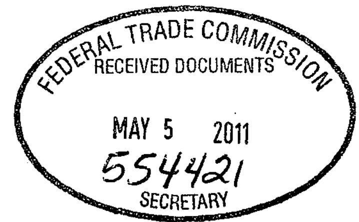

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

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

REPLY TO COMPLAINT COUNSEL'S POST-TRIAL BRIEF

Counsel for Respondent:

Noel L. Allen
Alfred P. Carlton, Jr.
M. Jackson Nichols
Catherine E. Lee
Brenner A. Allen, of counsel
Jackson S. Nichols, of counsel
Allen and Pinnix, P.A.
Attorneys for Respondent
Post Office Drawer 1270
Raleigh, North Carolina 27602
Telephone: 919-755-0505
Facsimile: 919-829-8098
Email: nallen@allen-pinnix.com
mjn@allen-pinnix.com
acarlton@allen-pinnix.com
clee@allen-pinnix.com
ballen@allen-pinnix.com
jsn@allen-pinnix.com

TABLE OF CONTENTS

I. OVERVIEW AND ELEMENTS OF THE ALLEGED VIOLATION 1

II. THE ACTIONS OF THE STATE BOARD DID NOT CONSTITUTE CONCERTED ACTION 2

A. The State Board does not have the capacity to take concerted action..........3

B. Even if the State Board has the capacity to take concerted action, it did not do so in connection with the challenged conduct..........................4

C. Even if the State Board has the capacity to take concerted action and even if it had taken concerted action with regard to the challenged conduct, such concerted action was not unlawful under the Sherman Act..7

III. THE STATE BOARD'S CHALLENGED CONDUCT WAS NOT ANTICOMPETITIVE UNDER THE RULE OF REASON ANALYSIS............8

A. The N.C. Dental Practice Act and the State Board's enforcement of that law is not inherently suspect, and not anticompetitive under a rule of reason analysis...9

B. The State Board's actions were not anticompetitive in nature; nor is there evidence of market power...21

C. There is no evidence that the State Board's enforcement of state law resulted in competitive harm...25

IV. EVEN IF THE STATE BOARD'S CONDUCT WERE PRIMA FACIE ANTICOMPETITIVE, IT IS PERMITTED BASED ON EFFICIENCY JUSTIFICATIONS...28

A. The State Board's enforcement of state law is saved by its pro-competitive justifications...28

B. There is sufficient evidence of the State Board's pro-competitive justifications...33

C. The State Board's restraints are legitimate and reasonably necessary.........34

V. THE STATE BOARD'S CHALLENGED CONDUCT IS NOT IN, OR AFFECTING, INTERSTATE COMMERCE.................................35

VI. THE STATE BOARD ACTED IN GOOD FAITH TO PROTECT PUBLIC HEALTH, AND TEETH WHITENING IS THE REMOVAL OF STAINS FROM TEETH....37

VII. THE TENTH AMENDMENT PROHIBITS THE REMEDIES SOUGHT BY COMPLAINT COUNSEL....43

VIII. REMEDIES MUST PRESERVE THE STATE BOARD'S LEGAL RIGHTS....45

IX. CONCLUSION....47

TABLE OF CASES AND AUTHORITIES

Cases

Allied Tube & Conduit Corp. v. Indian Head, 486 U.S. 492 (1988)....................16, 22

Am. Needle, Inc. V. Nat'l Football League, 130 S. Ct. 2201 (2010)......................3-5

Am. Soc'y of Mech. Eng'rs v. Hydrolevel, 456 U.S. 556 (1982)..........................22

Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332 (1982).........................28

Brazil v. Arkansas Bd. of Dental Exam'rs,
593 F. Supp. 1354 (E.D. Ark. 1984)...21

California Dental Ass'n v. FTC, 526 U.S. 756 (1999)..................................10, 32

California State Bd. of Optometry v. FTC, 910 F.2d 976 (D.C. Cir. 1990)................45

Concord v. Boston Edison Co., 915 F.2d 17 (1st Cir. 1990).................................28

Earles v. State Bd. of Certified Public Accountants of Louisiana,
139 F.3d 1033 (5th Cir. 1998)...20

Estate Constr. Co. v. Miller & Smith Holding Co., 14 F.3d 213 (4th Cir. 1994)..........37

Fashion Originators' Guild v. FTC, 312 U.S. 457 (1941)................................14-16

FTC v. Univ. Health, Inc., 938 F.2d 1206 (11th Cir. 1991).................................23

FTC v. Indiana Fed'n of Dentists, 476 U.S. 447 (1986).....................14, 15, 25, 30-33

FTC v. Nat'l Lead Co., 352 U.S. 419 (1957)..46

Gambrel v. Kentucky Bd. of Dentistry, 689 F.2d 612 (6th Cir. 1982)..................20-21

Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975)...30

Hall v. United Air Lines, Inc., 296 F. Supp. 2d 652 (E.D.N.C. 2003).....................6-7

Hass v. Oregon State Bar, 883 F.2d 1453 (9th Cir. 1989)...................................20

Hoffman Plastic Compounds v. NLRB, 535 U.S. 137 (2006)..............................46-47

Hosp. Bldg. Co. v. Tr. of Rex Hosp., 691 F.2d 678 (4th Cir. 1982)................29-30, 37

Hosp. Bldg. Co. v. Tr. of Rex Hosp., 425 U.S. 738 (1976)..............................35

In re Hawkins, 17 N.C. App. 378 (1973)..............................33

Mumford v. GNC Franchising LLC, 437 F. Supp. 2d 344 (W.D. Pa. 2006)..............................28

Nassimos v. N.J. Bd. of Exam'rs of Master Plumbers, No. 94-1319,
1995 U.S. Dist. LEXIS 21376 (D.N.J. Apr. 4, 1995)..............................20

New York v. United States, 505 U.S. 144 (1992)..............................45

Nw. Wholesale Stationers, Inc. v. Pac. Wholesale Stationers, Inc.,
472 U.S. 284 (1985)..............................16

Parker v. Brown, 317 U.S. 341 (U.S. 1943)..............................17-18

Pennsylvania Dental Ass'n v. Commonwealth of
Pennsylvania Ins. Dep't, 398 A.2d 729 (Pa. Commw. Ct. 1979)..............................31

Pocono Invitational Sports Camp, Inc. v. NCAA,
317 F. Supp. 2d 569 (E.D. Pa. 2004)..............................30

Printz v. United States, 521 U.S. 898 (1997)..............................45

Racetrac Petroleum, Inc. v. Prince George's County,
601 F. Supp. 892 (D. Md. 1985)..............................44

Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985)..............................13-14

United States v. Brown Univ., 5 F.3d 658 (3d Cir. 1993)..............................15, 28

United States v. Oregon State Med. Soc'y, 343 U.S. 326 (1952)..............................35-36

United States v. Syufy Enter., 903 F.2d 659 (9th Cir. 1990)..............................24

Virginia Vermiculite, Ltd. v. The Historic Green Springs, Inc.,
307 F.3d 277 (4th Cir. 2002)..............................7-8

White Smile USA, Inc. v. Bd. of Dental Exam'rs of Alabama,
36 So. 3d 9 (Ala. 2009)..............................31

Wilk v. Am. Med. Ass'n, 719 F.2d 207 (7th Cir. 1983)..............................32

Wilk v. Am. Med. Ass'n, 895 F.2d 352 (7th Cir. 1990)..............................32

Commission Decisions

In re Mass. Bd. of Registration in Optometry, Docket 91995, 1988 FTC LEXIS 159 (June 13, 1988)....4-6

In re Polygram Holding, Inc., 136 F.T.C. 310 (2003)....10, 17

In re Realcomp II, Ltd. Docket No. 9320, 2009 F.T.C. LEXIS 250 (Oct. 30, 2009)....8, 9, 25, 26, 28

State Attorney General Opinions

Kan. Op. Att'y Gen. No. 2008-13, 2008 Kan. AG LEXIS 13 (June 3, 2008)....31

Okla. Op. Att'y Gen. No. 03-13, 2003 Okla. AG LEXIS 13 (Mar. 26, 2003)....31

Statutes

N.C. Gen. Stat. § 90-22....1-2, 4, 14, 33

N.C. Gen. Stat. § 90-29....4, 14-15, 46

N.C. Gen. Stat. § 90-634....27

N.C. Gen. Stat. § 150B-4....23

Ind. Code § 25-1-7-14....31

Texas Occ. Code § 901.601....27

Other Authorities

American Bar Association Rule of Law Initiative, GEORGIA LEGAL PROFESSION REFORM INDEX Vol. I (2005)....20

Dept. of Health and Human Services, Food and Drug Administration, *Oral Health Care Drug Products for Over-the-Counter Human Use*; 21 CFR Part 356 (2003)....33-34

H. Hovenkamp, Exclusive Joint Ventures and Antitrust Policy, 1995 Colum. Bus. L. Rev. 1, 66 (1995)....11-12, 21

M. Goldberg et al., *Undesirable and Adverse Effects of Tooth-Whitening Products: A Review*, CLINICAL ORAL INVESTIGATIONS (Feb. 6, 2009)....33-34

ARGUMENT

I. OVERVIEW AND ELEMENTS OF THE ALLEGED VIOLATION

As Complaint Counsel provides in its Post-Trial Brief, the success of its lawsuit against the State Board hinges upon its ability to prove that: (1) the State Board engaged in concerted action; (2) the State Board's concerted action unreasonably restrained competition; and (3) the State Board's concerted action affects interstate or foreign commerce. Because the State Board did not prove any of these three elements at trial, its claims against the State Board fail.

Complaint Counsel's inaccurate description of the evidence presented at trial cannot salvage its claims, as more fully set forth in Respondent's Response to Complaint Counsel's Proposed Findings of Fact and Conclusions of Law, which are incorporated herein by reference. First, contrary to Complaint Counsel's assertions, the State Board did not "decide" that teeth whitening only could be performed under the supervision of a dentist; rather, this prohibition was dictated by the North Carolina Legislature in the N.C. Dental Practice Act, which the State Board, by law, is required to enforce.

Second, no evidence exists to show that the State Board's challenged actions "constitute and effectuate an agreement among its dentist-members" to exclude competition. Complaint Counsel asks the Commission to assume—without proof—that evidence of action is evidence of an agreement. Such an assumption is contrary to the standard set forth by the U.S. Supreme Court precedent.

