UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

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I. INTRODUCTION

Respondent North Carolina State Board of Dental Examiners (the "Board") is a combination of dentists that is excluding competition from non-dentists in the provision of teeth whitening services. Specifically, the Board has repeatedly ordered non-dentist competitors to cease and desist from whitening teeth; as a consequence, non-dentists have exited the market and others have not entered. The challenged conduct, the exclusion of a new and low cost class of competitors, is inherently suspect. In addition, this conduct has resulted in substantial consumer injury. Consumer injury will continue and grow unless the Board's exclusionary conduct is enjoined. There is no cognizable efficiency justification offsetting the consumer harm. Finally, the state action doctrine does not protect the Board's conduct, and no other defense identified by the Board has merit. As a result, the evidence will show that the Board has violated Section 5 of the FTC Act.

II. STATEMENT OF FACTS

A. The North Carolina Dental Board Is Controlled By Dentists, And Its Authority Under State Law Is Limited To Petitioning The Courts To Enjoin Or Sanction The Unauthorized Practice Of Dentistry In North Carolina

The Board is created by the Dental Act to regulate dentists and hygienists.[1] The Board consists of six dentists, one hygienist, and one consumer representative. Only the consumer representative is selected by an elected official (the Governor). The dentist Board members, who must be licensed dentists, are elected by other licensed dentists for a term of three years. Members are eligible for re-election, and some dentist members have served two or more terms.

The Dental Act authorizes the Board to address suspected instances of the unlicensed practice of dentistry in either of two ways: the Board may petition a state court for an injunction, or it may request that the district attorney initiate a criminal prosecution.[2] Pursuant to this authority, the Board has on occasion sought civil as well as criminal relief in the North Carolina courts.[3] We do not challenge those actions. On the other hand, the detailed provisions of the Dental Act do not provide the Board with the authority, on its own, to order an alleged violator to cease and desist from the unlicensed practice of dentistry. Yet it has repeatedly done so. This case challenges those actions, as well as other naked efforts to exclude competitors of dentists from providing teeth whitening services.

North Carolina law establishes no mechanism for any person or entity to review a Board decision to issue a cease and desist order to a non-dentist before the order is issued (or even thereafter). The Board does annually file audited financial statements with the Secretary of State, as well as an Annual Report to the Governor, Secretary of State, Attorney General, and Joint Legislative Administrative Oversight Committee, and individual Board members file

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[1] N.C. Gen. Stat. § 90-22.

[2] N.C. Gen. Stat. § 90-40.1.

[3] All were resolved without judgment on the merits.

Statements of Economic Interest with the State Ethics Commission. These reports/statements do not enable any governmental entity to examine Board decisions before or near the time that the Board acts. In short, no independent governmental entity engages in any review.

B. Absent Intervention By The Board, Teeth Whitening Services Would Be Offered In North Carolina By Both Dentists And Non-Dentists

In-office teeth whitening is a potentially lucrative business opportunity for both dentists and non-dentists. Dentists perform in-office teeth whitening treatments using hydrogen peroxide or carbamide peroxide.[4] Because in-office procedures use high concentrations of peroxide, before applying the peroxide solution, the dentist takes steps to protect the gums from burning. Then the peroxide solution is painted on the teeth. Dentists commonly direct a light source at the teeth, which according to some studies helps to "activate" the whitener. The entire procedure generally takes place in one sitting and has immediate whitening results. A dentist's in-office whitening procedure typically costs $300 to $500, and sometimes more.

Beginning in 1989, numerous companies began making products for dentists to dispense for at-home teeth whitening, which is implemented using a custom tray placed in the consumer's mouth. In addition to the tray, dentists send patients home with a supply of hydrogen or carbamide peroxide solution. The take-home kits can be used either as a follow-up to the in-office treatment, or as the sole whitening service. Used alone, a take-home kit can take many weeks to whiten the teeth. Dentist-provided take-home kits, including a custom tray, may cost the consumer hundreds of dollars.

