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.	)	

COMPLAINT COUNSEL'S REPLY TO RESPONDENT'S POST TRIAL BRIEF

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INTRODUCTION

Strip away the pretense that Respondent the North Carolina State Board of Dental Examiners ("Board") is implementing the law of the State of North Carolina, and here is what remains: A group of dentists, acting in concert and through the vehicle of the Board, are engaged in a multi-prong campaign to exclude non-dentists from competing with dentists in the provision of teeth whitening services.[1] The Board does not deny that there is an "anticompetitive effect arising from the State Board's challenged conduct." Respondent's Post Trial Brief ("RPTB") at 1. The Board's principal defense is to claim that its conduct is "reasonable" because the public is better off when the range of available teeth whitening options available to North Carolina consumers is narrowed. Consumers who desire teeth whitening services – including consumers who prefer the non-dentist operations previously available in malls and salons – should be compelled to visit their dentists. So sayeth the dentists.

[1] Opinion of the Commission, *In re North Carolina Board of Dental Examiners*, No. 9343, at 13 (Feb. 3, 2011) ("State Action Opinion") (rejecting the contention that the Board's determination that teeth whitening may be performed only under the supervision of a dentist represents the policy of the State of North Carolina).

What antitrust law says is that competitors are prohibited from subverting the competitive process and imposing their preferences upon the marketplace. The Board fundamentally misapprehends the meaning of the terms "reasonable" and "unreasonable" as used in antitrust law. A restraint is not reasonable because the dentists claim to be (or even are) moderate, well-meaning, guided by their view of state law, or experts in the oral cavity. A restraint is reasonable if and only if it enhances competition. A restraint is unreasonable where, as here, the restraint interferes with the competitive process and injures consumers. *See Nat'l Soc. of Prof'l Eng'rs v. United States*, 435 U.S. 679, 690-691 (1978).

The Board has decided that teeth whitening is a service that may be performed only under the supervision of a dentist, and is using the imprimatur of state authority to exclude non-dentists from the marketplace. The Board's conduct constitutes a clear and unmistakable violation of Section 5 of the Federal Trade Commission Act.

1. Concerted Action. A single entity controlled by competitors is a concerted actor for purposes of the antitrust laws. Examples of these concerted actors include the National Football League, the Indiana Federation of Dentists, and the Massachusetts Board of Registration in Optometry.[2] The Board has not and cannot distinguish these cases. The Board's claim that the dentist-members of the Board lack anticompetitive intent does not in any way show that there is no agreement among these members.

The Board's contention that its agents do not conspire with one another, or with outside parties, misses the boat. The Board has been issuing cease and desist orders and using other

[2] *American Needle, Inc. v. NFL*, 130 S. Ct. 2201 (2010); *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447 (1986); *In re Mass. Bd. of Registration in Optometry*, 110 F.T.C. 549 (1988).

ploys to exclude non-dentist competitors.[3] This conduct by the Board (a concerted actor) satisfies the concerted action requirement. (*See infra* Section V).

2. Prima Facie Showing of Competitive Injury. Complaint Counsel has shown, in three distinct ways, that the Board's campaign to eliminate non-dentist operators is prima facie anticompetitive. Stated differently, in three different ways we reach the unremarkable conclusion that, from the perspective of the consumer, having access to a desired alternative (non-dentist services) is better than eliminating such access. *See United States v. Brown University*, 5 F.3d 658, 675 (3d Cir. 1993) ("Enhancement of consumer choice is a traditional objective of the antitrust laws and has also been acknowledged as a procompetitive benefit.").

It is not necessary for Complaint Counsel to define a relevant market.[4] And the exclusion of non-dentist competitors is not excused because these competitors could perhaps have disregarded the orders issued by the Board. (*See infra* Section II).

3. Efficiency Defense. The Board's primary defense is that non-dentist teeth whitening poses a health and safety risk, and hence that this service should not be available to consumers. The record evidence regarding health and safety is disputed, voluminous, and technically complex. The Court need not wade into this controversy.

As a matter of law, the Board's claim that the expansion of consumer choice is itself

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[3] The methods of exclusion employed by the Board include issuing cease and desist orders to non-dentist providers; issuing cease and desist orders to manufacturers of products and equipment used by non-dentist providers; dissuading mall owners from leasing to non-dentist providers; and enlisting the cosmetology board also to threaten non-dentist providers. (Complaint Counsel's Proposed Findings of Fact ("CCPFF") ¶¶ 254-377).

[4] If this exercise were necessary, the evidence shows: (i) a market comprised of the four modes of teeth whitening: dentist services, non-dentist services, dentist kits, and over-the-counter products (*e.g.*, whitening strips); and/or (ii) a market comprised of dentist services and non-dentist services.

undesirable is not a valid antitrust defense. *See IFD*, 476 U.S. at 463, 465; *NSPE*, 435 U.S. at 695; *Wilk v. American Medical Ass'n (Wilk I)*, 719 F.2d 207, 228 (7th Cir. 1983); *Wilk v. American Medical Ass'n (Wilk II)*, 895 F.2d 352, 365 (7th Cir. 1990); *Virginia Acad. of Clinical Psychologists v. Blue Shield of Virginia*, 624 F.2d 476, 485 (4th Cir. 1980). The Board's claim that its members are well-intentioned is likewise not a valid antitrust defense.

If the testimony and documents regarding health and safety contentions are examined, the Court will find that the Board's claims are without evidentiary support. They are a combination of prejudice and unsupported hypotheses. (*See infra* Section III).

4. The Legality of Non-Dentist Services in North Carolina. The Board's brief repeats again and again the contention that non-dentist teeth whitening operators are engaged in the unauthorized practice of dentistry. This is likely to be inaccurate. And this is certainly irrelevant to the Board's antitrust liability. *IFD*, 476 U.S. at 465; *Fashion Originators' Guild v. FTC*, 312 U.S. 457, 468 (1941). In particular, the Court should reject the Board's claim that the interstate commerce requirement requires a showing that the affected commerce comports with state law. (*See infra* Sections I, IV).

5. Tenth Amendment and Commerce Clause. These Constitutional provisions have no bearing on the scope of a permissible or appropriate remedial Order. (*See infra* Section VI).

ARGUMENT

I. THE BOARD IS NOT IMPLEMENTING STATE LAW

The Board's mantra is that it is simply enforcing a North Carolina statute that prohibits non-dentists from providing teeth whitening services. In antitrust law, this is called the state action defense. *Parker v. Brown*, 317 U.S. 341 (1942). The Board had a full and fair

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

Also, as a matter of state law, the Board is not authorized to order a person or entity that it suspects of violating the Dental Practice Act to cease and desist. This authority rests with the state courts. (CX0019 at 006, 007, 020-21, Dental Practice Act § 90-27, 29, 40, 40.1). The Board is "evad[ing] judicial review of its decision to classify teeth whitening as the practice of dentistry by proceeding directly to issue cease and desist orders purporting to enforce that unsupervised decision." *State Action Opinion* at 17.[5]

II. THE BOARD'S ACTIONS EXCLUDE NON-DENTIST PROVIDERS OF TEETH WHITENING SERVICES, AND ARE PRIMA FACIE ANTICOMPETITIVE.

Complaint Counsel's Post Trial Brief demonstrates in three separate ways that the Board's conduct is prima facie anticompetitive, and hence that the conduct violates Section 5 in the absence of a sufficient efficiency justification. The rule of reason analysis presented by Complaint Counsel is faithful to Supreme Court precedent and *Realcomp* – the Commission's most recent and most authoritative statement regarding the proper analysis of concerted restraints on competition. *In re Realcomp II, Ltd.*, No. 9320, 2009 F.T.C. LEXIS 250 (FTC Oct. 30, 2009), *aff'd*, *Realcomp II, Ltd. v. FTC*, No. 09-4596, 2011 U.S. App. LEXIS 6878 (6th Cir. Apr.

[5] We note that the Board's view as to whether it has authority under state law to issue cease and desist orders changes from one court filing to the next.

6, 2011).

In contrast, the Board fails to follow – fails even to cite – *Realcomp*. The arguments advanced by the Board are legally flawed and unsupported by the record.

