for handling complaints and investigations in non-licensee cases, including those regarding teeth whitening, is set forth in the Board's investigations manual. (CX0527 at 008-010, 029-031; White, Tr. 2220-2221).

177. The process for handling non-licensee cases includes the receipt of a complaint, an investigation, and a decision by the case officer about how to proceed after the investigation. (CX0556 at 064 (Burnham, Dep. at 247-248)).

178. All complaints to the Board initially go to the Board's Deputy Operations Officer, Terry Friddle. (CX0562 at 011 (Friddle, IHT at 38-39)). Ms. Friddle assigns case numbers to the complaints and forwards the complaints to the Secretary-Treasurer. (White, Tr. 2219).

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[8] The testimony and exhibits refer to communications sent by the Board interchangeably as "cease and desist orders" and "cease and desist letters." Findings as to whether these communications constituted "letters" or "orders" are set forth in F. 207-226. Based on these findings, except where the term "cease and desist order" is specifically used in the testimony or exhibit, the communications sent by the Board are referred to herein as "cease and desist letters."

179. The Board's Secretary-Treasurer, a dentist, receives all complaints filed with the Board and assigns them to a case officer. (White, Tr. 2202-2203; Wester, Tr. 1281).

180. The Secretary-Treasurer has discretion in assigning cases or investigations. (White, Tr. 2203). The Secretary-Treasurer may keep a case or assign the case to another Board member. The assigned Board member is referred to as the case officer for that investigation. (CX0562 at 011 (Friddle, IHT at 38-39); CX0556 at 007-008 (Burnham, Dep. at 21-22); Owens, Tr. 1440-1441).

181. The investigative panel conducts investigations of alleged instances of the unlawful practice of dentistry. (Owens, Tr. 1440-1441; CX0527 at 006, 009-010, 015; CX0234 at 001-011).

182. A Board investigative panel consists of the case officer, the Deputy Operations Officer or Board designee, and the Investigator assigned to the investigation. The Board's legal counsel may participate in the panel meetings as needed. (CX0527 at 006; Owens, Tr. 1441; CX0554 at 012 (Allen, Dep. at 39)).

183. The case officer is the Board member assigned by the Board President or Secretary-Treasurer whose duty it is to oversee an investigation. (CX0527 at 006). Deputy Operations Officer Friddle assigns an investigator (either Mr. Kurdys or Mr. Dempsey) and a case manager (either Ms. Friddle or Ms. Goode) to the case. (CX0562 at 011 (Friddle, IHT at 38-39)).

184. Only dentists serve as case officers for teeth whitening investigations. (Hardesty, Tr. 2838; CX0563 at 009-010 (Goode, IHT at 33-34); CX0571 at 016 (Owens, IHT at 62); CX0566 at 008 (Hardesty, IHT at 27-28); CX0555 at 031-032 (Brown, Dep. at 117-118) (hygienist Board member cannot be assigned as a case officer)).

185. The case officer directs the investigation of instances of teeth whitening services performed by non-dentists and is assisted by other Board staff members. (Owens, Tr. 1441-1442; CX0571 at 014 (Owens, IHT at 50-51)).

186. At the direction of the case officer, Board investigators perform undercover investigations in non-dentist teeth whitening cases posing as prospective clients. (CX0558 at 017 (Dempsey, IHT at 64); (CX0038 at 004) (Hardesty directed Friddle to do a "sting" of a non-dentist teeth whitener where Board investigators posed as clients to have impressions made); CX0070 at 001; CX0367 at 001; CX0284 at 001; CX0201 at 001).

187. Board investigators also perform investigations, at the direction of the case officer, where they identify themselves as Board employees and ask questions about the processes used by non-dentist teeth whiteners. (CX0367 at 001; CX0228 at 001-002; CX0247 at 001).

188. Board investigator Dempsey often takes pictures and may write notes indicating whether non-dentist teeth whiteners had [dental] chairs set up, whether there were LED lights set up and if the providers were wearing lab coats. (CX0557 at 009 (Dempsey, Dep. at 28-29)).

189. The case officer is authorized by the Board to make enforcement decisions and take enforcement actions on its behalf. (CX0570 at 011 (Owens, Dep. at 37); CX0571 at 014 (Owens, IHT at 50-51); White, Tr. 2224).

190. At the conclusion of the investigation in an unlicensed practice of dentistry case, the case officer has two options. The case officer can direct the Board attorney to take civil action or recommend a criminal prosecution to a local district attorney. If that happens, the Board would be informed at the next Board meeting. (White, Tr. 2224).

191. The case officer in an unlicensed practice of dentistry case may decide to authorize a cease and desist letter to the target of the investigation. (CX0556 at 064 (Burnham, Dep. at 248)).

192. Ms. Efird, the consumer member of the Board, was a voting member of the Board. However, she did not vote on disciplinary matters involving dentists and hygienists. She did not participate in any votes on teeth whitening matters. (F. 59; CX0559 at 006 (Efird, Dep. at 16)).

193. Ms. Hall, the hygienist member, was not involved in any manner with the Board's investigations of teeth whitening services. Ms. Hall did not participate in any discussions relating to teeth whitening while on the Board. (CX0564 at 006 (Hall, Dep. at 15-16)).

b. Complaints about non-dentist providers of teeth whitening services made by dentists

194. In or around 2003, the Board received its first complaints about non-dentist providers of teeth whitening services. (CX0562 at 006 (Friddle, IHT at 21)).

195. Dr. Benjamin Brown opened an investigation of Great White Smiles in September 2003 after Dr. Richard Yeager complained that his staff had informed him that Great White Smiles was selling teeth whitening gel and making impressions for bleach trays at the "Southern Women's Show" in Charlotte, North Carolina. (CX0033 at 001-005). Dr. Brown subsequently directed Ms. Friddle to close the investigation for "lack of evidence." (CX0032 at 001-005).

196. Between August and September 2, 2004, four North Carolina dentists complained to the Board about Edie's Salon Panache. The complaints noted that the salon advertised that it was the second "salon in North Carolina to offer teeth whitening" and that it offered a price of $149, which was lower than the amount dentists charge. (CX0036 at 002-004).

197. On September 11, 2006, Dr. Luiz Arzola faxed the Board a complaint noting that "increasingly large number[s] of spas in the Hickory area are offering their clients dental bleaching." He inquired whether that procedure is legal when performed by unlicensed persons. (CX0619 at 001).

198. The Board met on February 9, 2007, and discussed the increasing number of complaints regarding non-dental teeth whitening services being provided in spas. (CX0056 at 005).

199. By February and March of 2008, Board employees Ms. Bakewell and Ms. Goode recognized that there were non-dentist teeth whitening service providers or "bleaching kiosks" and teeth whitening companies throughout the State of North Carolina. (CX0231 at 001; CX0092 at 001).

200. On November 19, 2007, Dr. Harald Heymann complained to the Board about a non-dentist bleaching salon in Southpoint Mall in North Carolina, emphasizing that the salon operator stated that they use 44% carbamide peroxide administered in a gel tray and that they charge $100. (CX0365 at 002).

201. After receiving a February 18, 2008 complaint from Dr. Mark Casey of Raleigh, North Carolina about a teeth whitening kiosk in Crabtree Valley Mall, Bobby White, the Board's COO, responded that the Crabtree Valley whitening kiosk "is one of many such 'bleaching kiosks' with which we are currently going forth to do battle," and that the Board had sent out "numerous cease and desist orders throughout the state." (CX0404 at 001-002).

202. In a letter dated February 27, 2008, Dr. Nicole LeCann complained to the Board about a bleaching kiosk in Crabtree Valley Mall. Dr. LeCann noted that the kiosk's prices started at $99 and wrote that the presence of kiosks "cheapens and degrades the dental profession." Dr. LeCann requested that the Board investigate the matter "quickly." (CX0278 at 001; White, Tr. 2317-2319).

203. The tripartite meeting is a meeting held between the North Carolina State Board of Dental Examiners, the North Carolina Dental Society ("NCDS") and the UNC School of Dentistry. The meeting is held once every year and hosted by each one of these groups on a rotating basis. (Hardesty, Tr. 2866).

204. The NCDS is a professional association of North Carolina Dentists that promotes, among other things, the interests of North Carolina dentists. (CX0578 at 010 (Parker, Dep. 32); CX0577 at 006 (Oyster, Dep. at 15)).

205. At the April 4, 2008 tripartite meeting, the NCDS members in attendance complained about the proliferation of non-dentist teeth whitening kiosks and asked the Board what it was going to do about it. The Board assured the NCDS that it was investigating

complaints about non-dentist teeth whiteners. (CX0565 at 067 (Hardesty, Dep. at 259-261); CX0109 at 003).

206. At a general meeting of the Board attended by Ms. Hall, it was mentioned that the Board would be investigating complaints about teeth whitening services. (CX0564 at 006 (Hall, Dep. at 15-16)).

2. Origins and numbers of cease and desist letters

207. On September 30, 2005, Board Investigator Dempsey sent an e-mail to Board member Dr. Brown and several Board staff regarding an investigation into jewelry stores fabricating decorative gold teeth. In the email he noted that he and Casie Smith [Goode], had previously developed a cease and desist letter to "deal with dentists practicing without a license" and he believed it would be useful in the jewelry case. He noted that he was working on a similar jewelry case in another part of the state and that he had written to the case officer in that case:

> In an email to the Case Officer, I stated: "I also must say that I really do like the Cease and Desist Letter . . . I think in the past, we have had several of these type of cases [person is allegedly treating patients without a license] that ended up getting closed because we didn't have evidence . . . at least now we can put them on notice that we know something is going on. This might work well with the "gold teeth" type cases as well. With them, they may not know that it is against the law to take impressions . . . this informs them and lets them know we are investigating them (or at least they think we are constantly watching them, sending in undercover agents, etc . . . when we aren't). Hopefully, it causes them to modify their behavior.

(CX0080 at 002 (alterations in original); White Tr. 2335-2336).

208. In 2006, the Board sent two cease and desist letters to non-dentist teeth whitening providers. (CX0038 at 001; CX0044 at 004-005). The first letter was to Serenity Day Spa, located at 814 C Old Spartanburg Highway, Hendersonville, North Carolina. (CX0038 at 001). The second letter was to Stephanie Keith of Star-Bright Whitening Systems at her place of business known as the Cutting Crib Hair Salon in Sanford, North Carolina. (CX0044 at 003-005).

209. In 2007, the Board sent at least 12 cease and desist letters to non-dentist teeth whitening providers. (CX0050 at 001-003; CX0069 at 001-002; CX0074 at 001-002; CX0077 at 001-002; CX0094 at 005-006; CX0096 at 001-002; CX0097 at 001-002; CX0279 at 001-002; CX0386 at 001-002). Of these 12 letters, several are addressed to the same establishment. (CX0065 and CX0097; CX0074 and CX0256).

210. Beginning in 2007, because the volume of complaints had increased, it became the policy of the Board to issue cease and desist letters on the basis of the complaint, without any investigation. (CX0070; CX0562 at 013 (Friddle, IHT at 43-44, 47)).

211. On March 22, 2007, Ms. Friddle sent an e-mail to Dr. Holland regarding the difficulty in getting the time to send staff to "perform these undercover spa deals." Ms. Friddle explained to Dr. Holland: "Dr. Hardesty has pretty much taken the stance that we write them a cease and desist letter the first go round." The Board would only "move in with the big guns," if the Board discovered that a cease and desist letter recipient persisted in providing non-dentist teeth whitening services. (CX0070 at 001; CX0561 at 022-023 (Friddle, Dep. at 81-83)).

212. When Dr. Hardesty directed Ms. Friddle around March 2007 to "write [non-dentist teeth whitening businesses] a cease and desist letter the first go round," Ms. Friddle understood that to mean to send a cease and desist letter when a complaint initially came in. On at least five occasions, she followed Dr. Hardesty's directions. (CX0070 at 001; CX0561at 022-023 (Friddle, Dep. at 81-84)).

213. In 2007 and 2008, cease and desist letters were sent "fairly quickly, like shortly after the case was set up." (CX0562 at 013 (Friddle, IHT at 47)). According to Ms. Friddle, "if it is unclear as to whether or not, or if it appears that there's a violation, then we would send a cease and desist." (CX0562 at 012 (Friddle, IHT at 43-44)).

214. Dr. Hardesty authorized sending a cease and desist letter to a business without having first sent an investigator to determine precisely what that business was doing. (Hardesty, Tr. 2856). Dr. Hardesty also authorized the sending of a cease and desist letter to a salon based solely on an e-mail from a dentist and his review of the website for the whitening product that the salon was considering using. (CX0565 at 043 (Hardesty, Dep. at 163-165); CX0293 at 001).

215. Dr. Owens sent out cease and desist letters within minutes or hours of receiving notice of a complaint, and at times without any investigation. (CX0297 at 001 (Dec. 1, 2008) (Dr. Owens authorized cease and desist 12 minutes after being assigned case); CX0311 at 001 (Dr. Owens authorized cease and desist letter same day as receiving assignment)).

216. In 2008, the Board sent at least 12 cease and desist letters to non-dentist teeth whitening providers. (CX0042 at 039-041; CX0059 at 001-002; CX0068 at 001-002; CX0079 at 001-002; CX0120 at 001-002; CX0122 at 001-002; CX0123 at 001-002; CX0387 at 001-002; CX0388 at 001-002; CX0389 at 001-002; CX0390 at 001-002; CX0391 at 001-002).

217. In 2009, the Board sent at least 22 cease and desist letters to non-dentist teeth whitening providers. (CX0042 at 001-002; CX0042 at 005-006; CX0042 at 008-009; CX0042 at 010-011; CX0042 at 012-013; CX0042 at 014-015; CX0042 at 016-017; CX0042 at 018-019; CX0042 at 020-021; CX0042 at 022-023; CX0042 at 024-025; CX0042 at 026-027; CX0042 at 028-029; CX0042 at 030-031; CX0042 at 032-033; CX0042 at 034-035; CX0058 at 001-002; CX0112 at 001-002; CX0153 at 001-002; CX0155 at 001-002; CX0156 at 001-002; CX0272 at 001-002). Several of these

letters were sent to the same recipients. (CX0042 at 001-002 and CX0042 at 039-041).

218. The Board has sent at least 47 cease and desist letters to non-dental teeth whitening manufacturers and providers since it began the practice in 2006. (CX0038 at 001; CX0042 at 001-002, 005-007, 008-009, 010-011, 012-013, 014-015, 016-017, 018-019, 020-021, 022-023, 024-025, 026-027, 028-029, 030-031, 032-033, 034-035; CX0044 at 004-005; CX0050 at 002-003; CX0058 at 001-002; CX0059 at 001-002; CX0065 at 001-002; CX0068 at 001-002; CX0069 at 001-002; CX0074 at 001-002; CX0077 at 001-002; CX0079 at 001-002; CX0094 at 005; CX0096 at 001-002; CX0097 at 001-002; CX0100 at 001-002; CX0112 at 001-002; CX0120 at 001-002; CX0122 at 001-002; CX0123 at 001-002; CX0153 at 001-002; CX0155 at 001-002; CX0156 at 001-002; CX0272 at 001-002; CX0279 at 001-002; CX0351 at 001-002; CX0386 at 001-002; CX0387 at 001-002; CX0388 at 001-002; CX0389 at 001-002; CX0390 at 001-002; CX0391 at 001-002; *see also* Joint Stipulations of Law and Fact ¶ 30 (stipulating to at least 40 cease and desist letters).

3. Content of cease and desist letters

219. The 47 cease and desist letters sent to non-dentist teeth whitening service providers or manufacturers were sent on the letterhead of the North Carolina State Board of Dental Examiners. The letterhead also contains each Board members name, the Past President of the Board and the name of the Chief Operations Officer. (CX0038 at 001; CX0042 at 001-002, 005-007, 008-009, 010-011, 012-013, 014-015, 016-017, 018-019, 020-021, 022-023, 024-025, 026-027, 028-029, 030-031, 032-033, 034-035; CX0044 at 004-005; CX0050 at 002-003; CX0058 at 001-002; CX0059 at 001-002; CX0065 at 001-002; CX0068 at 001-002; CX0069 at 001-002; CX0074 at 001-002; CX0077 at 001-002; CX0079 at 001-002; CX0094 at 005; CX0096 at 001-002; CX0097 at 001-002; CX0100 at 001-002; CX0112 at 001-002; CX0120 at 001-002; CX0122 at 001-002; CX0123 at 001-002; CX0153 at 001-002; CX0155 at 001-002; CX0156 at 001-002; CX0272 at 001-002; CX0279 at 001-002; CX0351 at 001-002; CX0386 at 001-002; CX0387 at 001-002; CX0388 at 001-002; CX0389 at 001-002; CX0390 at 001-002; CX0391 at 001-002).

220. At least 40 of the cease and desist letters sent to non-dentist teeth whitening service providers contain bold, capitalized headings that state: "NOTICE AND ORDER TO CEASE AND DESIST" or "NOTICE TO CEASE AND DESIST." (CX0038 at 001; CX0042 at 001-002, 005-007, 008-009, 010-011, 012-013, 014-015, 016-017, 018-019, 020-021, 022-023; 024-025, 026-027, 028-029, 030-031, 032-033; 034-035; CX0050 at 002-003; CX0058 at 001-002; CX0059 at 001-002; CX0065 at 001-002) or have a heading that states: "CEASE AND DESIST NOTICE." (CX0068 at 001-002; CX0069 at 001-002; CX0074 at 001-002; CX0077 at 001-002; CX0079 at 001-002; CX0094 at 005; CX0096 at 001-002; CX0097 at 001-002; CX0100 at 001-002; CX0112 at 001-002; CX0120 at 001-002; CX0122 at 001-002; CX0123 at 001-002; CX0272 at 001-002; CX0279 at 001-002; CX0351 at 001-002; CX0386 at 001-002; CX0387 at 001-002; CX0388 at 001-002; CX0389 at 001-002; CX0390 at 001-002;

CX0391 at 001-002; Joint Stipulations of Law and Fact ¶ 30 (stipulating to at least 40 cease and desist letters)).

221. In addition to cease and desist headings, the cease and desist letters sent to 39 non-dentist teeth whitening service providers or manufacturers state:

> You are hereby ordered to CEASE AND DESIST any and all activity constituting the practice of dentistry or dental hygiene as defined by North Carolina General Statutes § 90-29 and § 90-233 and the Dental Board Rules promulgated thereunder.
>
> Specifically, G.S. 90-29(b) states that .... "A person shall be deemed to be practicing dentistry in this State who does, undertakes or attempts to do, or claims the ability to do any one or more of the following acts or things which, for the purposes of this Article, constitute the practice of dentistry:"
>
> "(2) Removes stains, accretions or deposits from the human teeth;"
>
> "(7) Takes or makes an impression of the human teeth, gums or jaws:"
>
> "(10) Performs or engages in any of the clinical practices included in the curricula of recognized dental schools or colleges."

(CX0042 at 001-002, 005-007, 008-009, 010-011, 012-013, 014-015, 016-017, 018-019, 020-021, 022-023, 024-025, 026-027, 028-029, 030-031, 032-033, 034-035; CX0050 at 002-003; CX0058 at 001-002; CX0059 at 001-002; CX0068 at 001-002; CX0069 at 001-002; CX0077 at 001-002; CX0079 at 001-002; CX0094 at 005; CX0096 at 001-002; CX0097 at 001-002; CX0112 at 001-002; CX0120 at 001-002; CX0122 at 001-002; CX0123 at 001-002; CX0272 at 001-002; CX0279 at 001-002; CX0351 at 001-002; CX0386 at 001-002; CX0387 at 001-002; CX0388 at 001-002; CX0389 at 001-002; CX0390 at 001-002; CX0391 at 001-002).

222. Three of the cease and desist letters contain a bold, capitalized heading that states: "NOTICE OF APPARENT VIOLATION AND DEMAND TO CEASE AND DESIST." These three letters also state:

> The Dental Board hereby demands that you CEASE AND DESIST any and all activity constituting the practice of dentistry as defined by North Carolina General Statutes § 90-29 and the Dental Board Rules promulgated thereunder.
>
> Specifically, G.S. 90-29(b) states that . . . "A person shall be deemed to be practicing dentistry in this State who does, undertakes or attempts to do, or claims the ability to do any one or more of the following acts or things which, for the purposes of this Article, constitute the practice of dentistry:"
>
> "(2) Removes stains, accretions or deposits from the human teeth;"

"(7) Takes or makes an impression of the human teeth, gums or jaws:"

"(10) Performs or engages in any of the clinical practices included in the curricula of recognized dental schools or colleges."

(CX0153 at 001-002; CX0155 at 001-002; CX0156 at 001-002).

223. The last three cease and desist letters sent in 2009 contained slightly different language than the other cease and desist letters sent in 2009 and in 2008. (CX0153 at 001-002; CX0155 at 001-002; CX0156 at 001-002). These three cease and desist letters were captioned, "NOTICE OF APPARENT VIOLATION AND DEMAND TO CEASE AND DESIST" instead of being captioned "NOTICE AND ORDER TO CEASE AND DESIST." In addition, rather than stating "you are hereby ordered to CEASE AND DESIST any and all activity constituting the practice of dentistry . . . ," these three cease and desist letters stated that the Board "hereby demands that you CEASE AND DESIST any and all activity constituting the practice of dentistry . . . ." (CX0153 at 001-002; CX0155 at 001-002; CX0156 at 001-002).

224. All 47 of the cease and desist letters sent to non-dentist teeth whitening service providers or manufacturers were signed by the Board's Deputy Operations Officer Friddle, the Board's Attorney, or the Board's Assistant Director of Investigations. (CX0038-001; CX0042 at 001-002, 005-007, 008-009, 010-011, 012-013, 014-015, 016-017, 018-019, 020-021, 022-023, 024-025, 026-027, 028-029, 030-031, 032-033, 034-035; CX0044 at 004-005; CX0050 at 002-003; CX0058 at 001-002; CX0059 at 001-002; CX0065 at 001-002; CX0068 at 001-002; CX0069 at 001-002; CX0074 at 001-002; CX0077 at 001-002; CX0079 at 001-002; CX0094 at 005; CX0096 at 001-002; CX0097 at 001-002; CX0100 at 001-002; CX0112 at 001-002; CX0120 at 001-002; CX0122 at 001-002; CX0123 at 001-002; CX0153 at 001-002; CX0155 at 001-002; CX0156 at 001-002; CX0272 at 001-002; CX0279 at 001-002; CX0351 at 001-002; CX0386 at 001-002; CX0387 at 001-002; CX0388 at 001-002; CX0389 at 001-002; CX0390 at 001-002; CX0391 at 001-002).

225. All but 1 of the 47 cease and desist letters sent to non-dentist teeth whitening service providers or manufacturers indicate that the case officer and the Board's Attorney were copied on the letter. (CX0042 at 001-002, 005-007, 008-009, 010-011, 012-013, 014-015, 016-017, 018-019, 020-021, 022-023, 024-025, 026-027, 028-029, 030-031, 032-033, 034-035; CX0044 at 004-005; CX0050 at 002-003; CX0058 at 001-002; CX0059 at 001-002; CX0065 at 001-002; CX0068 at 001-002; CX0069 at 001-002; CX0074 at 001-002; CX0077 at 001-002; CX0079 at 001-002; CX0094 at 005; CX0096 at 001-002; CX0097 at 001-002; CX0100 at 001-002; CX0112 at 001-002; CX0120 at 001-002; CX0122 at 001-002; CX0123 at 001-002; CX0153 at 001-002; CX0155 at 001-002; CX0156 at 001-002; CX0272 at 001-002; CX0279 at 001-002; CX0351 at 001-002; CX0386 at 001-002; CX0387 at 001-002; CX0388 at 001-002; CX0389 at 001-002; CX0390 at 001-002; CX0391 at 001-002). Only the very first identified cease and desist letter, sent to Serenity Day Spa in Hendersonville, North

Carolina dated January 11, 2006, does not indicate that the case officer and the Board's Attorney were copied on the letter. (CX0038 at 001).

226. Cease and desist letters sent to non-dentist teeth whiteners were formally served either by return receipt mail (CX0042 at 001-002), by sheriff's service, (CX0095), by hand-delivery by a private investigator (CX0094 at 005) or personal service by a Board investigator. (CX0044 at 004-005).

4. Relationship between cease and desist letters and dentist complaints

227. Almost all of the complaints to the Board about non-dentist teeth whitening service providers have come from licensed North Carolina dentists or their employees. (CX0276 at 001; Owens Tr. 1576-1579 (approximately 90% of teeth whitening complaints are from dentists or employees of dentists)).

228. The Board admits that "only three investigations it opened included a report of harm or injury to an individual." (Response to RFA ¶ 22). Two of these stem from consumer complaints and one from a dentist on behalf of his patient. (RX0005 at 002-005; RX0017 at 001-021; RX0021 at 004-007; *see also* RPFF 100-237 (listing by case name 28 investigations the Board has taken in response to complaints and including in these proposed findings only 3 investigations based on complaints claiming harm from teeth whitening services by non-dentists)).

229. At least 47 individual dentists filed complaints with the Board about non-dentist teeth whitening operations. (CX0032 at 001-008; CX0035 at 001-002; CX0036 at 002-018; CX0043 at 001-013; CX0045 at 002-006; CX0054 at 002-006; CX0092 at 001; CX0102 at 001-003; CX0111 at 002-004; CX0198 at 001-002; CX0245 at 001; CX0251 at 001-002; CX0265 at 001; CX0276 at 001-002; CX0278 at 001; CX0281 at 001; CX0282 at 001; CX0293 at 001-002; CX0304 at 001; CX0365 at 001-022; CX0404 at 001-003; CX0411 at 001-004; CX0465 at 001; CX0477 at 003-005; CX0524 at 001-003; CX0619 at 001-002; CX0620 at 001).

230. At least 29 non-dentist teeth whitening providers were sent cease and desist letters by the Board in instances where a North Carolina dentist had filed a complaint with the Board.

Complaints: CX0043 at 001-013 (BleachBright); CX0092 at 001 (Port City Tanning); CX0245 at 001 (Celebrity Smiles); CX0251 at 001-002 (Inspire Skin & Body); CX0198 at 001-002 (Movie Star Smile);-CX0276 at 001 (*various*); CX0278 at 001 (BleachBright); CX0281 at 001 (Champagne Taste/Lash Lady); CX0304 at 001-002 (Bailey's Lightening Whitening); CX0365 at 001-002 (Celebrity Smiles); CX0404 at 001-003 (BleachBright); CX0411 at 003 (Whitening on Wheels).

Cease and desist letters: CX0042 at 001-002 (BleachBright/James & Linda Holder); CX0042 at 005-007 (BleachBright/Skin Sense); CX0042 at 008-009

(BleachBright/Electric Beach Pleasant Valley); CX0042 at 010-011 (BleachBright/Exotic Tan); CX0042 at 012-013 (BleachBright/Skin Sense Apex); CX0042 at 014-015 (BleachBright/Cris Scott Hair Studio); CX0042 at 016-017 (BleachBright/Douglas Carroll Salon); CX0042 at 018-019 (BleachBright/Electric Beach Cary); CX0042 at 020-021 (BleachBright/Electric Beach Mission Valley); CX0042 at 022-023 (BleachBright/Electric Beach North Market Drive); CX0042 at 024-025 (BleachBright/Cary Massage Therapy Center); CX0042 at 026-027 (BleachBright/Skin Sense Falls of Neuse Road); CX0042 at 028-029 (BleachBright/Modern Enhancement); CX0042 at 030-031 (BleachBright/Life's Little Pleasures); CX0042 at 032-033 (BleachBright/La Therapie Spa); CX0042 at 034-035 (BleachBright/Electric Beach Six Forks); CX0059 at 001-002 (Port City Tanning); CX0077 at 001-002 (Champagne Taste/Lash Lady); CX0079 at 001-002 (Movie Star Smile); CX0112 at 001-002 (BleachBright/Jason & Shanon Rabon); CX0120 at 001-002 (Fantiaticians); CX0153 at 001-002 (Serenity Total Body Care/BleachBright); CX0272 at 001-002 (Inspire Skin & Body); CX0351 at 001-002 (Celebrity Smiles at The Street of Southpoint); CX0386 at 001-002 (Details, Inc); CX0387 at 001-002 (Bailey's Lightning Whitening); CX0389 at 001-002 (Triad Body Secrets); CX0390 at 001-002 (Whitening on Wheels); CX0391 at 001-002 (The Extra Smile, Inc.).

231. With one exception, CX0477, dentists' complaints to the Board about non-dentist teeth whitening do not state that any consumer had been harmed by the procedure. (CX0032 at 001-002; CX0035 at 003; CX0036 at 001-002, 005-006, 007-018; CX0043 at 004-008, 009-010, 011-013; CX0054 at 002-006; CX0092 at 001-002; CX0111 at 001-004; CX0198 at 001-002; CX0245 at 001-002; CX0251 at 001-002; CX0278 at 001; CX0281 at 001; CX0293 at 001-002; CX0304 at 001; CX0365 at 001; CX0404 at 001-003; CX0411 at 001, 003; CX0465 at 001; CX0524 at 001-003; CX0619 at 001-002; CX0620 at 001-002).

232. Many of the dentists' complaints to the Board about non-dentist teeth whitening referenced, or attached advertisements, showing the prices charged by non-dentist teeth whitening service providers. (CX0035 at 003; CX0036 at 001-002, 005-006, 007-018; CX0043 at 004-008, 009-010, 011-013; CX0054 at 002-006; CX0198 at 001-002; CX0619 at 001-002).

233. North Carolina dentists who filed complaints or inquiries that led to Board investigations of the unauthorized practice of dentistry derived income from the provision of teeth whitening services in recent years. The following dentists, whose identities have been shielded from disclosure, were in dental practices that earned the following amounts of income from teeth whitening services from 2005 through 2010: Dentist A (CX0600 at 003; CX0304 at 001) (over $150,000); Dentist B (CX0599 at 003; CX0524 at 001) (over $100,000); Dentist C (CX0602 at 002; CX0035 at 001-002) (over $100,000); Dentist D (CX0603 at 003; CX0092 at 001) (over $100,000); Dentist E (CX0605 at 003; CX0245 at 001) (over $50,000); Dentist F (CX0616 at 021; CX0043 at 011-013) (over $50,000); Dentist G (CX0601 at 008; CX0276 at 001) (over $50,000); Dr. H (CX0608 at 002; CX0276 at 001) (over $50,000); Dentist I (CX0611 at 002, 004; CX0576 at 007-008 (Dep. at 20-22, 24-25)); (CX0054 at 003)

(over $50,000); Dentist J (CX0617 at 001, 012; CX0111 at 001-006) (over ($50,000); Dentist K (CX0610 at 002; CX0265 at 001) (over $15,000); Dentist L (CX0607 at 001; CX0276 at 001) (over $15,000); Dentist M (CX0609 at 001-002; CX0043 at 003-010) (over $15,000); Dentist N (CX0613 at 004-005; CX0102 at 001-002) (over $15,000).

