



nature of Mr. Bloom's duties, obligations, and authority either as Complaint Counsel or as "Assistant Director, Office of Policy Coordination" (as styled in numerous pleadings).

3. Counsel for Respondent has on numerous occasions since the filing of the Complaint herein inquired of co-lead counsel as to the jurisdiction of licensure of the entire group of individual attorneys comprising "Complaint Counsel" (or as styled in numerous pleadings, "Counsel Supporting the Complaint"). Counsel for Respondent has not received a response to this inquiry.

4. Respondent served its First Set of Interrogatories on Complaint Counsel on October 12, 2010. Complaint Counsel timely served its responses on November 18, 2010.

5. Interrogatory 8 of said interrogatories asked, "[w]hich jurisdiction's bar ethics rules are binding upon the Commission's legal staff including Complaint Counsel?" After initially objecting to the question, Complaint Counsel responded with a citation to Rule 4.1(e) and a list of states in which the attorneys working on this matter were licensed. However, Complaint Counsel did not include in the response Federal Trade Commission ("Commission") attorneys other than those working on this case, did not provide any identification as to (if any) the specific jurisdiction in which specific attorneys were licensed, or which ethical rules are applicable. A copy of Complaint Counsel's Response and Objections to Respondent's First Set of Interrogatories is attached hereto as Exhibit 1.

6. Complaint Counsel's interrogatory response deferred to Rule 4.1(e), which only requires attorneys practicing "before the Commission" to be bound by the rules of their state; however, Counsel for Respondent has never been informed whether or not

Complaint Counsel or other Commission attorneys are practicing "before the Commission."

7. To date, there have been at least eight attorneys from the Commission's Office of Counsel who have either appeared as Complaint Counsel or "Counsel Supporting Complaint." In addition, at least two persons have appeared as being designated in the "Office of Policy and Coordination" (Mr. Bloom and Ms. Meyers).

8. Complaint Counsel has not responded to Counsel for Respondent's numerous inquiries, or to the extent Complaint Counsel has responded to these inquiries, the response has been inadequate and uninformative (for example, see ¶ 5 above).

9. Respondent's Counsel has constantly been faced with multiple attorneys purporting to act on the same matter or related matters for Complaint Counsel. As a result, it has not been clear to Respondent's Counsel who is in charge, making it difficult to respond on several occasions, with resultant communication difficulties and misunderstandings.

10. These inquiries are relevant to Counsel for Respondent's ability to undertake prosecution of this case and to effectively represent the Respondent State Board.

11. Respondent's motion seeks the Commission to order the disclosure of the "Information Requested", as set forth in Exhibit 2.

12. None of the information requested is privileged or restricted.

13. Respondent's Counsel has conferred with Complaint Counsel in a good-faith effort to resolve by agreement the issues raised by this motion and has been unable

to reach such agreement. Further, Complaint Counsel has indicated their intention to oppose this motion.

WHEREFORE, Respondent respectfully requests that the Administrative Law Judge:

1. Issue an order requiring disclosure of above-requested non-privileged and non-restricted agency information (the "Information Requested" set forth in Exhibit 2); and
2. For such other and further relief as deemed just and proper.

This the 24th day of January, 2011.

ALLEN AND PINNIX, P.A.

/s/ Alfred P. Carlton, Jr.

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## CERTIFICATE OF SERVICE

I hereby certify that on January 24, 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:

Donald S. Clark, Secretary  
Federal Trade Commission  
600 Pennsylvania Avenue, N.W.  
Room H-159  
Washington, D.C. 20580

I hereby certify that the undersigned has this date served copies of the foregoing upon all parties to this cause by electronic mail as follows:

William L. Lanning  
Bureau of Competition  
Federal Trade Commission  
600 Pennsylvania Avenue, N.W.  
Room NJ-6264  
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I also certify that I have sent courtesy copies of the document via Federal Express and electronic mail to:

The Honorable D. Michael Chappell  
Administrative Law Judge  
Federal Trade Commission  
600 Pennsylvania Avenue N.W.  
Room H-113  
Washington, D.C. 20580  
[oyalj@ftc.gov](mailto:oyalj@ftc.gov)

This the 24th day of January, 2011.

/s/ Alfred P. Carlton, Jr.  
Alfred P. Carlton, Jr.