Third, evidence exists to establish that the North Carolina Legislature—not the State Board—reached the conclusion that teeth whitening services performed by non-licensed entities is potentially harmful to the public health, welfare, and safety of North

Carolina citizens. N.C. Gen. Stat. § 90-22(a); Respondent's Proposed Finding of Fact ("RPF") 2. As Complaint Counsel admits, federal antitrust law does not bar North Carolina from reaching this conclusion and prohibiting the very actions of non-licensed entities that are at issue in this case. FTC Post-Trial Brief, p. 99. The State Board has not demonstrated or expressed a preference "that consumers turn to their dentists for teeth whitening"; the only preference exhibited by the State Board is a preference that entities comply with the N.C. Dental Practice Act. Complaint Counsel further mischaracterizes the evidence showing that teeth whitening by non-licensed individuals is potentially dangerous for consumers. RPF 427-458.

II. THE ACTIONS OF THE STATE BOARD DID NOT CONSTITUTE CONCERTED ACTION.

Complaint Counsel claims that the dentist members of the State Board operate separate dental practices and therefore have "distinct and potentially competing" economic interests. FTC Post-Trial Brief, p. 72. Therefore, argues Complaint Counsel, the State Board should not be considered a "unitary business enterprise" and the conduct of the State Board automatically constitutes concerted action.

Complaint Counsel's arguments fail for several important reasons. First, Complaint Counsel cannot show that the State Board had the capacity to engage in concerted activity. Second, even if the State Board did have the capacity to engage in concerted activity, there is no evidence that it has done so with regard to the challenged conduct. Third, even if the State Board could—and in fact did—engage in concerted activity with regard to the challenged conduct, there is no evidence that the outcome of that concert (i.e. prevention of non-licensed teeth whitening providers from engaging in teeth whitening services) would not have occurred but for the concerted activity.

A. The State Board does not have the capacity to take concerted action.

In arguing that the State Board had the capacity to engage in concerted action, Complaint Counsel bases its argument on assumptions that are not supported by the evidence of record. Specifically, the State Board members did not have distinct and potentially competing economic interests **connected to the challenged conduct.** Granted, the State Board members continued to maintain their separate dental practices while serving on the State Board; indeed, by law, the dentist members of the State Board were required to be practicing dentists. RPF 4. However, the State Board members were absolutely prohibited from taking their own personal economic interests into account when conducting State Board work and there is no evidence that they did so when they engaged in the challenged conduct.

In determining whether concerted action exists, the courts "are moved by the identity of the persons who act, rather than the label of their hats." Am. Needle, Inc. v. Nat'l Football League, 130 S. Ct. 2201, 2209-10 (2010) (internal citation omitted). Thus, simply because some of the State Board members could be labeled as dentists, it does not follow that they were motivated by personal financial interests in the course of their work on the State Board. To the contrary, under North Carolina statute, the State Board members are prohibited from having such conflicts of interest in connection with their work on the State Board and in fact **did not derive benefits** to their day-to-day income as a result of their work. RPF 75-94. Complaint Counsel assumes that the State Board members' professions prevent them from fully aligning with common interests—while ignoring the substantial evidence of record to the contrary. In reality, the individual members of the State Board are sworn officers of the State of North Carolina who must

forego any interest that is not fully aligned with that of the State Board. RPF 15, 75-94. Cf. In re Mass. Bd. of Registration in Optometry, Docket 91995, 1988 FTC LEXIS 159 (June 13, 1988) (hereinafter "In re Mass Bd.") (No finding of evidence that respondent state agency members were governed by prohibitions on conflicts of interest and unethical behavior when FTC found respondent state agency capable of conspiracy).

Furthermore, Complaint Counsel is wrong in arguing that the State Board should not be considered a "unitary business enterprise." By engaging in the challenged conduct, the State Board was working for a common business purpose—to enforce N.C. Gen. Stat. § 90-29 (b)(2), as it was required to do, pursuant to N.C. Gen. Stat. § 90-22 (b). The steps that the State Board took to investigate and enforce N.C. Gen. Stat. § 90-29 (b)(2) against non-licensed teeth whiteners were consistent with North Carolina law and with its general practices and policies. The members of the State Board did not reach a specific agreement on how to handle enforcement actions against non-licensed teeth whitening providers. Indeed, the State Board performed such investigations with the same unitary decision-making process by which it performed other investigations. Thus, the State Board's challenged conduct hinged upon "routine, internal business decisions" and not "discrete agreements" worthy of judicial scrutiny. See Am. Needle, Inc., 130 S. Ct. at 2209 (2010).

B. Even if the State Board has the capacity to take concerted action, it did not do so in connection with the challenged conduct.

Even assuming that the State Board generally had the capacity to engage in concerted action—which the State Board denies—there is no evidence that the State Board in fact engaged in concerted action when it took the challenged conduct at issue in this case. The evidence shows that there was no agreement reached by State Board

members regarding enforcement actions against non-licensed teeth whitening providers specifically. See RPF 4-9. The State Board discussed teeth whitening during a closed session only once, when it received legal advice from counsel regarding the development of a policy to hand out to individuals who ask about teeth whitening. That policy was voted on in open session. RPF 64. Investigations into non-licensed teeth whitening are conducted with confidentiality and the case officer assigned to the case does not have knowledge of other cases handled by a separate case officer. RPF 253. Furthermore, State Board members do not discuss with each other, with members of the general public, or with other dentists anything pertaining to cease and desist letters. RPF 255-57. The State Board as a whole does not vote to file an injunction in a case or to open an investigation. RPF 260.

In conflating facts with theoretical possibility, Complaint Counsel relies primarily on Am. Needle, Inc. and In re Mass. Bd. In both of these cases, however, the defendant clearly was comprised of individuals who had reached an agreement to engage in the challenged conduct. The facts of these cases contrast sharply with the facts of the instant case.

In Am. Needle, Inc., thirty-two individual football teams formed a single entity (NFLP) to develop, license and market their intellectual property. The individual teams **voted** to authorize NFLP to grant exclusive licenses to manufacture and sell their apparel; this action was later challenged as violative of antitrust laws by a scorned vendor. In contrast, the State Board members never voted, agreed, or otherwise acknowledged collectively to send non-licensed teeth whitening providers cease and desist letters in an effort to avoid having to pursue enforcement through the court system.

Likewise, in In re Mass. Bd., the state agency members reached an agreement, **through a majority vote**, to promulgate and implement regulations that were contrary to Massachusetts statute and contrary to the advice of Massachusetts state government officials, including the Massachusetts Attorney General. 1988 FTC LEXIS at 70. Indeed, the FTC's decision finding a conspiracy hinged on the fact that the state agency had engaged in "discussion, votes, and promulgation of the challenged regulations." 1988 FTC LEXIS at 143. In the instant case, State Board members took no such concerted action; rather, they simply followed the dictates of the North Carolina Legislature in enforcing the N.C. Dental Practice Act against non-licensed teeth whitening providers, like they do with other individuals and entities who violate the law. In further contrast, there is no evidence that—in the instant case—the North Carolina Attorney General or any state government official has opined at all on whether non-dental teeth whitening constitutes the unlicensed practice of dentistry, let alone informed the State Board about any such alleged opinion. RX48.

In sum, just because a state agency **may** have the capacity to engage in concerted activity, it does not necessarily mean that the state agency has done so. Plaintiffs' burden in proving concerted action has been summarized as follows:

> First, they must establish that each defendant had a conscious commitment to a common scheme designed to achieve an unlawful objection. Second, plaintiffs must bring forward evidence that excludes the possibility that the alleged coconspirators acted independently or based upon a legitimate business purpose.
>
> When there is no direct evidence of antitrust activity . . . an agreement to restrain trade may be inferred from other conduct. However, to prove a violation through ambiguous conduct, proof must be offered that tends to exclude the possibility that the suspected agreement may be found consistent with independent conduct or a legitimate business purpose.

> Plaintiffs must produce evidence with respect to each defendant that is alleged to be part of the conspiracy.

Hall v. United Air Lines, Inc., 296 F. Supp. 2d 652, 660-61 (E.D.N.C. 2003) (internal citations omitted), aff'd, No. 03-2388, 2004 U.S. App. LEXIS 25432 (4th Cir. Dec. 9, 2004). Complaint Counsel clearly has not met this burden. It has failed to produce evidence tending to exclude the possibility that the State Board members acted with independent understandings of their State Board duties or that the State Board members acted with the legitimate business purpose of enforcing the N.C. Dental Practice Act.

C. Even if the State Board has the capacity to take concerted action and even if it had taken concerted action with regard to the challenged conduct, such concerted action was not unlawful under the Sherman Act.

Furthermore, even if the State Board had the capacity to take concerted action and even if the State Board did take concerted action in connection with the challenged conduct—again, which the State Board denies—Complaint Counsel cannot show that such concerted activity is unlawful under the Sherman Act. As the Fourth Circuit has explained:

> Coperweld well demonstrates that the Supreme Court has applied a gloss to the term "concerted action" when using it in the antitrust context. And, accordingly, courts must treat this phrase as a term of art in the context of the Sherman Act; **it cannot be understood as it might be in ordinary parlance, to reach any and all forms of joint activity by two or more persons**. It must be defined consonant with its role in the antitrust analysis, as the basis for determining the unlawfulness of conduct prohibited by section 1. We reaffirm what was made clear by Copperweld, that concerted activity susceptible to sanction by section 1 is activity in which multiple parties join their resources, rights or economic power together **in order to achieve an outcome that, but for the concert, would naturally be frustrated by their competing interests**.

Virginia Vermiculite, Ltd. v. The Historic Green Springs, Inc., 307 F.3d 277, 282-83 (4th Cir. 2002) (internal citations omitted and emphasis added). The evidence presented at

trial proved that the N.C. Dental Practice Act prohibits non-licensed teeth whitening providers from engaging in teeth whitening; this truism is the result of action by the North Carolina legislature, not the State Board. Regardless of whether or not the State Board engaged in concerted action with regard to the challenged conduct, non-licensed teeth whitening providers still would be prohibited from engaging in teeth whitening services. RPF 5. Therefore, under the standard established by the U.S. Supreme Court and followed by the Fourth Circuit, the alleged concerted activity complained of by Complaint Counsel is not the type of concerted activity deemed unlawful by the Sherman Act.

III. THE STATE BOARD'S CHALLENGED CONDUCT WAS NOT ANTICOMPETITIVE UNDER THE RULE OF REASON ANALYSIS.

Complaint Counsel has analyzed North Carolina state law and the State Board's challenged conduct pursuant to that law under a multi-faceted framework set forth by the Commission in In re Realcomp II, Ltd. Docket No. 9320, 2009 F.T.C. LEXIS 250 (Oct. 30, 2009), aff'd, Realcomp II, Ltd. v. FTC, No. 09-4596, 2011 U.S. App. LEXIS 6878 (6th Cir. Apr. 6, 2011). Under this framework, in order to prove a violation of federal antitrust law, Complaint Counsel is obliged to show that the State Board's challenged conduct had the tendency to "result in higher prices, reduced output, degraded quality, retarded innovation, or some other manifestation of harm to consumer welfare" rather than the tendency to "enhance competition." In re Realcomp II, Ltd., 2009 F.T.C. LEXIS 250 at **51-52.