5. Meaning and purpose of cease and desist letters

a. Testimony of Board members confirms the intent of the cease and desist letters was to make non-dentists stop providing teeth whitening services

234. Dr. Wester testified that the cease and desist letter was a message to the recipient that "they should stop" or "cease and desist" from engaging in teeth whitening activities. (CX0572 at 016 (Wester, Dep. at 57)).

235. Dr. Allen testified that through a cease and desist letter, the "[B]oard [is] saying that you not only are ordered but you have the responsibility to comply with this order." (CX0554 at 034 (Allen, Dep. at 126-127)).

236. Dr. Allen further testified that a cease and desist letter from the Board is "an order in the same sense that the board as the State's designee to regulate the practice of dentistry and protect the public is – is telling you not to do this anymore . . . . I mean, the letter implies that if you continue to do it you'll either be fined or in prison if you continue." (CX0554 at 034 (Allen, Dep. at 127-128)).

237. Dr. Wester testified that he treats a cease and desist letter sent by a case officer as essentially the same thing as an injunction or a court order, because the expected impact of a cease and desist order is that the recipient will stop doing what the Board wants them to stop doing. (Wester, Tr. 1337-1338, 1352-1353).

238. Mr. White testified that a cease and desist letter issued by the Board is "ordering [the recipient] either to stop whatever that activity is or to demonstrate why what they're doing is not a violation of the Act." (CX0573 at 007 (White, Dep. 19-20)).

239. Mr. White testified that he understands that in common parlance, "an order is viewed as a command to stop." (CX0573 at 010 (White, Dep. at 31)).

b. Contemporaneous documents of the Board members and staff refer to the cease and desist letters as "orders"

240. Contemporaneous e-mails, letters, and reports drafted by Board members and Board staff confirm that while the documents sent to non-dentist teeth whiteners are sometimes referred to as "letters," they are also referred to by Board members and staff as "Cease and Desist Orders." (*E.g.*, CX0070 at 001; CX0254 at 001; CX0258 at

001-002; CX0347 at 001; CX0404 at 001-002; CX0462 at 003-005; RX0019 at 005; RX0028 at 001).

241. On November 26, 2007, Board Investigator Dempsey wrote in an e-mail to Dr. Owens, Terry Friddle, Carolin Bakewell, Bobby White and Casie Smith Goode, that he "was able to serve the Cease and Desist Order to Ms. Heather York" of Celebrity Smiles. The next day, on November 27, 2007, Ms. Bakewell wrote in an e-mail that the Board "has recently issued Cease and Desist Orders to an out of state company that has been providing bleaching services in a number of malls in the state." (CX0350 at 001; CX0254 at 001).

242. On January 18, 2007, Board Investigator Dempsey wrote that the Amazing Grace Spa was sent "a Cease and Desist Order." (CX0347 at 001).

243. On January 17, 2008, Board Investigator Dempsey wrote in an Investigative Memo regarding a kiosk teeth whitening vendor that "Mr. Cogan explained that . . . he had not officially received a Cease & Desist Order. I explained that Mr. Nelson [the President of the company that manufactured Mr. Cogan's teeth whitening products] said that he had, and I was informing him verbally that he needed to cease and desist . . . . Before leaving, I explained, once again, that I was a representative of the North Carolina State Board of Dental Examiners and that he was practicing dentistry without a license and that he should cease and desist." (CX0258 at 001-002).

244. On February 20, 2008, Mr. Bobby White wrote in an e-mail in response to a dentist's complaint, "We've sent out numerous Cease and Desist Orders throughout the state." (CX0404 at 001).

245. Board members intended and understood that the cease and desist letters were intended to stop the recipients from providing teeth whitening services. (F. 234-244).

6. Effects of cease and desist letters

246. Some recipients of the cease and desist letters believed that the communication they received was an order from a state agency to stop teeth whitening activities. (F. 247-256).

247. In a letter from Tonya Norwood, received by the Board on February 9, 2009, the owner of Modern Enhancement Salon stated that she would "no longer perform this service as per your order to stop and will no longer perform teeth whitening services unless told otherwise by the North Carolina Board of Dental Examiners." (CX0162 at 001).

248. On March 27, 2007, Ms. Pamela Weaver of the Amazing Grace Spa responded to a cease and desist letter from the Board by stating that she had removed the teeth whitening machine from her salon. (CX0347 at 001; CX0050 at 001).

249. Mr. George Nelson of WhiteScience understood the cease and desist letters sent by the Board as "ordering businesses to close. [The Board] issue[s] a cease and desist and they order [non-dentist teeth whitening operations] to close and not to continue in the teeth whitening business with no other discussion or options . . . I personally haven't heard and been advised about any type of permitting or other type of option. I've only heard about ordering the close of the business." (Nelson, Tr. 850).

250. As a result of the Board's cease and desist letter, Triad Body Secret ceased offering teeth whitening services it had previously provided using the WhiteScience product. (Nelson, Tr. 785-786; CX0389 at 001-002).

251. After receiving a cease and desist letter from the Board dated February 8, 2007, the owner of Champagne Taste Salon, also known as "Lash Lady", wrote to the Board stating that "they have now stopped offering [teeth whitening] service[s]." (CX0622 at 003).

252. By February 29, 2008, according to a Memorandum to Members of the Board from Terry Friddle regarding Closed Investigative Files, after receiving a cease and desist letter from the Board, Savage Tan Salon no longer offered teeth whitening services at the location visited by the Board's investigator. (CX0623 at 003-004).

253. Margie Hughes of SheShe Studio Spa stopped offering teeth whitening services to the public after receiving the Board's cease and desist letter. (Hughes, Tr. 943, 946).

254. After receiving a cease and desist letter from the Board dated January 31, 2007, Details, Inc. notified the Board that it had sold its teeth whitening equipment and was no longer providing teeth whitening services. (CX0660 at 003).

255. After receiving a cease and desist letter from the Board dated July 17, 2008, the owner of Bailey's Lightning Whitening wrote to the Board that "due to [the Board's] letter[, she] had disposed of the [teeth whitening] product" and "would not be providing any teeth whitening services at her salon." (CX0658 at 005).

256. The Board's cease and desist letters were effective in causing non-dentists to cease providing teeth whitening services in North Carolina. (F. 247-255; Kwoka, Tr. 1007-1008; RX0078 at 008 (Respondent's expert stating, "[n]ot surprisingly, the actions of the State Board were effective and many kiosk and spa operators complied with state law by ceasing their actions that were clearly in violation of state law.").

257. When non-dentists ceased providing teeth whitening services in North Carolina, consumers were denied the ability to choose a non-dentist teeth whitening service provider. (Kwoka, Tr. 1136-1137, 1219; CX0654 at 005-006). *See also* CX0826 (Baumer, Dep. at 122-123 ("Yes, there's no doubt that, you know, if you reduce products, other things being equal, that there's a loss in consumer welfare or consumer surplus.")).

7. Board alternatives

258. Bobby White does not believe that the Board's ability to enforce the Dental Practice Act would be impacted if the letters that the Board sent out to non-dentist teeth whitening businesses stated that the Board believes that the recipient violated the law and may take the recipient to court to get an injunction or other relief, instead of stating "you are hereby ordered to cease and desist." (CX0573 at 010 (White, Dep. at 30)).

259. In October 2000, a letter sent to Ortho Depot regarding alleged unauthorized practice of dentistry had no heading stating "Cease and Desist," nor did the body of the letter state "You are hereby ordered to cease and desist." Instead, the Board letter stated "This is to advise you that the North Carolina State Board of Dental Examiners is considering initiating a civil suit to enjoin you from the unlawful practice of dentistry." (CX0136 at 001 (October 3, 2000).

260. A December 2001 letter notified the recipient that "[i]t has come to the attention of the North Carolina State Board of Dental Examiners 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." This letter neither had a heading stating "Cease and Desist," nor did the body of the letter state "You are hereby ordered to cease and desist." (CX0139 at 001 (December 10, 2001)). When the Board did not receive a response to its letter, it sent a follow-up letter, which is similarly void of any "cease and desist" language, and simply reiterates the request for the recipient to respond. (CX0138 at 001 (February 12, 2002)).

F. The Board and Teeth Whitening Manufacturers and Distributors, and Potential Entrants

261. The Board communicated to manufacturers and distributors of teeth whitening products and equipment that the provision of teeth whitening services by non-dentists is, constitutes, or may constitute, the unauthorized practice of dentistry in North Carolina, which is a misdemeanor. (CX0100 at 001; CX0122 at 001; Nelson, Tr. 850; CX0371 at 001; CX0110 at 001; CX0066 at 001).

262. Of the 47 cease and desist letters sent by the Board (F. 219), two were sent to manufacturers of teeth whitening products used by non-dentists. (CX0100 at 001 (WhiteScience); CX0122 at 001-002 (Florida WhiteSmile)).

263. On February 13, 2007, Ms. Bakewell wrote WhiteScience, regarding its present and future sales of non-dentist teeth whitening systems in North Carolina. On behalf of the Board, Ms. Bakewell represented to WhiteScience that those who purchased and provided WhiteScience's systems to the public may be practicing unlicensed dentistry, which is a misdemeanor, and that WhiteScience should "accurately inform current and potential customers of the limitations on the provision of teeth whitening services in North Carolina." (CX0110 at 001).

264. During the August 10 and 11, 2007 Board meeting, the Board discussed an inquiry by Frank Recker, an attorney representing WhiteScience, into whether WhiteScience could market its teeth whitening product to spas and salons operated by non-dentists. The Board's meeting minutes state with respect to WhiteScience's inquiry: "Upon review of the literature, it was determined that the application of bleaching gels or similar materials to human teeth and the use of a light to speed the curing process constituted the practice of dentistry . . . . Staff was directed to respond." (CX0106 at 005; CX0206 at 005).

265. The Board issued a "Notice to Cease and Desist" letter to WhiteScience on December 4, 2007 advising that "assisting clients to accelerate the whitening process with an LED light . . . constitutes the unauthorized practice of dentistry. This is a misdemeanor. The Board hereby directs your company to cease its activities unless they are performed or supervised by a properly licensed North Carolina dentist." The letter was signed by Ms. Bakewell as Board counsel. (CX0100 at 001).

266. George Nelson of WhiteScience understood from the letter he received from the Board, described in F. 265, that the people WhiteScience was selling to in North Carolina would be committing a misdemeanor. (Nelson, Tr. 775; CX0110).

267. Mr. Nelson of WhiteScience understood from his salon operators in North Carolina that the Board was ordering the salons to close their teeth whitening businesses. (Nelson, Tr. 776-777, 786, 789). "They issue a cease and desist and they order them to close and not to continue on the teeth whitening business with no other discussion or options . . . I personally haven't heard and been advised about any type of permitting or other type of option. I've only heard about ordering the closing of the business." (Nelson, Tr. 850).

268. Before being what Mr. Nelson described as "shut down" by the Board, WhiteScience was making close to $200,000 a year in sales of teeth whitening products in North Carolina. After the Board's actions with respect to WhiteScience, WhiteScience retail sales in North Carolina evaporated to nothing, from over a million dollars yearly. (Nelson, Tr. 734-736.)

269. As a result of WhiteScience's salon clients receiving cease and desist letters from the Board, the salon clients severed their relationships with WhiteScience. (Nelson, Tr. 785-786; CX0389 at 001-002).

270. Pam Helmendollar, with Savvy Salon and Spa in North Carolina informed WhiteScience that she stopped providing teeth whitening services at her business because she believed that the North Carolina Board of Cosmetic Arts Examiners deemed it unlawful for salons to provide teeth whitening services. She offered to give her remaining two whitening systems back to WhiteScience. (Nelson, Tr. 786-787; CX0814 at 001).

271. WhiteSmile first marketed its products and services in North Carolina in the spring of 2007 through a trade show in Raleigh and Charlotte, North Carolina. Jim Valentine, co-founder of WhiteSmile considered these trade show experiences to be very successful. (Valentine, Tr. 561).

272. WhiteSmile chose not to pursue locating within Sam's Clubs in North Carolina in late 2007, even though North Carolina would have been a good market with a large number of Sam's Clubs. This was because both WhiteSmile and Sam's Club were aware of the actions taken by the Board in North Carolina against non-dentist teeth whiteners. (Valentine, Tr. 562-563).

273. WhiteSmile became aware of the Board's position regarding non-dentist teeth whitening through his contacts with potential investors in North Carolina. WhiteSmile learned of the Board's use of cease and desist letters, and counsel for the investors was told by the Board that WhiteSmile's operations would be considered the practice of dentistry, even though providers would not touch their customers' mouths. (Valentine, Tr. 562-564).

274. On October 7, 2008, the Board issued a "Notice and Order to Cease and Desist," to Florida WhiteSmile, Orlando, Florida, stating that it was "investigating a report that you are engaged in the unlicensed practice of dentistry. Practicing dentistry without a license in North Carolina is a crime. . . . You are hereby ordered to CEASE AND DESIST any and all activity constituting the practice of dentistry . . . ." (CX0122 at 001-002).

275. When Mr. Valentine contacted the Board to inquire as to whether WhiteSmile could market its self-applied system to non-dentists in North Carolina, the Board advised him that the Board considered WhiteSmile's product and procedures to be the practice of dentistry, which must be performed by a licensed dentist. (Valentine, Tr. 564-567; CX0108; CX0206 at 004-005).

276. Mr. Valentine's inquiry (F. 275) was discussed in the Board's minutes of its meeting on August 10 and 11, 2007. The minutes state with regard to WhiteSmile: "Upon review of the literature, it was determined that the application of this product constituted the practice of dentistry and must be provided by a licensed dentist . . . . Only dentists and properly licensed and supervised auxiliaries may assist in the removal of stains, accretions or deposits from the teeth of other humans. This would include the application of bleaching gels or similar materials to a customer's teeth and using curing lights or similar methods to speed the process." Staff was directed to respond to Mr. Valentine's request. (CX0206 at 004-005; Valentine, Tr. 564-567; *see also* CX0106 at 005).

277. WhiteSmile's negotiations with potential investors in North Carolina fell apart due to the investors' and their attorneys' concerns over whether the Board would allow non-dentist teeth whitening. (Valentine, Tr. 563-564).

278. WhiteSmile eventually entered the North Carolina market in 2009 inside Sam's Clubs, after The News & Observer newspaper reported that North Carolina was going to look at teeth whitening on a case by case basis. This report satisfied Sam's Clubs that WhiteSmile could use their space. (Valentine, Tr. 567; CX0158).

279. WhiteSmile delayed its entry into the North Carolina market as a result of the Board's opposition, described in F. 276. WhiteSmile would have entered the North Carolina market in January 2008 had it not been for the Board's opposition to non-dentist provided teeth whitening services. As a result of the one and one-half year delay in entering the market, WhiteSmile estimates a loss of a one and one-half million dollars. (Valentine, Tr. 567-570).

280. On February 13, 2007, Ms. Bakewell, as counsel to the Board, wrote Enhanced Light Technologies stating that it had come to the attention of the Board that representatives of the firm "have sold and/or attempted to sell teeth whitening systems to non-dental professionals in North Carolina, such as spa and salon owners" and advising that "[i]ndividuals who use your products to provide teeth whitening services to the public may be engaging in the unauthorized practice of dentistry, which is a misdemeanor." The letter further stated that Enhanced Light Technologies should "accurately inform current and potential customers of the limitations on the provision of teeth whitening services in North Carolina." (CX0371 at 001).

281. As a result of the Dental Board's actions, including the issuance of cease and desist letters to non-dentist teeth whitening service providers in North Carolina, manufacturers of teeth whitening products used by non-dentist teeth whiteners have lost sales in North Carolina. (Nelson, Tr. 734-736, 774-778, 785-786; CX0814 at 001; CX0389 at 001-002 (WhiteScience); Valentine, Tr. 562-564, 567-570, 575 (WhiteSmile USA); Osborn, Tr. 671-675 (BriteWhite)).

282. Ms. Joyce Osborn of BEKS, Inc., which sells the BriteWhite System, stopped selling her products in North Carolina in 2008, because she was afraid of the risk of getting a cease and desist letter. Ms. Osborn was aware of the Board's cease and desist letters, and that one of her purchasers, Signature Spas, had been sued by the Board and went out of business. (Osborn, Tr. 670-674).

283. BriteWhite products have not been sold in North Carolina since 2008, even though there have been requests for its product from people in North Carolina, and even though Ms. Osborn would like to be selling in North Carolina. (Osborn, Tr. 671-675).

284. In an e-mail dated January 17, 2008, Board counsel Carolin Bakewell informed a non-dentist teeth whitener – in response to the teeth whitener's inquiries into the legality of teeth whitening in North Carolina – that the Dental Practice Act defines the practice of dentistry to include the "removal of stains and accretions." Ms. Bakewell informed the inquiring teeth whitener that his or her whitening business, which provides customers with a personal tray with a whitening solution and use of a whitening light, violated the statute because it was designed to remove stains from human teeth. Ms.

Bakewell further told the inquiring teeth whitener that the statute is not limited to situations where the non-dentist touches the customer's mouth. (CX0291 at 002-003).

285. On February 12, 2008, Board counsel Carolin Bakewell responded to an e-mail from Craig Francis inquiring about what he needed to do in order to lawfully operate a mall whitening kiosk. Ms. Bakewell informed Mr. Francis he "may not operate a whitening kiosk except under the direct supervision of a licensed North Carolina dentist. The prohibition remains the same even if the customer inserts the whitening tray themselves." (CX0523 at 001).

286. The purpose and effect of the communications described in F. 261-265, 274-276 was to discourage or prevent manufacturers and distributors of teeth whitening products and equipment from providing products and equipment to non-dentist teeth whitening service providers in North Carolina. (F. 266-273, 277-279, 281-283).

287. The purpose of the communications described in F. 284-285 was to dissuade the recipients from entering the teeth whitening market in North Carolina.

G. The Board and Property Owners and Mall Operators

1. Letters to mall operators regarding non-dentist teeth whitening service providers

288. On November 21, 2007, the Board sent 11 nearly identical letters to third parties, including mall management and out-of-state mall property management companies. These letters stated:

> The N.C. State Board of Dental Examiners is the agency created by the North Carolina legislature to enforce the dental laws in this state. The Dental Board has learned that an out of state company has leased kiosks in a number of shopping malls in North Carolina for the purpose of offering tooth whitening services to the public.
>
> North Carolina law specifically provides that the removal of stains from human teeth constitutes the practice of dentistry. See N.C. Gen. Stat. 90-29(b)(2), a copy of which is enclosed. The unauthorized practice of dentistry is a misdemeanor. See N.C. Gen. Stat. 90-40, a copy of which is also enclosed.
>
> It is our information that the teeth whitening services offered at these kiosks are not supervised by a licensed North Carolina dentist. Consequently, this activity is illegal.
>
> The Dental Board would be most grateful if your company would assist us in ensuring that the property owned or managed by your company is not being used for improper activity that could create a risk to the public health and safety.

(CX0203 at 001; CX0204 at 001-002; CX0205 at 001-002; CX0259 at 001-002; CX0260 at 001-002; CX0261 at 001-002; CX0262 at 001-002; CX0263 at 001-002; CX0323 at 001-002; CX0324 at 001-002; CX0325 at 001-002; CX0326 at 001-002; (Joint Stipulations of Law and Fact ¶ 31; CX0560 at 051 (Feingold, Dep. at 195-196)).

289. The Board members unanimously approved sending the November 21, 2007 letters to mall operators described in F. 288. (Hardesty, Tr. 2864; CX0565 at 054-055 (Hardesty, Dep. at 206-208, 210)).

290. It was the Board's intention to send "quite a number" of letters to mall operators warning them that kiosk teeth whiteners were violating the Dental Practice Act by offering teeth whitening services. (CX0565 at 055 (Hardesty, Dep. at 210); CX0203 at 001).

291. In separate letters, dated January 23, 2008, Board counsel Carolin Bakewell informed Dr. Kyle Taylor and Dr. Michael Catanese – dentists who each had alerted the Board of a teeth whitening kiosk in Carolina Place Mall – of the actions that the Board had taken in regard to teeth whitening kiosks in Carolina Place Mall. Ms. Bakewell enclosed in each letter a copy of the November 21, 2007 letter that the Board had sent to General Growth Properties – the company that owned Carolina Place Mall – informing them that the Board viewed the teeth whitening services being performed in Carolina Place Mall to be illegal. (CX0102 at 001-003; CX0524 at 001-003).

292. The purpose of the November 21, 2007 letter sent by the Board to mall operators (F. 288) was to induce the malls to refuse to rent space to non-dentist teeth whiteners, because they were "breaking the law." (CX0560 at 052 (Feingold, Dep. at 199-200); *see also* CX0581 at 067-071 (Bakewell, Dep. at 262-263 (one purpose was to let mall operators know that non-dentist teeth whiteners were breaking the law, and if the Board took action against the kiosk owner, the kiosk owner might leave the mall and lessor would be left with a bad lease)).

293. The Board sent the letters to malls and mall property management groups in response to the complaints the Board had received and "in hopes of trying to prevent further expansion" of non-dentist teeth whitening kiosks in malls. (CX0562 at 019-020 (Friddle, IHT at 71-72, 75-76 ("So not to have them there")).

2. Effects of the letters to mall operators

294. As a result of the Board's November 21, 2007 letters to malls, mall companies, and mall management companies, (F. 288) mall operators were reluctant to lease space to non-dentist teeth whitening service providers in North Carolina and some companies refused to lease space and cancelled existing leases. (Wyant, Tr. 876-884; Gibson, Tr. 627-628, 632-633; CX0255 at 001; CX0525 at 001; CX0629 at 001-002; CX0647 at 002). *See also* RX0078 at 008 (Respondent's expert stating, "Mall operators

cooperated [with the Board's actions to enforce state law] by refusing to renew leases or rent to operators of teeth whitening services.").

a. Hull Storey Gibson Companies

295. John Gibson is a partner and Chief Operating Officer ("COO") of Hull Storey Gibson Companies, L.L.C. ("HSG"). HSG is a retail property management company that owns 11.5 million square feet of retail space in seven states, including North Carolina. Mr. Gibson became the COO of HSG in 1999. (Gibson, Tr. 613, 615).

296. Cathy Mosley is the Specialty Leasing Manager and Leasing Representative of HSG. She reports to Mr. Gibson indirectly through the Vice President for Leasing. Because Mr. Gibson signs all the leases, he has frequent direct contact with Ms. Mosley. (Gibson, Tr. 616).

297. HSG operates five malls in North Carolina, including the Blue Ridge Mall in Hendersonville, North Carolina; the Cleveland Mall in Shelby, North Carolina; the Carolina Mall in Concord, North Carolina; the New Bern Mall in New Bern, North Carolina; and the Wilson Mall in Wilson, North Carolina. (Gibson, Tr. 613-614).

298. HSG held a non-dentist teeth whitening event at its Lake City Mall. (Gibson, Tr. 625).

299. HSG's Blue Ridge Mall received a letter dated November 21, 2007, "Re: Tooth Whitening Kiosks," that was brought to Mr. Gibson's attention by Ms. Mosley. HSG's Cleveland Mall received a virtually identical letter. (Gibson, Tr. 626-627; CX0203 at 001-002; CX0259 at 001-002).

300. The content of the November 21, 2007 letters received by HSG is set forth in F. 288.

301. Mr. Gibson understood from these letters that the Board took the position that the person operating the kiosks and providing non-dentist teeth whitening services would be violating North Carolina law. (Gibson, Tr. 629; CX0203 at 001-002; CX0259 at 001-002).

302. On March 21, 2008, Lisa Schaak of HSG sent an e-mail to Ms. Mosley indicating that Mr. Craig of BleachBright of Carolina wanted to talk to her about space for teeth whitening. On March 21, 2008, Ms. Mosley replied to Ms. Schaak stating "Mr. Craig will need to provide us with proof that the Board of Dental Examiners will approve this. I have had feedback from several Developers letting me know that this use is illegal in several states and that their operations have been shut down in their malls." (CX0255 at 001-002).

303. Ms. Mosley brought the mall letter (F. 288; CX0203 at 001-002) to Mr. Gibson's attention because she had been told that a prospective kiosk tenant insisted that the Board had approved its teeth whitening procedure. (Gibson, Tr. 627-631; CX0525 at 001).

304. On March 21, 2008, Ms. Mosley e-mailed Ms. Bakewell to confirm representations that she had received from BleachBright of Carolina to the effect that its teeth bleaching process had been approved by the Board. (Gibson, Tr. 629-631; CX0525 at 001).

305. Ms. Bakewell's March 24, 2008 response told Ms. Mosley that the Board had not issued an approval for the operation of teeth whitening kiosks by BleachBright. (CX0525 at 001; Gibson, Tr. 631-632).

306. HSG would have leased retail space to non-dentist teeth whiteners in North Carolina had they not received the Board's letter to the mall operators and Ms. Bakewell's e-mail to Ms. Mosley. (Gibson, Tr. 622-623, 632-633).

307. HSG would be willing to rent in-line or specialty space in its North Carolina malls today, if the Board withdrew its letters to HSG. (Gibson, Tr. 624).

308. HSG has continued to receive inquiries from non-dentist teeth whiteners, but it has declined to consider leasing space to them. (Gibson, Tr. 633).

b. General Growth Properties and Simon Group Properties

309. On December 7, 2007, Angela Wyant signed a license agreement to rent kiosk space for Brian Wyant's business, a non-dental teeth whitening service using the WhiteScience system, in Carolina Place Mall with General Growth Properties, owner of the mall. (Wyant, Tr. 871-872, 875-876; CX0665; CX0668).

310. In late January 2008, General Growth Properties' leasing agent informed Mr. Wyant that his month-to-month licensing agreement would not be renewed and that his teeth whitening business would have to leave Carolina Place Mall by February 1, 2008. Mr. Wyant was told that the North Carolina State Board of Dental Examiners had sent a letter stating that the business was the illegal practice of dentistry. In a subsequent meeting with Carolina Place Mall General Manager Michael Payton, Mr. Wyant was shown the Board's letter to General Growth Properties and was told that General Growth Properties' legal team had advised them not to allow Mr. Wyant to stay in business at the mall. (Wyant, Tr. 876-880, 884; CX0260; CX0629).

311. On January 28, 2008, Mr. Wyant called Concord Mills Mall in Concord, North Carolina, a Simon Group Properties Mall, to inquire about the possibility of locating his business there. Mr. Wyant was told by Ms. Christy Sparks that the Concord Mills Mall would not rent to non-dentist teeth whiteners due to the North Carolina State Board of Dental Examiners' letter (F. 288). Mr. Wyant also contacted SouthPark Mall, another Simon mall, about relocating his business there, and was advised by Ada Nosowicz that moving to a Simon mall was not an option. (Wyant, Tr. 881-884; CX0629).

c. Southpoint Mall

312. On February 11, 2008, Craig Francis e-mailed Bobby White at the Board inquiring about what approvals he would need from the Board to lawfully open up a teeth whitening kiosk. Mr. Francis was intending to sell the BleachBright teeth whitening system. He stated he was seeking information from the Board because the leasing office at Southpoint Mall "mentioned something about the board and the laws associated with the kiosk." (CX0542 at 001). *See* F. 285 for the Board's response.

313. In an e-mail dated February 13, 2008, Alissa Neal told Board investigator Line Dempsey that she wanted to talk to him "about the teeth whitening businesses that are growing in malls and salons in our area." Ms. Neal related that she had spoken to The Streets at Southpoint Mall, which had informed her that the previous teeth whitening business at that location had been "shut down very quickly" and she wanted to know why that business had been ordered to leave. (CX0354 at 001).

H. The Board[9] and the North Carolina Board of Cosmetic Art Examiners

314. Dr. Hardesty came to the realization that many of the non-dentist teeth whitening complaints were against salons and spas regulated by the North Carolina Board of Cosmetic Art Examiners ("Cosmetology Board"). (CX0565 at 060, 062 (Hardesty, Dep. at 233, 238)).

315. Dr. Hardesty believed that because a lot of the non-dentist teeth whitening providers were licensees of the Cosmetology Board, it was logical that the Cosmetology Board might be willing to assist the Board in its efforts regarding non-dentist teeth whitening services. (CX0565 at 060-061 (Hardesty, Dep. at 231-233, 236)).

316. Dr. Hardesty instructed Board counsel Carolin Bakewell to prepare an article for the Cosmetology Board to post regarding teeth whitening after discussing the issue with the other Board members at a Board meeting. (Hardesty, Tr. 2861-2862).

317. At the next Board meeting after Dr. Hardesty's realization referred in F. 315, Dr. Hardesty asked to go into closed session, and the Board had a general discussion regarding enlisting the assistance of the Cosmetology Board by allowing the Board to publish a letter to them. The Board, upon motion, formally approved the idea of having Ms. Bakewell write a letter to the Cosmetology Board. (CX0565 at 062 (Hardesty, Dep. at 238-240)).

318. At the Board's February 2007 meeting, the Board discussed the increase in complaints involving spas that are offering teeth whitening procedures. The Board also discussed advising the Cosmetology Board to let their licensees know that they should not engage in any unlawful teeth whitening procedures. (CX0566 at 030 (Hardesty, IHT at 115-116); CX0056 at 005).

[9] As defined in F. 1, "the Board" refers to the North Carolina State Board and not the Cosmetology Board.

319. In February 2007, Ms. Bakewell forwarded a draft article for the Cosmetology Board's newsletter. The text of the draft would have been reviewed by at least Mr. Bobby White before it was sent out. (CX0067 at 001, 003; CX0581 at 079-081 (Bakewell, Dep. at 308-310, 311-316)).

320. In February 2007, the Board contacted the Cosmetology Board about the subject of non-dentist teeth whitening services and approved providing the Cosmetology Board with a notice that, consistent with the draft forwarded by Ms. Bakewell, stated:

> Cosmetologists should be aware that any device or process that "removes stains, accretions or deposits from the human teeth" constitutes the practice of dentistry as defined by North Carolina General Statutes 90-29(b)(2). Taking impressions for bleaching trays also constitutes the practice of dentistry as defined by North Carolina General Statutes 90-29(b)(7).
>
> Only a licensed dentist or dental hygienist acting under the supervision of a licensed dentist may provide these services. The unlicensed practice of dentistry in our state is a misdemeanor.

