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	)	**PUBLIC**
THE NORTH CAROLINA [STATE] BOARD OF DENTAL EXAMINERS,	)	DOCKET NO. 9343
Respondent.	)	

RESPONDENT'S APPEAL BRIEF

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I. STATEMENT OF THE CASE

A. Statement of the Facts.

The factual circumstances surrounding the activities of members of the North Carolina State Board of Dental Examiners ("State Board" or "Respondent") acting pursuant to North Carolina statutes and regulations were described in detail in Respondent's Proposed Findings of Fact & Conclusions of Law, which are incorporated herein by reference. Respondent also provided substantial evidence describing the health and safety issues inherent to non-regulated teeth whitening conducted by non-dentists. All of these proposed findings of fact were supported by substantial evidence in the form of documents and testimony, as indicated in the record. Yet, almost none were adopted by the Administrative Law Judge ("ALJ").

The ALJ engaged in a cherry-picking exercise to consider only evidence of potential economic harm caused by exclusionary conduct. He did not consider the context in which such conduct occurred, *i.e.*, as an enforcement mechanism by a state agency charged by statute with regulating the practice of dentistry in North Carolina. Such enforcement was not meant to deter competition. Rather, as the facts bear out, the State Board merely sought to deter illegal conduct.

Additionally, the ALJ adopted a narrowed definition of the market from the evidence that Complaint Counsel presented at trial; he found that the relevant market only consisted of dentist-provided in-office and non-dentist-provided teeth whitening services. He also failed to address the ample evidence and the State Board's argument that the dentists' revenues from teeth whitening formed a very small percentage of their

practice and had declined recently. When the market is viewed in this context, the conclusion of "concerted action" cannot stand.

1. The State Board's Role as a State Agency.

The North Carolina State Board of Dental Examiners is created by the North Carolina General Assembly, and is the agency of the State of North Carolina charged with regulating the practice of dentistry in the interest of the public health, safety, and welfare of the citizens of North Carolina. Respondent's Proposed Findings of Fact ("RPFF") No. 11. The State Board is organized, exists, and transacts business under and by virtue of the laws of the State of North Carolina, with its principal office and place of business located at 507 Airport Blvd., Suite 105, Morrisville, NC 27560. *Id.* The State Board is authorized and empowered by the General Assembly of North Carolina to enforce the provisions of the Dental Practice Act. RPFF No. 12. Individual members of the State Board are sworn officers of the State of North Carolina. RPFF No. 15. N.C. Gen. Stat. § 90-22(b) provides that the Board shall consist of six practicing dentists, a hygienist, and a consumer representative. RPFF No. 16.

Pursuant to N.C. Gen. Stat. §§ 90-40 and 90-40.1, the State Board and its members have the authority to enforce the provisions of the Dental Practice Act by seeking recourse to the courts of North Carolina. RPFF No. 26; Joint Stipulations ¶ 14. Pursuant to N.C. Gen. Stat. §§ 90-40 and 90-40.1, the State Board is authorized to seek criminal prosecution for the unauthorized practice of dentistry, RPFF No. 28, and also to seek injunctions for the unauthorized practice of dentistry. RPFF No. 29. Pursuant to N.C. Gen. Stat. §§ 90-40 and 90-40.1, the North Carolina General Assembly has given the State Board the authority to petition a North Carolina court, either on its own or with

the assistance of a District Attorney, to stop violations of the Dental Practice Act. RPFF No. 30. Consistent with this authority, the State Board has sought civil and criminal relief in North Carolina courts under the Dental Practice Act. RPFF No. 46; Joint Stipulations ¶ 13.

N.C. General Statute § 93B provides that all occupational licensing boards in North Carolina, including the State Board, are state agencies and that board employees are state employees. RPFF No. 32.

The definition of the unlawful practice of dentistry as it relates to teeth whitening has remained the same as enacted by the N.C. General Assembly in N.C. Gen. Stat. § 90-29 in 1935. RPFF No. 67. N.C. Gen. Stat. § 90-29 provides that it is illegal to engage in the practice of dentistry without a license, and that

> [a] person shall be deemed to be practicing dentistry . . . who does, undertakes or attempts to do, or claims the ability to do any one or more of the following acts:
>
> (2) Removes stains, accretions or deposits from the human teeth;
> (7) Takes or makes an impression of the human teeth, gums or jaws;
> (13) Represents to the public, by any advertisement or announcement, by or through any media, the ability or qualification to do or perform any of the acts or practices set forth [] above.

Dentist members of the State Board are knowledgeable about teeth whitening because they took courses in dental schools and/or received training either through continuing education courses or from manufacturers as part of their practice. RPFF No. 68. Based on this background and their actual experience with teeth whitening, both current and former State Board members who are dentists consider teeth whitening to be

the removal of stains from teeth.[1] RPFF No. 69. The State Board's interpretation of the statute was based on the State Board's public protection duties as they relate to the unauthorized practice of dentistry. RPFF No. 70. The State Board did not see any necessity to promulgate a rule on the unauthorized practice of teeth whitening since the statute was clear. RPFF No. 71. This view was corroborated by evidence presented at the hearing. For instance, Dr. Haywood, Respondent's expert in the fields of practical and clinical esthetic and restorative dentistry, testified that dental school students are taught that bleaching is the removal of stains. RPFF No. 366. Even testimony from members of the non-dentist teeth whitening industry indicated that they viewed the use of their teeth whitening products to be the removal of stains. RPFF No. 371 (testimony of George Nelson and Bryan Wyant); Wyant, Tr. 906;[2] Nelson, Tr. 817-819.[3]

The North Carolina General Assembly's Joint Legislative Administrative Oversight Committee does not have the authority to interpret laws – it is the State Board's dictate to enforce the unauthorized practice statute of the Dental Practice Act. RPFF No. 72. To accomplish this, State Board members use their knowledge and common sense. *Id.* The State Board relies on North Carolina's courts to correct its statutory interpretations, but the courts have not done so to date. *Id.* The State Board formally adopted an interpretive statement incorporating its definition of the unauthorized practice of dentistry on January 9, 2010. RPFF No. 73. The State Board's interpretation is that the unauthorized practice of dentistry does not include the sale of over-the-counter

[1] Additionally, many of the non-dentist teeth whiteners investigated by the State Board were found to have committed violations of the Dental Practice Act for taking impressions and for advertising that they could remove stains.

[2] Question by Mr. Nichols: "And so to clarify, your understanding of what the WhiteScience product you used, it was designed to remove stains." Response by Mr. Wyant: "The product itself?" Mr. Nichols: "Yes, sir." Answer by Mr. Wyant: "Yes."

[3] Mr. Nelson: " … there is no teeth whitening, no such thing as teeth whitening. … So the only thing that teeth whitening is – and that's just a marketing term -- is actually stain removal…."

teeth whitening products that consumers apply themselves; rather, it is the offering of a teeth whitening service. RPFF No. 74.

All Board members are required to take an oath that they will uphold the laws of North Carolina and protect the health, safety, and welfare of the public, RPFF No. 75, and, accordingly, are required by law to investigate and act against violations of the Dental Practice Act. *See* N.C. Gen. Stat. § 90-41. They also undergo ethics training once every two years pursuant to the North Carolina State Government Ethics Act, and are required to take an ethics course within six months of being elected to the State Board pursuant to N.C. Gen. Stat. § 138A-14(b). RPFF No. 76. The North Carolina State Ethics Commission "regulates the Dental Board's conduct as it pertains to compliance with the Ethics Act and Lobbying Law." RPFF No. 80; N.C. Gen. Stat. § 138A-10.

2. The State Board's Investigative Activities.

Although the ALJ found that there was concerted action by the State Board, the record clearly revealed that there was no direct evidence of advance discussion and formal approval by Board members of cease and desist letters. Even factual findings made by the ALJ regarding the State Board's investigation of non-dentist teeth whitening did not identify any sort of advanced discussion. See FF Nos. 264, 276, 289, 317and 321. Instead, the evidence presented in the record and at the hearing revealed that teeth whitening cases were investigated by the State Board on a case-by-case basis. See RPFF Nos. 100, 101-237.

Additionally, the investigative process of the State Board was properly authorized. The evidence revealed that the State Board is complaint driven and will not open a case upon its own volition. RPFF No. 238. The majority of the complaints that the State Board receives come from the public. This can include other dentists and dental

hygienists, but could also be from insurance companies who believe that they have discovered fraud. RPFF No. 240.

