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UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

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

RESPONDENT'S POST-TRIAL BRIEF

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

The Federal Trade Commission ("Commission" or "FTC") commenced this action based on the assertion that Respondent, the North Carolina State Board of Dental Examiners ("State Board" or "Respondent"), has violated Section 5 of the Federal Trade Commission Act (15 U.S.C. § 45). The Commission alleges that members of the State Board "colluded" to engage in violations of the Federal Trade Commission Act ("FTC Act") by their efforts to prevent and prohibit non-dentist-supervised teeth whitening services.

After presenting nine witnesses during a thirteen day trial, Complaint Counsel has failed to prove essential elements of its case. First, Complaint Counsel cannot show that the State Board violated the Sherman Act's prohibition on agreements which unreasonably restrain competition. *See* 15 U.S.C. § 1. An analysis of the State Board's challenged conduct under the rule of reason test demonstrates that there has not been an unreasonable anticompetitive effect. Rather, the evidence shows that any ancillary anticompetitive effect arising from the State Board's challenged conduct was reasonable because it served to protect legal competition within the marketplace, as well as the health and safety of North Carolina citizens. Further, Complaint Counsel has failed to show that the State Board's actions had any effect on legal interstate commerce, as is required to prove a Sherman Act violation. *See* 15 U.S.C. § 1.

Second, Complaint Counsel's Complaint against the State Board did not properly define the relevant market. Complaint Counsel defined the relevant market as the "provision of teeth whitening services in North Carolina," excluding over-the-counter teeth whitening products not administered by a third party. Compl. ¶ 7. This definition,

which incorrectly excludes a large segment of the true market and includes illegal services, is not viable. Further muddying the waters, Complaint Counsel attempted to back down from this definition at trial. RPF 550. As a result of the failure to properly define a relevant market, Complaint Counsel cannot meet its burden of proof and its case fails.

Furthermore, Complaint Counsel has failed to establish **any** evidence that State Board members colluded, either among themselves or with other North Carolina dentists, to engage in the challenged conduct. Specifically, there is no evidence of any "contract, combination or conspiracy" by which the State Board agreed to send letters to non-licensed teeth whitening providers or other third parties such as shopping mall management companies for anticompetitive purposes. *See* 15 U.S.C. § 1. Even if the Commission were to find that such evidence exists—which it does not—such agreements were not made to suppress competition and were acted upon pursuant to a legitimate law enforcement objective and only based on a *prima facie* violation of the N.C. Dental Practice Act (N.C. Gen. Stat. § 90-22 *et seq.*). In such instances, the State Board took the challenged conduct to fulfill its disciplinary and enforcement duties and to conduct investigations before it filed any civil or criminal action, pursuant to the N.C. Dental Practice Act.

Lastly, Respondent Counsel will demonstrate that the relief sought by Complaint Counsel against the State Board violates the State Board's constitutional rights, as set forth under the Commerce Clause and the Tenth Amendment. U.S. CONST. art. I § 8, cl. 3 and amend. X.

The State Board's Proposed Findings of Fact, Conclusions of Law and Order, which were filed contemporaneously with this Post-Trial Brief, are hereby incorporated by reference.

II. ARGUMENT

A. Under the appropriate rule of reason analysis, the State Board has not committed an antitrust violation.

Complaint Counsel has not demonstrated that the State Board's restrictions on teeth whitening services violated Section 1 of the Sherman Act. 15 U.S.C. § 1. The Sherman Act prohibits only unreasonable restraints on trade affecting interstate commerce. Under the "rule of reason" analysis, the State Board's enforcement of the N.C. Dental Practice Act is not unreasonable, and thus is not an impermissible restraint on trade.[1] Additionally, the State Board's actions did not affect legal interstate commerce. 15 U.S.C. § 1. Nor did Complaint Counsel consistently base their case on the relevant market for teeth whitening services and products in North Carolina. RPF550. Therefore, the State Board's regulation of teeth whitening services within North Carolina and pursuant to North Carolina law does not fall under the jurisdiction of the Sherman Act or the FTC Act.

i. Complaint Counsel did not meet its burden of showing that the State Board's challenged conduct has an unreasonable anticompetitive effect.

To prove that the State Board's actions constituted an unreasonable restraint on trade, Complaint Counsel must show either that the State Board's conduct was a *per se*

[1] The N.C. Dental Practice Act limits the offering and provision of stain removal services to licensed dentists. As discussed in this brief, the law also permits the State Board to take action to enforce this limitation. Respondent's Proposed Findings of Fact ("RPF"), 363-374.

violation of the Sherman Act, or a violation of the "rule of reason" created by the courts to judge alleged restraints on trade.

a. The State Board did not commit a *per se* violation of the Sherman Act; its actions should be judged according to the traditional rule of reason test.

Complaint Counsel has admitted that no *per se* violation of the Sherman Antitrust Act exists in this case. Complaint Counsel Opening Statement, Tr. 25:4-7 ("We will be looking at a rule of reason analysis, which requires an inquiry that is beyond per se analysis. We're not saying that the conduct here is per se unlawful."). Therefore, the Board's actions must be judged using the rule of reason analysis. The Supreme Court's rule of reason test requires a determination as to "whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition, or whether it is such as may suppress or even destroy competition." Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918) (finding in favor of the Chicago Board of Trade's restrictions on purchases after business hours); National Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 691 (1978) (holding that the rule of reason analysis centers on whether the restraint "is one that promotes competition or one that suppresses competition"). The State Board meets this test; its actions at issue in this case merely regulated and promoted lawful competition.

Courts apply two similar types of rule of reason analyses to determine whether conduct has an unreasonable anticompetitive effect: the traditional rule of reason test and the "quick look" test. In this case, the traditional rule of reason analysis should be applied. Traditional rule of reason analysis places the burden of proof on the plaintiff to prove that its questioned conduct was justified. Federal Trade Commission, *The*

Truncated or "Quick Look" Rule of Reason at 1, available at http://www.ftc.gov/opp/jointvent/3Persepap.shtm (last visited April 22, 2011). Under "quick look" analysis, the burden is placed on the respondent. This court should apply the traditional rule of reason analysis because of the facts presented in this case. However, regardless of which analysis is applied, the N.C. Dental Practice Act's requirement that stain removal services be performed by a licensed dentist, and the State Board's enforcement of this requirement, meet the rule of reason test.

"Quick look" rule of reason analysis is utilized by courts in only a select class of cases: when producers have agreed to limit output; price-fixing cases; and horizontal agreements by producers to withhold a service from consumers. National Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. 85, 101 (1984); National Soc'y of Prof'l Eng'rs, 435 U.S. at 692 (1978); FTC v. Indiana Fed. of Dentists, 476 U.S. 447, 459 (1986); Cal. Dental Ass'n v. FTC, 526 U.S. 756, 770 (1999) (The "quick look" analysis is only appropriate when "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets"). The instant case does not fall into one of these categories of cases. Therefore, the "quick look" rule of reason analysis is not appropriate; the burden should be on Complaint Counsel to prove that the State Board harmed competition. However, regardless of which party bears this burden, it is clear that the State Board's enforcement of a state law did not unreasonably threaten or harm competition.

Thus, the State Board's actions are clearly distinguishable from the landmark "quick look" case on horizontal producer agreements to withhold services: Indiana Federation of Dentists. In that case, dentist members of the private, non-governmental

Federation agreed not to forward patient x-rays and claim forms to insurance companies. 476 U.S. at 459. Without patient x-rays, insurance companies would not be able to weigh in on treatment decisions. Id. at 453. Therefore, the dentists' aim was to ensure that decisions on procedures would be made entirely by the dentists, without insurance companies advising for less expensive alternative treatments. Id. The Supreme Court determined that the Federation's agreement "impairs the ability of the market to advance social welfare by ensuring the provision of desired goods and services to consumers at a price approximating the marginal cost of providing them." 476 U.S. at 459. Therefore, it did not pass the rule of reason test.

In contrast, the Board's challenged action—in connection with enforcing the N.C. Dental Practice Act's prohibition on non-dentist-supervised teeth whitening services—advances social welfare by ensuring the provision of desired services at a price approximating their marginal cost. Patients may in some cases pay a higher up-front cost for dentist-supervised services than for an unsupervised, illegal alternative. However, the purpose of federal antitrust regulation is not simply to ensure that consumers benefit from the lowest up-front price for a service. Other costs and benefits are just as important in establishing that the State Board's actions resulted in a competitive, open, and safe marketplace. See United States v. Brown Univ., 5 F.3d 658, 672 (3d Cir. 1993) ("While it is well settled that good motives themselves 'will not validate an otherwise anticompetitive practice,' courts often look at a party's intent to help it judge the likely effects of challenged conduct.") (quoting NCAA v. Board of Regents of the Univ. of Okla., 468 U.S. 85, 101 n.23. (1984)). As discussed elsewhere in this brief, legal teeth

whitening services are sometimes more expensive than their illegal counterparts because of the safeguards that dentists provide. RPF 425-458.

b. The State Board's actions are lawful under the rule of reason.

Traditional rule of reason analysis examines the totality of facts surrounding the enactment of a restriction and its possible and actual affects. Under the rule of reason test, Complaint Counsel must prove "an anticompetitive effect of the defendant's conduct on the relevant market." Levine v. Cent. Fla. Med. Affiliates, Inc., 72 F.3d 1538, 1551 (11th Cir. 1996). The Supreme Court has set forth several useful factors to consider in determining whether the State Board meets the traditional rule of reason test. These include:

- The relevant market's condition before and after the restraint was applied;
- The nature of the restraint and its "actual or probable" effect;
- The facts surrounding the enactment of the restraint (e.g., why was it believed necessary, why was it adopted, and what was its purpose).

Chicago Bd. of Trade, 246 U.S. at 239. An analysis of these factors is useful "because knowledge of intent may help the court to interpret facts and to predict consequences." Id. The following discussion of the above-listed factors provides further support for the reasonableness of the State Board's enforcement of N.C. Dental Practice Act limits on non-dentist-supervised teeth whitening services.

An examination of the state of the teeth whitening industry before and after the State Board's enforcement actions demonstrates the limited and reasonable scope of the restraint. As discussed supra in Section A (ii) of this brief, teeth whitening industry representatives did not testify that the State Board's actions had any effect on their legal

sales within North Carolina. The effect of the State Board's actions on illegal teeth whitening services was similarly reasonable.

The evidence has failed to show that the State Board was able to force any kiosk, spa, or other provider of non-dentist supervised services to stop operations based solely on its cease and desist letters. In order to close such a business, a court order or court judgment would be required. RPF 272-73. The State Board does not have the statutory authority to independently enforce an order requiring any person or entity to cease or desist their violations of the N.C. Dental Practice Act. RPF 273. Complaint Counsel did not present any evidence of an instance when a Board-issued cease and desist letter resulted in the restraint of any lawful activity. RPF 277.

Upon receipt of the State Board's cease and desist letters, recipients had several options of how to proceed; therefore, the letters did not have the immediate, irreversible, and unreasonable effect of shutting down businesses. RPF 293-300. For instance, the recipients could have offered evidence to the State Board showing that no violation of the N.C. Dental Practice Act had occurred—and, in some cases, they did so. RPF 298. Or, the recipients could have hired a licensed dentist to oversee teeth whitening services, or ceased offering such services until they could convince the North Carolina legislature that it was not in the public's interest to restrict the removal of stains from teeth to licensees.

Alternatively, the recipients could have requested—and in some cases did request—an administrative hearing or other relief from North Carolina courts. RPF 295-96; N.C. Gen. Stat. § 150B-4. For example, the State Board filed a lawsuit seeking a declaratory judgment against Carmel Day Spa & Salon in 2008, following that business's refusal to come into compliance with North Carolina law. RPF 126-133. The court's

consent order provided that the Spa & Salon "have engaged in the unlicensed practice of dentistry by removing stains, accretions and deposits from human teeth and by circulating brochures and otherwise representing that ... they are capable of removing stains, accretions and deposits from human teeth at a time when no employee of Carmel Day Spa was licensed to practice dentistry in North Carolina." RPF 133.