(Joint Stipulations of Law and Fact ¶ 33; CX0067 at 001, 003; CX0565 at 060 (Hardesty, Dep. at 231-232)).

321. The Board approved sending the letter to the Cosmetology Board regarding unlicensed teeth whitening by consensus after a five minute discussion with Board counsel. (CX0565 at 062 (Hardesty, Dep. at 238-240)).

322. In February 2007, the Cosmetology Board posted the Dental Board's notice on the Cosmetology Board's website. (Hughes, Tr. 940-941).

323. The purpose of the notice referred to in F. 320, posted on the Cosmetology Board's website, was to encourage the Cosmetology Board's licensees to cease providing teeth whitening services. (F. 314-321).

324. In March 2007, a cosmetologist advised the Board that they had ceased providing teeth whitening services, after learning from the Cosmetology Board on February 15, 2007 that it was not legal to do so. (CX0050 at 001 (letter from Ms. Pamela Weaver, dated March 27, 2007: "I found out . . . that it was not legal to use [a teeth whitening machine] from the state board of cosmetology and immediately removed it from the salon where I rent and have not used it since that time"); CX0347 (January 16, 2008 e-mail from Mr. Dempsey to Board members confirming that he made an on-site visit to confirm that Ms. Weaver no longer offered teeth whitening services)).

325. Other Cosmetology Board licensees also saw the statement against non-dentists performing teeth whitening services on the Cosmetology Board's website. (Hughes Tr. 940-943).

326. In an e-mail dated August 31, 2010, Pat Helmandollar notified WhiteScience that her salon "will no longer be doing teeth whitening in our salon/spa as the North Carolina board of cosmetic arts has deemed it unlawful to perform this service in a salon." (CX0814; Nelson, Tr. 786-787).

327. A direct result of the Board's actions with respect to the Cosmetology Board was to cause non-dentists to stop providing teeth whitening services. (F. 324-326; Hughes Tr. 941-943).

III. ANALYSIS

Complaint Counsel asserts that dentists and non-dentists compete with one another in the teeth whitening market. CCB at 70. Complaint Counsel states that salons, spas, and kiosks in shopping malls ("non-dentist providers") offer teeth whitening services to consumers, as do dentists, and that non-dentist teeth whitening services are a less costly alternative to going to a dentist to have one's teeth whitened quickly and efficiently. CCB at 70. Complaint Counsel argues that because the Board is a combination of competitors, its concerted actions to prevent non-dentists from offering teeth whitening services constitute an unreasonable restraint of trade. CCB at 72-74. Complaint Counsel further contends that the Board embarked upon a campaign to exclude non-dentist teeth whitening service providers from the market, using a variety of methods, including issuing cease and desist orders to non-dentist providers; issuing cease and desist orders to manufacturers of products and equipment used by non-dentist providers; dissuading mall owners from leasing to non-dentist providers; dissuading potential entrants from starting non-dentist teeth whitening businesses; and enlisting the North Carolina Board of Cosmetic Art Examiners also to discourage non-dentist providers. Complaint ¶¶ 20-22; CCB at 70 (hereafter referred to collectively, as the "challenged conduct"). Complaint Counsel further asserts that this conduct was likely to, and did in fact, result in anticompetitive effects, and that there is no procompetitive justification for the Board's conduct. CCB at 89-102. Therefore, Complaint Counsel concludes, the Board's conduct constitutes a combination, contract or conspiracy in restraint of trade, in violation of Section 5 of the Federal Trade Commission ("FTC") Act. As a remedy, Complaint Counsel requests an order enjoining Respondent from ordering non-dentists to discontinue providing teeth whitening goods and services, and from engaging in other conduct

and communications to prevent or discourage non-dentists from providing teeth whitening services, and teeth whitening goods provided in conjunction with those services.

The North Carolina Dental Practice Act, N.C. Gen. Stat. § 90-22, *et seq.* ("Dental Practice Act") provides that certain activities, including "remov[ing] stains, accretions or deposits from human teeth," constitute the practice of dentistry, and must be performed or supervised by a licensed dentist. N.C. Gen. Stat. § 90-29(b); F. 41-42. Respondent asserts that the provision of teeth whitening services by non-dentists equates to the "remov[al of] stains, accretions or deposits from human teeth," and thereby constitutes the illegal practice of dentistry without a license. RB at 9, 28-29. According to Respondent, the Board was therefore authorized, as an agent of the state enforcing the Dental Practice Act, to take steps to prevent non-dentists from providing teeth whitening services. RB at 3. Accordingly, Respondent argues, because the Board was acting in the public interest, as an agent of the state enforcing the Dental Practice Act, its conduct cannot be deemed unlawful under the rule of reason. RB at 9-11; *see also* RRB at 28-30, 37-43. In addition, Respondent argues that its actions were intended to promote social welfare, by ensuring that teeth whitening services are supervised by licensed dentists and by protecting consumers from dangerous or unsafe teeth whitening services. RB at 1, 12-14. Further, Respondent argues that the restraints on non-dentist teeth whitening providers are procompetitive because they will serve to "protect legal competition within the marketplace," RB at 1; "promote competition between qualified, legal teeth whitening service providers," RB at 13; and will ensure that teeth whitening services are offered at a cost that reflects the higher skills of dentist providers, rather than at the lower cost alternative offered by assertedly lesser skilled, non-dentist teeth whitening service providers. RRB at 6, 12.

Before evaluating whether the conduct challenged in the Complaint is a violation of the FTC Act, the jurisdiction of the Commission must first be established. (Section III.A). The Initial Decision next provides an overview of the applicable legal standards for cases brought under Section 5 of the FTC Act. (Section III.B). Then, the analysis turns to a determination of the relevant market in which to evaluate the challenged conduct (Section III.C) and whether the challenged conduct constitutes "concerted action." (Section III.D). The analysis then examines whether the challenged conduct constitutes an unreasonable

restraint of trade (Section III.E) and analyzes Respondent's proffered procompetitive justifications and defenses. (Section III.F). Finally, the nature and extent of an appropriate remedy is addressed. (Section III.G).

A. Jurisdiction

1. The Board is a "person" within the meaning of the FTC Act

The Complaint charges Respondent with violating Section 5 of the FTC Act. Section 5(a)(2) of the FTC Act gives the Commission jurisdiction "to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in or affecting commerce . . . ." 15 U.S.C. § 45(a)(2); *Kaiser Aluminum & Chem. Corp. v. FTC*, 652 F.2d 1324, 1327 n.2 (7th Cir. 1981). Complaint Counsel asserts that the Board is a "person" within the meaning of Section 5 of the FTC Act. CCFF 404. Respondent, at this stage of the proceeding, does not dispute that it is a "person" within the meaning of Section 5 of the FTC Act.

The Commission, in its decision denying Respondent's Motion to Dismiss, rejected the Board's argument that it was not subject to the Commission's jurisdiction and held that the Commission has many times exercised jurisdiction over state boards as "persons" under the FTC Act. *In re North Carolina Board of Dental Examiners*, Docket 9343, 2011 WL 549449, at *5 (Feb. 8, 2011) (hereinafter "State Action Opinion") (citing *Va. Bd. of Funeral Dirs. & Embalmers*, 138 F.T.C. 645 (2004); *In re South Carolina State Bd. of Dentistry*, 138 F.T.C. 229 (2004); *In re Mass. Board of Registration in Optometry*, 110 F.T.C. 549, 1988 FTC LEXIS 34 (1988)). In *Mass. Board*, the Commission reasoned that because the Supreme Court had held local governments, as agents of the state, to be persons within the meaning of the Sherman Act and the Clayton Act, they should also be considered persons under the FTC Act and concluded that a state board is a "person" for purposes of jurisdiction under the FTC Act. 1988 FTC LEXIS 34, at *25. Consistent with this precedent, Respondent is a "person" within the meaning of Section 5 of the FTC Act.

2. The Board's acts are in or affecting commerce

To establish jurisdiction, Complaint Counsel must also demonstrate that the acts of Respondent are in or affect commerce. 15 U.S.C. § 45(a)(1) (prohibiting unfair methods of

competition "in or affecting commerce"); *McLain v. Real Estate Board*, 444 U.S. 232, 242 (1980). The Commission utilizes cases interpreting jurisdiction under the Sherman Act in analyzing its jurisdiction under Section 5 of the FTC Act. *In re North Texas Specialty Physicians*, 140 F.T.C. 715, 726-27 & n.9 (2005). Such approach was upheld in *North Texas Specialty Physicians v. FTC*, 528 F.3d 346, 354-55 (5th Cir. 2008).

"The Supreme Court on numerous occasions has emphasized the breadth of federal antitrust jurisdiction, even when wholly intrastate conduct of local actors is challenged." *In re North Texas Specialty Physicians*, 140 F.T.C. at 727 (citing *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322, 328-31 (1991); *McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 241 (1980); *Hosp. Bldg. Co. v. Trs. of Rex Hosp.*, 425 U.S. 738, 743-45 (1976); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 784-85 (1975)). "Wholly local business restraints can produce the effects condemned by the Sherman Act." *Rex Hosp.*, 425 U.S. at 743 (citation omitted). Indeed, the jurisdictional reach of the Sherman Act (and, thus, the FTC Act), "is coextensive with the broad-ranging power of Congress under the Commerce Clause." *Chatham Condo. Ass'n v. Century Village, Inc.*, 597 F.2d 1002, 1007 (5th Cir. 1979) (citing *Burke v. Ford*, 389 U.S. 320, 321-22 (1967) ("When competition is reduced, prices increase and unit sales decrease . . . . Thus, the state-wide wholesalers' market division inevitably affected interstate commerce.")).

Purchases by a defendant of out-of-state goods are a factor in evaluating whether an activity substantially affects interstate commerce. *E.g.*, *Rex Hosp.*, 425 U.S. at 744 (petitioner's purchases of out-of-state medicines and supplies considered in determining "substantial effect" on interstate commerce); *Miller v. Indiana Hosp.*, 843 F.2d 139, 144 n.5 (3rd Cir. 1988) (defendant hospital's treatment of out-of-state patients, purchase of medical supplies from out-of-state, and receipt of money from out-of-state, including federal funds, satisfies the requirement of affecting interstate commerce); *Oksanen v. Page Mem. Hosp.*, 945 F.2d 696, 702 (4th Cir. 1991) (same). *See also United States v. Robertson*, 514 U.S. 669, 672 (1995) ("[A] corporation is generally 'engaged "in commerce"' when it is itself 'directly engaged in the production, distribution, or acquisition of goods or services in interstate commerce.'") (per curiam) (quoting *United States v. Am. Bldg. Maint. Indust.*, 422 U.S. 271, 283 (1975)).

The Supreme Court has explained with regard to jurisdiction under the Sherman Act that the plaintiff "need not allege, or prove, an actual effect on interstate commerce to support federal jurisdiction." *Summit Health*, 500 U.S. at 330 (citations omitted). "Nor is jurisdiction defeated in a case relying on anticompetitive effects by plaintiff's failure to quantify the adverse impact of defendant's conduct." *McLain*, 444 U.S. at 243.

The evidence in this case establishes that manufacturers of teeth whitening equipment and products used by dentist and non-dentist teeth whiteners are located outside the State of North Carolina. F. 88-92. Dentist and non-dentist teeth whiteners in North Carolina use instrumentalities of interstate commerce and communication in the conduct of their businesses, including without limitation, the telephone and the internet to communicate with manufacturers of teeth whitening equipment and products located outside the State of North Carolina. F. 93. Dentist and non-dentist teeth whiteners in North Carolina purchase and receive products and equipment that are shipped across state lines by manufacturers and suppliers located outside the State of North Carolina. F. 94. Dentist and non-dentist teeth whiteners in the State of North Carolina transfer money and other instruments of payment across state lines to pay for teeth whitening equipment and products received from manufacturers located outside the State of North Carolina. F. 95.

In addition, the Board sent at least 40 letters to non-dentist teeth whiteners in North Carolina ordering them to cease and desist from providing teeth whitening services (discussed *infra* Section III.E.2) and some recipients of these letters sent copies of those letters to their out-of-state suppliers of products, equipment, or facilities. F. 96. The Board also sent at least 11 letters to third parties, including out-of-state property management companies (discussed *infra* Section III E.2) which impacted some of those recipients' decisions whether to rent to non-dentist teeth whitening service providers in North Carolina. F. 97-98. Two of the cease and desist letters were sent to out-of-state manufactures of teeth whitening products used by non-dentist teeth whiteners in North Carolina. F. 99.

Respondent argues that jurisdiction does not exist because the interstate commerce allegedly affected is the "illegal" interstate commerce of non-dentist teeth whitening. RB at 15. Respondent cites no authority for this argument. Moreover, the argument assumes that

non-dentist teeth whitening has been held illegal, although Respondent cites no case that has interpreted the North Carolina Dental Practice Act in this way. Accordingly, Respondent's jurisdiction argument is without merit.

Under the broad jurisdictional scope of "a substantial effect on interstate commerce," the activities of Respondent are in or affect commerce. Thus, the Commission has jurisdiction over the Board, and the conduct challenged in the Complaint, under Sections 4 and 5 of the FTC Act. 15 U.S.C. §§ 44, 45.

B. Overview of Applicable Legal Standards

The FTC Act's prohibition of unfair methods of competition encompasses violations of Section 1 of the Sherman Act. *See, e.g.*, *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 762 & n.3 (1999); *FTC v. Cement Inst.*, 333 U.S. 683, 694 (1948). "[T]he analysis under § 5 of the FTC Act is the same . . . as it would be under § 1 of the Sherman Act." *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 32 (D.C. Cir. 2005); *see also FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 451-52 (1986). Accordingly, it is appropriate to rely upon Sherman Act jurisprudence in determining whether the challenged conduct violated Section 5 of the FTC Act. *Cal. Dental Ass'n*, 526 U.S. at 762 n.3; *see Indiana Federation*, 476 U.S. at 454-55 (noting that the same analysis applies to both violations of Section 1 of the Sherman Act and Section 5 of the FTC Act); *Realcomp II, Ltd. v. FTC*, 635 F.3d 815, 824 (6th Cir. 2011) (same).

Section 1 of the Sherman Act prohibits "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . ." 15 U.S.C. § 1. Despite its broad language, the ban on contracts in restraint of trade extends only to unreasonable restraints of trade, i.e., restraints that impair competition. *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997). Thus, a Section 1 violation requires a determination of "(1) whether there was a contract, combination, or conspiracy -- or, more simply, an agreement; and, if so, (2) whether the contract, combination, or conspiracy 'unreasonably restrained trade in the relevant market.'" *Realcomp*, 635 F.2d at 824 (citations omitted); *Law v. NCAA*, 134 F.3d 1010, 1016 (10th Cir. 1998).

The analysis, thus, turns first to a determination of the relevant market that the challenged conduct is alleged to have affected. Next, whether there was a contract, combination or conspiracy is evaluated. Following that determination is an evaluation of whether the restraint unreasonably restrained trade and, then, an evaluation of the procompetitive justifications offered by Respondent.

C. Relevant Market

1. Framework

An antitrust violation requires proof that defendants (1) participated in an agreement that (2) unreasonably restrained trade in the relevant market. *Wampler v. Southwestern Bell Tel. Co.*, 597 F.3d 741, 744 (5th Cir. 2010); *NHL Players' Ass'n v. Plymouth Whalers Hockey Club*, 325 F.3d 712, 718-19 (6th Cir. 2003). "The first step in this analysis is determining the relevant market, which itself is a function of the relevant product market and the relevant geographic market." *Wampler*, 597 F.3d at 744.

The Complaint alleges that "the relevant market in which to evaluate the conduct of the Dental Board is the provision of teeth whitening services in North Carolina" and that "[t]eeth whitening services are offered by dentists and non-dentists." Complaint ¶ 7. The Complaint does not include in the relevant market "[t]eeth whitening products (such as toothpaste and OTC whitening strips)." Complaint ¶ 12.

Respondent argues that Complaint Counsel failed to establish the relevant market because "the teeth whitening market should include over-the-counter products – which are not regulated by the State Board – and should exclude illegal non-dentist provided services." RB at 16.

In its Reply Brief, Complaint Counsel asserts "market definition is not a prerequisite to establishing liability under the rule of reason." CCRB at 10. This assertion is contrary to established law. *E.g.*, *Ark. Carpenters Health & Welfare Fund v. Bayer AG (In re Ciprofloxacin Hydrochloride Antitrust Litig.)*, 544 F.3d 1323, 1331-32 (Fed. Cir. 2008) (The first step in rule of reason analysis is for plaintiff to show that the challenged action has had an actual adverse effect on competition as a whole in the relevant market.); *Geneva Pharms.*

Tech. Corp. v. Barr Labs., Inc., 386 F.3d 485, 506-07 (2d Cir. 2004) ("Under the rule of reason, the plaintiffs bear an initial burden to demonstrate the defendants' challenged behavior 'had an actual adverse effect on competition as a whole in the relevant market.'"); *Worldwide Basketball & Sport Tours, Inc. v. NCAA*, 388 F.3d 955, 959 (6th Cir. 2004) ("Under the rule of reason analysis, the plaintiff bears the burden of establishing that the conduct complained of 'produces significant anticompetitive effects within the relevant product and geographic markets.'"). Although in some circumstances no "elaborate industry analysis" is necessary to find an unreasonable restraint of trade (see discussion *infra* Section III.E.1 on legal framework; *Cal. Dental Ass'n*, 526 U.S. at 770), the market in which competition has been allegedly affected must nevertheless be defined. *See Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 436 (3d Cir. 1997) (affirming dismissal of complaint for failure to sufficiently allege relevant market, stating "[p]laintiffs have the burden of defining the relevant market").

The relevant market has two components, a geographic market and a product market. *H.J., Inc. v. Int'l Tel. & Tel.*, 867 F.2d 1531, 1537 (8th Cir. 1989). The relevant geographic market is the region "in which the seller operates, and to which the purchaser can practicably turn for supplies." *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961). That North Carolina is the relevant geographic market in which to assess the challenged conduct is not disputed. *See* RB at 15-19.

The relevant product or service market is "composed of products [or services] that have reasonable interchangeability for the purposes for which they are produced – price, use and qualities considered." *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 404 (1956); *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 481-82 (1992) (noting that relevant market is determined by the choices of products or services available to consumers). Relying on *du Pont*, courts have found the "reasonable interchangeability" standard to be the essential test for ascertaining the relevant product market. *Worldwide Basketball & Sport Tours*, 388 F.3d at 961; *Hornsby Oil Co. v. Champion Spark Plug Co.*, 714 F.2d 1384, 1393 (5th Cir. 1983). "Reasonable interchangeability 'may be gauged by (1) the product uses, i.e., whether the substitute products or services can perform the same function, and/or (2) consumer response (cross-elasticity); that is, consumer sensitivity to price

levels at which they elect substitutes for the defendant's product or service.'" *Worldwide Basketball & Sport Tours*, 388 F.3d at 961 (citation omitted).

The evidence shows that there are four methods of teeth whitening, but that only dentist provided teeth whitening services and non-dentist teeth whitening services are reasonably interchangeable. Before discussing the four methods and their interchangeability, a brief overview of teeth whitening is provided below.

2. Overview of the methods for teeth whitening

There are three methods of whitening teeth: (1) the use of aesthetic or prosthetic dental restorations, such as crowns, caps or veneers; (2) dental stain removal, either through the application of toothpaste or by going to the dentist to have stains scraped off, including by the use of rotary instruments to polish teeth; and (3) bleaching, using peroxide-containing gels or serums that are applied to the teeth using a variety of delivery systems. F. 100. The challenged conduct in this case relates only to the third method of whitening, the use of peroxide-containing gels or serums. F. 100. The terms bleaching and whitening are used synonymously in this opinion.

Regarding whitening through the use of peroxide containing gels or serums, four methods are or were available in North Carolina: (1) dentist in-office teeth whitening services; (2) dentist provided take-home teeth whitening products; (3) over-the-counter ("OTC") teeth whitening products; and (4) non-dentist teeth whitening services in salons, retail stores, and mall kiosks. F. 105. Each of these methods uses some form of peroxide, either hydrogen peroxide or carbamide peroxide, and each involves application of that chemical in gel or strip form directly onto the teeth. F. 106. These four alternatives for obtaining teeth whitening differ in ways that are important to consumers, including immediacy of results, ease of use, provider support, and price, and are discussed below. F. 107.

Dentists began offering an in-office process of bleaching living teeth in the early 1990s. F. 101. This in-office process, also known as dental chairside bleaching, uses highly concentrated hydrogen peroxide (25% to 35%). F. 109. Around 2001, Proctor & Gamble introduced Crest White Strips: clear, thin, flexible pieces of plastic (polyethylene) that are

coated on one side with a thin film of a low level of hydrogen peroxide bleaching agent. F. 131. This and similar products can be purchased by consumers over-the-counter ("OTC") and are self-applied by the consumer, but, as discussed below, do not achieve teeth whitening results quickly. F. 131-32, 135.

Beginning around 2003, non-dentists began offering teeth whitening services, operating primarily in beauty salons, spas, warehouse clubs, fitness centers and kiosks at malls. F. 137-38. These non-dental providers of teeth whitening services use concentrations typically equivalent to 16% or less of hydrogen peroxide. F. 140. As further explained below, teeth whitening services provided by non-dentists achieve teeth whitening results in one visit, and, in this way, are similar to the teeth whitening services provided by dentists. F. 146, 150.

a. Dentist in-office teeth whitening services

Dentists in North Carolina provide teeth whitening services. F. 108. Dentist provided services typically use highly concentrated hydrogen peroxide, applied multiple times during a single office visit. F. 109. Dentists use protective barriers to prevent the gums from burning, paint the peroxide solution onto the teeth, and often use a curing light to activate the bleaching gel or expedite the process. F. 111-12. Dentist in-office teeth whitening provides results in one to three hours. F. 111. This service ranges widely in price, often costing between $400 and $700. F. 117-18. The principal benefits of dentist in-office teeth whitening services are that it is applied by a professional dentist, after an examination and determination that it is medically appropriate, and that it is quick and effective, providing immediate results in one visit to the dentist. F. 119. The disadvantages to dentist in-office teeth whitening are that it is relatively expensive compared to the alternatives, and it requires making an appointment with the dentist that may not be at a convenient time for the consumer. F. 120.

b. Take-home teeth whitening kits provided by dentists

Dentists in North Carolina also offer take-home teeth whitening kits that patients self-administer after a consultation with the dentist. F. 121. Take-home kits provided by dentists include a custom-made whitening tray and whitening gel. F. 122. Take-home kits provided

by dentists typically use low concentrations of hydrogen peroxide or carbamide peroxide and require the consumer to reapply the whitening solution to his or her own teeth multiple times over a period of weeks or months. F. 125. Dentist provided take-home kits typically cost hundreds of dollars, in part, because the dentist performs a diagnostic examination, charges to fabricate the custom tray, provides instruction on its use, and supplies the whitening product and kit. F. 126. Take-home kits provided by dentists are usually more expensive than over-the-counter kits, discussed below. F. 127. Take-home kits provided by dentists are less expensive than the dentist in-office procedure and are also relatively effective at whitening teeth. F. 128. However, the consumer is required to apply the product at home a number of times without assistance. F. 128.

c. Over-the-counter products

Over-the-counter ("OTC") products include tray-less methods, such as gels, rinses, chewing gums, trays, and strips, for at-home bleaching. F. 129. These products typically use relatively low concentrations of hydrogen peroxide or carbamide peroxide and must be applied daily for an extended period of time. F. 130. OTC products are sold in a variety of locations including pharmacies, groceries, and over the internet. F. 130. Consumers self-apply the OTC strips directly to their teeth and must reapply them multiple times over multiple days. F. 132-33. OTC strips and trays typically cost between $15 and $50, depending on brand, quantity, and concentration. F. 134. The whitening results with OTC strips are highly variable because user compliance is variable; a great many consumers will not complete the whitening regimen, which may require as much as 30 days of daily use. F. 135. OTC strips have the advantages of the convenience of at-home treatment and low cost compared to the other alternatives. F. 136. The disadvantage is that OTC strips require diligent and repeated application by the consumer. F. 136.

d. Non-dentist teeth whitening services

Non-dentists offer teeth whitening services in mall kiosks, spas, retail stores, and salons. F. 138. Non-dentist teeth whitening typically uses a mid-level hydrogen peroxide/carbamide peroxide concentration, which is usually applied once during a single visit. F. 140. In a typical non-dentist bleaching procedure, the operator generally will: (1)

have the client sit in a chair; (2) put on protective gloves; (3) place a bib around the client's neck; (4) take a tray from a sealed package, which is either pre-filled with peroxide solution or which the operator fills with the peroxide solution, and hand it to the customer, who places the tray into his or her mouth; (5) adjust the light, if used; and (6) start the timer. F. 143. At the end of the procedure, the customer will remove the tray and hand it to the provider, who disposes of it. F. 143. Teeth whitening services offered in mall kiosks, spas, retail stores, and salons typically take one hour or less to whiten the customer's teeth. F. 146. The cost of non-dentist teeth whitening services varies, but ranges between $75 and $150. F. 147. Non-dentist chair-side bleaching is accessible, located most often in large shopping malls, and does not require an appointment. F. 149. Importantly, non-dentist whitening teeth whitening services can be completed in a single session. F. 150.

3. Interchangeability of the methods for teeth whitening

a. Interchangeability of products and services

Take-home products do not contain as much hydrogen peroxide as is contained in the products used by dentists and non-dentists in providing teeth whitening services. F. 170. Therefore, take-home products, whether provided by a dentist, non-dentist, or purchased over-the-counter, require numerous bleaching sessions over many days or weeks. F. 171. By contrast, chair-side bleaching, whether provided by dentists or non-dentists, is usually limited to a single bleaching session. F. 171.

The amount of time it takes to whiten teeth is important to some consumers of teeth whitening services or products. F. 172. If consumers want teeth whitening within 24 hours because, for example, they have a special event the next day, their choices are to go either to a dentist or to a non-dentist kiosk or salon for whitening. F. 153. OTC products do not achieve the same whitening results that quickly. F. 133, 136, 171.

OTC products are the least expensive alternative for consumers who are willing to self-apply bleaching products over several days or weeks, aided only by written instructions. F. 133, 136, 171. However, they are not a good substitute for chair-side teeth bleaching for consumers who want quick results or are concerned about self-application of OTC products.

F. 174. Therefore, teeth whitening products, whether sold by dentists or OTC, are not reasonable substitutes for teeth whitening services. *See* F. 170-74.

b. Interchangeability of services offered by dentists and non-dentists

If a consumer wants same day teeth whitening, the only ways to achieve that are to go to a dentist or to a non-dentist provider of teeth whitening services, such as those located in mall kiosks. F. 152-53. Dentists and non-dentist providers of teeth whitening services use higher peroxide concentrations than used in typical OTC products available in drug stores and supermarkets and, thus, work faster. F. 109, 140, 170-71. Non-dentist and dentist teeth whitening services have common characteristics, including higher concentrations of peroxide, provision of instruction, provision of a tray, loading of the peroxide, use of a light activator, and convenience of achieving results in one session. F. 151.

Cross-elasticity measures the degree of substitution between alternative products, defined as the percentage change in quantity and demand of one product as the price of a different product changes. *FTC v. Swedish Match*, 131 F. Supp. 2d 151, 157 (D.D.C. 2000) ("Interchangeability of use and cross-elasticity of demand look to the availability of products that are similar in character or use to the product in question and the degree to which buyers are willing to substitute those similar products for the product."); *see also* F. 154.

The expert testimony in this case establishes that there is substantial cross-elasticity of demand between dentist and non-dentist teeth whitening services, as testified to by Complaint Counsel's economic expert, Dr. John Kwoka, and agreed to by Respondent's expert, Dr. David Baumer. F. 155 (Dr. Kwoka concluding there is substantial cross-elasticity of demand between dentist and non-dentist teeth-whitening services and Dr. Baumer agreeing that there is a high cross-elasticity between dentist and non-dentist teeth-whitening services). Respondent's expert further agreed that a reduction in the supply of teeth whitening services would have an upward impact on price. F. 162.

Dentists are aware that there is commonality between the services they provide and the services non-dentists provide. F. 157. Dentists have acknowledged that consumers may

choose to go to a kiosk teeth whitener to get their teeth whitened rather than to a dentist and that a non-dentist teeth whitener operating within two miles of a dentist could affect the volume of teeth whitening services provided by the dentist. F. 159-60. The fact that complaints sent to the Board about non-dentist teeth whitening services focus on the amount being charged by non-dentists also indicates a concern by dentists about competition from non-dentists. F. 196-97, 228, 231-32.

Non-dentist providers of teeth whitening services target advertisements to consumers who would or are considering going to the dentist for teeth whitening. F. 164. The advertisements boast similar results as dentists, but for a lower price. F. 164-65. In addition, Discus Dental, the largest manufacturer of whitening products for dentists, maker of Zoom and BriteSmile, has included salon/mall operations in its consumer surveys, showing industry recognition of interchangeability between dentists and non-dentist providers of teeth whitening services. F. 169.

4. Analysis

The geographic market is the State of North Carolina, because North Carolina is the region in which the dentists who comprise the North Carolina State Board of Dental Examiners operate (F. 7) and where consumers in North Carolina turn for teeth whitening services.

The product market is the provision of teeth whitening services by dentists and non-dentists and does not include self-administered teeth whitening products. The evidence, set forth at F. 151-53 and summarized above, establishes that dentists and non-dentist teeth whitening services are viewed by consumers as performing the same function – effective teeth whitening performed in one session – and, thus, are reasonably interchangeable. Dentists and non-dentist providers also view themselves as offering comparable services. F. 157-68. Expert testimony confirms the cross-elasticity of demand between dentist and non-dentist teeth whitening services. F. 154-55. The evidence also establishes that self-administered teeth whitening products are not reasonably interchangeable with dentist and non-dentist providers of teeth whitening services because the products do not achieve the same results

sought by consumers. F. 170-74. Accordingly, the relevant market in which to assess the challenged restraint of trade is the provision of teeth whitening services in North Carolina.

