ORIGINAL

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

In the Matter of	)	**PUBLIC**
THE NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS	)	**DOCKET NO. 9343**

COMPLAINT COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S APPEAL BRIEF

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RECORD REFERENCES

References to the record are made using the following citation forms and abbreviations:

RB - Respondent's Appeal Brief

ID - Initial Decision

IDF - Initial Decision Findings of Fact

IDCL - Initial Decision Conclusions of Law

SAO - Opinion of the Commission Rejecting the Board's State Action Defense

CCPFF - Complaint Counsel's Proposed Findings of Fact

CCPRFF - Complaint Counsel's Reply Proposed Findings of Fact

CCRRPTB - Complaint Counsel's Reply to Respondent's Post Trial Brief

CX - Complaint Counsel Exhibit

RX - Respondent's Exhibit

RPFF - Respondent's Proposed Findings of Fact

Joint Stipulations of Law & Fact - Citation to Joint Stipulations of Law & Fact

CCPTB - Complaint Counsel's Post Trial Brief

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I. STATEMENT OF THE CASE

Respondent North Carolina State Board of Dental Examiners ("Board") is dominated by dentists, and is engaged in a campaign to exclude from the marketplace non-dentist providers of teeth whitening services. Administrative Law Judge Chappell properly concluded that this conduct lessens competition, reduces consumer choice, harms consumers, and violates Section 5 of the FTC Act. The Board's criticisms of the Initial Decision are without merit.

The advent of non-dentist teeth whitening ("NDTW") presented consumers with a new alternative, combining some of the advantages of dentist service (*e.g.*, quick results) with some of the advantages of OTC whitening strips (*e.g.*, low price). The service is safe and effective, and attractive to consumers, as demonstrated by their willingness to patronize non-dentist providers at spa, salon, warehouse club, and mall locations.

North Carolina dentists complained to the Board about this new form of low-price competition. The Board responded to these complaints with various strategems designed to exclude non-dentist providers, including by issuing Orders directing non-dentist rivals to cease and desist from providing teeth whitening services.

The Board is a public/private hybrid entity. Opinion of the Commission, *In re North Carolina Board of Dental Examiners*, No. 9343 at 9 (Feb. 3, 2011) ("*SAO*"). The Board is public in the sense that it is a government agency, vested by the state legislature with certain delimited authority to regulate the practice of dentistry in North Carolina. *See* N.C. Gen. Stat. § 90-22 *et seq.* ("Dental Act"). The Board is simultaneously private in that it is controlled by its dentist-members, who are elected by North Carolina's licensed dentists. The decisions of the Board relevant to this litigation are not supervised by any state actor that is independent of financially interested dentists. Given this decision-making process, "'there is no realistic

assurance'" that the conduct of the Board promotes state policy, rather than merely serving the interests of the state's licensed dentists. *SAO* at 11. Consequently, the Commission determined that the antitrust state action exemption is inapplicable; that is, when regulating dentists and their non-dentist competitors, the Board is obliged to act in conformity with the antitrust laws. *Id.* at 13. The Commission previously held that the Board failed to comply with this requirement.

Upon learning that a person may be engaging in the unauthorized practice of dentistry, the Dental Act authorizes the Board to respond in one of two ways: the Board may bring a civil action in state court requesting that the court enjoin the alleged violation, or the Board may request that the district attorney commence a criminal prosecution. Seeking judicial intervention against non-dentists was viewed by the Board as too risky; the courts might not support the Board's position that only dentists should be permitted to bleach teeth. Thus, the Board decided on its own that teeth whitening is a service that may be performed only under the supervision of a dentist, and proceeded to use the imprimatur of state authority to exclude non-dentists from the marketplace.

The Board's exclusionary conduct includes issuing cease and desist orders to non-dentist providers; issuing cease and desist orders to manufacturers of products and equipment used by non-dentist providers; dissuading mall owners from leasing to non-dentist providers; and enlisting the Cosmetology Board to threaten non-dentist providers. As the ALJ properly determined, the Board's actions constitute and effectuate an agreement among its dentist-members. The manifest purpose and effect of the Board's multi-prong campaign is to eliminate NDTW operations in North Carolina. The Board's actions have and will reduce the availability of NDTW, forcing consumers to select an option that is less appealing to them, often at greater cost. And there is no offsetting efficiency justification.

The Board's arguments in this appeal are the very same arguments that populated the Board's state action brief. The Board claims that NDTW is illegal under North Carolina law, and that the Board is authorized by state law to drive these "illegal competitors" from the marketplace. Re-packaged as a defense under the rule of reason, the Board's arguments continue to be deficient. The Board's claims with regard to state law are inaccurate.[1] But more important, the rule of reason focuses upon the effects that a restraint has upon competitive conditions. The Board's arguments skew off in other directions, ignoring competition and the welfare of consumers. The Board simply ignores the Supreme Court case law, including the holding in *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 465 (1986) ("IFD"): "That a particular practice may be unlawful is not, in itself, a sufficient justification for collusion among competitors to prevent it."[2]

The Board believes that *IFD* – and virtually the entire corpus of antitrust case law – is inapplicable here because the Board is a state agency. The Commission has of course addressed this issue, concluding, "[a]bsent some form of state supervision, we lack assurance that the Board's efforts to exclude non-dentists from providing teeth whitening services in North Carolina represent a sovereign policy choice to supplant competition rather than an effort to benefit the dental profession." *SAO* at 13. The conduct challenged in this case is, for antitrust purposes, private action subject to the requirements of the FTC Act.

Complaint Counsel asks the Commission to affirm the ALJ's initial decision and to enter

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1 That is, NDTW is not illegal under North Carolina law. And the Board is not authorized by the Dental Act to engage in extra-judicial coercive efforts to eliminate competitors, whether lawful or not. ID 8.

2 *See also* ID 8.

his Order as the Order of this Commission.

II. STATEMENT OF FACTS

A. Introduction

The ALJ's findings are supported by the evidence and should be adopted by the Commission. In addition, we urge the Commission to make findings covering two additional areas. First, the ALJ properly found that the Board's conduct has the obvious tendency to harm competition; however, we urge the Commission to make additional findings that the economic theory and studies support the inherently suspect analysis. CCPFF 418-715 (discussed *infra* at 17-19).

Second, the ALJ correctly found that the Board's claim that NDTW may injure the public health and safety is not a cognizable antitrust defense and therefore declined to evaluate the evidence regarding health and safety issues. We urge the Commission to find that, even if cognizable, this defense fails as a matter of fact. CCPFF 716-1196 (discussed *infra* at 21-23).

As the record demonstrates, the Board's claims are vacuous. There are no scientific studies showing any systematic (or other) harms associated with NDTW. And the absence of such evidence is striking given the millions and millions of times that non-dentists teeth whitening has occurred. In fact, the only credible evidence on health and safety showed that any such concerns were unfounded.

Adopting these findings now will serve at least two purposes. First, such findings will provide a complete record for review should an appellate court disagree with the legal analysis on cognizability. Second, appropriate findings on this issue may allay public fears caused by the Board with respect to NDTW. In this sense, the findings may help to re-establish competition.

B. The Board Is Controlled By Market Participants

The Board is created by the Dental Act to regulate dentists and hygienists. IDF 1, 33, 35. The Board consists of six actively practicing dentists, one hygienist, and one consumer representative. IDF 2. The dentist Board members are elected by licensed dentists in North Carolina. IDF 15. The Board precluded the hygienist and the consumer representative from participating in investigations involving the alleged unauthorized practice of dentistry. IDF 40.

Dentists seek support from other dentists to become Board members, and continue to seek support once (re)elected. During campaigns for election to the Board, candidates may explain their positions on issues of financial interest to their dentist constituents. IDF 18-23; CCPFF 49, 52, 56. The Board solicits support from the dentists' trade association, the North Carolina Dental Society ("NCDS") to lobby the legislature for budget increases funded by increasing licensing fees. IDF 20, 204; CCPFF 73-76. Board members are members of the NCDS and other dentist trade associations. IDF 51, 53, 55, 56; CCPFF 132. In response to complaints about non-dentist teeth whitening from the NCDS, as well as individual dentists, the Board provided assurances that it was taking action. IDF 204-205.

C. Under State Law, The Board's Limited Authority To Redress The Unauthorized Practice Of Dentistry Does Not Include Issuance Of Cease And Desist Orders

The Dental Act authorizes the Board to address the alleged unlicensed practice of dentistry in two ways: the Board may petition a state court for an injunction, and/or it may request that the district attorney initiate a criminal prosecution. IDF 42-44. The Dental Act does not authorize the Board to issue a cease and desist order. IDF 45-49.

D. Teeth Whitening Can Be Provided By Dentists Or Non-Dentists, Or Self-Administered With Over-The-Counter Products Like Crest White Strips

1. Four Broad Categories of Teeth Whitening

There are four principal categories of modern teeth whitening products and services currently available in North Carolina and around the country: (i) dentist in-office teeth whitening services; (ii) NDTW services available in venues such as salons, warehouse clubs, and mall kiosks; (iii) dentist take-home teeth whitening products; and (iv) over-the-counter ("OTC") teeth whitening products. IDF 105.

Prior to 1989, whitening living teeth typically involved dental restorations or the physical scraping of stains from the teeth by a dentist. IDF 100-101; CCPFF 164-166. Then, in 1989, Dr. Haywood, the industry expert retained by the Board for this litigation, co-authored an article demonstrating the safety of "Night-Guard Vital Bleaching." This started the practice of whitening teeth with hydrogen peroxide at home under the supervision of a dentist. IDF 101.[3] A dentist makes a custom tray and provides the patient with applicators full of the peroxide. IDF 124. At home, the patient fills the tray with peroxide from the applicators and then places the tray in her mouth. IDF 121-124, 128. Because the trays contain a relatively low concentration of peroxide, effective whitening requires that the patient use the tray multiple times over a period of many weeks. IDF 125.