#### **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/ Alfred P. Carlton, Jr.  
Alfred P. Carlton, Jr.



**UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION**



<b>In the Matter of</b>	)	
	)	
<b>THE NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS</b>	)	<b>DOCKET NO. 9343</b>
	)	
	)	
	)	

**COMPLAINT COUNSEL’S RESPONSE AND OBJECTIONS TO RESPONDENT’S  
FIRST SET OF INTERROGATORIES**

Pursuant to Rule 3.35(b) of the Federal Trade Commission’s Rules of Practice, Complaint Counsel hereby respond to Respondent North Carolina State Board of Dental Examiners’ (“Respondent”) First Set of Interrogatories. Complaint Counsel have endeavored to offer a good faith response to each of Respondent’s First Set of Interrogatories. Yet many of the Respondent’s Interrogatories are improper, overbroad, vague, or otherwise unanswerable. Respondent has yet to certify compliance with Complaint Counsel’s First Request for Production served on June 29, 2010 and may produce additional documents, the review of which may require Complaint Counsel to amend or supplement their responses to these Interrogatories.

Complaint Counsel have already provided a great deal of information to Respondent. The Complaint is detailed in its allegations. Most of the significant documents, and all of the documents cited herein, are already in the possession of Respondent, including without limitation the transcripts of depositions and investigational hearings that address these issues. Complaint Counsel have repeatedly discussed the allegations included in the Complaint with counsel for Respondent, both in the course of the pre-complaint investigation and subsequently. Moreover, between the time Respondent posed these interrogatories and the date of the response, Complaint Counsel filed their Motion for Partial Summary Decision, which provides responses in great



detail to many of the questions propounded in these interrogatories, rendering much of this objectionable as duplicative.

### **General Objections and Reservations**

The following General Objections and Reservations apply to all of Respondent's Interrogatories and are hereby incorporated by reference into each of the following responses. The assertion of the same, similar, or additional objections or the provision of partial answers in response to an individual interrogatory does not waive any of Complaint Counsels' general objections as to the other interrogatories.

1. Complaint Counsel object to Respondent's interrogatories to the extent they prematurely seek discovery of expert testimony. Pursuant to the Scheduling Order in this case, the initial Complaint Counsel expert reports are due November 26, reply reports on December 10, and expert depositions may continue through December 30, 2010.
2. Complaint Counsel object to Respondent's interrogatories to the extent they are overly broad, and unduly burdensome.
3. Complaint Counsel object to Respondent's interrogatories to the extent that they are not reasonably calculated to lead to the discovery of admissible evidence.
4. Complaint Counsel object to Respondent's interrogatories to the extent that they seek documents protected by a claim of privilege, including without limitation deliberative process privilege, law enforcement investigative privilege, informant's privilege or the attorney work product doctrine.
5. Complaint Counsel object to Respondent's interrogatories on the grounds that they seek information and materials from sources and persons within the Commission that are

beyond the scope of the records search that Complaint Counsel are required to undertake pursuant to Rule 3.31(c)(2), and/or are expressly excluded from interrogatory responses by Rule 3.35(a)(1).

Complaint Counsel reserve all evidentiary or other objections to the introduction or use of any response to these interrogatories that they might make at the hearing in this action and do not, by any response to any interrogatory, waive any such objections to that interrogatory.

Complaint Counsel's discovery and investigation in this matter is continuing. Complaint Counsel reserve the right to amend or supplement these objections to Respondent's First Set of Interrogatories, and to amend or supplement their responses as necessary after the close of discovery.

Subject to the foregoing, Complaint Counsel provide the following responses to Respondent's First Set of Interrogatories:

**Interrogatory No. 1**

*Identify every act, omission, practice, instance, document, or communication relating to the grounds for each allegation asserted in your Complaint.*

Response to Interrogatory No. 1

Complaint Counsel specifically object to this interrogatory because it seeks to compel Complaint Counsel to undertake investigation, discovery, and analysis on behalf of Respondent.

Complaint counsel further object to this interrogatory because it is overbroad and unduly burdensome in that it asks for every fact related to each and every allegation in the Complaint, including every act, omission, practice, instance, document, or communication that may relate to the Complaint regardless of whether it will be relied upon at trial. Further, the Complaint lists numerous allegations, each requiring an independent inquiry and discrete response, and each

allegation may in turn relate to numerous acts, omissions, practices, documents, and communications. Therefore, this interrogatory inappropriately attempts to mask multiple separate interrogatories within one question. If each allegation were treated as a separate interrogatory, it would amount to substantially more than the 25 interrogatories permitted by Commission Rule 3.35.