A. The Board's Campaign to Exclude Non-Dentist Teeth Whitening is Inherently Suspect, and This is Sufficient to Establish a Prima Facie Case of Competitive Harm

Complaint Counsel's Post Trial Brief explains that concerted action calculated to exclude from the marketplace a competing product is inherently suspect. We show that this conclusion is supported by basic economic theory, an extensive economic literature, and Supreme Court precedent. The Board has nothing to say about either economic theory or the economic literature; both teach that concerted action by incumbents to exclude competing products tends to injure competition and consumers. As for the case law, the Board's discussion is without substance. [6]

The Board asserts that the inherently suspect mode of analysis (what the Board calls quick look rule of reason) is applicable only to horizontal agreements to fix prices or restrict output. The Board ignores almost the entire line of cases condemning, without an assessment of market power or direct proof of harm, horizontal conspiracies to exclude a rival product. *Allied Tube & Conduit Corp. v. Indian Head*, 486 U.S. 492, 501-02 (1988); *Am. Soc'y of Mechanical Eng'rs v. Hydrolevel*, 456 U.S. 556, 559, 577-78 (1982); *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656, 660 (1961); *Fashion Originators'*, 312 U.S. at 465.

[6] Complaint Counsel does not dispute the Board's contention that Complaint Counsel bears the initial burden of showing a prima facie case of competitive injury. The Board is not correct in claiming that inherently suspect analysis shifts this burden to the respondent (RPTB at 5). *See* Complaint Counsel's Post-Trial Brief ("CCPTB") at 75-85.

The Board addresses only *IFD*, and then misinterprets its lesson. The Supreme Court evaluated an agreement among dentists to withhold x-rays from insurance companies. The Court concluded that it is inherently suspect for competitors to agree to "withhold from their customers a particular service that they desire." *IFD*, 476 U.S. at 459. This is a powerful re-affirmation that the purpose of the antitrust laws is to ensure that the marketplace is responsive to consumer preferences, and free from manipulation by powerful competitor alliances. *See also NCAA v. Bd. of Regents*, 468 U.S. 85, 107-08 (1984) ("A restraint that has the effect of reducing the importance of consumer preference in setting price and output is not consistent with the fundamental goal of antitrust law.").

The Board argues that *IFD* is distinguishable because the non-dentist service desired by North Carolina consumers is assertedly unsafe and assertedly illegal under state law. This represents a fundamental misreading of *IFD*, as both of these arguments were advanced by the Indiana dentists. The Indiana dentists claimed that providing x-rays to insurance companies would harm consumers (*IFD*, 476 U.S. at 462-63), and would engage the insurance companies in the unauthorized practice of dentistry (*id.* at 465). Both of these assertions were explicitly judged in *IFD* to be irrelevant to liability, and therefore they cannot be a basis for distinguishing this precedent.

The Board's conduct is inherently suspect and requires justification.

B. The Record Contains Substantial Direct Evidence of the Adverse Competitive Effects Caused By the Board's Conduct

Complaint Counsel's Post Trial Brief summarizes the direct evidence that the Board's

actions have resulted in both the forced exit of non-dentist competitors, and the deterred entry of potential competitors. This evidence is sufficient to establish a prima facie case of competitive harm.

The Board does not deny that this marketplace injury occurred. However, according to the Board, non-dentist providers could have ignored, or tested, or circumvented the Board's cease and desist orders. The Board's musings about how non-dentists could have responded to a Board order are irrelevant. The Commission evaluates competitive harm by viewing the marketplace as it is, without regard to creative counter-factuals. *See, e.g.*, *Realcomp*, 2009 F.T.C. LEXIS 250 at *100.

Realcomp, an association of real estate brokers, operated a computer data base (a multiple listing service) which was used by members to disseminate and search for information about houses available for sale. Realcomp adopted various policies to deter brokers from accepting listings at discounted rates. Pursuant to Realcomp's "Search Function Policy," the default setting on the association's multiple listing service searched only full service/full price listings, and omitted listings where the broker had agreed to accept a discounted rate. Realcomp argued that the Search Function Policy did not harm competition "because users of the Realcomp MLS could override the default settings" (and in this way secure information about discounted listings). *Id.* at *98-100. Thus Realcomp, like the Board, offered the Commission a hypothetical world. In Realcomp's hypothetical world, all brokers are technologically savvy and highly motivated to seek out every listing, and Realcomp's anticompetitive tactics would be unsuccessful. The Commission correctly disregarded this story, explaining: "[D]ata and broker testimony show that many brokers did not override the default parameters. On this point we rely

upon the record evidence showing what brokers actually do." *Id.* at *100.

In North Carolina, what many non-dentist competitors actually do, upon receiving a cease and desist order, is to cease operating. This response by non-dentist operators is intended by the Board; it is foreseeable, reasonable, and even commendable.

The Board answers that its orders "did not have the immediate, irreversible, and unreasonable effect of shutting down businesses." RPTB at 8. The Board's argument is sheer sophistry. True, the Board did not send thugs to the malls to dismantle non-dentist teeth whitening operations. But this is not a prerequisite for liability. It is sufficient to establish liability that the Board's cease and desist orders and other extra-judicial enforcement activities were a material cause or a substantial factor in the demise of these businesses.[7] The mechanism of injury here, using the imprimatur of the State to coerce exit, is unusual but not entirely without precedent. *See Am. Soc'y of Mechanical Eng'rs v. Hydrolevel*, 456 U.S. 556, 559 (1982); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).

Hydrolevel was an antitrust claim against ASME, a standard setting body whose codes and standards are highly influential within government and industry. The Court characterized ASME as an "extra-governmental agency" that prescribes rules of commerce, and wields the "power to frustrate competition in the marketplace." *Hydrolevel*, 456 U.S. at 570-571. In order to impede the entry of a new and competing technology, a subcommittee vice chairman of ASME, acting with the imprimatur of the association, distributed a document falsely representing that the product was unsafe and violative of the association's code. This document caused (but did not physically compel) consumers to shun that product. ASME was judged

[7] *J.B.D.L. Corp. v. Wyeth-Ayerst Labs., Inc.*, 485 F.3d 880, 887 (6th Cir. 2007); *Conwood Co. v. U.S. Tobacco Co.*, 290 F.3d 768, 788-89 (6th Cir. 2002).

liable for the ensuing injury to competition. *Id.* at 571-572, 577.

In *Goldfarb*, the County Bar promulgated a schedule of recommended minimum prices for common legal services. Although no formal disciplinary actions were taken to compel adherence to the fee schedule, lawyers did generally adhere to the schedule and did not offer rates below those specified in the publication. The County Bar argued that the fee schedule was "merely advisory." 421 U.S. at 781. The Court rejected this argument, recognizing that the absence of formal enforcement actions did not negate the causal link between the fee schedule and consumer injury. The prospect of disciplinary actions by the State Bar together with "the desire of attorneys to comply with the announced professional norms" (*id.*) were sufficient to eliminate price competition among attorneys. *Id.* at 781-82.

In the present case, the actual and dispositive facts are that businesses exited the market, other firms were deterred from entering, and consumers were harmed. All of this was caused by the Board's actions. This evidence establishes a prima facie of competitive harm.

C. Complaint Counsel Is Not Required To Prove A Relevant Market

According to the Board, in order to establish a violation of the antitrust laws, Complaint Counsel "must establish the 'relevant market' within which it may evaluate the State Board's actions." RPTB at 15. This is not a correct statement of the law. And in any event, Complaint Counsel has established the relevant teeth whitening market with sufficient clarity.

Complaint Counsel is required to show that the Board's actions unreasonably restrain competition. Defining the relevant market is simply one analytical tool, a tool that may or may not be helpful in a given case. Accordingly, market definition is not a prerequisite to establishing liability under the rule of reason. *See California Dental Ass'n. v. FTC*, 526 U.S.