In practice, not a single recipient brought a case before the North Carolina courts or even requested an administrative hearing on the subject. RPF 295-96. Furthermore, no member of the teeth whitening industry took legal action to challenge the Board's cease and desist letters, despite the fact that some industry representatives were aware that they could do so. RPF 301-306. Therefore, the State Board's actions did not have an unreasonable or disproportionate effect on competition within the teeth whitening industry.

The nature of the State Board's restraint also reveals a reasonable and pro-competitive approach. The State Board's challenged conduct is the enforcement of the N.C. Dental Practice Act. N.C. Gen. Stat. § 90-22 et seq. It was not administratively, legally, or practically necessary for the State Board to promulgate a rule regarding the unauthorized practice of teeth whitening because the statute's requirements on the subject are quite clear. Under North Carolina law, stain removal services constitute the practice of dentistry and are limited to licensed persons. N.C. Gen. Stat. § 90-29 (b)(2). The State Board is authorized by law to order any person or entity suspected of violating the N.C. Dental Practice Act to cease and desist from the violation. RPF 11-14. Further, the State Board is empowered to enforce the N.C. Dental Practice Act by notifying prospective defendants in advance of judicial proceedings and communicating its

determinations that a person or entity may be violating the provisions of the N.C. Dental Practice Act. RPF 14, 276.

The State Board's enforcement of N.C. Dental Practice Act by engaging in the challenged conduct is not unreasonable; such conduct is utilized by other North Carolina occupational licensing boards, as well as other states' occupational licensing boards. RPF 278-80, 308. For example, the N.C. Board of Massage and Bodywork has a similar enforcement statute, N.C. Gen. Stat. § 90-634, and has made it a practice to send letters to mall and airport operators informing them of the legal requirement that persons providing massage services on site be licensed. Id.

Further, the facts surrounding the State Board's decision to enforce state restrictions on stain removal, the rationale behind the enforcement, and the purpose of the state's restrictions, are reasonable. Unlike the Federation in Indiana Federation of Dentists, the State Board does not have "a strong economic self-interest" in enforcing the N.C. Dental Practice Act. See Brown Univ., 5 F.3d at 677; RPF 271, 602-03. State Board members who are also practicing dentists are knowledgeable about the procedures and potential dangers associated with teeth whitening. RPF 68-69, 684. They consider teeth whitening to be the removal of stains. RPF 68-69. Their actions regarding unlicensed teeth whitening services were the result of their understanding of statutory language and their responsibility to uphold the law. RPF 67-70.

The State Board's actions were not based on members' financial interests or financial motives aimed at helping North Carolina dentists. Cases involving unlicensed teeth whitening services account for a very small percentage of the Board's case load (estimated at one to two percent of the Board's investigations). RPF 98. The

investigations account for an equally small amount of most current and former State Board members' revenue: again, only one to two percent. RPF 602. Former and current Board members report that they and other licensed dentists regularly recommend over-the-counter teeth whitening products to their patients instead of in-office treatments. RPF 501, 615. Dentists also reported charging far less than the $300 figure cited by Complaint Counsel for take-home teeth whitening kits. RPF 608. These facts further strengthen the State Board's argument that its regulation does not deprive consumers of teeth whitening services at a price approximating their marginal cost.

Given its lack of financial incentive to regulate teeth whitening, the State Board's situation is analogous to that of the private university defendants in Brown University. See 5 F.3d at 672 ("While professional organizations aim to enhance the profits of their members, they and the professionals they represent may have greater incentives to pursue ethical, charitable, or other non-economic objectives that conflict with the goal of pure profit maximization."); see also Goldfarb v. Virginia State Bar, 421 U.S. 773, 788-89 (1975) (The "public service aspect, and other features of ... professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently.").[2] In Brown University, the universities' legal aid distribution system was upheld because the universities' perceived anticompetitive conduct served a sufficiently pro-competitive objective: opening up the prospective student body to qualified but less affluent applicants. 5 F.3d at 683. In the

[2] However, it should again be stated that the State Board is not a "professional organization," but a state agency. Thus, its members are committed to a much higher standard for neutrality than their private counterparts. State Board members swear an oath to uphold the laws of North Carolina, and protect public health. RPF 75. They complete mandatory ethics trainings; are subject to conflict of interest disclosure and recusal requirements and financial disclosure requirements. RP 76-94. They can be subject to criminal sanctions for violations of their ethical and neutrality obligations. RPF 87. Conflict of interest recusals are taken seriously; State Board members have recused themselves as necessary on a number of occasions. RPF 91-92.

instant case, the pro-competitive objective is enforcement of a state law protecting the valuable benefit of a regulated marketplace, where the cost of medical treatment reflects the skills of its providers and patient safety. See 476 U.S. at 459 (requiring "some countervailing procompetitive virtue").

The State Board's enforcement of the North Carolina Dental Practice Act was necessitated by serious and well-known concerns over the dangers of unsupervised teeth whitening. See Brown Univ., 5 F.3d at 672 (quoting Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332, 349 (1982)) ("When bona fide, non-profit professional associations adopt a restraint which they claim is motivated by 'public service or ethical norms,' economic harm to consumers may be viewed as less predictable and certain. In such circumstances, it is proper to entertain and weigh pro-competitive justifications proffered in defense of an alleged restraint before declaring it to be unreasonable.") Evidence offered by the State Board shows that teeth whitening services are safer when provided under dental supervision than not. RPF 376-88. Dentists have a professional obligation to protect their patients' safety; they fulfill this obligation by taking far greater safety precautions than non-dentist teeth whitening service providers. Id. Dentists perform a thorough medical examination of potential teeth-whitening candidates and ensure that sanitation, sterilization, and safety procedures are followed. RPF 385-388, 428. Dentists also cannot evade personal liability for their own malpractice, thereby protecting patients who would otherwise be required to sign liability-absolving waivers as customers of non-dentist providers. See e.g., RPF 425, 631-32; *see* N.C. Gen. Stat. § 55B-9 (2011).

In contrast, numerous health hazards are present at non-dentist teeth whitening kiosks, which often do not have running water. RPF 376-84, 434-44, 440-42, 680. Kiosk

employees are therefore unable to wash their hands, and can clean equipment only by wiping it down with Lysol wipes. RPF 438-44. The State Board received reports of kiosk employees working without gloves or masks. RPF 440. Furthermore, although spas and salons typically have running water and must operate pursuant to the sanitation regulations of the North Carolina Board of Cosmetic Art Examiners, such facilities do not have to meet the strict sterilization rules of the American Dental Association, as adopted by reference in the State Board's rules. RPF 436-37. The State Board's enforcement of the N.C. Dental Practice Act to protect consumers from these conditions is not an unreasonable restraint on trade; it is necessary to promote competition between qualified, legal teeth whitening service providers.

Beyond sanitation and sterilization concerns, teeth whitening industry representatives themselves admit the immediate medical dangers of teeth whitening. When conducted without proper medical oversight, it can "mask pathology." RPF 395, 421-22. Other dangers identified by dentists include tooth damage, necrosis, tearing of mouth and lip flesh, aspirating, and allergic reactions. RPF 449-57. Dangers such as these were not just perceived by State Board members; they have been reported by customers of illegal teeth whitening services and have been covered in numerous state and national news stories. RPF 241, 408. These dangers contrast to the situation of the Federation in Indiana Federation of Dentists, where the Commission found "no evidence that use of x-rays by insurance companies in evaluating claims would result in inadequate dental care." 476 U.S. at 452.

Given the inherent risks of non-dentist supervised teeth whitening, the State Board's regulation of unlicensed teeth whitening providers is not just reasonable, it is

critical to protecting the dental health of North Carolinians. It is not anticompetitive to require professionals to be qualified and trained. It is not anticompetitive to protect the public from services that, while perhaps being cheaper on the day that they are offered, could result in serious and expensive medical complications. Kiosks selling food or eyeglasses in North Carolina are required to undergo inspections and obtain health permits. RPF 322. If such regulations were anticompetitive, then all occupational licensing laws, all occupational licensing boards, and even public health regulations and public safety laws would be illegal. Social welfare is advanced by ensuring that teeth whitening services supervised by licensed dentists are available to consumers. Competition is protected and promoted when licensing laws are enforced.

Under the traditional rule of reason analysis, the State Board's enforcement of the N.C. Dental Practice Act's restriction on teeth whitening services does not constitute an unreasonable restriction on trade. It merely regulates the teeth whitening industry to promote public safety. As the Commission itself has recognized, competition may be restricted "when necessary to protect the public from significant harm." Federal Trade Commission, *Commentary Re: Louisiana House Bill 687* (May 1, 2009) at 4 (internal citations omitted). While preventing illegal and dangerous conduct, the State Board's actions protect competition between the teeth whitening alternatives that are legal in North Carolina: teeth whitening services supervised by licensed dentists (both in-office and take-home kits) and over-the-counter teeth whitening kits. In conclusion, the State Board's actions at issue in this case do not violate the Sherman Act's restrictions on unreasonable restraints of trade.

ii. The nexus of the State Board's challenged conduct was not in and did not affect interstate commerce.

In order to be subject to Section 1 of the Sherman Act, the State Board's conduct must affect interstate commerce. However, the State Board's enforcement of the N.C. Dental Practice Act did not have any such effect on **legal** interstate commerce: sales of over-the-counter teeth whitening products or dentist-provided teeth whitening services. Testimony from out-of-state teeth whitening industry participants revealed that legal sales of teeth whitening products continue within North Carolina. RPF 625-27, 644, 665 (in which teeth whitening industry representatives specifically do not claim that their legal teeth whitening product sales were prevented by the State Board's actions).

The State Board's actions against illegal, non-dentist-supervised teeth whitening service providers were required under state law. However, only interstate commerce that violated state law was targeted by the State Board's regulation. As teeth whitening industry representatives have testified, their legal sales in North Carolina have been unaffected. In the absence of proof of an interstate effect on legal teeth whitening services, Complaint Counsel cannot prove that the State Board's actions affected interstate commerce.

iii. Complaint Counsel did not establish liability because it has not properly defined the relevant market.

To establish a violation of the Sherman Act, Complaint Counsel must establish the "relevant market" within which it may evaluate the State Board's actions. However, Complaint Counsel has not properly or consistently constructed its relevant market definition.

Its original definition of the market was the "provision of teeth whitening services in North Carolina," thereby excluding over-the-counter and take-home teeth whitening products.[3] Compl. ¶ 7. This selective definition achieves Complaint Counsel's goal of creating a market definition favorable to its action against the State Board. Under a narrower definition of the teeth whitening market, Complaint Counsel could argue that a greater fraction of North Carolina consumers' teeth whitening services were affected by the State Board's actions. However, this is not the case, as the teeth whitening market should include over-the-counter products—which are not regulated by the State Board—and should exclude illegal non-dentist-provided services. Operating under a fundamentally flawed definition of the relevant market, Complaint Counsel cannot meet its burden of proof in this case.

By law, North Carolina's teeth whitening market definition must be "composed of products [and services] that have reasonable interchangeability.'" Jacobs v. Tempur-Pedic Int'l, Inc., 626 F.3d 1327, 1337 (11th Cir. 2010) (quoting Levine, 72 F.3d at 1551). In determining whether teeth whitening methods are interchangeable, the court must look "to the uses to which the product is put by consumers in general." Maris Distrib. Co. v. Anheuser-Busch, Inc., 302 F.3d 1207, 1221 (11th Cir. 2002) (quoting Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430, 438 (3d Cir. 1997)); Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962) (finding that courts consider factors such as "unique production facilities, distinct customers, distinct prices" when determining a relevant product market).

[3] The State Board does not regard the mere sale of over-the-counter teeth whitening products that consumers apply themselves as the practice of dentistry. Rather, it is the offering of a service that constitutes the practice of dentistry. RPF 74. Therefore, the State Board does not apply the N.C. Dental Practice Act's unauthorized practice restrictions to over-the-counter teeth whitening products.

Legal over-the-counter teeth whitening kit sales are more interchangeable with legal dentist-supervised teeth whitening services (both in-office and take-home kits) than their illegal counterparts. In comparing the various teeth whitening methods, all three are put to the same use, though only the legal methods are safe to use. Therefore, the true relevant market for teeth whitening in North Carolina is the legal market: dentist-supervised services (both in-office and take-home products), and over-the-counter products.