By applying the various rule of reason analysis methods set forth by the Commission in In re Realcomp II, Ltd.[1] to the facts of the instant case, it is clear that—despite Complaint Counsel's sweeping efforts to discredit all occupational licensing agencies and despite the examples of violations by private, non-governmental actors—the State Board's challenged conduct taken to enforce state law was legal.

Complaint Counsel relies on three different methods of analysis, as set forth in In re Realcomp II, Ltd., to try to establish a "confident conclusion" that competitive injury "has been realized" or "or likely to arise." FTC Post-Trial Brief at 75. Specifically, competitive harm may be found if: (1) a respondent's actions are inherently suspect; (2) a respondent's actions have an "anticompetitive nature" and there is "evidence of market power"; or (3) there is evidence of "actual competitive harm." FTC Post-Trial Brief at 75. Under each of these three methods, the State Board's actions do not show either the occurrence of, or potential for, adverse effects on competition.

A. The N.C. Dental Practice Act and the State Board's enforcement of that law is not inherently suspect, and not anticompetitive under a rule of reason analysis.

Complaint Counsel's efforts to establish that the State Board and its authorizing statute are "inherently suspect" rest on three considerations. First, Complaint Counsel seeks to establish *prima facie* evidence of the anticompetitive nature of the N.C. Dental Practice Act and the Board's enforcement of that law. Second, Complaint Counsel attempts to analogize the State Board's conduct to that of a selection of private trade organizations. Third, Complaint Counsel puts forth economic studies on the purported shortcomings of occupational licensing agencies, in an effort to justify antitrust scrutiny

[1] Incidentally, the test set forth in In re Realcomp II, Ltd. was developed to evaluate the conduct of a private association of real estate brokers, rather than the state-mandated actions of a government agency, which are at issue in the instant case.

of the State Board's actions. The following analysis demonstrates that Complaint Counsel was unable to establish any of these three contentions; further, it evinces the logistical shortcomings of Complaint Counsel's sweeping condemnation of occupational licensing boards.

i. The State Board's enforcement of the N.C. Dental Act does not, on its face, show obvious anticompetitive effects.

Complaint Counsel attempts to establish that the N.C. Dental Practice Act and the State Board's enforcement of that Act would be seen as posing "significant competitive hazards" to "an observer with even a rudimentary understanding of economics." FTC Post-Trial Brief at 76. To that end, Complaint Counsel cites examples of cases involving private, non-governmental organizations in which courts reached such conclusions. See, e.g., In re PolyGram Holding, Inc., 136 F.T.C. 310, 345 (2003) (in which competitor **private businesses** were found to have restrained trade) and California Dental Ass'n v. FTC, 526 U.S. 756, 769-770 (1999) (holding that the FTC's rule of reason analysis of appellant **non-governmental, non-profit organization** was legally insufficient).

Complaint Counsel argues that competitive hazards are readily evident in this case because, as a result of the State Board's enforcement of the N.C. Dental Practice Act, persons in North Carolina who would otherwise rely on non-dentist teeth whitening services must rely on dentist-provided services or kits, or over-the-counter services, to whiten their teeth. By Complaint Counsel's logic, the "exclusion of a product desired by consumers is therefore presumed in economics to be anticompetitive, absent some compelling justification."[2] FTC Post-Trial Brief at 77.[3] Complaint Counsel also supports

[2] The existence of a compelling justification is discussed briefly in this section, and in more depth in Section IV of this Brief.

its argument with statements taken out of context from the State Board's expert witness Dr. David Baumer and antitrust scholar Prof. Herbert Hovenkamp. In fact, Complaint Counsel ignores Dr. Baumer's important conclusion that the exclusion of a selection of teeth whitening options did not occur in a vacuum; it was necessitated by state law and public interest. RPF 575. It is evident to any observer; the regulatory actions of a state agency, acting pursuant to its authorizing statute, do not pose significant competitive hazards.

Thus, Complaint Counsel's conclusion that the exclusion of an illegal service from the marketplace is *prima facie* anticompetitive ignores the fact that the exclusion addressed illegal services, and was necessitated by a state law enacted to protect the public interest. RPF 459 – 531 (discussing harm to consumers), 573, 575, 576, 585, and 586 ("[Complaint counsel expert witness] Dr. Kwoka conceded that if he had assumed evidence of health and safety issues was present, either in the form of expert testimony or literature, he would weigh that evidence in his analysis.").

Complaint Counsel also selectively cited a 1995 law review article by Prof. Hovenkamp, which discusses product exclusion in the context of private associations, not state entities. H. Hovenkamp, Exclusive Joint Ventures and Antitrust Policy, 1995 Colum. Bus. L. Rev. 1, 66 (1995) (citing, e.g., Allied Tube & Conduit Corp. v. Indian Head, 486 U.S. 492 (1988) (judging the actions of a private trade association)). Hovenkamp's full language on the subject notes that for the exclusion of a product or service to be anticompetitive, the excluded product should be "cheaper to produce,"

---

[3] By this logic, any action taken by an occupational licensing board pursuant to state law is inherently suspect. If the State Board's supposedly "inherently suspect" conduct is not saved by the fact that it was required under state law; or saved by the public interest justifications for the enactment of that state law, it follows that all state occupational licensing boards acting to exclude desired products, are guilty of *prima facie* anticompetitive acts.

should "threaten[] the profits of rival firms," and must be "preferred by consumers." Complaint Counsel ignores the fact that illegal teeth whitening services are not generally "cheaper to produce" than the over-the-counter teeth whitening products that comprise part of the market. RPF 617, 660. Respondent also demonstrated at trial that dentist-provided over-the-counter teeth whitening kits are not always as expensive as Complaint Counsel alleges, further strengthening the State Board's argument that legal teeth whitening methods are not necessarily more expensive than their illegal counterparts. RPF 608.

Further, Complaint Counsel has not cited evidence that dentists' profits were "threatened" by illegal teeth whitening services. To the contrary, dentists who testified before this court revealed that teeth whitening revenue accounted for a miniscule fraction of their overall profits for the period at issue. See, e.g., RPF 602.

Beyond the fact that some consumers chose to have their teeth whitened using illegal services, Complaint Counsel did not present any evidence that such services were preferred over the legal alternatives. With the OTC teeth whitening product market earning over $40 billion in revenue in 2006 alone, it seems dubious that any consumer in North Carolina would have suffered from a lack of teeth whitening opportunities as a result of the enforcement of state law. See RPF 599. In fact, neither Dr. Kwoka's report nor his testimony produced any statistical evidence of the alleged effect of the loss of non-dentist teeth whitening in North Carolina. RPF 596. Dr. Baumer noted that the credibility of Dr. Kwoka's conclusions was undermined by the lack of data he presented on the current state of the teeth whitening market. RPF 554 and 555.

Complaint Counsel's attempt to deem anticompetitive the exclusion of an illegal service is not supported by the relevant case law or by the expert commentary taken out of context. An observer with a "rudimentary understanding of economics" would comprehend that legal teeth whitening competition in North Carolina has been unaffected. A consumer of teeth whitening services in North Carolina may still choose between three legal options: over-the-counter teeth whitening kits, take-home, dentist-provided teeth whitening kits, or higher-strength dentist-supervised teeth whitening. State Board Post-Trial Brief at 12-13. The only choice eliminated from the market place is the illegal, unsafe option of teeth whitening services provided by untrained persons who do not necessarily follow basic safety protocols, do not even have running water, and are generally unaccountable for the inevitable mistakes they make. RPF 376-384, 434-444, 680.

ii. The State Board's challenged conduct does not bear a "close family resemblance" to conduct condemned by courts as anticompetitive.

As the second step in its efforts to establish that the State Board and its authorizing statute are inherently suspect, Complaint Counsel argues that, by analogy to supposedly similar cases, the State Board's conduct is anticompetitive. FTC Post-Trial Brief at 77. Complaint Counsel relies entirely on comparisons of the State Board's situation to that of private, non-governmental organizations. Complaint Counsel has no choice but to try to establish a "close family resemblance" to these cases because Complaint Counsel does not have any truly relevant respondents (i.e., state agencies acting pursuant to state law) that it can use for comparisons. In 1985, the Supreme Court concluded that it was "likely" that state agencies acting pursuant to clearly articulated state statute enjoy immunity from federal antitrust law. Town of Hallie v. City of Eau Claire, 471 U.S. 34,

46 (1985). Ever since then, courts have concluded that state agencies acting pursuant to state law were immune from federal antitrust standards, and have not examined immune occupational licensing agency conduct under the rule of reason test. See infra Sect. 3(A)(iii).

Therefore, instead of discussing the application of the rule of reason analysis to a state agency, Complaint Counsel relies primarily on cases involving trade associations setting rules that affect both their members and competitors. FTC Post-Trial Brief at 77 *et seq*. However, at issue in this case is not a private membership organization, or its member-made rules. The issue in this case is the enforcement of a decades-old state law by state officials. There was **no** State Board-created rule involved, as it was not necessary for the State Board to pass a rule addressing teeth whitening when the N.C. Dental Practice Act effectively and expressly addressed the subject. North Carolina state law forbids the practice of dentistry by unlicensed persons; by law, stain removal from human teeth is the practice of dentistry, and so it fell to the State Board to prohibit illegal stain removal/teeth whitening services. N.C. Gen. Stat. §§ 90-22(a), 90-29(b)(2).

Complaint Counsel also attempts to establish "close family resemblances" to FTC v. Indiana Federation of Dentists, 476 U.S. 447 (1986), another case involving a private trade organization. FTC Post-Trial Brief at 79. As discussed in the State Board's Post-Trial Brief, this case cannot be compared to the instant facts for the same reasons that the other cases cited by Complaint Counsel—such as Fashion Originators' Guild v. FTC, 312 U.S. 457 (1941)—are irrelevant. The challenged conduct in Indiana Federation was taken pursuant to a rule (not a statutory provision), made by agreement of private actors (not state actors), and, as the court in Indiana Federation concluded, public welfare

concerns were not at issue in that case. State Board Post-Trial Brief at 4-7; RPF 272-273, 295-296. The private association members in Indiana Federation acted to prevent private insurers from reviewing patient x-rays; this stands in sharp contrast to the North Carolina Legislature's decision to outlaw the provision of stain removal services by non-dentists to protect the public health. 475 U.S. at 453; N.C. Gen. Stat. § 90-29(b)(2).