Dentists also provide in-office whitening that typically requires only one sitting to achieve the desired level of whitening. IDF 109, 116. Among the teeth whitening options, in-office dentist whitening uses the highest concentration of hydrogen peroxide, typically in the

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[3] Thus, stain removal as used in the Dental Act, adopted in the 1930s, does not cover modern teeth whitening but refers to the physical removal of stains. CCPFF 161-173, 722, 746-747, 750, 753-754.

25% to 35% range. IDF 109; CCPFF 177-178. Due to the high peroxide concentration, a protective barrier must be placed on the gums to prevent burning. IDF 111. Dentists often use an LED or UV light to "accelerate" the whitening. IDF 112-115. Dentist-provided chairside teeth whitening is the most costly bleaching alternative, often costing between $400 and $700. IDF 117-118.

OTC teeth whitening products became popular with the introduction of Crest White Strips in 2001. IDF 129-131. These products are viewed by the FDA as sufficiently safe as to be classified as cosmetics rather than drugs (CCPFF 732, 976, 1124), and thus are directly available to consumers at supermarkets, drugstores, and other locations. IDF 130. The peroxide concentration in OTC products is considerably less than that used in-office by dentists (and historically less than that offered by non-dentist providers). IDF 130-131, 140. Like dentist take-home kits, consumers self-apply the OTC products over the course of weeks. IDF 130, 132-136. Whitening results vary considerably because consumer compliance with the regimen is required with no oversight or supervision. IDF 135-136.

Entrepreneurs recognized a market opportunity: consumer demand for a quick, low cost teeth whitening option. Through investment in R&D and extensive testing, several small businesses created teeth whitening systems to fill this niche. NDTW operations opened around the country. Salon and kiosk providers whiten teeth in one sitting, no appointment is necessary, and the cost is between $75-$150. IDF 137-140, 146-150.[4] One witness testified that his business grew from start-up to over 100 employees virtually overnight, operated in over 60

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[4] The products used by salons and kiosks have 10%-15% concentration. Carbamide peroxide, a compound of urea and hydrogen peroxide, is typically used: a carbamide peroxide concentration of 45% is approximately equal to a hydrogen peroxide concentration of 15%. CCPFF 171.

Sam's Clubs around the country, and provided over 100,000 bleachings since 2007. IDF 72; *see also* CCPFF 1275.

Trial witnesses demonstrated the typical NDTW procedure. IDF 142-144; CCPFF 457-459. A non-dentist operator explains the process to the customer, provides the customer with literature, sometimes including a consent form, and answers any questions before the procedure begins. IDF 142. The operator dons sanitary gloves and hands a sealed package containing a tray filled with carbamide peroxide to the customer, who places the tray into his or her mouth. IDF 143. No protection for the gums is necessary at these concentration levels. IDF 141. A light accelerator is then situated by either the customer or the operator. IDF 143-144. Unlike the UV lights often used in the dentist office, these LED lights do not raise the ambient temperature and produce little UV radiation. IDF 144. The process lasts less than an hour, after which the customer either returns the tray to the operator for disposal or disposes of it herself. IDF 143, 146.

The service is designed to minimize safety risks and accord with dental acts around the country. The whitening systems provide for customer self-application; the operator does not touch the customer's mouth. IDF 143; CCPFF 457-459. Salons and spas are regularly inspected by the State to assure compliance with very detailed, stringent health and safety requirements. CCPFF 1092. Cosmetologists are subject to training requirements. IDF 73. Kiosk operators receive information and training from the manufacturer before they start whitening teeth. IDF 74, 173. NDTWs, like dentists and other businesses, carry liability insurance in the event of consumer injury. CCPFF 1112, 1114, 1115.

Dr. Martin Giniger, a world-renowned teeth whitening expert (CCPFF 774-795), testified that teeth whitening is safe and effective, whether performed by dentists or non-dentists or by the

consumer using OTC products. IDF 82. Dr. Giniger is a licensed dentist, having obtained a doctor of dental medicine with honors in 1984. Dr. Giniger also has an MsD in Oral Medicine (1993), and a PhD in Biomedical Science (1993), with a specialization in oral biology. IDF 80; CCPFF 777-779. On the subject of teeth whitening, he has taught at prestigious dental schools, published in peer reviewed journals, conducted clinical studies, received prestigious awards and grants, received numerous patents, and consulted with major manufacturers such as Proctor & Gamble, Johnson & Johnson, and Discus Dental, helping to develop extremely successful products. IDF 80-81; CCPFF 781-791.

Dr. Giniger explained that over the last 20 years, millions of consumer have safely bleached their teeth without dentist involvement and there is not a single study demonstrating substantial, nontransient harm from non-dentist teeth bleaching. CCPFF 733-736, 908-909, 917-918.

2. Dentists and Non-Dentists Compete to Sell Teeth Whitening Services

Dentists and non-dentists compete to provide on-site or "chairside" teeth whitening to consumers in North Carolina. IDF 151-174. Chairside teeth whitening, whether by a dentist or non-dentist, results in whiter teeth in as little as an hour. IDF 111, 116, 146, 168. In contrast, take-home dentist trays and OTC products typically take weeks of self-application to achieve whitening. IDF 125, 135-136, 172. *See also* CX571-007 (Board member explaining patients prefer the in-office procedure because they "wanted whiter teeth without having to fuss with what they deemed as something that took too long."); CX0641-001 (dentist contrasting OTC with "one time whitening sessions seen at malls and some dental offices"), 041 ("there's no fuss or mess and no gels or trays to take home"). Compared to OTC products, non-dentist and dentist chairside providers offer several additional services, including instruction, provision of a chair, a

tray, provision and loading of the peroxide, use of a light activator, and disposal of the product. IDF 151-152; CCPFF 460-461. As the Board's expert economist testified, "[I]t seems like you have a similar lineup [of attributes] with the kiosk versus the dentist." CCPFF 504-505 (paraphrased in IDF 153).

There is industry recognition that consumers choose between dentists and non-dentists. IDF 157-169. Consumer surveys for a leading dental supplier show that consumers rate NDTW products between OTC products and dentist products across a variety of characteristics, including convenience, value and pain. IDF 169. Non-dentists advertise that their services compete with dentist chairside teeth whitening. IDF 164-168. Dentists commonly tout the advantages of using a dentist rather than a non-dentist operator, focusing on the dentist's training and the benefits of dentist-provided screening. CCPFF 488.[5]

Customers indicate that the high price of dentist whitening influences their decision to purchase non-dentist teeth whitening. IDF 107; CCPFF 475-476, 490, 506, 508; Tr. 2103. Not surprisingly, dentists recognize that consumers may substitute between dentists and non-dentists based on price. IDF 157-161. Dentists who forward complaints to the Board often include salon advertisements, and highlight the prices charged by the non-dentists, evidencing a concern over price competition. ID at 87 (citing IDF 196, 200, 202, 232); CCPFF 212, 213, 218, 220-221. *See* CCPFF 221 ($99 pricing "does affect the local dentist"), IDF 200 (citing CX0365 at 002) ("They charge $100!"). The dental profession acknowledges that the public may perceive attempts to stop NDTW as protecting their "turf;" that is, that dentists are more concerned with

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[5] Respondent's Brief acknowledges the marketing comparisons. *See, e.g.,* RB at 9 ("non-dental teeth bleaching carries the potential for a less esthetic outcome"); *id.* ("the patient may not receive any or the maximum benefit available for whitening, and may waste money on ineffective products"); *id.* at 8 (dentist provides custom treatment that non-dentist cannot).

monopolizing "lucrative cosmetic services than with access to care issues." CCPFF 1241.

There is a high cross-elasticity between dentist and NDTW. IDF 154-155; Tr.1842; CCPFF 521.

3. Dentists, Including Dentist Board Members, Have a Financial Interest in Preventing Non-Dentist Teeth Whitening

"[T]he existence of a financial interest of dentists in the exclusion of kiosk/spa operators does *not* require that dentists be the only substitutes for kiosk/spa operators . . . . It requires only that they compete with each other to a significant degree." CCPFF 157 (quoting Kwoka Expert Report, CX0654 at 009). As discussed in the prior section, dentists and non-dentists do compete to provide teeth whitening services.

In terms of financial interest, teeth whitening is the number one requested cosmetic dentistry procedure. IDF 102. The American Academy of Cosmetic Dentistry ("AACD") reported that dentist teeth whitening procedures increased more than 300% between 1996 and 2004. IDF 102. Over 80% of dentists engage in the practice of teeth whitening. IDF 103. Further, a Gallup poll found that even more dentists would provide teeth whitening under the right market conditions. CCPFF 147. To enter into the teeth whitening market, a "general" dentist need only start advertising cosmetic dentistry services; no certification is necessary. CCPFF 147.

Teeth whitening can be lucrative for dentists. The Board's constituents may earn tens of thousands of dollars per year by whitening teeth. For 2006, AACD members averaged teeth whitening revenues of $25,000 (total of $138.8 million). CCPFF 145; RPFF 606-607. This figure is consistent with reports from North Carolina dentists. Some dentists who complained to the Board about teeth whitening generated revenues of $30,000 per year or more, in recent years.

IDF 104, 233.[6]

Several Board members have earned tens of thousands of dollars annually from teeth whitening. IDF 8-11. The Board member with the highest practice revenues from teeth whitening, primarily in-office, was assigned – often on his initiative – most of the Board's NDTW investigations. IDF 10.