When a complaint comes in, it is assigned a number by the director of investigations and sent to the Secretary-Treasurer, who evaluates it for jurisdictional issues and assigns it to a case officer. The Secretary-Treasurer will not assign a case to a Board member if the dentist complained of is in the same geographic area of the state in which the Board member practices. RPFF No. 245. Once a case is assigned by the Secretary-Treasurer to a case officer, the case becomes that case officer's responsibility. The case officer has discretion in running the case, including sending out letters to collect more information, ordering further investigation, having the patient evaluated, and sending out a cease and desist letter. RPFF No. 246. Other members of the Board do not have knowledge of a case assigned to a case officer; only that case officer and the investigative panel know the details of the case. RPFF No. 251. Also, a case officer does not have knowledge of other cases handled by a separate case officer, RPFF No. 253, and the details of an investigation remain confidential until the investigation is concluded. RPFF No. 254.

If a case officer learns that a non-dentist is providing dental services, the case officer would send an investigator to investigate and gather more information. RPFF No. 247. If the case officer finds evidence of a violation, the individual case officer can instruct the Board attorney or staff to send a cease and desist letter or file an injunction. RPFF No. 248. There no evidence in the record of a contract, combination or conspiracy in that individual decision. Indeed, there is no evidence that any other licensee members knew about those decisions. Nor is there any evidence that any case officer handled a

case against any of his competitors, or caused to be issued a cease and desist letter to any of his competitors. In fact, case officers were not assigned to matters in the same geographic area of the state in which the Board member practices. RPFF No. 245. Also, the cease and desist letters are not drafted by Board members; they are drafted by the State Board's legal counsel. RPFF No. 282.

Further, despite the ALJ's finding of concerted action, there was no direct evidence of an agreement to request that the North Carolina Board of Cosmetic Art Examiners post notice of the State Board's position on its website (entire record).

3. The Health and Safety Issues of Non-Dentist Teeth Whitening.

In addition to not concluding that the State Board is a state agency of North Carolina acting pursuant to a clearly-defined statute, the ALJ also explicitly refused to consider the public policy justifications for excluding illegal teeth whitening by unlicensed practitioners.

Dr. Haywood, the State Board's expert in the fields of practical and clinical esthetic and restorative dentistry, testified to numerous health and safety issues associated with teeth whitening conducted by untrained personnel who are not supervised by a licensed dentist:

- Non-dentists who provide teeth bleaching treatments convey the illusion of having dentist supervision by the use of chairs and lights similar to what might be found in a dentist office. RPFF No. 376.

- Because of the equipment used by non-dentist teeth whiteners, such as chairs similar to the ones used by dentists, there is an illusion of people having dental training. RPFF No. 377.

- Non-dentists who encourage or direct a customer during the bleaching process may give the illusion that they are a dentist who possesses the knowledge of a dental professional about teeth whitening. RPFF No. 378.

- In Dr. Haywood's opinion, non-dentists who perform teeth whitening are presenting themselves as a health professional such as a dentist, with the attendant training and skill to be able to diagnose and treat patients for dental conditions such as tooth discoloration and stains. RPFF No. 379.

- The correct diagnosis is important to avoid inappropriate treatment and ensure that appropriate treatment is not delayed. This often requires a radiograph or an x-ray to determine the cause of discoloration. RPFF No. 380.

- Kiosk personnel cannot examine a customer for cancer, decay, restorations, or temporomandibular joint problems. They cannot take radiographs or perform an esthetic evaluation as dentists can prior to teeth whitening. RPFF No. 381.

- In order to properly perform teeth whitening, one has to know the side effects of other conditions or other problems that may be intertwined with treatment. One must identify the existing restorations, which will not change color, and use the appropriate materials both in composition and in concentration and, if using tray bleaching, use the custom-fitted tray for the least amount of material used. RPFF No. 382.

- Dr. Haywood's main concern regarding non-dental teeth bleaching is the safety issues that may result from the lack of diagnosis for proper treatment, as well as the potential for a less esthetic outcome. RPFF No. 383.

- Non-dentists do not have training to deal with allergic reactions to teeth whitening agents or if someone was to aspirate or gag on the impression material. RPFF No. 384.

Dr. Haywood pointed out several ways in which teeth whitening supervised or conducted at the direction of a dentist is much safer. For instance, dentists are able to prescribe custom-fitted trays, whose design is based on the patient, the material, and the situation. The tray can be a full arch tray or cover all the teeth, or it could only cover one tooth. The dentist may decide to take the tray off of the tissue to avoid tissue irritation with a certain patient. RPFF No. 385.

Other concerns that can be addressed by dentists are infection control and sanitation, which are critical issues for the delivery of patient care, including teeth bleaching. RPFF No. 386. Proper gloving, proper masking, and proper disinfectants are

all part of what a dentist does to ensure the health and safety of his/her patients. RPFF No. 387.

Additionally, dentists are governed by the American Dental Association's code of ethics, which Dr. Haywood paraphrased in his hearing testimony as "to do no harm to patients, to take care of them, do the right thing and be truthful about what we do." RPFF No. 388. As unlicensed practitioners that are not subject to any regulatory schemes (teeth whiteners at mall kiosks merely need a business license to operate there), non-dentist teeth whiteners are not subject to any code of ethics or in fact any safety precautions other than the ones they choose to put in place on their own.

Dr. Haywood summarized his concerns regarding non-dentist teeth whitening as follows: (1) non-dental teeth bleaching does not involve a diagnosis for proper treatment and can mask the pathology for such treatment in the future; (2) non-dental teeth bleaching carries the potential for a less esthetic outcome (*e.g.*, restorations are not identified, root canals are not known); (3) the safety of higher concentrations of teeth whitening solutions is unknown (*e.g.*, there has been no research for concentrations of hydrogen peroxide above 15%); (4) the quality of some products is unknown, especially with respect to issues involving pH, allergic ingredients, or other ingredients; and (5) the patient may not receive any or the maximum benefit available for whitening, and may waste money on ineffective products. RPFF No. 395.

The American Dental Association ("ADA") has also raised concerns about non-dentist teeth whitening. The ADA's House of Delegates (its legislative body) adopted a policy position that directed ADA staff to prepare an ADA position paper explaining the safety issues and concerns about teeth bleaching, and tasked the ADA Council on

Scientific Affairs with drafting a report about those concerns. RPFF Nos. 389 and 390. The ADA House of Delegates' adopted policy stated, as the ADA's official position, the ADA's concerns about the public safety of non-dentist bleaching. As part of the policy position initiative, Dr. Haywood and others were requested to draft the report to list and enumerate all the components of a proper dental exam and implications the application of bleaching materials by non-dentists without benefit of a dental exam prior to teeth whitening. Dr. Haywood and others were also asked to address the safety issues and the concentration maximums that might be appropriate. RPFF No. 392.

Dentists testifying during their depositions and at the hearing in this matter cited a number of safety concerns about sanitation and other health issues. *See* RPFF Nos. 425-458. For instance, dentists have a professional obligation to ensure the safety of their patients, and cannot evade personal liability for their own malpractice. RPFF No. 425. In contrast, non-dentist teeth whiteners testified at the hearing that they utilized liability waivers. RPFF No. 631 (admission of James Valentine of White Smile USA that his company requires customers to sign liability waivers).

Finally, the record reflected complaints by consumers who cited safety concerns associated with non-dentist teeth whiteners and claimed to have been harmed by them. *See* RPFF Nos. 460-512 (Brian Runsick's testimony describing lax sanitation methods of non-dentist teeth whiteners and how his gums bled for days after a procedure); RPFF Nos. 513-531 (complaints of three other consumers who suffered severe reactions after undergoing teeth whitening procedures at a mall kiosk and a tanning salon).

4. The Administrative Law Judge's Market Definition.

Despite the evidence and arguments set forth by both Complaint Counsel and State Board counsel at the hearing that the relevant market consists of four different

products/services, specifically: (1) over-the-counter ("OTC") teeth whitening kits, (2) non-dentist-provided teeth whitening services, (3) dentist-provided in-office teeth whitening, and (4) dentist-provided take-home teeth whitening, the ALJ found that the relevant market consisted only of dentist-provided in-office and non-dentist-provided teeth whitening services. However, much of the market data presented at trial and cited in the ALJ's Opinion did not account for differences among the four products/services and/or considered only the four products/services in the aggregate. Because the ALJ did not account for these distinctions in limiting his analysis to a relevant market consisting only of the two non-take-home types of teeth whitening services, his analysis and conclusions of law are based on flawed or partial data. As a result, the ALJ's analysis and application of the revenues of dentist-provided teeth whitening is erroneous.