756, 780-81 (1999) (the rule of reason calls for "an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint"); *IFD*, 476 U.S. at 460 (even if a restraint is "not sufficiently 'naked' to call this principle [of a restraint being anticompetitive by its very nature] into play, the Commission's failure to engage in detailed market analysis [was] not fatal to its finding of a violation of the Rule of Reason"); *NCAA*, 468 U.S. 85, 109 (1984) ("[W]here there is an agreement not to compete in terms of price or output, 'no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement.'") (quoting *NSPE*, 435 U.S. at 692); *Associated Gen. Contractors v. California State Council*, 459 U.S. 519, 528 (1983) ("Coercive activity that prevents its victims from making free choices between market alternatives is inherently destructive of competitive conditions and may be condemned even without proof of its actual market effect."); *Todd v. Exxon Corp.*, 275 F.3d 191, 206 (2d Cir. 2001) ("[A]n actual adverse effect on competition . . . . arguably is more direct evidence of market power than calculations of elusive market share figures."); *Toys "R" Us v. FTC*, 221 F.3d 928, 937 (7th Cir. 2000) (reduction in competitor's output "is sufficient proof of actual anticompetitive effects that no more elaborate market analysis was necessary"); *RE/Max Int'l, Inc. v. Realty One, Inc.*, 173 F.3d 995, 1018 (6th Cir. 1999) ("[A]n antitrust plaintiff is not required to rely on indirect evidence of a defendant's monopoly power, such as high market share within a defined market, when there is direct evidence that the defendant has actually set prices or excluded competition."); *Realcomp II, Ltd. v. FTC*, No. 09-4596, 2011 U.S. App. LEXIS 6878, at *26 (6th Cir. Apr. 6, 2011) ("If adverse effects are clear, inquiry into market power is unnecessary.").

The Commission's opinion in *Realcomp* discusses three variants of the rule of reason,

none of which requires market definition. *See* Complaint Counsel's Post Trial Brief at 74-94. One variant requires that the respondents have market power. But even a showing of market power (the power to exclude) does not require market definition where the evidence otherwise shows that the conspiring parties control an asset or facility necessary for effective competition. *See, e.g.*, *Nw. Wholesale Stationers v. Pac. Wholesale Stationers, Inc.*, 472 U.S. 284, 296 (1985); *Silver v. N.Y. Stock Exchange*, 373 U.S. 341, 347-49 (1963); *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1361 (5th Cir. 1980).[8]

Consider now the economic evidence. The trial record establishes that consumers interested in obtaining a whiter, brighter smile choose among four alternatives, and that these alternatives constitute a relevant market: (i) non-dentist services, (ii) dentist services, (iii) dentist supplied kits, and (iv) OTC products.[9] A second relevant market consists of just the closest substitutes: non-dentist services and dentist services. *See FTC v. Whole Foods Market, Inc.*, 548 F.3d 1028, 1038-39 (D.C. Cir. 2008). The Board would exclude from both markets non-dentist services. This makes little sense.[10] But more importantly, what is missing from the Board's

[8] This variant of the rule of reason is discussed at greater length in Complaint Counsel's Post Trial Brief ("CCPTB") at 85-89.

[9] *Geneva Pharm. Tech. Corp. v. Barr Labs. Inc*., 386 F.3d 485, 496 (2d Cir. 2004) ("The relevant market is defined as all products 'reasonably interchangeable by consumers for the same purposes,' because the ability of consumers to switch to a substitute restrains a firm's ability to raise prices above the competitive level." (*quoting Unites States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956))); *United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 239 (2d Cir. 2003) ("A distinct product market comprises products that are considered by consumers to be 'reasonabl[y] interchangeab[le]' with what the defendant sells." (*quoting Eastman Kodak Co. v. Image Tech'l Servs., Inc.*, 504 U.S. 451, 482 (1992))); *Telecor Commc'ns, Inc. v. Southwestern Bell Tel. Co.*, 305 F.3d 1124, 1130 (10th Cir. 2002).

[10] According to the Board, the relevant market does not include non-dentist teeth whitening because this service is (in the Board's view) illegal. RPTB at 16-17. Even assuming *arguendo* that non-dentist service is illegal, this view of the relevant market is incorrect. One cannot

brief is any explanation, any explanation whatsoever, for why this uncertainty over the contours of the relevant market matters to the economic analysis. It does not matter.

Even if it were necessary to define a relevant market in this case, whether one defines the market as teeth whitening services (dentist and non-dentist) as is alleged in the Complaint, or more broadly so as to include all four alternatives, does not alter the competitive effects analysis. In both cases, the exclusion of non-dentist teeth whitening operations results in a combination of the following anticompetitive effects:

- Loss of an innovative product.

- Higher prices and smaller consumer surplus for consumers shifting to dentists. (Note the Board's acknowledgment that as a result of its exclusionary conduct, some consumers will "pay a higher up-front cost for dentist supervised services." RPTB at 6.)

- Smaller consumer surplus (including delayed results) for consumers shifting to OTC products.

- Loss or consumer surplus for consumers who forgo teeth whitening.

- Higher prices for consumers whose first choice is dental services.[11]

(CCPFF ¶¶ 681-691). The Board and the Board's economic expert do not contest this economic analysis. The precise contours of the relevant market may affect the magnitude of consumer injury, the magnitude of gain realized by the dentists, and the magnitude of the price increase. But Complaint Counsel is not seeking money damages, and there is no need to quantify the

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evaluate the competitive effects of excluding non-dentist teeth whitening by pretending that it does not exist. (*See* Kwoka, Tr. 1168 (explaining that an illegal product can be considered part of a relevant market for purposes of economic analysis); *accord* Baumer, Tr. 1711 ("The fact that [the product] is illegal doesn't mean there isn't cross-price elasticity.")).

[11] *See Bolt v. Halifax Med. Center*, 891 F.2d 810, 820 (11th Cir. 1990) ("One of the first principles of economics is the inverse relationship of supply to price. If doctors in a hospital can exclude other doctors from practicing in that hospital, then obviously the remaining doctors can charge a higher price for their services.").

dentists' gain or the consumer harm. It is sufficient that the Court can confidently conclude that the exclusion of non-dentist teeth whitening is likely to result in significant consumer harm, absent some countervailing efficiency justification. Complaint Counsel has shown that the Court can reach this conclusion under three separate rule of reason standards, and in each case without defining a relevant market.[12]

III. THE BOARD'S ASSERTED DEFENSES ARE INSUFFICIENT

The Board has the burden of demonstrating a countervailing efficiency defense for its conduct. The Board must establish (i) that its justifications are legitimate (that is, cognizable and plausible), (ii) that its justifications are supported by the record evidence, and (iii) that the restraints imposed by the Board are reasonably necessary to achieve a legitimate, pro-competitive objective. *Realcomp*, 2009 F.T.C. LEXIS at *39-40. If even one of these standards is not satisfied, then the Board's efficiency defense must be rejected.

The Board's efficiency arguments are deficient.

A. The Board's Actions Are Not Necessary To Assure The Availability of Safe or Low-Cost Teeth Whitening Services Supervised By Dentists

The Board avers that by excluding non-dentists, the Board ensures that dentists can provide "safe" teeth whitening "at a price approximating their [the dentists'] marginal cost" of producing this service. RPTB at 6. But there is no applicable economic theory, no logic, and no empirical evidence showing that the exclusion of non-dentists either enhances the safety of dentist teeth whitening services, or reduces the dentists' costs of providing these services. The Court should simply disregard the Board's naked assertions.

[12] Dr. Kwoka did not define a relevant market, but still concluded (and demonstrated) that the exclusion of non-dentist services is anticompetitive absent an efficiency justification. (CCPFF ¶¶ 563-566, 681-710).

B. The Board's Public Interest Arguments Are Not A Cognizable Antitrust Defense

The Board claims that non-dentist teeth whitening entails "numerous health hazards," and is less safe than dentist supervised services. Although many consumers wish to patronize non-dentist providers, according to the Board, this alternative should be eliminated. Complaint Counsel's Post Trial Brief explains that this is not a valid antitrust defense. The claim that competition will lead consumers to make unwise choices is incompatible with the policy of the antitrust laws, and is always rejected as a matter of law. *See NSPE*, 435 U.S. at 695 (rejecting as non-cognizable the claim that, absent a ban on competitive bidding, price competition among engineers will lead consumers to select dangerous and deficient engineering services); *IFD*, 476 U.S. at 463 (rejecting as non-cognizable the claim that, absent a ban on a desired serviced (providing dental x-rays to insurance companies), patients will receive inadequate dental care); *Wilk I*, 719 F.2d at 228 (7th Cir. 1983) (rejecting as non-cognizable the claim that the elimination of chiropractics is preferable to exposing patients to this "dangerous quackery"); *Virginia Academy*, 624 F.2d at 485 (rejecting as non-cognizable the claim that the exclusion of clinical psychologists is socially beneficial).