Complaint Counsel attempts to claim that over-the-counter products are "inadequate substitutes" for legal and illegal teeth whitening services based solely on the fact that they generally provide less concentrated formulations of teeth whitening chemicals and thus produce more gradual results. Compl. ¶ 12. However, Complaint Counsel offers no evidence that consumers are unwilling to substitute over-the-counter kits for legal or illegal teeth whitening services. See FTC v. Staples, Inc., 970 F. Supp. 1066, 1074 (D.D.C. 1997) ("The general question is 'whether two products can be used for the same purpose, and if so, whether and to what extent purchasers are willing to substitute one for the other.'"). Given that the over-the-counter teeth whitening industry was worth over $40 billion in 2006, it seems unlikely that consumers are finding over-the-counter kits to be "inadequate substitutes." RPF 599. Further damaging the Complaint Counsel's argument, over-the-counter kits are generally less expensive than the teeth whitening services illegally offered by non-dentists. RPF 617, 660.

Complaint Counsel also has not established that illegal teeth whitening services are universally performed with stronger chemicals than their legal over-the-counter alternatives. RPF 618. Without only limited industry oversight of non-dentist teeth

whitening services, there is no official assurance that any specific strength of bleaching ingredients is used. Id. Given the lack of industry standards and evidence, Complaint Counsel has not established its relevant market to exclude over-the-counter teeth whitening products based on differences in the effectiveness of the two methods.

To prove that legal (dentist-supervised) and illegal teeth whitening services are roughly analogous, Complaint Counsel relies heavily on these illegal services' advertisements, which predictably promise dentist-equivalent services at a lower cost. Complaint Counsel's Response and Objections to Respondent's First Set of Interrogatories at 14-15. However, in defining a market, courts cannot discount more expensive services when "nonprice competitive factors, such as quality" affect consumer choices. FTC v. Tenet Health Care Corp., 186 F.3d 1045, 1054 (8th Cir. 1999) (holding that the fact that one set of hospitals is more expensive than the other does not mean that the two are not competitors). Further, the unproven claims of advertisers are insufficient to show that consumers view the two types of services as interchangeable, or that they are not interchangeable with the third option, over-the-counter kits.

Complaint Counsel did not establish that the relevant market for teeth whitening services is dentist-supervised and non-dentist-supervised services. This is true even while the non-dentist-supervised teeth whitening industry profits from analogizing itself to over-the-counter services. Illegal teeth whitening service providers' employees are instructed not to place teeth whitening trays in customers' mouths themselves, but rather to allow the customers to do so, so that they will not be accused by state authorities of engaging in the unauthorized practice of dentistry. RPF 685; Complaint Counsel Rule 3.24 Statement of Material Facts. Complaint Counsel's attempts to make such illegal

services appear more akin to over-the-counter teeth whitening products do not result in the two methods being interchangeable.

The exchangeability and similarity of over-the-counter teeth whitening kits and legal teeth whitening services can be understood by any reasonable consumer. Complaint Counsel cannot have it both ways: non-dentist supervised teeth whitening services cannot simultaneously be as safe as over-the-counter teeth whitening products, and thus not constitute the practice of dentistry, while over-the-counter teeth whitening products are themselves excluded from the market definition.

Further, Complaint Counsel not only has concocted a market definition that serves its own purposes while failing to meet well-established legal standards; it also has wavered in its application of this definition. RPF 550. Complaint Counsel brought its case against the State Board based on a definition of the relevant market that was legally flawed and self-serving. Unable to defend that definition at trial, Complaint Counsel attempted to backtrack. The end result is that Complaint Counsel has failed to meet its burden to prove the relevant market, and thus cannot prove that the State Board violated federal antitrust law. Complaint Counsel's definition of its relevant market formed part of the basis for the Commission's refusal to dismiss the Complaint. Complaint Counsel abandoned its narrow market definition at trial only after their own expert based his theory of injury to competition upon an entirely different market definition.

B. The Complaint Counsel failed to prove collusion among the State Board members in violation of the antitrust laws.

Here again, Complaint Counsel's theory of its case dramatically changed by the time of trial. Originally, the Complaint alleged that members of the Board and other dentists of North Carolina "colluded" to violate antitrust laws. By definition, the term

"collusion" asserts a conscious conspiracy to commit fraud. But that which served Complaint Counsel's purposes for its initial press release did not survive at trial. Indeed, in an earlier Reply Brief to Respondent's Motion to Dismiss, Complaint Counsel conceded that they were not claiming that Board members were "corrupt." At trial, Complaint Counsel abandoned its attempt to offer even circumstantial evidence of conspiracy either among Board members or with the state society of dentists, and stood solely upon a theory of *ipso facto* conspiracy.

In order to establish an antitrust violation of Section 5 of the FTC Act, Complaint Counsel must prove that the State Board engaged in some form of "concerted action." Indiana Fed. of Dentists, 476 U.S. at 454-55 (noting that the same analysis applies to violations of Section 5 of the FTC Act and to violations of Section 1 of the Sherman Act); Amer. Needle, Inc. v. Nat'l Football League, 130 S. Ct. 2201, 2209 (2010) (holding that "an arrangement must embody concerted action in order to be a 'contract, combination . . . or conspiracy' under [Section 1 of the Sherman Act]"). In other words, Complaint Counsel is required to produce evidence that the State Board "had a **conscious commitment** to a common scheme designed to achieve an unlawful objective." Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764 (1984) (emphasis added). Complaint Counsel has failed to meet its burden of proof on this issue.

i. There was no credible evidence of a conspiracy between State Board members, or between State Board members and North Carolina dentists, to engage in the challenged conduct.

The evidence shows that, other than very few informal, random and insignificant instances, there were no conversations or other communications about the investigation of teeth whitening complaints between dentist State Board members and non-dentist State

Board members. RPF 5. The evidence also shows that, other than very few informal, random, and insignificant instances, there were no conversations or other communications about the investigation of teeth whitening complaints between State Board staff & non-dentist State Board members. RPF 6.

The evidence showed that there have been no conversations between dentist State Board members and other dentists: (1) about competition between dentists and non-dentists who were performing teeth whitening, (2) about the impact of over-the-counter teeth whitening products on a dentist's practice, (3) about non-dentist teeth whitening hurting a dentist's business, or (4) where another dentist tried to pressure any Board member about non-dentist teeth whitening. RPF 4. As such, there is no evidence that the State Board members ever expressly agreed among themselves, or with North Carolina dentists, to engage in the challenged conduct.

Rather, investigations into the unlawful provision of teeth whitening services were conducted in the same manner that all other State Board investigations regarding the unauthorized practice of dentistry are conducted. RPF 249. When a complaint is received by the State Board, it is assigned a number by the director of investigations and sent to the Secretary-Treasurer, who evaluates it for jurisdictional issues and assigns it to a case officer. The Secretary-Treasurer will not assign a case to a State Board member if the dentist complained of is in the same geographic area of the state in which the State Board member practices. RPF 245. The State Board as a whole does not vote to open an investigation. RPF 260.

Once a case is so assigned, the case becomes that case officer's responsibility. The case officer has discretion in running the case, including sending out letters to collect

more information, ordering further investigation, having the patient evaluated, and sending out a cease and desist letter. RPF 247. Other members of the State Board do not have knowledge of a case assigned to a case officer; only that case officer and the investigatory panel know the details of the case. RPF 251. The investigatory panel includes the case officer, the State Board's staff assistant assigned to the case, a State Board's investigator, and sometimes the State Board attorney. RPF 250. The other members of the State Board would not know that a cease and desist letter had been sent or an injunction issued unless the recipient challenged it in court; however, the State Board may be informed that such a letter had been sent out at the next Board meeting RPF 261.

A case officer does not have knowledge of other cases handled by a separate case officer, and the details of an investigation remain confidential until the investigation is concluded. Investigations are not discussed with the public, including other dentists. RPF 253-254. Board members do not discuss anything pertaining to cease and desist letters with each other; with members of the general public; or with non-State Board member dentists (other than dentists who are complainants). RPF 255-57.

In light of the record, Complaint Counsel has failed to present evidence tending "to exclude the possibility that the alleged conspirators acted independently." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588 (1986) (citing Monsanto Co., 465 U.S. at 764). In other words, Complaint Counsel cannot show "that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed it." Precision Piping & Instruments, Inc. v. E.I. Du Pont de Nemours & Co., 951 F.2d 613, 617 (4th Cir. 1991).

As an initial matter, the fact that the State Board approached investigations into allegations of unlawful teeth whitening services in the same manner as it approached its other investigations into the unauthorized practice of dentistry tends to support an inference of independent conduct, rather than conspiracy. See Merck-Medco Managed Care, LLC v. Rite Aid Corp., No. 98-2847, 1999 U.S. App. LEXIS 21487, at *25-27, 30 (4th Cir. Sept. 7, 1999) (*per curiam*) (finding that challenged activity by defendant was consistent with normal business practices and therefore did not support inference of conspiracy).

Second, there is no evidence that the members of the State Board understood investigations could be conducted—or, in fact, authorized investigations to be conducted—for any reason **other** than to protect the health, safety, and welfare of North Carolinians. In every instance of an investigation into unlawful teeth whitening services, cease and desist letters were sent by the State Board only when there was *prima facie* evidence from a credible source of a violation of the North Carolina Dental Practice Act. RPF 288. The cease and desist letters were intended to warn the recipient that what they were doing was potentially illegal and requested that they stop. RPF 290. These cease and desist letters were a reasonable, common sense method by which persons were given an opportunity to voluntarily comply without resort to litigation or criminal prosecution. RPF 292. Given that the sending of such cease and desist letters was appropriate to protect North Carolinians, the State Board's challenged actions did not tend to show anticompetitive animus. Cf. Precision Piping & Instruments, Inc., 951 F.2d 617 n.4 (noting that "the expulsion from a trade organization did not necessarily imply anticompetitive animus and thereby raise a probability of anticompetitive effect, because

certain rules are necessary to the effective functioning of such an organization and may event promote competition").

ii. Complaint Counsel did not establish collusion among State Board members based solely on the State Board's composition.

As a general rule, "the unilateral actions of a single enterprise" do not constitute concerted action. Oksanen v. Page Mem. Hosp., 945 F.2d 696, 703 (4th Cir. 1991) (citing Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752 (1984)). An exception to this intraenterprise immunity rule may be allowed when an individual within the single enterprise has "an independent personal stake in achieving the [entity's] illegal objective." Oksanen, 945 F.2d at 705.

The Fourth Circuit has recognized that exceptions to the intraenterprise immunity rule should be made carefully, as it is "an exception that threatens to swallow the rule." Id. (citing P. Areeda, Antitrust Law, ¶ 1471 (1986)). In Oksanen, the plaintiff argued that the defendant hospital and its medical staff had conspired in violation of Section 1 of the Sherman Act when it, among other things, revoked his staff privileges. 945 F.2d at 701. The plaintiff argued that the individual doctors on the defendant's medical staff had "personal stakes" in revoking his staff privileges, because the medical practices of those doctors on the medical staff would benefit if he were eliminated as a competitor. Id. at 705. The Fourth Circuit affirmed the district court's holding that the defendant did not engage in a conspiracy. The Fourth Circuit refused to apply an exception to the intraenterprise immunity rule because: (1) there was insufficient evidence to establish that the decision to terminate the plaintiff's staff privileges would **directly benefit** the medical staff; and (2) the evidence showed that the hospital and the medical staff shared a common interest to improve the quality of patient care. Id.

Other federal circuits have declined to find the existence of a conspiracy solely on the basis of the single entity's composition. See, e.g. Viazis v. Amer. Ass'n of Orthodontists, 314 F.3d 758, 764-65 (5th Cir. 2002) (affirming that trade association did not engage in conspiracy by suspending plaintiff for violation of ethics rules when plaintiff could not show that the proceedings were a sham or that the standards applied were pretextual). "Despite the fact that a trade association by its nature involves collective action by competitors, **it is not by its nature a 'walking conspiracy,'** its every denial of some benefit amounting to an unreasonable restraint of trade." Id. at 764 (internal citation omitted and emphasis added).