D. Concerted Action

The first element of a Sherman Act Section 1 violation requires proof of a contract, combination, or conspiracy among two or more separate entities. *Valuepest.com of Charlotte, Inc. v. Bayer Corp.*, 561 F.3d 282, 286 (4th Cir. 2009); *Law v. NCAA*, 134 F.3d at 1016. "Independent action is not proscribed." *Monsanto Co. v. Spray-Rite Service Co.*, 465 U.S. 752, 761 (1984). "The fundamental prerequisite is unlawful conduct by two or more parties pursuant to an agreement, explicit or implied. Solely unilateral conduct, regardless of its anticompetitive effects, is not prohibited by Section 1. Rather, to establish an unlawful combination or conspiracy, there must be evidence that two or more parties have knowingly participated in a common scheme or design." *Mass. Board*, 1988 FTC LEXIS 34, at *28 (quoting *Contractor Utility Sales Co. v. Certain-Teed Products Corp.*, 638 F.2d 1061, 1074 (7th Cir. 1981)). "The term 'concerted action' is often used as shorthand for any form of activity meeting the section 1 'contract, combination or conspiracy' requirement." *Alvord-Polk v. F. Schumacher & Co.*, 37 F.3d 996, 999 n.1 (3rd Cir. 1994). *See, e.g., Viazis v. Am. Ass'n of Orthodontists*, 314 F.3d 758, 761 (5th Cir. 2002) ("[t]o establish a § 1 violation, a plaintiff must demonstrate concerted action").

In the instant case, Complaint Counsel alleges that the Board's efforts to prevent or eliminate non-dentist teeth whitening services, through issuing cease and desist letters and other communications to providers, manufacturers, potential entrants, and mall operators (collectively, the "challenged conduct"), constituted concerted actions of the Board. Complaint ¶¶ 18-22, 26. Complaint Counsel argues that it has established the element of concerted action, as a matter of law, because the Board, although ostensibly a single legal entity, is controlled by six independent dentist members, each with a distinct and independent economic interest, who compete in the industry they regulate. CCB at 72-73; CCRB at 27-28.

In support of this argument, Complaint Counsel notes that courts and the Commission have treated contracts and other agreements made by professional organizations and trade groups as "concerted action" of the controlling members, for purposes of Section 1, despite

such a group's organization as single, distinct legal entity. CCB at 72-72, citing, *e.g.*, *American Needle, Inc. v. NFL*, 130 S. Ct. 2201 (2010) and *Mass. Board*, 110 F.T.C. 549 (1988). However, in both of the foregoing cases, there was no factual issue as to whether there had been "a contract or other agreement" made by the organization. In *American Needle*, the member teams of the NFL voted to cause its licensing entity, which the NFL had formed, to enter into an exclusive license agreement with one company and to terminate a previous license agreement with American Needle. In *Mass. Board*, the respondent's members collectively voted to promulgate regulations that restricted advertising by optometrists. *See also FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986) (defendant dentists' union promulgated a work rule requiring member dentists to withhold x-rays requested by dental insurers); *Arizona v. Maricopa County Med. Soc.*, 457 U.S. 332 (1982) (medical fees were set by majority vote of medical foundation members, and contracts were made that bound members to abide by set fees); *National Soc'y of Professional Engineers v. United States*, 435 U.S. 679 (1978) (professional society adopted code of ethics prohibiting engineers from engaging in competitive bidding). The issue in both *American Needle* and *Mass. Board* was whether, given the membership composition of each organization, the organization was legally "*capable* of engaging in a 'contract, combination . . . , or conspiracy' as defined by § 1 of the Sherman Act, 15 U.S.C. § 1, or, . . . whether the alleged activity . . . 'must be viewed as that of a single enterprise for purposes of § 1.'" *American Needle,* 103 S. Ct. at 2208 (emphasis added); *see also Mass. Board*, 1988 FTC LEXIS 34, at *28-30.

Contrary to Complaint Counsel's argument, case law does not hold that the membership composition of a group, by itself, establishes the element of "concerted action" for a Section 1 violation. As the Commission stated in *Mass. Board*, Section 1 requires proof that that the members comprising the group "*agree* to a common design . . . The fundamental prerequisite of [Section 1] is unlawful conduct by two or more parties pursuant to *an agreement, explicit or implied*. . . . [T]o establish an unlawful combination or conspiracy, there must be evidence that two or more parties have knowingly participated in a *common scheme or design*." 1988 FTC LEXIS 34, at *28 (quoting in part *Contractor Utility Sales Co. v. Certain-Teed Products Corp.*, 638 F.2d 1061, 1074 (7th Cir. 1981)) (emphasis added). *See*

Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 771 (1984) (holding that agreement under Section 1 of the Sherman Act may be found from "a unity of purpose or a common design and understanding, or a meeting of minds"). Accordingly, a finding of a legal capacity to conspire does not resolve the issue of whether a conspiracy actually occurred. "The mere opportunity to conspire does not by itself support the inference that such an illegal combination actually occurred." *Capital Imaging v. Mohawk Valley Medical Associates, Inc.*, 996 F.2d 537, 545 (2d Cir. 1993).

Consistent with the foregoing authorities, it must first be determined whether the Board is legally capable of concerted action. Following that determination, the analysis next examines whether the Board's conduct with regard to non-dentist teeth whitening service providers was, in fact, concerted action, under the law.

1. The Board's capacity for concerted action

Complaint Counsel contends that the Board is controlled by six independent dentist members, who are practicing dentists with distinct and independent economic interests, and who compete in the industry they regulate. CCB at 72. Respondent claims that the Board's dentist members, although practicing dentists, have little, if any, economic interest in the challenged conduct of non-dentist teeth whitening services; are in any event ethically bound not to let their economic interests interfere with their work on the Board; and, in taking action with regard to non-dentist teeth whitening services, were pursuing the common business purpose of enforcing North Carolina law. RB at 24-26; RRB at 3-4. Accordingly, Respondent claims, the evidence indicates that the Board is not composed of competing economic actors, but rather constitutes a "unitary business enterprise" within the rule of *Copperweld Corp. v. Indep. Tube Corp*, 467 U.S. 752 (1984) (holding that parent company and wholly owned subsidiary were a "single aggregation of economic power" that could not conspire within the meaning of Sherman Act § 1).

"[S]ubstance, not form, should determine whether a[n] . . . entity is capable of conspiring under § 1." *Copperweld*, 467 U.S. at 773 n.21; *American Needle*, 130 S. Ct. at 2211. The relevant inquiry is not whether the defendant is a single legal entity, but whether the entity's decision-makers consist of "separate economic actors" with "separate economic

interests," whose joint decision could deprive the marketplace of actual or potential competition. *American Needle*, 130 S. Ct. at 2212-13. Accordingly, both the courts and the Commission have held that "when an organization is controlled by a group of competitors, the organization is viewed as a combination of its members, and their concerted actions will violate the antitrust laws if [those actions constitute] an unreasonable restraint of trade." *North Texas Specialty Physicians*, 140 F.T.C. at 738 (citing *In re Michigan State Med. Soc'y*, 101 F.T.C. 191, 286 (1983)). *See, e.g.*, *American Needle*, 130 S. Ct. at 2212-13 (holding that NFL was capable of conspiracy where it was controlled by competing member teams that were each independently owned and managed); *United States v. Sealy, Inc.*, 388 U.S. 350, 353-54 (1967) (holding that licensing entity operated and controlled by group of manufacturer-licensees was not a single actor for purposes of Sherman Act Section 1); *Capital Imaging*, 996 F.2d at 544 (holding that multi-member association of competing doctors, all of whom were in private practice for themselves, was capable of conspiring); *Mass. Board*, 110 F.T.C. 549, 1988 FTC LEXIS 34, at *29-30 (1988) (rejecting argument that Board conduct was unilateral action, where member optometrists were each principally engaged in private practice, and had separate economic identities). The rationale for such "jurisprudence is sound. Without it, any group of competitors could avoid antitrust liability . . . by acting through single organizations that they control. . . ." *North Texas Specialty Physicians*, 140 F.T.C. at 738. Indeed, antitrust law "has been particularly watchful of organizations of the various trades or professions. *See, e.g., National Soc'y of Professional Engineers v. United States*, 435 U.S. 679, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 95 S. Ct. 2004, 44 L. Ed. 2d 572 (1975). . . ." *Virginia Academy of Clinical Psychologists v. Blue Shield of Virginia*, 624 F.2d 476, 481 (4th Cir. 1980) (other citations omitted).

In the instant case, the evidence shows that the Board is controlled by member dentists, who hold six of the eight seats on the Board. F. 2, 15; *see also* F. 184 (only dentist members serve as case officers in non-dentist teeth whitening investigations). The remaining two seats, held by the consumer and hygienist members, have only limited authority, and virtually no role in or power over the Board activities affecting non-dentist teeth whitening. F. 36-40, 59-60, 192-93. Moreover, at all relevant times, each dentist Board member has been

engaged in the full-time practice of dentistry while serving on the Board. F. 6-7. Thus, the evidence shows that the Board is controlled by dentist members who are each "separate economic entities." *See Capital Imaging Associates,* 996 F.2d at 544 (holding that where each doctor in independent practice association practiced medicine in his or her own individual capacity, each was a separate economic entity); *Mass. Board*, 1988 FTC LEXIS 34, at *29 (affirming Administrative Law Judge's ruling that, where Optometry Board members were practicing optometrists, they had separate economic identities).

Respondent's claim that the dentists controlling the Board did not have competing economic interests with respect to non-dentist teeth whitening services is not borne out by the evidence. Many of the Board members provide teeth whitening services through their private practices and derive income from it. F. 8-11. Some dentists in North Carolina earned thousands of dollars annually in revenue from the provision of teeth whitening procedures during the period from 2005 until August of 2010. F. 104, 233. In addition, dentist members of the Board are elected by fellow dentists in North Carolina, and they campaign for their Board positions. F. 15-23. Moreover, the Board is funded by fees paid by dentists. F. 13-14. These facts support an inference that Board members have a financial interest in the business of teeth whitening. F. 12 (Board members "may well be influenced by the impact on the bottom line," including the financial interest of dentists, in deciding whether to ban non-dentist teeth whitening). Board members are in a position to enhance their incomes and those of their constituents by preventing or eliminating non-dentist teeth whitening services. F. 12. The Board's assertion that it is subject to ethical rules against conflicts of interest on the part of its dentist members, RB at 31, and the fact that the members are obliged to enforce North Carolina law (F. 1, 33), do not transform the dentists' separate economic interests into a unity of economic interest as would negate the legal capacity to engage in concerted action.

Respondent's reliance on *Oksanen v. Page Mem'l Hosp.*, 945 F.2d 696 (4th Cir. 1991) and *Amer. Chiropractic v. Trigon Healthcare*, 367 F.3d 212 (4th Cir. 2004) (RB at 24-26) is misplaced. In *Oksanen*, the court held that a hospital and its peer review committee were not legally capable of conspiring with one another, due to the hospital's management structure and authority to overrule the committee's recommendations. 945 F. 2d at 702-05. *See also Trigon Healthcare*, 367 F.3d at 224-25 (holding that insurance company and managed care

advisory panel were not separate entities capable of conspiring together). In the instant case, unlike both *Oksanen* and *Trigon*, the claim is that the Board *itself* engaged in concerted action.[10] In this regard, it is significant that the court in *Oksanen*, in evaluating the claim that the members of the peer review committee conspired among themselves, specifically recognized that when "physicians with independent and at times competing economic interests . . . join together to take action among themselves, they are unlike a single entity and therefore they have the capacity to conspire as a matter of law." *Oksanen*, 945 F.2d at 706. [11]

Consistent with the foregoing authorities, and based on the evidence, the Board is indeed legally capable of concerted action.

2. The Board's concerted action with regard to non-dentist teeth whitening services in North Carolina

Complaint Counsel argues that the Board can only act through its agents, that the dentist members are agents of the Board, and that the dentist members' actions against non-dentist teeth whitening service providers, such as sending out cease and desist letters on behalf of the Board, were taken with the actual or apparent authority of the Board. CCRB 30-32. Therefore, Complaint Counsel concludes, it has proven the element of "concerted action" in this case because the conduct of the individual dentist members is attributable to the Board. CCRB at 31-32 (citing *Am. Soc'y of Mechanical Eng'rs v. Hydrolevel*, 456 U.S. 556 (1982); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982); and *Viazis v. American Ass'n of Orthodontists*, 314 F.3d 758 (5th Cir. 2002)). Complaint Counsel's theory is inapposite.

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[10] Although the introduction to the Complaint states that "[d]entists in North Carolina, acting through the instrument of" the Board "are colluding to exclude non-dentists from competing with dentists" in the teeth whitening services market, Complaint, p. 1, Complaint Counsel has apparently abandoned that claim in favor of the theory that the Board *itself* engaged in unlawful concerted action. CCB at 72-73 (stating that the conduct of the Board constitutes concerted action within the meaning of antitrust law and that because the Board's conduct constitutes concerted action, whether the Board conspired with non-Board dentists is immaterial).

[11] Moreover, the facts underlying the holdings in *Oksanen* and *Trigon* are readily distinguishable. In *Oksanen*, the peer review committee had been specifically tasked by the hospital's Board of Trustees to conduct a peer review and make recommendations. In addition, the Board of Trustees could modify the committee's recommendations at any time and, pursuant to by-laws, retained ultimate responsibilities for all credentialing decisions. Because of the committee's limited role as an agent of the hospital, with the hospital exercising control and authority over the committee, the court concluded that the peer review committee was akin to a corporation's officers, or members of an autonomous corporate unit, and was not a separate entity capable of conspiring with the hospital. 945 F.2d at 702-05. In *Trigon*, the insurer created the panel, held 6 of its 15 seats, including the chair, and the recommendations of the panel were not binding on the insurer. *Trigon*, 367 F.3d at 224-25. The facts of these cases are simply not analogous to the facts of this case.

In *Hydrolevel*, the issue was whether the American Society of Mechanical Engineers (ASME) could be held liable under Sherman Act Section 1 for conspiring with two other entities to interpret and apply a certain influential ASME code in a way that competitively disadvantaged Hydrolevel's product. *Am. Soc'y of Mechanical Eng'rs v. Hydrolevel*, 456 U.S. 556 (1982). The Supreme Court held that ASME could be held liable as a participant in the conspiracy with the other entities because the ASME members that participated in the challenged conduct were agents of ASME, acting with the apparent authority of ASME, and that it was not necessary to show that ASME ratified its agents' conduct. *Id.* at 573. In the instant case, however, Complaint Counsel contends that the Board *itself* conspired to remove non-dentist teeth whitening service providers from the market, not that the Board conspired with other persons or entities. *See* fn.10, *supra*. *Compare NAACP v. Claiborne Hardware Co.* (addressing whether NAACP, by a vote of its members, conspired with other organizations and non-member individuals in a boycott of white merchants); *Viazis v. American Ass'n of Orthodontists* (deciding, *inter alia*, whether the American Association of Orthodontists, through the conduct of some of its members, conspired with three other entities and one individual to keep Viazis' orthodontic appliance out of the market). Thus, whether the Board can be held liable as a participant in a conspiracy with other entities, because of the acts of its member-agents, is immaterial to determining whether the Board's conduct constitutes the concerted action of its members.

As explained above, to establish the element of concerted action, Complaint Counsel must show that the dentist members of the Board had an express or implied agreement to exclude non-dentist teeth whitening services from the market. An agreement results from two or more parties knowingly participating in a common scheme or design. *Mass. Board*, 1988 FTC LEXIS 34, at *28. *See Copperweld*, 467 U.S. at 771 (holding that agreement under Section 1 of the Sherman Act may be found from "a unity of purpose or a common design and understanding, or a meeting of minds"). Moreover, contrary to Respondent's argument, RB at 20-21, RRB at 4-6, "it is settled that 'no formal agreement is necessary to constitute an unlawful conspiracy,' *American Tobacco Co. v. United States*, 328 U.S. 781, 809, and that 'business behavior is admissible circumstantial evidence from which the fact finder may infer agreement.'" *Norfolk Monument Co. v. Woodlawn Memorial Gardens, Inc.*, 394 U.S. 700,

703-04 (1969) (quoting *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537, 540). *See Alvord-Polk*, 37 F.3d at 1000 ("An agreement need not be explicit to result in section 1 liability . . . direct evidence of concerted action is not required.") (citations omitted). Thus, in *Realcomp*, the court held that the defendant's website policy, adopted by its governing members, constituted an agreement of its governing members. 635 F.3d at 824-25. In *Mass. Board*, 1988 FTC LEXIS 34, at *32, the Board's promulgation of regulations, after discussion and vote of the Board's members, was sufficient to demonstrate concerted action of the Board's members.

Applying the foregoing legal principles, the evidence in this case shows that the Board had a common scheme or design, and therefore an agreement, to prevent or eliminate non-dentist teeth whitening services in North Carolina. This agreement is readily inferable from the Board's course of conduct in issuing cease and desist letters and similar Board communications designed to discourage non-dentist teeth whitening. *See* F. 207-45 (providers and manufacturers), 261-80 (manufacturers and entrants), 288-93 (mall owners and operators), 314-23 (North Carolina Board of Cosmetic Art Examiners). The consistency and frequency of the Board's message regarding non-dentist teeth whitening, over the course of several years and across the tenures of varying Board members, is highly probative circumstantial evidence of an agreement among Board members as to the content and purpose of that message. *Id.*; *see also* F. 32 (Board members from 2005 to 2010). Indeed, with respect to some of the Board's communications targeting non-dentist teeth whitening, there is direct evidence of advance discussion and formal approval by Board members. F. 264, 276, 289, 317, 321.

The Board's form letter issued to various mall operators stating that non-dentist teeth whitening was illegal was designed to prevent the expansion of mall-based teeth whitening kiosks, by inducing malls to refuse to rent space to non-dentist providers. F. 288, 290-93. The Board members discussed and unanimously approved this letter in advance. F. 289. In addition, the Board members expressly agreed to request the North Carolina Board of Cosmetic Art Examiners ("Cosmetology Board") to post a notice of the Board's position against non-dentist teeth whitening, in order to encourage the Cosmetology Board's licensees to stop providing teeth-whitening services. F. 317, 321. As with the mall letters, it is also

significant that the content of the notice, as well as its purpose, was discussed and unanimously approved by Board members in advance. *See id.* A similar message of the Board's position against non-dentist teeth whitening service providers was also sent to manufacturers of teeth whitening systems, after discussion and approval at a Board meeting. F. 264, 276.

The Board members' common design, and hence agreement, to prevent or eliminate the provision of non-dentist teeth whitening services in North Carolina is further demonstrated by the Board's issuance of cease and desist letters to non-dentist teeth whitening service providers. The cease and desist letters contained nearly identical messages and were issued over the course of multiple years and across the tenures of varying Board members, including at times upon receipt of a complaint without any additional investigation. F. 32, 210-26. These facts support the inference that the Board's issuance of these letters was an agreed policy of the Board's members, in response to complaints from dentists (F.194-206), in furtherance of the dentist members' common purpose to eliminate non-dentist teeth whitening. *See also* F. 201 (The Board's executive director responding to a complainant in February of 2008, referred to the Board's "going forth to do battle" with mall "bleaching kiosks" and its issuing "numerous cease and desist orders throughout the state"). Moreover, the cease and desist letters sent to teeth whitening product manufacturers and distributors were virtually identical to those sent to non-dentist teeth whitening service providers. F. 220, 262. This fact further supports the inference that the use of such letters was an agreed policy, in furtherance of the Board members' common purpose of discouraging the expansion of non-dentist teeth-whitening services.

Respondent argues that Complaint Counsel has failed to produce evidence to exclude the possibility that, in issuing the cease and desist letters, the Board members were acting independently. RRB at 7. *See Toys "R" Us v. FTC*, 221 F.3d 928, 934 (7th Cir. 2000) ("When circumstantial evidence is used, there must be some evidence that 'tends to exclude the possibility' that the alleged conspirators acted independently." (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986))). For example, according to Respondent, evidence that the Board approached investigations into allegations of unlawful teeth whitening services in the same manner as it approached its other investigations into the

unauthorized practice of dentistry supports an inference of independent conduct, rather than conspiracy. RRB at 23, relying on *Merck-Medco Managed Care, LLC v. Rite Aid Corp.*, 1999 U.S. App. LEXIS 21487, at *25-27, 30 (4th Cir. 1999). While *Medco* notes that evidence of departure from normal business practices can be valuable proof of conspiracy, 1999 U.S. App. LEXIS 21487, at *30, *Medco* does not stand for the proposition that such proof is required to prove conspiracy.

Moreover, unlike *Medco*, the evidence in this case shows more than mere parallel conduct among Board members that could just as well be independent action, as contended by Respondent. RB at 27. Rather, as set forth above, the evidence shows a consistent, and persistent, course of conduct, using virtually identical language, over an extended period of time, during which the dentist Board members shifted and changed. *See* F. 27-32. Such facts tend to negate the possibility that the Board members were acting independently, "in parallel." In any event, the law does not require that the evidence exclude *all* possibility that the alleged conspirators acted independently of one another. *Toys "R" Us*, 221 F.3d at 934-35. Furthermore, it is not necessary to demonstrate that every Board member participated in the conspiracy. *See In re Mich. State Med. Soc'y*, No. 9129, 101 F.T.C. 191, 1983 FTC LEXIS 113, at *222 (Feb. 17, 1983) (holding that even if less than all members of an organization or association agree to participate, that fact does not negate the presence of a conspiracy or combination as to those who do participate). Similarly, proof of concerted action does not require a showing of simultaneous agreement by the alleged conspirators. *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 227 (1939) ("It is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators.").

Finally, Respondent contends that, even if the Board is capable of concerted action, and even if it took concerted action with regard to the challenged conduct, such concerted action is not unlawful because the dentist Board members were acting to enforce the Dental Practice Act, and not to suppress competition. RB at 27-29; RRB at 7-8. Because this argument is not material to whether or not the Board's conduct was "concerted action," but

rather to whether that conduct constitutes an unreasonable restraint of trade, it is addressed in Section III.E below.

E. Restraint of Trade

Complaint Counsel alleges that the Board's campaign to exclude non-dentist teeth whitening providers from offering teeth whitening services constitutes an unreasonable restraint of trade. CCRB at 6. Complaint Counsel charges that the "methods of exclusion employed by the Board include issuing cease and desist orders to non-dentist providers; issuing cease and desist orders to manufacturers of products and equipment used by non-dentist providers; dissuading mall owners from leasing to non-dentist providers; and enlisting the Cosmetology Board also to threaten non-dentist providers." CCB at 70.

The Dental Practice Act provides that certain activities, including "remov[ing] stains, accretions or deposits from human teeth," constitute the practice of dentistry, and must be performed or supervised by a licensed dentist. N.C. Gen. Stat. § 90-29(b); F. 41-42. Respondent asserts that the Dental Practice Act limits the offering and provision of stain removal services to licensed dentists and authorizes the Board to take action to enforce this limitation. RB at 3. Because it is enforcing the Dental Practice Act, Respondent argues, the Board's actions against non-dentist teeth whitening service providers cannot properly be deemed an "unreasonable" restraint of trade. RB at 3.

The Commission has decided in this case that the Board, although an agency of the State, is not entitled to state action immunity for its alleged anticompetitive conduct. State Action Opinion, 2011 WL 549449, at *1. The Commission reasoned: "[T]he Board has presented no evidence to suggest that its decision to classify teeth whitening as the practice of dentistry and to enforce this decision with cease and desist orders was subject to any state supervision, let alone sufficient supervision to convert the Board's conduct into the conduct of the state of North Carolina." State Action Opinion, 2011 WL 549449, at *17. Respondent's contention, summarized above, that its conduct cannot be deemed an antitrust violation because it acted as a state agency enforcing state law, is logically indistinguishable from its argument to the Commission that, as a state agency enforcing state law, the Board is immune from antitrust liability. *See, e.g.*, Answer, pp. 8-17; Respondent's Motion to Dismiss, Nov. 3,

2010. Accordingly, the Commission's decision that the Board's actions are not protected from antitrust liability based on the state action doctrine effectively precludes the Administrative Law Judge from considering that issue, and forecloses Respondent from defending its conduct on the ground that the Board is a state agency enforcing state law. Similarly, the Commission's holding that the Board's conduct is not immunized as state action renders immaterial whether or not non-dentist teeth whitening services constitute a violation of the Dental Practice Act. Thus, whether non-dentist teeth whitening constitutes the "remov[al of] stains, accretions or deposits from human teeth," and, thereby, constitutes the illegal unlicensed practice of dentistry, need not and will not be addressed.

With that background, the analysis turns to whether the concerted actions of the Board constitute an unreasonable restraint of trade. The legal framework for such analysis is set forth below.

1. Legal framework

In analyzing whether an agreement unreasonably restrains trade, the Supreme Court has explained that "a restraint may be adjudged unreasonable either because it fits within a class of restraints that has been held to be '*per se*' unreasonable, or because it violates what has come to be known as the 'Rule of Reason.'" *Indiana Federation*, 476 U.S. at 457-58; *Realcomp*, 635 F.3d at 825. Complaint Counsel does not contend that the challenged conduct of the Board is unreasonable *per se*. Accordingly, the challenged conduct is analyzed pursuant to a rule of reason inquiry.

The conventional rule of reason approach requires courts to engage in a thorough analysis of the relevant market and the effects of the restraint in that market. *Realcomp*, 635 F.3d at 825 (citing *Indiana Federation*, 476 U.S. at 461). As the court in *Realcomp* explained:

> A full rule-of-reason inquiry "may extend to a 'plenary market examination,'" *Continental Airlines, Inc. v. United Airlines, Inc.*, 277 F.3d 499, 509 (4th Cir. 2002) (quoting *Cal. Dental Ass'n*, 526 U.S. at 779), which may include the analysis of "'the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed,'" *id.* (quoting *Nat'l Soc'y of Prof'l Eng'rs v.*

> *United States*, 435 U.S. 679 (1978)), "as well as the availability of reasonable, less restrictive alternatives," *id.*

Realcomp, 635 F.3d at 825. If the challenged restraint is shown to have actual anticompetitive effects, then the burden shifts to the proponent of the challenged restraint to provide procompetitive justifications for it. *Id.* In addition, "[m]arket power and the anticompetitive nature of the restraint are sufficient to show the potential for anticompetitive effects under a rule-of-reason analysis, and once this showing has been made, [the proponent of the policies] must offer procompetitive justifications." *Id.* at 827. However, proof of actual detrimental effects can obviate the need for an inquiry into market power, which is but a "surrogate for detrimental effects." *Indiana Federation*, 476 U.S. at 460-61, quoting 7 P. Areeda, Antitrust Law P1511, at 429 (1986).

A "quick look," or abbreviated rule of reason analysis applies to those arrangements that "an observer with even a rudimentary understanding of economics could conclude . . . would have an anticompetitive effect on customers and markets." *Cal. Dental Ass'n*, 526 U.S. at 770. In such cases, the nature of the restraint is such that the likelihood of anticompetitive effects "can easily be ascertained," or is "comparably obvious" and no elaborate or detailed market analysis is necessary. *See id.* at 769-71. If the nature of the restraint is deemed facially anticompetitive pursuant to this "quick-look," "the proponent of the restraint must provide 'some competitive justification' for it, 'even in the absence of a detailed market analysis' showing market power or market effects." *Realcomp*, 635 F.3d at 825 (quoting *Cal. Dental Ass'n,* 526 U.S. at 769-71).

The Commission has held that an abbreviated rule of reason analysis is appropriate in cases where "the conduct at issue is inherently suspect owing to its likely tendency to suppress competition. Such conduct ordinarily encompasses behavior that past judicial experience and current economic learning have shown to warrant summary condemnation. If the plaintiff makes such an initial showing, and the defendant makes no effort to advance any competitive justification for its practices, then the case is at an end and the practices are condemned." *In re Polygram Holding, Inc.*, 136 F.T.C. 310, 344-45 (2003), *aff'd Polygram Holding, Inc. v. FTC*, 416 F.3d 29 (D.C. Cir. 2005). *Accord In re North Texas Specialty Physicians*, 140 F.T.C. at 733-36; *In re Realcomp II Ltd.*, No. 9320, 2009 FTC LEXIS 250, at

*52-55 (Oct. 30, 2009). The Commission's "inherently suspect" framework is essentially a "'quick-look' rule-of-reason analysis." *North Texas Specialty Physicians*, 528 F.3d at 360-61; *see also Polygram*, 416 F.3d at 36-37 ("Although the Commission uses the term 'inherently suspect' to describe those restraints that judicial experience and economic learning have shown to be likely to harm consumers, . . . the rebuttable presumption of illegality arises . . . from the close family resemblance between the suspect practice and another practice that already stands convicted in the court of consumer welfare.").

While there are varying modes of inquiry, the ultimate test of legality "'is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.'" *Polygram*, 136 F.T.C. at 327 n.14, quoting *Chicago Board of Trade v. United States,* 246 U.S. 231, 238 (1918). As the court explained in *Realcomp*:

> Despite these different methods, "no categorical line" separates those "restraints that give rise to an intuitively obvious inference of anticompetitive effect and those that call for more detailed treatment." *Cal. Dental Ass'n*, 526 U.S. at 780-81. Rather, the Supreme Court has emphasized that "whether the ultimate finding is the product of a presumption or actual market analysis, the essential inquiry remains the same -- whether or not the challenged restraint enhances competition." *Id.* at 779-80 (quoting *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 104 (1984)). Accordingly, the Court has moved "away from . . . reliance upon fixed categories and toward a continuum," *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 35 (D.C. Cir. 2005), within which "the extent of the inquiry is tailored to the suspect conduct in each particular case," *id.* at 34; *see also* 7 Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 1507 (3d ed. 2010) . . . ("[T]he quality of proof required should vary with the circumstances."). Therefore, we must make "an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint." *Cal. Dental Ass'n*, 526 U.S. at 781.

635 F.3d at 826.

Applying a rule of reason analysis, the challenged conduct of the Board constitutes concerted action which, absent a valid procompetitive justification, unreasonably restrains trade. As fully explained in detail below, the evidence shows that the challenged conduct is, by its nature, anticompetitive. (Section III.E.2.a). The evidence further shows that Respondent has market power. (Section III.E.2.b). The evidence additionally shows that the

challenged conduct has had actual anticompetitive effects. (Section III.E.3). Respondent's asserted procompetitive justifications and defenses are analyzed in Section III.F.

2. Potential adverse effects

a. Anticompetitive nature

The challenged conduct has been addressed in a summary fashion above, in the context of showing that the actions of Respondent constituted concerted action. Additional details of this course of conduct are described here in order to assess the anticompetitive nature of Respondent's conduct. "[T]he facts peculiar to the business, the history of the restraint, and the reasons why it was imposed," *National Soc'y of Professional Engineers*, 435 U.S. at 692, are reviewed first, however, to put the anticompetitive nature of the challenged conduct in context.

(i) Context for the challenged conduct

A. Teeth whitening popularity

Teeth whitening or bleaching has become one of the most popular esthetic dental treatments over the past two decades. *See* F. 102-03. In 2004, the American Academy of Cosmetic Dentistry reported that teeth whitening services had increased more than 300% since 1996. F. 102. A 2008 national Gallup Poll reported that over 80% of dentists nationwide engage in the practice of teeth whitening. F. 103.