Dentists also fear that permitting non-dentists to offer teeth whitening competition may open the floodgates to other negative consequences for dentists. As Dr. Van Haywood, the Board's industry expert, testified,

> If we are unable to define what a dentist does based on their training and education, then we have opened the door for the lowest level of 'mid-level provider,' the mall bleacher. . . . I believe this bleaching question will be what the definition of the profession hinges on for the future. If you cannot defend the position that it is best to see a dentist, then there is no need for a dentist for any other treatments.

CCPFF 225. *See also* CCPFF 220; CX0278 at 001 (dentist complains that $99 mall bleaching "cheapens and degrades the profession" and "teaches the public to not value or respect the dental profession"); CCPFF 224 ("[i]f we as dental professionals do not take a stand, then it will not be to [sic] long that the patient will be doing their own dental work outside of the dental office.").

Because dentists are market participants, the Board and those it represents have a financial interest in preventing competition from NDTWs. *SAO* at 14. As articulated by the Board's own expert economist: Board members "may well be influenced by the impact on the bottom line" in deciding whether to ban NDTW. IDF 12.

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[6] Subpoena returns from dentists include promotional material for in-office whitening, and report substantial billing for in-office procedures, as well as other teeth whitening revenues. E.g., CX0600, CX0601, CX0610, CX0612, CX0613, CX0617.

E. The Board Issued Cease And Desist Orders To Non-Dentist Operators

Beginning around 2003, North Carolina dentists began to complain to the Board about the increasing presence of non-dentists performing teeth whitening in salons and kiosks throughout the state. IDF 137, 194-205.

A complaint received by the Board is assigned to one of the dentist members serving as Case Officer. The Case Officer reviews the incoming complaint, determines whether to investigate, and decides whether to pursue litigation as authorized under Dental Act or, alternatively, to issue a cease and desist order on behalf of the Board. IDF 183, 185, 189-191. Initially, as contemplated by the Dental Act, the Board challenged NDTW in court. CCPFF 234, 238, 245.

Beginning in 2006, concerned that North Carolina courts would not rule in its favor,"[7] the Board shifted to issuing its own cease and desist orders. IDF 207-208; CCPFF 239-241, 254-255, 258. The Board issues these cease and desist orders as a *substitute* for the process of gathering evidence and going to court as provided for by North Carolina law. IDF 210-215; see CX0070 at 002 ("Dr. Hardesty has pretty much taken the stance that we write them a Cease and Desist letter the first go round."); IDF 213 ("[I]f it is unclear as to whether or not, or if it appears that there's a violation, then we would send a Cease and Desist, you know."); CX0555 at 060 (if not clear that case against a target can be won in court, the Board would "probably" issue a cease

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[7] The Board has not been wholly successful in litigating against non-dentists providing cosmetic dental services. For example, a North Carolina court found that the Dental Act "should be liberally construed," but nonetheless ruled that the Board had overstepped its authority when it alleged in a civil complaint that a maker of cosmetic mouth jewelry was engaged in the practice of dentistry: "[t]he extension of the definition of 'practice of dentistry' . . . is best left to the legislature." CCPFF 240. Notably, the Board there too asserted that non-dentists would seriously harm the public. *Id.*; CX0141 at 001-002.

and desist order).

F. The Board's Letters To Teeth Whitening Operators Purport To Be Orders From A State Agency

Over the past five years, more than 45 cease and desist orders were issued by various members of the Board, using virtually identical language. *See* IDF 208-209, 216-25 (providers); 261-262, 264-65, 274, 286 (manufacturers). The record before the Commission at the summary decision stage, as well as testimony at trial and additional contemporaneous documents, all confirm that the letters were orders from a state agency to stop teeth whitening activities. IDF 234-245; *SAO* at 5.[8]

G. The Board's Exclusionary Conduct Extended Beyond Issuing Cease And Desist Orders

1. The Cosmetology Board

In February 2007, the Board realized that a large number of the non-teeth whitening operations were facilities regulated by the Cosmetology Board. IDF 314-315. Board counsel, after receiving approval from the entire Board, contacted the Cosmetology Board to enlist its assistance in dissuading non-dentists from competing. IDF 316-321. The Board induced the Cosmetology Board to inform cosmetologists that "only a licensed dentist or dental hygienist acting under the supervision of a licensed dentist" may provide these services and that the "unlicensed practice of dentistry in our state is a misdemeanor." IDF 320, 322. Thus, the Dental Board used the Cosmetology Board to command salons and spas to stop teeth whitening and

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[8] The Board clearly understood how to warn and advise rather than order. *See* IDF 259 (October 2000 letter to one company, rather than commanding the recipient to stop its activities, simply stated "This is to advise you that the North Carolina State Board of Dental Examiners is considering initiating a civil suit to enjoin you from the unlawful practice of dentistry."). IDF 260 (December 2001 letter: "This is to advise you that the Board is conducting an inquiry . . . .").

prevent further entry. IDF 322-327.

2. Manufacturers, Mall Operators, and Potential Entrants

The Board's concerted exclusionary campaign extended beyond targeting existing non-dentist operators. The Board also contacted manufacturers of teeth whitening products (IDF 261-266, 274-276, 280), potential entrants, and mall owners and operators. IDF 284-293. The Board communicated the message that NDTW is unlawful unless performed under the supervision of a dentist. IDF 264, 274-276, 280, 284-293. For example, the Board unanimously approved sending letters to eleven malls stating in relevant part:

> It is our information that the teeth whitening services offered at these kiosks are not supervised by a licensed North Carolina dentist. Consequently, this activity is illegal.
>
> The Dental Board would be most grateful if your company would assist us in ensuring that the property owned or managed by your company is not being used for improper activity that could create a risk to the public health and safety.

IDF 288-289. The purpose and effect of these additional letters and communications was to impede entry by non-dentists. IDF 292-293.

H. Dentist Board Members Engaged In Concerted Action

Each action challenged in this matter was undertaken with either the express or implicit authorization of the dentist board members. From the outset of the Board's campaign, dentist Board members consciously committed to the development and implementation of the Board's campaign against NDTW.

In 2004, the Board received a complaint concerning one of the first teeth whitening operations in North Carolina. The complaint circulated among the Board members, with references as to the legality of the operation, and how to proceed. CCPFF 232; CX0041.

Board decisions with respect to this and all subsequent complaints were unanimous

because the Board speaks with "one voice." CCPFF 127. The dentist Board members "act as one body;" and "once a decision is made, it becomes the Board's final ruling and should be supported by all members." CCPFF 127-128. In other words, there is no individual action by dentist Board members.

The Board delegated to individual members the authority to deal with NDTW, including through the issuance of cease and desist letters. IDF 176-191. This Case Officer, however, does not act independently of the Board. The Board's Investigative Manual specifically explains that "At all times, investigations, as well as investigative and Board staff, will be subject to Board authority and oversight." CX0527 at 067. In short, all actions of individual members reflect collective action. The Board suggests that the NDTW investigations were conducted in a manner similar to other cases – all of which involve the Board members acting together with one voice.

Evidence of the commitment to a common scheme is present throughout the record. The Orders, like other Board actions, were issued on Board stationary, signed by Board members or staff, and copied to Board counsel. The Order itself states that the directive came from the Board and that responses were to be directed to the Board. IDF 219-225. Board members also discussed and agreed that the Orders could be issued without evidence. CCPFF 263; CX0070 at 001.

Additionally, the Board formally approved actions against non-dentist operators. The Board voted unanimously to send out letters to property owners and managers of malls. IDF 288-293. The Board unanimously approved communicating with the Cosmetology Board in furtherance of its policy. IDF 316-321. Whenever asked about the teeth whitening policy, whoever was speaking, indicated that the Board, not any individual, was acting. See, e.g., IDF

241, 263. See also IDF 201 ("we are currently going forth to do battle"); IDF 264, 276 (Board minutes "staff directed to respond" that teeth whitening must be done by dentists). The Board members deliberated over the content of the teeth whitening policy, the Chief Operating Officer circulated a statement setting out the Board's teeth whitening policy, the Board members deliberated over it, and it was issued to the public on behalf of the Board. CCPFF 388. The policy statement was created to present a common Board policy. CX0369 (COO to members of the Board: "I suggest we draft a brief statement for your approval so we can say the same thing to everyone."). In January 2010, a new (albeit almost identical) statement was circulated and approved by the Board. White, Tr. 2314; CX0475. Board members debated among themselves and Board counsel whether to settle a case. CCPFF 249-251. Even the decision not to meet with lawyers for NDTWs was made collectively. CCPFF 373.

There is no evidence in the record that, contrary to Board policy, Board members were acting on their own, or without authority from the Board. To the contrary, the Board has defended its teeth whitening actions as those of the Board.

I. The Board's Anticompetitive Conduct Resulted In Decreased Output, Higher Prices And Reduced Consumer Choice

1. Economic Theory and Studies Establish Presumption of Consumer Harm Through Higher Prices and Reduced Consumer Choice

a. Economic theory

The two testifying expert economists, Professor Kwoka and Professor Baumer, agreed that an exclusion model, rather than a cartel model, was the correct framework to analyze the Board's conduct. They also agreed as to the principal conclusion of this model: exclusion of a low cost provider will result in the loss of consumer welfare, in the absence of a valid efficiency

justification. CCPFF 545-564.