On page 75 of the Initial Decision, in support of his findings that the State Board is controlled by member dentists who "have competing economic interests with respect to non-dentist teeth whitening services," the ALJ cited the revenues of Board member dentists and concluded that the State Board is controlled by member dentists who "have competing economic interests with respect to non-dentist teeth whitening services" and concluded that they "have a financial interest in the business of teeth whitening." He stated that "[s]ome dentists in North Carolina earned thousands of dollars annually in revenues from the provision of teeth whitening procedures during the period from 2005 until August 2010," and in support thereof he cited his own factual findings that are based on the revenues presented by several dentists who submitted complaints to the Board regarding non-licensed teeth whiteners.

The ALJ's reliance on this data after limiting his analysis of the relevant market for teeth whitening services to "teeth whitening performed in one session" – either in the office by dentists or by non-dentists in a spa/kiosk -- is flawed and cannot properly support his conclusion that dentists have a significant financial interest in preventing non-dentist teeth whitening. The evidence that the ALJ relies on for his factual findings numbered 104 and 233 to conclude that dentists "earned thousands of dollars annually in revenues" is based on several dentists' responses to Complaint Counsel's subpoenas *duces tecum*. The revenue figures are labeled "TOTAL TOOTH WHITENING PRODUCT AND SERVICE REVENUES," but there is no specification as to what percentage of such revenues is attributable to take-home trays, in-office whitening, or simply the sale of over-the-counter products. Thus, these revenues are not specific enough to be properly used by the ALJ to make findings regarding the financial motivations of dentists with respect to the in-office (as opposed to at-home or OTC) teeth whitening market.

In fact, evidence submitted at the hearing showed that for many dentists, very little of their teeth whitening revenues came from the provision of in-office teeth whitening. For instance, Dr. Hardesty testified that he no longer even uses his in-office Zoom system, and instead now relies exclusively on take-home trays for his teeth whitening services. (Hardesty, Tr. 2775). Testimony given by numerous dentists before and during the hearing demonstrates that Dr. Hardesty's experience is typical of dentists, and that dentists' revenues from in-office teeth whitening are either insubstantial or nonexistent.

For instance, the ALJ's finding of fact number 9 stated that "[m]any of the dentist Board members provide teeth whitening services through their private practices and derive income from it." The ALJ then cites a number of dentists' testimony, including Dr. Allen, Dr. Burnham, Dr. Feingold, Dr. Morgan, Dr. Owens, and Dr. Wester. Yet these individuals provided testimony indicating how little of their teeth whitening revenues actually came from in-office procedures, and **many of them do not administer any in-office teeth whitening at all**:

- **Dr. Allen** does not perform in-office teeth whitening; he offers "home applications using custom trays that were made in the office and a bleaching kit that we purchased from the manufacturer." (RX49 at 6 (Allen Dep. at 18)).

- **Dr. Burnham** testified that in his practice, both in-office and take home teeth whitening is performed. (CX556 at 39 (Burnham Dep. at 146-147)). However, the Zoom method has not been used by anyone in his office "in months." (CX556 at 39 (Burnham Dep. at 148)).

- **Dr. Feingold** has literally performed only one single Zoom teeth whitening treatment, the remainder of his services were take-home. (RX56 at 4 (Feingold Dep. at 10-11)). For his one Zoom treatment, the fee was $500. (CX560 at 48 (Feingold Dep. at 183)).

- **Dr. Hardesty** currently offers teeth whitening services using a take-home tray system. (CX565 at 5 (Hardesty Dep. at 15)). Dr. Hardesty used the Zoom system at one point in his practice but no longer does so. (CX565 at 26 (Hardesty Dep. at 98)). Dr. Hardesty testified at the hearing in this matter on March 10, 2011 that his Zoom equipment has been sitting unused in his office for three or four years. (Hardesty, Tr. 2804-2805). He also testified at the hearing that when he used the Zoom system, his patients would receive a take-home kit that they used in conjunction with the in-office treatment. (Hardesty, Tr. 2808-2809). Receipt of the take-home kit was not an option – the Discus Dental kits that he purchased for in-office use also contained take-home bleach and materials to fabricate the take-home trays, which he would provide to every patient. (Hardesty, Tr. 2808-2809).

- **Dr. Holland** does take-home tray whitening exclusively; he typically has his teeth whitening patients come in for two appointments. (RX563 at 14 (Holland Dep. at 49-51)).

- **Dr. Morgan** has never performed in-office teeth whitening. (RX65 at 9 (Morgan Dep. at 30)).

- For his teeth whitening patients, **Dr. Owens** uses a combination of the in-office Zoom procedure and take-home trays. (CX570 at 44 (Dr. Owens Dep. at 169-170)). Dr. Owens' patients receive an in-office Zoom treatment and are provided with a custom-made whitening tray that they utilize at home for a week or two after their office visit. (CX570 at 44 (Dr. Owens Dep. at 169-170)). Dr. Owens also testified at the hearing on March 1, 2011, that the Zoom process involves the in-office whitening and taking impressions for the take-home "part of the process" during the same visit. (Owens, Tr. 1618-1621).

- **Dr. Wester** uses take-home trays for his teeth whitening procedures; he does not use "the laser or LED light-activated Zoom! whitening system or something like that." (CX572 at 9 (Wester Dep. at 21-22)).

Further, for a significant period of the time in question, the Board President or the case officer was not even engaged in the teeth whitening business (entire record).

The ALJ cited the testimony of these dentists for the revenue figures that he included in his findings numbered 10-11, 104 and 233,[4] but completely failed to account for the fact that their testimony in the record demonstrates the utter inapplicability of such revenue figures to his market definition.

In addition, the ALJ did not account for the fact that some of the non-dentist businesses simply sold over-the-counter products and provided no services. Clearly, these sales should be part of the market analysis. Yet the ALJ explicitly stated that take-home products are not "reasonable substitutes," for the purpose of his legal analysis, to the one-stop kiosk or spa-provided teeth whitening services offered by non-dentist teeth whiteners. Initial Decision at 32-33, 69. In short, the data on which the ALJ relies for his

[4] All of the dentists involved in this matter requested that their identities remain anonymous in conjunction with the public use of their revenues. It should be noted that the ALJ appears to have allowed other dentists such anonymity in his ruling, but failed to do so here for Dr. Owens in the ALJ's finding numbered 10. Dr. Owens was never advised by Complaint Counsel, in accordance with FTC Rule 3.45(b), that his confidential information would be used after he requested anonymity.

findings is almost completely unsuitable for his analysis and the conclusions of law that he makes based upon such findings.

The ALJ also disregarded Respondent's evidence that teeth whitening did not constitute a significant portion of Board members revenues. Testimony at the hearing and depositions taken in the matter demonstrated that teeth whitening comprised only one or two percent of the total practice revenues of most of the current or former dentist Board members, and one did not perform any teeth whitening at all. RPFF No. 602. Some current or former dentist State Board members also testified that their revenues from teeth whitening had decreased during the past five years. RPFF No. 603. Such revenues already constituted a very small percentage of these dentists' practices when such revenue figures included take-home teeth whitening products. When dental take-home teeth whitening kits and over-the-counter kits are removed from consideration, such revenues become dramatically lower.

The ALJ concluded that the State Board was engaged in concerted action "based on th[is] evidence." See Initial Decision at 75-76, 94. But, as illustrated above and discussed more fully in Section II.B, the evidence the ALJ relied on is flawed based on his market definition.

5. Mischaracterization of Dr. Baumer's Testimony.

The ALJ's Finding of Fact number 12 mischaracterizes Dr. Baumer's testimony regarding the financial interests of the Board members. This finding accepts a blatant mischaracterization of Dr. Baumer's testimony that was made by Complaint Counsel in its proposed findings of fact, despite the fact that Dr. Baumer's testimony was taken out of context and did not actually support this finding. Respondent made the following

response to Complaint Counsel's proposed factual finding regarding Dr. Baumer's testimony:

> The citation of Dr. Baumer's deposition testimony for the first sentence blatantly misrepresents his testimony. Dr. Baumer only said that [it] is "possible" that the financial interests of dentists could affect the Board's judgment as to whether or not to ban teeth whitening. He then went on to point out that doing so would be a breach of their duty as sworn public servants, but allowed that for some degree of it is human nature. But he pointed out that Board members have gone to great lengths to avoid the appearance of impropriety by not assigning cases to case officers in the same geographic area, and also noted that for a member of the Board that derived less than 1 percent of their revenue from teeth whitening, their financial interest is far less significant than if they derived 25 percent of their revenue from it. (Baumer, Tr. 107-108). **Nowhere in Dr. Baumer's cited testimony does he define the Board members interest as a "nontrivial financial interest."**

Respondent's Replies to Complaint Counsel's Proposed Findings of Fact No. 534 (emphasis added). The effect of this finding is that Dr. Baumer is on the record as saying that "Board members have a significant, non-trivial financial interest in the business of their profession," when this was not his testimony.

