

ORIGINAL

PUBLIC DOCUMENT

UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

0810137



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In the Matter of )  
 )  
THE NORTH CAROLINA [STATE] BOARD )  
OF DENTAL EXAMINERS, )  
 )  
Respondent. )  
\_\_\_\_\_ )

DOCKET NO. 9343

RESPONSE TO COMPLAINT

NOW COMES Respondent, The North Carolina State Board of Dental Examiners ("Dental Board" or "Board"), by and through the undersigned, and answers and otherwise responds to the Complaint of the Federal Trade Commission ("FTC"). Because the FTC complaint asserts that the Board and its members (and, apparently, all the licensed dentists in North Carolina) are engaged in an illegal "conspiracy," the Board submits this more detailed response to refute not only a baseless complaint but also misleading characterizations made in the press release that the FTC issued before the Complaint was officially served.

THE TRUE NATURE OF THE CASE

The "Nature of the Case" section at the beginning of the Complaint alleges that "[d]entists in North Carolina, acting through the instrument of the North Carolina [sic] Board of Dental Examiners ('Dental Board'), are colluding to exclude non-dentists from competing with dentists in the provision of teeth whitening services." However, the Dental Board is a state agency, not a private trade association, and the Complaint's description of the respondent in Paragraph 1 of the Complaint acknowledges this fact ("The Dental Board is an agency of the State of North Carolina"). There is no collusion, no conspiracy, no agreement, and not one shred of evidence even hinting at such. A substantial number of complaints initiating cases came from dental school educators and non-dentists (some of whom were harmed by spa or kiosk whitening operators).

The true nature of this case concerns the plain and unequivocal meaning of "removal of stains." A North Carolina statute (not a rule, a policy or an interpretation, but a *statute*) makes it illegal for non-dentists to provide the service of "removal of stains" from the teeth. The Board narrowly applies this statutory prohibition to rendering of teeth whitening services rather than the over-the-counter (OTC) sale of teeth whitening kits. The complaint alleges that the statute "does not expressly address whether, or under what

circumstances, a non-dentist may engage in teeth whitening.” If the service of teeth whitening does involve the removal of stains from teeth, then the Complaint has mislabeled as “collusion” and “conspiracy” the actions of a state agency and its sworn officers’ presumptively good faith efforts to enforce a state public protection statute. No one other than, apparently, the Commission, sees a difference between stain removal services and teeth whitening services –

- not at least twenty other states that have similar laws;
- not the numerous members of the public actually harmed by illegal stain removal/teeth whitening;
- not the local and national media who have carried reports of public harm caused by unlicensed stain removal/teeth whitening services;
- not the U.S. Food and Drug Administration (FDA), which has reported on the health risks associated with the stronger chemicals and equipment used by illegal practitioners;
- not the state courts in civil and criminal court cases brought by the Board in enforcing the statute;
- not the Alabama Supreme Court and other states’ attorneys general who have ruled that the public must be protected from illegal stain removal/teeth whitening service providers;
- not dental school faculty who have studied the risks of nonprofessionals rendering stain removal/teeth whitening services with the strength of chemicals and equipment they use;
- not the teeth whitening product manufacturers who market their products as stain removers; and
- not even unlicensed teeth whitening businesses whose marketing materials use the terms “teeth whitening” and “stain removal” interchangeably.

The allegation that the N.C. Dental Practice Act “does not expressly address whether, or under what circumstances, a non-dentist may engage in teeth whitening” defies the gravity of law and common sense. N.C. Gen. Stat. § 90-29(b) expressly provides that the doing, undertaking, attempting to do, or claiming the ability to remove stains from human teeth is the practice of dentistry. If teeth whitening does not mean the removal of stains from teeth, then the FTC would need to proceed against the teeth whitening businesses for falsely claiming that their services “remove stains from teeth.”

Despite repeated requests, the Complaint has presented no authority for its interpretation of North Carolina’s unambiguous statute or for a direct attack on a state statute, nor presented any evidence to rebut the presumption that the Board members are acting in good faith. And, despite ample evidence of actual public harm caused by the illegal practice of dentistry by unlicensed teeth whitening service purveyors, the Complaint has embarked upon a direct attack upon the plain meaning of a state statute, a state’s ability to protect its citizens, and a state board’s sworn duty to enforce the statute.

On May 20, 2009, the President of the United States issued a Memorandum to all Executive Departments and Agencies instructing them “that preemption of State law by

executive departments and agencies should be undertaken only with full consideration of the legitimate prerogatives of the States and with a sufficient legal basis for preemption." Despite that memo, as the Board shows more fully herein, the Commission's Complaint signals an aggressive campaign to preempt the enforcement of unambiguous state consumer protection statutes.

## RESPONDENT

Except to the extent specifically admitted herein, Respondent denies each and every allegation contained in the Commission's Complaint, including all allegations contained in headings or otherwise not contained in one of the Complaint's 26 numbered paragraphs. Specifically, Respondent denies that it has engaged in conduct that violates Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and denies that this proceeding is in any way in the public interest.

1. Respondent admits that it is an agency of the State of North Carolina established by statute to protect the public by enforcing the Dental Practice Act. It is also admitted that the Board is organized, exists, and transacts business under and by virtue of the laws of the State of North Carolina, with its principal office and place of business located at 507 Airport Blvd., Suite 105, Morrisville, NC 27560. The FTC so thoroughly misses the status of the Board and its members that it misnamed the Board in its Complaint, ironically omitting the word "State" from the statutory name of the agency. Thus, the correct name of Respondent is The North Carolina *State* Board of Dental Examiners.

2. It is admitted that the majority of members of state boards of dentistry in all states are licensed dentists. Per N.C. Gen. Stat. § 90-22, all Board members who are dentists must be licensed and actively engaged in the practice of dentistry in North Carolina. Board members are required by law to protect the public and base their decisions solely on whether there was a violation of the North Carolina Dental Practice Act. Being that service on the Board involves considerable financial sacrifice by its members, it is highly unlikely that their reasons for serving on the Board involve financial gain. Instead, each Board member is a sworn officer of the State.

Otherwise, the allegations of paragraph 2 are denied. There is no precedent for the notion that an occupational licensing board constituted of members of the regulated profession is a *per se* violation of antitrust laws. Involving licensees in the selection of members of occupational licensing boards is a routine practice in North Carolina and elsewhere. For instance, the seven physician members of the North Carolina Medical Board are nominated by a Review Panel and appointed by the Governor. N.C. Gen. Stat. §§ 90-2(a)(1), 90-3(c). With the exception of one public member, each member of the Review Panel is a physician, a physician assistant, or a nurse practitioner. N.C. Gen. Stat. § 90-3(a). In addition, the attorney members of the North Carolina State Bar Council (the governing body of the North Carolina State Bar) are elected by the North Carolina judicial district bars, whose membership consists exclusively of attorneys. See N.C. Gen. Stat. §§ 84-16, 84-18(b). All members of the Medical Board and the State Bar Council continue to practice their professions while serving on their respective Boards. Like

dentistry, law and medicine have long been recognized as self-regulating professions, hence the need for licensees to be involved in the board member selection process. We are aware of no case precedent holding that having a majority of licensing board members as active members of the profession violates the antitrust laws, and the FTC has not cited any such caselaw. In fact, this is typically seen as a vital element to fair and healthy regulatory practices.