The *Brown University* case, relied on by the Board, is not to the contrary. The Department of Justice alleged that Ivy League universities and MIT (collectively, the "Overlap" universities) violated Section 1 of the Sherman Act by agreeing to award financial aid exclusively on the basis of need (*e.g.*, no athletic scholarships), and to determine jointly the amount of financial aid that would be awarded to commonly admitted students. The universities claimed that the financial aid restraints made an Overlap education affordable for a larger number of talented but needy students. The court recognized that it was obliged to reject any

pure social welfare defense unrelated to the impact of the restraint on competitive conditions. *Brown University*, 5 F.3d at 677 ("Both the public safety justification rejected by the Supreme Court in *Professional Engineers* and the public health justification rejected by the Court in *Indiana Dentists* were based on the defendants' faulty premise that consumer choices made under competitive market conditions are 'unwise' or 'dangerous.'"). However, the court credited the argument that the financial aid restraints served to enhance the range of choices available to low-income students. As the enhancement of consumer choice is "a traditional objective of the antitrust laws and . . . a procompetitive benefit" (*id.* at 675), the universities had advanced a cognizable antitrust defense.

Brown University stands for the proposition that a restraint that is adopted for reasons of social policy may survive antitrust review if the restraint also enhances competition (for example, by enhancing consumer choice). But this principle does not save the Board from liability because the exclusion of non-dentist providers eliminates an alternative desired by many consumers but adds no new alternative to the marketplace. The Board's exclusion of non-dentist providers constricts rather than enhances consumer choice.

C. The Board's Claims Regarding the Risks of Non-Dentist Teeth Whitening Are Not Supported By The Record Evidence

The Board contends that its efforts to eliminate non-dentist providers are justified because non-dentist teeth whitening "could result in serious and expensive medical complications." RPTB at 14. Even if this were a cognizable defense (it is not) the health and safety issues asserted by the Board "must be established by record evidence." *In re Indiana*

Fed'n of Dentists, 101 F.T.C. 57, 175 (1983). This means that the Court cannot simply defer to the asserted expertise of the Board. Indeed, in light of the history of unjustified restraints adopted by financially-interested regulators much like the Board (CCPFF ¶¶ 572, 579-582, 587-589, 596, 599), it would be more appropriate to view this state board's self-serving arguments with (in Dr. Baumer's words) a "healthy skepticism." (Baumer, Tr. 1916-1917).[13]

Not one of the health/safety "concerns" identified by Respondent can withstand scrutiny. (*See, e.g.*, Complaint Counsel's Reply to Respondent's Proposed Findings of Fact ("CCRRPFF") ¶¶ 436, 447, 450-458). Board members complain that lay-operators of teeth bleaching facilities do not adhere to the same infection control/sanitation precautions as dentists. True, but non-

[13] The Board cites *Withrow v. Larkin*, 421 U.S. 35 (1975), for the proposition that Board members, like judges, should be presumed to act with honesty and integrity. With all its honesty and integrity, the Board somehow fails to point out that this presumption is overcome where, as here, the decisionmaker has a financial interest in the controversy: "[V]arious situations have been identified in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable. Among those cases are those in which the adjudicator has a pecuniary interest in the outcome . . . ." *Id.* at 47. *See also State Action Opinion* at 11 ("[A]bsent antitrust to police their actions, unsupervised self-interested boards would be subject to neither political nor market discipline to serve consumers' interests.").

The Board argues that its financial stake in teeth whitening is small. The Commission addressed this issue:

> Although there may be some factual dispute over the relative importance of teeth whitening revenues to a dental practice's total revenues, the undisputed facts show that North Carolina dentists – including some of those dentists who complained to the Board about non-dentist teeth whitening – perform teeth whitening in their private practices. Non-dentists also provide teeth whitening services in North Carolina, and advertise themselves as a lower priced alternative for dentist teeth whitening. Under these circumstances, "common sense and economic theory, upon both of which the FTC may rely," dictate the conclusion that Board actions in this area could be self interested.

State Action Opinion at 13 (citations omitted).

dentist-providers of teeth bleaching do one thing: assist consumers in self-application of bleaching materials. (*See* CCPFF ¶¶ 198, 453, 454). In marked contrast, dentists are hands-on practitioners who do a variety of risky and invasive procedures involving close-up contact, as well as teeth bleaching. And dentist-provided teeth bleaching is itself more far more invasive than lay-provided teeth bleaching. As Dr. Giniger explained, without contradiction, with in-office teeth bleaching dentists isolate the teeth by doing things like placing retractors in the patient's mouth and painting barrier materials on the gums and lips. (CCPFF ¶¶ 178-179, 427). In Nightguard Vital Bleaching, the dentist takes an impression of the patient's teeth by placing in the mouth, adjusting, and removing an alginate-filled tray, among other things. *(See* Giniger, Tr. 196-202; *see also* CCPFF ¶183-184). Most dentists use infection control/sanitation procedures appropriate to dental practice, though not all. (*See* Giniger, Tr. 264 (discussing journal article indicating many dentists fail to implement required infection control/sanitation procedures); *see also* CCPFF ¶¶ 1093 (Board has found licensed dentists who have engaged in unsanitary practices)). Lay-providers of teeth bleaching use infection control/sanitation procedures appropriate to the work *they* do. (*See* CCPFF ¶ 1079; *see also* CX0630 at 001-013). These protocols often are in writing, and compliance is a high priority for the owners of the teeth bleaching businesses and the establishments in which they operate, which often have significant reputational interests at stake. (CCPFF ¶ 1106; *see also* CCPFF ¶ 1104-1105 (market disciplines unsafe or ineffective products and services)). Further, but for the actions of the Board, licensed cosmetologists, some of whom withdrew from the market in response to Board actions, could provide teeth bleaching services in North Carolina. (CCPFF ¶¶ 629-633, 635-636). Licensed cosmetologists adhere to extensive infection control/sanitation regulations prescribed by their

licensing authority. (CCPFF ¶ 1092).

The Board has claimed, in particular, that a lack of running water in lay-operated facilities poses an insuperable problem and a basis for excluding non-dentist-providers from the market. It does not. To begin, salons and in-line mall-located teeth bleaching operations do not lack running water. (CCPFF ¶ 1094). Further, running water is or can be provided to teeth bleaching kiosks in malls on request. (CCPFF ¶ 1097). But finally, running water is not necessary to effective infection control/sanitation in non-dentist-provided teeth bleaching. (CCPFF ¶ 1098). The proper use of sanitizing gels and foams is adequate for infection control/sanitation given that lay-providers do not put their hands in the mouths of consumers. (CCPFF ¶¶ 198, 453, 454; Owens, Tr. 1457 (links need for running water to hands in consumers' mouth)).

Non-dentist providers typically use pre-packaged, single use bleaching materials that are self-applied by consumers; they regularly disinfect items of equipment like "dental chairs" and LED lights; and they glove (and re-glove) up prior to interacting with each new consumer. (*See* CCPFF ¶¶ 198, 453, 457, 1099 (describing typical protocol for lay-operated facility), 449-451, 1078 (discussing pre-packaged, single use products)). The adequacy of their infection control/sanitation measures is attested to by one critical fact: despite millions of teeth bleaching events at lay-operated facilities, no witness was aware of even one reported instance of a customer being injured by the spread of a communicable disease or otherwise as a result of an infection control/sanitation failure at a non-dentist-operated teeth bleaching facility. (CCPFF ¶¶ 734, 1077).