6. Reliance on Dr. Giniger's Testimony Without Proper Foundation.

The ALJ made a number of findings based on Dr. Giniger's testimony despite the fact that such testimony lacked proper foundation.

The ALJ's finding of fact number 100 cites Dr. Giniger's testimony and basically accepts his testimony that "bleaching" is a different method of teeth whitening from "stain removal," which the ALJ appears to correlate with the physical (not chemical) stain removal through techniques such as scaling. This implicitly addresses the Board's argument that it was acting pursuant to its enforcement authority of the Dental Practice Act's prohibition against unlicensed "stain removal," despite the ALJ's insistence in his

Initial Decision that he was not considering whether the State Board was acting pursuant to a state statute.

The ALJ's finding of fact number 140 inexplicably states that the concentration of hydrogen peroxide for non-dentist teeth whitening is "typically" 16%. But there is no proper basis for this statement other than Dr. Giniger's testimony. Dr. Giniger by his own admission conceded that he lacked a proper foundation for such an assertion: he testified at the hearing that he had only visited one teeth whitening kiosk during his visit to North Carolina. (Giniger, Tr. 360) (testifying that he only observed one single kiosk in North Carolina). Thus the ALJ blindly accepted Dr. Giniger's assertion regarding characteristics of products sold by non-dentist teeth whiteners in North Carolina despite his almost complete lack of familiarity with them.

Similarly, finding of fact number 141 makes broad assumptions about what types of bleaching procedures and delivery systems are used by non-dentist teeth whiteners. Yet as Dr. Haywood pointed out in his testimony, there is no way to know what concentration of peroxide non-dentist teeth whiteners are providing to customers or whether they are actually using pre-impregnated trays. (Haywood, Tr. 2546-2547) ("The problem here is we don't know what are in the ingredients that non-dentist folks are using . . . we don't have any data on that. The higher the concentration, the greater concern for systemic problems."). Finding number 141 is based solely on Dr. Giniger's testimony, which as described above lacked a proper basis.

7. Other Inaccuracies in the Administrative Law Judge's Findings.

Respondent has noted other findings by the ALJ that do not properly reflect the record. For instance, finding of fact number 268 inaccurately finds that WhiteScience's

sales in North Carolina "evaporated to nothing" as a result of the State Board's conduct. But Nelson later admitted on cross that his company continued to do business in North Carolina. (Nelson, Tr. 809-811) ("We did continue to market [in North Carolina].").

Finding of fact number 205 states that "[a]t the April 4, 2008 tripartite meeting, the NCDS [North Carolina Dental Society] 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." In support of this finding, the ALJ cites Dr. Hardesty's deposition and minutes from a Board meeting, and appears to rely on Complaint Counsel's proposed finding numbered 223. Yet he appears to have completely disregarded Respondent's response, which pointed out how this proposed finding mischaracterized the record. Respondent's original response is reprinted in its entirety below:

> Respondent disputes this proposed finding of fact as a mischaracterization and misrepresentation of the record. The Tripartite Report for the April 4, 2008 does not mention any discussion of teeth whitening kiosks. (CX176 at 2). Board members and members of the Dental Society have testified that there were no conversations or other communications about the unlicensed practice of dentistry at Tripartite meetings. (RX52 (Burnham, Dep. at 236); RX56 (Feingold, Dep. at 258); RX75 (Oyster, Dep. at 73-74); RX76 (Parker, Dep. at 231)). Further, the portion of Dr. Hardesty's hearing testimony cited by Complaint Counsel in support of this proposed finding of fact merely describes what a Tripartite meeting is. (Hardesty, Tr. 2866). In his deposition, Dr. Hardesty expressed some uncertainty about whether all of the topics to be presented by the Tripartite meeting were addressed by the Society. (CX259 (Hardesty, Dep. at 259-260).

B. Summary of the Argument.

Despite the lack of evidence of any conspiracy by the State Board to restrain trade in illegal teeth whitening services, and despite the lack of any legal analysis of the State

Board's procompetitive justification for its actions, the ALJ decided that the State Board has violated the FTC Act.

The ALJ determined that the State Board acted in concert to restrain the trade in non-dentist supervised teeth whitening services in North Carolina. The ALJ claimed to conduct a rule of reason inquiry into whether the State Board's supposed actions were allowed based on a procompetitive justification. But in reality this inquiry just consisted of explaining that the State Board's most important procompetitive justification (that it acted pursuant to a clearly articulated state law) was irrelevant. After reaching these conclusions, the ALJ drafted an Order preventing the State Board from enforcing the relevant state law, and imposing a series of additional reporting requirements, effectively placing the enforcement of a portion of the North Carolina Dental Practice Act under Commission control.

The Commission should reverse the ALJ's finding that the State Board violated the FTC Act in its actions against illegal teeth whitening service providers.

II. SPECIFICATION OF QUESTIONS INTENDED TO BE URGED

1. Whether the State Board may be an "agent of the state" for the purpose of claiming Commission jurisdiction, but not an "agent of the state" for the purpose of claiming state action immunity.

2. Whether a violation of the FTC Act can be proven without evidence that the State Board conspired to restrain the trade in illegal teeth whitening services.

3. Whether a rule of reason analysis of the State Board's actions must include consideration of the State Board's primary procompetitive justification for its actions: that

its conduct was mandated under a clearly articulated and affirmatively expressed state law.

III. ARGUMENT

Prior to the commencement of the hearing in this matter, the Federal Trade Commission ("Commission" or "FTC") rejected the Respondent's state action immunity defense. This denial is counter to federal legislative intent and decades of clear federal court precedent promising state agencies such immunity. Moreover, it effectively reduced the Administrative Law Judge's analysis of this case to a series of contradictory conclusions, ignoring the central issue in this matter: whether the State Board acted pursuant to state law. Instead, the ALJ treated the State Board like a cabal of private competitors engaging in a covert and unfair scheme to drive competitors out of business.

In his Initial Decision, the ALJ erroneously considered irrelevant the fact that the State Board has a duty to enforce the North Carolina Dental Practice Act, N.C. Gen. Stat. § 90-22 *et seq*., and the fact that the State Board's allegedly anticompetitive actions were taken to protect legal competition and the public welfare against a widely-recognized threat. Initial Decision, at 81-82, 100, 104-06. Eliminating the question of whether the State Board was enforcing a state law produced the following result in the instant case: a state agency such as the State Board violates the federal antitrust laws whenever the state agency enforces clearly articulated statutory prohibitions against unauthorized practice.

If the ALJ's Initial Decision in this matter is allowed to stand, state professional regulation as we know it will cease to exist. The Commission has sought this result for years. According to the Commission, a majority-licensee state agency enforcing a state

law is identical to a trade association or a group of private companies forcing a backroom deal on competitors and consumers for the sole purpose of profit. Fed. Trade Comm'n, Report of the State Action Task Force at 37 *et seq.* (2003). The refusal to even consider statutory enforcement as a factor forces every board member in every state licensing board to violate the sworn duty to protect the public by allowing the illegal practice of a state regulated profession despite clear statutes defining professional practice. Initial Decision, In the Matter of the North Carolina [State] Board of Dental Examiners at 124-126 ("Initial Decision"); N.C. Gen. Stat. § 90-29(b)(2).

Notwithstanding the separate issue of state action, the undisputed fact is that the unlicensed removal of stains from teeth prohibition is not found in a Board decision adopted via rule or policy, but is found in the North Carolina statute – not State Board rules, but state law (a critical distinction, apparently lost on at least some members of the Commission).[5] The precise wording of the state law requires licensure for "undertak[ing] or attempt[ing] … or claim[ing] the ability" to "remove[] stains, accretions or deposits from the human teeth." N.C. Gen. Stat. § 90-29(b)(2).