No exception to the intraenterprise immunity rule should be applied to the State Board in the instant case. First, as in the Oksanen case, Complaint Counsel has failed to establish that the State Board members received any direct benefit when the case officer sent "cease and desist" letters to non-licensed teeth whitening providers. As stated previously, teeth whitening services comprised only one or two percent of the total practice revenues of most of the current or former dentist State Board members—and one State Board dentist member did not perform any teeth whitening services at all. RPF 271, 602. In fact, some current or former dentist Board members testified that their revenues from teeth whitening had **decreased** during the past five years, and that they have recommended over-the-counter teeth whitening products to their patients. RPF 603-04, 501, 615.

Second—**and most importantly**—the State Board is a North Carolina agency that exists for the sole purpose of protecting the health, safety, and welfare of the public. RPF 11. Its members serve only to fulfill this purpose, and are governed strictly by laws

and regulations that ensure their actions are not motivated by financial gain. RPF 75-94; see supra Section A (i). The evidence showed that State Board members do not derive benefits to their day-to-day income from serving on the State Board. In fact, their activities on behalf of the State Board take away from their income because it forces them to be out of the office to attend to State Board matters. RPF 94. The evidence showed that the State Board's investigatory panel conducted its investigations into unlawful teeth whitening in a manner that is consistent with North Carolina law. RPF 238-65. Thus, like in Oksanen, the evidence shows that the State Board members were working toward a common interest: to protect the health, safety, and welfare of North Carolina citizens. See also Amer. Chiropractic v. Trigon Healthcare, 367 F.3d 212, 224-25 (4th Cir. 2004) (Even though medical doctors and insurance companies do not generally share a unity of interest, the parties shared a common interest in this case to address clinical issues in a way that would best serve patients. Therefore, no conspiracy existed.).

Complaint Counsel may attempt to argue that the State Board members' lack of communication amongst themselves with regard to the challenged conduct is irrelevant because the State Board members were engaged in a "hub-and-spoke" conspiracy. Specifically, Complaint Counsel may argue that the State Board members authorized the case officer to engage in the challenged conduct on behalf of the State Board and that each State Board member was implicitly aware that the other State Board members would stand to benefit from the case officer's challenged conduct. However, this argument would fail. Even if some State Board members may have had an economic incentive to so authorize the case officer—which the State Board emphatically denies—

there was no implicit awareness among State Board members that the case officer was engaging in the challenged conduct for any reason other than to protect the health, safety, and welfare of North Carolinians. At most, the evidence suggests a "merely parallel conduct [among State Board members] that could just as well be independent action." See Howard Hess Dental Labs., Inc. v. Dentsply Int'l Inc., 602 F.3d 237, 255-56 (3d Cir. 2010).

Furthermore, Complaint Counsel cannot show that any State Board member specifically authorized the case officer to send cease and desist letters requesting that the recipients cooperate in a State Board investigation. Indeed, as discussed above, the State Board is governed strictly by North Carolina legal prohibitions against individual members engaging in self-aggrandizing activities. RPF 75-94. The case officer only was authorized to oversee the State Board's efforts to protect the public by enforcing the North Carolina Dental Practice Act.

iii. The State Board's challenged actions were not taken to suppress competition and were a legitimate law enforcement activity taken in response to a *prima facie* violation of the North Carolina Dental Practice Act.

In addition to being unable to exclude independent action, Complaint Counsel cannot show that the State Board acted in a manner inconsistent with steps needed to protect the health, safety, and welfare of North Carolinians.

The general form of the cease and desist letters or orders utilized by the State Board is a time-honored, customary, and widely accepted method of enforcing prohibitions on unauthorized practice across a broad variety of professions in North Carolina and in a large number of states. See, supra, Section A (i) (discussing the North Carolina Board of Massage & Bodywork's similar practice of sending cease and desist

orders to unauthorized practitioners of that licensed profession). As previously discussed in this brief, other North Carolina state boards also use cease and desist letters to enforce prohibitions on the unauthorized practice of their licensed professions. See, supra, Section A (i); RPF 278-80, 308. Further, the State Board sends cease and desist letters when there is evidence that a person is engaged in the unauthorized practice of dentistry, not just teeth whitening. RPF 285.

In the absence of an in-person investigation, the State Board sent cease and desist letters because there was credible evidence of a violation of the N.C. Dental Practice Act, usually regarding advertising. RPF 287. In every instance, cease and desist letters were sent by the State Board only when there was *prima facie* evidence from a credible source of a violation. RPF 288. The cease and desist letters were intended to warn the recipient that what they were doing was potentially illegal and requested that they stop. RPF 290. Cease and desist letters were a reasonable, common sense method by which persons were given an opportunity to voluntarily comply without resort to litigation or criminal prosecution. RPF 292.

The letters at issue in this case had no legal effect; indeed, any person or entity ordered by the Dental Board to cease and desist any activity could have disregarded such an order. RPF 300; see, supra, Section A(i). Furthermore, any person or entity who received a cease and desist letter had the ability to pursue an administrative remedy, or relief in the courts of the State of North Carolina if they felt they had been aggrieved. RPF 293, 295-96; see, supra, Section A(i).

Clearly, the State Board did not engage in the challenged conduct with the intent to suppress competition. To the extent that any displacement of competition in the field

of teeth whitening services took place, such displacement was required by the North Carolina General Assembly by its enactment of N.C. Gen. Stat. § 90-29 (prohibiting unlicensed persons from practicing dentistry, including the removal of "stains, accretions or deposits from the human teeth"). RPF 95. The State Board and its members have the authority to enforce the N.C. Dental Practice Act with respect to the unauthorized and unlawful practice of dentistry by seeking recourse to the courts of North Carolina, pursuant to N.C. Gen. Stat. §§ 90-40 and 90-40.1. RPF 26. Under the operation of N.C. Gen. Stat. §§ 90-40 (making the unauthorized practice of dentistry a misdemeanor) and 90-40.1 (enjoining unlawful acts), the Board clearly has been granted the authority to notify prospective defendants in advance of initiating a judicial proceeding. RPF 275; cf. North Carolina v. Chas. Pfizer & Co., Inc., 537 F.2d 67 (4th Cir. 1976) (noting that antitrust laws were not meant to prohibit defendants from adopting sound business policies). In sum, the evidence supports a finding that the State Board, at all times, acted to protect the health, safety, and welfare of North Carolinians.

C. The legal remedies sought by Complaint Counsel exceed Congressional authorization and would violate the U.S. Constitution.

Through this proceeding, Complaint Counsel seeks an order requiring the State Board, among other things:

- To provide appropriate notification to an independent state authority of any proposed contemplated action that may, if implemented, restrain the provision of teeth whitening services by non-dentist providers;
- 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;
- To cease and desist from directing any non-dentist provider of teeth whitening services to cease providing teeth whitening services; and

- To cease and desist communication 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.

Compl., Notice of Contemplated Relief, p. 6.

These proposed legal remedies would violate the State Board's constitutional rights under the Commerce Clause and the Tenth Amendment. U.S. CONST. art. I § 8, cl. 3 and amend. X.

i. The relief sought by Complaint Counsel exceeds the FTC's authority under the FTC Act and violates the Tenth Amendment to the U.S. Constitution.

The relief sought by Complaint Counsel goes beyond the limits of the Federal Trade Commission Act and would trample upon the rights reserved for the State of North Carolina and its agency, the State Board, under the U.S. Constitution's Tenth Amendment by supplanting the state's statutes with the Commission's theories, which have not been authorized by Congress or vetted in FTC rulemaking. See U.S. CONST. amend. X. It is well-established that the principles of federalism embodied in the Tenth Amendment to the U.S. Constitution prohibit the federal government from instructing states to take federally-mandated actions. New York v. United States, 505 U.S. 144, 161 (1992) (internal citations omitted) (invalidating a federal law provision because "Congress may not simply commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program").

The federal government cannot bypass this fundamental prohibition by attempting to direct the actions of state officials. Printz v. United States, 521 U.S. 898, 929 (1997) (requiring state officers "to perform discrete, ministerial tasks specified by Congress"

violates the federalism principles under the Tenth Amendment). As aptly stated by Justice Scalia,

> It is an essential attribute of the States' retained sovereignty that they remain independent and autonomous with their proper sphere of authority. It is no more compatible with this independence and autonomy than their officers be "dragooned" . . . into administering federal law, than it would be compatible with the independence and autonomy of the United States that its officers be impressed into service for the execution of state laws.

Id. at 928 (internal citations omitted).

Not only is the federal government prohibited from directing states' officers to act, the federal government also cannot prescribe the qualifications of state officials. In Gregory v. Ashcroft, the U.S. Supreme Court refused to apply a federal law prohibiting age discrimination to certain state judges, as the state law required those judges to retire by the age of 70 and as the federal law did not "plainly cover" those judges. 501 U.S. 452, 467 (1991). The Court recognized that, "[t]o give the state-displacing weight of federal law to mere congressional **ambiguity** would evade the very procedure for lawmaking on which [Garcia v. San Antonio Metropolitan Transit Authority] relied to protect states' interests." Id. at 464 (citing L. Tribe, American Constitutional Law § 6-25, p. 480 (2d ed. 1988) (emphasis in original).

Complaint Counsel has predicated its administrative enforcement action on the assumption that, simply because North Carolina's statute requires that the majority of the members of the State Board to be licensed dentists, the members of the State Board are "colluding" to violate antitrust laws. This assumption ignores the presumption of proper action by public officials, established in case law and statutes, and the standards set forth in North Carolina's State Government Ethics Act. See N.C. Gen. Stat. § 150B-40(b); see also N.C. Gen. Stat. § 138A *et seq.*; see also Withrow v. Larkin, 421 U.S. 35, 47 (1975).

Nevertheless, based on this assumption, North Carolina must either change its statutes so that the State Board is not "dominated" by licensed dentists, or North Carolina must take steps to provide additional oversight to the State Board's enforcement activities.

These attempts to dictate the qualifications of the members of the State Board violate the Tenth Amendment. The North Carolina statute mandating that the majority of State Board members be licensed dentists exists for good reason: the North Carolina legislature wishes to ensure that the regulation of the practice of dentistry is conducted by individuals with the knowledge to do so competently. In fact, North Carolina courts give deference to occupational licensing boards' expertise to the exclusion of expert witnesses. See, e.g., Leahy v. North Carolina Bd. of Nursing, 346 N.C. 775, 780-81 (1997). Complaint Counsel cannot point to any evidence that Congress intended to give the Commission the power to preempt this state statute. Therefore, pursuing preemption is unconstitutional.

Complaint Counsel's attempts to direct the manner in which North Carolina and the State Board regulate the practice of dentistry also violate the Tenth Amendment. As discussed above, such attempts are contrary to the prohibitions set forth in New York and Printz. Those prohibitions are even more important to the sovereignty of North Carolina in the instant case since the power to regulate the practice of dentistry resides with the State. As the U.S. Supreme Court has held:

> That the State may regulate the practice of dentistry, prescribing the qualifications that are reasonably necessary, and to that end may require licenses and establish supervision by an administrative board, is not open to dispute. The State may thus afford protection against ignorance, incapacity, and imposition. We have held that the State may deny to corporations the right to practice, insisting upon the personal obligations of individuals, and that it may prohibit advertising that tends to mislead the public in this respect.

Semler v. Oregon State Bd. of Dental Examiners, 294 U.S. 608, 611 (1935) (internal citations omitted). In sum, the FTC has no authority to dictate the steps that must be taken by the State Board to enforce the N.C. Dental Practice Act, particularly as it attempts to direct the actions of "independent state authorities." Asserting such authority is a violation of the Tenth Amendment.

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

The U.S. Constitution's Commerce Clause does not allow the FTC to pursue its requested relief against State Board. U.S. CONST. art. I § 8, cl. 3. As recently noted by the U.S. Supreme Court:

> [t]he dormant Commerce Clause is not a roving license for federal courts to decide what activities are appropriate for state and local government to undertake, and what activities must be the province of private market competition. . . . "The Commerce Clause significantly limits the ability of States and localities to regulate or otherwise burden the flow of interstate commerce, but it does not elevate free trade above all other values."