Teeth whitening or bleaching is the number one requested cosmetic dentistry procedure.[5] In 2007, the American Academy of Cosmetic Dentistry ("AACD") reported that dental teeth

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[4] Originally, hydrogen peroxide was used as a periodontal treatment to help heal diseased gums; as a result, the substance gained quick acceptance as a safe and effective means to whiten teeth.

[5] Cosmetic dentistry consists of optional services.

whitening procedures increased more than 300% over the previous five years. A dentist may earn tens of thousands of dollars per year by whitening teeth. For 2006, AACD dentists reported performing an average of 70 teeth whitening procedures, garnering average revenues of $25,000 (total of $138.8 million). This figure is consistent with reports from North Carolina dentists. Procter & Gamble states that with proper marketing, dentists can earn $100,000 to $200,000 per year by performing teeth whitening services: "Your esthetic practice could explode overnight."

In 2000, the efficacy of whitening "strips" was shown, and Proctor & Gamble introduced Crest White Strips: clear, thin, flexible pieces of plastic (polyethylene) that are coated on one side with a thin film of hydrogen peroxide bleaching agent. These and similar over-the counter ("OTC') strips and gels use substantially less peroxide than dentists use in-office, and typically require more time to work. Whitening strips cost in the $15-$75 range, depending on brand, quantity, and peroxide concentration.

Mall kiosks and salons as a venue for teeth whitening began to appear around 2004-05. Typically, a non-dentist operator will explain the procedure to the customer, provide the customer with literature, sometimes including a consent form, and answer questions before the procedure begins. The operator will don sanitary gloves, take a tray filled with carbamide peroxide from a sealed package and hand it to the customer, who places the tray into his or her mouth. A light "activator" is then put in place by either the customer or the operator. The process lasts approximately 30-45 minutes, after which the customer returns the tray to the operator for disposal. The operator does not touch the customer's mouth. These operations seek to provide immediate results. Non-dentist teeth whitening typically costs in the $79-$150 range.

In general, anyone who wants very quick results must go to the dentist or to the mall/salon for in-chair whitening. Both in-chair dentist and non-dentist teeth whitening use higher peroxide concentration than is used in typical OTC products available in drug stores and supermarkets. They are also closer in terms of the services provided, including instruction, provision of a tray, loading of the peroxide, convenience, and use of a light activator. It is clear

that both dentists and non-dentist providers of teeth whitening believe that they compete with one another; non-dentist teeth whitening operators compare their services to dentists, and dentists commonly urge patients to use a dentist rather than a non-dental teeth operator.

C. The Board Is Excluding Competition From Non-Dentists, And Is Acting Independent Of The Courts

The Board has received inquiries and complaints from dentists about non-dentist providers of teeth whitening services. Although the Board has expressed concern about the safety of these operations, Dr. Martin Giniger, D.M.D., M.S.D., Ph.D., F.I.C.D., will testify that such concerns are unwarranted. Notably, the Board has not urged the Department of Health or other state regulatory authorities to take action with respect to non-dental teeth whitening.

At the same time that non-dentist whitening operations were proliferating, the Board learned that jewelry stores were fabricating "grills" - cosmetic crowns (*e.g.,* gold, "bling," fangs) that are worn temporarily for decorative purposes. The Board challenged one jewelry store in court alleging the unauthorized practice of dentistry because the store took impressions of teeth. Soon thereafter a Board investigator suggested that the Board use Cease and Desist Orders against other grill operations in order to avoid the risk of losing in court for lack of evidence.

Similarly, with respect to teeth whitening, the Board has issued Cease and Desist Orders to short-cut the need for evidence and independent review. As discussed above, this action is beyond the Board's statutory authority. Yet, the Board sometimes issues these Cease and Desist Orders without any evidence that the non-dentist provider is doing anything unlawful. Instead, the Board on occasion issues these Cease and Desist Orders as a *substitute* for the process of gathering evidence and going to court. This practice raised concerns even among members of the Board.