The ALJ's Initial Decision inevitably is not just on a state agency, but on a state statute itself, and the state government as a whole. The Initial Decision would undermine

[5] The Commission appears to be confused over this critical point. In a recent article attempting to rationalize the FTC's action against the State Board, a recused Commissioner erroneously wrote that a board rule, rather than a statute, is at issue in the proceeding. Julie Brill, *Competition and Consumer Protection: Strange Bedfellows or Best Friends?*. The Antitrust Source, Dec. 2010 at 4. Further, the FTC's expert economist witness mistakenly premised his entire economic opinion upon the assumption that a rule, rather than a statute that the Board must enforce, was at issue in the FTC administrative proceeding. *See* Expert Report at 10 (concluding that "[t]he Board could have adopted or advocated less restrictive alternatives" but ignoring that the Board is acting pursuant to a statute it is charged with enforcing) (Kwoka, Tr. 1148) (admitting that in writing his report and concluding the Board could have adopted a less restrictive alternative that he did not know whether the Board had any discretion in enforcing a statute: "I haven't looked at the prerogatives and range of discretion of the board. I don't know what specifically are the boundaries of what it can and cannot do."). The FTC's administrative Complaint did not mention a single state statute. The misunderstanding or indifference was also exemplified by Complaint Counsel's use of an out-of-date version of North Carolina's Dental Practice Act throughout depositions.

any states' prerogative to protect its citizens through the regulation of the practice of dentistry within its borders. This is contrary to federal antitrust laws, as argued throughout this case, and to the fundamental division of powers between state and federal government. See, e.g., Lambert v. Yellowley, 272 U.S. 581, 596 (1926) ("There is no right to practice medicine which is not subordinate to the police power of the States."); Cal. State Bd. of Optometry v. Fed. Trade Comm'n, 910 F.2d 976, 981-82 (D.C. Cir. 1990), reh'g denied, 924 F.2d 243 (D.C. Cir. 1991) (vacating FTC rule that prevented a state agency from imposing certain restrictions on the practice of optometry, as "state regulation of the practice of optometry is a quintessentially sovereign act"); see also Fed. Trade Comm'n, Enforcement Actions in Industry/Sector: Health Care at 7, *available at* http://www.ftc.gov/bc/caselist/industry/cases/healthcare/HealthCareAll.pdf (tacitly acknowledging that health care, *i.e.*, medicine, is the central issue in the instant case).

The following legal argument sets forth (1) the flaws in the ALJ's Initial Decision regarding jurisdiction; (2) the reasons why no combination, contract, or conspiracy or restraint on trade existed in this case; and finally (3) even if a restraint on trade occurred, why procompetitive justifications permit the restraint.

A. The Administrative Law Judge Did Not Have Jurisdiction to Hear the Instant Case.

1. The Administrative Law Judge Incorrectly Concluded that the State Board Is a "Person" Within the Meaning of the Federal Trade Commission Act.

Seeking to establish the Commission's jurisdiction over the State Board, the ALJ first decided that the State Board was a "person" within the meaning of the FTC Act (which 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). However, this determination conflicts with decades of case law finding state agencies to be "agents of the state" and therefore immune from antitrust law.

Referencing the Commission's denial of the State Board's Motion to Dismiss, the ALJ looked to the holding in Massachusetts Board of Registration in Optometry for guidance on the jurisdiction issue.

> [B]ecause 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. [A] state board is a "person" for purposes of jurisdiction under the FTC Act.

Initial Decision at 59 (citing In re Mass. Bd. of Registration in Optometry,110 F.T.C. 549, 1988 FTC LEXIS 34 (1988) (emphasis added)). However, numerous courts have concluded that "agents of the state," *e.g.*, local governments and state agencies, the very term that the ALJ used, are unequivocally immune from federal antitrust law. Parker v. Brown, the seminal state action immunity case, explains that there was no congressional intent to subject agents of state, acting pursuant to state law, to federal antitrust law.

> We find 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. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.

Parker v. Brown, 317 U.S. 341, 350-51 (1943); see also, Deak-Perera Hawaii, Inc. v. Dept. of Transp., 553 F. Supp. 976, 979 (D. Haw. 1983) ("For the [Department of Transportation] to have state-action immunity in its grant of the exclusive concession here in question, it must either show that … it is an agent or instrumentality of the state acting as sovereign and as such is entitled to state-action immunity.") (emphasis added).

By the ALJ's tautological reasoning, the State Board is subject to Commission jurisdiction because it is a "person" as defined by the FTC Act. It is a person because it is an "agent of the state," and according to the Commission's own prior decision, a majority-licensee state agency is an agent of the state. Yet, when the fundamental Supreme Court case establishing state action immunity explains that agents of the state acting pursuant to state law are immune from federal antitrust law, there is some difference? Perhaps the difference is that the State Board was not acting pursuant to state law? But no, neither the Commission nor the ALJ have been able to show that North Carolina state law did not prohibit unlicensed teeth whitening services. Can a state agency be an agent of the state but not an agent of the state? This distinction was not lost on the court in the California State Board of Optometry case, which held that the state was a "person" for antitrust law purposes, but not when acting in its sovereign capacity. California State Bd. of Optometry v. Fed. Trade Comm'n, 910 F.2d 976, 980 (D.C. Cir. 1990).

The ALJ declines to offer any solution to the logical puzzle he and the Commission have created. This contradiction is not merely an incidental, quirky little mistake by the ALJ; it is the fundamental problem with this case. By setting aside the issue of state action immunity, the ALJ and the Commission have pieced together an argument that is simply a series of blatant contradictions.

B. The Administrative Law Judge Incorrectly Determined that the State Board Agreed to Unreasonably Restrain Trade in the Relevant Market.

The ALJ stated that an antitrust violation was proven by (1) participation in an agreement that (2) unreasonably restrains trade (3) in the relevant market. Initial Decision at 63 (citing Wampler v. Southwestern Bell Tel. Co., 597 F.3d 741, 744 (5th Cir.

2010) *et al*.). The ALJ concluded that the State Board's enforcement of state law met these three criteria, but this is not a correct conclusion. The ALJ made a very serious error in defining the relevant market for teeth whitening services in North Carolina. Therefore, his conclusions are incorrect regarding the existence of an agreement to restrain trade among State Board members. Thus, the actions of the State Board did not unreasonably restrain trade. See discussion, *supra*, in the Statement of Facts, Sections I.A.2 and I.A.4.

1. The State Board Did Not Undertake a Contract, Combination, or Conspiracy to Restrain Trade.

The State Board is not capable of engaging in concerted action under the FTC Act. First, the evidence does not show that the State Board's decision-makers consist of "separate economic actors" with separate economic interests, whose joint decisions could deprive the marketplace of "actual or potential competition." Amer. Needle, Inc. v. NFL, 130 S. Ct. 2201, 2212-13 (2010)) ("while the president and a vice president of a firm could (and regularly do) act in combination, their joint action generally is not the sort of 'combination' that § 1 [of the Sherman Act] is intended to cover"). Importantly, the ALJ gave no consideration to the state laws that prohibit the State Board members from operating as such economic actors and relied instead on inaccurate findings to infer that the State Board members have a financial interest in the business of teeth whitening. See Statement of Facts, *supra*, Sections I.A.1. through 4.

Second, even if the State Board members were capable of engaging in concerted action—which they are not—there is no evidence to support a finding that State Board members did so in this case. In reaching the conclusion that the State Board members entered into an agreement to exclude non-dentist teeth whitening services from the

market, the ALJ relied substantially on the fact that the "cease and desist" letters at issue were similar in form and substance. See Initial Decision at 78. As set forth more fully in the Statement of Facts, such a finding ignores credible evidence regarding the State Board's investigative process, which tends to shows that this circumstantial evidence of an alleged "business practice" is not sufficient to support a finding of concerted action. Indeed, the evidence shows that teeth whitening cases were investigated on a case-by-case basis, RPFF No. 100, and those investigations were conducted separately by different case officers. RPFF Nos. 246 and 251. The details of such investigations remained confidential and case officers did not communicate with each other or with other Board members regarding the details of investigations. RPFF Nos. 251, 253 and 254. Further, neither individual dentist Board members nor the Board together drafted the cease and desist letters – they were drafted separately by counsel for the State Board. RPFF No. 282.

Third, the ALJ gave undue weight to the similarities between the various "cease and desist" letters and erroneously concluded that the similarities tend to negate the possibility that the State Board members were acting independently with regard to the challenged conduct. Without more, the mere existence of similarities fails to meet the burden of proof that Complaint Counsel is bound to establish, and the ALJ's conclusions should be reversed.

2. The Administrative Law Judge's Relevant Market for Teeth Whitening Services in North Carolina Conflicts with Evidence Presented on Teeth Whitening Services.

After erroneously finding the existence of an agreement, the ALJ considered the context of the State Board's actions and the relevant market for teeth whitening services

in North Carolina. In other words, the ALJ examined "the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed." Initial Decision at 85, citing National Soc'y of Prof'l Eng'rs, 435 U.S. at 692. The ALJ drew a number of conclusions regarding the extent of teeth whitening services provided by State Board members and other North Carolina dentists. However, as described below, the ALJ incorrectly interpreted the evidence presented at trial regarding the teeth whitening services. The result of his mistake is that the conclusions he draws on the relevant market are largely incorrect.