Realizing the popularity of teeth whitening, non-denists began offering teeth whitening services to consumers in salons, spas, or kiosks at malls, in North Carolina in approximately 2003 or 2004. F. 137. Non-dentist providers of teeth whitening services have advertised that: they are comparable to dentists in terms of time and convenience; they can whiten teeth in one hour or less; and they charge lower prices than dentists for their services. F. 164-68. And indeed, the evidence shows that these services are a less costly alternative to going to a dentist to have one's teeth whitened quickly and efficiently. F. 148. Whereas dentist provided teeth whitening services commonly cost around $400 to $500, non-dentist provided teeth whitening services commonly cost between $75 and $150. F. 117, 147; *see also* F. 150. For consumers who want their teeth whitened quickly, teeth whitening services

provided at salons, spas or kiosks at malls are the only reasonable substitute for teeth whitening services provided by dentists. F. 151-53.

B. Dentists' responses to non-dentist provided teeth whitening services

Dentists became aware that individuals who sought quick and inexpensive teeth whitening services saw salons, spas or mall kiosks as an alternative to going to the dentist. F. 157; *see also* F. 194-206. For example, Board member Dr. Burnham discussed with other Board members that individuals may choose to go to a kiosk teeth whitener rather than to a dentist to get their teeth whitened, and Board member Dr. Hardesty acknowledged that a non-dentist teeth whitener operating within two miles of a dentist could affect the volume of teeth whitening services provided by the dentist. F. 159-61.

In or around 2003, the Board received its first complaints about non-dentists providing teeth whitening services. F. 194. Between August and September 2, 2004, four North Carolina dentists complained to the Board about Edie's Salon Panache. The complaints noted that the salon advertised that it was the second "salon in North Carolina to offer teeth whitening" and that it offered a price of $149, which was lower than the amount dentists charge. F. 196. On September 11, 2006, another dentist faxed the Board a complaint noting that "increasingly large number[s] of spas in the Hickory area are offering their clients dental bleaching." F. 197.

At least 47 individual dentists filed complaints with the Board about non-dentist teeth whitening operations. F. 229. At least 29 non-dentist teeth whitening providers were sent cease and desist letters by the Board in instances where a North Carolina dentist had filed a complaint with the Board. F. 230. With one exception, dentists' complaints to the Board about non-dentist teeth whitening do not state that any individual had been harmed by the procedure. F. 231. The Board admits that "only three investigations it opened included a report of harm or injury to an individual." F. 228. Two of these investigations stem from consumer complaints and one stems from a dentist on behalf of his patient. F. 228; *see also* RFF 100-237 (listing by case name 28 investigations the Board has taken in response to

complaints and including in these proposed findings only three investigations based on complaints claiming harm from teeth whitening services by non-dentists).

Many of the dentists' complaints to the Board about non-dentist teeth whitening referenced the price being charged by, or attached advertisements showing the prices charged by, non-dentist teeth whitening service providers. F. 232. *See also* F. 196, 200, 202. Moreover, many of the dentists who filed complaints or inquiries that led to the Board investigations of non-dentist teeth whitening service providers derived income from the provision of teeth whitening services in recent years. F. 233. Some dentists in North Carolina earned thousands of dollars annually in revenue from the provision of teeth whitening procedures during the period of 2005 until August of 2010. F. 104, 233. Furthermore, many of the Board members provide teeth whitening services through their private practices and derive income from it. F. 9-11.

C. Summary of context

The evidence shows that non-dentists began to offer teeth whitening services at mall kiosks, salons and spas in approximately 2003 and, thus, recently entered the market for teeth whitening services. The evidence further shows that the overwhelming number of complaints to the Board from dentists reference the price charged by non-dentists, rather than the harm caused by this procedure.

In addition, the evidence shows that dentists and some Board members had an economic interest in preventing non-dentists from offering teeth whitening services. The expert testimony, from both Complaint Counsel's and Respondent's experts, confirms that Board members have a significant, nontrivial financial interest in the business of their profession, including teeth whitening. F. 12.

As stated in *Realcomp* by the Commission: "The circumstances surrounding the establishment of the policies, and Realcomp's evident aim of retarding the emergence of a new business model, underscore the exclusionary impact of those policies." 2009 FTC LEXIS 250, at *64. Here too, the circumstances of non-dentists recently entering the teeth whitening services market, and the Board's evident aim to prevent non-dentists from offering

teeth whitening services (discussed below) underscore the exclusionary impact of the challenged conduct. It is from this backdrop that the challenged conduct is assessed below.

(ii) The challenged conduct

The evidence shows that Respondent engaged in a concerted effort to exclude non-dentists from the market for teeth whitening services and to deter potential providers of teeth whitening services from entering the market. Respondent pursued its objective through the following course of conduct: (a) sending letters to non-dentist teeth whitening providers, ordering them to cease and desist from offering teeth whitening services; (b) sending letters to manufacturers of products and equipment used by non-dentist providers, and other potential entrants, either ordering them to cease and desist from assisting clients offering teeth whitening services, or otherwise attempting to dissuade them from participating in the teeth whitening services market; (c) sending letters to owners or operators of malls to dissuade them from leasing to non-dentist providers of teeth whitening services; and (d) eliciting the help of the North Carolina Board of Cosmetic Art Examiners ("Cosmetology Board") to dissuade its licensees from providing teeth whitening services.

A. Letters to non-dentist providers

The Board has sent at least 47 cease and desist letters to non-dental teeth whitening providers and manufacturers since it began the practice in 2006. F. 218. These 47 cease and desist letters were sent on the letterhead of the North Carolina State Board of Dental Examiners. F. 219. At least 40 of the cease and desist letters sent to non-dentist teeth whiteners contain bold, capitalized headings that state: "NOTICE AND ORDER TO CEASE AND DESIST" or "NOTICE TO CEASE AND DESIST" or a heading that states: "CEASE AND DESIST NOTICE." F. 220. The text of the majority (39 of 47) of these letters states:

> You are hereby ordered to CEASE AND DESIST any and all activity constituting the practice of dentistry or dental hygiene as defined by North Carolina General Statutes § 90-29 and § 90-233 and the Dental Board Rules promulgated thereunder.
>
> Specifically, G.S. 90-29(b) states that . . . "A person shall be deemed to be practicing dentistry in this State who does, undertakes or attempts to do, or

> claims the ability to do any one or more of the following acts or things which, for the purposes of this Article, constitute the practice of dentistry:"
>
> "(2) Removes stains, accretions or deposits from the human teeth;"
>
> "(7) Takes or makes an impression of the human teeth, gums or jaws:"
>
> "(10) Performs or engages in any of the clinical practices included in the curricula of recognized dental schools or colleges."

F. 221.

The Board's objective in sending the cease and desist letters was to order the recipients to stop providing teeth whitening services. *See* F. 234-45. This is borne out by testimony of Board members and staff and by contemporaneous Board documents. *Id.* For example, Dr. Allen testified that through a cease and desist letter, the "[B]oard [is] saying that you not only are ordered but you have the responsibility to comply with this order." F. 235. Mr. White, the Board's Chief Operating Officer, testified that through a cease and desist letter "the Board is ordering [the recipient] either to stop whatever that activity is or to demonstrate why what they're doing is not a violation of the Act." F. 238.

Contemporaneous e-mails, letters, and reports drafted by Board members and Board staff confirm that while the documents sent to non-dentist teeth whitening service providers are sometimes referred to as "letters," they are also referred to by Board members and staff as "Cease and Desist Orders." F. 240. For example, on November 26, 2007, Board Investigator Dempsey wrote in an e-mail to Dr. Owens, Terry Friddle, Carolin Bakewell, Bobby White and Casie Smith Goode, that he "was able to serve the Cease and Desist Order to Ms. Heather York" of Celebrity Smiles. F. 241. The next day, on November 27, 2007, Ms. Bakewell, Board counsel, wrote in an e-mail that the Board "has recently issued Cease and Desist Orders to an out of state company that has been providing bleaching services in a number of malls in the state." F. 241. On February 20, 2008, Mr. White wrote in an e-mail in response to a dentist's complaint, "We've sent out numerous Cease and Desist Orders throughout the state." F. 244.

B. Letters to manufacturers and potential entrants

Two of the 47 cease and desist letters discussed above were sent to teeth whitening product manufacturers. F. 262. On December 4, 2007, the Board issued a "Notice to Cease and Desist" to WhiteScience, advising it that assisting clients to accelerate the teeth whitening process with an LED light constitutes the unauthorized practice of dentistry, which is a misdemeanor. F. 265. The Board further directed WhiteScience to "cease its activities unless they are performed or supervised by a properly licensed North Carolina dentist." F. 265. On October 7, 2008, the Board issued a "Notice and Order to Cease and Desist," to Florida WhiteSmile, stating it was "investigating a report that you are engaged in the unlicensed practice of dentistry. Practicing dentistry without a license in North Carolina is a crime. . . . You are hereby ordered to CEASE AND DESIST any and all activity constituting the practice of dentistry . . ." F. 274. In addition, on February 13, 2007, Ms. Bakewell wrote Enhanced Light Technologies, stating that it had come to the attention of the Board that representatives of the firm "have sold and/or attempted to sell teeth whitening systems to non-dental professionals in North Carolina, such as spa and salon owners" and advising that "[i]ndividuals who use your products to provide teeth whitening services to the public may be engaging in the unauthorized practice of dentistry, which is a misdemeanor." F. 280. The letter further directed that Enhanced Light Technologies should "accurately inform current and potential customers of the limitations on the provision of teeth whitening services in North Carolina." F. 280.

Moreover, the Board took action to dissuade potential non-dentist providers of teeth whitening services from entering the teeth whitening services market. In an e-mail dated January 17, 2008, Board counsel Carolin Bakewell informed a non-dentist teeth whitener – in response to the teeth whitener's inquiries into the legality of teeth whitening in North Carolina – that the Dental Practice Act defines the practice of dentistry to include the "removal of stains and accretions." F. 284. Ms. Bakewell informed the inquiring teeth whitener that his or her whitening business, which provides customers with a personal tray with a whitening solution and use of a whitening light, violated the statute because it was designed to remove stains from human teeth. F. 284. Ms. Bakewell further told the inquiring teeth whitener that

the statute is not limited to situations where the non-dentist touches the customer's mouth. F. 284. In another instance, on February 12, 2008, Carolin Bakewell responded to an e-mail from Craig Francis inquiring about what he needed to do in order to lawfully operate a mall whitening kiosk. F. 285. Ms. Bakewell informed Mr. Francis that he "may not operate a whitening kiosk except under the direct supervision of a licensed North Carolina dentist. The prohibition remains the same even if the customer inserts the whitening tray themselves." F. 285.

C. Letters to owners and operators of malls

On November 21, 2007, the Board sent 11 nearly identical letters to third parties, including mall management and out-of-state mall property management companies. F. 288. These letters stated:

> The N.C. State Board of Dental Examiners is the agency created by the North Carolina legislature to enforce the dental laws in this state. The Dental Board has learned that an out of state company has leased kiosks in a number of shopping malls in North Carolina for the purpose of offering tooth whitening services to the public.
>
> North Carolina law specifically provides that the removal of stains from human teeth constitutes the practice of dentistry. See N.C. Gen. Stat. 90-29(b)(2), a copy of which is enclosed. The unauthorized practice of dentistry is a misdemeanor. See N.C. Gen. Stat. 90-40, a copy of which is also enclosed.
>
> It is our information that the teeth whitening services offered at these kiosks are not supervised by a licensed North Carolina dentist. Consequently, this activity is illegal.
>
> The Dental Board would be most grateful if your company would assist us in ensuring that the property owned or managed by your company is not being used for improper activity that could create a risk to the public health and safety.

F. 288. As noted in Section III.D.2, the Board members unanimously approved sending the November 21, 2007 letters to mall operators. F. 289. The objective of the November 21, 2007 letter sent by the Board to mall operators was to induce the malls to refuse to rent space to non-dentist teeth whitening service providers. F. 290-93.

D. Notice to Cosmetology Board

Many of the complaints about non-dentist teeth whitening service providers were against salons and spas regulated by the North Carolina Board of Cosmetic Art Examiners. F. 314. Dr. Hardesty believed that because many of the non-dentist teeth whitening service providers were licensees of the Cosmetology Board, it was logical that the Cosmetology Board might be willing to assist the Board in its efforts regarding non-dentist teeth whitening services. F. 315.

In February 2007, the Board provided the Cosmetology Board with a notice that stated:

> Cosmetologists should be aware that any device or process that "removes stains, accretions or deposits from the human teeth" constitutes the practice of dentistry as defined by North Carolina General Statutes 90-29(b)(2). Taking impressions for bleaching trays also constitutes the practice of dentistry as defined by North Carolina General Statutes 90-29(b)(7).
>
> Only a licensed dentist or dental hygienist acting under the supervision of a licensed dentist may provide these services. The unlicensed practice of dentistry in our state is a misdemeanor.

F. 320. Shortly thereafter, the Cosmetology Board posted the Dental Board's notice on the Cosmetology Board's website. F. 322. The Board's objective in providing that notice was to encourage the Cosmetology Board's licensees to cease providing teeth-whitening services. F. 323.

(iii) Tendency to harm competition

As summarized above, the evidence shows that the nature of the challenged conduct was to prevent non-dentists from offering teeth whitening services and thereby to exclude these competitors from the market. Agreements to exclude competitors from the market have long been held to violate antitrust laws. In *Fashion Originators' Guild v. FTC*, 312 U.S. 457 (1941), a combination of manufacturers of women's garments and manufacturers of textiles used in their making who claimed that the designs of their products, though not protected by patent or copyright, were original and distinctive, took actions aimed at preventing manufacturers who copied their designs from selling garments. The Supreme Court found

that "the aim of petitioners' combination was the intentional destruction of one type of manufacturer and sale which competed with Guild members. The purpose and object of this combination, its potential power, its tendency to monopoly, the coercion it could and did practice upon a rival method of competition, all brought it within the policy of the prohibition declared by the Sherman and Clayton Acts." *Fashion Originators' Guild*, 312 U.S. at 467-68. In the instant case as well, the aim of the Board was to eliminate non-dentist teeth whitening service providers that competed with Board dentist members and the Board's constituents, and, therefore, the Board's conduct is well within the policy of the prohibition declared by the Sherman Act.

The Supreme Court in *Fashion Originators' Guild* further stated, "even if copying were an acknowledged tort under the law of every state, that situation would not justify petitioners in combining together to regulate and restrain interstate commerce in violation of federal law." 312 U.S. at 468. Similarly here, even if teeth whitening is the unauthorized practice of dentistry, that does not justify Respondent's concerted action to restrain commerce if, as the Commission has decided in this case, the Board's actions are not protected by state action immunity.

Other Supreme Court cases confirm the serious competitive harm from agreements to exclude competitors. *E.g.*, *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656, 658, 660 (1961) (concerted refusal by a trade association to provide certification with result that plaintiff was "effectively excluded from the market," "clearly has, by its 'nature' and 'character,' a 'monopolistic tendency,'" and hence was per se unlawful); *Allied Tube & Conduit Corp. v. Indian Head*, 486 U.S. 492, 496, 500, 501 n.5 (1988) (where association of manufacturers of building materials that developed a model code for electrical wiring systems "collectively agreed to exclude respondent's product" from the code, Supreme Court recognized the "serious potential for anticompetitive harm" of industry standard setting, including that "'it might deprive some consumers of a desired product . . . [or] exclude rival producers.'") (quoting 7 P. Areeda, Antitrust Law ¶ 1503, p. 373 (1986)).

The anticompetitive nature of concerted action to exclude rivals from the market was recently addressed in the Sixth Circuit's opinion in *Realcomp*. There, the evidence showed

that the respondent, an association of full service real estate brokers, implemented policies that significantly curtailed the ability of limited-service brokers to access websites controlled by the association and utilized by consumers looking to purchase real estate. *Realcomp*, 635 F.3d at 830. The court of appeals held that this evidence revealed "'a concerted refusal to deal with [limited-service brokers] on substantially equal terms' and establishe[d] that the [challenged practice was] likely to protect its [members] from competitive pricing pressure." *Id.* (quoting *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 295 n.6 (1985)). The Sixth Circuit then stated, "[c]ombining these findings with Realcomp's substantial market power, the Commission reasonably concluded that Realcomp's website policy is likely to be anticompetitive." *Id.* at 830.

The evidence in this case, summarized above, also shows that the stated objective of the Board – to stop unlicensed persons from providing teeth whitening services – had the tendency to prevent consumers from getting a particular service they desire: teeth whitening in a quick, one-time session. The Supreme Court, in *Indiana Federation* held, "[a]bsent some countervailing procompetitive virtue . . . an agreement limiting consumer choice by impeding the 'ordinary give and take of the market place,' *National Society of Professional Engineers, supra,* at 692, cannot be sustained under the Rule of Reason." 476 U.S. at 459. There, a group of dentists agreed to withhold x-rays from dental insurance companies that requested their use in benefits determinations. The Supreme Court condemned the restraint as "a horizontal agreement among the participating dentists to withhold from their customers a particular service that they desire." *Id.* at 459. Here, the concerted action of the Board is to prevent non-dentists from offering teeth whitening services, which thereby withholds from consumers the choice of where they can go to get their teeth whitened quickly and less expensively than a dentist. F. 257.

The context in which Respondent's course of conduct arose and the nature of the challenged conduct reveals a tendency to harm competition. In summary, the Board has an interest in serving the interests of dentists, including dentists' financial interests. Dentists and some Board members engage in teeth whitening, in competition with non-dentists. Dentists and some Board members perceived that non-dentists were offering teeth whitening services at cheaper prices than dentists. The Board engaged in a course of conduct to prevent non-

dentists from offering teeth whitening services. The Board used its status as a state agency to direct non-dentists to cease and desist from offering teeth whitening services and to direct manufacturers of products used for teeth whitening services to cease and desist from selling such products to non-dentists. The Board also used its status as a state agency to inform owners or operators of malls that it viewed the practice of non-dentist teeth whitening as an illegal practice, in order to dissuade them from leasing to non-dentist teeth whitening providers. Although in *Indiana Federation* the challenged restraint was condemned without an analysis of market power, 476 U.S. at 460-61, an assessment of the Board's market power in this case follows. *See Realcomp,* 635 F.3d at 828-29.

b. Market power

Market power is defined as the ability to raise prices or the ability to exclude competition. *E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956). In the instant case, the evidence shows that the Board has the power to exclude competition.

The Board was created by the Dental Practice Act "as the agency of the State for the regulation of the practice of dentistry in this State." N.C. Gen. Stat. § 90-22(a); F. 1, 33. The Board is responsible for enforcing the Dental Practice Act, including its prohibition against practicing dentistry without a license. F. 33, 41-44. Stating that it was acting pursuant to this state statute, the Board sent letters on Board letterhead, in most instances with bold, capitalized headings of: "NOTICE AND ORDER TO CEASE AND DESIST" or "NOTICE TO CEASE AND DESIST." F. 219-25. Recipients of these letters believed, and reasonably so, that they were being ordered by a state agency to stop providing teeth whitening services. F. 246-56, 266-67.

Similar evidence in *Mass. Board of Optometry* supported a finding that the respondent, also a state agency, possessed market power. Finding that the Massachusetts Board of Registration in Optometry "can impose its restraints on the market for optometric goods and services throughout Massachusetts" and its "disciplinary powers give it the ability to impose sanctions on any optometrist who fails to obey its rules and regulations," the Administrative Law Judge found that the Massachusetts Board "has market power." *In re Mass. Board of Registration in Optometry*, 1986 FTC LEXIS 39, at *78, 110 F.T.C. 549 (June

20, 1986), *aff'd* 110 F.T.C. 549 (June 13, 1988). Here, although the Board did not have disciplinary power over non-dentists, it was nevertheless able to impose restraints on the market for teeth whitening services through its course of conduct, as shown in Section III.E.3 below.

Moreover, in cases involving standard-setting organizations ("SSOs"), defendants have been found to have the power to exclude because the SSO's decision to disapprove a product strongly influenced the market. For example, in *Hydrolevel*, where the codes and standards of the American Society of Mechanical Engineers, Inc. ("ASME") were found to "influence the policies of numerous States and cities," the Supreme Court stated:

> ASME wields great power in the Nation's economy. . . . [A]s has been said about "so-called voluntary standards" generally, its interpretations of its guidelines "may result in economic prosperity or economic failure, for a number of businesses of all sizes throughout the country," as well as entire segments of an industry. ASME can be said to be "in reality an extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce." . . . [ASME's agents have] the power to frustrate competition in the marketplace.

Hydrolevel, 456 U.S. at 570-71 (citations omitted). In *Allied Tube*, the Supreme Court also acknowledged "the setting of the Association's Code . . . in part involves the exercise of market power." *Allied Tube,* 486 U.S. at 507.

Like an SSO, the Board undertook, on its own, to set a standard that teeth whitening could only be performed by, or supervised by, a dentist, and then undertook, extra-judicially, to enforce that standard through sending letters ordering recipients to cease and desist. Moreover, Respondent's expert witness acknowledged that the Board has the power to drive from the marketplace non-dentist teeth whitening businesses. (CX0826 at 036 (Baumer, Dep. at 136-137 (The Board has "the power to exclude competition"). As more fully discussed in Section III.E.3 below, the exercise of that power resulted in actual exclusion, and restriction of consumer access to the market. Accordingly, the Board had the power to exclude.

A finding of market power, coupled with the determination that the nature of the challenged policies was to exclude competitors from the market, supports an inference of

actual or likely adverse competitive effects. *In re Realcomp*, 2009 FTC LEXIS 250, at *95 (citing *e.g., Law v. NCAA*, 134 F.3d at 1019; *Tops Markets*, 142 F.3d at 96; *Levine v. Central Florida Medical Affiliates, Inc.*, 72 F.3d 1538, 1551 (11th Cir. 1996); *Brown Univ.*, 5 F.3d at 669). As the Commission stated in *Realcomp*, "if the tribunal finds that the defendants had market power and that their conduct tended to reduce competition, it is unnecessary to demonstrate directly that their practices had adverse effects on competition." *In re Realcomp*, 2009 FTC LEXIS 250, at *47 (citing *e.g., United States v. Brown Univ.*, 5 F.3d 658, 668 (3d Cir. 1993); *Flegel v. Christian Hospital*, 4 F.3d 682, 688 (8th Cir. 1993); *Gordon v. Lewistown Hosp.*, 423 F.3d 184, 210 (3d Cir. 2005); *Law v. NCAA*, 134 F.3d at 1019; *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928, 937 (7th Cir. 2000)). In light of the Board's market power and the facially restrictive nature of the challenged conduct, no more is required to find that the challenged conduct constitutes an unreasonable restraint of trade because the challenged conduct will predictably result in harm to competition. Nevertheless, an analysis of the effects of the challenged conduct follows.

3. Actual adverse effects

a. Summary of facts

(i) Manufacturers lost sales

The evidence shows that manufacturers of the products used by non-dentist providers of teeth whitening services have lost sales in North Carolina. F. 268-70, 279, 281-83. Two of the 47 cease and desist letters summarized above were sent to manufacturers of teeth whitening products used by non-dentists, WhiteScience and White Smile. F. 262. George Nelson of WhiteScience understood that the Board was ordering non-dentist teeth whitening businesses to close, and that the people to whom WhiteScience was selling in North Carolina would be committing a misdemeanor. F. 266-67. After the Board's actions with respect to WhiteScience and its customer-teeth whitening service providers, WhiteScience's retail sales in North Carolina evaporated to nothing, from over one million dollars yearly. F. 268. Similarly, WhiteSmile's negotiations with potential investors in WhiteSmile operations in North Carolina fell apart due to the investors' and their attorneys' concerns over whether the Board would allow non-dentist teeth whitening. F. 273, 277. WhiteSmile eventually was

able to enter the North Carolina market, but the delay in entering resulted in an estimated loss of revenue for WhiteSmile of one and one-half million dollars. F. 278-79.

(ii) Owners and operators of malls stopped leasing to non-dentist providers

The evidence also shows that as a result of the Board's November 21, 2007 letters to mall companies, mall management companies, and malls (F. 288), mall operators have been reluctant to lease space to non-dentist teeth whitening service providers in North Carolina, and some companies refused to lease space and cancelled existing leases. F. 294. Respondent's expert agrees, stating "[m]all operators cooperated [with the Board's actions to enforce state law] by refusing to renew leases or rent to operators of teeth whitening services." F. 294.

As an example, Hull Storey Gibson Companies, L.L.C. ("HSG"), a retail property management company that operates five malls in North Carolina, understood from the November 21, 2007 letter it received (F. 288) that the Board took the position that the person operating the kiosks and providing non-dentist teeth whitening services would be violating North Carolina law. F. 295-301. When a non-dentist sought to lease space in an HSG mall, HSG stated that the non-dentist provider would "need to provide us with proof that the Board of Dental Examiners will approve this." F. 302. HSG contacted the Board to determine if BleachBright's teeth bleaching process had been approved by the Board and was told by Board counsel, Ms. Bakewell, that the Board had not issued an approval. F. 304-05. HSG would have leased retail space to non-dentist teeth whiteners in North Carolina had they not received these communications and would be willing to rent space to non-dentist providers if the Board were to withdraw its opposition. F. 306-08.

As another example, a non-dental provider using the WhiteScience system in Carolina Place Mall, owned by General Growth Properties, was told that his month-to-month rental agreement would not be renewed and that his teeth whitening business would have to leave Carolina Place Mall. F. 309-11. He was further told that, based on the Board's November 21, 2007 letter, General Growth Properties' legal team advised him not to allow the non-dentist to

stay in business at the mall. F. 310. Thus, the Board's letters to owners and operators of malls also resulted in excluding non-dentist teeth whiteners from the market.

(iii) Non-dentist providers exited the market

Finally, the evidence shows that, as a result of the Board's actions, non-dentist providers who were operating in North Carolina ceased offering teeth whitening services. F. 246-56. For example, the owner of Modern Enhancement Salon stated in a letter to the Board, that "per your order to stop," she would "no longer perform teeth whitening services unless told otherwise by the North Carolina Board of Dental Examiners." F. 247; *see also* F. 248, 254, 255 (letters from Amazing Grace Spa, Details, Inc., and Bailey's Lightning Whitening, respectively, notifying the Board that they were no longer providing teeth whitening services). As a result of the Board's cease and desist letters, Champagne Taste Salon, Savage Tan, SheShe Studio Spa, and Triad Body Secret also ceased offering teeth whitening services. F. 250-53. Respondent's expert acknowledged the effectiveness of the letter: "[n]ot surprisingly, the actions of the State Board were effective and many kiosk and spa operators complied with state law by ceasing their actions that were clearly in violation of state law." F. 256.

A direct result of the Board's actions with respect to the Cosmetology Board was to cause non-dentists to stop providing teeth whitening services. F. 324-27. For example, one salon owner notified WhiteScience that her salon "will no longer be doing teeth whitening . . . as the North Carolina board of cosmetic arts has deemed it unlawful to perform this service in a salon." F. 326. Another salon notified the Board that they had ceased providing teeth whitening services, after learning from the Cosmetology Board that it was not legal to do so. F. 324. In summary, the Board has forced non-dentist teeth whitening operators to terminate their businesses, and deterred others from entering.

b. Analysis

The evidence summarized above shows that the actions of the Board caused non-dentists to cease and desist from offering teeth whitening services and prevented potential non-dentists from opening up salons or kiosks to offer the services. The Board's actions

thereby: (1) excluded non-dentists from the teeth whitening service market; and (2) deprived consumers of a reasonable alternative to dentist provided teeth whitening services. "[A]n observer with even a rudimentary understanding of economics" could readily conclude that the exclusion of a rival service "would have an anticompetitive effect on customers and markets." *Cal. Dental Ass'n*, 468 U.S. at 770.

(i) Exclusion of competitors and potential entrants

Respondent asserts that the Board's conduct did not have any effect on the *legal* sales of teeth whitening; instead, the Board's action affected only *illegal* teeth whitening services and was therefore reasonable under the rule of reason. RB at 7-8 (emphasis added). Respondent cites no case in which a court has held that non-dentist teeth whitening is illegal in North Carolina. Moreover, the Board's argument essentially claims that it is permitted to engage in anticompetitive conduct because it was enforcing state law. As previously discussed, issues regarding whether the Board was enforcing state law were rendered immaterial by the State Action Opinion. The Commission decided: "Absent some form of state supervision, we lack assurance that the Board's efforts to exclude non-dentists from providing teeth whitening services in North Carolina represent a sovereign policy choice to supplant competition rather than an effort to benefit the dental profession." State Action Opinion, 2011 WL 549449, at *13. Accordingly, Respondent's argument that its actions should be deemed reasonable under the rule of reason because the actions affected only "illegal" services is not considered further.

Respondent next asserts that the evidence fails to show that the Board was able to force any kiosk, spa, or other provider of non-dentist teeth whitening services to stop operations based solely on the Board's cease and desist letters. Indeed, Respondent admits: "In order to close such a business, a court order or court judgment would be required. The State Board does not have the statutory authority to independently enforce an order requiring any person or entity to cease or desist their violations of the N.C. Dental Practice Act." RB at 8. A similar argument was rejected in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).

In *Goldfarb,* the County Bar, which published a minimum fee schedule for common legal services, argued that because the fee schedule was merely advisory, the schedule and its

enforcement mechanism did not constitute price fixing. *Id.* at 781. The County Bar further contended "that in practice the schedule has not had the effect of producing fixed fees." *Id.* The Supreme Court rejected those arguments, observing that, because of the prospect of disciplinary actions by the State Bar and "the desire of attorneys to comply with the announced professional norms," bar members did, in fact, comply with the schedule. *Id.* at 781-82. Although the Board here does not have the power to take disciplinary actions against non-dentists, as summarized in Section III.E.2.b, the Board projected an apparent state power of enforcement. Furthermore, just as the County Bar's argument that the schedule was "merely advisory" was rejected because the lawyers did in fact comply with the schedule, here the Board's argument that it did not have authority to enforce an order against any non-dentist teeth whitening service provider is similarly rejected because non-dentists did in fact comply with the letters directing them to cease and desist from offering teeth whitening services.