In its Post Trial Brief, the Board identifies other supposed dangers as well: tooth damage;

necrosis (destruction of the nerve of the tooth); choking; allergic reaction; and, of course, "tearing of mouth and lip flesh." There is abundant evidence that non-dentist teeth bleaching does not damage the enamel of teeth *in vivo*, CCPFF ¶¶ 947, 949-950; that it does not cause allergic reaction (in part because hydrogen peroxide is produced in the human body as a part of cellular metabolism), CCPFF ¶¶ 931-944; and that, unlike dentist-provided teeth whitening, it does not involve the application of sufficiently concentrated hydrogen peroxide or sufficiently hot bleaching-accelerating lights to heat the pulp and so destroy the nerve of the tooth. (CCPFF ¶¶ 957-962). As for the ripping of lips and mouth, this is a recent invention by the Board and is utterly untethered from any supporting evidence. Despite millions upon millions of non-dentist provided teeth bleachings over a several year period, not a single witness could testify to any literature reporting actual harm to a consumer as a result of these supposed dangers. (CCPFF ¶ 955).[14] Indeed, not one witness could identify a verified incident in which any consumer was harmed as a result of these supposed dangers. How could that be if these dangers were real? It could not, and the supposed dangers are not real.

Nor is there any real-world counterpart to Dr. Haywood's theory that non-dentist teeth bleaching masks pathologies thereby inhibiting diagnosis and treatment and resulting in harm. (CCPFF ¶ 717). As Dr. Giniger explained, numerous low-probability events *all* would have to occur for pathology to be masked so as to impede diagnosis/treatment. (CCPFF ¶¶ 1010-1044). Among them, the teeth bleaching would have to be so effective as to substantially eradicate all traces of the trauma-induced stain. But Dr. Haywood concluded that non-dentist teeth bleaching is ineffective, and unlikely to lighten severe staining so as to make it unnoticeable by a dentist.

[14] To be precise, there is one Case Report from 1991 involving a claim of deenamelization of a single person's teeth as a result of at-home use of an OTC product.

(CCPFF ¶ 1029-1031). Although Dr. Giniger finds that non-dentist teeth bleaching lightens teeth to a degree that satisfies most consumers, CCPFF ¶ 711, he too observes that non-dentist teeth bleaching will not so thoroughly lighten trauma-induced stains as to conceal them from a dentist. (CCPFF ¶ 1028; *see also* CCPFF ¶ 1006 (Board's Dr. Wester testifying that teeth bleaching would not conceal pathology from him)). As Dr. Giniger explained, the likelihood of *all* necessary conditions masking of pathology thereby inhibiting diagnosis/treatment being satisfied approaches zero. (CCPFF ¶¶ 1001, 1043-1044). And if – just if – in some instance a pathology were masked delaying diagnosis/treatment, little or no harm would result. (CCPFF ¶ 1045). Again, the proof is in our experience: despite millions upon millions of non-dentist teeth bleachings, there is not so much as a single case report in which non-dentist teeth bleaching masked a pathology thereby harming a consumer. (CCPFF ¶¶ 993-995).

The supposed dangers identified by the Board and its members are not reasons for excluding non-dentist providers from teeth bleaching; they are mere excuses for doing so based on bias and self-interest. Non-dentist provided teeth bleaching is safe. (CCPFF ¶ 716 (safe and effective); *see also* ¶¶ 931-944 (little or no risk of allergic reaction), 945-962 (little or no risk to enamel or pulp), 963-971 *and* 976-977 (no systemic toxicity), 1047 *and* 1077-1087 (no infection control/sanitary hazard), 717 (does not mask pathology impeding diagnosis/treatment), 993-995 (no studies or reports showing masking), 1010-1044 (masking theory requires satisfaction of all of numerous low-likelihood conditions), 1045 (if in some instance a pathology were masked delaying diagnosis/treatment, little or no harm would result)).

In sum, the Board presented no credible evidence of "dangers" stemming from non-dentist teeth bleaching, and Complaint Counsel presented compelling evidence that teeth

bleaching is safe, whether provided by dentists, or by non-dentist operators, or by consumers using OTC products at home. (*See, e.g.*, CCRRPFF ¶ 380).

D. The Board's Claim That It Acted With a Proper Motive is Not a Valid Antitrust Defense

The Board's actions are prima facie anticompetitive, and there is no legitimate efficiency defense. So the Board seeks credit for its allegedly good intentions. The Board intended to impel the exit of non-dentist providers (RPTB at 28), and its actions had this effect. This does not advance the Board's cause.

The Board asks the Court to focus on a second level of intent (or motive). We are told that Board members acted at all times "to protect the health, safety, and welfare of North Carolinians." RPTB at 29. Or alternatively, that Board members acted to uphold state law as they understood it. RPTB at 10. The Board contends that this somehow supports the conclusion that the Board's actions are "reasonable."

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

> While as the guardian of an important American tradition, the NCAA's motives must be accorded a respectful presumption of validity, it is nevertheless well settled that good motives will not validate an otherwise anticompetitive practice.

468 U.S. at 101 n.23. The *NCAA* opinion goes on to cite the long pedigree of cases that support this principle: *United States v. Griffith*, 334 U.S. 100, 105-06 (1948); *Associated Press v. United States*, 326 U.S. 1, 16 n.15 (1945); *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238

(1918); *Standard Sanitary Mfg. Co. v. United States*, 226 U.S. 20, 49 (1912); *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 342 (1897).

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

In *Allied Tube*, producers of steel conduit conspired to exclude plastic conduit from the market. The Court affirmed liability, notwithstanding a jury finding (in answer to special interrogatories) that the steel producers "acted, at least in part, based on a genuine belief that plastic conduit was unsafe." 486 U.S. at 498. Defendant engineers in *NSPE* claimed that their price restraint would protect the public from shoddy engineering work. 435 U.S. at 693. Defendant dentists in *IFD* claimed that their restraint would help patients to secure appropriate dental care. 476 U.S. at 462-63. Defendant lawyers in *SCTLA* claimed that higher legal fees would ensure that indigent defendants in criminal cases received appropriate legal services. *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 423-24 (1990). In none of these cases

were the conspiring parties able to escape antitrust liability.

One lesson to be drawn from the case law, and the economics literature as well, is that the professed good motives of professionals vested with responsibility for self-regulation is no guarantee that their policies will yield pro-competitive results. Members of state regulatory boards will invariably say that they are targeting unsafe providers, and regulating in the interests of the public. Members of regulatory boards are subject to conflict of interest laws, swear an oath of office, and attend ethics training. And yet, economic studies show that these state regulatory boards over time and around the country have often adopted restrictions on competition that raise prices without any offsetting improvement in the quality of services. (CCPFF ¶¶ 572-575, 579-582, 587). The Board's claim to have acted in good faith is not evidence that the restraints are beneficial.

The Board responds that this enforcement action calls into question the legality of "all occupational licensing laws, all occupational licensing boards, and even public health regulations and public safety laws." RPTB at 14. This is incorrect. First, only anticompetitive regulation may contravene the antitrust laws; not all regulation is anticompetitive. Second, and as the Commission has previously recognized, "anticompetitive regulation is allowed to withstand antitrust challenge so long as a court is satisfied that the restraint at issue is truly state action." *State Action Opinion* at 6. For these reasons, Complaint Counsel's legal theory poses no threat to the great bulk of state regulatory activity.[15]

[15] The Board quotes from a Commission staff letter to a Louisiana legislator concerning proposed legislation to prohibit the practice of most forms of in-school dentistry throughout Louisiana. RPTB at 14. The staff letter expresses doubt that the proposed legislation would improve the quality of dental care for indigent and economically disadvantaged students. Federal Trade Commission, Commentary Re: Louisiana House Bill 687 at 4 (May 1, 2009). How to balance the benefits of competition against possibly conflicting public health concerns is

E. The Board's Claim That It Acted In A "Reasonable" Manner Is Not A Valid Antitrust Defense

The antitrust rule of reason "does not open the field of antitrust scrutiny to any argument in favor of a challenged restraint that may fall within the realm of reason. Instead it focuses on the challenged restraint's impact on competitive conditions." *NSPE*, 435 U.S. at 688. Seemingly unaware of the meaning of the rule of reason, the Board advances a litany of contentions that are irrelevant to antitrust liability.

1. The Board asserts that teeth bleaching involves the removal of stains, and that non-dentist providers are therefore guilty of the unauthorized practice of dentistry under North Carolina law. This is not an antitrust defense. First, expert testimony establishes that teeth bleaching does not actually remove stains from teeth. Second, what is contemplated by the statute (and reserved to dentists) is the scraping of stains from teeth with abrasive instruments, and not the application of chemical bleach. Third, there is a bona fide question as to whether the law reaches a non-dentist who only assists the consumer with the self-application of a bleaching product.