Further, any perceived bias inherent in this selection procedure is counterbalanced by the fact that North Carolina's State Government Ethics Act bans conflicts of interest on the part of elected and appointed state officials. N.C. Gen. Stat. § 138A-2. The Act requires a conflict of interest/board member bias statement to be read at the beginning of every Board meeting. N.C. Gen. Stat. § 138A-15(e). The Dental Board's President reads a conflict of interest statement at the beginning of every meeting of the Board, including those in which enforcement actions are considered. The N.C. Ethics in Government Act also requires the Board's members, as public servants, to file an annual economic interest statement with the N.C. State Ethics Commission. N.C. Gen. Stat. § 138A-22(a).

The U.S. Supreme Court in *Withrow v. Larkin*, 421 U.S. 35 (1975), held that courts are to defer to licensing boards in the interpretation of their statutes and most importantly, the good faith of board members is to be presumed. In that case, the Court said that "state administrators 'are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances.'" *Id.* at 55, quoting *United States v. Morgan*, 313 U.S. 409, 421 (1941). The Supreme Court also observed that those who would allege bias on the part of decision makers such as the courts or administrative agencies "must overcome a presumption of honesty and integrity in those serving as adjudicators; and it must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented." 421 U.S. at 47. It is a presumption that has also served the FTC itself, and should not be back-handed without clear evidence. See, e.g., *FTC v. Cement Institute*, 333 U.S. 683 (1948).

As to the financial interest of the Board members in teeth whitening, according to the testimony of the two Board members deposed in this investigation, teeth whitening constituted a miniscule portion of their annual income. Indeed, one of the deposed dentists has discontinued offering in-office whitening partly due to a lack of demand for the service, but primarily because he found in-office whitening to be no more effective than the custom-made take-home bleaching trays. Both dentists testified that the portion of their practices devoted to teeth whitening services was small, in one case amounting to no more than about one percent of the services offered to patients

3. Respondent denies the allegations of paragraph 3. Each Board member is an officer of the State and is obliged under oath to uphold the laws of this state. Indeed, failure to fulfill the duties of office is a crime. See, e.g., N.C. Gen. Stat. §14-230. Board

members also swear to uphold the N.C. Constitution, Article I, Section 34 of which poses a filter through which each statute, rule, and agency action must pass.

4. Respondent admits that it is the licensing authority for dentists in the state of North Carolina and that the unauthorized practice of dentistry is prohibited. The further allegations of paragraph 4 are denied. It is unlawful for anyone to practice regulated professional without being duly licensed by their respective state board. The activities of the Dental Board as described in paragraph 4 of the Complaint constitute "state action" pursuant to statutory authority. The Board cannot "police" the unauthorized practice of dentistry on its own; it is aided in its statutory obligations to enforce the North Carolina Dental Practice Act by the North Carolina court system and law enforcement agencies.

**THE FTC DOES NOT HAVE THE AUTHORITY OR JURISDICTION  
TO FORCE THE BOARD AS A STATE AGENCY  
TO ABROGATE A STATE STATUTE**

5. The allegations of paragraph 5 are denied. The Board is immune from 15 U.S.C. Section 45 pursuant to the state action doctrine pronounced by the United States Supreme Court. Because the Board is immune under the state action doctrine, the FTC has failed to state a claim upon which relief can be granted, and therefore the FTC lacks the jurisdiction to force the Board to abrogate a state statute. Fed. Rule of Civ. Proc. 12(b)(6) See also *Hoover v. Ronwin*, 466 U.S. 558, 566 (1984); *Ronwin v. State Bar of Arizona*, 686 F.2d 692, 694, n.1 (9th Cir. 1982), *cert. denied*, 461 U.S. 983 (1983) (upholding the District Court's dismissal of the case for failure to state a claim upon which relief can be granted, based on the application of the state action doctrine); *Earles v. State Bd. of Certified Public Accountants*, 139 F.3d 1033, 1040 (5th Cir. 1998) (dismissing a suit against the Louisiana State Board of Certified Public Accountants for failure to state a claim upon which relief can be granted, based on the application of the state action doctrine); *Parker v. Brown*, 317 U.S. 341 (1943).

Alternatively, because of the Board's immunity under the state action doctrine, the FTC also lacks subject matter jurisdiction to force the Board to abrogate a state statute. Fed. Rule of Civ. Proc. 12(b)(1); see also *Griffith v. Health Care Authority*, 705 F. Supp. 1489, 1497, 1507 (1989) (dismissing defendants' motion to dismiss based on lack of subject matter jurisdiction, as a result of the application of the state action doctrine).

6. Respondent denies the allegations of paragraph 6. The acts and practices of the Dental Board, like the actions of any state regulatory authority, may have an incidental effect on commerce. However, North Carolina law prohibits out-of-state and in-state persons from providing any services that constitute the practice of dentistry unless they are licensed to do so by the state of North Carolina. The teeth whitening services, themselves, are purely local. Pursuant to N.C. Gen. Stat. § 90-29(a), "[n]o person shall engage in the practice of dentistry in this State, or offer or attempt to do so, unless such person is the holder of a valid license or certificate of renewal of license duly issued by the North Carolina State Board of Dental Examiners." (emphasis added).

**THE REAL COMPETITION FOR UNLICENSED TEETH WHITENING COMES  
FROM OTC SALES OF TEETH WHITENING KITS WHICH ARE NOT  
REGULATED BY THE BOARD**

7. Respondent denies the allegations of paragraph 7. In its definition of the relevant market, the FTC excludes from consideration the OTC teeth whitening factor. There is no evidence that the market supports the FTC's distinction.

8. Respondent admits, upon information and belief, that some dentists offer take-home whitening kits to their patients. Respondent is without sufficient information to admit or deny the remainder of the allegations in paragraph 8. The Board does not object to the sale of take-home whitening kits -- whether purchased by the consumer at a pharmacy, salon, or mall kiosk -- since under North Carolina law, sales of take-home kits are not the practice of dentistry. In some instances, the strength of the whitening agents offered by unlicensed providers are a bit stronger than those provided in the take-home kits available at a pharmacy, and a whitening light is sometimes used as part of the whitening process. However, it is not clear what value is added if untrained sales clerks subject to no sanitation restrictions (but sometimes passing themselves off as medical personnel) hand the consumer the bleaching trays.