In contrast to the cases discussed above involving private associations and private rules, a myriad of cases have found state agencies are immune from the application of federal antitrust law, when they acted to enforce a clearly articulated state statute. See infra Sect. 3(A)(iii). Lacking examples of state agencies actually subject to a rule of reason analysis, the next "closest family resemblance" to the instant facts is United States v. Brown University, 5 F.3d 658, 672 (3d Cir. 1993). In Brown University, the Court upheld a consortium of universities' tuition practices, based on their public policy rationale. Id. ("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.") (internal citations omitted).

Unlike the situation in Indiana Federation, there was no conspiracy between State Board members to exclude illegal teeth whitening service providers, as more fully set forth in Section II of this Brief. See 475 U.S. at 451. State Board members never had any more than the occasional, informal conversation about the State Board's actions against teeth whitening service providers; they did not conspire to form an internal policy on the matter. There were also no communications regarding teeth whitening at meetings between N.C. State Dental Society and State Board members. RPF 5, 6, 8, and 9. There is no evidence that dentists and Board members discussed competition between dentists

and non-dentists; the impact of that competition on dentist revenue; or any evidence of pressure on Board members to enforce state law so as to eliminate non-dentist teeth whitening services. RPF 4.

Unlike the Guild in Fashion Originator's Guild, 312 U.S. at 462-463, or the National Fire Protection Association in Allied Tube & Conduit Corp. v. Indian Head, 486 U.S. 492, 498 (1988), the State Board did not establish a set of independent internal rules and procedures to handle non-licensed teeth whitening providers, as opposed to others who violate the N.C. Dental Practice Act. Furthermore, the State Board's authority to act was based entirely on state law, which allowed the State Board to order any person or entity suspected of violating the N.C. Dental Practice Act to cease and desist from the violation and gave the State Board the right to tell a person or entity that it may be violating that Act. State Board Post-Trial Brief at 9-10; RPF 11-14, 276.

Lastly, Complaint Counsel's comparisons between the State Board's challenged conduct and "the wholesale exclusion from the marketplace of a distinct category of providers," as described in Nw. Wholesale Stationers, Inc. v. Pac. Wholesale Stationers, Inc., 472 U.S. 284 (1985), are flawed. In Nw. Wholesale Stationers, Inc., an organization of sellers voted to expel one seller from its members. Since the expulsion did not deprive the seller from access to the market, the court did not find that a *per se* Sherman Act violation had occurred. Thus, Complaint Counsel attempts to argue that the "expulsion" in this case was more serious than that in Nw. Wholesale Stationers. However, there is no exclusion of a specific business in this case. Any of the providers of illegal teeth whitening services in North Carolina could have simply brought their businesses into compliance with the law. Such compliance could have been achieved by hiring a dentist

to supervise teeth whitening services, or by converting their business to the provision of over-the-counter products. RPF 567. State law required businesses to provide dentist supervision for teeth whitening services; there was no intended or actual effect of driving law-abiding providers out of business. State Board Post-Trial Brief at 15.

In arguing its case, Complaint Counsel assumes that a state agency acting pursuant to state law should be granted no more protection from federal antitrust law than a private association of competitors conspiring to exclude a rival from the market. Complaint Counsel would give the State Board no more deference in its enforcement of a state law than it would give the North Carolina Dental Society—a true trade association—in its enforcement of an entirely self-created rule. However, there is no legal precedent for applying the rules that regulate private competitors to the actions of the State Board.

iii. Economic studies do not demonstrate any reason for antitrust scrutiny of the State Board's challenged conduct.

In its third and final effort to show that the State Board's conduct was inherently suspect, Complaint Counsel looks to "economic studies," claiming that they provide "a reason for close antitrust scrutiny." PolyGram 136 F.T.C. at 344-345. Thus, Complaint Counsel attempts to prop up its arguments with a series of studies showing that restrictions "adopted by state legislatures or state agencies . . . have often been shown to be anticompetitive."[4] FTC Post-Trial Brief at 81. Complaint Counsel has stated its motivation for advancing this sweeping argument:

---

[4] Again, for nearly seventy years, it has been an unquestionably settled law that no matter how anticompetitive a state law is, it is immune from enforcement of federal antitrust law. See, e.g., Parker v. Brown, 317 U.S. 341, 350 (U.S. 1943) ("We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature ... an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.").

> **States vary significantly in the kinds of regulations that they impose** on licensed service providers, including doctors, dentists, optometrists, veterinarians, real estate brokers, plumbers, and electricians ... [citing, as examples, reciprocity laws, licensing examinations, and restrictions on forms of practice] ... These restrictions on competition are often adopted at the behest of the incumbent providers, and defended by them as necessary to protect consumers from the dangers posed by unqualified practitioners ... It turns out, however, that **these restrictions are generally unnecessary and harmful to consumers.**

FTC Post-Trial Brief at 82-82 (emphasis added).

In essence, to support its argument via economic studies (and case law), Complaint Counsel must make the radical claim that the State Board's procedures are fundamentally flawed. Thus, by extension, Complaint Counsel argues that the N.C. Dental Practice Act is inherently anticompetitive and—since that Act is functionally identical to the statutes establishing hundreds of other similarly-structured state agencies—those other agencies are also *prima facie* federal antitrust law violators. It is necessary for Complaint Counsel to make these sweeping claims if it is to invent some rationale for removing state action immunity from an agency of the state. However, these claims are contrary to clearly established congressional intent and decades of federal case law.

As acknowledged in Complaint Counsel's attack on occupational licensing boards, quoted above, the restrictions on unauthorized practice enforced by state agencies are **state**-mandated, rather than mandated by state agencies or private individuals. Respondent has argued that, under the Supreme Court-created doctrine of state action immunity, restrictions based on clearly articulated state law are entitled to immunity from federal antitrust law. Parker v. Brown, 317 U.S. 341, 350 (U.S. 1943). While the Commission itself has not yet acknowledged that the State Board acted pursuant to state

law, here, Complaint Counsel appears to concede the point. See Opinion of the Commission at 7, fn.8.

Previous legal arguments advanced by Complaint Counsel similarly have attempted to discredit state agencies as presumed conspirators, requiring some sort of unspecified supervision by state government (beyond being subject to numerous state-imposed ethics restrictions, acting only subject to state law, and having any enforcement activities subject to state ratification). RPF 75-94. It appears that Complaint Counsel's radical position on this issue—that is, that states should not license or regulate professions—is necessary for them to be able to piece together a coherent economic theory to advance their rule of reason argument.

The economic analysis offered by Complaint Counsel at trial and in their Post-Trial Brief was based largely on outdated literature (studies primarily dating from the 1970s and 1980s). RPF at 590. Specifically, Complaint Counsel's expert witness omitted important facts in drawing in economic theories regarding the impact of excluding illegal teeth whitening services from the market. For example, in his analysis, Dr. Kwoka did not consider the possibility that banning non-dentist teeth whitening might not have any effect on the prices that dentists charge, or that dentists set their fees based on time expended and overhead, such as liability insurance, rent, and equipment costs. RPF 588 and 589. Furthermore, Dr. Kwoka's economic model did not take into account the State Board's justification in enforcing state law—that is, that the state requires teeth whitening services be limited to licensed persons. RPF 592.

Dr. Kwoka judges professional licensing as being entirely without redeeming value. RPF 595. He makes this judgment based on studies, which, as previously stated, are

twenty to thirty years old and which concern a range of occupational licensing agencies, not just North Carolina agencies or dental examining boards. FTC Post-Trial Brief at 82-83. Dr. Kwoka concluded, based on these studies, that:

> Restrictions on reciprocity, restrictions through the use of high fail rates on exams, restrictions on scope of practice have the effect of increasing the price of services within the state with the most stringent of such regulations. But time after time the studies do not find any systematic benefits in quality to consumers.

FTC Post-Trial Brief at 83. Dr. Kwoka reaches this conclusion despite the fact that barriers to entry, codes of conduct, and enforcement against unauthorized practitioners are ubiquitous in nearly every single trained profession, not just in the United States, but also overseas.[5] For the bulk of these professions, regulation occurs through licensing agencies. In sum, Dr. Kwoka's analysis is consistent with a *per se* analysis and not a rule of reason analysis. See Response to FTC's Proposed Finding of Fact No. 619.

Complaint Counsel may have reached the conclusion that it is anticompetitive and without any public benefit to ensure that doctors, nurses, accountants, dentists, veterinarians, lawyers, etc. are competent and in compliance with technical and ethical standards. However, this model is ensconced in the laws of every U.S. state and territory, and has been upheld on numerous occasions by federal courts in the face of antitrust challenges. See, e.g., Nassimos v. N.J. Board of Examiners of Master Plumbers, No. 94-1319, 1995 U.S. Dist. LEXIS 21376 (D.N.J. Apr. 4, 1995), aff'd, 74 F.3d 1227 (3rd Cir. 1995), cert. denied, 517 U.S. 1244 (1996); see also Hass v. Oregon State Bar, 883 F.2d 1453 (9th Cir. 1989); see also Earles v. State Board of Certified Public Accountants of

[5] Indeed, the U.S. government funds the creation of occupational licensing standards, and the strengthening of barriers to entry into professions as a means to secure the rule of law in developing countries. See, e.g. American Bar Association Rule of Law Initiative, GEORGIA LEGAL PROFESSION REFORM INDEX Vol. I (2005) at 18-19, detailing U.S. government-funded efforts to strengthen and reform admission requirements for the country of Georgia's bar.

Louisiana, 139 F.3d 1033 (5th Cir. 1998); see also Gambrel v. Kentucky Board of Dentistry, 689 F.2d 612 (6th Cir. 1982); see also Brazil v. Arkansas Board of Dental Examiners, 593 F. Supp. 1354 (E.D. Ark. 1984), aff'd, 759 F.2d 674 (8th Cir. 1985).

If Complaint Counsel seeks to significantly change the licensing laws and state agency practices of every U.S. state, it should affect this change through legislative reform, not by attacking a state agency that is acting pursuant to a state law enacted to protect the public health.

B. The State Board's actions were not anticompetitive in nature; nor is there evidence of market power.

At trial, Complaint Counsel did not show that the State Board's challenged conduct, taken to enforce the N.C. Dental Practice Act, was inherently suspect. Similarly, Complaint Counsel did not demonstrate through a "traditional" rule of reason analysis that the State Board's market power and conduct constituted a federal antitrust violation. However, even if the Commission accepts Complaint Counsel's argument that the State Board's conduct has a "tendency to harm competition," Complaint Counsel has failed to show that the State Board had the market power to actually harm competition.