United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 343-44 (2007) (quoting Maine v. Taylor, 477 U.S. 131, 151 (1986)). In United Haulers Association, the U.S. Supreme Court affirmed the Second Circuit's decision holding that certain ordinances requiring private haulers to obtain permits from the defendant state agency to collect solid waste did not violate the Commerce Clause, when such ordinance benefited a public facility but treated both in-state and out-of-state private parties in the same manner. The U.S. Supreme Court held that the ordinances at issue did not discriminate against interstate commerce and that any incidental burden that the ordinances may have on interstate commerce did not outweigh the benefits conferred on

the state citizen; therefore, no violation of the Commerce Clause had taken place. 550 U.S. at 334.

The Court in Parker v. Brown reached a similar conclusion, permitting indirect interstate commerce effects by a state. Chief Justice Stone stated that state regulations falling outside the power of federal Commerce Clause regulation yet directly or indirectly affecting interstate commerce should be upheld when:

> upon a consideration of all the relevant facts and circumstances it appears that the matter is one which may appropriately be regulated in the interest of the safety, health and well-being of local communities, and which, because of its local character, and the practical difficulties involved, may never be adequately dealt with by Congress.

317 U.S. 341, 362 (1943). In Parker, ninety-five percent of the products regulated by California's state statute were ultimately sold outside the state. Yet the Court did not find any Commerce Clause violation stemming from the state law. Id. at 359.

In the instant action, the statute under which the State Board acted to enforce prohibitions against the unauthorized practice of dentistry does not discriminate against interstate commerce, and the benefits of the statute outweigh any burden that it places on interstate commerce. The State could have left the regulation of dentistry entirely up to the free market, but it made a lawful choice to vest such responsibility with the State Board and empowered its members to take action to uphold their statutory duties. Hass v. Oregon State Bar, 883 F.2d 1453, 1462 (9th Cir. 1989). The state law restricts stain removal from teeth to licensed dentists and persons supervised by licensed dentists, and treats non-residents and residents identically, with only incidental effects on non-residents. Specifically, ensuring the health and safety of consumers of teeth whitening

services far outweighs any incidental effects on interstate commerce; as recognized in United Haulers Association:

> [G]overnment is vested with the responsibility of protecting the health, safety, and welfare of its citizens. . . . These important responsibilities set state and local government apart from a typical private business. . . . Given these differences, it does not make sense to regard laws favoring local government and laws favoring private industry with equal skepticism.

550 U.S. at 342-43 (internal citations omitted); Hawkins v. North Carolina Dental Soc'y, 355 F.2d 718, 720 (4th Cir. 1966) (Board of Dental Examiners is a "creature[] of the State of North Carolina," and that its functions are "concededly public functions of the state").

In this case, as discussed above, there is nothing in the legislative history of the FTC Act to suggest that Congress intended to preempt North Carolina's laws on the regulation of the practice of dentistry. Furthermore, even if the Commission could argue that the FTC Act is intended to preempt North Carolina's ability to regulate the practice of dentistry as it best sees fit—which it cannot—such preemption would be unconstitutional. Petersburg Cellular P'ship v. Bd. of Supervisors of Nottoway County, 205 F.3d 688 (4th Cir. 2000).

In Petersburg Cellular Partnership, the plaintiff, a private business, applied for a conditional use permit to construct a communications facility. The defendant, a county board, recommended approval of the permit, subject to certain conditions, including approval by the Federal Aviation Administration ("FAA"). However, even though the FAA ultimately approved the application for the permit, the defendant rejected the application because of concerns expressed by county citizens. Plaintiff filed a federal lawsuit to reverse the board's decision, seeking a "mandatory injunction enforcing the

terms of the Telecommunications Act by ordering the approval of plaintiff's application." The Fourth Circuit reversed the district court's grant of the mandamus, rejecting the plaintiff's arguments that the federal law permissibly preempted the state's licensing standards. The Fourth Circuit noted that:

> Preemption involves the *direct* federal governance of the people in a way that supersedes concurrent state governance of the same people, not a federal usurpation of state government or a "commandeering" of state legislative or executive processes for federal ends. . . . The deliberate choice that Congress made not to preempt, but to use, state legislative processes for siting towers precludes the federal government from instructing the states on how to use their processes for this purpose.

Id. at 703-04. In this case, Congress has made the deliberate choice to not preempt the states' ability to regulate the practice of dentistry, and Complaint Counsel is precluded from now attempting to assert the FTC Act as an offensive measure to usurp such control from North Carolina.

In sum, even if the Commission had been delegated the power to apply the FTC Act to a state agency acting pursuant to state law, the State Board's enforcement of North Carolina law would be outside the reach of federal Commerce Clause regulation.

III. CONCLUSION

In order to prove its case, Complaint Counsel is required to show that the State Board members colluded to restrain trade in violation of the FTC Act. Additionally, Complaint Counsel must demonstrate that the restraint was unreasonable and affected interstate commerce. The Commission's ability to prove these violations also hinges on its use of a viable definition of the relevant market. Complaint Counsel has not met any of these requirements.

As demonstrated at trial, the State Board, its members, and other North Carolina dentists did not collude to suppress competition. Instead, the State Board acted to enforce North Carolina state law, protecting public health and legal competition. Their actions had no effect on legal interstate commerce. In addition, Complaint Counsel's argument falls prey to the Commission's poorly defined conception of the relevant product market. The State Board's actions against illegal non-dentist teeth whitening service providers should be viewed in relation to its actions regarding the legal alternative teeth whitening methods: dentist-supervised services and over-the-counter products. Complaint Counsel cannot simultaneously argue that over-the-counter products are entirely dissimilar from non-dentist-provided services, while attempting to analogize the two methods to support an argument that non-dentist provided services are safe and should be legal.

Further, the Commission's proposed remedies for the State Board's allegedly illegal actions are themselves in violation of the U.S. Constitution Commerce Clause as well as the Tenth Amendment. Consequently, the Court should find in favor of the North Carolina State Board of Dental Examiners in this case.

This the 25th day of April, 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

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This the 25th day of April, 2011.

/s/ Noel L. Allen
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CERTIFICATION FOR ELECTRONIC FILING

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

/s/ Noel L. Allen
Noel L. Allen

LEXSEE 1999 U.S. APP. LEXIS 21487

MERCK-MEDCO MANAGED CARE, LLC, Plaintiff-Appellant, v. RITE AID CORPORATION; EAGLE MANAGED CARE CORPORATION, a Subsidiary of Rite Aid Corporation; GIANT FOOD, INC.; EPIC PHARMACY NETWORK, INCORPORATED; NEIGHBORCARE PHARMACIES, INCORPORATED, Defendants-Appellees, NATIONAL PRESCRIPTION ADMINISTRATORS, INCORPORATED, Movant.

No. 98-2847

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

1999 U.S. App. LEXIS 21487; 1999-2 Trade Cas. (CCH) P72,640

June 8, 1999, Argued
September 7, 1999, Decided

NOTICE: [*1] RULES OF THE FOURTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

SUBSEQUENT HISTORY: Reported in Table Case Format at: *1999 U.S. App. LEXIS 36612.*

PRIOR HISTORY: Appeal from the United States District Court for the District of Maryland, at Baltimore. Benson E. Legg, District Judge. (CA-96-499-L).

DISPOSITION: AFFIRMED.

COUNSEL: ARGUED: James Patrick Tallon, SHEARMAN & STERLING, New York, New York, for Appellant.

Lewis A. Noonberg, PIPER & MARBURY, L.L.P., Washington, D.C.; Glenn Alfredo Mitchell, STEIN, MITCHELL & MEZINES, Washington, D.C., for Appellees.

ON BRIEF: Kenneth M. Kramer, Daniel D. Edelman, SHEARMAN & STERLING, New York, New York; Thomas M. Wilson, III, John B. Isbister, Scott Patrick Burns, TYDINGS & ROSENBERG, L.L.P., Baltimore, Maryland, for Appellant.

Leonard L. Gordon, Kenneth G. Starling, Susan H. Pope, PIPER & MARBURY, L.L.P., Washington, D.C., for Appellees Rite Aid and Eagle; David U. Fierst, Andrew Beato, STEIN, MITCHELL & MEZINES, Washington, D.C., for Appellee Giant Food; Michael F. Brockmeyer, Jay I. Morstein, PIPER & MARBURY, L.L.P., Baltimore, Maryland, for Appellee Epic; Ward B. Coe, III, Pamela M. Conover, WHITEFORD, TAYLOR & PRESTON, L.L. [*2] P., Baltimore, Maryland, for Appellee NeighborCare.

JUDGES: Before MICHAEL, Circuit Judge, HOWARD, United States District Judge for the Eastern District of North Carolina, sitting by designation, and FRIEDMAN, United States District Judge for the Eastern District of Virginia, sitting by designation.

OPINION

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PER CURIAM:

The managed health care industry has drastically changed the way medical and pharmaceutical services are dispensed in this country. Where individuals once stopped at their local drug store to fill a prescription, people now shop almost exclusively in those stores which service the health benefit plans provided by their employers. Competition is keen over what company will administer an employer's health plan.

In September 1995, the State of Maryland awarded to the appellant, Merck-Medco Managed Care, Inc. ("Medco"), a contract to manage the prescription drug benefits program for State employees and retirees (the "Maryland Plan" or the "Plan"). Under the terms of the award, Medco was required to assemble an extensive statewide network of pharmacies which would agree to fill prescriptions at a steeply discounted rate.

The Maryland Plan was scheduled to go [*3] "live" on January 1, 1996. By mid-December 1995, the State had grown concerned about Medco's ability to put together a satisfactory network in time. On December 20, 1995, the State issued an ultimatum to Medco, requiring Medco to submit a certified list of participating pharmacies within three days. Because Medco failed to assemble a network satisfactory to the State, the State terminated Medco's contract on December 27, 1995. Ultimately, the State rebid the contract and awarded it to one of Medco's competitors.

The appellees own or represent approximately one-half of the retail pharmacies in Maryland. Four of the appellees were engaged in the retail pharmacy business in 1995. Rite Aid operated 180 pharmacies in Maryland. Giant, a supermarket, had 76 stores in Maryland and each included a pharmacy. NeighborCare operated 20 pharmacies in Maryland, all of which were located in hospitals or medical centers. EPIC is an umbrella organization that represented the interests of over 200 independently owned pharmacies. The fifth appellee, Eagle, is a wholly owned subsidiary of Rite Aid and a direct competitor of Medco. In partnership with EPIC, Eagle was an unsuccessful bidder for the Maryland [*4] contract.

Both Eagle and Medco are Pharmacy Benefits Managers ("PBM"). PBMs were created in response to the rising costs of pharmaceutical products. They seek to keep prices down by pooling claims. A PBM will contract with a plan sponsor, such as the State of Maryland, and for a fee, will manage the drug benefits program for the sponsor's employees. The PBMs put together a network of participating pharmacies. To be included in the network, the pharmacies must agree to dispense drugs at a discount. For each prescription filled, the PBM reimburses the pharmacy under a formula based on the drug's average wholesale price ("AWP") less a percentage, plus a dispensing fee. For the Maryland Plan, the network pharmacies were to be reimbursed at a rate of AWP minus 15% plus $ 2.00. The PBM that can offer the greatest price discount gains an advantage in winning the contracts of large employers.

Pharmacies can decide to either join or not join a network and numerous factors influence their decision. These factors include the number of people covered by the plan, the pharmacy's market share, the PBM's reputation for prompt payment and whether a particular network is "open" or "closed." "Open" [*5] networks permit any pharmacy to enter or exit at any time. "Closed" networks fix the membership at a certain date and no other pharmacies can join afterwards. Pharmacies are more willing to accept deep discounts in a "closed" network because they are more certain of their market share. The incentive to join an "open" network comes from an increase in volume of customers to the pharmacy who typically buy other incidental items for sale at the pharmacy, like magazines and non-prescription drugs. Increased volume is difficult to measure.

Some PBMs, like Medco, fill prescriptions by mail and, therefore, are not only administering the network but are also directly competing with the pharmacies in the network. Medco, as a subsidiary of Merck, a very large drug manufacturer, has a substantial advantage in discounting the price of prescription drugs. This practice by drug manufacturers has prompted retail pharmacies to file a suit in federal court in Chicago alleging price fixing, conspiracy and other antitrust violations. Hundreds of similar lawsuits from around the country have been consolidated before the United States District Court for the Northern District of Illinois.