The purpose of an interrogatory is to narrow and clarify the issues and disputes to be addressed at trial. A general interrogatory asking for all conceivably relevant facts fails to narrow the issues and is impermissible. Therefore, no response is required to this interrogatory.

#### **Interrogatory No. 2**

*What was the total dollar volume of retail sales of over-the-counter teeth-whitening products each of the years 2000 through 2009 in the United States?*

#### **Response to Interrogatory No. 2**

Complaint Counsel specifically object to this interrogatory because it is overbroad, and unduly burdensome. Complaint Counsel further object because Respondent seeks to compel Complaint Counsel to undertake investigation, discovery, and analysis on behalf of Respondent.

Subject to the foregoing objections, Complaint Counsel respond as follows:

Complaint Counsel do not possess all the relevant information needed to determine the total dollar volume of retail sales of over-the-counter (“OTC”) teeth whitening products in the United States. Complaint Counsel received documents from companies that manufacture and sell OTC and dentist provided teeth whitening products, including Dentovations, Discus, Dentsply, DentAmerica, Heraeus Kulzer and Proctor & Gamble, which may contain information relevant to answering this interrogatory. Complaint Counsel provided those documents to Respondent in the



same form as they were received by Complaint Counsel, pursuant to Paragraph 11 of the Additional Provisions in Judge Chappell's Scheduling Order in this matter. Because these documents are third party documents already in the possession of the Respondent, the burden of deriving the requested answer would be the same on Respondent as it would be on Complaint Counsel, and no further answer is required.

### **Interrogatory No. 3**

*What was the total dollar volume of retail sales of over-the-counter teeth-whitening products each of the years 2000 through 2009 in North Carolina?*

### **Response to Interrogatory No. 3**

Complaint Counsel specifically object to this interrogatory because it is overbroad, and unduly burdensome. Complaint Counsel further object because Respondent seeks to compel Complaint Counsel to undertake investigation, discovery, and analysis on behalf of Respondent.

Subject to the foregoing objections, Complaint Counsel respond as follows:

Complaint Counsel do not possess all the relevant information needed to determine the total dollar volume of retail sales of OTC teeth whitening products in North Carolina. Complaint Counsel received documents from companies that manufacture and sell OTC and dentist provided teeth whitening products, including Dentovations, Discus, Dentsply, DentAmerica, Heraeus Kulzer and Proctor & Gamble, which may contain information relevant to answering this interrogatory. Complaint Counsel provided those documents to Respondent in the same form as they were received by Complaint Counsel, pursuant to Paragraph 11 of the Additional Provisions in Judge Chappell's Scheduling Order in this matter. Because these documents are third party documents already in the possession of the Respondent, the burden of deriving the requested



answer would be the same on Respondent as it would be on Complaint Counsel, and no further answer is required.

**Interrogatory No. 4**

*What was the total dollar volume of retail sales of teeth-whitening services provided by persons other than dentists or persons working under the direct supervision of a dentist for each of the years 2000 through 2009 in the United States?*

Response to Interrogatory No. 4

Complaint Counsel specifically object to this interrogatory because it is overbroad, and unduly burdensome. Complaint Counsel further object because Respondent seeks to compel Complaint Counsel to undertake investigation, discovery, and analysis on behalf of Respondent.

Subject to the foregoing objections, Complaint Counsel respond as follows:

Complaint Counsel do not possess all the relevant information needed to determine the total dollar volume of retail sales of teeth-whitening services provided by persons other than dentists or persons working under the direct supervision of a dentist in the United States.

Complaint Counsel received documents from companies that manufacture and sell *products* used by persons other than dentists or persons working under the direct supervision of a dentist, including BEKS, Beyond Dental and Health, WhiteSmile USA, Bleach Bright, Whiter Image and White Science, which may contain information relevant to answering this interrogatory.

Those documents were produced to Respondent pursuant to Respondent's First Set of Requests for Production of Documents and Paragraph 11 of the Additional Provisions in Judge Chappell's Scheduling Order in this matter. Because these documents are third party documents already in the possession of the Respondent, the burden of deriving the requested answer would be the same on Respondent as it would be on Complaint Counsel, and no further answer is required.