Moreover, even though Respondent admits that it does not have the authority to enforce an order for a non-dentist entity to cease or desist from violations of the Dental Practice Act, the letters that it sent did in fact order recipients to cease and desist. F. 220-22 (letters with headings including "NOTICE AND ORDER TO CEASE AND DESIST" and text stating: "You are hereby ordered to CEASE AND DESIST any and all activity constituting the practice of dentistry or dental hygiene as defined by North Carolina General Statutes § 90-29 and § 90-233 and the Dental Board Rules promulgated thereunder."). As summarized above, recipients interpreted these letters as ordering them to cease and desist from providing teeth whitening services or to stop selling products for use by non-dentist teeth whiteners. And, as a result of these letters and other communications issued by the Board, non-dentists did, in fact, cease and desist from providing teeth whitening services and potential entrants decided not to enter such market. Manufacturers of two teeth whitening products used by non-dentists lost sales in North Carolina, of approximately one and one half million dollars in one case and one million dollars in the other, as a result of the Board's efforts and actions to stop non-dentists from offering teeth whitening services.

Thus, the evidence shows that the concerted action of Respondent excluded non-dentists from competition, conduct that the Supreme Court has long held to be

anticompetitive. For example, in *Associated Press v. United States,* 326 U.S. 1, 9, 13-14 (1945), it was held that the effect of a challenged restraint by a news association composed of member newspapers (Associated Press) was to block all newspaper non-members from any opportunity to buy news from Associated Press or any of its publisher members. The Supreme Court found the challenged restraint "hindered and restrained the sale of interstate news to non-members who competed with members" and held: "[t]rade restraints of this character, aimed at the destruction of competition, tend to block the initiative which brings newcomers into a field of business and to frustrate the free enterprise system which it was the purpose of the Sherman Act to protect." *Id.* at 13-14. *See also, e.g., Silver v. N.Y. Stock Exchange*, 373 U.S. 341, 347-49 (1963) (holding that collective action of the New York Stock Exchange and its members that excluded petitioners from a valuable business service that petitioners needed in order to compete effectively falls into "forbidden category of restraints which 'because of their inherent nature or effect injuriously restrained trade'"); *Hydrolevel*, 456 U.S. at 564, 571 (holding that defendant SSO that promulgated and published codes and standards for areas of engineering liable for harm to competition where one entity was able to use an "unofficial" response from the SSO on an interpretation of a code "to injure seriously the business of a competitor" which, after that response, "continued to suffer from market resistance").

Despite the evidence, Respondent asserts that because recipients of the Board's letters had alternatives to ceasing operations, "the letters did not have the immediate, irreversible, and unreasonable effect of shutting down businesses." RB at 8. The alternatives to shutting down that Respondent poses are that recipients could have offered evidence to the Board showing that no violation of the Dental Practice Act had occurred; could have hired a licensed dentist to oversee teeth whitening services; could have ceased offering such services until they could convince the North Carolina legislature that it was not in the public's interest to restrict the removal of stains from teeth to licensees; or could have requested an administrative hearing or other relief from North Carolina courts. RB at 8. But arguments as to what the non-dentists "could have done" is not as compelling as the evidence of what they actually did, which was to cease and desist from offering teeth whitening services. The Commission made a similar ruling in *Realcomp*. There, an association of real estate brokers, operated a

computer database used by its members to disseminate and search for information about houses available for sale (multiple listing service or MLS). Realcomp adopted a "Search Function Policy," whereby the default setting on the association's MLS searched only full service/full price listings, and omitted listings where the broker had agreed to accept a discounted rate. Realcomp argued that the Search Function Policy did not harm competition "because users of the Realcomp MLS could override the default settings" in order to secure information about discounted listings. *Id.* at *98-100. The Commission rejected this argument, explaining: "[D]ata and broker testimony show that many brokers did not override the default search parameters. On this point we rely upon the record evidence showing what brokers actually do." *Id.* at *100. Thus, in the instant case, Respondent's speculation of what the non-dentists could have done does not defeat the record evidence showing what the non-dentists actually did in response to the Board's course of conduct. Indeed, the non-dentists' response in ceasing to provide teeth-whitening services was precisely the response intended by the Board. F. 234-45.

(ii) Limited consumer choice

In addition to excluding rivals from the market, Respondent has harmed competition by depriving consumers of a choice. F. 257. In *Indiana Federation*, the Supreme Court condemned the "horizontal agreement among the participating dentists to withhold from their customers a particular service that they desire – the forwarding of x-rays to insurance companies along with claim forms." *Id.* at 459. In this case, while the Board has not withheld services offered by dentists, its concerted activities have deprived consumers of the services of others – that of non-dentist teeth whitening service providers. By causing non-dentists to cease and desist from offering teeth whitening services, the Board has deprived consumers of the option of going to a mall, spa or salon for teeth whitening services. Thus, as in *Indiana Federation*, Respondent has "disrupted the proper functioning" of the market.[12]

[12] In *Indiana Federation*, the Supreme Court "did not require proof of actual anticompetitive effects, such as higher prices, because the agreement was 'likely enough to disrupt the proper functioning of the price-setting mechanism of the market that it may be condemned even absent proof that it resulted in higher prices or, as here, the purchase of higher priced services, than would occur in its absence.'" *Realcomp*, 2009 FTC LEXIS 250 at *66 (quoting *Indiana Federation*, 476 U.S. at 461-62). Just as in *Realcomp*, where Complaint Counsel was not required to proffer "elaborate econometric 'proof that [the restraint] resulted in higher prices,'" id. at *46, it is not required to do so here.

In *Realcomp*, where an association of full service real estate brokers instituted a website policy that "severely restricted consumers' access to limited service listings" (offered by the full service brokers' competitors), the court of appeals upheld the "Commission's conclusion that Realcomp's website policy is likely to have an adverse impact on competition by restricting consumer access to discount listings." 635 F.3d at 829, 831. The Commission had held, "as a matter of law, there is liability under the Rule of Reason cases insofar as Realcomp's Policies operated to narrow consumer choice or hinder the competitive process." *In re Realcomp*, 2009 FTC LEXIS 250, at *111. In addition, the Commission, drawing on record evidence and testimony from Complaint Counsel's expert, found that the reduction of "choices available to consumers of brokerage services," among other factors, led to the conclusion that the challenged policies "had a substantial restrictive effect on competition" in the relevant market. *Id.* at *126.

The expert testimony in this case also confirms the conclusion that Respondent's course of conduct harmed consumers and had a substantial restrictive effect on competition. Complaint Counsel's expert, Dr. Kwoka, concluded that exclusion of a product desired by consumers is presumed in economics to be anticompetitive, absent some compelling justification and Respondent's economic expert, Dr. Baumer, agreed with Dr. Kwoka's conclusion. F. 257. Respondent points out, however, that Dr. Baumer's testimony is taken out of context. According to Respondent, "Dr. Baumer's important conclusion [is] that the exclusion of a selection of teeth whitening options did not occur in a vacuum; it was necessitated by state law and public interest." RRB at 11. The issue of whether the Board's exclusion of a selection of teeth whitening options was necessitated by state law has been rendered immaterial by the decision of the Commission that state action immunity does not apply and, therefore, will not be addressed. The issue of whether the exclusion was in the public interest is evaluated in Section III.F below, addressing Respondent's procompetitive justifications.

Having determined that Respondent's course of conduct had direct adverse effects on competition, Respondent's procompetitive justifications are next considered.

F. Procompetitive Justifications and Defenses

Respondent's concerted action to exclude non-dentists and limit consumer choice cannot be sustained under a rule of reason analysis "[a]bsent some countervailing procompetitive virtue." *Indiana Federation*, 476 U.S. at 459. Respondent bears the burden of "establishing an affirmative defense which competitively justifies this apparent deviation from the operations of a free market." *National Collegiate Athletic Ass'n*, 468 U.S. at 113; *Realcomp*, 635 F.3d at 825. *See also Realcomp*, 2009 FTC LEXIS 250, at *126 (stating that "defendants generally may be able to defeat a finding of liability if their practices can be 'justified by plausible arguments that they were intended to enhance overall efficiency and make markets more competitive'" (quoting *Northwest Wholesale Stationers*, 472 U.S. at 294)). The Initial Decision turns now to Respondent's proffered justifications and defenses.

Respondent contends that its efforts to restrict non-dentist teeth whitening services, even if amounting to restraints, were not "unreasonable" restraints under the rule of reason because it was acting to protect the citizens of North Carolina from the unauthorized practice of dentistry. This contention is raised by Respondent in defense of its course of conduct and is therefore analyzed herein as a proffered procompetitive justification.

In support of this contention, Respondent first argues that it was acting as a state agency or occupational licensing board enforcing the Dental Practice Act, to protect the public interest, and not to promote economic self-interest. RB at 9-11; *see also* RRB at 28-30, 37-43. As noted earlier in Section III.E., this argument is essentially a reiteration of Respondent's claim that the Board's conduct is exempt from antitrust liability by the state action doctrine that has been decided against Respondent by the Commission and will not be considered.

In *Indiana Federation*, the Supreme Court held that, where there was no active state supervision, the Federation's concerted action in withholding x-rays from insurance companies was subject to condemnation under the Sherman Act "whether or not the policy the Federation has taken upon itself to advance is consistent with the policy of the State of Indiana . . . ." *Indiana Federation,* 476 U.S. at 465. In the instant case as well, because the Commission decided that there was no active state supervision, regardless of whether the

conduct of the Board is aimed at preventing unauthorized dentistry and is consistent with the Dental Practice Act, Respondent has no state action immunity defense and the conduct is "anticompetitive collusion among private actors . . . subject to Sherman Act condemnation." *Id.*

Second, Respondent argues that its actions were intended to promote social welfare, by ensuring that teeth whitening services are supervised by licensed dentists and by protecting consumers from dangerous or unsafe teeth-whitening services. RB at 1, 12-14. Specifically, Respondent contends that the Board's enforcement of the Dental Practice Act was necessitated by serious and well-known concerns over the dangers of unsupervised teeth whitening. RB at 12. It is well established, however, that a restraint on competition cannot be justified solely on the basis of social welfare concerns, including concerns about health hazards.

The Supreme Court, in *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978), rejected as a matter of law a trade association's defense that it had restrained trade in order to protect the public from the danger of inferior engineering work. There, a trade association of engineers adopted an ethics rule that prohibited association members from engaging in competitive bidding for their engineering services. In its defense, the association claimed that "competitive pressure to offer engineering services at the lowest possible price would adversely affect the quality of engineering" and "the practice of awarding engineering contracts to the lowest bidder, regardless of quality, would be dangerous to the public health, safety, and welfare." *Id.* at 685. The district court rejected this justification "without making any findings on the likelihood that competition would produce the dire consequences foreseen by the association." *Id.* at 681. The court of appeals affirmed and the Supreme Court granted certiorari to decide whether the district court should have considered the factual basis for the proffered justification before rejecting it. *Id.* In affirming, the Supreme Court held:

> The Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services. . . . The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain -- quality, service, safety, and durability -- and not just

> the immediate cost, are favorably affected by the free opportunity to select among alternative offers. Even assuming occasional exceptions to the presumed consequences of competition, the statutory policy precludes inquiry into the question whether competition is good or bad.
>
> The fact that engineers are often involved in large-scale projects significantly affecting the public safety does not alter our analysis. Exceptions to the Sherman Act for potentially dangerous goods and services would be tantamount to a repeal of the statute. In our complex economy the number of items that may cause serious harm is almost endless – automobiles, drugs, foods, aircraft components, heavy equipment, and countless others, cause serious harm to individuals or to the public at large if defectively made.

Id. at 695. Thus, the Supreme Court held, even if the challenged restraint "ultimately inure[d] to public benefit by preventing the production of inferior work," this reason did not "satisfy the Rule [of Reason]." *Id.* at 693-94.

Such a public safety defense has also been rejected in the medical field. In *Wilk v. Am. Med. Assoc.*, 719 F.2d 207, 214 (7th Cir. 1983), through various mechanisms physicians were discouraged from cooperating with chiropractors in patient treatment, educational activities, and interpreting electrocardiograms, and chiropractors were denied access to the hospital facilities they considered necessary to practice their profession. Defendant physicians argued that their conduct had been undertaken in the interest of public health, safety, and welfare and that their conduct had been non-commercial. 719 F.2d at 216. The court of appeals rejected this argument, holding:

> It is true that medical doctors are better qualified than most members of the public to form an opinion whether chiropractic poses a threat to public health, safety and welfare. They are free to attempt to persuade legislatures and administrative agencies. But a generalized concern for the health, safety and welfare of members of the public as to whom a medical doctor has assumed no specific professional responsibility, however genuine and well-informed such a concern may be, affords no legal justification for economic measures to diminish competition with some medical doctors by chiropractors.

Id. at 228. *See also Indiana Federation,* 476 U.S. at 463 (the argument "that an unrestrained market in which consumers are given access to the information they believe to be relevant to their choices will lead them to make unwise and even dangerous choices . . . amounts to 'nothing less than a frontal assault on the basic policy of the Sherman Act.'"); *Patrick v.*

Burget, 486 U.S. 94, 105 (1988) (rejecting claim that threat of antitrust liability for physician peer-review activities will discourage participation in the process to the detriment of patient care, stating that such argument "essentially challenges the wisdom of applying the antitrust laws to the sphere of medical care, and as such is properly directed to the legislative branch").

Thus, in this case, even if the Board was acting to prevent the public from physical harm that could result from teeth whitening services provided by non-dentists, such an argument does not, under applicable antitrust law, constitute a valid justification for the Board's conduct. For this reason, expert testimony on whether teeth whitening services performed by non-dentists is safe and other testimony on harm purported to have been caused by non-dentist teeth whitening need not and will not be addressed. Rather than alleged public welfare benefits, to avoid liability Respondent must demonstrate that the restraints have "some countervailing procompetitive virtue -- such as, for example, the creation of efficiencies in the operation of a market or the provision of goods and services . . ." *Indiana Federation,* 476 U.S. at 459; *accord Realcomp*, 2009 FTC LEXIS 250, at *127 ("The requisite beneficial effect ordinarily is one that stems from measures that increase output or improve product quality, service, or innovation." (citing *Polygram*, 136 F.T.C. at 345-46)).

Third, Respondent argues that the challenged restraints upon non-dentist teeth whitening are procompetitive because they will ensure that teeth whitening services are offered at a cost that reflects the higher skills of dentist providers, RRB at 6, 12, rather than at the lower cost alternative offered by assertedly lesser skilled, non-dentist teeth whitening providers. This argument is analogous to the argument that was made, and rejected, in *National Society of Professional Engineers*. As the Court stated in that case, "[i]t may be, as petitioner argues, that competition tends to force prices down and that an inexpensive item may be inferior to one that is more costly. There is some risk, therefore, that competition will cause some suppliers to market a defective product." *National Soc'y of Professional Engineers*, 435 U.S. at 694. However, to attempt to justify the restraint on this basis – that competition is harmful – "is nothing less than a frontal assault on the basic policy of the Sherman Act." *Id.* at 695.

In the instant case, as in *National Society of Professional Engineers*, the Board claims that permitting non-dentists to provide teeth whitening services in competition with dentists risks the production of an inferior service that consumers will choose due to lower cost. As in *National Society of Professional Engineers*, such claim runs counter to the policy of the Sherman Act and must be rejected. Respondent's argument that withholding a lower cost service from consumers is ultimately beneficial to consumers is also similar to the argument rejected in *Indiana Federation,* 476 U.S. at 462-63 (rejecting claim that withholding x-rays from insurers will prevent insurers from permitting only lower cost, inadequate treatment).

Fourth, Respondent contends that the challenged restraints are procompetitive because they will serve to "protect legal competition within the marketplace," RB at 1, and "promote competition between qualified, legal teeth whitening service providers." RB at 13. However, this argument presumes that only dentist provided teeth whitening is legal. Respondent cites no case that has held that non-dentist teeth whitening constitutes the unlawful practice of dentistry under the Dental Practice Act, as previously discussed, this Initial Decision need not and does not decide that issue. Moreover, "[t]hat a particular practice may be unlawful is not, in itself, a sufficient justification for collusion among competitors to prevent it." *Indiana Federation,* 476 U.S. at 465.

In support of its claim that the challenged restraints are procompetitive, and therefore not an unreasonable restraint of trade, Respondent relies upon *United States v. Brown Univ., et al.*, 5 F.3d 658 (3rd Cir. 1993). In *Brown*, a group of Ivy League colleges and universities agreed to distribute financial aid based exclusively on need and to collectively determine the amount of financial assistance that each school would offer to the commonly admitted students. The schools acknowledged that the purpose and effect of this agreement was to eliminate price competition for talented students among member institutions. However, they proffered the justification, *inter alia*, that by removing financial obstacles for needy students, the schools were expanding the choice of schools that students might attend and thereby enhancing consumer choice. The court concluded that, while the financial aid program had social benefits, the claimed enhancement of consumer choice was an economic benefit, which distinguished the case from the social welfare justifications rejected in both *National Society of Professional Engineers* and *Indiana Federation*. 5 F.3d at 676-77. Thus, the court

concluded that the lower court erred in refusing, on the basis of *National Society of Professional Engineers* and *Indiana Federation*, to consider the schools' justifications as part of a full rule of reason analysis. *Id.* at 677. Respondent's reliance on *Brown* is misplaced. Respondent's restraints on non-dentist provided teeth whitening services tend to and did remove the service from the market, (*e.g.*, F. 246-56, 324-27), thereby restricting consumer choice. F. 257. By contrast, the restraint in *Brown* enhanced consumer choice as well as provided social welfare benefits. As demonstrated above, Respondent's proffered "procompetitive" justifications are far more analogous to those rejected as anticompetitive in *National Society of Professional Engineers* and *Indiana Federation*.[13]

For the foregoing reasons, Respondent's defenses are insufficient to justify the Board's anticompetitive restraints. Accordingly, Complaint Counsel has demonstrated that the challenged conduct is an unreasonable restraint of trade, in violation of Section 5 of the FTC Act.

G. Remedy

1. Applicable legal standards

Pursuant to Section 5 of the Federal Trade Commission Act, upon determination that the challenged practice is an unfair method of competition, the Commission "shall issue . . . an order requiring such person . . . to cease and desist from using such method of competition or such act or practice." 15 U.S.C. § 45(b); *FTC v. National Lead Co.*, 352 U.S. 419, 428 (1957). The Commission's authority to issue remedial orders also includes requiring respondents to make affirmative disclosures, including sending notices to affected parties. *See, e.g., Am. Med. Ass'n*, 94 F.T.C. 701, 1979 FTC LEXIS 182, at *368, *373-79 (1979) (requiring respondent to notify its members and others of prohibition against, *inter alia*, certain advertising restrictions), *aff'd*, 638 F.2d 443 (2d Cir. 1980), *aff'd by an equally divided*

[13] Respondent also relies on *Hospital Building. Co. v. Trustees of Rex Hospital*, 691 F.2d 678 (4th Cir. 1982), and *Pocono Invitational Sports Camp, Inc. v. NCAA*, 371 F. Supp. 2d 569 (E.D. Pa. 2004) for the proposition that courts recognize procompetitive, public interest justifications for state regulatory schemes. Neither case stands for such proposition. *Rex* held that the rule of reason permitted defendants the opportunity to demonstrate that a federal certificate of need statute, upon which they relied to justify their conduct, effectively created an exemption to the antitrust laws. *Id.* at 685. *Pocono* held that the regulations in question were not "trade or commerce" within the meaning of the Sherman Act. 317 F. Supp. 2d at 583-84.

court, 452 U.S. 960 (1982); *Southwest Sunsites, Inc. v. FTC*, 785 F.2d 1431, 1439 (9th Cir. 1986) (corrective advertising); *Amrep Corp. v. FTC*, 768 F.2d 1171, 1180 (10th Cir. 1985) (same). Courts have long recognized that the Commission has considerable discretion in fashioning an appropriate remedial order, subject to the constraint that the order must bear a reasonable relationship to the unlawful acts or practices. *See, e.g., FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 394-95 (1965); *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952); *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 612-13 (1946).

In this case, Complaint Counsel has proven that Respondent took concerted action to eliminate or prevent the provision of non-dentist teeth whitening services in North Carolina, and that its actions constitute an unreasonable restraint of trade and an unfair method of competition under Section 5 of the FTC Act. The appropriate remedy is to bring an end to this conduct, rectify past violations, and prevent reoccurrence. The provisions of the attached order (hereafter, "Order"), more fully discussed below, accomplish these objectives and are reasonably related to the proven violations. Thus, the Order is necessary and appropriate to remedy the violations of law found to exist.

2. Cease and desist provisions

The Order requires the Board to cease and desist from directing a non-dentist teeth whitening provider to cease providing teeth whitening services, or teeth whitening goods provided in conjunction with those services (collectively, "teeth whitening goods and services"), II. A., as well as from prohibiting, restricting, impeding or discouraging the provision of such goods and services. II.B. Complaint Counsel requested language for Paragraph II.B. that would prohibit the Board from "engaging in any action that restrains, restricts, inhibits, deters or otherwise excludes" the provision of teeth whitening goods or services. Complaint Counsel's proposed prohibition is overbroad. For example, the proposed provision could be interpreted to prohibit the Board's filing a lawsuit for a suspected violation by a non-dentist teeth whitening provider, or notifying such a provider of its intention to do so, both of which are not prohibited by the Order. *See* Paragraph II.F. As modified, the language of Paragraph II.B. is consistent with the Order entered in *Mass. Board*, 1988 FTC LEXIS 34, at *83 (ordering the Board to cease and desist from, *inter alia*: "Prohibiting,

restricting, impeding, or discouraging the advertising or publishing of the name of an optometrist or the availability of an optometrist's services by a person or organization not licensed to practice optometry"). Similarly, certain language proposed by Complaint Counsel for Paragraph II.G. is rejected, as unduly vague and overbroad, in favor of language used by the Commission in the order entered in *Mass. Board* (prohibiting the Board from "[i]nducing, urging, encouraging, or assisting any person or organization to take any of the actions prohibited by" the order). [14]

The Order also requires the Board to cease and desist from communicating to any current or prospective non-dentist providers, lessor of commercial property, or actual or prospective manufacturer, distributor or seller of teeth whitening goods or services, that a non-dentist's teeth whitening goods or services violate the Dental Practice Act. Section II., Paragraphs C.-F. As found above, the Board's communications to these parties that non-dentist teeth whitening was illegal were intended to prevent or eliminate non-dentist teeth whitening; had the tendency and effect of excluding non-dentist providers; and have been determined to be part of Respondent's anticompetitive course of conduct. Accordingly, prohibiting these communications is directly related to the violation. Moreover, prohibiting such communications as set forth in Section II, Paragraphs C-F will strengthen and support the Order's requirements in Section II, Paragraphs A and B, that Respondent cease actions to eliminate, restrain, or discourage the provision of non-dentist teeth whitening services.

Complaint Counsel requested language that would also prohibit Respondent from communicating that a non-dentist provider's teeth whitening goods or services "may be" in violation of the Dental Practice Act. Such a prohibition would conflict with provisions, also proposed by Complaint Counsel, and provided in the Order, which expressly permit the Board, notwithstanding the provisions of Paragraphs II.C-G, to communicate that it is investigating a suspected violation, to provide notice of intent to file a lawsuit for a suspected violation, and to file a lawsuit for an "alleged" violation. Communicating a "suspected" or "alleged" violation is the equivalent of communicating that there "may be" a violation.

[14] Section II G as proposed by Complaint Counsel would have prohibited Respondent from "[e]ncouraging, suggesting, advising, pressuring, or inducing, . . ." anyone to violate the terms of the Order.

Accordingly, the Order does not prohibit communicating that a non-dentist provider "may be" violating the Dental Practice Act.

Section II also contains important provisions that nothing in the Order prohibits the Board from engaging in certain conduct and communications, including: (i) investigating a non-dentist provider for suspected violations of the Dental Practice Act; (ii) filing or causing to be filed, a court action against a Non-Dentist Provider for an alleged violation of the Dental Practice Act pursuant to N.C. Gen. Stat. §§ 90-40, 90-40.1, or 90-233.1; (iii) pursuing any administrative remedies against a non-dentist; (iv) communicating notice of "its bona fide intention to file a court action" for a suspected violation of the Dental Practice Act with regard to teeth whitening goods or services; or (v) communicating "its bona fide intention to pursue administrative remedies" with regard to teeth whitening goods or services. Although not proposed by either party, the Order extends the provision protecting certain communications to notice of the Board's "belief or opinion regarding whether a particular method of providing Teeth Whitening Goods or Teeth Whitening Services may violate the Dental Practice Act." This additional provision is necessary to give full effect to the rights retained by the Board to investigate, issue notifications, and pursue bona fide remedies regarding teeth whitening goods and services.

These communication rights retained by the Board under Section II, described above, are conditioned upon the Board's including "with equal prominence" certain affirmative disclosures, set forth in Appendix A to the Order. As noted above, requiring such affirmative disclosures are well within the Commission's remedial authority. Appendix A advises the recipient that the opinion of the Board with regard to the legality of the recipient's teeth whitening goods or services is not a legal determination; that the Board cannot order the recipient to discontinue providing the teeth whitening goods or services; and that such matters are for a court to decide. The notice also advises the recipient of potential rights to obtain a declaratory ruling under North Carolina law. These provisions are designed to ensure that the recipient of a permitted communication from the Board regarding an investigation, administrative action, or intended court action for a suspected violation, fully understands the scope or effect of the Board's communication.

3. Affirmative disclosures

Section III of the Order requires the Board to send notices and other affirmative disclosures to parties affected by the Order. As explained above, such notices are well within the Commission's remedial authority. Paragraphs A and B of Section III require the Board to send a copy of the Complaint and the Order to all present, and future, Board members, officers, directors, employees and agents. Paragraph C requires the Board to send a letter, in the form of Appendix B, to each person to whom the Board previously sent a "cease and desist" communication or to whom the Board otherwise communicated that a non-dentist provider of teeth whitening goods or services was violating the law. Appendix B briefly summarizes the Complaint and Order in this matter, and then sets forth substantially the same information as that set forth in Appendix A regarding the scope and effect of the Board's prior communication and the potential right to a declaratory judgment under North Carolina law. *See also* Paragraph III.C. and Appendix C (requiring the same information be provided to licensees of the Cosmetology Board, either directly or through the Cosmetology Board's website). Such affirmative disclosures serve to clarify, and remedy, impressions created by the Board's prior anticompetitive communications and conduct. In this regard, the required communications are analogous to corrective advertising.

Complaint Counsel also requested that the Order require the Board, for a period of five years, to publish in reports and post on its website, a notice containing the following affirmative disclosures:

> As of the date the record closed in the Federal Trade Commission proceeding, the Board was not aware of any scientific, clinical or empirical, studies anywhere in this country that showed that teeth whitening services provided by non-dentists were any less safe than teeth whitening services provided by dentists. The harms that had been reported to the Board by consumers of non-dentist teeth whitening services were not substantiated, and the Board was not aware of any other systemic report of such harm from anywhere else in this country at that time. The FTC has ordered the Board to post this notice in response to the anticompetitive practices enumerated in the FTC Complaint. To read the FTC Order and Complaint click here [required links].

Proposed Order, Paragraph III.E. Paragraph III.E. addresses matters that are outside the scope of the violations alleged in the Complaint and outside the scope of the notice of contemplated

relief attached to the Complaint. Moreover, as noted in Section III.E of this Initial Decision, no determination is made as to whether non-dentist teeth whitening is unsafe or injurious to consumers because that issue is not material to whether Respondent's conduct constitutes an unlawful restraint of trade. Accordingly, Complaint Counsel's proposed disclosure improperly overreaches and is not included in the Order.

4. Miscellaneous provisions

The remainder of the Order addresses various reporting and record-keeping requirements that will enable the Commission to verify compliance with the Order, and are appropriate ancillary provisions. *See* Sections IV.-VI.

5. Respondent's objections

a. Tenth Amendment

Respondent contends that the relief sought in this case violates the Tenth Amendment to the United States Constitution by "direct[ing] the actions of state officials." RB at 30-31. Respondent relies on *New York v. United States*, 505 U.S. 144 (1992) and *Printz v. United States*, 521 U.S. 898 (1997). In *New York*, the Court held that certain provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985, which required States either to enact legislation providing for the disposal of radioactive waste generated within their borders, or to take title to, and possession of, the waste, effectively required States either to legislate, or enact administrative rules, in accordance with the dictates of Congress. According to the Court, such provisions violated the sovereignty of the States because: "[t]he Federal Government may not compel the States to enact or administer a federal regulatory program." *New York v. United States*, 505 U.S. at 188. In *Printz*, the Court held that state chief law enforcement officers could not, consistent with the Constitution's provisions for state sovereignty, be compelled by the Brady Act to administer background checks on prospective handgun purchasers.

Neither *New York* nor *Printz* applies to the instant case. First, unlike either the challenged provisions of the Low-Level Radioactive Waste Policy Amendments Act or the Brady Act, the FTC Act is not directed at state governments or state officials. Rather, it is a

statute of general applicability. Respondent cites no case in which the Tenth Amendment barred a statute of general applicability from being applied to state governments or state officials, particularly where as here, the statute regulates interstate commerce. Legislation of general applicability does not violate the Tenth Amendment simply because it may have the effect of regulating a state activity. *South Carolina v. Baker*, 485 U.S. 505, 512 (1988) (holding that federal legislation prohibiting bearer bonds did not implicate Tenth Amendment because "[t]he Tenth Amendment limits on Congress' authority to regulate state activities . . . are structural, not substantive – i.e., . . . States must find their protection from congressional regulation through the national political process, not through judicially defined spheres of unregulable state activity"); *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985) (holding that the Tenth Amendment did not bar application of Fair Labor Standards Act to state employers).

Respondent further argues that the requested relief violates the Tenth Amendment by impermissibly prescribing the qualifications of state officials. RB at 31-32. Respondent argues that because the antitrust violation in this case is related to the Board's being composed of licensed dentists, pursuant to North Carolina law, the State of North Carolina "must either change its statutes so that the State Board is not 'dominated' by licensed dentists, or North Carolina must take steps to provide additional oversight to the State Board's enforcement activities." RB at 32. In this regard, Respondent restates the bases for the Commission's decision that the state action doctrine did not immunize the Board from antitrust liability, State Action Opinion, 2011 WL 549449; however, nothing in the Order requires North Carolina to take such steps to immunize the Board against the consequences of anticompetitive conduct in the future. Rather, the Order is designed to prevent the Board from repeating or engaging in what has been found to be anticompetitive conduct.