Fourth and most importantly, even if non-dentist teeth whitening were with certainty illegal under North Carolina law, this would not show that the exclusion of non-dentists by the Board is pro-competitive or otherwise permitted by the antitrust laws. *See IFD*, 476 U.S. at 465 ("[That] the unauthorized practice of dentistry . . . [is] unlawful is not, in itself, a sufficient justification for collusion among competitors to prevent it."); *Keifer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 214 (1951); *Fashion Originators'*, 312 U.S. at 468; *Sweeney v. Athens Reg'l Med. Center*, 709 F. Supp. 1563, 1575 (M.D. Ga. 1989).

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appropriately an issue for the Legislature, and not for the dentists.

2. The Board states that it is authorized by state law to transmit a litigation threat letter notifying a prospective defendant of an impending lawsuit. RPTB at 9-10. Complaint Counsel does not dispute this. But this has no bearing on whether the conduct of the Board challenged here – including communications that order (not advise) the recipient to cease and desist (not simply to be forewarned of litigation) are lawful.

3. The Board asserts that a few of the nearly sixty occupational licensing boards in North Carolina, separate from the Board, send letters and/or cease and desist orders to alleged violators. RPTB at 10. The Board offers no reliable evidence on this issue. (CCRRPFF 278-280, 308). In any event, this has no bearing on whether the challenged conduct of the Board enhances or restrains competition, or is otherwise lawful.

IV. THE BOARD'S ANTICOMPETITIVE CONDUCT OCCURRED IN, OR HAD AN EFFECT ON, INTERSTATE COMMERCE

Complaint Counsel's Post Trial Brief explains that the Board's actions have a substantial effect on the flow of interstate payments, including interstate payments from non-dentist providers in North Carolina to out-of-state suppliers of bleaching equipment and supplies. This is sufficient to establish the Commission's jurisdiction over this matter. *See, e.g.*, *Goldfarb*, 421 U.S. at 785 ("[O]nce an effect [on interstate commerce] is shown, no specific magnitude need be proved").

The Board asserts that its actions have not affected legal interstate commerce. RPTB at 15. This is nonsense at several levels. First, not even the Board claims that the interstate purchase of teeth bleaching equipment and supplies by non-dentists in North Carolina is illegal. Second, the Board is likely incorrect when it claims that the provision of teeth whitening services by non-dentists in North Carolina is illegal. Third, this focus on legal interstate commerce has

no basis in the law. Federal courts have exercised jurisdiction in antitrust cases where the excluded product/service was assertedly illegal. *IFD*, 476 U.S. at 465; *Keifer-Stewart*, 340 U.S. at 214; *Fashion Originators'*, 312 U.S. at 468; *Sweeney*, 709 F. Supp. at 1575. The Board cites no authority for its claim that the interstate commerce requirement is sensitive to whether the affected commerce is legal or illegal under state law.

V. THE CHALLENGED ACTIONS OF THE BOARD CONSTITUTE CONCERTED ACTION

A. The Board is a Combination of Competitors

Is the Board a single, unitary enterprise (like the typical business corporation), or is the Board a combination of its members? The holding of *Mass. Board*, 110 F.T.C. at 610-11, is that a state regulatory agency consisting of independent competitors is for antitrust purposes a combination of its members. It inescapably follows that the Board must be considered a combination of its members.

Complaint Counsel's Post Trial Brief confirms this conclusion with the functional analysis prescribed by *American Needle*. The following factors indicate that in connection with its efforts to exclude non-dentists, the Board is a combination of the dentist-members that control the Board – a "concerted actor": (i) the members have distinct and competing economic interests; (ii) the members are not seeking to maximize the profits of any single economic actor; (iii) the Board is not a unitary business enterprise; (iv) the Board is explicitly engaging in industry regulation; and (v) the members exercise greater economic power when acting together than when acting independently. In all these respects, the Board is similar to the professional/trade association entities that the Supreme Court has repeatedly found to be engaged in concerted action. *E.g.*, *CDA*, 526 U.S. at 765-69; *SCTLA*, 493 U.S. at 422-23; *IFD*, 476 U.S.

at 458-59; *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332, 356-57 (1982); *NSPE*, 435 U.S. at 692-93; *Fashion Originators'*, 312 U.S. at 465.

The Board cites a single trade association case suggesting a different analysis. *See Viazis v. American Ass'n of Orthodontist*, 314 F.3d 758 (5th Cir. 2002). Viazis addressed the decision by an association of orthodontists to suspend a member for violating the association's prohibition on false and misleading advertising. The court conflated the issues of agreement and competitive effects and concluded in one step (and with one sentence) that the conduct was not unlawful. *Id*. at 764-65 ("[Plaintiff] was unable to demonstrate that the ethics proceedings against him were a sham or that the standards applied were pretextual, so he failed to establish the existence of an unlawful conspiracy."). The precise holding of *Viazis* is that "a trade association is not necessarily a 'walking conspiracy,' . . . and that collective action by competitors must result in an unreasonable restraint of trade before there is an antitrust violation." *North Texas Specialty Physicians v. FTC*, 528 F.3d 346, 358 (5th Cir. 2008). The one-step analysis employed by the *Viazis* court is inconsistent with *American Needle* and the Supreme Court cases cited above. But given the strong showing of competitive harm in the present case, conflating agreement and competitive effects will not enable the Board to escape liability.[16]

The other cases relied upon by the Board do not involve an entity controlled by competitors, and so do not remotely support the contention that the Board is a unitary

[16] The *Viazis* court raises this question: Is it appropriate and useful to label as concerted action routine conduct by a concerted actor that, on its face, can have no non-trivial effect on competition? The Supreme Court in *American Needle* declined to reach this question. 130 S. Ct. at 2216 n.9. This Court also need not resolve this question.

enterprise.[17] In *Oksanen v. Page Mem'l Hosp.*, 945 F.2d 696 (4th Cir. 1991), a doctor alleged that a hospital conspired with the hospital's peer review committee (composed of staff physicians at the hospital) to limit and then revoke his staff privileges. The court determined that the functional relationship between the hospital and its peer review committee was akin to the relationship between a corporation and its officers (*id.* at 703), and so concluded that the two were a single enterprise. Relevant considerations were that the hospital and the peer review committee were not competitors; that the hospital would not benefit from the improper exclusion of the plaintiff doctor; and that the role of the peer review committee was to offer recommendations – with the hospital retaining ultimate responsibility for all credentialing decisions. In all these respects, *Oksanen* is distinguishable from the present case. That is, the Board is composed of competing dentists, the dentists have a financial interest in excluding non-dentists, and the dentists control the operations of the Board (as opposed to simply offering recommendations).[18]

In *American Chiropractic Ass'n v. Trigon Healthcare*, 367 F.3d 212 (4th Cir. 2004), a health insurance company produced and distributed to physicians guidelines for treating back problems; the guidelines discouraged the use of chiropractors. The document had been approved by the insurance company's advisory panel, composed of both corporate employees and independent doctors. Plaintiffs, several chiropractic associations, alleged that the document was

[17] *See, e.g., North Texas Specialty Physicians v. FTC*, 528 F.3d 346, 356 (5th Cir. 2008) ("When an organization is controlled by a group of competitors, it is considered to be a conspiracy of its members.").

[18] Significantly, the *Okansen* court concluded that the members of a medical staff have the capacity to conspire with one another because the "medical staff can be comprised of physicians with independent and at times competing economic interests." *Oksanen*, 945 F.2d at 706.

the product of a conspiracy – between the insurance company and the medical doctors who served on the advisory panel – intended to shift insurance dollars away from chiropractors. Relying on *Oksanen*, the court held that the insurance company and the medical doctors serving on the panel were a single enterprise. Relevant considerations were that the panel was a division of the insurance company (not a separate legal entity); that the panel offered only non-binding advice to the insurance company; that the doctors and the insurance company shared an interest in improving the service delivered by the insurance company; and that the doctors were not competitors of the insurance company. *Id.* at 224-25. Again, the relationship among the dentist-board members is wholly different: the members are distinct and competing economic actors; the members exercise real authority and are not simply advisors; and the Board itself has no separate, identifiable economic interest.