**Interrogatory No. 5**

*What was the total dollar volume of retail sales of teeth-whitening services provided by persons other than dentists or persons working under the direct supervision of a dentist for each of the years 2000 through 2009 in North Carolina?*

Response to Interrogatory No. 5

Complaint Counsel specifically object to this interrogatory because it is overbroad, and unduly burdensome. Complaint Counsel further object because Respondent seeks to compel Complaint Counsel to undertake investigation, discovery, and analysis on behalf of Respondent

Subject to the foregoing objections, Complaint Counsel respond as follows:

Complaint Counsel do not possess all the relevant information needed to determine the total dollar volume of retail sales of teeth-whitening services provided by persons other than dentists or persons working under the direct supervision of a dentist in North Carolina.

Complaint Counsel received documents from companies that manufacture and sell *products* used by persons other than dentists or persons working under the direct supervision of a dentist, including BEKS, Beyond Dental and Health, WhiteSmile USA, Bleach Bright, Whiter Image and White Science, which may contain information relevant to answering this interrogatory.

Complaint Counsel provided those documents to Respondent in the same form as they were received pursuant to Respondent's First Set of Requests for Production of Documents and Paragraph 11 of the Additional Provisions in Judge Chappell's Scheduling Order in this matter.

Because these documents are third party documents already in the possession of the Respondent, the burden of deriving the requested answer would be the same on Respondent as it would be on Complaint Counsel, and no further answer is required.

**Interrogatory No. 6**

*Identify all of your sources for your answers to question 2 – 5, above.*

Response to Interrogatory No. 6

Subject to the general objections stated above, Complaint Counsel respond as follows:

Complaint Counsel's response to this interrogatory is incorporated into its responses to interrogatories 2 through 5.

**Interrogatory No. 7**

*Identify each dental practice expert you have contacted, interviewed or consulted regarding the teeth-whitening products or services.*

Response to Interrogatory No. 7

Complaint Counsel specifically object to this interrogatory because it seeks impermissible expert discovery. Rule 3.31A(d) provides that a "party . . . may not discover facts known or opinions held by an expert who has been retained . . . in anticipation of litigation or preparation for hearing and who is not listed as a witness for the evidentiary hearing." To the extent that this interrogatory seeks to obtain the names of expert witnesses Complaint Counsel intends to call to testify at trial, that information was provided to Respondents through Complaint Counsel's Expert Witness List on November 5, 2010. The identified expert was Dr. Martin Giniger.

**Interrogatory No. 8**

*Which jurisdiction's bar ethics rules are binding upon the Commission's legal staff including Complaint Counsel?*

Response to Interrogatory No. 8

Complaint Counsel specifically object to this interrogatory on the ground that it is

irrelevant. However, subject to the foregoing objection, Complaint Counsel respond as follows:

Pursuant to Rule 4.1(e), “[a]ll attorneys practicing before the Commission shall conform to the standards of ethical conduct required by the bars of which the attorneys are members.” As Complaint Counsel, FTC attorneys are considered “attorneys practicing before the Commission.” At this time, attorneys working on this matter are admitted to the bars of the following jurisdictions: New Jersey, Virginia, Pennsylvania, Maryland, California, New York, Georgia and the District of Columbia.

#### **Interrogatory No. 9**

*Identify each person service with a subpoena duces tecum by you in this matter and each of your attorneys who spoke to each such person.*

#### **Response to Interrogatory No. 9**

Complaint Counsel specifically object to this interrogatory because it is vague and ambiguous. Complaint Counsel further object to the interrogatory because it seeks irrelevant information. Complaint Counsel also specifically object to this interrogatory because it seeks information already provided to Respondent by Complaint Counsel.

It is unclear what “person *service* with a *subpoena duces tecum*” means or what information Respondent seeks to elicit through its use. To the extent that this interrogatory seeks identification of all individuals and companies served with subpoenas in this matter, Complaint Counsel already timely provided Respondent with copies of all *subpoena duces tecum* and *subpoena ad testificandum* issued by the Commission in this matter. The identity of Commission attorneys who spoke to individual recipients of subpoenas or a recipient’s agents is not reasonably calculated to lead to the discovery of admissible evidence. Accordingly, no further response is



required to this interrogatory.

**Interrogatory No. 10**

*What is the basis in law and fact for your position that the Respondent is not an official or agency of the state of North Carolina?*

Response to Interrogatory No. 10

Complaint Counsel specifically object to this interrogatory because it is based on a misstatement, misunderstanding, or mischaracterization of the allegations of the Complaint.