In attempting to prove that the State Board had the wherewithal to harm competition, Complaint Counsel defines market power as the "ability to foreclose from the market or to limit a rival's output or expansion." FTC Post-Trial Brief at 86 (citing H. Hovenkamp, Exclusive Joint Ventures and Antitrust Policy, 1995 Colum. Bus. L. Rev. 1, 67 (1995)). As with its other efforts to show federal antitrust law violations, Complaint Counsel's market power argument depends on analogies relating the Board's actions to that of private actors. Complaint Counsel's examples are primarily court decisions finding antitrust violations in private associations' agreements to exclude their

rivals from the market places. FTC Post-Trial Brief at 86-87. However, as has been explained throughout Section III of this Brief, the State Board is not a private organization. Its actions regarding illegal teeth whitening service providers were not the result of a private agreement. The State Board is a government agency; its members are state officials; and their actions were taken pursuant to state law.

Complaint Counsel cites two examples of private "standard-setting" organizations which, while not possessing government authorization, do have the power to influence government decisions on market access: Allied Tube & Conduit Corp., 486 U.S. at 495, concerning the actions of a private, voluntary association representing industry, labor, academia, insurers, organized medicine, firefighters, and the government, and Am. Soc'y of Mechanical Eng'rs v. Hydrolevel, 456 U.S. 556 (1982), concerning the actions of a private trade association. By Complaint Counsel's logic, if these standard-setting organizations were found to have violated antitrust law based on the *de facto* power they possess over law-makers, then actual government actors must possess that much more market power. There are two flaws to Complaint Counsel's logic. First, as stated numerous times, the State Board is not analogous to a private standard-setting organization. It is an arm of the state, acting pursuant to legislative authority, not an informal agreement to exclude competitors.

Second, Complaint Counsel's analogy fails to take into consideration the limits of the State Board's legal authority. The State Board's "ability to foreclose from the market or to limit a rival's output or expansion" is subject to oversight from the state judiciary at nearly every turn. These limits have been detailed by Respondent in previous filings. State Board cease and desist letters did not have the immediate effect of shutting down

business, and they could not have had such effect. RPF 293-300. Some recipients were able to offer evidence that violations did not occur, and the State Board closed their files with no further action. RPF 298. Recipients could also come into compliance with the N.C. Dental Practice Act by hiring a licensed dentist to oversee teeth whitening services. Recipients could request an administrative hearing or relief from North Carolina courts, as the judiciary held the ultimate power to enforce the Act's prohibitions on unauthorized practice. RPF 295-96; N.C. Gen. Stat. § 150B-4. Any legal action to bring a recipient into compliance with state law had to be mandated by the judiciary, and, in practice, the State Board did pursue legal proceedings against non-licensed teeth whitening providers on numerous occasion, as explained in more detail in Section VI of this Brief. RPF 126-133. Thus, even though the State Board is—as Complaint Counsel acknowledges—a "state actor," its actions affecting the legal rights of individuals and entities only take place with oversight from state government, in the form of legislative authorization and state courts.

Complaint Counsel also attempts to demonstrate that, despite the blanket rule of state action immunity, courts recognize that "government regulation can exclude competition." Complaint Counsel claims that the court in FTC v. University Health, Inc. found a state law to exclude competition in violation of federal antitrust law. 938 F.2d 1206, 1219 (11th Cir. 1991). This is a misleading interpretation of the case. The court in University Health determined that state action immunity was not available to the private actors whose conduct was at issue in the case. The court reached this conclusion because the state statute upon which private actors relied to authorize their conduct did not meet the "clearly articulated state policy" requirement. 938 F.2d at 1213 ("Georgia has not

clearly articulated a policy to displace all competition by hospitals."). Without meeting the "clearly articulated" requirement, the private parties could not claim that the state sanctioned their conduct. Therefore, the issue in University Health was the illegal conduct of private actors, not the legality of a state law. Thus, the language of University Health is irrelevant to the instant facts.

Complaint Counsel's reliance on United States v. Syufy Enterprises is similarly misguided. FTC Post-Trial Brief at 89 (citing 903 F.2d 659, 673 (9th Cir. 1990) ("It is well known that some of the most insuperable barriers in the great race of competition are the result of government regulation.")) In that case, the court found in favor of the private actor (a theater owner), dismissing the U.S. Department of Justice's antitrust suit against him. Complaint Counsel cites the Syufy Enterprises Court's language chastising the U.S. Department of Justice for its decision to bring a law suit against the appellee. 903 F.2d at 673. However, as was the case in University Health, the Syufy Enterprises court did not draw the conclusion that a clearly articulated state law or a state agency acting pursuant to that law, may violate federal antitrust statutes.

In its efforts to establish the State Board's power to affect the teeth whitening market, Complaint Counsel recognizes the power of the state to regulate the practice of dentistry, while faulting this power as inherently anticompetitive and conspiratorial. Complaint Counsel states that "the legal system could not function if citizens routinely ignored government orders, and this course should not be either encouraged by the Board or by the Federal Trade Commission." FTC Reply Brief at 94. Indeed, the State Board has not advocated that citizens should ignore government orders. However, unlike

Complaint Counsel, the State Board also supports state agencies' right to enforce, rather than ignore, state law.

C. There is no evidence that the State Board's enforcement of state law resulted in competitive harm.

Lastly, Complaint Counsel relies on a third approach to the rule of reason set forth in In re Realcomp II, Ltd, allowing for a "presumptive violation" of federal antitrust law by a showing of "direct proof" that the State Board's enforcement of state law had or is likely to have any anticompetitive effects. FTC Post-Trial Brief at 89. However, Complaint Counsel cannot show that the State Board caused any anticompetitive effects among the legal teeth whitening methods available in North Carolina.

i. The evidence does not show that the State Board's challenged conduct had anticompetitive effects on legal teeth whitening methods.

Complaint Counsel did not show that the State Board's enforcement of the N.C. Dental Practice Act had any impact on legal teeth whitening methods: over-the-counter products, dentist-provided take-home kits, and dentist-supervised teeth whitening services. Teeth whitening industry leaders' testimony reveals that legal sales of teeth whitening chemicals continue within North Carolina with no stated decline. RPF 625-627, 644, 665. This is in contrast to the facts of the cases cited by Complaint Counsel in support of their claims. See In re Realcomp II, Ltd., 2009 F.T.C. Lexis 250 at *45-46 (citing Indiana Federation, 476 U.S. at 460-461) (establishing market power based on the conclusion that in some locations, the Federation succeeded in its aim of denying insurance companies patient records).

In the instant case, the evidence did not show that that non-licensed teeth whitening providers were prevented from selling legal products at any location in the state, as a

result of the State Board's challenged conduct. Further, no recipient of a cease and desist letter took legal action to challenge the State Board's interpretation of the N.C. Dental Practice Act. Not a single recipient of a cease and desist order brought a case before the North Carolina courts or even requested an administrative hearing on the subject. RPF 295-96. No member of the teeth whitening industry took legal action to challenge the Board's cease and desist letters, despite the fact that many industry representatives report that they 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.

While the Commission in In re Realcomp II, Ltd. held that no "elaborate econometric 'proof that the restraint resulted in higher prices'" was required, obviously some proof that the alleged exclusion occurred is necessary. FTC Post-Trial Brief at 90, fn. 34 (internal citation omitted). However, Complaint Counsel did not demonstrate that any legal teeth whitening services or product sales were affected, even a little, by the State Board's enforcement of the N.C. Dental Practice Act.

ii. The State Board did not cause any legal teeth whitening service providers to be excluded from the market.

Complaint Counsel's next contention is that the State Board has tried unsuccessfully to defend itself by claiming that it does not directly have the power to enforce the N.C. Dental Practice Act. This is not correct. The State Board has set forth the ways in which its enforcement of the Act is actively supervised by the state legislature and state courts. RPF 293-300. In fact, as discussed in Section VI infra, the State Board has relied on the courts on numerous occasions to hold unlicensed teeth whitening providers accountable for their unlawful actions. The State Board is not

sidestepping responsibility for the role it played in enforcing the N.C. Dental Practice Act; it has repeatedly pointed to evidence of how decisions it makes are actively supervised by the state courts.

Complaint Counsel also bases its argument on the example of a "rouge" officer within a private, non-governmental standard setting organization in Hydrolevel. FTC Post-trial Brief at 93. Complaint Counsel argues that, just as the organization in Hydrolevel was ultimately responsible for the rouge acts of its officer, the State Board cannot absolve itself of liability by claiming its actions were rogue and without practical effect. FTC Post-Trial Brief at 93-94. However, the State Board does not claim to be a rogue agency of the state of North Carolina. There is no need to make such a claim: the State Board acted pursuant to state law authorizing its conduct in this matter.

If the State Board's conduct was rogue, then so are the widespread practices of occupational licensing boards in North Carolina and elsewhere, in preventing and stopping unauthorized practice via the distribution of cease and desist letters. For example, the N.C. Board of Massage and Bodywork's enforcement statute, N.C. Gen. Stat. § 90-634, empowers that Board to send cease and desist letters regarding unauthorized practice. Thus, the N.C. Board of Massage and Bodywork has made a practice of sending letters to mall and airport operators, informing them of the legal requirement that persons providing massage services on site be licensed. Id. Other occupational licensing boards in North Carolina[6] and elsewhere[7] similarly rely on cease and desist letters to enforce prohibitions on unauthorized practice. RPF 278-280.

[6] E.g. the North Carolina State Bar, the North Carolina Medical Board, and the North Carolina Board of Pharmacy. RPF 280.

IV. EVEN IF THE STATE BOARD'S CONDUCT WERE *PRIMA FACIE* ANTI COMPETITIVE, IT IS PERMITTED BASED ON EFFICIENCY JUSTIFICATIONS.

A. The State Board's enforcement of state law is saved by its pro-competitive justification.

Even if Complaint Counsel met its burden of proving the State Board's market power or actual anti-competitive effects, the State Board's actions are still permissible based on the Board's pro-competitive justifications. See Brown University, 5 F.3d at 669. As Complaint Counsel acknowledges, these pro-competitive justifications must be legitimate; supported by evidence in the record; and must support restraints that are reasonably necessary to achieve a precompetitive end. In re Realcomp II, Ltd., 2009 F.T.C. LEXIS 250 at *39-40.