9. Respondent is without sufficient information about the allegations in paragraph 9, and therefore, denies the allegations. If there has been an expansion of teeth whitening operations by non-dentists in salons, retail stores and mall kiosks, where is the evidence that the alleged illegal restraint is working? Also, along with the expansion of teeth whitening operations by non-dentists, there have been increased efforts in other states to prevent these operations from engaging in the unlicensed practice of dentistry. For example, several teeth whitening kiosks voluntarily shut down in Oklahoma after that state's dental board filed an injunction against them, and the West Virginia board obtained a temporary injunction against the operator of a mall teeth whitening kiosk. And, as mentioned elsewhere in this response, the Alabama Supreme Court has ruled that teeth whitening constitutes the practice of dentistry. Also, legislation is pending in three states (Hawaii, Minnesota, and New Hampshire) that would include teeth whitening services in the definition of the practice of dentistry, and rules and policy statements on teeth whitening were recently proposed in two other states (Pennsylvania and Montana).

10. Respondent is without sufficient information to admit or deny the allegations in paragraph 10, but denies the allegation that the non-dentist provider generally does not touch the consumer's mouth. By using the word "generally," the FTC is conceding that the non-dentist provider may on occasion touch the customer's mouth or in other ways assist in the administration of tooth stain removing products which would constitute the practice of dentistry under North Carolina law. Actually, there is evidence of non-dentist providers of teeth whitening services not operating in the "typical" manner described in the Complaint (for example, taking impressions, polishing teeth, applying agents, etc.) and also direct evidence of public harm.

11. Respondent is without sufficient information to admit or deny what dentists typically charge for teeth whitening. Respondent admits that some non-dentists have advertised charges in the price range alleged in paragraph 11, but the Board, itself, does not collect price information regarding licensees or non-licensees. Indeed, the Board is informed and believes that most members of the Board engaged in little or no teeth whitening business. However, it seems reasonable to assume that licensed dentists who have training, education, tight safety regulations, office expenses, and liability insurance might charge more than an unlicensed, untrained teeth whitening kiosk operator who does not even have running water. The Board denies that there is any credible evidence that dentists have done anything other than independently base their fees upon factors such as their overhead and training. The Board suggests that the real competition for teeth whitening services offered by mall kiosks and salons is the OTC kits, which appear to be sold at a fraction of the price apparently charged by kiosks and the like.

12. The allegations of paragraph 12 are denied. There is no evidence that OTC teeth whitening products are generally viewed by consumers as "inadequate substitutes" for teeth whitening services. In fact, published data on total sales suggests otherwise. Additionally, studies identified by the FDA suggest otherwise. More likely, the principal factor distorting public perceptions is the misleading marketing by kiosks. For example, Board investigations have found that kiosk teeth whitening operators have attempted to create the impression that they have medical training by wearing lab coats, by requiring customers to sign health care disclosure forms, and by making exaggerated claims comparing their services to dentists in an effort to justify the difference between their prices and the price of OTC kits.

13. The allegations of paragraph 13 are denied. There is no evidence to suggest that the Board is acting as a competitor in the teeth whitening market. The more likely competitive reality is that teeth whitening service providers are misrepresenting their product and services because they must rationalize the price differential between their products and the OTC sales of teeth whitening kits. To justify prices of four to five times the cost of teeth whitening kits (which the Board does not regulate), teeth whitening kiosks have attempted to mislead the public. Some of the advertising materials disseminated by non-dentist teeth whitening service providers deceptively claim that the services are provided by "professionals." Indeed, the FTC itself considers that an advertisement may be deceptive, even if literally true, if it has the capacity or tendency to deceive. *Goodman v. FTC*, 244 F.2d 584, 604 (9th Cir. 1957). The FTC has applied this standard to determine whether an act or practice is deceptive under 15 U.S.C. § 45(a)(1). See *Exposition Press, Inc. v. FTC*, 295 F.2d 869, 873 (2nd Cir. 1961), *cert. denied*, 370 U.S. 917 (1962) (FTC may consider an advertisement from point of view of least sophisticated reader).

An example of misleading advertising may be found in a brochure entitled "What Does Your Smile Say About You?," which was disseminated by a North Carolina salon and referred to nonexistent FDA legislation re-defining the teeth whitening services offered as cosmetic. [NCBOARD298-299] It also represented that the teeth whitening system "lightens [teeth] from the inside out." ... The gel [used in the whitening process] will

“penetrate all three layers of the teeth; the dentin, pulp, and enamel,” which, if true, means the whitening product penetrates the hardest substance in the human body and delivers carbamide peroxide to the living center of the tooth. Another salon advertised “professional teeth whitening treatment” and stated that the teeth whitening system was “the same technology used in dental offices for Power Whitening, and the results are comparable.” An overt misrepresentation of yet another whitening salon stated that once treated, the stains would never reappear.

14. The allegations of paragraph 14 are denied. It is well-settled that a state in the exercise of its general police powers may prescribe the qualifications for obtaining a license to practice a profession and exclude from the profession those who do not possess such qualifications. *See Dent v. West Virginia*, 129 U.S. 114, 124 (1889) (a West Virginia statute that required persons to obtain a certificate from the State Board of Health before engaging in the practice of medicine did not violate the due process rights of a physician who did not possess the prescribed qualifications for licensure where the prescribed qualifications were appropriate to the profession and attainable by reasonable study or application).

The Board derives and exercises its powers pursuant to the mandates of the N.C. General Assembly. According to the 2003 Report of the FTC’s State Action Task Force “special purpose instrumentalities” such as state regulatory boards “lack independent sovereign status.” Office of Policy Planning, FTC, Report of the State Action Task Force (Sept. 2003), available at <http://www.ftc.gov/os/2003/09/stateactionreport.pdf>, at 7. However, the report noted a way for such instrumentalities to show clear articulation. “What is needed is a clearly articulated and affirmatively expressed state policy to displace competition. The critical question is whether ‘the State as sovereign *clearly* intends to displace competition in a particular field with a regulatory structure.’ The clear articulation must come from the state as sovereign.” FTC Report, at 9. Here, the North Carolina General Assembly has clearly articulated a policy forbidding unlicensed persons to practice dentistry and including the removal of “stains, accretions or deposits from the human teeth” in the practice of dentistry. N.C. Gen. Stat. § 90-29. Thus, there is a clear intent by the North Carolina legislature to displace competition in the field of teeth whitening in the interest of the public’s health and safety.

**THE DENTAL BOARD IS ACTING TO PROTECT THE PUBLIC,  
NOT TO SUPPRESS COMPETITION**

15. The allegations of paragraph 15 are denied. The plain language of N.C. Gen. Stat. § 90-29(b) states that:

A person shall be deemed to be practicing dentistry in this State who does, undertakes or attempts to do, or claims the ability to do any one or more of the following acts or things which, for the purposes of this Article, constitute the practice of dentistry ... (2) [r]emoves stains, accretions or deposits from the human teeth.