Subject to the foregoing objection, Complaint Counsel respond as follows:

Complaint Counsel do not contend that the “Respondent is not an . . . agency of the state of North Carolina.” In fact, paragraph one of the Complaint states, “The Dental Board is an agency of the State of North Carolina . . . .” Complaint Counsel do contend that Respondent is not entitled to any protection against antitrust liability under the state action defense. Respondent is distinguishable from governmental entities that may enjoy state action protection for the reasons set forth in detail in the Memorandum in Support of Partial Summary Decision, and the supporting exhibits, served on Respondent on November 3, 2010, at pages 14-27, which are hereby incorporated by reference.

**Interrogatory No. 11**

*Identify each instance in which the Board’s actions deterred persons from other states from providing teeth whitening services in North Carolina.*

Response to Interrogatory No. 11

Complaint Counsel object to this interrogatory because Respondent seeks to compel Complaint Counsel to undertake investigation, discovery, and analysis on behalf of Respondent.

Complaint Counsel further object to this interrogatory because it is overbroad and unduly burdensome.

Subject to the foregoing objections, Complaint Counsel respond as follows:

Complaint Counsel do not possess all the relevant information needed to identify each and every instance in which Respondent engaged in anticompetitive actions that deterred persons from other states from providing teeth whitening services in North Carolina.

Respondent's files contain documents which may contain information relevant to answering this interrogatory. *See e.g.*, documents relating to Joyce Osborn/BEKS International of Jasper, AL; Peggy Grater/Grater Whiter Smiles of Fond du Lac, WI; Hull Storey Retail Group of Augusta, Georgia; Jim Valentine/WhiteSmileUSA of Atlanta GA; BleachBright, LLC of Kenner, LA; General Growth Properties of Chicago, IL; CBL & Associates Properties, Inc., of Chattanooga, TN; and Hendon Properties of Atlanta, GA. Because these documents are Respondent's own documents and are already in the possession of the Respondent, the burden of deriving the requested answer on Respondent would be the same, or less than, the burden on Complaint Counsel. Therefore no further answer is required.

#### **Interrogatory No. 12**

*Identify all sources, data, documents, expert opinion, and any other information, including dates, upon which you based your assertion in your Complaint that "Teeth whitening services performed by non-dentists are much less expensive than those performed by dentists. A non-dentist typically charges \$100 to \$200 per session, whereas dentists typically charge \$300 to \$700, with some procedures costing as much as \$1,000."*

#### **Response to Interrogatory No. 12**

Complaint Counsel specifically object to this interrogatory because Respondent already possesses the requested information in the form of depositions, Complaint Counsel's Statement of

Uncontested Facts, and other discovery sources.

Subject to the foregoing objection, Complaint Counsel respond as follows:

Complaint Counsel contend that non-dentist teeth whitening services are less expensive than when the same services are provided by a dentist. Dentists typically charge \$300 or more for tooth whitening procedures, as confirmed by a number of different sources, including current and former Dental Board members' own testimony. *See e.g.*, Owens IH, 30:09 (charges \$495 for in-office teeth whitening procedures); Feingold Dep., 183:15 (charges \$500); Holland Dep. 58:11 (charges \$175 per arch). Other sources corroborate this contention. *See e.g.*, Oyster Dep., 29:03 (\$150 per arch, ); CX0053-001-002 (Frequently Asked Questions for Professional Teeth Whitening, dentist teeth whitening can cost \$400); CX0108-008 (White Science training manual for non-dentist teeth whitening system, "The major drawbacks of 'in-office' whitening are price (\$400-\$900)"); CX0096 (advertisement from SheShe studio spa, teeth whitening in dentist offices cost \$400-\$600). Non-dentist teeth whitening services typically cost between \$100 and \$200, as evidenced by Dental Board documents. *See e.g.*, CX0054 (Signature Spa of Hickory charging \$199.99); CX0043 (Bleach Bright advertising for \$99); CX0198 (Movie Star Smile charging \$99); CX0365 (e-mail from dentist about a non-dentist teeth whitening salon) ("They charge \$100!").