The State Board's pro-competitive justifications are that it acted to enforce state law and that the state law was necessary to protect the public interest. These justifications meet all three Realcomp requirements. As discussed in the State Board's Post-Trial Brief, courts are quite willing to recognize and weigh such pro-competitive justifications of "public service or ethical norms." Brown University, 5 F.3d at 672 (citing Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 349 (1982)). After all, the purpose behind the Sherman Act is "to protect consumer welfare by protecting competition itself, not particular competitors." Mumford v. GNC Franchising LLC, 437 F. Supp. 2d 344, 354 (W.D. Pa. 2006) (internal citations omitted); see also Concord v. Boston Edison Co., 915 F.2d 17, 21 (1st Cir. 1990) (Breyer, C.J.) ("[A] practice is not 'anticompetitive'

[7] E.g. the Texas State Board of Public Accountancy is similarly authorized by law to issue cease and desist orders to persons based on evidence of their violations of the Texas Public Accountancy Act's restrictions on unauthorized practice. Texas Occ. Code § 901.601.

simply because it harms competitors. . . . Rather, a practice is 'anticompetitive' only if it harms the competitive process.")

Thus, it is generally understood that occupational licensing boards are justified in enforcing laws that restrict competition based on their pro-competitive justifications. As recognized by a collection of state boards that filed an *amicus curiae* brief in in support of the North Carolina State Board of Dental Examiners' suit against the Federal Trade Commission:

> North Carolina created state regulatory boards because it recognized the need to protect its citizens from both charlatans and unskilled practitioners. Recognizing the inherent challenges in regulating highly specialized professions, the State carefully crafted these boards to provide them with the resources, knowledge, expertise, and legal authority necessary to oversee the designated professions.

Proposed Amicus Brief of the North Carolina Medical Board, North Carolina Board of Nursing, North Carolina Board of Pharmacy, and North Carolina Board of Physical Therapy Examiners in Support of the North Carolina State Dental Board at 15, North Carolina State Board of Dental Examiners v. Federal Trade Commission, Case No. 5:11-CV-49-FL, ECF No. 28-1 (E.D.N.C. Apr. 22, 2011).

There are a number of cases in which courts have recognized pro-competitive, public interest justifications for state regulatory schemes. For example, in the Fourth Circuit's decision in Hospital Bldg. Co. v. Trustees of Rex Hospital, the rule of reason was interpreted to permit activities justified by their pro-public interest intent and results:

> We think a very narrow "rule of reason" is required in order to permit defendants to show, if they can, that participation in certain planning activities that would otherwise violate § 1 might not under the circumstances have been an unreasonable restraint on trade. The appropriate rule, we find, is simply that planning activities of private health services providers are not "unreasonable" restraints under § 1 if undertaken in good faith and if their actual and intended effects lay within

> those envisioned by specific federal legislation in place at the time of the challenged activities as desirable consequences of such planning activities.

691 F.2d 678, 685 (4th Cir. 1982) (rejecting the finding of a *per se* antitrust violation, in favor of a rule of reason analysis). Similarly, in Pocono Invitational Sports Camp, Inc. v. NCAA, the court found the National Collegiate Athletic Association's internal regulations to be non-violative of the rule of reason, as they were enacted for the purpose of—and had the practical effect of—promoting fair competition and academic excellence among student athletes. 317 F. Supp. 2d 569, 584 (E.D. Pa. 2004).

For over twenty-five years, state agencies acting pursuant to clearly articulated state law have been granted immunity from federal antitrust law without undergoing a rule of reason analysis. Therefore, Complaint Counsel has been forced to rely on tenuous analogies between the present facts and cases involving independent, non-governmental entities applying internally-developed rules. An examination of these cases reveals the clear path towards a pro-competitive justification by the State Board.

For example, the court in Indiana Federation acknowledged that the federal judiciary has adopted a more lenient approach to its rule of reason analysis of standards when the case involves professional associations rather than profit-driven private actors.[8] Indiana Federation of Dentists, 476 U.S. at 458-459 ("We have been slow to condemn rules adopted by professional associations as unreasonable *per se*, and, in general, to extend *per se* analysis to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious.") (internal citations omitted); see also Goldfarb v. Virginia State Bar, 421 U.S. 773, 788-789 n.17 (1975) ("The public service aspect, and other features of the professions, may require that a

[8] It again should be noted that the issue in the instant case is not a rule set by a professional association, but a state law enforced by an arm of the State of North Carolina.

particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently.").

Complaint Counsel also cites Indiana Federation as proof that the State Board's concerns over the unauthorized practice of dentistry do not justify its enforcement of state law. Indiana Federation 476 U.S. at 465 (rejecting the argument that permitting insurance companies to review patient x-rays would constitute the unauthorized practice of dentistry). Federation dentists claimed that, by routinely denying insurance agencies review of dental patients' x-rays, they were protecting patients from the unauthorized practice of dentistry. In distinguishing Indiana Federation from the instant facts, it first should be noted that it was not the Federation's responsibility to protect patients from unauthorized practice. That duty presumably fell to the Indiana State Board of Dentistry.[9] Second, Complaint Counsel's comparison is weakened by the fact that the Commission was able to cite Pennsylvania law in support of the idea that permitting insurance agents to review dental patient x-rays in determining claims does not constitute the practice of dentistry. See Pennsylvania Dental Ass'n v. Commonwealth of Pennsylvania Ins. Dep't, 398 A.2d 729 (Pa. Commw. Ct. 1979). There is no North Carolina case law disputing North Carolina's position that teeth whitening constitutes the practice of dentistry. In fact, other states have reached the same conclusion as North Carolina on this issue. See, e.g., White Smile USA, Inc. v. Bd. of Dental Exam's of Alabama, 36 So. 3d 9 (Ala. 2009); Okla. Op. Att'y Gen. No. 03-13, 2003 Okla. AG LEXIS 13 (Mar. 26, 2003); Kan. Op. Att'y Gen. No. 2008-13, 2008 Kan. AG LEXIS 13 (June 3, 2008).

[9] Incidentally, the Indiana State Board of Dentistry, like the North Carolina State Board of Dentistry, is authorized to issue cease and desist orders to prevent and stop the unauthorized practice of dentistry. Ind. Code § 25-1-7-14 (2011).

Complaint Counsel also draws comparisons to Wilk v. American Medical Ass'n, in which a collection of medical associations attempted to reduce competition from chiropractors through a variety of exclusionary tactics (e.g. refusing to refer patients to chiropractors and denying them hospital privileges). 719 F.2d 207 (7th Cir. 1983) (hereinafter "Wilk I"); Wilk v. American Medican Ass'n, 895 F.2d 352 (7th Cir. 1990) (hereinafter "Wilk II"). As with Indiana Federation, Wilk must be distinguished because it does not represent the actions of the state government based on clearly articulated state law. Indeed, the trial court judge in Wilk I determined that it was not his place to decide whether chiropractic was a valid health profession: "The question of whether chiropractic poses an impermissible hazard to the health and welfare of the public is one for the Congress and/or the state legislatures to resolve, not the defendants or other private persons or groups." Wilk I, 719 F.2d at 223. The Wilk I court agreed that, while doctors may not conspire to exclude chiropractors from practice, they are "are free to attempt to persuade legislatures and administrative agencies" of the chiropractic profession's threat to public health. Wilk I, 719 F.2d at 228. Now, however, Complaint Counsel seeks to analogize Wilk and the instant facts, ignoring the distinction that was drawn in that case between the proper role of private associations on one hand, and the proper role of the state legislature and administrative agencies on the other.

Courts' deference to private entities' pro-competitive motivations is so firm that a federal antitrust exception has been carved out for non-profit entities, somewhat similar to the immunity granted to state governments. See, e.g., California Dental Ass'n, 526 U.S. at 766 (finding that "an organization devoted solely to professional education may lie outside the FTC Act's jurisdictional reach, even though the quality of professional

services ultimately affects the profits of those who deliver them"). In California Dental, the standard applied by the courts in determining whether a violation of the FTC Act had occurred was that "proximate relation to lucre must appear." Thus, even in the world of non-governmental actors, courts are reluctant to rush to a judgment that an association of professionals, or a non-profit corporation dedicated to a not entirely self-interested cause, has committed a violation of federal antitrust law. This exception is particularly relevant to the State Board, which was created solely to protect the public interest, with no profit motives. N.C. Gen. Stat. § 90-22; see In re Hawkins, 17 N.C. App. 378 (1973), cert. denied and appeal dismissed, 283 N.C. 393, cert. denied, 414 U.S. 1001 (1973).

B. There is sufficient evidence of the State Board's pro-competitive justifications.

Complaint Counsel argues that the State Board did not provide sufficient evidentiary support to justify the pro-competitive nature of its actions. According to Complaint Counsel, any claims that illegal teeth whitening services are "inherently dangerous" are unsubstantiated. FTC Post-Trial Brief at 99. A comparison of the instant facts to those set forth by Complaint Counsel regarding Indiana Federation reveals the fallacy of this statement. In Indiana Federation, there was no evidence at trial of "erroneous treatment decisions attributable to the misuse of x-rays, and no evidence that any consumer had in fact been harmed." This contrasts to the litany of mistakes and obvious safety violations discussed at trial in the instant case. RPF 376-384, 434-444, 440-442, 680. Evidence also showed the medical concerns associated with non-dentist-supervised teeth whitening services. RPF 395, 421-422, 449-457. Complaint Counsel's Post-Trial Brief contentions—that teeth whitening is safe and that no medical literature contemplates material harm to consumers from teeth whitening methods—are

contradicted by evidence presented by the State Board. See, e.g., Dept. of Health and Human Services, Food and Drug Administration, *Oral Health Care Drug Products for Over-the-Counter Human Use*; 21 CFR Part 356 (2003); See also M. GOLDBERG ET AL., *Undesirable and Adverse Effects of Tooth-Whitening Products: A Review*, CLINICAL ORAL INVESTIGATIONS (Feb. 6, 2009).

C. The State Board's restraints are legitimate and reasonably necessary.

Last, Complaint Counsel claims that the State Board's restrains on trade were not appropriate in scope. Instead of enforcing state law requiring stain removal services to be performed by licensed dentists, Complaint Counsel insists that consumers could be informed about the "risks of non-dentist teeth whitening" (risks of which Complaint Counsel denied the existence in its Post-Trial Brief) by a consumer fact sheet; or that consumers could be protected by enacting training requirements for non-dentist-supervised kiosk personnel, through permit requirements for such businesses, or by simply notifying local health boards of suspected problems. FTC Post-Trial Brief at 103-104. These suggestions contradict earlier claims by Complaint Counsel, further confusing Complaint Counsel's already unclear motives in bringing this case.