Therefore, the Board has explicit statutory authority over non-dentists who perform, undertake, attempt to undertake, or claim the ability to whiten human teeth, since such activities remove stains from teeth and by statute constitute the practice of dentistry.

16. The allegations of paragraph 16 are denied. Pursuant to N.C. Gen. Stat. § 90-29(b)(2), the removal of stains from teeth constitutes the practice of dentistry. It is the state legislature, not the Dental Board, which has made this determination. Furthermore, other authorities have agreed that teeth whitening services constitute the practice of dentistry. The Supreme Court of Alabama recently held that teeth whitening is "the practice of dentistry." See *White Smile USA, Inc. v. Board of Dental Examiners of Alabama*, No. 1080780, 2009 Ala. LEXIS 242 (Ala. Oct. 16, 2009). The Attorney General of Oklahoma, ruling upon a statute similar to North Carolina's statute, stated that offering or undertaking to remove stains from teeth constitutes the practice of dentistry. See *Okl. Op. Att'y Gen. No. 03-13* (Mar. 26, 2003), 2003 Okla. AG LEXIS 13, at \*7-8. By law, Missouri also defines teeth whitening services as the practice of dentistry. *Mo. Ann. Stat. § 332.366*. In a 2008 decision, the Attorney General of Kansas granted that state's dental board the authority to adopt a regulation defining the application of teeth whitening products as the practice of dentistry. *Kan. Op. Att'y Gen. No. 2008-13* (June 3, 2008), 2008 Kan. AG LEXIS 13, at \*8.

17. The allegations of paragraph 17 are denied. The Board enforces that statute as written, to wit, the prohibition of offering or rendering the service of removing stains from teeth by non-licensed persons. The meaning of the statute is plain and unambiguous as more fully described below.

No more precise definition of stains or accretions is necessary or provided in the North Carolina Dental Practice Act or the regulations promulgated thereunder. However, N.C. Gen. Stat. § 90-22(a) states that:

The practice of dentistry in the State of North Carolina is hereby declared to affect the public health, safety and welfare and to be subject to regulation and control in the public interest. It is further declared to be a matter of public interest and concern that the dental profession merit and receive the confidence of the public and that only qualified persons be permitted to practice dentistry in the State of North Carolina. This Article shall be liberally construed to carry out these objects and purposes.  
[emphasis added]

The Board's past-president was asked in his investigational hearing what the definition of a stain was in the "context of the statute." He replied that "[a] stain could be either extrinsic or intrinsic in a tooth. Could be something like [an] external stain, debris left from coffee, tea, red wine, food; or it could be intrinsic staining such as fluorosis staining, tetracycline stain, discolored stain, [or a] necrotic stain." His interpretation of "a stain," as well as the interpretations of his fellow Board members, was not arrived at arbitrarily. Rather, it was the result of many years of experience and education in the field of dentistry.

Reasonable interpretations of a regulatory statute should be accorded great weight when adopted by an agency charged with enforcing the statute. *Clarke v. Securities Industry Assn.*, 479 U.S. 388, 403-404 (1987), quoting *Investment Co. Institute v. Camp*, 401 U.S. 617, 626-627 (1971). The U.S. Supreme Court has held on numerous occasions that courts are to defer to boards' interpretations of their enabling statutes. "The Due Process Clause imposes only broad limits, ... on the exercise by a State of its authority to regulate its economic life, and particularly the conduct of the professions." *Friedman v. Rogers*, 440 U.S. 1, 18 n. 19 (1979); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978); *North Dakota Pharmacy Board v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 164-167 (1973); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487-488 (1955).

Furthermore, the Board's interpretation of its authorizing statute is both reasonable and far from unique. In fact, the Board's interpretation conforms to that of a number of other state dental boards and attorneys general who have interpreted similar statutes. As previously noted, the Alabama Supreme Court, in *White Smile USA*, reached a similar interpretation regarding an analogous statute, holding that the sale of Lightwhite at a salon was a dental service within the meaning of the Alabama statute. 2009 Ala. LEXIS 242, at \*14. Although the teeth whitening product was self-administered by the customer, the salon's employees provided instructions about the product's application, answered questions, and handled many of the materials while wearing protective gloves. *Id.* at \*13-14. Also, the lower courts in North Carolina have agreed with the Board's interpretation and enforced the plain language of the statute. See consent orders in *North Carolina State Board of Dental Examiners v. Carmel Day Spa & Salon*, No. 08CVS1542 (Mecklenburg County Super. Ct. July 9, 2008) [NCBOARD1874 - 1876] and *North Carolina State Board of Dental Examiners v. Signature Spas of Hickory, Inc.*, No. 06CVS3843 (Catawba County Super. Ct. Oct. 31, 2008) [NCBOARD2067 - 2069], and arrest warrants in *State v. Temple*, No. 04CR62182 (Davidson County Dist. Ct. Jan. 4, 2005) [NCBOARD289-290] and *State v. Angelette*, No. 04CR54519 (Cabarrus County Dist. Ct. Oct. 27, 2004) [NCBOARD240].

18. Respondent admits having enforced statutes to protect the public by prohibiting the unlicensed offering or rendering services in the practice of dentistry. Any enforcement actions undertaken by the Board through its staff are pursuant to its statutory duty to protect the citizens of North Carolina. This motivation can be illustrated by examining the relevant cases that the Board pursued in either civil or criminal court pursuant to the authority granted them under N.C. Gen. Stat. § 90-29. The teeth whitening activities of the persons and business establishments involved in each of these cases were particularly egregious.

- A salon makeup artist was making impressions of teeth in violation of N.C. Gen. Stat. § 90-29(b)(7). She was not wearing gloves or following any sterilization procedures, and she had a poison ivy rash on her hands.
- A salon brochure claimed that the teeth whitening solution penetrated to the interior of the teeth and that the stains would not reappear. The proprietor was

making impressions of her clients' teeth in violation of N.C. Gen. Stat. § 90-29(b)(7).

- The whitening in another case was chiefly performed by an employee who formerly worked as a dental assistant, and who should have been aware that teeth whitening required the supervision of a dentist under North Carolina law. The whitening process was particularly involved, with the direct application of a hydrogen peroxide gel by the spa's employees and the shining of an LED light on the teeth. In some instances, the teeth were also polished by the spa employees to loosen stains or bacteria prior to the whitening procedure.
- When the Board's investigator first visited a salon, he was falsely informed by the owner that a licensed dentist performed the teeth whitening procedures, but the owner was unable to provide the name of the dentist. After receipt of a cease and desist letter from the Board, a representative of the spa advised the Board that whitening procedures were no longer being performed. However, on a follow-up visit to the spa, the Board's investigator was told that the spa did indeed provide teeth whitening services, in the form of a whitening substance being painted on the customer's teeth and activated by a light.