Over the past seven years, the Board has sent numerous cease and desist orders to non-dentist teeth whitening operators. Most often, these documents commence with a bold, all capitals heading: **"NOTICE AND ORDER TO CEASE AND DESIST" or "NOTICE TO**

CEASE AND DESIST." The body of the Orders vary to some degree. For example, in December 2007, after learning that one non-dentist teeth whitener was "assisting clients to accelerate the whitening process with an LED light," the Board sent a letter with the latter heading. The document continued: "The Board hereby directs your company to cease its activities unless they are performed or supervised by a properly licensed North Carolina dentist." Other Orders reference a possible Board investigation, but reiterate the message of the bold heading: "You are hereby ordered to CEASE AND DESIST any and all activity constituting the practice of dentistry or dental hygiene as defined by North Carolina General Statutes § 90-29 and § 90-233 and the Dental Board Rules promulgated thereunder."

Contemporaneous documents confirm that the letters are intended, and understood by recipients, as Orders from a state agency to stop teeth whitening activities. As acknowledged by the Board's in-house counsel, the Board "has recently issued cease and desist orders to an out of state company that has been providing bleaching services in a number of malls in the state."

The Board has acted in other extra-judicial ways to stop non-dentist teeth whitening operations. For example, the Board sent Cease and Desist Orders to suppliers, cutting off actual and prospective non-dentist teeth whiteners from the means of doing business in North Carolina. The Board also sent letters to managers of malls stating that teeth whitening by non-dentists is unlawful, and asking that the malls not lease to these businesses. As a result, some operators of commercial properties concluded that they should terminate and cease entering into leases with non-dentists intent on operating teeth whitening facilities in malls. The Board has acknowledged that it does not believe that commercial property owners would be violating the law by leasing space to non-dentist teeth whiteners. Rather, the Board's efforts are, again, part of an extra-judicial campaign to deny actual and potential non-dentist teeth whiteners the means to conduct their businesses.

In addition, the Board contacted the North Carolina Cosmetology Board to enlist its assistance in stamping out this competition. This action also resulted in the closure of non-

dentist operations.

The views of the Board and Board members on what constitutes unlawful teeth whitening have varied among members and over time. At its strictest, the Board may seek to terminate a business where teeth whitening is done almost exclusively by the customer; for example, that an operator simply offers instructions on how to use an OTC product is sufficient to draw a Cease and Desist Order from the Board.

Non-dentist operations have closed as a result of the Board's conduct. Furthermore, mall owners are now reluctant to lease space to teeth whitening operations, limiting the growth of this industry. As a result, consumers are deprived of a less expensive alternative to dentist-provided teeth whitening, and other benefits that would accrue from competition between dentist and non-dentist providers.

D. The Board's Conduct Is Anticompetitive With No Offsetting Efficiency Justifications

Dr. Giniger will testify that a ban on non-dentist teeth whitening is not necessary to protect the public health. The Board's contrary argument is simply incorrect. Non-dentist teeth whitening is similar in terms of safety to other means of teeth whitening. Non-dentist teeth whitening is very safe.

Professor Kwoka, Neal F. Finnegan Distinguished Professor of Economics at Northeastern University, will testify that the Board and its constituents have a material financial interest in excluding non-dentists from competing in the provision of teeth whitening services. Professor Kwoka will further testify that the Board's conduct, excluding an innovative low cost competitor, is presumptively anticompetitive absent some efficiency justification.

No cognizable justification has been proffered by the Board. Further, with regard to the health and safety "justification" cited by the Board, there are ways to achieve any legitimate objective that are less restrictive than a total ban of non-dentist teeth whitening.

III. LEGAL DISCUSSION

A. Jurisdiction

1. The Board Is A "Person" Within The Meaning of Section 5 of the Federal Trade Commission Act.

The Board is a state agency, and therefore a "person" within the meaning of the FTC Act.[6] In *Mass. Bd.*, the Commission held that a state regulatory body is a person within the meaning of the FTC Act. This conclusion is supported by the legislative history of the Act, "which indicates that Congress intended an expansive meaning for the word 'person.'"[7] The Commission also explained that viewing a state agency as a "person" is "consistent with Commission case law."[8] Since its *Mass. Bd.* decision, the Commission has issued complaints alleging that a state board is a person under the FTC Act.[9]

The Supreme Court has held that state actors are "persons" within the meaning of the Sherman and Clayton Acts.[10]

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[6] *In re* Massachusetts Board of Registration in Optometry, 110 F.T.C. 549, 608-09 (F.T.C. 1988) (hereinafter "Mass. Bd.").