The requirements for a successful exclusion model and the results that follow from exclusion are, as Professor Baumer acknowledged, "straightforward" "Econ 101." CCPFF 559-560, 562. The Board represents the interests of dentists and has the power and ability to exclude non-dentists from the teeth whitening market. CCPFF 553. This is in fact what occurred. In the absence of an efficiency justification, the exclusion of NDTW will deprive consumers of the benefits that would accrue from competition. Some consumers are denied their non-dentist provider of choice and switch to higher priced dentist services or more time consuming OTC products. Consumers who already use dentist providers will pay higher prices. And some consumers will leave the market altogether.

b. Empirical economic studies

Empirical economic studies teach that unjustified exclusion results in anticompetitive effects across all markets, including markets involving health care professionals and state licensing boards generally, as well as dentistry-related markets specifically. CCPFF 572-577. Professor Kwoka demonstrated that the economic literature is replete with empirical studies confirming that licensing boards have acted to benefit their constituents, with corresponding harm to consumers. CCPFF 572-577. The studies found that restrictions in numerous and varied occupations were often adopted at the behest of incumbent providers of professional services and defended as protecting the public, but that the restrictions had no systematic benefits in quality and resulted in higher prices. CCPFF 574, 577-581. Based on prior economic studies, Professor Baumer admits that a public interest justification is often a smokescreen, and therefore it is "prudent to maintain healthy skepticism" when such a justification is raised. CCPFF 594, 605.

Some studies focused specifically on restrictions in dentistry. For example, economists concluded that dental board restrictions on entry by new dentists and restrictions on scope of practice by dental hygienists have resulted in higher prices without quality benefits. CCPFF 583-584. The economic studies show that exclusionary conduct by dentists and dental boards produces harm similar to that found in studies of exclusionary conduct by other professionals and non-professionals. CCPFF 582-587.

Professor Baumer's attempt to downplay the studies' probative value in the current matter was shown to be baseless. *See, e.g.,* CCPFF 577 (Professor Baumer himself relied on these studies in a 2007 article and did not change his view till after he was hired for this litigation).[9] Professor Baumer observed that professional boards still engage in anticompetitive actions and that there is "absolutely" "continuing potential for abuse by state boards." CCPFF 604.

The studies discussed by Professor Kwoka provide a strong foundation for a presumption that exclusionary conduct by a dental board is anticompetitive absent an efficiency justification. CCPFF 544-568, 596-598.

2. Evidence Shows Actual Anticompetitive Effects

a. The Board's conduct resulted in decreased output

The Board's campaign to shut down NDTW operations in North Carolina met with considerable success. As a result of the cease and desist orders, numerous teeth whitening

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[9] Professor Baumer admits that, historically, incumbent professionals imposing the restraints on "lesser" skilled professionals used the exact same justification - the potential competitors were woefully underqualified and threatened the health and safety of consumers. CCPFF 605. Notably, the exclusion here applies against "lesser" professionals such as hygienists and dental assistants (Joint Stipulations of Law & Fact 33, 35-36; CCPFF 320).

operations closed; others pared back operations and advertising. IDF 246-257. The Board's other extra-judicial conduct also resulted in reduced output. For example, the Board's letters to the malls had their desired effect. As a result of these letters, operators of at least seven malls in North Carolina either terminated or refused to lease space to non-dentists intent on operating teeth whitening facilities. IDF 294-313. And sales into North Carolina of teeth bleaching supplies and equipment for use by non-dentist-providers of teeth whitening services have decreased substantially. IDF 261-287 (covering undisputed testimony of three manufacturers).

b. Consumers were harmed

As the economic theory and studies predict, the Board's anticompetitive conduct resulted in substantial consumer harm. Professor Kwoka identified five types of harm to consumers:

(1) loss of an innovative product,

(2) higher prices to consumers who shift from non-dentist to dentist teeth whitening,

(3) smaller consumer surplus to consumers who shift fom NDTW to less-favored OTC strips,

(4) loss of consumer surplus by consumers who forego teeth whitening, and

(5) higher price to consumers of dentist teeth whitening due to increased demand.

IDF 79; CCPFF 681-710.

Indeed, Professor Baumer concedes that consumers will suffer from loss of convenience and higher prices. CCPFF 685-691.[10] And, as the ALJ properly found, there is a loss of consumer choice. IDF 257; IDCL 34; ID 103.

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[10] The absence of data to show price effects from exclusion is a more frequent occurrence than its availability because such data is difficult to come by. CCPFF 695. Professor Baumer admitted that collecting data and performing an economic study to measure the costs and benefits of a ban on teeth whitening would require "Herculean assumptions that would be virtually unverifiable." CCPFF 696.

J. No Offsetting Efficiencies Exist

Judge Chappell rejected the Board's safety justification for its anticompetitive conduct because such a defense is not cognizable under the antitrust law. ID 108. Having so held, Judge Chappell saw no need to make Findings of Fact regarding the safety of NDTW, and did not do so. ID 8. Nevertheless, we urge the Commission to make findings covering the safety of NDTW and the credibility of witnesses. CCPFF 716-1196.

We begin by noting that the Board's claim that NDTW is dangerous rests almost entirely on naked assertions by Board members and employees, and the unsupported opinions of Dr. Haywood, who was retained by the Board to testify. The Board members and employees share the Board's interest in the outcome of this matter, and their testimony should be rejected because it is wholly unsubstantiated. Asked repeatedly if they knew of any studies, reports, or verified incidents establishing that NDTW had harmed consumers in fact, Board members and employees repeatedly answered that they did not.[11] CCPFF 908, 909, 915. Similarly, Dr. Haywood did not know of any studies, reports, or verified incidents establishing that NDTW had harmed consumers in fact. CCPFF 917, 918.[12]

In contrast, Dr. Martin Giniger testified credibly concerning the safety of NDTW based on superior training, experience, logic, and candor. *See, e.g.*, CCPFF 774-799, 1313-1323. Dr.

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[11] One Board member testified that hydrogen peroxide was safe enough to be used with newborns, and that consumers using too much bleaching solution in their trays would "just get a mouthful of bubbles." CCPFF 726, 986, 988.

[12] While directing the Commission's attention to three states purportedly supporting its view of NDTW (RB 38), the Board fails to mention that NDTW is permitted in numerous other states, including Florida, California, New York, Illinois, Ohio, Indiana, Wisconsin, Tennessee, and Texas. CCPFF 1246. These states encompass approximately half the population of the United States, and yet the Board failed to present any evidence of public safety problems in those states.

Giniger debunked claims by Board members and Dr. Haywood by walking the court through the scientific literature critically analyzed at length in his expert report. CCPFF 716-724, 931, 945-951, 952-960, 963-971, 1008-1045, 1077, 1313-1323; CX0653. Dr. Giniger testified that scientific studies relevant to NDTW were indicative of its safety. See, *e.g.*, CCPFF 716, 717, 725, 727, 728, 786, 798, 896, 946, 967-971. He spoke to the composition and characteristics of NDTW products (see, *e.g.*, CCPFF 725-732, 931-938, 953-955, 963-971) and the methods and protocols used by non-dentist teeth whiteners (see, *e.g.*, CCPFF 447-450, 452-457, 463-464, 1077-1081, 1092), explaining why they too were indicative of NDTW's safety. And he testified as to the evidence derived from experience: there have been millions upon millions of non-dentist-provided teeth whitening events over a multi-year period. Given the ubiquity of NDTW, if NDTW were harmful, there would be some studies, reports, or verified incidents showing that harm – but there are none. Finally, given Dr. Giniger's involvement with both dentist and non-dentist provided teeth whitening, he had no motive to slant his testimony in favor of one group or the other.

Dr. Haywood's contrary opinions are unsupported and speculative, and Complaint Counsel's Proposed Findings of Fact demonstrate that his views are the product of deeply ingrained positional bias, which is rooted in his close identification with *dentist-provided* nightguard vital bleaching ("NVB"). CCPFF 800-906. Dr. Haywood's co-development of NVB is the foundation of his professional career, his esteem within the dentist community, and his economic well-being. CCPFF 801, 804-810. His decades-long mission has been the promotion of *dentist-provided* NVB, and for an ever-increasing set of uses. CCPFF 807, 811, 820-821, 829-830. Now lay people provide similar services, provoking Dr. Haywood to offer

outlandish,[13] unscientific,[14] flawed,[15] uninformed,[16] and internally inconsistent[17] "expert" opinions concerning the dangers posed by these interlopers. In addition, Dr. Haywood admittedly offers a theory of harm that, even if false, cannot be disproven. CCPFF 1003. This is an indicium of "junk science" (See *Daubert*). And Dr. Haywood's reliance upon it as the keystone for his "NDTW is harmful" contention is proof that Dr. Haywood's positional bias has overwhelmed any semblance of professional objectivity, rendering his testimony untrustworthy.

Finally, for Dr. Haywood (and others), non-dentist teeth whitening is just the opening wedge for a broader lay intrusion into the dentist's rightful domain; it therefore must be stopped. CCPFF 837-839. The advent and rapid growth of non-dentist teeth whitening radically shakes the ground on which Dr. Haywood stands.

Dr. Haywood's testimony should be disregarded.

K. Less Restrictive Alternatives

Banning a desired product is a drastic measure, and there are less restrictive alternatives available to address the purported safety justification. CCPFF 1201, 1251. One example is that

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[13] CCPFF 844, 848 (calls non-dentist teeth whiteners "charlatans," "quacks," and "thieves"); CCPFF 850 (calls NDTW "assisted suicide"); CCPFF 851 (likens NDTW to "abortion").

[14] CCPFF 874, 881-885, 891-906, 945-962, 993, 995, 1006, 1009 (refusing to account for millions and millions of safe uses, failing to explain away the absence of evidence of harm, ignoring numerous studies showing the safety of NDTW). *See also* CCPFF 1003.

[15] CCPFF 992, 1001, 1011-1044 (failing to explain why the extremely low probability of a masked pathology warrants a ban on NDTW).

[16] CCPFF 845, 848, 862-888 (condemning NDTW with admittedly no information about the service or product other than that it is performed by non-dentists).

[17] CCPFF 992, 1001, 1011-1044 (asserts NDTW doesn't whiten while also opining that NDTW works so good that it will mask a "pathology").

states may prohibit non-dentists from putting their hands in the customer's mouth, but otherwise permit NDTW. CCPFF 1247-1248. In addition to various alternatives short of a ban on NDTW (CCPFF 1194, 1205, 1254-1255, 1261), the Board could challenge NDTW by using the procedure prescribed in the Dental Act by the State of North Carolina.