With these "lesser" solutions, Complaint Counsel forces the State Board to ignore its authorizing statute and to allow the unauthorized practice of dentistry to continue. The State Board was created to enforce the N.C. Dental Practice Act. There is no law, no federal court precedent, and no authority other than Complaint Counsel's unsupported notion that the Board should ignore its authorizing statute and opt for a lesser degree of enforcement of state law.

Complaint Counsel's "appropriate in scope" argument would require the State Board to adopt new rules regarding teeth whitening practices and unsupervised stain removal services, or to seek statutory authorization from the state legislature. FTC Post-Trial Brief at 104-105. Complaint Counsel may view such steps as meeting the mysterious "active supervision" requirement that it demands. But, given that the State Board already has a state law authorizing its conduct, there is no need for amending that law, or engaging in the much less actively-supervised form of regulation through rule-making.

V. THE STATE BOARD'S CHALLENGED CONDUCT IS NOT IN, OR AFFECTING, INTERSTATE COMMERCE.

Complaint Counsel argues that the State Board's challenged conduct occurred in, or affecting, interstate commerce because it has reduced and will reduce the amount of teeth bleaching equipment and supplies that non-licensed teeth whitening providers in North Carolina purchase from out-of-state entities. Complaint Counsel failed to present credible evidence at trial showing any decrease in interstate sales of such equipment and supplies, in fact, were caused by the State Board's challenged conduct. Indeed, according to one representative from the teeth whitening industry, such decreases—to the extent they exist—were caused by the downturn of the economy in 2009. RPF 626. To prove its claim, Complaint Counsel must establish that "the **restraint in question** 'substantially and adversely affects interstate commerce." See Hosp. Bldg. Co. v. Rex Hosp., 425 U.S. 738, 746 (1976) (internal citations omitted) (emphasis added). Because Complaint Counsel cannot show the required nexus, its claims fail. See United States v. Oregon State Med. Soc'y, 343 U.S. 326, 338 (1952) (affirming dismissal when the

government failed to prove that the challenged conduct adversely affected interstate commerce).

Second, Complaint Counsel argues that interstate commerce has been affected because the State Board's challenged conduct deterred non-licensed out-of-state individuals from opening non-licensed teeth-whitening operations in North Carolina. Again, Complaint Counsel has not presented any credible evidence to support this allegation. At the very most, Complaint Counsel has not shown that there has been, or will be, a **substantial** deterrence of non-licensed out-of-state teeth whitening providers. See Oregon State Med. Soc'y, 343 U.S. at 339 (affirming dismissal when challenged conduct affected a few out-of-state medical providers on a sporadic and incidental basis).

Third, Complaint Counsel argues that interstate commerce has been affected because the State Board's challenged conduct has reduced and will reduce the volume of rental payments that non-dentist operators in North Carolina pay to out-of-state mall owners. As with its other arguments regarding interstate commerce, Complaint Counsel failed to present evidence that showed the necessary nexus between the State Board's challenged conduct and the alleged reduction in rent paid by non-licensed teeth whitening providers to out-of-state mall owners. Oregon State Med. Soc'y, 343 U.S. at 339. Furthermore, to the extent that the evidence establishes that such a nexus does exist—which the State Board denies—the evidence is sporadic, incidental and insufficient to meet Complaint Counsel's burden of proof. See id. Indeed, Complaint Counsel proffered the testimony of **only one** mall owner at trial, who indicated that he had not leased to non-licensed teeth whitening providers because of his correspondence from the State Board. Response to FTC PFOF No. 416.

In sum, Complaint Counsel has the burden of either: (1) "demonstrating that the alleged anticompetitive conduct occurred in interstate commerce;" or (2) "showing that the conduct, though wholly intrastate, had a substantial effect on interstate commerce." Estate Constr. Co. v. Miller & Smith Holding Co., 14 F.3d 213, 221 (4th Cir. 1994) (internal citations omitted). Because Complaint Counsel's cannot present sufficient evidence to support this burden, its arguments alleging the existence of jurisdiction fail.

VI. THE STATE BOARD ACTED IN GOOD FAITH TO PROTECT PUBLIC HEALTH, AND TEETH WHITENING IS THE REMOVAL OF STAINS FROM TEETH.

Complaint Counsel attempts to rebut State Board's legitimate reasons for engaging in the challenged conduct. For the reasons set forth below, Complaint Counsel's arguments fail.

First, Complaint Counsel argues that the State Board cannot justify its challenged conduct on the basis that its actions were intended to eliminate illegal competition. Complaint Counsel, however, misses the point. The State Board did not engage in the challenged conduct in order to eliminate illegal competition; it engaged in the challenged conduct—at the direction of the North Carolina Legislature—to protect the health, safety, and welfare of North Carolina citizens. This justification is warranted because: (1) the actions of the State Board were taken in good faith in relation to the health care needs of the consumer public; and (2) the actual and intended effects lay within those envisioned by the N.C. Dental Practice Act as desirable consequences of the challenged conduct. See Hosp. Bldg. Co. v. Tr. of the Rex Hosp., 691 F.2d 678, 685-86 (4th Cir. 1982), reh'g denied, 464 U.S. 904 (1983).

In the instant case, Complaint Counsel has failed to present any evidence that the State Board engaged in bad faith through the course of the challenged conduct; to the contrary, 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. Furthermore, the N.C. Dental Practice Act expressly prohibits the practice of dentistry, which includes the removal of stains from teeth, by non-licensed entities. The only alleged consequence of the State Board's challenged conduct is that non-licensed entities ceased to engage in teeth whitening services. As such, the alleged effects of the challenged conduct are envisioned by the N.C. Dental Practice Act.

Second, Complaint Counsel argues that the removal of stains from teeth does not include the practice of teeth whitening; therefore, the results of the State Board's challenged conduct were not envisioned by the N.C. Dental Practice Act. Complaint Counsel's argument is not supported by credible evidence.

All three methods of teeth whitening (i.e. over-the-counter, non-dental, and dentist-supervised) involve bleaching techniques. RPF 367. According to the State Board's witness, Dr. Haywood, the bleaching process used in teeth whitening services actually takes both the external stains off the teeth and takes the internal stains out of teeth. RPF 368, 409. Because the bleaching mechanism involves the removal of stains from teeth and changes the genetic color of the tooth, the removal of stains is teeth whitening. RPF 369. Dr. Haywood testified that the theory presented by Complaint Counsel—that stains are not removed but "discolorized"—is not accepted at all and that he is not aware of any support for Complaint Counsel's theory. RPF 409. Indeed, Dr. Haywood noted that the

removal of stains always has been taught in dental school as the practice of dentistry and bleaching is the removal of stains. RPF 366-68, 400.

Furthermore, members of the teeth whitening industry testified that the use of their teeth whitening products resulted in stain removal. RPF 371. Complaint Counsel's witness—Ms. Osborn, who operates a teeth whitening business called BriteWhite Teeth Whitening System—testified that the dentist with whom she consulted to develop her teeth whitening process used the word "stains" to describe the conditions of teeth that are removed by the teeth whitening process they developed. RPF 634, 637. Ms. Osborn later removed the word "stain" to describe the teeth whitening process in an attempt to avoid state regulations that would view her system as the practice of dentistry. RPF 636. Complaint Counsel's witness—Mr. George Nelson, who is the President of WhiteScience—testified that he believes that teeth whitening is really the removal of stains from teeth. RPF 655, 670. WhiteScience's marketing literature states that its product will "deliver real teeth whitening and stain removal." RPF 669. In sum, Complaint Counsel's theory that the teeth whitening services do not remove stains from teeth is not supported by the evidence of record.

Third, Complaint Counsel argues that, even if teeth teething is the removal of stains under the N.C. Dental Practice Act, non-licensed teeth whitening providers have adopted procedures whereby they only "provide the consumer with a pre-packaged tray, information, and a well-maintained facility (including, for example, set-up and clean-up services)." FTC Post-Trial Brief, p. 107. Again, Complaint Counsel's argument is not supported by the evidence presented at trial. To the contrary, the State Board presented

ample evidence showing that the industry's alleged "hands-off" procedures have not been followed in practice. The following evidence was presented:

- In late August/early September 2004, the State Board received several faxes, emails, and mailings about a salon. Each communication made reference to a flyer advertising teeth whitening at the salon. RPF 147. An undercover investigation revealed that a makeup artist at the salon was making custom impressions as part of her teeth whitening services. She was not wearing gloves or following any sterilization procedures, and she had a poison ivy rash on her hands. RPF 148.
- On September 23, 2003, the State Board received a complaint about impressions being taken at a trade show. RPF 156.
- On October 28, 2004, State Board staff paid an undercover visit to a spa, in response to evidence of unlawful teeth whitening, where the proprietor took impressions of her teeth and created a custom teeth whitening tray on the premises. She also received a teeth whitening kit containing a 22% carbamide peroxide solution. No tooth whitening was done on the premises. RPF 161.
- On September 8, 2006, the Board received a formal complaint about a spa. RPF 206. A State Board staff member posing as a potential customer made an undercover visit to the spa. The investigation revealed that a spa employee who formerly worked as a dental assistant was performing teeth whitening services. The whitening process involved the direct application of a hydrogen peroxide gel by the spa's employees and the shining of an LED light on the teeth. In

some instances, the teeth were also polished to loosen stains or bacteria prior to the whitening procedure. RPF 207.

- On January 3, 2007, the State Board received a phone call from a complaining dentist. He reported that he telephoned the spa and was told they were bleaching teeth by placing a gel directly on the teeth and using an LED light. RPF 101.
- On August 8, 2007, the State Board received a complaint about an advertisement for teeth whitening services, and the case officer requested an investigation. RPF 189. A Board investigator visited the salon and was informed that a worker performed the teeth whitening procedures by brushing a gel on the client's teeth and using a curing light. RPF 190.
- On August 13, 2007, the State Board received a complaint of Zoom whitening at a spa and commenced an investigation. RPF 126. During the course of the investigation, the State Board's investigator was told that the spa did indeed provide teeth whitening services, in the form of a whitening substance being painted on the customer's teeth and activated by a light. RPF 130.
- Mr. Runsick testified that, during his visit to a non-licensed teeth whitening provider on February 17, 2008, he observed non-licensed employees take a mouth piece out of another customer's mouth, detach it from the teeth whitening light, wipe it down with "a Handi-Wipe which you might see at KFC," and place it in his mouth for him. RPF 464, 474.

- Ms. Margie Hughes testified that she used to offer teeth whitening services as part of her business, even though she is not a licensed dentist. RPF 712-13. In doing so, she would take an impression of her customer's teeth. RPF 713.In sum, non-licensed individuals offering teeth whitening services in salons, retail stores, and mall kiosks do not universally follow the self-administration procedures described in Complaint Counsel's Post-Trial Brief. RPF 434, 686.