[7] *Mass Bd.*, 110 F.T.C. at 609 & n.19 (*citing* 51 Cong. Rec. 14,928 (1914) ("The section which deals with unfair methods of competition confers upon the Commission certain administrative powers somewhat analogous to the Interstate Commerce Commission, extending to persons, partnerships, and corporations, and with respect to the great industrial activities in interstate commerce. It embraces within the scope of that section every kind of person, natural or artificial, who may be engaged in interstate commerce.").

[8] *Mass Bd.* 110 F.T.C. at 609 (*citing In re* Indiana Federation of Dentists, 93 F.T.C. 231, 231 n.1 (Feb. 5, 1979) (Commission Interlocutory Order); *In re* Rhode Island Board of Accountancy, No. 9181 (February 12, 1985, Brown, ALJ); Statement of Basis and Purposes for the Trade Regulation Rule on Advertising and of Ophthalmic Goods and Services, 43 Fed. Reg. 23992 24004 (1979)).

[9] *In re* Missouri Board of Embalmers and Funeral Directors, 2007 WL 809642 (F.T.C. 2007); *In re* South Carolina State Board of Dentistry, No. 9311, 2003 FTC LEXIS 139 (September 12, 2003).

[10] City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 394-7 (1978) (*citing* Georgia v. Evans, 316 U.S. 159 (1942); Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390 (1906)). Additionally, the Supreme Court has held that the language of the Robinson-Patman Act was sufficiently broad to cover state actors. Jefferson County Pharm. Ass'n v. Abbott Labs., 460 U.S. 150, 155 (1983) ("[t]he statutory language-'persons' and

2. The Board's Conduct Occurred In, Or Had An Affect On, Interstate Commerce.

Section 5 of the FTC Act prohibits unfair methods of competition "in or affecting commerce." 15 U.S.C. § 45(a)(1), amended by the Magnuson-Moss Act in 1975.[11] Congress intended the Commission's jurisdiction to include the full extent of the Congress's power to regulate commerce. Jurisdiction is proper where a "not insubstantial" amount of interstate commerce is involved. The affected volume of commerce is measured both by the actual present effects of the challenged conduct, and by the potential future reach of any anticompetitive action. It is necessary only to show that there exists some "appreciable" activity that is demonstrably in interstate commerce, and that the activities of the Respondent has a "not insubstantial" effect on that interstate commerce.[12]

In *Summit Health v. Pinhas*,[13] a doctor who charged lower fees than his colleagues alleged that a hospital violated the Sherman Act by terminating his hospital privileges. The Court affirmed that the Sherman Act applied without a showing of the actual effects of the defendant's exclusion of the plaintiff because "[t]he competitive significance of [his] exclusion from the market must be measured, not just by a particularized evaluation of his own practice, but rather, by a general evaluation of the impact of the restraint on other participants and

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'purchasers-is sufficiently broad to cover governmental bodies.") (citations omitted). Similarly, the Supreme Court has held that a foreign government plaintiff is also a "person" within the meaning of the Clayton Act. Pfizer Inc. v. Government of India, 434 U.S. 308, 318 (1978) (a foreign nation is a "person" under § 4 of the Clayton Act).

[11] *See* Act of Jan. 4, 1975, Pub. L. No. 93-637, § 201(a), 88 Stat. 2183, 2193.

[12] McClain v. Real Estate Board, 444 U.S. 232, 242-43 (1980) ("If establishing jurisdiction required a showing that the unlawful conduct itself had an effect on interstate commerce, jurisdiction would be defeated by a demonstration that the alleged restraint failed to have its intended anticompetitive effect. This is not the rule of our cases. A violation may still be found in such circumstances because in a civil action under the Sherman Act, liability may be established by proof of *either* an unlawful purpose or an anticompetitive effect.") (italics in original; citations omitted).