In addition, Board documents show that non-dentist teeth whitening service providers promote their services as cheaper than those of dentists in much of their advertising. *See e.g.*, CX0096 (advertisement from SheShe studio spa, "Teeth whitening has also always been offered in dental offices . . . and delivers the same results that we offer at a fraction of the cost."); CX0103 (BriteWhite advertisement stating that "as with more expensive dental office procedures, it is recommended that you have a session every six months to keep your smile bright and new"); CX0043 (Bleach Bright advertisement, \$99 side-by-side with "Dentists \$350-\$500"). In addition,



manufacturers and distributors of non-dentist teeth whitening kits promote their products to salons, retail stores and mall kiosks, by claiming the same, or nearly the same results, as dentist teeth whitening products for a lower cost. *See, e.g., CX0108* (White Science claims its products are “very similar to BriteSmile and Zoom . . . but there are a few key differences including . . . most importantly, price”).

### **Interrogatory No. 13**

*Identify all sources, data, documents, expert opinion, and any other information, including dates, upon which you based your assertion in your Complaint that “Teeth whitening products (such as toothpaste and OTC whitening strips) are generally viewed by consumers as inadequate substitutes for teeth whitening services, due to differences in the nature of the product, quality, cost, and convenience.”*

#### **Response to Interrogatory No.13**

Complaint Counsel specifically object to this interrogatory because Respondent seeks to compel Complaint Counsel to undertake investigation, discovery, and analysis on behalf of Respondent. Complaint Counsel further object to this interrogatory to the extent it calls for the premature discovery of expert testimony. Complaint Counsel also specifically object to this interrogatory to the extent that it seeks the identities of informants or experts who are not going to testify at trial.

Subject to the foregoing objections, Complaint Counsel respond as follows:

Teeth whitening products such as toothpaste and OTC whitening strips are generally viewed by consumers as inadequate substitutes for teeth whitening services provided by both dentists and non-dentists, due to differences in the nature of the products, quality, cost, and convenience. Support for this is already in the possession of Respondent in Respondent’s own files. Documents and testimony show that teeth whitening services, as distinguished from OTC



products, are more convenient (CX0108 (White Science training manual) (“What can be more convenient than getting your teeth whitening at your local salon or spa? While getting your haircut, highlights, or nails painted, you now have the option to whiten your teeth”)), provide immediate results (CX0054 (Signature Spa of Hickory - teeth whitening in 20 minutes); CX0108 (White Science claims its products “provide dramatic results in just 12, 24, or 36 minutes”), Feingold Dep., 184:09-20 (“for the next-day whitening you have basically two choices[,] . . . go to a dentist for a treatment like Zoom or to go to a kiosk or a salon for a treatment.”); KAM-FTC-000028- 29 (service takes “just about one hour”); AAED 161 (“Talking With Patients, Tooth Whitening: Why, Who, What, Where and How”) (“In-office whiteners usually take about 1-3 hours; the advantage is that the result is immediate, but, they are often more expensive”); NCBoard4949 (American Academy of Pediatric Dentistry, “Policy on the Use of Dental Bleaching for Child and Adolescent Patients”) (“Advantages of in-office whitening include . . . rapid results.”); CX0308 (salon advertising “whiter teeth in 30 minutes or less guaranteed!”); CX0043 (Bleach Bright advertises “cosmetic teeth whitening at the speed of light in just 20 minutes!”); CX0078 (salon advertises teeth whitening in 40-60 minutes); CX0073 (Dempsey Aff. ¶ 11, North Carolina State Board of Dental Examiners v. Carmel Day Spa & Salon (Jan. 11, 2008)) (employee of Carmel Day spa informed Dempsey that teeth whitening service would take one hour); CX0108 (WhiteSmile claims its products “provide dramatic results in just 12, 24, or 36 minutes”); CX0054 (Signature Spa of Hickory advertises teeth whitening in 20 minutes); CX0103 (BriteWhite pamphlet states treatment “can take up to one hour if required”); NCBOARD4979 (Ichel Goldberg et al., Tooth Bleaching Treatments, A Review (2007)) (listing different brands of OTC strips products, each requiring twice a day treatment over 14 days); NCBOARD987 (Question and Answer article with Dr. Van Haywood (2008)) (six shade change could be obtained with “16 days

of strip applications”); NCBOARD3888 (web page from www.teethwhiteningreviews.com, “Teeth Whitening: What Works and What Doesn’t,” Jan. 2, 2006) (“You’ll wear the trays, strips, or painted-on bleach for up to 60 minutes a day (in two or more individual applications) and for the suggested period of time: 1-2 weeks depending on the product.”); CX0380 (web page from Crest, www.3dwhite.com, “Crest 3D White Whitestrips Professional Effects Teeth Whitening System”) (consumer must wear Crest White strips once a day for thirty minutes for 20 days); CX0043 (Bleach Bright advertisement states that “Whitening Strips take 5 times longer”).