The Board's concerns regarding the dangers of teeth whitening services provided by non-dentists were recently echoed by the American Dental Association (ADA). In its petition to the FDA on November 20, 2009, the ADA requested the establishment of classifications for teeth whitening chemicals. According to the ADA's press release, the petition also referenced "[t]he tremendous expansion of products available directly to consumers and application of products in venues such as shopping malls, cruise ships, and salons," which concerned the ADA because consumers of those services "have little or no assurance regarding the safety of product ingredients, doses, or the professional qualification of individuals employed in these non-dental settings." A frequent claim/defense offered by companies and individuals supplying chemicals for or engaged in non-professional teeth whitening is that the bleaching materials have received FDA approval or sanction. This is simply not the case. The concerns expressed by the ADA echo those of the Board.

These concerns have also been voiced by the regulatory agencies of other countries, including the United Kingdom and other members of the European Union. The British government has banned the provision of teeth whitening services by non-dentists, and has investigated alleged incidents of the provision of such services by non-dentists. BBC, "*Illegal*" Teeth Whitening Warning (Sept. 26, 2007), available at <http://news.bbc.co.uk/2/hi/health/7014615.stm>. The European Union has issued an advisory opinion limiting certain teeth whitening practices to licensed dentists. European Commission Health & Consumer Protection Directorate-General, Scientific Committee on Consumer Products, Document No. SCCP/1129/07, *Opinion on hydrogen peroxide, in its free form or when released, in oral hygiene products and tooth whitening products*, available at [http://ec.europa.eu/health/ph\\_risk/committees/04\\_sccp/docs/sccp\\_o\\_122.pdf](http://ec.europa.eu/health/ph_risk/committees/04_sccp/docs/sccp_o_122.pdf).

19. The allegations of paragraph 19 are denied. Regarding the supposed “extra-judicial activities,” no kiosk, spa or other provider of teeth whitening services by a non-dentist could actually be forced to stop operations unless the Board obtained either a court order or the cooperation of a district attorney in a criminal conviction and a court judgment. Any party receiving a cease and desist letter could simply ignore the letter and assert as a defense to the Dental Board’s request for an injunction their contention that their activities do not constitute the practice of dentistry or seek a declaratory ruling or judgment on the issue of whether their activities constitute the practice of dentistry. See N.C. Gen. Stat. § 150B-4.

Although the Board is an independent state agency, it is not without direct state supervision. *Hass v. Oregon State Bar*, 883 F.2d 1453 (9th Cir. 1989), *cert. denied*, 494 U.S. 1081 (1990), provides authority for showing that the Board is under the direct supervision of N.C. state officials. The 9th Circuit examined the qualities of the Oregon State Bar that would not necessitate a showing of an active supervision for purposes of determining whether the Bar was protected by the state action exemption. The Bar was a state agency that regulated the practice of law for the benefit of the public. The Bar’s records were open to public inspection. The Bar’s accounts and financial records were audited by the State Auditor. The Bar’s Board of Governors was required to give public notice of its meetings. Members of the Board of Governors were public officials subject to a code of ethics enacted by the state legislature. “These requirements leave no doubt that the Bar is a public body, akin to a municipality for the purposes of the state action exemption.” *Hass*, 883 F.2d at 1460. Because the Oregon Bar was shown to be a state agency acting pursuant to a “clearly articulated and affirmatively expressed state policy,” there was no need to satisfy the active supervision requirement in order to qualify under the state action exemption. *Id.* at 1461.

All of the qualities ascribed to the Oregon State Bar by the 9th Circuit in *Hass* are equally applicable to the North Carolina State Board of Dental Examiners. As an occupational licensing entity, the Board is subject to North Carolina’s Administrative Procedure Act (APA), N.C. Gen. Stat. § 150B-1 *et seq.* This Act “establishes a uniform system of administrative rule making and adjudicatory procedures for agencies. The procedures ensure that the functions of rule making, investigation, advocacy, and adjudication are not all performed by the same person in the administrative process. N.C. Gen. Stat. § 150B-1(a). Any of the foregoing activities undertaken by the Board must comply with the APA. For example, any rules promulgated by the Board must go through a rule making process that includes an opportunity for legislative override via the Joint Legislative Administrative Procedure Oversight Committee. N.C. Gen. Stat. § 150B-21.16. If any of the non-licensed teeth whitening service providers had requested a declaratory ruling from the Board, the declaratory ruling process would have had to comply with N.C. Gen. Stat. § 150B-4.

The Board is subject to the direct supervision of the state of North Carolina pursuant to the provisions of N.C. Gen. Stat. Chapter 93B, which governs occupational licensing boards. Every board must file an annual report with the Secretary of State containing information set out in N.C. Gen. Stat. § 93B-2(a). A financial report must also be filed. N.C. Gen. Stat. § 93B-2(b). The books, records, and operations of each board are subject

to the oversight of the State Auditor pursuant to Article 5A of Chapter 147 of the General Statutes. N.C. Gen. Stat. § 93B-4. Certain restrictions on the use of occupational licensing boards' funds are also found in Chapter 93B, including the purposes for which the interest from the State Treasurer's Investment Program may be used (N.C. Gen. Stat. § 93B-11) and a prohibition against the expenditure of Board funds for lobbying purposes (N.C. Gen. Stat. § 93B-6).

The Board is also under the direct supervision of the Governor of North Carolina pursuant to the N.C. Dental Practice Act. The Board must file an annual report with the Governor on its proceedings, "showing therein the examinations given, the fees received, the expenses incurred, the hearings conducted and the result thereof." N.C. Gen. Stat. § 90-44.

Any of the Board's meetings, including those in which enforcement actions may be discussed, are subject to statutes governing the conduct of state government, such as North Carolina's Open Meetings Act, N.C. Gen. Stat. § 143-318.9 *et seq.* and the Public Records Act, N.C. Gen. Stat. Chapter 132. The State Government Ethics Act, N.C. Gen. Stat. Chapter 138A also bans conflicts of interest on the part of public officials such as the Board's members. As public officials, Board members are sworn to uphold the N.C. Dental Practice Act as well as the state and federal constitutions. In particular, Board members must comply with the N.C. Constitution regarding monopolies. N.C. Constitution Article I § 34.

State courts also provide direct supervision to the Board. The Board requires the involvement of a state court in order to undertake any action beyond the issuance of a warning letter against a non-licensee who is in violation of the N.C. Dental Practice Act. It should be noted that the cease and desist letters in the instant situation were exactly this – letters, not orders. Any enforcement actions by the Board against non-licensees who are providing teeth whitening services, whether civil or criminal, may only be pursued in the state's courts. If a non-licensee providing teeth whitening services is prosecuted criminally for violation of N.C. Gen. Stat. § 90-40, the action is brought in the name of the state, not the Board. N.C. Gen. Stat. § 1-5. In addition, the warrant initiating the action must be signed by a magistrate or other judicial official and supported by a finding of probable cause. N.C. Gen. Stat. §§ 15A-301(a)(2), 15A-304(d). Furthermore, the local district attorney, rather than a private attorney employed or retained by the Board, prosecutes the action in District Court. There, a judge sits as trier of fact and is required to find guilt beyond a reasonable doubt before entering a judgment of conviction. N.C. Gen. Stat. §§ 7A-61, 7A-196(b), 7A-272(a).