[13] 500 U.S. 322 (1991).

potential participants in the market from which he has been excluded."[14]

In this case the correct inquiry is whether (i) non-dentist teeth whitening has a not-insubstantial impact on interstate commerce, or (ii) if left unimpeded, non-dentist teeth whitening would have a not-insubstantial impact on interstate commerce. The record will show that both dentists and non-dentists purchase teeth whitening products, the main input for teeth whitening services, from out-of-state suppliers. Further, the likely flow of interstate goods and services that would have occurred but for the Board's interdiction of the development of non-dentist, chair-side teeth whitening services in North Carolina would have been more than sufficient to support the application of the FTC Act to the Board's conduct. This satisfies the jurisdictional requirement.

B. Elements of A Section One Sherman Act Claim and Burdens of Proof.

The Complaint alleges that the Board, acting as a combination of dentists, has unreasonably restrained trade and commerce in violation of Section 5 of the FTC Act. The elements of the claim are: (1) a combination or conspiracy of dentists that (2) unreasonably restrains trade. *See, e.g., Valuepest.com v. Charlotte, Inc.*, 561 F.3d 282, 286 (4th Cir. 2009); *Fashion Originators' Guild, Inc. v. FTC*, 312 U.S. 457, 463-64 (1941) (Section 5 of the FTC Act violations may be based on Sherman Act violations). The Board is itself a combination of competitors, and its conduct constitutes concerted action within the meaning of the antitrust laws. *See Am. Needle, Inc. v. NFL*, 130 S. Ct. 2201, 2209-2210 (2010); *Mass Bd.*, 110 F.T.C. at 610-11.

Agreements unreasonably restrain trade when they have (or are likely to have) a not insubstantial anticompetitive effect in an antitrust market, e.g., raising price, reducing output,

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[14] *Id.* at 332. United States v. Romer, 148 F.3d 359, 364 (4th Cir. 1998) ("Indeed, the Supreme Court has noted that by using the phrase 'commerce among the several States,' Congress intended the Sherman Act to reach the constitutional limits of the commerce power."); United States v. Foley, 598 F.2d 1323, 1328 (4th Cir. 1979) ("Jurisdictional reach of the statute is coterminous with Congress' power to regulate interstate commerce.")

reducing quality, or consumer choice. *See, e.g., Standard Oil Co. v. United States*, 283 U.S. 163, 179 (1931); *Hahn v. Oregon Physicians' Serv.*, 868 F.2d 1022, 1026 (9th Cir. 1988).

The trial evidence will establish that the Board's ongoing campaign of excluding non-dentists from providing teeth whitening services unreasonably restrains competition that the actual and/or likely future effect of this conduct is to harm both competition and consumers. *See California Dental Ass'n v. FTC*, 526 U.S. 756, 780-81 (1999) (the "essential enquiry" is whether "the circumstances, details, and logic of a restraint" support "a confident conclusion" that "the principal tendency" of that restraint is to harm competition and consumers); *FTC v. Brown Shoe Co.*, 384 U.S. 316, 322 (1966) (Section 5 empowers the Commission to enjoin in their incipiency restraints which, if allowed to continue, would substantially harm competition); *FTC v. Motion Picture Advertising Services Co.*, 344 U.S. 392, 394-95 (1953) (same); *In re Coca-Cola Co.*, 117 F.T.C. 795 (1994) (same).

An antitrust court determines the "principal tendency" of a restraint by evaluating, first, the plaintiff's prima facie case of competitive harm, and then, any efficiency defenses advanced by the defendant. To make this determination courts consider one or more of three factors: the nature of the restraint; market power; and evidence of actual effects. *In re Realcomp II, Ltd.*, No. 9320, 2009 FTC LEXIS 250, at *43-51 (Oct. 30, 2009) (Commission Opinion). Although a finding of liability in this case will not require evidence on all of these issues, Complaint Counsel will nonetheless offer evidence on each of these issues.