In addition, non-dentist teeth whitening providers state that their services provide results that are similar to those provided by dentists. (CX0108 (White Science claims its products are “very similar to BriteSmile and Zoom . . . but there are a few key differences including . . . most importantly, price”); CX0372 (dentist complaint about a non-dentist teeth whitening manufacturer distributing brochures in the area where the dentist provides teeth whitening, Jan. 25, 2007) (“From their website, the procedure is very similar or identical to the system we use in our office.”)).

#### **Interrogatory No. 14**

*Identify all sources, data, documents, expert opinion, and any other information, including dates, upon which you based your assertion in your Complaint that “The Dental Board’s exclusion of the provision of teeth whitening services by non-dentists does not qualify for a state action defense nor is it reasonably related to any efficiencies or other benefits sufficient to justify its harmful effect on competition.”*

#### **Response to Interrogatory No. 14**

Complaint Counsel specifically object to this interrogatory because Respondent seeks to compel Complaint Counsel to undertake investigation, discovery, and analysis on behalf of Respondent. Complaint Counsel further object to this interrogatory to the extent it calls for the

premature discovery of expert testimony.

Subject to the foregoing objections, Complaint Counsel respond as follows:

The entirety of the Memorandum in Support of Partial Summary Decision, and the supporting Separate Statement of Material Facts to Which There is No Genuine Issue and its exhibits, served on Respondent on November 3, 2010, which are hereby incorporated by reference, provide detailed support for Complaint's Counsel's contention that Respondent is ineligible for the state action defense.

Cognizable benefits and justifications under the antitrust laws include results such as increases in output, decreases in price, and improvements in quality. Under *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978), a combination of private persons – including trade associations, as in that case, and financially interested state boards, as here – may not take anticompetitive actions and claim that doing so is necessary because the competition itself would have been harmful to the public. Furthermore, 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 . . . .” *Wilk v. Am. Med. Ass’n*, 719 F.2d 207, 228 (7th Cir. 1983). Such concerns about potential public health and safety are left to state legislatures, courts, and other entities not financially interested in excluding rivals from competing in a given market.

However, even if the asserted justification in this case— health and safety— is considered, the elimination of non-dentist teeth whitening establishments is not the least restrictive means of dealing with any legitimate concerns. An alleged procompetitive justification fails if “the challenged restraint is not reasonably necessary to achieve the defendant’s procompetitive

justifications, or [if] those objectives may be achieved in a manner less restrictive of free competition.” *United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 238 (2d Cir. 2003).

As an initial matter, the basis for Respondent’s purported justification – concern regarding health and safety – is overblown. First, there is ample evidence that the side effects of peroxide based teeth whitening are minor and rare. *See e.g.*, Allen Dep., 95:24-96:07 (unaware of any “nontransient harm” from non-dentist teeth whitening; unaware of any literature establishing that “people have been subjected to nontransient harm from non-dentist tooth whiteners”); Parker Dep., 191:22-194:01); Wester Dep., 124:4-12 (dentists cannot predetermine teeth sensitivity to whitening); NCDS004951-5 (article by ADA, Frequently Asked Questions on Tooth Whitening Safety, July 2010) (“Whether tooth whitening is performed under the care and supervision of a dentist, self-applied at home or in a non-dental setting, whitening materials are generally well-tolerated when used appropriately and according to directions. Tooth sensitivity is not unusual but it normally is self-limiting and resolves.”). The incidence of non-transient harm from non-dentist teeth whitening are rare. *See e.g.*, Respondent’s Response to Complaint Counsel’s First Set of Requests for Admissions (“RFA”) No. 18 (“Respondent admits that only three investigations it opened included a report of harm or injury to an individual”); RFA No. 21 (“Respondent admits that it is not aware of studies comparing the safety of teeth whitening services as performed by dentists” versus non-dentists); RFA No. 38 (Board not aware of “studies comparing the ‘patient health issues’ that might arise from teeth whitening services as performed by dentists” and non-dentists).