During the time [*6] leading up to the filing of this lawsuit, the retail pharmacies in Maryland were not only attempting to determine if they should become part of Medco's network, but they were also attempting to have fair pricing laws enacted and attempting to carve out pharmacy benefits from a transfer of the state Medicare population into managed care.

After receiving bids from PBMs, the State awarded the contract to Medco on September 13, 1995, based on its representation that over 800 pharmacies would be members of the open network. Medco made this prediction without contacting any of the pharmacies and provided a list to the State of the pharmacies Medco expected to be in the network. This list included all appellees except NeighborCare. The contract required Medco to assemble participation by 86.3% of Maryland's pharmacies by January 1, 1996. Medco was unsuccessful in assembling the network because over half of Maryland's pharmacies refused to participate in the plan. Medco accused Rite Aid of leading a conspiracy to sabotage Medco's network.

On February 20, 1996, Medco filed the instant suit against appellees, alleging that they jointly agreed to sabotage the Plan by boycotting Medco's network [*7] and that appellees' actions constituted a violation of *§ 1* of the Sherman Antitrust Act and the Maryland Antitrust Act. *Section 1* of the Sherman Act prohibits any con-

spiracy the object of which is to restrain trade or commerce.

After extensive discovery, the parties filed cross-motions for summary judgment, and after holding four hearings, the district court granted the appellees' motion for summary judgment on the antitrust claims and granted the appellant's motion for summary judgment as to some ancillary claims. In an 83-page decision, the district court concluded that Medco's evidence did not tend to exclude the possibility of independent conduct on the part of the appellees and the evidence was, therefore, insufficient to support a reasonable inference of a conspiracy to violate the antitrust laws.

Medco alleges that numerous actions by appellees indicate a conspiracy, such as: an advertisement placed in the Baltimore Sun and Washington Post by Rite Aid on December 21, 1995; various conference calls between the different pharmacies; denials of communication; statements by corporate officers; and, reactions of appellees. Medco catalogs over 450 instances of contact between defendants [*8] and others from September 11, 1995, to December 27, 1995.

In its answer, Rite Aid alleged that its Vice President of Government and Trade Relations, Jim Krahulec, did not discuss the Maryland Plan with any of the other appellees. In an unrelated case, Krahulec signed a Federal Trade Commission consent decree promising that he would not attend a formal or informal meeting of representatives of pharmacy firms that he expects, or reasonably should expect, will facilitate communications concerning the firms' participation in managed care benefit plans. Medco produced evidence that Krahulec participated in conversations with other pharmacies in which discussion of the Maryland plan occurred.

Discovery produced evidence that on September 15, 1995, Rite Aid's Senior Vice President, Joel Feldman, called Giant's Assistant Director of Managed Care Programs, Gary Wirth, and informed him that Medco received the contract. There was also a conference call on September 15 between EPIC and Rite Aid and another on September 17 involving Rite Aid, NeighborCare and others. Other conference calls occurred on September 18 involving Krahulec (Rite Aid), Giant, NeighborCare and representatives from the [*9] National Association of Chain Drug Stores; on September 19 involving Krahulec and NeighborCare; and, on September 20 involving Rite Aid and Giant.

I. *STANDARD OF REVIEW*

The court reviews a summary judgment motion by a district court *de novo.* Summary judgment is appropriate when there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).* Defendants bear the burden of initially coming forward and demonstrating the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett, 477 U.S. 317, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986); Ross v. Communications Satellite Corp., 759 F.2d 355, 364 (4th Cir. 1985).* When making the summary judgment determination, the facts and all reasonable inferences must be viewed in the light most favorable to the nonmoving party. *See Anderson, 477 U.S. at 255.* Defendants can bear their burden either by presenting affirmative evidence, or by demonstrating that Medco's evidence is insufficient to [*10] establish its claim. *See Celotex Corp., 477 U.S. at 331* (Brennan, J., dissenting).

Once defendants have met their burden, Medco must then affirmatively demonstrate that there is a genuine issue of material fact which requires trial. *See Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986).* There is no issue for trial unless there is sufficient evidence favoring Medco for a jury to return a verdict for it. *See Anderson, 477 U.S. at 250.* The standard for summary judgment therefore mirrors the standard for judgment as a matter of law under *Fed. R. Civ. P. 50(a), viz.* a trial court must grant a judgment if, under the governing law, there can be but one reasonable conclusion as to the verdict. *See Anderson, 477 U.S. at 250.* A trial judge faced with a summary judgment motion "must ask himself not whether he thinks the evidence unmistakenly favors one side or the other, but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented." *Id. at 252.*

In opposing summary judgment, the non-moving party must "set [*11] forth such facts as would be admissible in evidence." *Fed. R. Civ. P. 56(e).* Inadmissible hearsay cannot be used to oppose summary judgment. *See Greensboro Prof. Fire Fighters Ass'n v. Greensboro, 64 F.3d 962, 967 (4th Cir. 1995).*

At oral argument, counsel for Medco succinctly stated the issues in this appeal -- what is Medco's burden under the summary judgment standard and did Medco meet its burden?

II. *SUMMARY JUDGMENT IN ANTITRUST CASES*

While the summary judgment standard of *Fed. R. Civ. P. 56* for an antitrust suit is the same as that for any other action, the application of *Rule 56* to antitrust cases is somewhat unique. The inferences to be drawn from underlying facts on summary judgment must be viewed in a light most favorable to Medco. *See Matsushita, 475 U.S. at 587.* "But antitrust law limits the range of permissible inferences from ambiguous evidence in a *§ 1*

case . . . conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Id.* (citing *Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984)*); [*12] *see also Thompson Everett, Inc. v. National Cable Advertising, L.P., 57 F.3d 1317, 1323 (4th Cir. 1995)* ("Inferences which may be drawn vary from one substantive area of the law to another. . . .").

Section 1 of the Sherman Antitrust Act states in relevant part:

> Every contract, combination in the form of trust or other wise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared illegal.

15 U.S.C. § 1 (West 1997). To prove a violation of this statute, Medco must establish: first, that there are at least two persons acting in concert and, second, that the restraint complained of constitutes an unreasonable restraint on trade or commerce. *See Estate Constr. Co. v. Miller & Smith Holding Co., Inc., 14 F.3d 213, 220 (4th Cir. 1994)*.

A. *Unreasonable Restraint on Trade*

Medco must establish that an agreement among appellees not to participate in Medco's plan would be an unreasonable restraint on trade.

Certain restraints on trade are *per se* violations "which presume[] that the questionable conduct has anticompetitive effects without comprehensive [*13] inquiry into whether the concerted action produced adverse, anticompetitive effects." *In re Baby Food Antitrust Litigation, 166 F.3d 112, 118 (3rd Cir. 1999)*; *see also Oksanen v. Page Memorial Hospital, 945 F.2d 696, 708 (4th Cir. 1991)* ("Certain forms of agreements, such as varieties of group boycotts, have been classified as per se violations."). Medco asserts a *per se* violation of *§ 1* and appellees do not contest this characterization. [1]

> 1 We believe that the characterization of appellees' alleged conduct as a *per se* violation of *§ 1* is appropriate. Most boycotts have been considered *per se* violations of *§ 1*. Only boycotts having valid business justifications and procompetitive effects may possibly be considered under a rule of reason analysis. *See, e.g., Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 80 L. Ed. 2d 2, 104 S. Ct. 1551 (1984)*. If appellees committed the acts alleged, the state's cost for administering the Plan would have increased and competition among PBMs would have been adversely affected, thereby resulting in an unfair restraint of trade.

[*14] Because Medco has alleged a *per se* violation of *§ 1*, it is unnecessary for the court to evaluate appellees' conduct under the rule of reason which involves a case-by-case determination of whether the methods are anticompetitive and should be prohibited. *See id.*; *see also Oksanen, 945 F.2d at 709* (discussing rule of reason test).

B. *Conspiracy*

A plaintiff alleging conspiracy must demonstrate a "conscious commitment to a common scheme designed to achieve an unlawful objective." *Thompson Everett, Inc. v. National Cable Advertising, L.P., 57 F.3d 1317, 1324 (4th Cir. 1995)* (quoting *Monsanto, 465 U.S. at 764*). *Monsanto* requires "something more" than independent action, and must rise to the level of "a unity of purpose or a common design and understanding, or a meeting of minds." *Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, Inc., 878 F.2d 801, 805 (4th Cir. 1989)* (quoting *Monsanto, 465 U.S. at 764*).

A party may demonstrate an agreement by direct evidence or circumstantial evidence. When relying upon circumstantial evidence, the range of permissible inferences [*15] that the court may draw from the evidence is limited by the "plausibility of the plaintiff's theory and the danger associated with such inferences." *In re Baby Food, 166 F.3d at 124*. A plaintiff may have a plausible theory, but the danger to the market or innocent participants in the market may be so great as to warrant a limitation of the inferences available to the plaintiff. Consequently, "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Matsushita, 475 U.S. at 588* (citing *Monsanto, 465 U.S. at 764*).

Therefore, to withstand a motion for summary judgment, "a plaintiff seeking damages for a violation of *§ 1* must present evidence that tends to exclude the possibility that the alleged competitors acted independently." *Id.* The heart of this case is to what degree Medco must produce evidence tending to exclude independent action by defendants and whether Medco has presented such evidence. The standards for summary judgment and the limits on inferences in antitrust lawsuits are often quoted but not universally agreed upon. The Supreme [*16] Court has considered numerous antitrust appeals and through *Matsushita, Monsanto and Eastman Kodak v. Image Technical Services, 504 U.S. 451, 119 L. Ed. 2d 265, 112 S. Ct. 2072 (1992)*, has established a framework

within which to analyze antitrust summary judgment motions.

1. Matsushita *and* Monsanto

Matsushita involved a suit filed by American TV manufacturers alleging a 20-year conspiracy by Japanese TV manufacturers to unfairly price their products in America in violation of the Sherman Antitrust Act. The American manufacturers alleged that the intent of the conspiracy was to force the Americans out of business by fixing prices below the market level in the United States. The losses sustained in the American market were offset by monopoly profits in the Japanese markets. [2] The Supreme Court concluded that "to survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of *§ 1* must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently." *475 U.S. at 588.* The Supreme Court borrowed the "tends to exclude the possibility" language from the Court's earlier [*17] *Monsanto* decision.

> 2 This agreement by Japanese manufacturers is called a horizontal antitrust claim because it deals with manufacturers banding together to unlawfully control a price.

Monsanto was a vertical antitrust case. The plaintiff, Spray-Rite, alleged that Monsanto, an agricultural herbicide manufacturer, along with its distributors, fixed the price of herbicide and unfairly prejudiced the plaintiff, a former distributor of Monsanto's products. The case went to trial and Spray-Rite won a $ 10 million judgment that was upheld on appeal. The Supreme Court affirmed the judgment but on different grounds than those of the district or appellate courts. The Supreme Court held that "something more than evidence of complaints [about price fixing] is needed. There must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently." *Monsanto, 465 U.S. at 764.*

Appellant attempts to distinguish *Monsanto* and *Matsushita* [*18] on the grounds that one was a vertical antitrust case and the other was a horizontal antitrust case. [3] We do not agree that the cases turned on this distinction because the Supreme Court in *Matsushita*, decided after *Monsanto*, specifically held that in the absence of direct evidence of a conspiracy, "to survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of *§ 1* must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently." *Matsushita*, 475 at 588. The Court later stated that "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Id.*

> 3 By making this distinction, appellant attempts to convince the court that because *Monsanto* was a vertical antitrust case, it does not apply to horizontal antitrust cases. Therefore, we cannot rely on it to analyze the horizontal antitrust dispute between Medco and appellees.