Nature Of The Restraint. The Board's exclusionary strategy should be judged to be inherently suspect; which is to say, the restraint requires justification even in the absence of a showing of market power or direct evidence of competitive harm. *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 36-37 (D.C. Cir. 2005). Case law establishes that an agreement among competitors to exclude from the market a service that consumers would prefer is inherently likely to harm competition, and requires justification. *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656, 658-60 (1991) (*per curiam*) (the "conspiratorial refusal" of gas

utilities to supply plaintiff's "safer and more efficient" radiant burners "because they are not approved by" a gas association of plaintiff's rivals "clearly has, by its nature and character, a monopolistic tendency," and is "hence forbidden") (citations and internal quotation marks omitted); *Denny's Marina, Inc. v. Renfro Productions, Inc.*, 8 F.3d 1217 (7th Cir. 1993) ("concerted action by dealers to protect themselves from price competition by discounters" may be condemned without any further market inquiry.); *In re Realcomp II*, 2009 FTC LEXIS 250, at *72 (an agreement among full service real estate brokers to exclude discounters from the market is inherently suspect). *See also* H. Hovenkamp, *Exclusive Joint Ventures and Antitrust Policy*, 1995 Colum. Bus. L. Rev. 1, 66 (1995) (product exclusion is anticompetitive "when its purpose or effect is to keep a product or process off the market that consumers would prefer, or that is cheaper to produce, but whose introduction would threaten the profits of firms making rival products").

Further elucidating the nature of the challenged conduct, Dr. Kwoka will testify that the substantial or complete exclusion of non-dental teeth whitening by the Board harms consumers in several different ways. Would-be consumers of non-dental teeth whitening may shift to dentist teeth whitening or purchase OTC products, or may forgo teeth whitening altogether. In all of these cases, consumers are denied their preferred choice, and there is a reduction in consumer welfare. Further, the shift in consumer demand from non-dentist to dentist services leads to an increase in prices. Dr. Kwoka will also explain that there is an extensive economic literature showing that analogous exclusionary restraints adopted by professional boards and associations, dentists included, result in higher prices with no offsetting benefit to competition.

Market power. The relevant market power inquiry in this case is whether the Board has the power to exclude from the market non-dentist providers. *See United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956) (market power is the power to raise prices or exclude competition). Complaint Counsel will offer both inferential and direct evidence of the Board's power to exclude. The inferential evidence derives from the Board's status as a governmental

agency. Because the Board acts with the imprimatur of the State of North Carolina, small businesses are apt to comply when ordered by the Board to cease and desist from providing teeth whitening services. Further, there will be direct evidence, both testimony and documents, showing that recipients of the Board's orders have in fact exited the market.

The nature of the Board's actions together with this showing of market power are sufficient to establish that the conduct has the potential for significant adverse effects on competition. *See In re Realcomp II*, 2009 FTC LEXIS 250, at *51.

Direct proof of actual detrimental effects. In *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986), a group of dentists agreed to withhold x-rays from dental insurance companies that requested access in order to determine whether payment was appropriate. The Court instructed that direct proof of anticompetitive harm was sufficient to establish a prima facie violation. The Court reasoned that "[s]ince the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, 'proof of actual detrimental effects, such as a reduction in output,' can obviate the need for an inquiry into market power, which is but a 'surrogate for detrimental effects.'" *Id.* at 460-61. "Significantly, the evidence that the Court accepted as direct proof of adverse effects did not involve an elaborate econometric 'proof that it resulted in higher prices,' 476 U.S. at 462, but rather simply that in two localities, over a period of years, insurers were 'actually unable to obtain compliance with their requests for submission of x-rays.'" *In re Realcomp II,* 2009 FTC LEXIS 250*,* at *46.

In the present case, the direct proof of actual detrimental effects is similar. Complaint Counsel will offer evidence that many non-dentist teeth whitening businesses exited the market upon receiving the Board's order to cease operating, and that still others did not enter due to the board's unauthorized actions.

C. There Are No Cognizable, Offsetting Efficiency Justifications Or Other Defenses To Offset The Competitive Harm

1. A Quality of Care or Public Safety Defense Fails, both as a Matter of Law and Fact

If the Board's exclusionary campaign against non-dentist competitors is judged to be inherently suspect, or if Complaint Counsel otherwise establishes a prima facie case of competitive harm, then the next step in the competitive analysis is to evaluate any efficiency defense advanced by the Board. We expect the Board's argument to be that non-dentist teeth whitening endangers the health and safety of consumers, and should appropriately be banned. This argument is insufficient for three reasons.