In sum, the Board is not a unitary actor, but rather a combination of competitors that may, and does, engage in concerted action.

B. The Challenged Conduct is Attributable to the Board

The Board acts through its agents (case officers, members, officers, other employees), and is liable for such actions when the agent is acting within the scope of its actual or apparent authority.[19] With regard to Board investigations of non-dentist teeth whitening, the case officer

[19] *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 930 (1982) ("The NAACP – like any organization – of course may be held responsible for the acts of its agents throughout the country that are undertaken within the scope of their actual or apparent authority."); *Hydrolevel*, 456 U.S. at 570-71 (standard setting body is liable for the actions of its agents taken with apparent authority); *Viazis*, 314 F.3d at 763 ("A corporate entity such as [the defendant trade association] can act only through its agents. Consequently, in the absence of formal decision making, an antitrust plaintiff must prove an association's conduct by demonstrating that the action was taken by individuals having apparent authority to act for the association.").

The following is a concise statement of the basic principles of agency law:

is always one of the six dentist-members of the Board. (CCPFF ¶¶ 107-108).[20]

The Board argues that its case officers (that is, dentist-members) and employees act independently of one another during an investigation. (This issue is discussed in Section V.C below.) The Board does not, however, assert that such case officers and employees act independently of the Board or outside the scope of their authority. Stated affirmatively, the Board acknowledges and admits that the exclusionary acts challenged in this case are the acts of the Board:

> - Non-dentist teeth whitening "was targeted by the State Board's regulation." RPTB at 15.
>
> - Complaints regarding non-dentist teeth whitening are "received by the State Board." RPTB at 21.
>
> - The Secretary-Treasurer of the State Board evaluates each complaint for jurisdictional issues and assigns it to a case officer. RPTB at 21.
>
> - The case officer "was authorized to oversee the State Board's efforts to protect the

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> Actual authority may be express or implied. When a principal explicitly authorizes the agent to perform certain acts, the agent has express authority. However, most actual authority is implied: a principal implicitly permits the agent to do those things that are "reasonably necessary" for carrying out the agent's express authority. In contrast, a principal may also be bound by actions taken that are "completely outside" of the agent's actual authority, if the principal allows the agent to appear to have the authority to bind the principal. Such a circumstance is called "apparent authority."

Malmquist v. OMS National Ins. Co., No. CV. 09-1309-PK, 2010 U.S. Dist. LEXIS 139916, at *27-28 (D. Or. Dec. 28, 2010). *Accord Beardsley v. Farmland Co-Op, Inc.*, 530 F.3d 1309, 1315-16, 1318 (10th Cir. 2008); *Trs. of the Graphic Commc'n Int'l Union v. Bjorkedal*, 516 F.3d 719, 727-28 (8th Cir. 2008); *Brainard v. Am. Skandia Life Assurance Corp.*, 432 F.3d 655, 661-63 (6th Cir. 2005).

[20] The Board avers that no Board member "specifically authorized the case officer to send cease and desist letters." RPTB at 27. As the case officer is himself a Board member, this is rather misleading.

public by enforcing" the Dental Act. RPTB at 27 (emphasis added).

- "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." RPTB at 22.

- "[T]he 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 . . ." RPTB at 23.

- "[C]ease and desist letters or orders [were] utilized by the State Board . . . [to enforce] prohibitions on unauthorized practice . . ." RPTB at 27.

- - "[C]ease and desist letters were sent by the State Board only when there was *prima facie* evidence" of a violation. RPTB at 28.

- "Further, the State Board sends cease and desist letters when there is evidence that a person has engaged in the unauthorized practice of dentistry, not just teeth whitening." RPTB at 28.

- "[T]he State Board sent cease and desist letters because there was credible evidence of a violation . . ." RPTB at 28.

- "[T]he State Board may be informed that [a cease and desist letter] had been sent out at the next Board meeting." RPTB at 22.

Again, the Board admits that the exclusionary conduct at issue in this litigation is attributable to the Board (a concerted actor). The trial record fully confirms this proposition. (CCPFF ¶¶ 312-313, 628-639).

C. The Claim That Agents of the Board Act Independently Does Not Negate a Finding of Concerted Action

We return now to the Board's puzzling insistence that a dentist board member acting as a case officer does not confer with other case officers in the course of an investigation. The Board is perhaps thinking that if a case officer independently selects the target for anticompetitive exclusion, and independently implements such anticompetitive exclusion, then the concerted action label does not apply. This would be a neat evasion of Section 1 of the Sherman Act (not

necessarily Section 5), but this is not the law. *See American Needle*, 130 S. Ct. at 2215-16 ("[C]ompetitors 'cannot simply get around' antitrust liability by acting 'through a third-party intermediary or joint venture.'"); *NTSP*, 528 F.3d at 356 ("[A]ntitrust law would be easily evaded if illegal joint activity could be transformed into legal unilateral activity through the formation of a single trust or other corporate entity.").

American Needle recounts that the 32 teams in the National Football League employ a single agent (NFLP) for purposes of marketing their intellectual property (name, logos, trade marks). NFLP is a separate corporation with its own management. NFLP (perhaps through its agent) granted a license to Reebok on an exclusive basis, and declined to license to plaintiff American Needle. When American Needle filed an antitrust action, the NFL teams offered the defense that their agent, NFLP, acted independently, and hence that Section 1 is inapplicable. The Court rejected this argument. In making the relevant licensing decisions, NFLP is simply "an instrumentality of the teams," a vehicle "for ongoing concerted action." Therefore, "[d]ecisions by the NFLP regarding the teams' separately owned intellectual property constitute concerted action." *American Needle*, 130 S. Ct. at 2215.

The Board issued cease and desist orders and committed the other acts of exclusion at issue in this case. The Board, like NFLP, is an instrumentality of its members, a vehicle for ongoing concerted action. Consequently, the exclusionary actions of the Board constitute concerted action.

D. The Claim That The Board Lacked Specific Intent to Harm Competition Does Not Negate a Finding of Concerted Action

According to the Board, the Board "did not engage in the challenged conduct with the intent to suppress competition." RPTB at 28. Instead the Board "acted to protect the health,

safety, and welfare of North Carolinians." RPTB at 29. Even assuming that these contentions are true, this does not evidence unilateral conduct, and does not negate the existence of concerted action. It is telling that the Board cites no legal authority in this section of its brief.

We have discussed at length (Section III.D, *supra*) the Supreme Court cases instructing that good motives will not validate an anticompetitive restraint. A corollary of this principle is that a plaintiff alleging an anticompetitive agreement "need not prove an intent on the part of the co-conspirators 'to restrain trade or to build a monopoly.' So long as the purported conspiracy has an anticompetitive effect, the plaintiff has made out a case under section 1." *Bolt*, 891 F.2d at 820. *Accord United States v. Brown*, 5 F.3d 658, 672 (3d Cir. 1993); *Ferguson v. Greater Pocatello Chamber of Commerce, Inc.*, 848 F.2d 976, 982 n.3 (9th Cir. 1988); *Int'l Distrib. Centers v. Walsh*, 812 F.2d 786, 793 (2d Cir. 1987); *Allegheny Pepsi-Cola Bottling Co. v. Mid-Atlantic Coca-Cola Bottling Co.*, 690 F.2d 411, 416 n.5 (4th Cir. 1982).

VI. THE TERMS OF THE PROPOSED ORDER DO NOT VIOLATE THE CONSTITUTION OR EXCEED THE AUTHORITY OF THE COURT

A. The Tenth Amendment Does Not Limit The Court's Authority To Remedy the Board's Violations of the FTC Act

According to the Board, the Tenth Amendment "prohibit[s] the federal government from instructing states to take federally-mandated actions." RPTB at 30. This is patently inaccurate. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (rejecting claim that the Tenth Amendment prohibits enforcement against state employers of the minimum-wage and overtime provisions of the Fair Labor Standards Act). In fact, "the Federal Government directs state governments in many realms. The Government regulates state-operated railroads, state school systems, state prisons, state elections, and a host of other state functions." *New York v.*

United States, 505 U.S. 144, 211 (1992) (White, J., concurring in part and dissenting in part). One should not rely on Board counsel for lessons on, *inter alia*, constitutional law.