III. ARGUMENT

Congress empowered the Commission to prevent "persons, partnerships, or corporations" from using "unfair methods of competition in or affecting commerce." 15 U.S.C. § 45(a)(2). The ALJ properly determined that the Board is a "person" subject to the Commission's jurisdiction; that the Board engaged in concerted action that excluded non-dentists from competing with dentists in the provision of teeth whitening services; that the Board's multi-prong, exclusionary campaign constitutes an unfair method of competition; and that the Board's actions were in or affecting commerce. The Commission should affirm these conclusions, and should enter an appropriate Order against the Board.

A. The Board Is A "Person" Subject To Commission Jurisdiction

The Commission fully resolved the jurisdictional issue in this case. The Commission determined that a state agency is a "person" within the meaning of Section 5. *SAO* at 5-6. The Board is, by its own acknowledgment, a state agency. Accordingly, the Board is subject to the jurisdiction of the Commission. The Board seeks to re-visit this issue, but offers no new argument or authority. In sum, the Board is not an executive branch agency and it is not the sovereign; the Board is a "person" within the meaning of the FTC Act.

B. The Challenged Actions Of The Board Constitute Concerted Action

The ALJ properly determined that the Board's campaign to exclude non-dentist providers of teeth whitening services constitutes concerted action. ID 71-81. The dentist-members of the Board are the conspirators; the Board members and employees implement the exclusionary strategy, and in this sense serve as the instruments or agents of the conspiracy. The ALJ rejected the Board's contentions, now renewed on appeal, (i) that the Board and its members are a single enterprise incapable of concerted action, and (ii) that the challenged conduct is not in fact the

product of an agreement among members of the Board. As discussed below, the Board's arguments are without merit.

1. Board Members are Capable of Engaging in Concerted Action

Board decision-making is dominated by six independent dentists, each with an independent economic interest. Consequently, the members of the Board are capable of concerted action within the meaning of the antitrust laws.

Whether the Board is properly characterized as a "contract, combination . . . or conspiracy" of its members, or instead as a single enterprise, requires a "functional consideration of how the parties involved in the alleged anticompetitive conduct actually operate." *Am. Needle, Inc. v. NFL*, 130 S. Ct. 2201, 2208-10 (2010) (holding that the licensing activities of the National Football League constitute concerted action). In this regard, it is undisputed that the dentist-members of the Board operate separate dental practices, and that their economic interests are distinct and potentially competing.[18] This is not a matter of happenstance: Section 90-22(b) of the Dental Act expressly requires that the dentist-members be "actually engaged" in the practice of dentistry, thus ensuring a multiplicity of economic interests. Unlike the components of a unitary business enterprise (*e.g.*, parent and subsidiary corporations; employer and employee), the dentist-members are not seeking to maximize the profits of the Board – or of any other single economic actor. The Board's efforts to exclude non-dentist providers of teeth whitening are not the sort of "routine, internal business decisions" of a single firm that are

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[18] *Cf. Am. Needle*, 130 S. Ct. at 2206, 2213 (NFL teams are "separate, profit-maximizing entities"; the teams "have distinct, potentially competing interests").

indicative of individual action.[19] Instead, this is precisely the type of conduct that Section 1 is intended to cover. *See SAO* at 14 (the challenged conduct – efforts by incumbent dentists' to exclude their competitors – "lies at the heart of the federal antitrust laws").[20] Finally, it is only by acting in combination, as a regulatory body, that the individual Board members have the power to exclude non-dentists or otherwise to supervise the industry.[21] All of these factors, according to the Supreme Court, weigh in favor of a finding that the Board is engaged in concerted action.

That the Board is a legal entity does not negate the capacity for concerted action. The Supreme Court has "repeatedly found instances in which members of a legally single entity violated Section 1 when the entity was controlled by a group of competitors and served, in essence, as a vehicle for ongoing concerted activity." *Am. Needle*, 130 S. Ct. at 2209. For example, the Court treats professional organizations[22] and trade groups[23] as concerted actors. These cases are closely analogous to the present litigation, in that the Board (like these non-

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19 *Cf. id.* at 2209. "Congress used this distinction between concerted and independent action to deter anticompetitive conduct and compensate its victims, without chilling vigorous competition through ordinary business operations." *Id.*

20 *Cf. id.* at 2212.

21 *Cf. Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 769 (1984) (concerted behavior "not only reduces the diverse directions in which economic power is aimed but suddenly increases the economic power moving in one particular direction").

22 *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447 (1986); *Arizona Maricopa County Med. Soc'y*, 457 U.S. 332 (1982); *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679 (1978) ("NSPE").

23 *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988); *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961) (per curiam); *Fashion Originators' Guild of America, Inc. v. FTC*, 312 U.S. 457 (1941).

governmental entities) is a mechanism for competing professionals to engage in industry self-regulation – a core Section 1 concern. Even more precisely on point is *In re Massachusetts Bd. of Registration in Optometry*, 110 F.T.C. 549, 610-11 (1988), holding that a state agency consisting of independent competitors is engaged in concerted action. The Board offers no rationale for distinguishing these cases.

The Board instead answers that North Carolina laws "prohibit" Board members from operating as "separate economic actors." RB at 25. The intended meaning of the Board's brief and undeveloped answer is obscure. Again, North Carolina law requires that the majority of Board members be licensed dentists who are "actually engaged" in the practice of dentistry. Yes, these Board members take an oath of office and undergo annual ethics training. However, these exercises are not probative of a state action defense (*SAO* at 14), and likewise have no logical relationship to the capacity of the dentist-members to act in concert.

2. The Board's Campaign to Exclude Non-Dentists is Concerted Action

As developed above, the Board is not a unitary actor, but rather a combination of competitors that are capable of conspiring within the meaning of Section 1. The next step is to consider whether the Board members have in fact conspired. The Board contends that each episode of exclusion identified by the ALJ was the work of a single dentist-member, and hence that there is no concerted action. In particular, we are told that only one Board member, serving as Case Officer, sent each cease and desist order. This is not a serious way to characterize what, as the ALJ found, is a prolonged, deliberate, and collaborative effort by the Board to eliminate an entire category of rivals. There are two ways to demonstrate that the Board's exclusionary conduct is concerted action.

a. The Board is a continuing conspiracy of its members

The anticompetitive activities of a concerted actor like the Board may properly be "attributed to its members as a continuing conspiracy," and so perforce satisfy the concerted action requirement. Areeda & Hovenkamp, *Antitrust Law*, ¶1477. According to the leading antitrust treatise, "[t]he courts proceed in these terms, although seldom explicitly . . . ." *Id.* For example, where two association members issued, on association stationary, "'unofficial' letters . . . to injure seriously the business of a competitor,"[24] "the premise of the violation was the organization's status as a continuing combination of its members." *Id.*

The continuing conspiracy concept explains cases involving a joint venture among competitors: the actions of the venture and its agents are perforce attributable to the venturers, thus satisfying the concerted action requirement. *E.g., Am. Needle*, 130 S. Ct. 2201; *United States v. Sealy, Inc.*, 388 U.S. 350, 352-355 (1967); Areeda & Hovenkamp ¶1478a. The defendant in *Sealy* was a single corporation jointly owned by competing mattress manufacturers. Sealy licensed each manufacturer to make and sell products, under the Sealy name, and in an exclusive territory. Sealy claimed that its licensing scheme was a vertical arrangement between Sealy (claiming to be a unitary enterprise) and individual manufacturer-licensees. The Court looked to the "substance rather than form" of the arrangement (388 U.S. at 352), and discerned a horizontal conspiracy among the manufacturer-licensees:

> The territorial arrangements must be regarded as the creature of horizontal action by the licensees . . . . Sealy, Inc., is an instrumentality of the licensees for the purpose of the horizontal allocation. It is not the principal.

Similarly, here, the Case Officer who sends a cease and desist order is not the principal, but

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[24] *Am. Soc'y of Mechanical Eng'rs v. Hydrolevel Corp.*, 456 U.S. 556, 571 (1982).

rather an agent of the continuing conspiracy.

The continuing conspiracy concept is also employed in *American Needle*. The 32 teams in the National Football League employed a single corporate agent, NFLP, for purposes of marketing their intellectual property (name, logos, trade marks). NFLP granted a license to Reebok on an exclusive basis, and declined to license to plaintiff American Needle. When American Needle filed an antitrust action, the NFL teams offered the defense that NFLP acted independently, and hence that Section 1 is inapplicable. The Court rejected this argument. In making the relevant licensing decisions, NFLP is simply "'an instrumentality' of the teams," a vehicle "for ongoing concerted action." *Am. Needle*, 130 S. Ct. at 2215. Therefore, "decisions by the NFLP regarding the teams' separately owned intellectual property constitute concerted action." *Id.*

As in *American Needle* and *Sealy*, the Complaint here challenges the conduct of a concerted actor (the Board) acting through its agents: the Board issued cease and desist orders, letters and other coercive communications to non-dentist providers, potential entrants, manufacturers, and mall operators. The evidence plainly shows that each of these actions were taken on behalf of the Board. (There is no claim that Board representatives were acting outside of their authority.) The challenged activities are therefore attributable to the Board – a continuing combination of its members – and constitute concerted action.[25]

The ALJ did not accept the continuing conspiracy concept. ID at 76-77. The forgoing analysis is, however, well-supported by Supreme Court precedent and the leading antitrust treatise, and should be expressly endorsed by the Commission as one of two alternative basis for

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[25] Of course, not all concerted conduct constitutes an unreasonable restraint of trade. *N. Tex. Speciality Physicians v. FTC*, 528 F.3d 346, 358 (5th Cir. 2008).

finding concerted action in this case.

b. The evidence establishes that Board members acted in concert to exclude non-dentists

A second way to test for concerted action is to assess whether the preponderance of evidence shows that the alleged conspirators "had a common scheme or design, and therefore an agreement, to prevent or eliminate NDTW services in North Carolina." ID 76-79. Applying this method, the ALJ concluded that the Board members had in fact agreed to exclude NDTW services in North Carolina. ID 78.