The evidence presented at trial about the provision of teeth whitening services by State Board members is based on a definition of the teeth whitening market to include four different consumer options: (1) dentist-provided, in-office teeth whitening services, (2) dentist-provided teeth whitening kits, (3) non-dentist supervised (illegal) teeth whitening services, and (4) over-the-counter teeth whitening kits. Revenue figures presented by Respondent and Complaint Counsel throughout the hearing relied on this four-part market definition. See Statement of Facts, Section I.A.4. But, the ALJ instead defines the market as "teeth whitening performed in one session," Initial Decision p. 70, which would include dentist-provided in-office teeth whitening services and non-dentist-provided teeth whitening services; no dentist-provided take-home kits or over-the-counter kits were included in the definition. Initial Decision at 68 *et seq*.

The problem with the ALJ's two-part market definition is that his entire Initial Decision relies on data gathered via subpoenas *duces tecum* issued by Complaint Counsel to reflect the four-part market definition, not the two-part definition. So, when the ALJ claims that the dentist members of the State Board members and other N.C. dentists are

financially interested in teeth whitening services, he is not actually citing revenue figures for in-office teeth whitening services: his revenue figures in fact include both in-office services AND take-home kits sold by dentists. In addition, Zoom, the in-office teeth whitening system utilized by the majority of the dentists who responded to the subpoenas *duces tecum*, includes both in-office and a take-home kit components as part of the procedure. (Hardesty, Tr. 2808-2809). It is not strictly a "one-session" teeth whitening procedure.

As the ALJ notes, "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.'" Initial Decision at 64 (citing Worldwide Basketball & Sport Tours, Inc. v. NCAA, 388 F.3d 955, 959 (6th Cir. 2004)). However, the ALJ did not rely on credible evidence when determining that Complaint Counsel met that burden. There is no reliable proof that:

- "Some Board members had an economic interest in preventing non-dentists from offering teeth whitening services";
- "Board members have a significant, nontrivial financial interest in the business of … teeth whitening"; or
- "Many of the Board members provide teeth whitening services through their private practices and derive income from it."

Initial Decision at 87. Without this evidence, the circumstances surrounding the Board's actions cannot be compared to a private association of real estate brokers acting with the "aim of retarding the emergence of a new business model," as were the facts in the

decision rendered in In re Realcomp II, Ltd., Docket No. 9320, 2009 F.T.C. LEXIS 250, at *64 (Oct. 30, 2009), upon which the ALJ relied heavily.

C. The State Board's Actions Did Not Unreasonably Restrain Trade Because the Actions Were Mandated by State Law.

1. Under a Rule of Reason Analysis, North Carolina Law Justified the State Board's Actions.

The ALJ applied a rule of reason analysis to the question of whether the State Board's actions against illegal teeth whitening service providers constituted an unreasonable restraint on trade. Having concluded (wrongly) that the State Board's conduct had "actual anticompetitive effects," the ALJ decided that there were no viable procompetitive justifications to permit the State Board's conduct. Initial Decision at 82 *et seq*. The test for establishing a procompetitive justification is "whether the restraint imposed is such as merely regulates or perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." Initial Decision at 84 (citing In re Polygram Holding, Inc., 136 F.T.C. 310, 327 n.14 (2003)). By concluding that no such procompetitive justifications existed, the ALJ dismissed the State Board's explanation that it acted to meet its responsibility to uphold state law. According to the ALJ, this explanation was "essentially a reiteration of Respondent's claim that the [State] Board's conduct is exempt from antitrust liability by the state action doctrine, which has been decided against Respondent by the Commission." Initial Decision at 7-8 and 81 *et seq*.[6]

[6] According to the Commission (but contrary to every single one of the numerous federal courts that have examined this issue), the long-standing grant of immunity from federal antitrust law to state agencies acting pursuant to a "clearly articulated and affirmatively expressed" state law should not exist. Id. Instead, state agencies should be subject to the requirement that they show "active supervision" by the state. California Retail Liquor Dealers Ass'n v. Midcal Aluminum, 445 U.S. 97, 106 (1980) (establishing, for private organizations and companies, a two-part immunity test: acting pursuant to state law and "actively supervised" by the state). This "active supervision" requirement has to date only been required of private organizations and businesses, *e.g.,* an association of liquor retailers in Midcal.

It is true that, in its February 2011 Opinion in support of its Order Granting Complaint Counsel's Motion for Partial Summary Decision, the Commission decided the State Board did not meet the second of two requirements (acting pursuant to a clearly articulated state law and being actively supervised by the State), which the Commission claims state agencies must meet to obtain immunity from federal antitrust law.[7] Opinion of the Commission in the Matter of the North Carolina [State] Board of Dental Examiners at 2. However, in that Opinion, the Commission declined to decide whether the State Board met the first requirement (whether the State Board had acted pursuant to a clearly articulated state law). Opinion of the Commission at 7 n. 8 ("[f]or purposes of this motion, we have assumed, but not decided, that the Board has satisfied the clear articulation requirement") (internal citation omitted). Therefore, the State Board's argument that its enforcement of a state law does not constitute an unreasonable restraint on trade is not "logically indistinguishable" from the immunity issue. Initial Decision at 81-82.

[7] However, as Respondent has repeatedly pointed out to the Commission, state agencies acting pursuant to state law are granted immunity from federal antitrust law. This is a settled area of the law. See, e.g., Town of Hallie v. City of Eau Claire, 471 U.S. 34, 46 (1985) (state agencies are "likely" not required to show active supervision to enjoy state action immunity); see also, Pope v. Mississippi Real Estate Comm'n, 695 F. Supp. 253, 280 (N.D. Miss. 1988) ("[state action] immunity protects governmental agencies"); see also, Nassimos v. N.J. Board of Examiners of Master Plumbers, No. 94-1319, 1995 U.S. Dist. LEXIS 21376, at *10 (D.N.J. Apr. 4, 1995), aff'd, 74 F.3d 1227 (3rd Cir. 1995), cert. denied, 517 U.S. 1244 (1996) ("A state agency is presumed to act in the public interest and, in order to come within the 'state action exemption,' it need only establish that its action is taken pursuant to a clearly articulated and affirmatively expressed state policy."); see also Hass v. Oregon State Bar, 883 F.2d 1453, 1461 (9th Cir. 1989) (after discussing the state's supervision over the Bar, via open meetings and record retention requirements, bar members' status as public officials, etc., the court concluded active supervision existed; see also Earles v. State Board of Certified Public Accountants of Louisiana, 139 F.3d 1033, 1041 (5th Cir. 1998) ("Despite the fact that the Board is composed entirely of CPAs who compete in the profession they regulate … so long as the Board is acting within its authority and pursuant to a clearly established state policy, there is no need for active supervision of the exercise of properly delegated authority."); see also Brazil v. Arkansas Board of Dental Examiners, 593 F. Supp. 1354, 1362 (E.D. Ark. 1984), aff'd, 759 F.2d 674 (8th Cir. 1985) ("the key to gaining [state action] immunity is governmental authorization; it must be shown that the anticompetitive acts of the state agency or municipality were taken "in furtherance or implementation of clearly articulated and affirmatively expressed state policy."); see also Flav-O-Rich, Inc. v. N.C. Milk Commission, 593 F. Supp. 13 (E.D.N.C. 1983) (considering active supervision to be supervision by a state agency).

The Commission's consideration of immunity consisted only of a discussion of (1) the need to show active supervision and (2) the failure of the Board to meet this requirement. The ALJ is not precluded from considering whether the State Board's actions were justified by its duty to uphold state law. Indeed, in its February 2011 Opinion, the Commission did not even consider whether the law indeed prohibits teeth whitening by unlicensed persons; whether the law should contain such a prohibition based on the dangers of the unlicensed practice of dentistry; or whether a state may justify otherwise anticompetitive acts by its duty to regulate and protect legal and safe competition.

The illegality of non-dentist-supervised teeth whitening services, and the rationale behind that illegality are in fact procompetitive justifications that should allow the State Board's actions to withstand the rule of reason test applied by the court. Respondent's Reply to Complaint Counsel's Post-Trial Brief at 28. The State Board enforced a state law limiting the practice of dentistry to licensed persons. N.C. Gen. Stat. § 90-29(b)(2). It was required by law to investigate and act against violations. N.C. Gen. Stat. § 90-41. Federal antitrust law is aimed at protecting legal competition, not illegal competition. See discussion, *supra*. Thus, the question of whether state law, in fact, banned non-dentist-supervised teeth whitening services is in fact the central question for the ALJ to have answered. It is not possible to reach a legitimate conclusion on this case without determining whether the State Board was regulating competition as required by state law or acting outside the constraints of state law.