First, contentions regarding the alleged peril posed by non-dentist teeth whitening is not a cognizable antitrust defense. The inquiry mandated by the rule of reason is whether the challenged restraint is one that promotes competition or one that restrains competition. Accordingly, a respondent is precluded from arguing that an unrestrained market will lead consumers to make dangerous choices. *See Indiana Federation of Dentists*, 476 U.S. at 462-64 (rejecting quality of care justification for dentists' refusal to provide x-rays to insurance companies); *National Soc'y of Professional Engineers v. United States*, 435 U.S. 679, 695 (1978) (rejecting claim that competition among engineers will lead consumers to choose an inadequate level of quality); *Wilk v. Am. Medical Ass'n*, 719 F.2d 207, 227-28 (7th Cir. 1983) (where medical doctors sought to exclude chiropractors from the market, rejecting defense that chiropractors pose a threat to the public health, safety, and welfare).

Second, the evidence at trial will show that, in fact, non-dentist teeth whitening poses no danger to the public. Dr. Martin Giniger, an expert on all manner of teeth whitening, will testify that teeth bleaching by non-dentists and by consumers themselves is safe, as evidenced both by the relevant scientific literature, and the fact that there have been millions upon millions of applications over a number of years without resulting harm.

Third and finally, even if one concludes that there is some health risk associated with

teeth whitening by non-dentists, the problem can be satisfactorily remedied with steps far less restrictive than a complete ban on this service. For example, if there were evidence that customers perceive kiosk/spa operators to be dentists, then such operators could be required to post a notice disclosing that the staff lacks dental training. From a competition perspective, this would be preferable to the elimination of non-dentist teeth whitening.

A restraint that is overly broad, that is more restrictive of competition than reasonably necessary, should be deemed to violate Section 5. *Schering-Plough v. FTC*, 402 F.3d 1056, 1073 (11th Cir. 2005) ("Naturally, the restraint imposed must relate to the ultimate objective, and cannot be so broad that some of the restraint extinguishes competition without creating efficiency."); *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 224 (D.C. Cir. 1986) ("If [a restraint] is so broad that part of the restraint suppresses competition without creating efficiency, the restraint is, to that extent, not ancillary."); Department of Justice and Federal Trade Commission, *Antitrust Guidelines for Collaborations Among Competitors* § 3.36(b) (April 7, 2000) ("*Collaboration Guidelines*") ("[I]f the participants could have achieved or could achieve similar efficiencies by practical, significantly less restrictive alternative means, then the Agencies conclude that the relevant agreement is not reasonably necessary to their achievement."); Areeda & Hovenkamp, *Antitrust Law*, ¶ 1505 (3d ed. 2006) ("An apparently anticompetitive restraint can be redeemed only if reasonably necessary to achieve a legitimate objective. To be reasonably necessary, the restraint must not only promote the legitimate objective but must also do so significantly better than the available less restrictive alternatives. This is a two-part inquiry: (1) Does the restraint actually serve the claimed legitimate objective? (2) Can that objective be achieved in a manner that restrains competition less?").

2. The Board's State Action Defense Is Without Merit and Should Be Dismissed

The Board asserts that the conduct challenged in this case should be considered as state action and exempt from antitrust liability. The evidence will show that the state action defense is

inapplicable. Two motions addressing the state action defense are pending with the Commission, and the Commission may issue its decisions before trial.[15] Thus, it is possible that all dispute concerning the state action doctrine will be resolved by the Commission. Alternatively, the Commission may identify particular issues that require fact finding and resolution by the ALJ. For present purposes, we offer a brief overview of the state action defense in this case.

The state action doctrine limits the reach of the federal antitrust laws in order to safeguard the traditional role of the states in regulating commerce "in the interest of the safety, health, and well-being of local communities."[16] Supreme Court cases provide for three distinct modes of state action review, depending upon whether the decision-maker is the state acting in its sovereign capacity, a public actor, or a private actor. Plainly, the Board is not the sovereign, a term that refers to the state legislature and the state's highest court.