Similarly, nothing in the Order dictates the manner of enforcing the Dental Practice Act, as claimed by Respondent. RB at 32-34. In fact, the Order is clear that none of its provisions bars the Board from fulfilling its duties to investigate, issue notifications, and pursue bona fide remedies regarding teeth whitening goods and services. *See* Section II., at 3. The Order does, however, require that the Board execute its duties without repeating the conduct that has been proven to violate the antitrust laws. The limitations on the Board's

conduct provided in the Order do not interfere with the Board's enforcement of the Dental Practice Act. *See* F. 258 (Board's Chief Operating Officer stating that Board's ability to enforce the Dental Practice Act would not be impacted if the letters that the Board sent out to non-dentist teeth whitening businesses stated that it was a notice that the Board believes there is a violation and may take the recipient to court); *see also* F. 259-60 (In 2000 and 2001, Board letters did not include cease and desist language.). Accordingly, Respondent provides no basis for concluding that such limitations on the Board's activities violate the Tenth Amendment.

b. Commerce Clause

Respondent next contends that the Commerce Clause, U.S. CONST. art. I § 8, cl. 3, prohibits relief in this case because the regulation of dentistry is a state function and, therefore, outside the reach of the federal government's commerce clause powers. RB at 34-36. Respondent's argument lacks merit. First, the Order does not regulate the practice of dentistry. Rather, as noted above, the Order is designed to ensure that the Board executes its regulatory duties without repeating the activities that have been proven to violate the antitrust laws. Moreover, preventing unfair competition in or affecting interstate commerce is expressly delegated to the FTC pursuant to the FTC Act. 5 U.S.C. § 45(a). The issue of whether the Board's conduct in this case is nevertheless exempt, as state regulatory conduct, has been decided against the Board and is not addressed. State Action Opinion, 2011 WL 549449, at *17. For all these reasons, the Commerce Clause does not bar the entry of the Order in this case.

IV. SUMMARY OF CONCLUSIONS OF LAW

1. The Federal Trade Commission ("FTC") has jurisdiction over Respondent North Carolina State Board of Dental Examiners ("Respondent" or the "Board") and the subject matter of this proceeding pursuant to Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45.

2. Respondent is a "person" within the meaning of Section 5 of the FTC Act. 15 U.S.C. § 45.

3. The activities of Respondent challenged in the Complaint are in or affecting commerce, within the meaning of Sections 4 and 5 of the FTC Act. 15 U.S.C. §§ 44, 45.

4. The FTC Act's prohibition of unfair methods of competition under Section 5 of the FTC Act encompasses violations of Section 1 of the Sherman Act. 15 U.S.C. § 45; 15 U.S.C. § 1.

5. The legal analysis to determine a violation of Section 5 of the FTC Act is the same as it would be under Section 1 of the Sherman Act (hereafter, "Section 1").

6. A Section 1 violation requires a determination of (1) whether there was a contract, combination, or conspiracy or, more simply, an agreement; and, if so, (2) whether the contract, combination, or conspiracy unreasonably restrained trade in the relevant market.

7. Complaint Counsel has the burden of proving the relevant market in which the challenged conduct occurred.

8. The relevant product market is the provision of teeth whitening services by dentists and non-dentists.

9. The relevant geographic market is the State of North Carolina.

10. The fundamental prerequisite under Section 1 is unlawful conduct by two or more parties pursuant to an agreement, explicit or implied. An agreement results from two or more parties knowingly participating in a common scheme or design.

11. There need not be direct evidence of an agreement to find an unlawful conspiracy under Section 1. An agreement may be inferred from circumstantial evidence, such as business behavior.

12. Membership composition of a group, by itself, does not establish the element of concerted action for a Section 1 violation. The mere opportunity to conspire does not by itself support the inference that such an illegal combination actually occurred.

13. Although a single legal entity, the Board is capable of concerted action under Section 1 because it is controlled by six practicing dentist members who are each separate economic entities and who are in a position to enhance their own incomes and/or the incomes of their dentist constituents by preventing or eliminating non-dentist teeth whitening.

14. The evidence shows a common scheme or design, and therefore an agreement, of the Board's dentist members to prevent or eliminate non-dentist teeth whitening services in North Carolina. This agreement is readily inferable from the Board's course of conduct in issuing cease and desist letters and similar Board communications designed to stop non-dentist teeth whitening in North Carolina.

15. Evidence of the Board's consistent, and persistent, course of conduct, using virtually identical language, over an extended period of time, tends to negate the possibility that Board members were acting independently.

16. The law does not require that the evidence exclude all possibility that the alleged conspirators acted independently of one another.

17. It is not necessary to demonstrate that every Board member participated in the conspiracy.

18. Proof of concerted action does not require a showing of simultaneous agreement by the alleged conspirators.

19. Complaint Counsel has met its burden of showing that Respondent engaged in concerted action to exclude non-dentists from the market for teeth whitening services and to deter potential providers of teeth whitening services from entering the market.

20. A restraint may be adjudged unreasonable either because it fits within a class of restraints that has been held to be "*per se*" unreasonable, or because it violates the "rule of reason."

21. The conventional rule-of-reason approach requires courts to engage in a thorough analysis of the relevant market and the effects of the restraint in that market.

22. A "quick look," or abbreviated rule of reason analysis applies to those arrangements that an observer with even a rudimentary understanding of economics could conclude would have an anticompetitive effect on customers and markets.

23. An abbreviated rule of reason analysis is appropriate in cases where the conduct at issue is inherently suspect owing to its likely tendency to suppress competition, including behavior that past judicial experience and current economic learning have shown to warrant summary condemnation.

24. If the nature of the restraint is deemed facially anticompetitive pursuant to an

abbreviated rule of reason analysis, the proponent of the restraint must provide some competitive justification for it, even in the absence of a detailed market analysis showing market power or market effects.

25. Proof of market power and the anticompetitive nature of the restraint are sufficient to show the potential for anticompetitive effects under a rule of reason analysis, and once this showing has been made, the proponent of the policies must offer procompetitive justifications.

26. Proof of actual detrimental effects from the challenged practice can obviate the need for an inquiry into market power, which is but a surrogate for detrimental effects.

27. If the challenged restraint is shown to have actual anticompetitive effects, then the burden shifts to the proponent of the challenged restraint to provide procompetitive justifications for it.

28. While there are varying modes of inquiry, the ultimate test of legality under Section 1 is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.

29. An agreement to exclude competitors, by its nature, has the tendency to harm competition.

30. Absent some countervailing procompetitive virtue, an agreement limiting consumer choice by excluding competitors from the market impedes the ordinary give and take of the marketplace and cannot be sustained under the rule of reason.

31. Market power is defined as the ability to raise prices or the ability to exclude competition.

32. The Board's power to exclude competition is demonstrated by the fact that non-dentist teeth whitening providers exited the market in response to the Board's cease and desist letters.

33. Complaint Counsel has met its burden of showing that Respondent engaged in concerted action to exclude non-dentists from the teeth whitening services market and deterred potential non-dentist providers from entering that market through the following course of conduct: (a) sending letters to non-dentist teeth whitening providers, ordering them to cease and desist from offering teeth whitening services; (b) sending letters to manufacturers of products and equipment used by non-dentist providers, and other potential entrants, either ordering them to cease and desist from assisting clients offering teeth whitening services, or otherwise attempting to dissuade them from participating in the teeth whitening services market; (c) sending letters to owners or operators of malls to dissuade them from leasing to non-dentist providers of teeth whitening services; and (d) eliciting the help of the North Carolina Board of

Cosmetic Art Examiners ("Cosmetology Board") to dissuade its licensees from providing teeth whitening services.

34. The Board's concerted actions to exclude non-dentist teeth whitening in North Carolina resulted in anticompetitive effects, including: the exit of non-dentist teeth whitening services providers from the North Carolina market; the limitation of consumer choice through exclusion of non-dentist teeth whitening service providers in North Carolina; lost sales by manufacturers of products used by non-dentist providers of teeth whitening services in North Carolina; and the decision of mall owners and operators to stop leasing to non-dentist teeth whitening service providers in North Carolina.

35. Respondent bears the burden of establishing an affirmative defense that competitively justifies the apparent deviation from the operations of a free market caused by its concerted actions to exclude non-dentist teeth whitening.

36. Respondent's proffered justification that in acting to restrict non-dentist teeth whitening, it was acting as a state agency or occupational licensing board enforcing the North Carolina Dental Practice Act, to protect the public interest, and not to promote economic self-interest, is essentially a reiteration of Respondent's claim that the Board's conduct is exempt from antitrust liability by the state action doctrine, which was decided against Respondent by the Commission. Commission State Action Opinion, 2011 WL 549449, at *1, 17.

37. It is well established that a restraint on competition cannot be justified solely on the basis of social welfare concerns, including concerns about health hazards.

38. A generalized concern for the health, safety and welfare of members of the public, however genuine and well-informed such a concern may be, affords no legal justification for economic measures to diminish competition.

39. To avoid liability, Respondent must demonstrate that the challenged restraints have some countervailing procompetitive virtue, such as the creation of efficiencies in the operation of a market or the provision of goods and services, increases in output, or improvements in product quality, service, or innovation.

40. Respondent's proffered justification that its actions to exclude non-dentist teeth whitening service providers were intended to promote social welfare or public safety, by ensuring that teeth whitening services are supervised by licensed dentists and by protecting consumers from dangerous or unsafe teeth whitening services is not a valid justification under applicable antitrust law.

41. Respondent's proffered justification that its actions to exclude non-dentist teeth whitening are procompetitive because they will ensure that teeth whitening services are offered at a cost that reflects the higher skills of dentist providers, rather than at the lower cost alternative offered by assertedly lesser skilled, non-dentist teeth whitening

providers is not a valid justification under applicable antitrust law. Competition cannot be restrained based upon the risk that competition may result in the marketing of inferior products.

42. Respondent's proffered justification that its actions to exclude non-dentist teeth whitening are procompetitive because they will serve to protect "legal competition" between qualified, legal teeth whitening service providers is not a valid justification under applicable antitrust law. Even if non-dentist teeth whitening were illegal in North Carolina, which has not been decided, the fact that a practice may be unlawful is not, in itself, a sufficient justification for collusion among competitors to prevent it.

43. Respondent's actions to exclude non-dentist teeth whitening, as described in paragraphs 19 and 33 above, constitute a contract, combination or conspiracy, that unreasonably restrained trade in the market for teeth whitening services in North Carolina, which violates Section 1 of the Sherman Act and constitutes an unfair method of competition in violation of Section 5 of the FTC Act. 15 U.S.C. § 45.

44. Upon determination that a challenged practice is an unfair method of competition, the Commission "shall issue . . . an order requiring such person . . . to cease and desist from using such method of competition or such act or practice." 15 U.S.C. § 45(b).

45. The Commission's authority to issue remedial orders also includes requiring Respondents to make affirmative disclosures, including sending notices to affected parties.

46. The Commission has considerable discretion in fashioning an appropriate remedial order, subject to the constraint that the order must bear a reasonable relationship to the unlawful acts or practices.

47. The appropriate remedy is to bring an end to this conduct, rectify past violations, and prevent reoccurrence.

48. The Order entered herein is necessary and appropriate to remedy the violation of law found to exist.

ORDER

I.

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

A. "Board" means the North Carolina State Board of Dental Examiners ("NCSBDE"), its officers, directors, members, employees, agents, attorneys, representatives, successors, and assigns; and the subsidiaries, divisions, groups, and affiliates controlled by it; and the respective officers, directors, members, employees, agents, attorneys, representatives, successors, and assigns of each.

B. "Communicate" or "Communicating" means exchanging, transferring, or disseminating any information, without regard to the manner or means by which it is accomplished.

C. "Communication" means any information exchange, transfer, or dissemination, without regard to the means by which it is accomplished, including, without limitation, oral or written, in any manner, form, or transmission medium.

D. "Dental Practice Act" means any legislation that is administered by the Board, including, North Carolina General Statutes, Chapter 90, Article 2 (Dentistry) (N.C. Gen. Stat. §§ 90-22 - 90-48.3 (2010)) and Article 16 (Dental Hygiene Act) (N.C. Gen. Stat. §§ 90-221 - 90-233.1 (2010)).

E. "Dentist" means any individual holding a license, issued by the Board, to practice dentistry in North Carolina.

F. "Direct" or "Directing" means to order, direct, command or instruct.

G. "Non-Dentist Provider" means any Person other than a Dentist engaged in the provision, distribution or sale of any Teeth Whitening Goods or Teeth Whitening Services.

H. "Person" means both natural persons and artificial persons, including, but not limited to, corporations, and unincorporated entities.

I. "Principal Address" means either (i) primary business address, if there is a business address, or (ii) primary residential address, if there is no business address.

J. "Teeth Whitening Goods" means any formulation containing a peroxide bleaching agent, whether or not used in conjunction with an LED light source, and any other ancillary products used in the provision of Teeth Whitening Services.

K. "Teeth Whitening Services" means whitening teeth through the use of a formulation containing a peroxide bleaching agent, whether or not used in conjunction with an LED light source.

L. "Third Party" means any Person other than NCSBDE.

II.

IT IS FURTHER ORDERED that Respondent, directly or indirectly, or through any corporate or other device, in connection with the provision of Teeth Whitening Services in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, cease and desist from:

A. Directing a Non-Dentist Provider to cease providing Teeth Whitening Goods or Teeth Whitening Services;

B. Prohibiting, restricting, impeding, or discouraging the provision of Teeth Whitening Goods or Teeth Whitening Services by a Non-Dentist Provider;

C. Communicating to a Non-Dentist Provider that: (i) such Non-Dentist Provider is violating, or has violated the Dental Practice Act by providing Teeth Whitening Goods or Teeth Whitening Services; or (ii) the provision of Teeth Whitening Goods or Teeth Whitening Services by a Non-Dentist Provider is a violation of the Dental Practice Act;

D. Communicating to a prospective Non-Dentist Provider that: (i) a Non-Dentist Provider would violate the Dental Practice Act by providing Teeth Whitening Goods or Teeth Whitening Services; or (ii) the provision of Teeth Whitening Goods or Teeth Whitening Services by a Non-Dentist Provider would violate the Dental Practice Act;

E. Communicating to a lessor of commercial property or any other Third Party that (i) the provision of Teeth Whitening Goods or Teeth Whitening Services by a Non-Dentist Provider is a violation of the Dental Practice Act, or (ii) that any Non-Dentist Provider is violating or has violated the Dental Practice Act by providing Teeth Whitening Goods or Teeth Whitening Services;

F. Communicating to an actual or prospective manufacturer, distributor, or seller of Teeth Whitening Goods used by Non-Dentist Providers, or to any other Third Party that (i) the provision of Teeth Whitening Goods or Teeth Whitening Services by a Non-Dentist Provider is a violation of the Dental Practice Act, or (ii) that any Non-Dentist Provider is violating or has violated the Dental Practice Act by providing Teeth Whitening Goods or Teeth Whitening Services; and

G. Inducing, urging, encouraging, assisting or attempting to induce, any Person to engage in any action that would be prohibited to Respondent by Paragraphs II.A through II.F above;

Provided, however, that nothing in this Order prohibits the Board from:

(i) investigating a Non-Dentist Provider for suspected violations of the Dental Practice Act;

(ii) filing or causing to be filed, a court action against a Non-Dentist Provider for an alleged violation of the Dental Practice Act pursuant to N.C. Gen. Stat. §§ 90-40, 90-40.1, or 90-233.1; or

(iii) pursuing any administrative remedies against a Non-Dentist Provider pursuant to and in accordance with the North Carolina Annotated Code;

Provided further, that nothing in this Order prohibits the Board from Communicating to a Third Party:

(i) notice of its belief or opinion regarding whether a particular method of providing Teeth Whitening Goods or Teeth Whitening Services may violate the Dental Practice Act;

(ii) notice of its bona fide intention to file a court action against that Person for a suspected violation of the Dental Practice Act with regard to Teeth Whitening Goods or Teeth Whitening Services; or

(iii) notice of its bona fide intention to pursue administrative remedies with regard to Teeth Whitening Goods or Teeth Whitening Services,

so long as such Communication includes, with equal prominence, the paragraph included in Appendix A to this Order.

III.

IT IS FURTHER ORDERED that Respondent shall:

A. Within thirty (30) days from the date this Order becomes final, send a copy of this Order and the Complaint by first-class mail with delivery confirmation or electronic mail with return confirmation to:

1. each Board member; and

2. each officer, director, manager, representative, agent, attorney, and employee of the Board;

B. Distribute by first-class mail, return receipt requested, a copy of this Order and the Complaint to each individual who becomes a Board member, or an officer, director, manager, attorney, representative, agent or employee of Board, and who did not

previously receive a copy of this Order and the Complaint from Respondent, within ten (10) days of the time that he or she assumes such position;

C. Within thirty (30) days from the date this Order becomes final, send a copy of the letter, on the Board's official letterhead, with the text included in Appendix B to this Order by first-class mail with delivery confirmation or electronic mail with return confirmation to:

1. each Person, including without limitation actual or prospective Non-Dentist Providers, manufacturers of goods and services used by Non-Dentists Providers, or any other Third Party, to whom the Board Communicated a cease-and-desist order, letter; or other similar Communication;

2. each Person, including without limitation actual or prospective lessors of commercial property or any other Third Party, to whom the Board Communicated that (i) the provision of Teeth Whitening Goods or Teeth Whitening Services by a Non-Dentist Provider is a violation of the Dental Practice Act, or (ii) that any Non-Dentist Provider is violating, has violated, or may be violating the Dental Practice Act by providing Teeth Whitening Goods or Teeth Whitening Services; and

3. any other Third Party to whom, or with whom, the Board Communicated substantially the same information set forth in C.1 and 2 of this Paragraph III;

D. Within sixty (60) days from the date this Order becomes final, Respondent shall arrange with the North Carolina Board of Cosmetic Art Examiners for the notice included as Appendix C to this Order to appear on the website of that Board for a period of six (6) months;

Provided, however, should Respondent be unable within sixty (60) days to arrange with the North Carolina Board of Cosmetic Art Examiners for such notice to appear on that Board's website, Respondent shall within ninety (90) days from the date this Order becomes final: (1) obtain from the North Carolina Board of Cosmetic Art Examiners its most current list of licensees; and (2) send the Appendix C notification by first-class mail with delivery confirmation or electronic mail with return confirmation to each licensee on that current list;

IV.

IT IS FURTHER ORDERED that Respondent shall file verified written reports within sixty (60) days from the date this Order becomes final, annually thereafter for three (3) years on the anniversary of the date this Order becomes final, and at such other times as the Commission may by written notice require. Each report shall include, among other information that may be necessary:

A. The identity, including address and telephone number, of each Non-Dentist Provider, and any other Third Party, that the Board Communicated with during the relevant reporting period regarding Teeth Whitening Goods or Teeth Whitening Services;

B. Copies of all Communications with any Non-Dentist Provider, and any other Third Party regarding the provision of Teeth Whitening Goods or Teeth Whitening Services;

C. Copies of the delivery confirmations or electronic mail with return confirmations required by Paragraph III. A and B; and

D. A detailed description of the manner and form in which Respondent has complied, and is complying, with this Order.

V.

IT IS FURTHER ORDERED that Respondent shall notify the Commission of any change in its principal address within twenty (20) days of such change in address.

VI.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and upon five (5) days notice to NCSBDE, that NCSBDE shall, without restraint or interference, permit any duly authorized representative of the Commission:

A. Access, during office hours of NCSBDE and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and all other records and documents in the possession, or under the control, of NCSBDE relating to compliance with this Order, which copying services shall be provided by NCSBDE at its expense; and

B. To interview officers, directors, or employees of NCSBDE, who may have counsel present, regarding such matters.

VII.

IT IS FURTHER ORDERED that this Order shall terminate twenty (20) years from the date it is issued.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: July 14, 2011

Appendix A

The Federal Trade Commission, by its Order of _____, 2011, has directed the Board to provide you with the following Notice. The Board hereby notifies you that the opinion of the Board expressed in this communication is not a legal determination. The Board does not have the authority to order you to discontinue providing Teeth Whitening Goods or Teeth Whitening Services. Only a court may determine that you have violated, or are violating, any law, and, if appropriate, impose a remedy or penalty for such violation.

Further, pursuant to 21 N.C.A.C. 16N .0400 and N.C. Gen. Stat. § 150B-4, you may have the right, prior to the initiation of any court action by the Board, to request a declaratory ruling regarding whether your method of providing teeth whitening goods or services is lawful.

You are further notified that any right to a declaratory ruling from the Board is additional to any other legal rights that you may already have to establish the legality of your teeth whitening goods or services. A complete copy of the Federal Trade Commission's Complaint and Decision and Order are available on the Commission's website, http:\\www.ftc.gov.

Appendix B

(Letterhead of NCSBDE)

(Name and Address of the Recipient)

Dear (Recipient):

As you may know, the Federal Trade Commission issued an administrative complaint in 2010 against the Board challenging the legality of the Board's activities directed at the elimination of dental teeth whitening services in North Carolina by non-dentists. At the conclusion of that administrative proceeding, the Commission issued a Decision and Order directing that the Board, among other things, cease and desist from certain activities involving teeth whitening by non-dentists and take certain remedial actions, of which this letter is one part. A complete copy of the Federal Trade Commission's Complaint and Decision and Order are available on the Commission's website, http:\\www.ftc.gov.

You are receiving this letter because you previously received from the Board either: (1) a letter directing, or ordering, you to cease and desist the unlicensed provision of dental teeth whitening services, or selling dental teeth whitening goods or services to non-dentist teeth whiteners in violation of the Dental Practice Act, N.C. Gen. Stat. §§ 90-29(b)(2), 90-40, and/or 90-40.1; or (2) a letter advising you that (i) a non-dentist would or might be violating the Dental Practice Act by providing teeth whitening goods or services; or (ii) the provision of teeth whitening goods or services by a non-dentist would or might be a violation of the Dental Practice Act, N.C. Gen. Stat. §§ 90-29(b)(2), 90-40, and/or 90-40.1.

The Board hereby notifies you that the prior letter you received from the Board only expressed the opinion of the Board, and that such opinion is not a legal determination. The Board does not have the authority to order that you discontinue providing Teeth Whitening Goods or Teeth Whitening Services. Only a court may determine that you are violating, or have violated, any law and, if appropriate, impose a remedy or penalty for such violation. Further, you may have the right to request a declaratory ruling from the Board, pursuant to 21 N.C.A.C. 16N .0400 and N.C. Gen. Stat. § 150B-4, regarding whether a particular method of providing teeth whitening goods or services is lawful. You are further notified that any right to a declaratory ruling from the Board is additional to any other legal rights that you may already have to establish the legality of any particular method of providing teeth whitening goods or services.

Appendix C

Teeth Whitening Notice

As you may know, the Federal Trade Commission issued an administrative complaint in 2010 against the North Carolina State Board of Dental Examiners challenging the legality of the Dental Board's activities directed at the elimination of dental teeth whitening services in North Carolina by non-dentists. At the conclusion of that administrative proceeding, the Commission issued a Decision and Order directing that the Dental Board, among other things, cease and desist from certain activities involving teeth whitening by non-dentists and take certain remedial actions, of which this Notice is one part. A complete copy of the Federal Trade Commission's Complaint and Decision and Order are available on the Commission's website, http://www.ftc.gov.

In 2007, the Cosmetology Board, at the request of the Dental Board, displayed a "Teeth Whitening Bulletin" on the Cosmetology Board's website advising cosmetologists and estheticians "that any process that 'removes stains, accretions or deposits from human teeth' constitutes the practice of dentistry. . . Taking impressions for bleaching trays also constitutes the practice of dentistry. . ." That Bulletin further advised that it was a misdemeanor for anyone other than a licensed dentist to provide those services.

The Dental Board hereby notifies you that the prior Bulletin, described above, only expressed the opinion of the Dental Board, and that such opinion is not a legal determination. The Dental Board does not have the authority to order that you discontinue providing Teeth Whitening Goods or Teeth Whitening Services. Only a court may determine that you have violated, or are violating, any law and, if appropriate, to impose a remedy or penalty for such violation. Further, you may have the right to request a declaratory ruling from the Dental Board, pursuant to 21 N.C.A.C. 16N .0400 and N.C. Gen. Stat. § 150B-4, regarding whether a particular method of providing teeth whitening goods or services is lawful. You are further notified that any right to a declaratory ruling from the Dental Board is additional to any other legal rights that you may already have to establish the legality of any particular method of providing teeth whitening goods or services.

EXHIBIT D

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**

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.

The Commission has considered Respondent's Motion to Dismiss on state action grounds (which the Commission has treated as a motion for summary decision) and Complaint Counsel's Motion for Partial Summary Decision on state action grounds, Respondent's Motion to Disqualify the Commission, and Respondent's Motion for Leave to File Limited Surreply Brief, as well as both parties' memoranda of law in support of and in opposition to these motions. For the reasons set forth in the accompanying Opinion, the Commission has determined to deny Respondent's Motion to Dismiss, to grant Complaint Counsel's Motion for Partial Summary Decision, to deny Respondent's Motion to Disqualify the Commission,[1] and to grant Respondent's Motion for Leave to File Limited Surreply Brief. Accordingly,

I.

IT IS ORDERED THAT Respondent's Motion to Dismiss (which the Commission has treated as a motion for summary decision) be, and it hereby is, **DENIED**.

[1]An opinion setting forth the reasons for denying this motion is forthcoming.

II.

IT IS FURTHER ORDERED THAT Complaint Counsel's Motion for Partial Summary Decision, be, and it hereby is, **GRANTED** and Respondent's state action defense is **DISMISSED**.

III.

IT IS FURTHER ORDERED THAT Respondent's Motion to Disqualify the Commission, be, and it hereby is, **DENIED**.

IV.

IT IS FURTHER ORDERED THAT Respondent's Motion for Leave to File Limited Surreply Brief, be, and it hereby is, **GRANTED**.

By the Commission, Commissioner Brill recused.

Donald S. Clark
Secretary

SEAL:
ISSUED: February 3, 2011

EXHIBIT E

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 OF THE COMMISSION

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

I. INTRODUCTION

This case presents us with an opportunity to decide whether the principles of federalism embodied in the state action doctrine shield respondent, the North Carolina State Board of Dental Examiners (the Board), from antitrust challenge to its pattern of conduct alleged to have impaired competition in the market for teeth whitening services.

The Supreme Court held nearly seventy years ago that Congress did not intend the federal antitrust laws to cover the acts of sovereign states. *Parker v. Brown,* 317 U.S. 341 (1943). Since then, a line of Supreme Court cases, which has come to form the state action doctrine, has developed to exempt acts of the sovereign from antitrust scrutiny. This doctrine does not prevent a state from delegating its sovereign ability to pursue anticompetitive market regulation to non-sovereign actors, such as cities or even private actors. Because the balance between competition policy and federalism embodied in the state action doctrine exempts only sovereign policy choices from federal antitrust scrutiny, non-sovereign defendants invoking the state action defense must clear additional hurdles to ensure that their challenged conduct truly comports with a state decision to forego the benefits of competition to pursue alternative goals. These requirements vary depending on the extent to which a tribunal is concerned that decision-makers are pursuing private rather than sovereign interests. For example, municipalities can enact anticompetitive regulations as long as they can show that their actions are consonant with a clearly articulated and affirmatively expressed state policy. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 40 (1985). Private parties that engage in anticompetitive conduct, on the

[1] Commissioner Julie Brill has not participated in this matter.

other hand, can avail themselves of the state action exemption only if they can show that their actions were both taken pursuant to a clearly articulated and affirmatively expressed state policy and actively supervised by the state itself. *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980).

In the case before us, the decisive majority of the Board, which is charged with regulating the practice of dentistry in North Carolina, earns a living by practicing dentistry. The Complaint alleges that the Board determined on its own that teeth whitening was a practice that could be performed only under the supervision of a dentist and used the imprimatur of state authority to drive lower-priced non-dentists from the relevant market. We conclude that given the Board's obvious interest in the challenged restraint, the state must actively supervise the Board in order for the Board to claim state action protection from the antitrust laws. Because we find such supervision lacking, we further hold that the Federal Trade Commission Act reaches the Board's conduct.

II. PROCEDURAL BACKGROUND

The Commission issued an administrative complaint against the respondent Board on June 17, 2010. The complaint alleges that the Board violated Section 5 of the FTC Act by classifying teeth whitening as the practice of dentistry and by enforcing this determination through cease and desist orders that were neither authorized nor supervised by the state, and that were designed to, and did, drive non-dentist teeth whiteners from the relevant North Carolina market. The evidentiary hearing before the Administrative Law Judge is currently scheduled for February 17, 2011. Before us are the Board's motion to dismiss the entire administrative complaint on the ground that its conduct is exempted from antitrust liability by the state action doctrine, and Complaint Counsel's motion for partial summary decision on the propriety of the Board's invocation of the state action doctrine as an affirmative defense. The parties have filed memoranda in support of their motions and their respective responses, replies, and supplemental filings, the latest of which was filed on January 20, 2011.[2] Pursuant to our Rules of Practice, 16 C.F.R. § 3.24(a)(1)-(2), the parties have also filed their respective statements of material facts as to which Complaint Counsel contends there is no genuine issue for trial,[3] and as to some of which the Board contends that a genuine dispute does exist.[4] Our decision here is based on our

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[2] The Board filed a motion for leave to file a surreply brief, along with the surreply brief, on January 20, 2011. We note that there are no provisions in the Commission Rules to file a surreply brief. Further, the Board's brief is untimely – coming a month after the last filing by Complaint Counsel – and it does not respond to any new arguments raised by Complaint Counsel's reply brief. Nonetheless, as a matter of discretion, we have considered the Board's filing.

[3] *See* Compl. Counsel's Rule 3.24 Separate Statement of Material Facts As to Which There Is No Genuine Issue (hereinafter "CCSMF").

[4] *See* Respt's Separate Statement of Material Facts As to Which There Are and Are Not Genuine Issues (hereinafter "BSMF").

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 here *ab initio*.

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. *See* [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); CCSFM at 22-23, ¶¶ 75-76; Newson Decl. at 5, ¶ 11; CX0395; CX0396. The Board must submit an annual report to the Secretary of State, the State Attorney General, and the Joint Legislative Administrative Procedure Oversight Committee (JLAPOC), which provides, *inter alia*, aggregate information on the number and disposition of investigations by type. N.C. Gen. Stat. § 93B-2; CX0085; CX0086; CX0088; CX0089; CX0091. The Board also must comply with North Carolina's Public Records Act (N.C. Gen. Stat. § 132-1 *et seq.*), Administrative Procedure Act (N.C. Gen. Stat. § 150B-1 *et seq.*), and open meetings law (N.C. Gen. Stat. §143-318.9 *et seq.*). BSMF at 53, ¶ 72. Further, the JLAPOC has the power "[t]o review the activities of the State occupational licensing boards

[5] Throughout the opinion we use the following abbreviations for the parties' filings: Board's Memorandum in Support of Motion to Dismiss (Corrected) ("Bd. Memo"); Board's Memorandum in Opposition to Complaint Counsel's Motion for Summary Judgment ("Bd. Opp."); Board's Reply Memorandum in Support of Motion to Dismiss ("Bd. Reply"); Complaint Counsel's Memorandum in Support of Motion for Summary Judgment ("CC Memo"); Complaint Counsel's Memorandum in Opposition to Respondent's Motion to Dismiss ("CC Opp.").

to determine if the boards are operating in accordance with statutory requirements." N.C. Gen. Stat. § 120-70.101(3a).