Tenth Amendment jurisprudence distinguishes between two types of Congressional action: (i) regulation directed solely at the activities of States, and (ii) regulations generally applicable to both State governments and private parties (e.g., the Fair Labor Standards Act). *New York*, 505 U.S. at 160-61. The Board is relying on the wrong line of cases.

With regard to category (i), regulation directed at the States alone, the Supreme Court has instructed that the Federal Government may not, consistent with the Tenth Amendment, compel the States to administer or enforce a federal regulatory program. Thus, Congress may not require state and local law enforcement officers to conduct background checks on prospective handgun purchasers. *Printz v. United States*, 521 U.S. 898 (1997). Congress may not direct the States to provide for the disposal of radioactive waste generated within their borders. *New York*, 505 U.S. at 166. And Congress may not require local governments to employ particular rules in their zoning and land use processes. *Petersburg Cellular P'ship v. Bd. of Supervisors*, 205 F.3d 688 (4th Cir. 2000).

Obviously, the FTC Act is not directed solely at the States. The cases invoked by the Board – *Printz*, *New York*, and *Petersburg Cellular* – are inapplicable.

Tenth Amendment cases governing federal statutes of general applicability (category (ii)) have "traveled an unsteady path" over the years.[21] The prevailing view is that the Tenth

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[21] *See New York*, 505 U.S. at 160:

> Most of our recent cases interpreting the Tenth Amendment have concerned the authority of Congress to subject state governments to generally applicable laws. The Court's jurisprudence in this area has traveled an unsteady path. *See Maryland v. Wirtz*, 392 U.S. 183 (1968) (state schools and hospitals are subject to

Amendment contains "no substantive limitation on the power of Congress to regulate commerce." *Reich v. New York*, 3 F.3d 581, 589 (2d Cir. 1993). *Garcia* holds that "the States must find their protection from congressional regulation through the national political process, not through judicially defined spheres of unregulable state activity." *South Carolina v. Baker*, 485 U.S. 505, 512 (1988). In *Baker*, the Court noted that *Garcia* "left open the possibility that some extraordinary defects in the national political process might render congressional regulation of state activities invalid under the Tenth Amendment." *Baker*, 485 U.S. at 512. Such a defect might arise, the Court indicated, where a State "was deprived of any right to participate in the political process or . . . was singled out in a way that left it politically isolated and powerless." *Id.* at 513.

The FTC Act is a law of general applicability. The Board has not demonstrated any defect in the political process that led to the enactment of the FTC Act. Accordingly, the Tenth Amendment has no bearing on the present case.

We also point out that Complaint Counsel's proposed Order does not "prescribe the qualifications" (RPTB at 31) of Board members. Dentists may continue to serve as members of the Board. The State of North Carolina is not required "to change its statutes" in any way (RPTB at 32). And the Order does not "pre-empt" (RPTB at 32) the regulation of dentistry in North Carolina. The Board would, however, be required to conform its conduct to the requirements of the federal antitrust laws.

Fair Labor Standards Act): *National League of Cities v. Usery*, 426 U.S. 833 (1976) (overruling *Wirtz*) (state employers are not subject to Fair Labor Standards Act); *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985) (overruling *National League of Cities*) (state employers are once again subject to Fair Labor Standards Act).

B. The Commerce Clause Does Not Limit The Court's Authority To Remedy the Board's Violations of the FTC Act

The final section of the Board's brief appears to charge that Complaint Counsel may not predicate the proposed remedy upon the claim that the Board has violated the Commerce Clause. This is a meaningless argument, as Complaint Counsel does not allege that the Board has violated the Commerce Clause (*i.e.*, that the Board discriminated against interstate commerce). We allege only a violation of the FTC Act. *See, e.g.*, Administrative Complaint at 5. As discussed below, the Commerce Clause has no bearing on this case, except as it requires Complaint Counsel to show that the Board's conduct affects interstate commerce. The Commerce Clause does not constrain this Court's choice of remedy, and this is true without regard to whether the Board's conduct comports with the Commerce Clause.

The Commerce Clause grants Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States." U.S. Const. art. I, § 8, cl. 3. Pursuant to this authority, Congress enacted the FTC Act. The jurisdictional reach of the FTC Act is "'co-extensive with the broad-ranging power of Congress under the Commerce Clause.'" *In re North Texas Specialty Physicians*, 140 F.T.C. 715, 878 (2004) (Initial Decision). The Commerce Clause limits FTC authority only in the sense that FTC jurisdiction extends to interstate and foreign commerce, but does not reach purely intrastate commerce. We have previously explained that the actions of the Board are in or affecting interstate commerce (*see supra* Section IV).

The Commerce Clause is interpreted to restrain the power of the States to erect barriers against interstate trade. Subject to certain exceptions, a state law violates the so-called "dormant" aspect of the Commerce Clause when it discriminates on its face against interstate commerce. *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330,

338 (2007).[22] In this context, "discrimination" means "'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the later.'" *Id.* It follows that a State has authority to act in ways that affect interstate commerce without necessarily violating the Commerce Clause. This is the import of the cases that are cited by the Board; some State regulation of interstate commerce is permitted. *See id.* at 342 (county ordinance requiring trash haulers to bring waste to a county-owned processing facility does not violate the Commerce Clause because it treats in-state private businesses the same as out-of-state private businesses); *Maine v. Taylor*, 477 U.S. 131 (1986) (Maine law prohibiting the importation of live bait fish into the state does not violate the Commerce Clause because it serves a legitimate local purpose that cannot be served as well by nondiscriminatory alternatives); *Parker v. Brown,* 317 U.S. 341 (1943) (state controls on marketing of raisins designed to enhance price do not violate the Commerce Clause because the program is not aimed at and does not discriminate against interstate commerce); *Hass v. Oregon State Bar,* 883 F.2d 1453 (9th Cir. 1989) (state bar rule requiring licensed attorneys to purchase malpractice insurance through the state bar's insurance fund does not violate the Commerce Clause because the burden on interstate transactions is incidental and not excessive in light of the substantial state interest served by the rule).[23]

The Board asserts that its conduct does not discriminate against interstate commerce, and is consistent with the dormant Commerce Clause. We may assume for purposes of argument that this is correct. The Board goes on to assert that, because its conduct comports with the

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[22] For a more detailed synthesis of Supreme Court case law concerning the dormant Commerce Clause, see *Hass v. Oregon State Bar*, 883 F.2d 1453, 1462-63 (9th Cir. 1989).

[23] The Board also cites *Petersburg Cellular*. This is a Tenth Amendment case and does not address the Commerce Clause.

Commerce Clause, such conduct cannot be enjoined by an Order of this Court. No case cited by the Board remotely supports this second proposition. Instead, the cases cited by the Board indicate that antitrust analysis and dormant Commerce Clause analysis are independent and do not intersect. *See Parker*, 317 U.S. at 344; *Hass*, 883 F.2d at 1455. The final nail in the coffin is *Goldfarb*. The Court concluded that the enforcement of a price schedule for attorneys, by the State Bar (a state agency), violated the Sherman Act. *Goldfarb*, 421 U.S. at 792-93. The opinion contains no discussion of the Commerce Clause and no suggestion that the State Bar's conduct discriminates against interstate commerce.

In sum, the dormant Commerce Clause restricts only the actions of the states. It has no bearing on Complaint Counsel's Section 5 claim. It has no bearing on the terms of the Order that the Court may adopt to remedy the anticompetitive conduct proven in this case.

VII. CONCLUSION

For all of the foregoing reasons, Complaint Counsel requests that this Court rule that the North Carolina State Board of Dental Examiners has violated Section 5 of the Federal Trade Commission Act, and enter an Order to cease and desist in the form submitted to the Court by Complaint Counsel on April 22, 2011.

Respectfully submitted,

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Dated: May 5, 2011

CERTIFICATE OF SERVICE

I hereby certify that on May 5, 2011, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-113
Washington, DC 20580

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

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-110
Washington, DC 20580

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

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CERTIFICATE FOR ELECTRONIC FILING

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

May 5, 2011

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