Courts routinely weigh such procompetitive justifications of "public service or ethical norms." United States v. Brown Univ., 5 F.3d 658, 672 (3d Cir. 1993) (internal

citation omitted). The purpose of federal antitrust laws is to protect lawful competition, not just to protect consumers. See Mumford v. GNC Franchising LLC, 437 F. Supp. 2d 344, 354 (W.D. Pa. 2006) (internal citations omitted); see also Concord v. Boston Edison Co., 915 F.2d 17, 21 (1st Cir. 1990) (Breyer, C.J.) ("[A] practice is not 'anticompetitive' simply because it harms competitors. . . . Rather, a practice is 'anticompetitive' only if it harms the competitive process"). Courts often find that pro-competitive, pro-public protection justifications "save" otherwise unreasonable restraints on trade. See, e.g., Hospital Bldg. Co. v. Trustees of Rex Hospital, 691 F.2d 678 (4th Cir. 1982) (rejecting the finding of a *per se* antitrust violation, in favor of a rule of reason analysis). A finding that an action was taken "in good faith" and in accordance with the intent of a law is reason to allow an action that would otherwise be an unreasonable restraint on trade. 691 F.2d 678, 685. Promoting "fair" competition and academic success of students has also been deemed a justification for otherwise unreasonable conduct. See Pocono Invitational Sports Camp, Inc. v. NCAA, 317 F. Supp. 2d 569, 584 (E.D. Pa. 2004). Surely promoting the public health and enforcing state law are similarly strong justifications.

The ALJ erred by refusing to consider enforcement of a public protection statute as the State Board's competitive justification. The Commission's ruling on the state action exemption does not foreclose weighing statutory enforcement against illegal practitioners as procompetitive. There is no cited authority, and indeed, there is no case authority for refusing to consider procompetitive aspects of statutory compliance. It has been long-established that illegal sales are not even to be considered in defining a relevant product market. See Microsoft Corp. v. Computer Support Servs. of Carolina, Inc., 123 F. Supp. 2d 945, 952 (W.D.N.C. 2000) (holding that a claim for injury in an

illegal market is not recognized under antitrust law). It is hard to comprehend how state-mandated actions taken to protect legal competition could in fact be an unreasonable restraint on trade, given that the purpose of federal antitrust laws is purely to protect legal competition:

> The essence of the Section 1 Rule of Reason analysis "is whether the challenged agreement is one that promotes competition or one that suppresses competition." This query must be resolved by distinguishing between conduct that injures competition and that which may injure competitors. This Court has forthrightly stated: Anticompetitive conduct is conduct designed to destroy competition, not just to eliminate a competitor. *Lively legal competition* will result in the efficient and shrewd businessman routing the inefficient and imprudent from the field.

White & White, Inc. v. American Hosp. Supply Corp., 723 F.2d 495, 505 (6th Cir. 1983) (internal citations omitted) (emphasis added).

Instead of addressing the issue of whether the State Board was in fact enforcing state law, the ALJ's rule of reason analysis was erroneously based entirely on applying the State Board's conduct to that of private businesses, trade unions, and associations of businesses, all acting completely without the scope of legal authority. See Initial Decision at 105 *et seq.*, citing, e.g., National Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679 (1978) (involving a professional association); American Soc'y of Mech. Eng'rs v. Hydrolevel, 456 U.S. 556 (1982) (involving a professional association); American Tobacco Co. v. United States, 328 U.S. 781 (1946) (involving private companies).

In effect, the ALJ's decision to ignore the facts of this case resulted in the rule of reason analysis actually becoming a *per se* analysis, in which the State Board's actions are considered to be in a specific class of *per se* unreasonable (and therefore illegal) restraints, without any further analysis. Though the ALJ claimed to apply a rule of

reason analysis to the facts of the case, as discussed, no analysis of the Board's justifications for its conduct actually occurred. Initial Decision at 82.

The ALJ's *de facto* rule of reason analysis occurred without any explanation of how a state agency enforcing state law fit into the category of restraints on trade that are *per se* illegal. Complaint Counsel did not even attempt to claim that the State Board's conduct was a *per se* restraint on trade. Indeed, even among non-state actors, such as professional associations, courts typically shun *per se* analysis. See Fed. Trade Comm'n v. Indiana Federation of Dentists, 476 U.S. 447, 458-59 (1986) ("We have been slow to condemn rules adopted by professional associations as unreasonable *per se*, and, in general, to extend *per se* analysis to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious.") (internal citations omitted). Yet, the ALJ conducted no analysis of "the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed." Initial Decision at 82 (citing, Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679 (1978)). In other words, the ALJ did not address the State Board's rationale for its actions, that being enforcement of a clearly articulated state statute. By bypassing this critical issue, the ALJ ignored the State Board's procompetitive justification for its actions, and no rule of reason analysis occurred.

2. North Carolina Law Prohibits the Removal of Stains from Teeth by Unlicensed Persons.

As discussed *supra*, the ALJ stated he would not address the meaning or intent of North Carolina state law regarding illegal stain removal services, nor whether this law justified the State Board's actions against illegal stain removal service providers. This refusal to discuss the relevant North Carolina statute's clearly articulated requirements

regarding stain removal services had the practical result of denying the State Board any chance at defending its actions against illegal stain removal service providers.

However, the ALJ did briefly express his thoughts on the subject of the North Carolina Dental Practice Act, managing to contradict both himself and the Commission in the process. The ALJ diverged from the Commission (which expressed no reservations regarding the State Board's interpretation of N.C. Gen. Stat. § 90-29(b)(2)) by indirectly questioning the State Board's interpretation of state law on stain removal/teeth whitening. The ALJ criticized the State Board for assuming that stain removal is teeth whitening and averred that "no case that has interpreted the North Carolina Dental Practice Act in this way." Initial Decision at 62. One may infer that the ALJ felt compelled to express his doubts as to whether teeth whitening services constitute "stain removal"—despite the overwhelming evidence that it does—so that he could justify his failure to consider the North Carolina Dental Practice Act, which directly supports the State Board's procompetitive justifications.

Employing the ALJ's reasoning, it seems that a state licensing agency may never enforce a law—even a law whose meaning is plainly obvious, on its face—without first bringing a lawsuit to ensure that the judiciary agrees with its obvious conclusion on its own authorizing statute.[8] This is a bizarre conclusion. Certainly no case law exists supporting a contrary interpretation of N.C. Gen. Stat. § 90-29(b)(2); the instant action and the State Board's claim in federal court are the only actions dealing with this issue of first impression. Surely the ALJ is not actually claiming that every time a state agency

[8] Federal courts have upheld the state action immunity doctrine with the aim of avoiding this result. See, e.g., Southern Motor Carriers Rate Conference v. United States, 471 U.S. 48, 64 (1985) ("Agencies are created because they are able to deal with problems unforeseeable to, or outside the competence of, the legislature. Requiring express authorization for every action that an agency might find necessary to effectuate state policy would diminish, if not destroy, its usefulness.")

wants to investigate and act to prevent a violation of state law, it must first adjudicate the meaning of that law in state court? North Carolina state government faces a predicted $2.4 billion shortfall[9] for the next fiscal year. The ALJ cannot possibly be suggesting that the state should expend its limited resources to litigate whether "stain removal" means "teeth whitening" rather than simply allowing state agencies to do their jobs. Unfortunately, it is hard to reach any other conclusion about the intent behind the ALJ's holding on this issue.

There is no legal support for the ALJ's notion that a state court must interpret state law for the State Board. Gambrel v. Kentucky Bd. of Dentistry, 689 F.2d 612, 619 (6th Cir. 1982) ("[w]e are unaware of any decisions by the courts of Kentucky which either accept or reject the Board of Dentistry's interpretation of the statute. In the absence of such judicial interpretation, we place great persuasive weight on the interpretation of the statute by the administrative body charged with enforcing it"). Indeed, the presumptions of agency interpretation of rules and the propriety of agency action have been totally ignored. See Initial Decision at 105 (declining to address the State Board's argument that it was a state agency acting according to a clearly articulated state statute). See also United States v. Mead Corp., 533 U.S. 218, 227 (2001) ("We hold that administrative implementation of a particular statutory provision qualifies for Chevron deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.")

[9] Fannie Flono, *How N.C.'s Budget Troubles Stack Up*, Mar. 25, 2011, Charlotte Observer, http://www.charlotteobserver.com/2011/03/25/2169822/how-ncs-budget-troubles-stack.html.