Unlike criminal prosecutions, the Board may bring a civil action for injunctive relief in its own name. N.C. Gen. Stat. § 90-40.1(a). N.C. Gen. Stat. § 90-40.1(a) states in part that "[t]he practice of dentistry by any person who has not been duly licensed so as to practice or whose license has been suspended or revoked, or the doing, committing or continuing of any of the acts prohibited by this Article by any person or persons, whether licensed dentists or not, is hereby declared to be inimical to public health and welfare and to constitute a public nuisance" [emphasis added]. Although the burden of proof is lower than in criminal cases, only the court can grant the relief requested. N.C. Gen. Stat. § 90-

40.1(c). Even in those cases in which the defendant consents to the imposition of the requested relief, the presiding judge must approve and sign the consent judgment. In addition, only the court has the power to enforce the injunction by holding anyone who violates it in contempt of court. N.C. Gen. Stat. § 5A-15. Moreover, even disciplinary cases against licensees and declaratory rulings are subject to judicial review although they fall within the Board's administrative jurisdiction. N.C. Gen. Stat. §§ 150B-4(a), 150B-43. In short, the judiciary, as an independent branch of government is heavily involved in the Board's proceedings, whether civil, criminal or administrative; this fact also belies any assertion that the Board's enforcement actions are not subject to direct supervision.

20. Respondent denies the allegations of paragraph 20, but admits that the Board, through its staff, has sent truthful letters to persons when the Board had evidence that they were offering or rendering dental services in violation of the law. The letters sent by Board staff to persons or establishments reported to be engaged in unlicensed teeth whitening services were captioned "Notice and Order to Cease and Desist." The letters, which have not been sent out by the Board for over two years, were more in the nature of a notice rather than an order, and were similar to the cease and desist letters that other state and federal agencies (including the FTC) routinely send. The Board's Executive Officer, Bobby White, testified that the letters were sent to "people who are not our licensees who it appears are engaged in the unauthorized practice of dentistry." Testimony of Bobby White, p. 111, lines 15-17 (July 6, 2009). As for the purpose behind the letters, the following exchange occurred:

Q. And in sending a cease and desist letter, is it the desire of the Board that the person simply stop doing the activity that they are doing?

A. Well, again, it would be if they are violating the Dental Practice Act, yes, it would be the Board's desire that they stop the unauthorized practice of dentistry. And if not, tell us why they are not engaged in the unauthorized practice of dentistry.

Testimony of Bobby White, p. 162, lines 16-23 (July 6, 2009). Mr. White has also characterized the cease and desist orders as "warning letters asking them to stop any questionable practices." Parker, *State Lets Whitening Kiosks Be*, Raleigh News & Observer, Mar. 18, 2008, available at <http://www.ultrabrightusa.com/images/Newsobserver.pdf>. Just as legal counsel for non-dentist teeth whitening service providers should recognize the difference between providing teeth whitening services and selling teeth whitening kits, legal counsel should also recognize the difference between the Board's letter and a court order.

Due to the potential for confusion on this matter, it is important to note that there are major differences between Board letters and FTC cease and desist orders. The FTC is authorized to issue cease and desist orders to prevent persons and other entities from engaging in unfair competition or unfair or deceptive acts or practices. 15 U.S.C. § 45(b). Cease and desist orders issued by the FTC have the force of law; the civil penalty for violation of a cease and desist order is not more than \$10,000 for each violation. 15

U.S.C. § 45(l). Contrast the FTC's reach and power regarding their cease and desist orders with that of the Board. The reality is that if a mall kiosk or salon refuses to comply or even respond to a cease and desist letter, the Board has to proceed in court on the merits and cannot seek sanctions for the mere failure to comply with such a letter. Before compliance can be enforced, the courts – a direct arm of the state – must provide due process, reviewing the evidence and applicable law. As explained more fully below, the cease and desist letters, are facially truthful. The letters inform the recipient of the investigation, quote the applicable statute, and demand that the recipient stop violating that statute. If the service of teeth whitening is, as the Supreme Court of Alabama and state attorneys general have held, the removal of stains from teeth and thus a violation of a North Carolina statute making it illegal for a non-dentist to offer or perform such services, the letter is accurate and appropriate. The FTC has offered no authority to the contrary and did not intervene in the Alabama case. On the other hand, without an “independent review,” the FTC, at the behest of one or more teeth whitening businesses attempting to illegally practice dentistry, seeks to force North Carolina to “cease and desist” enforcing its public protection statutes.

21. Respondent admits that on occasion the Board, through its staff, informed non-dentists of the provisions of the North Carolina Dental Practice Act, including the statute making it illegal to offer or render the service of removing stains from teeth without a dental license. Regarding communication with non-dentists who were considering opening teeth whitening businesses, Board staff correctly informed anyone about the applicable statutes which require that only a licensed dentist may provide the service of removing stains from teeth.

22. Respondent admits that the Board's staff sent some letters to mall owners and property management companies reciting the statute which makes offering and rendering teeth whitening services by non-dentists illegal. Respondent denies that the purpose of the letters was anything other than in furtherance of the Board's sworn duty to protect N.C. citizens and enforce the statutes. The bulk of these letters sent by Board staff to the property management companies of various shopping malls in North Carolina were dated November 21, 2007. The content of the letters was not threatening, nor were the letters enforceable orders. The letters merely requested mall management's assistance in preventing *unlawful* activity on their premises that could endanger the public. In her testimony before the FTC in July 2009, the Board's Deputy Operations Officer explained that the Board's purpose in sending the letters was primarily informational.

I believe that the purpose was informational for the owners of the mall to let them know what we believed the practice of dentistry encompassed and just informational for them; that if this was going on at these kiosks, that they could possibly help us in making sure that illegal activity was not occurring.

Testimony of Terry W. Friddle, pp. 75-76, lines 23-25 & 1-3 (July 7, 2009). Beyond sending the letters, the Board did not take any actions against the property management companies. Testimony of Terry W. Friddle, pp. 72-73, lines 23-25 & 1-5 (July 7, 2009).