[*19] 2. *Eastman Kodak Company v. Image Technical Services*

Eastman Kodak did not involve a conspiracy claim under *§ 1* of the antitrust act as did *Monsanto* and *Matsushita*. In *Eastman Kodak*, the Court considered whether Eastman Kodak's market power was sufficient to find it guilty of "tying." Tying deals with the ability of a market participant to condition the sale of product A on the purchase of product B. A market participant can violate *§ 1* of the Sherman Antitrust Act "if the seller has 'appreciable economic power' in the tying product market and if the arrangement affects a substantial volume of commerce in the tied market." *Eastman Kodak, 504 U.S. at 462* (quoting *Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 22 L. Ed. 2d 495, 89 S. Ct. 1252 (1969)).*

Kodak did not dispute that it began a program to condition the sale of replacement parts for its copiers on the use of Kodak service and repair programs. This policy adversely affected the independent servicers of Kodak equipment. Kodak also did not deny that its arrangement affected a substantial volume of commerce. However, Kodak denied that its practices [*20] were an unlawful tying arrangement. Kodak asserted that competition in a market foreclosed the finding of monopoly power in certain instances. Kodak further argued that the court's failure to adopt its view would deter procompetitive behavior. *See 504 U.S. at 467.*

Kodak relied on *Matsushita* in attempting to convince the court that if Kodak had a plausible economic theory, then the plaintiffs' claims could not make sense; thus, entitling Kodak to summary judgment. In discussing Kodak's summary judgment burden, the Court rejected Kodak's proposed presumption that "equipment competition precludes any finding of monopoly power in derivative aftermarkets." [4] *Id. at 466.* The Court explained:

> The . . . requirement in *Matsushita* that the plaintiffs' claims make economic sense did not introduce a special burden on plaintiffs facing summary judgment in antitrust cases. The Court did not hold that if the moving party enunciates any

> economic theory supporting its behavior, regardless of its accuracy in reflecting the actual market, it is entitled to summary judgment. *Matsushita* demands only that the nonmoving party's inferences be reasonable in order to reach the jury [*21] . . . .

Id. at 468.

> 4 Kodak presented no statistical evidence in support of its economic theory.

Because of the Court's response to Kodak's argument, Medco relies on *Eastman Kodak* to dismiss its requirement under *Monsanto* and *Matsushita* to produce evidence that tends to exclude that the defendants acted independently. However, we do not read *Eastman Kodak* as reaching that far. The Court was not dealing with a *§ 1* conspiracy in *Eastman Kodak* as it was in *Monsanto* and *Matsushita*. It was dealing with monopoly power under § 2 of the Antitrust Act. The Court did not overrule *Monsanto* and *Matsushita* with this statement, and it would be a mistake to dismiss the requirements imposed on Medco due to the inherent dangers to the market and innocent parties associated with a conspiracy case.

Our conclusion that *Eastman Kodak* did not overrule or modify the requirements explained in *Matsushita* and *Monsanto* is further bolstered by Fourth Circuit precedent. In [*22] *Thompson Everett*, this court recognized that "on summary judgment motions in antitrust cases, the Supreme Court instructed that when there is evidence of conduct that is consistent with both legitimate competition and an illegal conspiracy, courts may not infer that an illegal conspiracy has occurred without other evidence." *57 F.3d at 1323*; *see also Blomkest Fertilizer, Inc. v. Potash Corporation of Saskatchewan, Inc., 176 F.3d 1055, 1074 (8th Cir. 1999), vacated, reh'g en banc granted* ("*Eastman Kodak* was not concerned with the sufficiency of the evidence of conspiratorial acts") (Beam, J., dissenting); *Super Sulky, Inc. v. United States Trotting Ass'n, 174 F.3d 733 (6th Cir. 1999)* (relying on *Matsushita* to grant summary judgment in *§ 1* case without discussing *Eastman Kodak*); *RE/MAX International, Inc. v. Realty One, Inc., 173 F.3d 995, 1999 WL 184350 (6th Cir. 1999)* (relying on principles of *Matsushita* and *Monsanto* to reverse district court's grant of summary judgment on *§ 1* claim); *In re Baby Food Antitrust Litigation, 166 F.3d 112* [*23] (same as *Super Sulky*).

Therefore, Medco must forecast evidence which tips the balance in favor of a conspiracy. If it is as likely that the conduct was lawful as it was conspirational, it is improper to let the case proceed to trial.

In *Laurel Sand & Gravel, Inc. v. CSX Transportation, Inc., 924 F.2d 539 (4th Cir. 1990)*, we described the antitrust summary judgment procedure. When there is no direct evidence of antitrust activity, "an agreement to restrain trade may be inferred from other conduct." *Id. at 542.*

There are two possible judicial interpretations when the conduct to restrain trade is ambiguous. The first interpretation is that the "suspected agreement may be found consistent with the independent conduct or a legitimate business purpose." *Id.* The second interpretation is that the agreement may be consistent with an illegal agreement. "To prove a violation through ambiguous conduct, proof must be offered that tends to exclude the first interpretation." *Id.* We concluded,

> given the *Monsanto/Matsushita* standard, [plaintiffs] must discharge a twofold evidentiary burden. First, they must establish that [defendants] [*24] had a "conscious commitment to a common scheme designed to achieve an unlawful objective." Second, [plaintiffs] must bring forward evidence that excludes the possibility that the alleged coconspirators acted independently or based upon legitimate business purpose.

Id. at 543.

The district court correctly noted that the quantum of evidence required to exclude the possibility of independent action or legitimate business purposes is directly related to the plausibility of the plaintiff's theory. Compare *Matsushita, 475 U.S. 574, 89 L. Ed. 2d 538, 106 S. Ct. 1348*, and *Super Sulky, 174 F.3d 733*, with *Monsanto, 465 U.S. 752, 79 L. Ed. 2d 775, 104 S. Ct. 1464*, and *Petruzzi's IGA Supermarkets v. Darling-Delaware Co., 998 F.2d 1224, 1242-43* (3d Cir.), *cert. denied, 510 U.S. 994 (1993)*. If the plaintiff advances a strong, plausible theory then the quantum of evidence tending to exclude independent action is not as great as if the plaintiff advances a weak or implausible theory. Likewise, when there is a risk that the threat of antitrust liability will chill legitimate, procompetitive [*25] conduct by market participants, the quantum of evidence is also high.

C. *Conscious Parallelism*

An agreement to boycott may be inferred from the business conduct of the parties. This pattern of uniform business practices is commonly referred to as "conscious parallelism." *See* ABA Section of Antitrust Law, Antitrust Law Developments, p. 8 (4th ed. 1997). The Court of Appeals for the Third Circuit has explained that courts

may find consciously parallel behavior where a plaintiff shows: "(1) that the defendants' behavior was parallel; [and] (2) that the defendants were conscious of each other's conduct and that this awareness was an element in their decision-making process." *Id.* n.39 (quoting *Petruzzi's IGA, 998 F.2d at 1242-43*).

There is no doubt that conscious parallelism was at work in appellees' business conduct. Through newspaper articles and trade organization meetings, Rite Aid, EPIC, NeighborCare and Giant were each aware that the other had not participated in the Maryland Plan. Each also knew that if not enough pharmacies participated, the State would likely cancel the contract with Medco and award the contract to another pharmaceutical benefits [*26] manager that would offer better terms than Medco. However, it has long been recognized that parallel behavior alone is not enough to prove a conspiracy. *See Theatre Enterprises v. Paramount Film Distributing Corp., 346 U.S. 537, 540, 98 L. Ed. 273, 74 S. Ct. 257 (1954)* ("This Court has never held that proof of parallel business behavior conclusively establishes agreement or, phrased differently, that such behavior itself constitutes a Sherman Act offense.").

In order to infer a conspiracy, conscious parallelism must be accompanied by "plus factors." While the Supreme Court has not recounted a list of plus factors, numerous plus factors, such as "motive to conspire," "opportunity to conspire," "high level of interfirm communications," irrational acts or acts contrary to a defendant's economic interest, but rational if the alleged agreement existed, and departure from normal business practices, have been considered by other circuits. *See City of Tuscaloosa v. Harcros Chemicals, Inc., 158 F.3d 548, 571 n.35 (11th Cir. 1998)*; *Apex Oil Co. v. DiMauro, 822 F.2d 246, 253-54* (2d Cir.), *cert. denied, 484 U.S. 977 (1987)*. [*27]

If a party establishes the existence of plus factors, a rebuttable presumption of conspiracy arises. *See In re Baby Food, 166 F.3d at 122*; *Todorov v. DCH Healthcare Authority, 921 F.2d 1438, 1456 n.30 (11th Cir. 1991)*. Viewing all the evidence and taking the plus factors into consideration, the court must then determine if the evidence tends to exclude the possibility that the alleged coconspirators acted independently or based upon legitimate business purposes.

III. *APPLICATION OF THE STANDARD FOR ANTITRUST CASES TO MEDCO'S FORECAST OF EVIDENCE*

In order to survive summary judgment, Medco must first forecast evidence of a conspiracy to restrain trade. If successful, Medco must then demonstrate evidence that tends to exclude independent action by the defendants.

A. *Conscious Commitment to a Common Scheme*

Medco has asserted a plausible theory of conspiracy. If the alleged conspiracy succeeded, the State would rescind the contract with Medco and the conspirators would likely receive more lucrative reimbursements from the next pharmaceutical benefits manager. If the conspiracy failed, the conspirators could merely join Medco's network after [*28] the plan went live.

While Medco's theory is plausible, it also creates a danger of chilling legitimate, procompetitive activity by other pharmaceutical service providers. A low quantum of proof tending to exclude independent action in cases such as this would threaten pharmacies with antitrust litigation when they have legitimate, procompetitive reasons for not joining a plan. Incentives to negotiate, to hold out for better terms and ultimately to not participate would have to be weighed in the light of a possible lawsuit if other pharmacies engaged in the same activities.

As discussed above, Medco has presented sufficient evidence that conscious parallelism occurred among appellees during the fall of 1995. Therefore, the court must examine the plus factors in order to determine if a conspiracy may be inferred from appellees' consciously parallel behavior.

1. *Motive to Conspire*

Rite Aid, Giant, NeighborCare and EPIC owned or controlled 50% of the pharmacies in Maryland. Medco's plan proposed deep cuts in profits from the pharmacies' previous plan. Additionally, Rite Aid had been sanctioned by the United States Justice Department for antitrust actions in New York where they [*29] conspired to boycott a Medco plan. Thus, construing all reasonable inferences in Medco's favor, it appears that the defendants had a motive to conspire against the Medco plan.

2. *Opportunity to Conspire and High Level of Inter-Firm Contacts*

Medco presented voluminous evidence of inter-firm contacts between the parties providing ample opportunity to conspire. The inter-firm contacts occurred between high level corporate officers. Reasonable inferences from this evidence establishes opportunity to conspire and high level of inter-firm contacts.

3. *Acts Contrary to Economic Interest*

Evidence of acts contrary to an alleged conspirator's economic interest is perhaps the strongest plus factor indicative of a conspiracy. Having reviewed the record, we conclude that rejecting the Medco plan was consistent with the pharmacies' economic interests. Particu-

larly, NeighborCare's involvement would have been directly contrary to its economic interest. Ninety-eight percent of NeighborCare's business consisted of prescriptions. They did not sell ancillary items that Medco promised would make up for the lower reimbursement rate.

Also, it was in each company's best interest to hold out as [*30] long as possible in an effort to attain a better deal with Medco. Due to the plan's "open" nature, if the company did not receive better terms, it could merely join at a later date. Medco presents no evidence of price sharing among appellees. All indications from the evidence point to independent negotiations by Giant, NeighborCare and EPIC with Medco concerning the rate of reimbursement. Consequently, there are no acts by appellees inconsistent with their economic best interests.

4. *Departure From Normal Business Practices*

Medco has not asserted a departure from normal business practices. In fact, Medco concedes that both Giant and Rite Aid had a history of holding out until the last minute and negotiating for a better reimbursement rate. NeighborCare had never joined a plan with a reimbursement rate as low as the one offered by Medco. Only EPIC departed from the normal business practice of binding all 200 independent pharmacies at the Medco rate.

B. *Appellees' Evidence Rebutting the Inference of Conspiracy*

Medco's establishment of two plus factors requires appellees to rebut the resulting inference of conspiracy. The district court painstakingly reviewed the evidence [*31] presented by Rite Aid, Giant, EPIC and NeighborCare offered to rebut the inference of conspiracy. [5]

> 5 The district court relied in part on the *Noerr-Pennington* doctrine. Medco assigned error to the district court's reliance on this doctrine because defendants had not affirmatively raised it in their pleadings. Under this doctrine, horizontal competitors may join together to lobby the government. The *First Amendment* shields this joint lobbying from antitrust liability, even when the competitors are seeking governmental action that would eliminate competition or exclude competitors. We do not believe it is necessary to invoke the *Noerr-Pennington* doctrine to affirm the district court's decision.