Second, the Food and Drug Administration (“FDA”) classifies hydrogen peroxide used in teeth-whitening as a cosmetic and not a drug, and classifies the LED lights used in teeth whitening outside of dental offices as Class I devices which require no license or prescription for use. Third,



there are states that explicitly allow non-dentists to provide teeth whitening services. *See e.g.*, FTCP-NCDB-000519 (Ohio), 225 ILCS 25/17(11) (Illinois), GWS-FTC-12-15(Wisconsin), FTCP-NCDB-701-703 (Florida), FTCP-NCDB-000675 (Michigan). In other states such as California, Texas, and Virginia, non-dentists provide teeth whitening services without any interference by any dental board or any state authority. Thus, the exclusion of a class of competitors is not reasonably necessary to insure safe teeth whitening provided by non-dentists. In addition, other less restrictive alternatives exist to address the purported justification. For example, in several states, a non-dentist can provide teeth whitening services as long as providers do not touch a customer's mouth. Other regulations short of totally excluding competition could be promulgated setting standards and other requirements.

Finally, the statute itself provides the appropriate means for Respondent to seek to prevent the unauthorized practice of dentistry - going to court, rather than deciding on its to take the unauthorized act of issuing cease and desist orders to prevent a class of competitors from competing. Respondent's Chief Operating Officer has testified that altering the language of the letter to eliminate the references to "Order" would not affect the Board's ability to fulfill its statutory obligation. White Dep., 27:11-25 (Rough).

Because Respondent's actions are neither reasonably necessary nor narrowly tailored to combat the alleged health risks, especially where, as here, those risks are minimal, Respondent's exclusion of the provision of teeth whitening services by non-dentists is not reasonably related to any efficiencies or other benefits sufficient to justify its adverse effect on competition. thereto.

I state under penalty of perjury that the above Complaint Counsel's Response and Objections to Respondent's First Set of Interrogatories was prepared and assembled under my supervision, and that the information contained herein is, to the best of my knowledge, true and correct.

Respectfully submitted,

s/Melissa Westman-Cherry

Richard B. Dagen

William L. Lanning

Melissa Westman-Cherry

Counsel Supporting the Complaint

Dated: November 18, 2010

**CERTIFICATE OF SERVICE**

I certify that I served via electronic mail delivery a copy of Complaint Counsel's Response and Objections to Respondent's First Set of Interrogatories to:

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By: s/ Richard B. Dagen  
Richard B. Dagen  
Federal Trade Commission  
Bureau of Competition

**INFORMATION REQUESTED BY RESPONDENT'S COUNSEL  
 IN EMAIL TO MSSRS. LANNING AND DAGEN DATED 1/16/11, 3:21 P.M.**

Item No.	Subject	Information Requested
1	Duties and responsibilities of co-lead counsel William Lanning	Clarifications of the duties, responsibilities, and authority of Mr. Lanning
2	Duties and responsibilities of co-lead counsel Richard Dagen	Clarifications of the duties, responsibilities, and authority of Mr. Dagen
3	Jurisdiction of licensure of individual attorneys designated as "Complaint Counsel"	<p>a. Identification of which individual Complaint Counsel were licensed in which of the various jurisdictions listed in Complaint Counsel's response to Respondent's Interrogatory No. 8</p> <p>b. Identification of which jurisdiction's rules of ethics applies to the conduct of each individual attorney in the case.</p>
4	Status/involvement of the FTC's Office of Policy and Coordination in this enforcement matter.	<p>Clarification of the following as to Mr. Michael Bloom's capacity in this matter:</p> <p>a. authority to speak for Complaint Counsel if he is serving in the capacity of either Complaint Counsel or as an official of the Commission;</p> <p>b. authority as an official of the Commission to direct the activities of Complaint Counsel;</p> <p>c. authority with respect to the activities of other individual Complaint Counsel; and</p> <p>d. jurisdiction or jurisdictions in which he is licensed to practice law</p>
5	Status/involvement of the FTC's Office of Policy and Coordination in this enforcement matter.	<p>Clarification of the following as to Ms. Erika Meyers' capacity in this matter:</p> <p>a. authority to speak for Complaint Counsel if she is serving in the capacity of either Complaint Counsel or as an official of the Commission;</p> <p>b. authority as an official of the Commission to direct the activities of Complaint Counsel;</p>



Item No.	Subject	Information Requested
		c. authority with respect to the activities of other individual Complaint Counsel; and  d. jurisdiction or jurisdictions in which she is licensed to practice law