Furthermore, each of the statements contained in the letters is truthful, as illustrated:

1. "The N.C. State Board of Dental Examiners is the agency created by the North Carolina legislature to enforce the dental laws in this state." This statement is correct, pursuant to N.C. Gen. Stat. § 90-22.
2. "The Dental Board has learned that an out of state company has leased kiosks in a number of shopping malls in North Carolina for the purpose of offering tooth whitening services to the public." This statement is correct, and note that the operative word is "services." Teeth whitening services were being provided, in contrast with the legal sale of teeth whitening kits. To the Board's knowledge, there is no evidence that the letter itself stopped anyone who was only selling teeth whitening kits and not providing services that constitute the practice of dentistry. Non-dentist providers of teeth whitening services have access to legal counsel, either directly or through their supplier. Legal counsel should know the difference between the sale of products (teeth whitening kits) and the provision of teeth whitening services.
3. "North Carolina law specifically provides that the removal of stains from human teeth constitutes the practice of dentistry. See N.C. Gen. Stat. 90-29(b)(2)." The statute speaks for itself.
4. "The unauthorized practice of dentistry is a misdemeanor. See N.C. Gen. Stat. 90-40." Again, the statute speaks for itself.
5. "It is our information that the teeth whitening services offered at these kiosks are not supervised by a licensed North Carolina dentist." This statement is correct, and once again the operative word is "services."
6. "The Dental Board would be most grateful if your company would assist us in ensuring that 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." This statement is correct, and it should also be noted that it emphasizes the Board's concern for public protection is its primary motivation in addressing such services.

Regardless, such letters had limited effect on the property management companies that received them. In her testimony, Terry Friddle reported that she did not recall receiving any phone calls from people who were planning to open a teeth whitening business and were having difficulty leasing retail space. Testimony of Terry W. Friddle, p. 78, lines 19 – 24 (July 7, 2009). However, there was at least one instance where a property management company contacted the Board as the result of receiving a letter. In that instance, the management company had been "repeatedly informed" by someone seeking to lease kiosk space that the Board had reviewed their particular teeth whitening process and actually approved it.



23. The allegations of paragraph 23 are denied. As stated previously, the Dental Board is a state agency, not a private trade association, and it is the state legislature, not the Dental Board, which has decided that the removal of stains from human teeth constitutes the practice of dentistry. Furthermore, the danger to the public more than outweighs any harmful effects on competition. Two Dental Board members testified at the FTC's investigatory hearings about the many health concerns associated with the removal of stains from teeth by non-qualified persons. In addition, a Board investigator also testified regarding the unsanitary conditions she found at one teeth whitening salon. See Testimony of Terry Friddle, p. 96, lines 10 - 22 (July 7, 2009). The Board has also received several complaints from consumers who reported they were injured by non-dentists providing teeth whitening services.

The Board's enforcement of the Dental Practice Act vis-à-vis teeth whitening businesses is not based upon a Board rule, but upon a state statute making it illegal for non-licensees to provide services to remove stains from teeth. Given the explicit statutory language and high degree of direct state supervision (although arguably not necessary to be shown in this case), this matter is squarely within the scope of the state action doctrine.

As with *Hass*, the case of *Staker v. Board of Regents of the State University of N.Y.*, 1977-2 Trade Cas. (CCH) ¶ 61,703, 1977 U.S. Dist. LEXIS 14024 (E.D.N.Y. 1977), typifies courts' application of the *Parker* test to facts such as those presented here. In *Staker*, the New York State Board for Dentistry was alleged to have committed antitrust violations. The Board of Regents, the dental board, and the individual members of both boards were under scrutiny for the promulgation of certain advertising regulations. The plaintiff also sought a declaratory judgment that a statute barring certain advertising practices was in violation of antitrust laws. The court held that the action would not lie against the two boards and their members in their official capacities. 1977 U.S. Dist. LEXIS 14024, at \*10. The court further explained that,

[t]o the extent that they acted, they were acting under an explicit power delegated to the Board of Regents by the legislature. ... Their action was, whether found mistaken or not in some final analysis, well within the scope of their delegated authority, and, to the extent that they acted, their action was not out of keeping with the considered judgment of the time in which they acted.

*Id.* at \*11. Also see *Brazil v. Arkansas State Bd. of Dental Examiners*, 759 F.2d 674 (8th Cir. 1985) (state action doctrine applied to the Arkansas dental board, which had promulgated a rule prohibiting the making of dentures without a prescription or work order signed by a dentist); *Llewellyn v. Crothers*, 765 F.2d 769, 773 (9th Cir. 1985) (where the restraint in question is, first, clearly articulated and affirmatively expressed as a matter of state policy, and, second, subject to the active supervision of the state itself, the *Parker* defense is applicable).

**THE BOARD'S ENFORCEMENT OF THE STATE STATUTE SOLELY  
PROTECTS THE PUBLIC AND HAS NO ADVERSE EFFECTS ON  
LAWFUL COMPETITION**

24. The allegations of paragraph 24 are denied. As to any alleged exclusionary course of conduct by the Board, there is no desire on the Board's part to diminish the number of salons, retail stores, kiosks, etc. or impede their sales as long as they obey the laws of North Carolina as enacted by the General Assembly and that the Board members have sworn an oath to uphold. There is no evidence that the competitive sales of OTC kits has lessened. Indeed, market reports indicate that such sales are increasing. It is true that the Board, by executing its statutory mandate, has decreased the likelihood that non-licensed kiosk workers will endanger the health, safety, and welfare of the public.

25. The allegations of paragraph 25 are denied. As to the Board's alleged actions and course of conduct restraining competition and injuring consumers, non-dentists are prohibited by N.C. law from providing services that constitute the practice of dentistry. The Board is one of the agencies designed to enforce the statute enacted by the General Assembly. If price is the primary concern for some consumers, they may freely avail themselves of numerous OTC teeth whitening kits. Any consumer in North Carolina can get OTC teeth whitening without impediment and without paying for the illusion of receiving a professional teeth whitening service from untrained and unsanitary kiosk workers.

**THE BOARD'S EFFORTS TO PROTECT THE PUBLIC  
DO NOT CONSTITUTE VIOLATIONS OF THE ANTITRUST LAWS**

26. The allegations of paragraph 26 are denied. There is no contract, combination or conspiracy, nor a sliver of evidence even hinting of such. Board members' good faith is presumed as a matter of law and alleged "collusion" cannot be inferred from the mere fact that, as required by statute, they are dentists. The North Carolina General Assembly adopted an explicit prohibition against unlicensed persons providing teeth stain removal services to the public. In fact, the financial interest of the dentist members is nominal at best, whereas the least expensive alternatives, OTC kits, are not regulated by the Board.

**THE FTC'S CONTEMPLATED RELIEF EXCEEDS THE FTC'S AUTHORITY  
AND WOULD UNCONSTITUTIONALLY IMPAIR THE ABILITY OF THE  
STATE OF NORTH CAROLINA TO PROTECT ITS CITIZENS UNDER THE  
TENTH AND ELEVENTH AMENDMENTS TO THE CONSTITUTION**

Respondent denies that any of the relief set forth in the Complaint's Notice of Contemplated Relief, or the subparts thereto, is justified by fact or law, or in equity. The relief the FTC seeks belies a fundamental disregard for the prerogative of a state to protect its citizens by statute. Over all, the relief would require the Board and Board members to violate the clear and unambiguous language of a state statute.