The Supreme Court distinguishes between public actors and private actors based upon the decision-making incentives of the actor. When a state board or its controlling members have a financial interest in the market that is being restrained, the state board is considered to be a private actor. *Compare Goldfarb v. Virginia State Bar*, 421 U.S. 773, 791 (1975) (financially interested state agency, the Virginia State Bar Association, treated as a private actor for state action analysis), *and Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 706 (1962) (financially-interested corporation exercising governmental authority treated as a private actor for state action purposed), *with Town of Hallie v City of Eau Claire*, 471 U.S. 34, 45-46 (1985) (a municipality is a public actor because it is not a market participant and generally lacks the incentive to engage in private anticompetitive conduct).

The Board and its constituents (licensed dentists) have a financial incentive to exclude

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[15] Complaint Counsel filed a motion for partial summary decision striking the Board's asserted state action defense. The Board filed a motion to dismiss the Complaint in its entirety.

[16] *See Parker v. Brown*, 317 U.S. 341, 362 (1942).

non-dentists and in restrain competition. For this reason, the Board is considered a private person for purposes of the state action defense.

Private conduct is exempt from the antitrust laws only if both prongs of the exacting two-part *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*[17] test are satisfied. First, a state wishing to shield anticompetitive private conduct from the antitrust laws must clearly articulate a policy to displace those laws with a regulatory regime (referred to as prong 1, or the clear articulation requirement). Second, to assure that the anticompetitive restraint truly embodies state policy, the state must actively supervise the conduct in question (referred to as prong 2, or the active supervision requirement). Together, these requirements ensure that the state action doctrine shelters only the particular anticompetitive acts of private parties that, in the judgment of the State, promote state regulatory policies, as opposed to the individual interests of the private parties. *FTC v. Ticor Title Insurance Co.*, 504 U.S. 621, 633-34 (1992). Neither *Midcal* requirement is satisfied in this case.

The State of North Carolina has not clearly articulated a policy of permitting the Board to exclude non-dentists. The Board is created by, and derives its authority from, the Dental Practice Act, N.C. Gen. Stat. § 90-20 *et seq*. ("Dental Act"). This statute does not authorize the Board to issue cease and desist orders to non-dentists. In fact, the Dental Act does not authorize the Board, acting on its own authority, to take any actions that impede the competitive activity of non-dentists. Only the courts of North Carolina are empowered to exclude persons engaged in the unauthorized practice of dentistry. The legislature could not have intended or foreseen that the Board would ignore the clear language of the statute and usurp the authority expressly granted to the judiciary. Thus, prong 1 of the state action doctrine is not satisfied.

In addition, the State of North Carolina does not actively supervise the exclusionary conduct of the Board. Active supervision requires that state officials both have and exercise

[17] 445 U.S. 97 (1980).

"power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy." *Patrick v. Burget*, 486 U.S. 94, 101 (1988). But here, the Board acting alone conceived of an extra-judicial strategy to exclude non-dentists; acting alone it identified the alleged violators; and acting alone it implemented the strategy. The Board issued cease and desist orders, and engaged in other exclusionary conduct, entirely independently: without the approval of, without review by, and without consultation with any other governmental entity. Thus, prong 2 of the state action doctrine is not satisfied.

For these reasons, the Board's claim to the state action exemption is without merit.

IV. REMEDY.

The remedies identified in the Notice of Contemplated Relief issued with the Complaint in this matter are reasonably necessary to ensure the Board's future compliance with the antitrust laws of the United States. The proposed relief includes notice to an independent state reviewing authority, prior review and approval from such authority, ceasing the issuance of unauthorized, apparently self-enforcing enforcement directives, and other similar provisions. Further, those provisions accord due deference to the sovereign interests of the State of North Carolina, and are no broader than necessary to assure future compliance.

V. CONCLUSION.

For all of the foregoing reasons, Complaint Counsel request the entry of a cease and desist order that substantially accords with the provisions contained within the Notice of Contemplated Relief.

Respectfully submitted,

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January 19, 2011

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CERTIFICATE OF SERVICE

I hereby certify that on January 19, 2011, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-159
Washington, DC 20580

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

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., NW
Washington, DC 20580

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

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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.

January 19, 2011

s/ Richard B. Dagen
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