The conclusions reached by the ALJ are also in direct conflict with the decision rendered in Cal. State Bd. of Optometry v. Fed. Trade Comm'n, 910 F.2d 976 (D.C. Cir. 1990), reh'g denied, 924 F.2d 243 (D.C. Cir. 1991). In Cal. State Bd. of Optometry, the Court of Appeals for the District of Columbia vacated a rule promulgated by the Commission, which was intended to prevent state agencies from imposing certain restrictions on the practice of optometry. Finding that the Commission exceeded its limited delegation of authority in doing so, the Court held that the Commission's rule would impair the "procedural safeguards inherent in the structure of the federal system." Id. at 981. If the conclusions reached by the ALJ in the instant case are allowed to stand, Complaint Counsel will have succeeded in achieving a result that they cannot reach through rule-making, by virtue of the Cal. State Bd. of Optometry case. The result will be to prevent an agent of the state of North Carolina from enforcing a clearly articulated and affirmatively expressed state law.

While the ALJ claims that his decision would not have this effect, and does not "dictate the manner of enforcing the Dental Practice Act," the Order accompanying the Initial Decision shows a contrary result. The Order's express purpose is to stop the State Board from enforcing the N.C. Dental Practice Act's prohibition of stain removal services by unlicensed, unsupervised persons. Initial Decision at 116, 124-25. The only way the ALJ could rationally view the Order as not affecting the State Board's enforcement of the Act is if he believed that the Act did not actually address stain removal/teeth whitening. Moreover, he ignored the ample evidence that the recipients of the cease and desist letters could have challenged them in court, but chose not to do so.

The ALJ's veiled attack on the meaning of N.C. Gen. Stat. § 90-29, and his demand for case law proof that "removal of stains" equates to "teeth whitening" might be necessary if there was any doubt on the matter. But, there is no persuasive evidence casting doubt on the plain meaning of this provision in North Carolina law. See Public Citizen v. United States Dep't of Justice, 491 U.S. 440, 455 (1989) (internal citations omitted). Teeth whitening is stain removal, and offering or overseeing stain removal services is a task statutorily limited to licensed dentists.

Teeth whitening service providers themselves advertise and refer to their services as "removing stains from teeth." Respondent's Memorandum in Opposition to Complaint Counsel's Motion for Partial Summary Decision [Corrected] at 9. No illegal teeth whitening/stain removal service providers have challenged the State Board's interpretation of this definition in state court. State governments and the only state supreme court to consider the issue have agreed that teeth whitening services are the practice of dentistry. See, e.g., Okla. Op. Att'y Gen. No. 03-13 (Mar. 26, 2003), 2003 Okla. AG LEXIS 13; Kan. Op. Att'y Gen. No. 2008-13 (June 3, 2008), 2008 Kan. AG LEXIS 13; White Smile USA, Inc. v. Board of Dental Examiners of Alabama, 36 So. 3d 9 (Ala. 2009). The European Union reached an identical conclusion as well when it examined the issue. Respondent's Memorandum in Opposition to Complaint Counsel's Motion for Partial Summary Decision [Corrected] at 9. The Commission should accept as persuasive precedent the case law of the only court to have considered the issue, the opinions of two state attorneys general, and the conclusions of twenty-seven other countries that teeth whitening is stain removal.

In addition to claiming to ignore the question of whether the State Board acted pursuant to a clearly articulated state law (while, in the meantime, evincing skepticism that the Board did), the Initial Decision also claims not to address "whether or not non-dentist teeth whitening is harmful or unsafe for consumers." Initial Decision at 8. While the ALJ's entire decision relies heavily on comparing the facts of the instant case to restraints on trade by private businesses and other non-governmental organizations, one case in particular, cited by the Commission and now the ALJ, demonstrates the absurdity of this entire line of reasoning. The ALJ cites Wilk v. American Medical Association to support his decision that a restraint on trade cannot be justified by the fact that it protects public health and safety. 719 F.2d 207 (7th Cir. 1983); Initial Decision at 107. But, the court in Wilk specifically stated that "[t]he question of whether chiropractic poses an impermissible hazard to the health and welfare of the public is one for the Congress and/or the state legislatures to resolve, not the defendants or other private persons or groups." Id. at 223. While doctors may not conspire to exclude chiropractors from practice, they are "are free to attempt to persuade legislatures and administrative agencies" of the chiropractic profession's threat to public health. Wilk, 719 F.2d at 228. If administrative agencies cannot act to protect the public health, who can??

D. The Administrative Law Judge's Initial Decision Violates the Tenth Amendment to, and the Commerce Clause of, the U.S. Constitution.

The ALJ concludes that the remedies order in the Initial Decision does not violate: (1) the Tenth Amendment to the U.S. Constitution; or (2) the Commerce Clause, art. I, § 8, cl. 3, of the U.S. Constitution. The ALJ is incorrect.

First, the ALJ concludes that the binding U.S. Supreme Court precedent of New York v. United States, 505 U.S. 144 (1992) and Printz v. United States, 521 U.S. 898

(1997) are not applicable because "the FTC Act is not directed at state governments or state officials." This conclusion misses the point; the ALJ's enforcement of the FTC Act against the State Board in such a way that compels the State Board to regulate the practice of dentistry at the FTC's direction violates the Tenth Amendment. As recognized in California State Board of Optometry, the Commission's misuse of the FTC Act to prevent a state agency from imposing certain restrictions on the practice of optometry violates the Tenth Amendment. Cal. State Bd. of Optometry, 910 F.2d at 981-82. The Commission cannot dismantle "the procedural safeguards inherent in the structure of the federal system" by relying on an argument that the FTC Act is "legislation of general applicability." Id. at 981; see Initial Decision at 116.

Second, the ALJ concludes that the Order does not regulate the practice of dentistry and, thus, does not run afoul of the Commerce Clause of the U.S. Constitution. Again, the ALJ's conclusion is incorrect. The Order clearly restricts the State Board's ability to conduct a bona fide investigation into possible violations of the North Carolina Dental Practices Act, as it renders useless the State Board's ability to prevent unlicensed teeth whitening services. In issuing this Order, the ALJ is preventing the State Board from enforcing the North Carolina Dental Practices Act without federal interference prohibited by the Commerce Clause.

Although the ALJ claims that the Order will not bar the State Board from "fulfilling its duties to investigate, issue notifications, and pursue bona fide remedies regarding teeth whitening goods and services," such a claim cannot be substantiated. See Initial Decision at 116. Indeed, the State Board now faces the tenuous position of being prohibited from even "discouraging" the provision of teeth whitening goods or services

by a non-dentist provider while being required under North Carolina law to investigate and enforce the North Carolina Dental Practices Act against non-licensed providers who engage in the removal of stains from teeth. A direct conflict exists between the State Board's mandate from the North Carolina legislature and the ALJ's order in this proceeding. In reality, adherence to the Order will prevent the State Board from complying with its state statutory obligations.

IV. CONCLUSION

The ALJ's Initial Decision falls short of the basic requirements for FTC action. The ALJ could not find the "collusion" promised by the Complaint. The great conspiracy was, at worse, occasional unilateral action by some licensee Board members for about half the time in question, regarding less than one percent of the licensees' business, and not involving any of their actual individual competitors. The relevant market was, by the testimony of Complaint Counsel's own witnesses, exactly what the relevant North Carolina statute prohibited – removal of stains from human teeth. The ALJ had to ignore consumer protection and statutory enforcement in order to conclude that the alleged restraint was unreasonable. For these reasons, and others stated above, the ALJ's finding of a violation of the federal antitrust laws must be vacated.

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	)	**PUBLIC**
THE NORTH CAROLINA [STATE] BOARD OF DENTAL EXAMINERS,	)	DOCKET NO. 9343
Respondent.	)	

PROPOSED ORDER

Upon consideration of the briefs submitted by Respondent and Complaint Counsel, the arguments of counsel for the parties before this Commission in Open Session, and the record in this matter, it is hereby ordered that:

1. The Administrative Law Judge's Initial Decision is premised on erroneous findings of fact and conclusions of law.

2. The relief sought by Complaint Counsel exceeds the Federal Trade Commission's authority under the Federal Trade Commission Act and violates the Tenth Amendment to the U.S. Constitution.

3. The relief sought by Complaint Counsel violates the U.S. Constitution's Commerce Clause.

4. The Administrative Law Judge's Initial Decision is vacated, and the Complaint is dismissed with prejudice.

Dated:_____

_____
The Commission

This the 25th day of August, 2011.

Respectfully submitted,

ALLEN, PINNIX & NICHOLS, P.A.

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CERTIFICATE OF SERVICE

I hereby certify that on August 25, 2011, I electronically filed the foregoing with the Federal Trade Commission using the FTC E-file system, which will send notification of such filing to the following:

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I also certify that I have copies of the document have been hand delivered to:

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This the 25th day of August, 2011.

/s/ Noel L. Allen
Noel L. Allen

CERTIFICATION FOR ELECTRONIC FILING

I further certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and by the adjudicator.

/s/ Noel L. Allen
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