The Board suggests that the only evidence of concerted action is that Board members, acting in parallel, used a common form for cease and desist orders. This ignores the direct evidence of communications and joint actions marshaled by the ALJ in support of his findings, including the approval of two policy statements, the agreement to enlist the Cosmetology Board in its campaign, discussions of the elements of unauthorized teeth whitening and the criteria for issuing a cease and desist order, the unanimous approval of the mall letters, the fact that individual members act by virtue of a delegation of the Board as a whole, and the absence of any repudiation by the Board. ID at 76-80 (discussed *supra* at 15-17).

In excluding non-dentist operators from the market, the Board acted as a combination of its dentist-members.

C. The ALJ Correctly Defined The Relevant Market

The ALJ correctly determined that there is a relevant market consisting of NDTW services and dentist chairside teeth whitening services. The Board asserts that this market is "largely incorrect" (RB at 27) but offers no coherent explanation of this objection, and cites no evidence to the contrary (*see* RB at 27-29). Further, the ALJ's liability finding in this case is

correct without regard to how the market is defined. Thus, the Board's claims regarding market definition are not only wrong, but also irrelevant.

The trial record establishes that consumers interested in obtaining a whiter, brighter smile choose among four alternatives: (i) dentist teeth whitening services; (ii) NDTW services; (iii) dentist supplied take-home kits; and (iv) OTC products. What differentiates chairside whitening (i, ii) in the eyes of consumers, is that superior teeth whitening results are achieved in a single session. Experts for both Complaint Counsel and the Board testified that the cross-elasticity between these two types of services is high. ID at 69; IDF 154-155. The ALJ properly concluded then that alternatives (i) and (ii) are closest competitors and constitute a relevant market. *See FTC v. Whole Foods Market, Inc.*, 548 F.3d 1028, 1038-39 (D.C. Cir. 2008) (premium organic supermarkets is a relevant market within the larger grocery store market); *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1075 (D.D.C. 1997) (office superstores is a relevant market within larger market of sellers of consumable office supplies).

From the consumer's perspective, dentist kits and OTC products are more distant substitutes. These products require a longer time to be effective, and are applied by the consumer without real-time assistance or advice. Still, as the Board suggests (RB at 10-11), the four teeth whitening alternatives also constitute a relevant market. *See Whole* Foods, 548 F.3d at 1037 ("A broad market may also contain relevant submarkets which themselves 'constitute product markets for antitrust purposes.'"); Horizontal Merger Guidelines § 4.1 (Aug. 19, 2010) (multiple relevant product markets may exist).

The Board contends that the ALJ's choice of the narrower market is incorrect. The Board's claim is that the ALJ relied on subpoena response data, said to be misinterpreted, relating to revenues earned by dentist Board members. Many errors are embedded in this

seemingly simple assertion. First, the ALJ did not in fact rely on the survey data when defining the market. ID at 70-71 (defining relevant market by reference to *Brown Shoe*[26] factors). Second, the Board does not explain how dentist revenue data, whether accurate or inaccurate, relates to the contours of the market. In fact it does not. Revenue data tells us nothing about substitutability or consumer preferences, the determinants of market definition.

Third, the Board has not shown that the subpoena data was actually misread by the ALJ. Judge Chappell interpreted the survey data as showing that dentist Board members earn revenues from the provision of in-office teeth whitening services. ID at 75. This is substantially identical to the interpretation advanced by the Board, which admits that "the majority of the dentists who responded to the subpoenas" use Zoom!, which "includes both in-office and take-home kit components as part of the procedure." RB 28 (emphasis added). These dentists provide an in-office teeth bleaching service; and offer the customer the option of also using a take-home kit to help sustain the whitening effect. It follows that the dentist Board members offering Zoom! derive revenues from the provision of in-office teeth whitening services, just as the ALJ described. And even apart from this survey data, the Board itself admits that Board members have performed in-office teeth whitening. RB 13-14 (listing Drs. Burnham, Feingold, Hardesty, and Owens).

Fourth and most importantly, the Board does not explain why its claim regarding the scope of the product market is at all relevant to the resolution of this litigation. It is not. Even if the relevant market is expanded to include at-home teeth whitening products, this would not alter or affect the ALJ's competitive analysis. That is, the ALJ's conclusion that the exclusion of

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[26] *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962).

NDTW is prima facie anticompetitive is not reliant upon any particular market definition. *See* ID 81-104 (ALJ's competitive effects analysis).

The Commission has previously concluded that the dentist members of the Board have a private interest in the regulation of dentists and NDTW operations, regardless of whether any individual member currently performs teeth whitening. *SAO* at 13-14. The Board has not shown that the personal financial income of individual Board members is relevant to market definition or to any other issue in this litigation.

The ALJ's discussion of market definition does contain one misstatement of law. For the benefit of future cases, we respectfully urge the Commission to correct this error. *Cf. In re Matter of Kentucky Household Goods Carriers Ass'n*, 139 F.T.C. 404, 433 (2005) (correcting misstatement in Initial Decision to the effect that a relevant market must be defined in even a per se case).

The Initial Decision states that a relevant market must be defined to establish liability under the rule of reason. ID 63-64. Given developments in the case law, this is no longer a useful generalization. *See California Dental Ass'n v.FTC*, 526 U.S. 756, 780-81 (1999) ("CDA") (the rule of reason calls for "an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint"); *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 36-38 (D.C. Cir. 2005) (truncated rule of reason analysis without market definition). Market definition is not essential to establish competitive injury where a prima facie showing of competitive harm is predicated upon, for example, the inherently suspect nature of the restraint,[27]

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[27] *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents*, 468 U.S. 85, 109 (U.S. 1984); *Polygram*, 416 F.3d 29, 35-36; *In re Realcomp II, Ltd.*, 2009 FTC LEXIS 250, *43-44 (Oct. 30, 2009); *In re N. Tex. Specialty Physicians*, 140 F.T.C. 715, 884-886 (2004), *aff'd, N. Tex. Speciality Physicians v. FTC*, 528 F.3d 346 (5th Cir. 2008).

direct evidence of anticompetitive effects,[28] or where respondent's market power is shown through its ability to exclude competitors together with the facially anticompetitive nature of the restraint.[29]

It was not necessary that the ALJ define a relevant market. In any event, the market defined by the ALJ (dentist and NDTW services) is supported by the evidence.

D. The Board's Concerted Action Excludes Non-Dentist Teeth Whitening Services, And Is Prima Facie Anticompetitive Under Each Of Three Variations Of The Rule Of Reason

The ALJ determined that the Board's concerted actions had the purpose and effect of excluding non-dentist providers of teeth whitening services, and that the exclusion of this class of competitors is prima facie anticompetitive. (These conclusions hold true if the relevant market is teeth whitening services only, and also if the relevant market includes teeth whitening products.) More specifically, on the basis of substantial evidence the ALJ determined that:

- "'[A]n observer with even a rudimentary understanding of economics' could readily conclude that the exclusion of a rival service 'would have an anticompetitive effect on customers and markets.'" (ID 99-100);
- the Board has the power to exclude competition and the conduct is facially anticompetitive (ID 95-97);
- there is substantial direct evidence of adverse competitive effects flowing from the Board's conduct, including the forced exit of existing non-dentist competitors, impeded and deterred entry of potential competitors (ID 97-104), and the resulting loss in consumer choice and consumer surplus (IDF 257).

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[28] *IFD*, 476 U.S. at 460-461; *Toys "R" Us v. FTC*, 221 F.3d 928, 937 (7th Cir. 2000); *Realcomp*, 2009 FTC LEXIS *45-46.

[29] *See Hydrolevel,* 456 U.S. at 570-71 (defendant standard setting organization has market power by virtue of its ability to exclude competitors from the marketplace); *United States v. E.I. du Pont de Nemours &* Co., 351 U.S. 377, 391 (1956) (market power is the ability to raise prices or to exclude competition). *See also* ID 95-97.

With the exception of the concerted action finding (discussed above), for purposes of this appeal, the Board disputes none of this. The Commission should therefore find that the challenged conduct of the Board is prima facie anticompetitive under each of the three variations of the rule of reason identified in the *Realcomp* decision.[30]

Because the Board's conduct is prima facie anticompetitive, the Board has the burden of demonstrating a countervailing efficiency justification for its practices. *CDA*, 526 U.S. at 771; *IFD*, 476 U.S. at 459; *NCAA*, 468 U.S. at 113; *Realcomp*, 2009 F.T.C. LEXIS 250 *48, *74. The Commission must assess "[i] whether those purported justifications are legitimate (*i.e.*, 'cognizable' and 'plausible'); [ii] whether they are supported by evidence in the record; and [iii] whether the restraints they impose are reasonably necessary to achieve a legitimate, procompetitive end." *Realcomp*, 2009 F.T.C. LEXIS 250 *39-40. If even one of these standards is not satisfied, then the Board's efficiency defense must be rejected. As discussed in the following two sections, the Board has failed to meet its burden.