The complaint's allegations concern the market for teeth whitening services in North Carolina. Compl. ¶ 7. Teeth whitening services are offered both by dentists, as an in-office procedure or a take-home kit, and by non-dentists, in salons, retail stores, and mall kiosks. CCSMF at 3-4, ¶ 16; BSMF at 10-11, ¶ 16. Dentist and non-dentist teeth whiteners differ in terms of the strength of the solution used, the time involved, and the procedures used. *See generally* CCSMF at 4-7, ¶¶ 17-26; BSMF at 11-16, ¶¶ 17-26. The price for non-dentist teeth whitening typically is less than teeth whitening performed by dentists in their offices. CCSMF at 5,7, ¶¶ 19, 25; BSMF at 12, 15, ¶¶ 19, 25.

The complaint charges that the Board, reacting to the competitive threat by non-dentist providers, sought to exclude, and did exclude, non-dentists from the market for teeth whitening services in North Carolina. Compl. ¶¶ 13-23. The undisputed facts show that the Board on numerous occasions sent letters to non-dentist providers, alleging that those recipients were engaging in the unauthorized practice of dentistry in violation of North Carolina laws, and ordering the recipients to cease and desist from providing teeth-whitening services in North Carolina. CCSMF at 17-18, ¶¶ 55, 60; BSMF at 37, 44, ¶¶ 55, 60. The Board also has sent letters to some mall operators asserting that teeth whitening services offered at mall kiosks are illegal, and asking these mall operators to refrain from leasing space to non-dentist teeth whiteners. CCSMF at 19, ¶ 61; BSMF at 44-45, ¶ 61. The complaint does not challenge any attempts by the Board to bring civil or criminal proceedings against alleged violators of the North Carolina Dental Practice Act (N.C. Gen. Stat. § 90-22 *et seq.*).

V. DISCUSSION AND CONCLUSIONS OF LAW

A. Jurisdiction

Citing *California Dental Ass'n v. FTC*, 526 U.S. 756 (1999), the Board argues that it is not subject to the Commission's jurisdiction. *See* Bd. Memo at 17. We disagree. *California Dental* is inapposite in this case where jurisdiction is asserted over a "person," not a "corporation." The complaint in this case, consistent with this established precedent, asserted jurisdiction because "[t]he Dental Board is a 'person' within the meaning of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45." Compl. ¶ 5. Under Section 5 of the FTC Act, the FTC may exercise jurisdiction over "persons, partnerships, or corporations," with certain exceptions not relevant here. 15 U.S.C. § 45(a)(2). The jurisdictional question at issue in *California Dental* concerned the scope of the statutory definition of "corporation" and, in particular, whether an entity formally organized as a non-profit could nonetheless be subject to the Commission's jurisdiction as a "corporation" if it were "organized to carry on business for its own profit or that of its members." 526 U.S. at 765-66 (quoting 15 U.S.C. § 44). *California Dental*'s test for jurisdiction over "corporations," therefore, has no relevance to this case.

The Supreme Court has held that states and their regulatory bodies constitute "persons" under the antitrust laws. *See, e.g., Jefferson Cnty. Pharm. Ass'n v. Abbott Labs.*, 460 U.S. 150,

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 Optometry*, 110 F.T.C. 549 (1988).[6]

B. The State Action Doctrine

In our "dual system of government, . . . the states are sovereign." *Parker*, 317 U.S. at 351. As such, with "nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature," the Supreme Court concluded that when "[t]he state itself exercises its legislative authority in making the regulation and in prescribing the conditions of its application," it is exempt from the prohibitions of the Sherman Act. *Id.* at 350-52. Thus, anticompetitive regulation is allowed to withstand antitrust challenge as long as a court is satisfied that the restraint at issue is truly state action. *See Hoover v. Ronwin*, 466 U.S. 558, 574 (1984) (the litmus test of the state action exemption has always been whether the conduct at issue can be deemed to be "that of the State acting as a sovereign") (internal quotation marks and citation omitted).

When non-sovereign entities engage in conduct that otherwise would violate the antitrust laws, they too can avail themselves of state action protection as long as the sovereign has put into place sufficient safeguards to assure that non-sovereign actors are pursuing state goals rather than their own. *See id.* at 568 (when the activity at issue is carried out by someone other than the sovereign, "closer analysis is required" because "it becomes important to ensure that the anticompetitive conduct of the State's representative was contemplated by the State."). For example, in *Midcal*, the Supreme Court held that private parties can use the state action doctrine

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[6] In *Massachusetts Bd. of Registration in Optometry*, the Commission reasoned that because the Supreme Court had held local governments, as agents of the state, to be persons within the meaning of the Sherman Act and the Clayton Act, so too should they be considered persons under the FTC Act. 110 F.T.C. 549, 608-09 (1988) (citing *United States v. American Bldg. Maintenance Indus.*, 422 U.S. 271, 277-78 (1975)). The Commission also noted that its holding was consistent with Commission precedent, including *Indiana Fed'n of Dentists*, 93 F.T.C. 231 n.1 (1979), and the Statement of Basis and Purpose for the Trade Regulation Rule on Advertising of Ophthalmic Goods and Services, 43 Fed. Reg. 23992, 24004 (1979). The Commission found its holding further supported by the legislative history of the FTC Act. *Mass. Bd.*, 110 F.T.C. at 609 n.19. The D.C. Circuit's decision in *California State Bd. of Optometry v. FTC*, 910 F.2d 976 (D.C. Cir. 1990), is not contrary to the general rule that for purposes of jurisdiction, states and their agents are "persons" under the FTC Act. That decision merely holds that the FTC is not authorized to reach the "'acts or practices'" of States acting in their sovereign capacity. *Id.* at 980 (citations omitted). Because we conclude that the Board is not acting as a sovereign, *California State Bd. of Optometry* has no bearing on this case.

as a shield to avoid antitrust liability if they can show that the challenged restraint is (1) pursuant to a "clearly articulated and affirmatively expressed [] state policy;"and (2) "actively supervised by the State itself." 445 U.S. at 105 (internal quotation marks omitted).

Although "[a] municipality must demonstrate that it is engaging in the challenged activity pursuant to a clearly expressed state policy" before it is entitled to state action exemption from the antitrust laws, *Town of Hallie*, 471 U.S. at 40, municipalities are not subject to *Midcal*'s active supervision prong. *Id.* at 46. As the Court explained, "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." *Id.* Accordingly, municipalities should be subject to a lower evidentiary threshold, because unlike the case of a private party where "there is a real danger that he is acting to further his own interests, . . . there is little or no danger that [a municipality] is involved in a *private* price-fixing agreement." *Id.* at 47 (emphasis in original); s*ee also id.* at 45 ("We may presume, absent a showing to the contrary, that the muncipality acts in the public interest. A private party, on the other hand, may be presumed to be acting primarily on his or its own behalf.").

The Board in this matter is not the sovereign.[7] The questions before us now are whether the Board must meet both of *Midcal*'s requirements to qualify for state action protection, and, if so, whether the Board has met them as a matter of law. We conclude that the Board must meet both prongs of the *Midcal* test and that it has failed to show sufficient state supervision.[8] Complaint Counsel is therefore entitled to partial summary judgment dismissing the state action doctrine as an affirmative defense.[9]

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[7] The Supreme Court has held that the legislature and the state's highest court acting in its regulatory capacity are sovereign, but has left open the possibility that the executive may also be sovereign. *See Hoover*, 466 U.S. at 568 & n.17. It is undisputed that the Board is not an arm of the North Carolina legislature or the North Carolina Supreme Court. Moreover, as discussed below, the Board functions in a manner that makes it wholly inappropriate to treat its actions as presumptively sovereign, even if actions of the Governor or executive agencies subject to plenary gubernatorial control might be.

[8] For purposes of this motion, we have assumed, but not decided, that the Board has satisfied the clear articulation requirement. *Cf. Patrick v. Burget*, 486 U.S. 94, 100 (1988) ("We need not consider the clear articulation prong of the *Midcal* test because the active supervision requirement is not satisfied.") (internal quotation marks omitted).

[9] The Board makes fleeting reference to the *Noerr-Pennington* doctrine in the memorandum supporting its Motion to Dismiss. *See* Bd. Memo at 39-40 (citing *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965); *E. R.R. Presidents' Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961)). Such perfunctory recitation of authority, without development, fails to constitute a colorable basis to dismiss the complaint. Accordingly, we do not address this issue.

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 does meet, the first prong of the Supreme Court's standard, enunciated in *Midcal* – that "the challenged restraint must be one clearly articulated and affirmatively expressed as state policy." 445 U.S. at 105 (internal quotation marks and citation omitted). The Board argues, moreover, that even if the second prong of that test – that "the policy must be 'actively supervised' by the State itself," *id.* – applies in this case, then North Carolina's "structural legal oversight" of the Board is sufficient as a matter of law to satisfy that condition. *See* Bd. Memo at 34-37.

Complaint Counsel argues that the Board is financially interested in the exclusion of non-dentists from the market for teeth whitening services, and also is beholden to the industry it purports to regulate, by virtue of the fact that it is controlled by its dentist members, who are privately elected by North Carolina's licensed dentists. Therefore, says Complaint Counsel, the Board must meet both of *Midcal*'s prongs in order to qualify for state action exemption. *See* CC Memo at 17-29. Further, Complaint Counsel argues that the North Carolina Dental Practice Act, through which the Board was constituted and from which it derives its authority, does not authorize the Board to order non-dentist teeth whitening providers to cease and desist from providing such services, nor to communicate with prospective providers and third parties that the provision of teeth whitening services by dentists is unlawful. Rather, the Dental Act merely authorizes the Board to petition the North Carolina courts for relief relating to any allegedly unauthorized practice of dentistry. Accordingly, argues Complaint Counsel, the Board cannot satisfy either of the *Midcal* prongs, and thus does not qualify for antitrust exemption. *See* CC Memo at 29-34.

Midcal's active supervision requirement serves to ensure that "the State has exercised sufficient independent judgment and control so that the details of the [challenged restraint on competition] have been established as a product of deliberate state intervention." *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 634 (1992); *see also Burget*, 486 U.S. at 100 (noting that the active supervision requirement "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). The Court has held that the active supervision requirement applies to private parties (*e.g., Midcal*; *Patrick*; *Ticor*), and does not apply to political subdivisions of the State such as municipalities (*e.g., Hallie*). Respondent argues, however, that the Court has never ruled directly on the question of whether state agencies must be supervised too, and therefore we should take our guidance from a footnote suggesting they need not[10] and from lower court cases in accord.

[10] Bd. Memo at 30 n.7 (quoting *Hallie*, 471 U.S. at 46 n.10).

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-maker's independent judgment. The state bar's enforcement of a minimum fee schedule was deemed clearly for the benefit of its member lawyers, not the general public. Second, it seems reasonable to conclude that had the state's supervisory role, in the form of the Virginia Supreme Court's approval of the state bar's ethical opinions, been more vigorous, the Court's conclusion on the application of the state action doctrine may well have been different. Instead, the Court's analysis strongly suggests that such active supervision is crucial, even for a state agency, in circumstances where the state agency's decisions are not sufficiently independent from the entities that the agency regulates.

Although the courts of appeals have been less than consistent on this issue, there is ample support for the proposition that financially interested governmental bodies must meet the active supervision prong of *Midcal*. *See, e.g.*, *Wash. State Elec. Contractors Ass'n, Inc. v. Forest*, 930 F.2d 736, 737 (9th Cir. 1991) (whether an entity must show active supervision depends on the realities of its structure, such as having private members who "have their own agenda which may or may not be responsive to state . . . policy"); *FTC v. Monahan*, 832 F.2d 688, 689-90 (1st Cir. 1987) (Breyer, J.) ("[W]hether any 'anticompetitive' Board activities are 'essentially' those of private parties" – and hence subject to active supervision – "depends upon how the Board functions in practice, and perhaps upon the role played by its members who are private pharmacists."); *Norman's on the Waterfront, Inc. v. Wheatley*, 444 F.2d 1011, 1018 (3rd Cir. 1971) (in determining whether state action exemption applies to a state regulatory board, "the relevant distinction is between genuine governmental action controlling the anticompetitive practice, and an attempt by government officials to 'authorize individuals to perform acts which

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 HARV. L. REV. 667, 689 (1991); *see also id.* at 696 ("[A]n anticompetitive restraint is immune from antitrust liability whenever a financially disinterested and politically accountable actor controls and makes a substantive decision in favor of the terms of the restraint.").

Lastly, requiring active supervision by the state itself in circumstances where the state agency in question has a financial interest in the restraint that the agency seeks to enforce, especially when the state agency is not accountable to the public but rather to the very industry it purports to regulate, is entirely consistent with the policies underlying the *Parker* doctrine. The Supreme Court created the state action doctrine in recognition that states, in their sovereign capacities, may choose to supplant competition to effect other policy goals. A state decision to take action that contravenes the antitrust laws in theory represents a choice by citizens of that state to forego the benefits of competition in favor of alternative ends. If a state legislature adopts a policy that restricts competition against the wishes of its citizens, it faces political consequences. The Court has explained that the rationale behind the *Midcal* requirements is to assure political accountability:

> States must accept political responsibility for actions they intend to undertake. . . . Federalism serves to assign political responsibility, not to obscure it. Neither federalism nor political responsibility is well served by a rule that essential national policies are displaced by state regulations intended to achieve more limited ends. For States which do choose to displace the free 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 price fixing it has sanctioned and undertaken to control.

Ticor, 504 U.S. at 635. Accordingly, if a state permits private conduct to go unchecked by market forces, the only assurance the electorate can have that private parties will act in the public

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 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; absent antitrust to police their actions, unsupervised self-interested boards would be subject to neither political nor market discipline to serve consumers' best interests.

Although requiring active supervision of state regulatory bodies that are controlled by private market participants may impose additional costs on states, we believe that this rule is faithful to the Supreme Court's decisions striking the correct balance between our national policy in favor of competition, on the one hand, and principles of federalism on the other. As discussed above, the risk to competition posed by regulatory bodies comprising private market participants is greater than the risk posed by elected representatives, who are accountable directly to the public. At the same time, deference to policy-making by private parties who occasionally are cloaked in a modicum of state authority does not vindicate federalism to the same degree as granting the state sovereign itself wide berth to regulate markets.

We find unconvincing the Board's arguments that a regulatory body controlled by private market participants should not be asked to show active state supervision of its exclusionary conduct. The Board first relies on certain decisions of the courts of appeal that found state agencies need not show active supervision, even in circumstances where the Board's independent judgment and control are not manifest. *See* Bd. Opp. at 18 (citing *Earles v. State Bd. of Certified Public Accountants of Louisiana,* 139 F.3d 1033, 1041 (5th Cir. 1998); *Bankers Ins. Co. v. Florida Residential Property & Casualty Joint Underwriting Ass 'n*, 137 F.3d 1293, 1296-97 (11th Cir. 1998); *Hass v. Oregon State Bar*, 883 F.2d 1453, 1460 (9th Cir. 1989); *Gambrel v. Kentucky Board of Dentistry*, 689 F.2d 612 (6th Cir. 1982)). These decisions, however, appear in large part to be based on those courts' examination of a laundry list of attributes of the respective governmental entities (e.g., open records, general financial and ethical oversight) to determine the extent to which they resembled the municipality in *Hallie*, rather than an inquiry into whether the challenged restraint was effected by a body controlled by market participants who stood to benefit from the regulatory action. *See, e.g.*, *Earles*, 139 F.3d at 1041 (examining a list of factors and concluding that "the Board is functionally similar to a municipality"); *Hass*, 883 F.2d at 1460 (state law provisions governing its public records and meetings, financial audits, and ethical conduct "leave no doubt that the Bar is a public body, akin to a municipality, for the purposes of the state action exemption."). The Eleventh Circuit in *Bankers Insurance*, moreover, appeared to find the fact that the members of the underwriting association *did not* compete in the market that they regulated key to its decision not to require active supervision. 137 F.3d at 1297 ("This impossibility of competition is an indicator that the

Association represents public interests, rather than competing private interests.").[11] *Gambrell*, a case on which the respondent relies heavily, is also distinguishable from the instant case. There, the Kentucky Board of Dentistry was enforcing a clear, unambiguous legislative prohibition on denture producers taking orders from anyone other than licensed dentists. 689 F.2d at 618 (defendant's conduct "emanates directly from the mandate of the state law in a well-developed and long-established statutory scheme. It is not left to the private sector to decide what the policy is and whether it is to be complied with."). Here, by contrast, the Board has exercised discretion to implement a policy to exclude non-dentists from a market in which they compete against North Carolina dentists. Accordingly, with the possible exception of *Earles*, which we decline to follow, we do not read these cases to be contrary to our holding here.[12]

The Board also argues that *Goldfarb* and *Bates* predate *Hallie*'s dicta that state agencies likely would not be required to show active state supervision, and thus those cases should not be accorded much weight in our analysis. Bd. Reply at 10. We disagree. First, *Midcal*'s two-pronged test itself was extracted from the Court's prior state-action decisions, including *Goldfarb*. *See* 445 U.S. at 104-05 ("These decisions establish two standards for antitrust immunity under *Parker v. Brown*") (referring to *Goldfarb*; *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976); and *New Vehicle Motor Bd. of Cal. v. Orrin W. Fox Co.*, 439 U.S. 96 (1978)). A Supreme Court decision that is directly on point here should not be ignored because of a subsequent passing comment by the Court, especially when the *Hallie* Court made it amply clear that it was not deciding the state agency issue. *See Hallie*, 471 U.S. 46 n.10. Second, the dicta in footnote 10 of *Hallie* must be reconciled with the Court's other language and reasoning in that same decision. The *Hallie* Court distinguished *Goldfarb* and *Cantor* on the basis that those cases "concerned private parties – not municipalities." *Id.* at 45. The party claiming the state action exemption in *Goldfarb* was the Virginia State Bar, explicitly acknowledged by the Court to be "a state agency by law." *See Goldfarb*, 421 U.S. at 789-90. Yet, the *Hallie* Court distinguished the Virginia State Bar from a municipality, on the ground that the latter "is an arm of the State" and thus is presumed to "act[] in the public interest," while "[a] private party, on the other hand, may be presumed to be acting primarily on his or its own behalf." 471 U.S. at 45. Thus, the Court clearly did not view state regulatory bodies such as the Virginia State Bar as equivalent to

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[11] Further, the rule at issue in *Hass* required participation in a malpractice insurance pool; the challenged regulation did not implicate competition among the regulators themselves. Although the *Hass* court did not focus on this fact as a ground for its decision, the absence of such competition suggests that there was limited danger that private parties were "further[ing their] own interests, rather than the governmental interests of the State." *Town of Hallie*, 471 U.S. at 47.

[12] As Complaint Counsel points out in its opposition memorandum, *see* CC Opp. at 7 n.8, the *Earles* court's reliance on cases it perceived as relevant precedents, but which do not in fact involve regulatory bodies controlled by private market participants, confirms our view that the court's holding there is not squarely on point with the allegations here. Moreover, unlike the Board here, the *Earles* Board members "are chosen by the governor . . . and they must be confirmed by the state senate," 139 F.3d at 1035, thus providing some of the political accountability lacking in this case.

municipalities with respect to their incentives to pursue public as opposed to private ends – and therefore excused from *Midcal*'s active supervision requirement – as the Board would have us read footnote 10 of the *Hallie* opinion. The *Hallie* Court based its public/private distinction on the realities of the specific economic interests involved, as we do here.

We accordingly hold that a state regulatory body that is controlled by participants in the very industry it purports to regulate must satisfy both prongs of *Midcal* to be exempted from antitrust scrutiny under the state action doctrine.[13] We further conclude that the Board is such a state regulatory body. Because North Carolina law requires that six of the eight Board members be North Carolina licensed dentists, the Board is controlled by North Carolina licensed dentists. *See* CCSMF at 1, ¶ 1; BSMF, at 6, ¶ 1; N.C. Gen. Stat. § 90-22(b). Although there may be some factual dispute over the relative importance of teeth whitening revenues to a dental practice's total revenues, the undisputed facts show that North Carolina dentists – including some of those dentists who complained to the Board about non-dentist teeth whitening – perform teeth whitening in their private practices. *See* CCSMF at 11-12, ¶¶ 37-40; BSMF at 21-23, ¶¶ 37-40. Non-dentists also provide teeth whitening services in North Carolina, and advertise themselves as a lower-priced alternative for dentist teeth whitening. CCSMF at 6, 9, ¶¶ 23, 30; BSMF at 14, 18, ¶¶ 23, 30. Under these circumstances, "common sense and economic theory, upon both of which the FTC may rely," *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 456 (1986), dictate the conclusion that Board actions in this area could be self interested. Absent some form of state supervision, we lack assurance that the Board's efforts to exclude non-dentists from providing teeth whitening services in North Carolina represent a sovereign policy choice to supplant competition rather than an effort to benefit the dental profession.

Our conclusion that the Board must meet the active supervision requirement is reinforced by the Board's accountability to North Carolina's licensed dentists; the six dentist members of the Board are elected directly by their professional colleagues, the other licensed dentists in North Carolina. N.C. Gen. Stat. § 90-22(b); *see also* CCSMF at 1, ¶¶ 1-3; BSMF at 6, ¶¶ 1-3. The dentist members of the Board can run for reelection, and some of them have served two or more terms. CCSMF at 1, ¶ 4; BSMF at 6-7, ¶ 4. The Board's judgment under such economic and political pressures can hardly be characterized as sufficiently independent that the Board may bypass active supervision by the state, yet still enjoy the antitrust exemption accorded only to a state's sovereign acts.

The Board argues that Complaint Counsel has presented no evidence that the individual dentist members of the Board have a financial conflict of interest or that they derived substantial revenues in their private practice from teeth whitening services. *See, e.g.,* Bd. Memo at 38, 40; Bd. Reply at 13-14. We find this argument unpersuasive. First, we hold that the determinative factor in requiring supervision is not the extent to which individual members may benefit from

[13] Because the Board is so clearly controlled by market participants, we need not consider the extent to which the active supervision prong should apply to state regulatory bodies comprising other types of private actors, where the risk of harm to competition and the level of political accountability might be balanced differently.

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 "is heavily involved in the State Board's proceedings," and argues that the Board thus meets the criteria articulated in *Hass* and *Bankers Insurance* that would allow it to bypass the active supervision requirement. Bd. Memo at 32-33. As discussed above, however, rather than formalities such as financial audits of Board funds and taking oaths to uphold the state law, the most salient factor to consider in determining whether active state supervision ought to be required is that the Board is controlled by members who continue to participate in the private market that the Board is charged with regulating. This latter factor, bolstered in this case by the fact that the Board members are selected by other North Carolina dentists, strongly suggests a lack of judgment and control independent of the regulated industry, which are the hallmarks of the *Midcal* active supervision test.

Accordingly, we conclude that for the Board to succeed in its claim of antitrust exemption under the state action doctrine, it must show that it satisfies both prongs of *Midcal*.

2. The Board's Conduct Was Not Actively Supervised

The Board argues that even if it were subject to *Midcal*'s active supervision requirement, the state of North Carolina's oversight of the Board would be sufficient to confer state action protection. *See* Bd. Memo at 34; Bd. Reply at 16-17. We disagree. As discussed above, the active supervision requirement exists to guarantee that self-interested parties are restricting competition in a manner consonant with state policy. In this manner, the active supervision converts private conduct, which is subject to antitrust review, into a sovereign policy choice, which is not. Toward this end, the active supervision requirement "mandates that the State *exercise* ultimate control over the challenged anticompetitive conduct[;] . . . [t]he mere presence of some state involvement or monitoring does not suffice." *Burget*, 486 U.S. at 101 (emphasis added); *see also 324 Liquor Corp. v. Duffy*, 479 U.S. 335, 345 n.7 (1987) (holding that certain forms of state scrutiny of a private restraint did not constitute active supervision because they did

[14] As discussed *infra*, the Ethics Commission review for financial conflicts of interest does not include an examination of substantive Dental Board policies.

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 State, the State Attorney General, and the JLAPOC; and the Board submit an annual audited

[15] *See, e.g.*, N.C. Gen. Stat. § 6-19.1 (attorney's fees to parties appealing or defending against agency decision); N.C. Gen. Stat. § 7A-3 (judicial power, transition provisions); N.C. Gen. Stat. § 50-13.12(a)(1) (forfeiture of licensing privileges for failure to pay child support or for failure to comply with subpoena issued pursuant to child support or paternity establishment proceedings); N.C. Gen. Stat. § 55B-2(3) (definition of professional corporation); N.C. Gen. Stat. §§ 66-58(a) & (e) (sale of merchandise by government units); N.C. Gen. Stat. §§ 66-68(a) & (e) (certificate to be filed; contents; exemption of certain partnerships and limited liability companies engaged in rendering professional services; withdrawal or transfer of assumed name); N.C. Gen. Stat. § 114-8.2 (charges for legal services); N.C. Gen. Stat. §115C-457.1 (creation of civil penalty forfeiture fund; administration); N.C. Gen. Stat. §115D-89 (state board of community colleges to administer Article; issuance of diplomas by schools; investigation and inspection; rules); N.C. Gen. Stat. § 147-69.3 (administration of State Treasurer's investment programs); N.C. Gen. Stat. §§ 153A-134, 160A-194 (regulating and licensing businesses).

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 belong and businesses other than their dental practices. *See* CCSMF at 22-23, ¶¶ 75-76; Newson Decl. at 5, ¶ 11; CX0395; CX0396. The declaration of the Executive Director of the North Carolina Ethics Commission states that "the Commission . . . has not assessed whether Dental Board members have sought to regulate or restrict the business practices of non-dentist providers of teeth whitening services." Newson Decl. at 6, ¶ 14; *see also id.* at 6, ¶ 15 ("The Commission's primary focus is on the avoidance of unlawful conflicts of interest by individual members of covered Boards and other entities; not on the specific substantive actions taken by covered boards."). Similarly, the Board's audited financial statements include no information regarding the Board's actions generally, or its policy regarding non-dentist teeth whitening, specifically. *See* CCSMF at 22, ¶ 73.

In sum, none of these legislative 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.

The Board also points to requirements that it comply with North Carolina's Public Records Act, Administrative Procedure Act, and open meetings law when conducting its business, *see* Bd. Opp. at 29, and to the JLAPOC's power "[t]o review the activities of the State occupational licensing boards to determine if the boards are operating in accordance with statutory requirements." N.C. Gen. Stat. § 120-70.101(3a).[16] The Board, however, presents no evidence that any state actor became aware of the Board's non-dentist teeth whitening policy pursuant to these, or any other, provisions of North Carolina law. Even had these provisions made a disinterested state actor aware of the Board's non-dentist teeth whitening policy, moreover, the Board provides no evidence that the JLAPOC, or any other state actor, reviewed or approved the Board's challenged conduct. For state action purposes, silence on the part of the state does not equate to supervision. In *Ticor*, for example, the Supreme Court rejected the argument that private conduct was adequately supervised when the state merely was made aware

[16] It is unclear whether the JLAPOC even has the ability to review the Board's non-dentist teeth whitening policy to the extent that the Board's actions were classified as "individual disciplinary actions." *See* N.C. Gen. Stat. § 120-70.101(3a) (JLAPOC review "shall note include decisions concerning . . . individual disciplinary actions."). Further, the open records requirement does not guarantee that enforcement actions regarding the unauthorized practice of dentistry will not be addressed in closed session. *See* Board's Resp. and Objections to Compl. Counsel's First Set of RFAs at 17, ¶ 44.

of privately-set rates and took no action, holding that "[t]he mere potential for state supervision is not an adequate substitute for a decision by the State." 504 U.S. at 638. Rather, to satisfy the active supervision standard, a state official must "have *and* exercise power to review particular anticompetitive acts." *Patrick*, 486 U.S. at 101 (emphasis added). Further, the Supreme Court has made clear that ex-post consideration of a restraint via the political process is also insufficient to satisfy *Midcal*'s active supervision requirement. *See Lafayette*, 435 U.S. at 406; *Duffy*, 479 U.S. at 345. Accordingly, the mere fact that the Board's decisions possibly could have been discovered by the public or subject to review by the JLAPOC is not active supervision for state action purposes.

The Board also argues that several other means by which it could exclude non-dentists from performing teeth whitening are subject to state supervision. *See* Bd. Memo at 35. For example, a criminal suit or civil suit to enjoin illegal teeth whitening must be brought in a North Carolina court; a rule on teeth whitening is subject to the state's Administrative Procedure Act and subject to review by legislative committees; and a binding interpretation of the Dental Practice Act regarding teeth whitening must be made pursuant to the state's Administrative Procedure Act. *Id.* Even if ex-post review by a North Carolina court of the Board's decision to classify teeth whitening as the practice of dentistry were to constitute adequate supervision – an issue on which the Supreme Court has yet to decide, *see Burget*, 504 U.S. at 104, and which we do not address – the Board did not choose this path. Rather, the Board evaded judicial review of its decision to classify teeth whitening as the practice of dentistry by proceeding directly to issue cease and desist orders purporting to enforce that unsupervised decision.[17] Similarly, although ex-post judicial, legislative, or executive review of a formal rule making or binding interpretation of the Dental Practice Act might constitute adequate supervision for state action purposes in some circumstances, the Board chose to forgo these formal means to address non-dentist teeth whitening.

In the end, the Board has presented no evidence to suggest that its decision to classify teeth whitening as the practice of dentistry and to enforce this decision with cease and desist orders was subject to any state supervision, let alone sufficient supervision to convert the Board's conduct into conduct of the state of North Carolina.

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We conclude that because the Board is controlled by practicing dentists, the Board's challenged conduct must be actively supervised by the state for it to claim state action exemption from the antitrust laws. Because we find no such supervision, we hold that the antitrust laws reach the Board's conduct.

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[17] Our holding is not meant to suggest that the Board must always proceed directly to court against individuals whom it suspects may be involved in the unauthorized practice of dentistry. For example, the Board may be authorized to send warning letters as incidental to its authority to bring civil actions. We hold only that for the Board to enjoy state action exemption from the antitrust laws, the state of North Carolina must supervise the Board's actions that restrain competition.

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.

EXHIBIT F

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.