1. *Rite Aid*

Eagle, Rite Aid's subsidiary, submitted an unsuccessful bid for the Maryland Plan. As a result of the unsuccessful bid, Eagle and EPIC launched a bid protest on September 18, 1995. Eagle and EPIC contended that the State's failure to verify the accuracy of Medco's proposal amounted to an arbitrary [*32] and capricious award of the contract to Medco. As evidence of Medco's inaccurate proposal, Eagle relied on Medco's representation to the State that Rite Aid would join Medco's network. [6] Rite Aid asserts that becoming a member of Medco's network while Eagle was protesting the award of the contract would undercut Eagle's appeal.

> 6 Medco contends this is normal business practice in the industry.

Rite Aid also presented evidence that part of its business practice was to initially decline participation in a plan and bargain for the best terms they could; [7] particularly when the plan was open and there was no risk that they would be shut out if they did not join before the plan went live.

> 7 Medco representatives admitted that Rite Aid typically held out before joining a plan and that Rite Aid's Joel Feldman was "a great negotiator."

[*33] According to Rite Aid, the low reimbursement rate offered by Medco did not attract Rite Aid. Rite Aid presented evidence that its decision to join a plan at such a low reimbursement rate was governed by how large the plan was, Rite Aid's market share, whether the plan was open or closed and the prominence of the plan's sponsor. Rite Aid asserts that due to Rite Aid's prominent market share in Maryland, [8] it was not quick to sacrifice prescription profits for unproven ancillary income.

> 8 In 1995, Rite Aid had 180 pharmacies in the State of Maryland.

2. *Giant*

Giant presented evidence that they had forecasted a loss of over $ 1 million if they joined Medco's network at the offered reimbursement rate. Since the beginning of 1995, Giant had been in the process of abandoning plans [9] with rates similar to those Medco offered.

> 9 Giant had dropped out of nine plans due to the reimbursement rate. Eight of the nine plans had rates greater than or equal to Medco's rate.

[*34] Evidence presented by Giant indicates that Giant was deeply concerned about Medco's mail order program. According to Giant, their participation in another plan administered by Medco caused a loss of 225,485 prescriptions per year to Medco's mail order program, valued at over $ 10 million. Giant engaged in negotiations with Medco through December 1995, at-

tempting to bargain for "reasonable" reimbursement rates.

3. *EPIC*

EPIC asserts that its board chose not to participate in the Maryland Plan because of the low reimbursement rate and because of slow payments by Medco in other plans in which EPIC was involved. Medco requested to address EPIC's board two times in an attempt to convince them to join Medco's network. The board offered to participate in a plan with a rate of AWP minus 12% plus $ 2.00, but Medco and EPIC were unable to reach an agreement. However, EPIC allowed Medco to directly solicit the independent pharmacies over which EPIC had contractual binding authority. Medco's solicitation yielded the participation of 100 independent pharmacies.

Additionally, EPIC was involved in the bid protest along with Eagle, and EPIC contends that until their protest was denied in late [*35] November 1995, they had absolutely no incentive to join Medco's network.

4. *NeighborCare*

NeighborCare had never participated in a plan with a reimbursement rate as low as the one offered by Medco. NeighborCare's two owners had a longstanding policy to reject any networks offering reimbursement rates which fell below their profitability threshold.

NeighborCare also did not engage in the sale of ancillary items to which an increase in customer flow would contribute. Ninety-eight percent of NeighborCare's profits came from prescriptions.

Based on the evidence presented by Rite Aid, Giant, EPIC and NeighborCare, we are convinced that they have rebutted Medco's inference of conspiracy. Medco may still survive summary judgment if it carries its ultimate burden and forecasts proof which tends to exclude independent action or legitimate business decisions by appellees.

C. *Medco's Evidence Tending to Exclude Independent Action or Legitimate Business Purpose*

Medco does not forecast direct evidence of a conspiracy to restrain trade, but relies on circumstantial evidence. It advances at least seven factual arguments that purportedly demonstrate a conspiracy and exclude independent [*36] action: (1) appellees' reaction as soon as Maryland announced its plan; (2) the reaction of EPIC which had historically joined a plan at the price offered by Medco; (3) the actions of Rite Aid's Jim Krahulec; (4) the statement on September 29 by EPIC's representative that the plan would "kill us" if it went into effect; (5) Rite Aid's advertisement; (6) conversations between high level officers within appellees' companies; and (7) statements by EPIC and Giant on December 7, 1995.

1. *Appellees' Reaction to Announcement of Award of Contract to Medco*

No pharmacy reacted with joy to the news that Maryland had awarded Medco the pharmacy plan. The deep discount Medco attempted to achieve in its pricing forecasted large losses to some appellees. [10] The offset to this deep discount was intended to be an increased flow of patrons to the pharmacies, but for pharmacies like NeighborCare, which derived 98% of profits from prescriptions, an increase in the sale of incidentals like magazines and candy could not make up for the loss in prescription dollars.

10 Giant predicted that it would lose in excess of $ 700,000 per year by joining the Plan at Medco's rate.

[*37] After learning on September 11, 1995, of the State's intention to award the contract to Medco at a Board of Public Works meeting on September 13, Rite Aid's Joel Feldman testified that "we were really focused on developing a strategy to somehow influence the process politically" comparable to a "red alert." (A. 451) The "red alert" was implemented by "getting on the telephone and . . . calling as many people as you can who you think will have some role in influencing the decision of the Board of Public Works." *Id.*

As indicated by the flurry of activity after the announcement, most pharmacies, [11] not just appellees, attempted to address concerns raised by the award of the Plan to Medco. The thrust of these activities appears to be influencing the governor and state representatives to rethink some of the details of the Plan.

11 As indicated by conference call participation, not only did appellees take part in the lobbying effort, but so did Safeway Inc., Thrift Drug, Inc., Revco D.S. Inc., CVS and the National Association of Chain Drug Stores.

[*38] 2. *EPIC's Reaction to the Plan*

Medco asserts EPIC's reaction to the plan creates an inference of conspiracy. EPIC was "up in arms" over the contract price Medco was offering even though they had always accepted contracts for similar prices in the past.

EPIC counters that it needed to accept low reimbursement rates in the past in order to prove that it could deliver on the participation of its 200 independent pharmacies. Now that EPIC had established that their pharmacies would honor contracts entered into on their behalf by EPIC, the board felt that it was time to seek

higher rates of reimbursement. EPIC's board voted not to participate after brief negotiations with Medco due to the low rate and delays in payments by Medco on other contracts. If EPIC's board had voted to accept the contract, all 200 independent pharmacies would be bound by their decision. Rather than accept the rate, EPIC gave Medco permission to directly solicit the individual pharmacies.

3. *Actions of Rite Aid's Jim Krahulec*

Medco contends that the presence of Jim Krahulec at trade organization meetings and conference calls raises an inference of conspiracy given Krahulec's past activity. Krahulec entered [*39] into a consent judgment with the Federal Trade Commission ("FTC") whereby the FTC ordered him not attend "a formal or informal meeting of representatives of pharmacy firms that [he] expects or reasonably should expect will facilitate communications . . . concerning one or more firms' intentions or decisions with respect to entering into, refusing to enter into, threatening to refuse to enter into . . . any existing or proposed participation agreement . . ." (A.57).

4. *EPIC's Statement that the Plan "Would Kill Us"*

Jim Miller, EPIC's representative at a September 29 meeting of the Maryland Association of Chain Drug Stores, stated that he did not "know why we're having a meeting to discuss the Medicaid waiver considering that if the Maryland deal went through it would kill us."

EPIC negotiated with Medco until mid-December, giving Medco's representative numerous opportunities to address the board concerning the merits of Medco's plan. Even after rejecting Medco's plan, EPIC permitted direct solicitation of the independent pharmacies resulting in participation by half of them in Medco's network.

5. *Rite Aid's Advertisement*

Medco also contends that the advertisement that [*40] Rite Aid ran in the Baltimore Sun and the Washington Post is evidence of a conspiracy. When Rite Aid ran the ad, none of the other retailers gave Rite Aid permission to include their names, and none of them protested that their names were included.

As justification for its actions, Rite Aid relies on a December 19, 1995, article in the Baltimore Sun announcing that "three large chains and a network of independent pharmacies said yesterday that they are refusing to participate in the state employee's drug plan." (A. 60) Rite Aid allegedly ran the advertisement on December 21, because it felt that it should explain to its customers why it was not participating and wanted to make a public statement concerning the State's award of the contract to Medco. The advertisement asked State employees to contact the governor or their union to seek a change in the Plan and listed other pharmacies that had refused to participate in the Plan.

6. *Conversations Between High Level Corporate Officers*

As a forecast of evidence from which a reasonable inference of conspiracy may be drawn, Medco also relies on telephone conversations and September 15, 17, 18, 19 and 20 conference calls, and the appellees' [*41] failure to remember these conversations. In their answer to Medco's complaint, appellees denied having ever talked to each other. Later, in deposition testimony, representatives of Rite Aid, EPIC and NeighborCare testified under oath that they had not communicated with their competitors regarding the Maryland Plan. When new evidence surfaced, appellees admitted talking about the plan but submitted that they were only lobbying or that they had simply forgotten their prior conversations.

It challenges logic to assert that individuals concerned about the loss of millions of dollars to a new pharmacy plan would simply forget conversations about the plan. Evidence of these forgotten conversations is Medco's strongest argument for reversal of the district court's summary judgment order. This evidence must be viewed in light of all the evidence in determining if Medco has carried its ultimate burden of establishing a reasonable inference of a conspiracy.

7. *Statements by EPIC and Giant on December 7, 1995*

Finally, Medco asserts that statements made by NeighborCare and Giant on December 7, 1995, that Medco "would not have a network," excludes the possibility of independent action. This [*42] statement, along with the selective memories of appellees' corporate officers regarding their telephone conversations, does not meet the quantum of proof required to establish lack of independent action.

8. *Evidence as a Whole*

"[A] court should not tightly compartmentalize the evidence put forward by the nonmovant, but instead should analyze it as a whole to see if together it supports an inference of concerted action." *Petruzzi, 998 F.2d at 1230.* Taking all of the evidence together, the court is not convinced that Medco has presented evidence to support an inference of concerted action. Two examples of an inference of conspiracy presented by Medco, fail under closer review.

The district court concluded that to infer improper restraint of trade from the advertisement was pure speculation, and we agree. There was no reason for the other retailers to object to Rite Aid's justification for their collective failure to join the network.

Medco contends that EPIC's failure to join the network was not a mere coincidence, but that EPIC's actions indicate a conspiracy. However, the court does not believe that a conspirator would permit Medco to essentially invalidate [*43] its decision not to participate by allowing Medco to directly solicit its independent pharmacies. A conspiracy based on EPIC's actions is not a reasonable inference from the facts.

We must avoid the danger of an inevitable competition chilling result that would occur should a low quantum of proof be required before a party may harness the power of the Sherman Antitrust Act against facially legitimate, procompetitive business practices. Viewing all the plus factors presented by Medco, the rebuttal by appellees and the additional evidence Medco asserts tends to exclude independent action, we conclude that Medco has not met the threshold of forecasting the quantum of proof required for its claims to survive summary judgment. All of the evidence viewed together does not create a reasonable inference of conspiracy.

Had Medco been able to forecast evidence of activity that was completely outside of normal business practices in negotiating for health care networks, actions not in the best economic interests of the appellees or an utter failure to negotiate with Medco along with the record of appellees' communications, this likely would be a different case.

Medco has failed to establish [*44] that the evidence is more consistent with conspiracy than with independent action. Medco's forecast of evidence does not tend to exclude the possibility that the pharmacies' decisions were independent or were made for legitimate business reasons. Thus, viewing the facts in a light most favorable to appellant, Medco has failed to present material issues of disputed fact necessitating a trial.

IV. *CONCLUSION*

For the reasons stated above, we conclude that the district court properly ruled that no genuine issue of material fact exists on the issue of Medco's claim that the defendants conspired to boycott the Maryland Plan. The district court correctly found that Medco failed to forecast sufficient evidence tending to exclude independent conduct by the defendants. Therefore, the ruling of the district court is

AFFIRMED.