The Board's Appeal Brief represents (in the Statement of Facts) that NDTW presents a health and safety risk to consumers. This is not, however, asserted as a defense to liability in this appeal. *See* RAB at 19-20 (listing issues contested by the Board). The ALJ correctly determined that the Board's health and safety argument is not a cognizable antitrust defense. ID at 105-110. The inquiry mandated by the rule of reason is whether a restraint is one that promotes competition or one that restrains competition. Antitrust law prohibits the Board from displacing market-based outcomes regarding the mix of products to be offered with collusive determinations that certain products (here, NDTW) should not be available to willing consumers.

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30 *Realcomp*, 2009 FTC LEXIS *43-52.

NSPE, 435 U.S. at 694-695; *IFD,* 476 U.S. at 462-463; *Wilk v. Am. Med. Ass'n.*, 719 F.2d 207, 228 (7th Cir. 1983); *Virginia Academy of Clinical Psychologists v. Blue Shield of Virginia,* 624 F.2d 476, 485 (4th Cir. 1980). The ALJ's legal analysis on this point should be affirmed. In addition, and as discussed above, the Commission should conclude that the Board's health and safety argument lacks evidentiary support. *See* Statement of Facts; CCPTB at 94-105; CCRRPTB at 15-22.

E. The Board's Contention That Its Exclusionary Conduct Is Lawful Because it Eliminates Only "Illegal Competition" Is Unsound

The Board asserts that it may exclude NDTW from the marketplace because non-dentist operators remove stains from teeth, and the removal of stains from teeth constitutes the unauthorized practice of dentistry under North Carolina law. This argument is wrong on the law and wrong on the facts.

As a matter of law, in the absence of a valid state action defense, the Board's efforts to eliminate assertedly "illegal" competitors are not immune from antitrust liability. *See IFD,* 476 U.S. at 465 (That "unauthorized practice of dentistry . . . may be unlawful is not, in itself, a sufficient justification for collusion among competitors to prevent it."); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 214 (1951) (alleged illegal conduct of plaintiff "could not legalize the unlawful combination by [defendants] nor immunize them against liability to those they injured"); *Fashion Originators' Guild,* 312 U.S. at 468 (claim that certain clothing manufacturers are engaged in unfair competition does not justify a conspiracy to exclude these manufacturers).

The cases cited by the Board do not remotely show that competitors may collude to stop purportedly illegal competition. In fact, the issue of illegal competition was not present in

Concord v. Boston Edison Co., 915 F.2d 17 (1st Cir. 1990) (price squeeze imposed by regulated utility judged not exclusionary), *Mumford v. GNC Franchising LLC*, 437 F. Supp. 2d 344 (W.D. Pa. 2006) (terms of franchise agreement do not establish bounds of the relevant market where substitute products are available), or *White & White, Inc. v. American Hospital Supply Corp.*, 723 F.2d 495 (6th Cir. 1983) (rebate contingent on buyers' meeting volume requirements was not an act of monopolization).[31]

Finally, the Board misreads *Microsoft Corp. v. Computer Support Services of Carolina, Inc.*, 123 F. Supp. 2d 945 (W.D.N.C. 2000). The district court concluded that a seller of counterfeit Microsoft software lacked antitrust standing to challenge Microsoft's policies with regard to the reproduction and distribution of its intellectual property where such policies were authorized under federal copyright law. The decision is distinguishable in that: (i) the actions of the Board are not authorized by copyright law or any other federal statute; and (ii) the antitrust standing requirement that was decisive in *Microsoft* (failure to show that the plaintiff was injured by the challenged lessening of competition) is applicable only to private plaintiffs.[32] An FTC action seeks to vindicate the public interest, and there is no requirement that the FTC be an injured party.

The Board's argument regarding "illegal competition" is also factually flawed (although the ALJ found it unnecessary to address this issue). The non-dentists targeted by the Board are not in fact engaged in the removal of stains within the meaning of North Carolina law. The

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[31] The phrase "lively legal competition" (*American Hospital Supply*, 723 F.2d at 505), relied upon by the Board, simply distinguishes between beneficial, procompetitive competition on the merits and harmful predatory/exclusionary strategies (harmful).

[32] *See Associated General Contractors v. Otter Tail Power Co.*, 611 F.2d 684 (8th Cir. 1979).

preponderance of the evidence shows as follows: the Dental Act defines dentistry as including the removal of stains from teeth.[33] What is contemplated by the statute is the scraping of stains from the teeth with abrasive instruments, and not the application of bleach (whether self-administered at home, or assisted application at a spa or salon).[34] Teeth bleaching lightens the appearance of a stain on the teeth, but does not remove the stain. The stain molecules remain in place on the customer's teeth.[35]

Further, even if teeth bleaching were determined to be the removal of stains under North Carolina law, this still would not be sufficient to show that non-dentist operators are violating the Dental Act. In response to the hostility of dentists and the opposition of certain dental boards around the country, non-dentists in North Carolina and elsewhere have adapted their operations such that the consumer, rather that the operator of the facility, is actually performing the teeth bleaching: the consumer accepts a pre-packaged tray, opens the package, inserts the tray in mouth, and removes the tray after the designated time. The ancillary role of the non-dentist operator is to provide the consumer with a pre-packaged tray, a well-maintained facility, and information and assistance (including set-up and clean-up services).[36]

The evidence cited by the Board purporting to show that the Dental Act prohibits NDTW is unpersuasive. That contemporary providers of teeth bleaching refer to their services as "removing stains from teeth" is not probative of the meaning of a 1935 statute. That the European Union and certain states other than North Carolina limit NDTW is likewise not

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33 IDF 41-42.

34 CCPFF 161-170, 774.

35 CCPFF 170-172.

36 IDF 143; CCPFF 197.

probative of the meaning of the Dental Act. North Carolina courts have never ruled on whether teeth bleaching involves the removal of stains, and North Carolina courts have never ruled that the assistance provided by a non-dentist in connection with teeth bleaching by the consumer constitutes the practice of dentistry. Why have these issues not been formally resolved? "The Board evaded judicial review of its decision to classify teeth whitening as the practice of dentistry by proceeding directly to issue cease and desist orders purporting to enforce that unsupervised decision." *SAO* at 17.

In sum, it is likely that the non-dentists excluded by the Board are not engaged in illegal activity. Further, even if the non-dentists were engaged in illegal activity, the case law establishes that this would not constitute an antitrust defense. Finally, as discussed in the following section, the Board's remedy under the Dental Act (if any) is to bring suit in state court, as opposed to driving the non-dentists from the marketplace through extra-judicial coercion.

F. The Board's Contentions That Its Actions Are Lawful Because Authorized By State Law, Or "In Good Faith," Are Also Unsound

The Board asserts that it may lawfully exclude NDTW from the marketplace because non-dentist operators are engaged in the unlicensed practice of dentistry under North Carolina law, and the Board is required (or alternatively, authorized) by state law to act against such violations. The Board misconstrues both the Dental Act and the antitrust laws.

To begin, the North Carolina Legislature does not require the Board to engage in the exclusionary actions at issue in this litigation. The Dental Act is clear and specific: if the Board believes that a person is engaged in the unlicensed practice of dentistry, it may seek a remedy from a state court. The Board is not required or empowered to order a person to cease and desist from "unlawful" conduct or to engage in the other coercive conduct judged illegal by the ALJ.

This lawsuit addresses the discretionary actions of the Board.

The Board's alternative claim is that it is authorized (albeit not required) by state law to exclude non-dentists. In antitrust law, this is referred to as the state action defense. *Parker v. Brown*, 317 U.S. 341 (1942). However, the requirements of the defense are not satisfied.

The Board had a full and fair opportunity to demonstrate that its challenged conduct "truly comports with a state decision to forgo the benefits of competition to pursue alternative goals." *SAO* at 1. The Board's legal and factual arguments were judged by the Commission to be deficient. The Commission concluded that the Board's discretionary decision to classify teeth whitening as the practice of dentistry and to enforce this decision through cease and desist orders and other extra-judicial means is private action, not state action. *Id.* at 13, 17.[37]

The Board correctly points out that neither the Commission nor the ALJ ruled on the Board's specific claim that it is acting "pursuant to a clearly articulated and affirmatively expressed state policy." This is the clear articulation requirement, the first prong of *Midcal*'s two-prong state action defense. The Commission assumed (without deciding) that the clear articulation requirement has been satisfied. *SAO* at 7 n. 8. However, compliance with the first prong alone is insufficient to defeat antitrust liability, for the multiple reasons set forth in the *SAO*. A regulatory body consisting of market participants must also demonstrate that the challenged restraints on competition are actively supervised by the State itself (second prong). The Board is not subject to active supervision, and accordingly, the Board's state action defense fails.

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[37] As the Board is not engaged in state action, it was entirely appropriate for the ALJ's competitive effects analysis to rely on *NSPE* and other cases involving a combination of private actors.

The Board now seeks to re-package its failed state action defense, the contention that it is upholding state law, as a pro-competitive or efficiency defense under the rule of reason. This is not a cognizable defense. The rule of reason "does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason. Instead it focuses directly on the challenged restraint's impact on competitive conditions." *NSPE*, 435 U.S. at 688. "Cognizable justifications ordinarily explain how specific restrictions enable the defendants to increase output or improve quality, service, or innovation." *In re Polygram Holding*, 136 F.T.C. 310, 345-346 (2003). Assuming *arguendo* that the State of North Carolina has authorized the Board to eliminate NDTW, this fact would not establish that such a policy promotes competition or enhances the welfare of consumers. *See, e.g., Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985) (states may and sometimes do elect to forgo the benefits of competition to pursue alternative goals); *SAO* at 1.[38]

The cases cited by the Board do not remotely support the Board's contention that "upholding state law" is a defense under the rule of reason. In *United States v. Brown University*, 5 F.3d 658 (3d Cir. 1993), the Department of Justice alleged that Ivy League universities and MIT violated Section 1 of the Sherman Act by agreeing to determine jointly the amount of financial aid that would be awarded to commonly admitted students. The universities did not assert that the restraint upheld state law. Instead, the universities claimed – and the court

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[38] The Board's contention that state authorization alone is a sufficient antitrust defense, if credited, would of course render the "active supervision" prong of the state action defense a nullity. But the Commission here, and the courts consistently, have required that the respondent establish not one but both *Midcal* prongs in order to avoid antitrust liability. *E.g.*, *Patrick v. Burget*, 486 U.S. 94, 100 (1988) ("We need not consider the clear articulation prong of the *Midcal* test because the active supervision requirement is not satisfied.") (internal quotation marks omitted).

found – that the financial aid restraint expanded consumer choice (*i.e.*, enhanced consumer welfare) by making a high-quality education affordable for a larger number of talented but needy students. Expanding consumer choice is of course a bona fide efficiency defense that is cognizable under the rule of reason. The Board's actions, in contrast, restrict consumer choice by reducing the number of teeth whitening options available to consumers.