1. Regarding a requirement for the Board to notify an independent state authority of any proposed or contemplated action to restrain non-dentist providers from offering teeth whitening services, this proposed relief arises from the FTC's fundamental misunderstanding of the way state boards operate in North Carolina. North Carolina occupational licensing boards are independent state agencies. They operate as independent quasi-judicial Boards as provided in the state Constitution. The independent body is the Board itself. However, aside from Board oversight regarding enforcement practices, the Board cannot lawfully actually force a kiosk operator to stop providing dental services without either a court order or, in the instance of a criminal prosecution, the cooperation of a local district attorney. The Board cannot convict anyone of the crime of unauthorized practice of dentistry without the decision of a court (in North Carolina, our district attorneys and our courts are "independent").
2. Regarding a requirement for the Board to secure the "prior and appropriate approval" of an independent state authority before taking any action that may restrain the provision of teeth whitening services by non-dentist providers, see the response to paragraph1 above.
3. As to the requirement that the Board cease and desist from directing any non-dentist provider of teeth whitening services to cease providing those services, the Notice and Order to Cease and Desist has not been sent in the last two years. However, the cease and desist letter is substantively similar to letters sent by many other state and federal agencies and indeed the FTC itself.
4. As to the requirement that the Board cease and desist communicating to any non-dentist provider of teeth whitening services that: (i) such non-dentist provider is violating, has violated, or may be violating the North Carolina Dental Practice Act by providing teeth whitening services, or (ii) the provision of teeth whitening services by a non-dentist provider is a violation of the North Carolina Dental Practice Act, it is the Board's statutory duty to enforce the North Carolina Dental Practice Act - especially when the perceived conduct might be a criminal violation. If indeed the conduct is blatant, the agency can go further and should. Such kiosk operators always have within their reach legal counsel, and indeed if it is a criminal action they have a right to a court-appointed attorney. It should be noted that in the instances discussed above, where the Board sought criminal prosecution there was a defense, but the defense did not challenge the Board's authority to send the letter. In the civil matters, the courts sustained the Board's prerogative.
5. As to the requirement that the Board include in all correspondence with any non-dentist provider of teeth whitening services a statement that the Board does not have the authority to determine whether the law has been violated, and that only a court can make that determination and then assess penalties, if judged appropriate, it is clearly the Board's statutory prerogative to initiate civil suits and to seek criminal prosecution. The Board cannot and should not unilaterally agree to another arrangement that has not been statutorily authorized. Again, the FTC seems to think that North Carolina boards can assert jurisdiction over and force unlicensed kiosk operators into hearings before their

Board similar to the way the FTC operates. There are far greater assurances of due process in the way the Dental Board must proceed.

6. As to the requirement that the Board cease and desist communicating to a lessor of commercial property that (i) the provision of teeth whitening services by a non-dentist provider is a violation of the North Carolina Dental Practice Act, or (ii) that any non-dentist provider of teeth whitening services is violating, has violated, or may be violating the North Carolina Dental Practice Act by providing teeth whitening services, the Board has not done so for over two years. Nevertheless, the Board has an obligation to inform third parties who might act in reliance upon the illegal conduct of kiosk operators to clearly and accurately inform them of the Board's position and the statutes implicated.

7. As to the requirement that the Board distribute a copy of the Commission's order to each and every current and future Dental Board member; officer, manager, representative, agent, and employee of the Dental Board, the Board will provide a copy of this response to any such person.

8. The Board shall seek reimbursement of costs of this proceeding.

#### **FURTHER DEFENSES**

The inclusion of any defense within this section does not constitute an admission that Respondent bears the burden of proof on each or any of the issues, nor does it excuse complaint counsel from establishing each element of its purported claim for relief.

##### **First Defense**

The Complaint fails to state a claim upon which relief can be granted under Section Five of the Federal Trade Commission Act, 15 U.S.C. § 45.

##### **Second Defense**

The Respondent Board is immune from the Federal Trade Commission Act pursuant to the State Action Doctrine as pronounced the U.S. Supreme Court.

##### **Third Defense**

The Respondent Board, as an agency of the state of North Carolina, possesses sovereign immunity under the 11th Amendment to the U.S. Constitution.

##### **Fourth Defense**

The actions of the Respondent Board are protected by the 10th Amendment to the U.S. Constitution, which reserves the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, to the States.

#### **Fifth Defense**

The Commission lacks subject matter jurisdiction to force the Respondent Board to abrogate a state statute.

#### **Sixth Defense**

Pursuant to 15 U.S.C. § 45(a)(3), the Commission lacks jurisdiction over conduct that does not have a direct, substantial, and reasonable foreseeable effect on U.S. commerce.

#### **Seventh Defense**

The relief sought in the Complaint is not in the public interest because it would, among other things, endanger the health, safety, and welfare of the citizens of North Carolina.

#### **Eighth Defense**

Respondent reserves the right to assert additional defenses as this matter proceeds.

#### **CONCLUSION**

Counsel for the Board has asked repeatedly for citation to a single authority for the FTC's position. None has been provided because none exists. This is an unprecedented frontal attack on a clear state statute and on a sovereign state's right to protect its citizens. Without evidence or precedent, and despite contrary court precedence directly on point, the Complaint has charged that the Board, by merely by enforcing the law as required by state statutes, was *ipso facto* "conspiring" in violation of the antitrust laws.

The "removal of stains" includes teeth whitening services in North Carolina's definition of the practice of dentistry. Even if a sliver of ambiguity could be found in North Carolina's statute, the U.S. Supreme Court has repeatedly held that the courts are to defer to state licensing boards in the interpretation of state enabling statutes.

The Commission cannot premise its theory of collusion or conspiracy upon the mere fact that the majority of the Board are practicing dentists. Furthermore, the U.S. Supreme Court has repeatedly held that the good faith of licensing board members is to be presumed.

This the 6th day of July, 2010.

ALLEN AND PINNIX, P.A.

/s/ Noel L. Allen

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## CERTIFICATE OF SERVICE

I hereby certify that on July 6, 2010, I electronically filed the foregoing with the Federal Trade Commission using the FTC E-file system, which will send notification of such filing to the following:

Richard C. Donohue  
Acting Secretary  
Federal Trade Commission  
600 Pennsylvania Avenue, N.W.  
Room H-159  
Washington, D.C. 20580

I also certify that the undersigned has this date served copies of the foregoing upon all parties to this cause by depositing copies hereof, postage prepaid, in the United States Mail, addressed as follows:

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I also certify that I have sent courtesy copies of the document via Federal Express and electronic mail to:

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

/s/ Noel L. Allen

#### **CERTIFICATION FOR ELECTRONIC FILING**

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

/s/ Noel L. Allen