Pocono Invitational Sports Camp, Inc. v. NCAA, 317 F. Supp. 2d 569 (E.D. Pa. 2004), addressed an antitrust challenge to NCAA regulations restricting the manner in which colleges recruit teenagers at summer basketball camps. The court concluded that the recruiting rules are "noncommercial" and therefore are not subject to Sherman Act scrutiny. The *Pocono* court did not address state law or even the scope of the rule of reason. Finally, *Hosp. Bldg. Co. v. Trustees of the Rex Hosp.*, 691 F.2d 678 (4th Cir. 1982), is inapposite because the court there was seeking to reconcile the antitrust laws with a conflicting federal (not state) law governing the expansion of health care facilities. The doctrine of implied antitrust immunity that comes into play when a federal statute conflicts with the federal antitrust laws (as in *Rex Hospital*) is inapplicable to an alleged conflict between state law and federal antitrust law (as in the present case). Once again, any federal/state conflict is addressed by the state action doctrine.

The Board's claim to have acted "in good faith" is also not a valid antitrust defense. A defendant that engages in anticompetitive concerted conduct, even with the best of intentions, still violates the antitrust laws. In *NCAA*, the Supreme Court reviewed the claim that the NCAA's program governing the telecast of college football games violated Section 1 of the Sherman Act. The Court held that antitrust liability did not require a finding that the NCAA acted with anticompetitive intent, and that benign intent is not a defense:

While as the guardian of an important American tradition, the NCAA's motives

> must be accorded a respectful presumption of validity, it is nevertheless well settled that good motives will not validate an otherwise anticompetitive practice.

468 U.S. at 101 n.23. The *NCAA* opinion goes on to cite the long pedigree of cases that support this principle: *United States v. Griffith*, 334 U.S. 100, 105-06 (1948); *Associated Press v. United States*, 326 U.S. 1, 16 n.15 (1945); *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 1918); *Standard Sanitary Mfg. Co. v. United States*, 226 U.S. 20, 49 (1912); *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 342 (1897). The Commission has similarly held that "good" motives do not justify otherwise anticompetitive restraints on competition. *In re California Dental Ass'n*, 121 F.T.C. 190, *41-42 (1996).[39]

The Board responds that this enforcement action calls into question the legality of all professional regulation by states. In the same vein, the Board asserts that, if liability is affirmed, then state agencies would be impeded from protecting the public health, and/or barred from enforcing state law without first securing judicial interpretation of the relevant statute.[40] This concern is unwarranted. Complaint Counsel fully agrees that state legislatures and state agencies

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[39] The Court of Appeals for the Ninth Circuit twice reviewed the FTC's challenge to restraints on advertising adopted by the California Dental Association. In both opinions, the court assigned no significance to the Association's claim that the purpose of the code was to protect patients and to comply with state law. *CDA v. FTC*, 224 F.3d 942, 948-49 (9th Cir. 2000) (courts "examine intent only in those close cases where the plaintiff falls short of proving that the defendant's actions were anticompetitive"); *CDA v. FTC*, 128 F.3d 720, 729 (9th Cir. 1997) ("[W]hatever its motivation, the point of the advertising policy was clearly to limit the type of advertising in which dentists could engage, and thereby restrict a form of competition. 'Good motives will not validate an otherwise anticompetitive practice.'"). The intervening Supreme Court decision likewise gave no weight to the dentists' claim that their motives were benign. *CDA v. FTC*. 526 U.S. 756, 791 (1999).

[40] The Board cites *United States v. Mead Corp.*, 533 U.S. 218 (2001) and *Gambrel v. Kentucky Bd. of Dentistry*, 689 F.2d 612 (6th Cir. 1982), for the proposition that a court will give weight to an agency's interpretation of a statute that it is charged with enforcing. This falls far short of endorsing the proposition (advanced by the Board) that a financially-interested state agency acting to suppress competition may bypass the courts and all other state supervision.

have a legitimate role to play in protecting the public health. *See Wilk v. American Medical Association*, 719 F.2d 207, 223 (7th Cir. 1983). This responsibility may readily be discharged in a manner that conforms with the antitrust laws. First, only anticompetitive regulation may contravene the antitrust laws; not all regulation is anticompetitive. Second, and as the Commission has previously recognized, even "anticompetitive regulation is allowed to withstand antitrust challenge as long as a court is satisfied that the restraint at issue is truly state action." *SAO* at 6. For example, where a state agency is controlled by disinterested actors (as distinguished from market participants), all that is required to avoid antitrust risk is that the agency act pursuant to a clearly articulated state policy to displace competition with regulation; the active supervision requirement would be inapplicable. Alternatively, where a state empowers market participants to regulate, additional measures may be implemented to assure that the "self-interested parties are restricting competition in a manner consonant with state policy." *Id.* at 14. For these reasons, Complaint Counsel's legal theory poses no threat to the great bulk of state regulatory activity.[41]

The Board lastly claims that the ALJ's competitive effects analysis was inadequate because it failed to consider the Board's justifications for its exclusionary conduct. The Board charges that the ALJ effectively applied a standard of per se liability. This argument is frivolous. The doctrine of per se liability for certain facially anticompetitive agreements precludes an antitrust defendant from even interposing a plausible and cognizable efficiency defense. In this case, the ALJ carefully evaluated each efficiency defense asserted by the Board.

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[41] In addition, regulated market participants directly elect far fewer members of the vast majority of North Carolina boards. CCPFF 46-47. And unlike professional licensing boards in some other states, the Board is not part of another North Carolina department. CCPFF 48.

All such defenses were correctly judged to be non-cognizable. This is not, as the Board suggests, a finding of per se illegality.

G. The Terms Of The Proposed Order Do Not Violate The Tenth Amendment Or The Commerce Clause

The Board contends that the proposed Order interferes with the State's ability to sanction unlicensed dentistry, and so would violate the U.S. Constitution. The ALJ properly rejected this claim.

The scope of the proposed Order is entirely reasonable. The Board is enjoined from repeating its violations of the antitrust laws, including engaging in certain extra-judicial efforts to restrict or impede the provision of teeth whitening services by non-dentists. The role assigned to the Board by the Dental Act is expressly preserved: that is, the Board may investigate suspected violations of the Dental Act and file, or cause to be filed, a court action against an alleged violator. *See* IDF 258 (acknowledgment that Board can enforce Dental Act without issuing cease and desist orders).

The Board cites *California State Board of Optometry* for the proposition that the Tenth Amendment bars the Commission from restricting the manner in which the Board regulates the practice of dentistry. *California Optometry* is not a Tenth Amendment decision, but rather a state action decision. "That decision merely holds that the FTC is not authorized to reach the 'acts or practices' of States acting in their sovereign capacity." *SAO* at 6 n.6. The Board is not a sovereign actor, and hence *California Optometry* has no bearing on this case.

The Tenth Amendment contains "no substantive limitation on the power of Congress to regulate commerce." *Reich v. New York*, 3 F.3d 581, 589 (2d Cir. 1993). The Supreme Court's Tenth Amendment jurisprudence teaches that "States must find their protection from

congressional regulation through the national political process, not through judicially defined spheres of unregulable state activity." *South Carolina v. Baker*, 485 U.S. 505, 512 (1988).[42]

The Board also asserts that the Commerce Clause bars the Commission from restricting the manner in which the Board regulates the practice of dentistry. No analysis, explanation, or authority is offered. That alone is sufficient reason for the Commission simply to disregard the Board's contention. *Cf. SAO* at 7 n. 9 (Commission will disregard contentions that are not adequately developed by a litigant). Moreover, and contrary to the Board's assertion, the Order would not bar the Board from enforcing the Dental Act. The Board would remain free to bring a case in state court to enjoin any conduct that it believes constitutes the unlicensed practice of dentistry, just as the North Carolina Legislature intended.[43]

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[42] This proposition is subject to an important exception. With regard to regulation directed at the states alone, the federal government may not, consistent with the Tenth Amendment, compel the states to administer or enforce a federal regulatory program. *New York v. United States*, 505 U.S. 144, 160-161 (1992). Obviously, the FTC Act is not directed solely at the states.

[43] The applicability of the Tenth Amendment and the Commerce Clause to Commission orders is discussed at greater length in CCRRPTB at 35-39.

IV. CONCLUSION

For the reasons stated above, Complaint Counsel requests that the Commission affirm the Initial Decision entered by the Administrative Law Judge, and enter his Order as the Order of this Commission.

Respectfully submitted,

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Dated: October 4, 2011

CERTIFICATE OF SERVICE

I hereby certify that on October 4, 2011, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

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I also certify that I delivered via electronic mail a copy of the foregoing document to:

The Honorable D. Michael Chappell
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CERTIFICATE FOR ELECTRONIC FILING

I 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 the adjudicator.

October 4, 2011

By: s/ Richard B. Dagen
Richard B. Dagen