In the past, the State Board has sought civil and criminal relief in North Carolina courts under the N.C. Dental Practice Act for the unauthorized practice of dentistry by non-licensed teeth whitening providers. RPF 46-49, 126-133. In two separate instances, a consent order of permanent injunction resulted from such litigation, providing that the defendants would not engaged in the unlicensed practice of dentistry by removing stains, accretions and deposits from human teeth or by circulating brochures, and would not otherwise represent to the public they are capable of removing stains, accretions and deposits from human teeth unless appropriately licensed. RPF 133, 211.

In a third instance, criminal proceedings were pursued against a non-licensed teeth whitening provider—Marcia Angelette of Edie's Salon Panache—on the grounds that she was practicing dentistry without a license. RPF 150. Ms. Angelette pled not guilty, but was found guilty of the charge. On January 5, 2005, the Cabarrus County District Court granted a prayer for judgment continued on the condition that she not engage in the unauthorized practice of dentistry. RPF 151.[10] In a fourth instance, criminal proceedings were pursued against a non-licensed teeth whitening provider—Ms. Brandi Temple—for the offense of engaging in the practice of dentistry without a license. The District Attorney in Davidson County undertook the prosecution of the case. The District Attorney voluntarily dismissed the criminal charges against Ms. Temple after she signed an affidavit, providing that she would no longer take teeth impressions in connection with the sale of teeth whitening kits. RPF 162.[11]

Clearly, in taking the challenged conduct, the State Board has acted in good faith pursuant to a legitimate interest and has not attempted to "evade judicial review," as alleged by Complaint Counsel.[12]

---

[10] In its Proposed Findings of Fact, Complaint Counsel blatantly misrepresents the record by asserting that this criminal case "was disposed of before a trial on the merits of the claim . . . ." In fact, Ms. Angelette pled not guilty, but a guilty verdict was rendered by the court. State Board's Response to FTC Proposed Findings of Fact 238.

[11] Again, in its Proposed Findings of Fact, Complaint Counsel mischaracterizes the record by asserting that the District Attorney voluntarily dismissed the criminal case based on Ms. Temple's affidavit, which noted that the affidavit was "given in compromise of a doubtful and disputed criminal charge." To the contrary, the Dismissal form filed with the court did not indicate that the reason for the dismissal was "no crime is charged" or "insufficient evidence to warrant prosecution;" the reason provided for the dismissal was that the matter was "corrected." State Board's Response to FTC Proposed Findings of Fact 235.

[12] Any conclusion previously reached by the Commission in its Order granting Complaint Counsel's Motion for Partial Summary Decision on the limited issue of state action immunity, as to whether or not the State Board "evaded judicial review," is not controlling, given that this issue was not before the Commission at that time and no evidence had been presented to support or oppose such a finding.

VII. THE TENTH AMENDMENT PROHIBITS THE REMEDIES SOUGHT BY COMPLAINT COUNSEL.

Complaint Counsel argues that "any defense under the Tenth Amendment extends no further than the state action defense." FTC Post-Trial Brief, p. 109. In support of this argument, Complaint Counsel cites only two federal district courts cases from California, one of which is unpublished and both of which are over twenty-five years old.

Since those decisions were rendered, federal courts have recognized that a distinction may be drawn between one's immunity through the state action doctrine under Parker and one's constitutional rights provided by the Tenth Amendment. See, e.g., Racetrac Petroleum, Inc. v. Prince George's County, 601 F. Supp. 892, 903 n.12 (D. Md. 1985), aff'd 786 F.2d 202 (4th Cir. 1986) (per curiam) (recognizing that a finding of state action immunity under Parker "is rendered as a matter of statutory construction, i.e. an effort to determine Congressional purpose regarding the reach of the Sherman Act in light of our federal system," without deciding whether immunity also would be required by the Tenth Amendment). Clearly, whether the Tenth Amendment serves as a defense against antitrust liability—even though the Commission has ruled that no state action immunity under Parker v. Brown applies—is an unsettled matter of law.

In any event, regardless of whether the Commission has held that antitrust laws reach the State Board's challenged conduct, the **remedies sought** by Complaint Counsel infringe upon the Tenth Amendment rights of the State Board and North Carolina. In essence, Complaint Counsel seeks an order requiring the State Board to cease and desist from taking any action that may restrain the provisions of teeth whitening services by non-dentists, including, but not limited to: (1) ordering non-dentists to cease the provision of teeth whitening services; and (2) communicating to anyone that any provision of teeth

whitening services by non-dentists violates or may violate North Carolina law. FTC Post-Trial Brief, p. 110.[13]

However, North Carolina has expressly created the State Board for the purpose of preventing non-dentists from engaging in the practice of dentistry, which includes the removal of stains from human teeth. An order like the one sought by Complaint Counsel would cause the Commission to direct the manner in which North Carolina and the State Board regulate the practice of dentistry: a result that is clearly prohibited by New York v. United States, 505 U.S. 144 (1992) and Printz v. United States, 521 U.S. 898 (1997). North Carolina and the State Board would be forced to develop alternative means of informing the public about the prohibitions against the unlicensed practice of dentistry. Such a result impermissibly would "alter the usual balance between the Federal government and the States," in violation of the Tenth Amendment. See California State Bd. of Optometry v. FTC, 910 F.2d 976, 982 (D.C. 1990) (vacating FTC rule that declared certain state laws regulating the practice of optometry unlawful, because the FTC is not empowered to regulate state action).

VIII. REMEDIES MUST PRESERVE THE STATE BOARD'S LEGAL RIGHTS.

Because Complaint Counsel has failed to prove that the State Board violated Section 5 of the FTC Act, it is not entitled to the remedies sought in Section VIII of its Post-Trial Brief. However, to the extent that the Commission determines that Complaint Counsel is entitled to relief, the State Board objects to the remedies set forth in Complaint Counsel's Post-Trial Brief for the following reasons.

[13] The relief now sought by Complaint Counsel, as set forth in its Post-Trial Brief, is substantially different than the relief sought in its Administrative Complaint.

As an initial matter, to the extent that the relief sought infringes on the State Board's constitutional rights, as set forth in Section VII *supra*, such requested relief must be denied.

Second, the proposed order that Complaint Counsel now seeks is not reasonably tailored to remedy the alleged violations of law upon which this proceeding is predicated. See FTC v. Nat'l Lead Co., 352 U.S. 419, 428 (1957) (requiring that the remedy selected have a reasonable relation to the unlawful practices found to exist) (internal citations omitted). In addition to the requested relief described above, Complaint Counsel also seeks an order prohibiting the State Board from communicating to **any person** (including non-licensed teeth whitening providers and lessors of commercial property) that a non-licensed teeth whitening provider may be violating North Carolina law by providing teeth whitening services. Such an order would significantly hinder the State Board in fulfilling their statutory duty to enforce the N.C. Dental Practice Act, when such providers are, in fact, violating the law by offering teeth whitening services (e.g., "takes or makes an impression of human teeth," in violation of N.C. Gen. Stat. § 90-29 (b)(7)). Specifically, the State Board would be prevented from taking certain necessary steps prior to pursuing judicial action against the non-licensed teeth whitening providers, such as responding appropriately to complaints from consumers and talking to witnesses to determine if, in fact, a violation of the N.C. Dental Practice Act had occurred. Given that these prohibitions would trench upon the State Board's ability to comply with its statutory mandates under the N.C. Dental Practice Act, such an order is not viable. See Hoffman Plastic Compounds v. NLRB, 535 U.S. 137, 150 (2006) (rejecting award of back pay to undocumented worker who was not authorized to work in the United States when such an

award "trivializes" other statutory laws and "condones and encourages future violations").

Third, such an order could result in a tremendous waste of economic resources. For instance, suppose an unlicensed business owner invests in the equipment needed to make custom-made bleaching trays through impressions or to scrape stains off of teeth, after the State Board could not tell her whether or not she would be in violation of the N.C. Dental Practice Act by providing teeth whitening services. If the State Board then were to initiate legal proceedings against the business owner for the unauthorized practice of dentistry, the unlicensed business owner would face a significant financial loss and possible devastation to her business operations—without any advance notice. Thus, any order entered against the State Board should be tailored to prevent the likelihood of such financial waste.

IX CONCLUSION

Complaint Counsel has attempted—without success—to create a story of conspiracy and unreasonable restraints, based on a skewed and cockeyed view of the evidence presented at trial. In weaving its tale of alleged antitrust violations, Complaint Counsel disregards a significant amount of evidence that, when properly taken into consideration, indicates the State Board at all times took the challenged conduct in good faith and in accordance with its statutory mandates under the N.C. Dental Practice Act. Complaint Counsel has failed to show that the State Board engaged in concerted action to restrain trade; that the restraint was unreasonable or affected interstate commerce; or that a viable definition of the relevant market was used at trial. Therefore, Complaint Counsel's claims fail as a matter of law.

This the 5th day of May, 2011.

Respectfully submitted,

ALLEN AND PINNIX, P.A.

/s/ Noel L. Allen
Noel L. Allen
Alfred P. Carlton, Jr.
M. Jackson Nichols
Catherine E. Lee
Brenner A. Allen, of counsel
Jackson S. Nichols, of counsel
Attorneys for Respondent
Post Office Drawer 1270
Raleigh, North Carolina 27602
Telephone: 919-755-0505
Facsimile: 919-829-8098
Email: nallen@allen-pinnix.com
mjn@allen-pinnix.com
acarlton@allen-pinnix.com
clee@allen-pinnix.com
ballen@allen-pinnix.com
jsn@allen-pinnix.com

CERTIFICATE OF SERVICE

I hereby certify that on May 5, 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:

Donald S. Clark, Secretary
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Room H-113
Washington, D.C. 20580

I hereby certify that the undersigned has this date served copies of the foregoing upon all parties to this cause by electronic mail as follows:

William L. Lanning
Bureau of Competition
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Room NJ-6264
Washington, D.C. 20580
wlanning@ftc.gov

Melissa Westman-Cherry
Bureau of Competition
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Room NJ-6264
Washington, D.C. 20580
mwestman@ftc.gov

Michael J. Bloom
Bureau of Competition
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Room NJ-7122
Washington, D.C. 20580
mjbloom@ftc.gov

Steven L. Osnowitz
Bureau of Competition
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Room NJ-6264
Washington, D.C. 20580
sosnowitz@ftc.gov

Tejasvi Srimushnam
Bureau of Competition
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Room NJ-6264
Washington, D.C. 20580
tsrimushnam@ftc.gov

Richard B. Dagen
Bureau of Competition
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Room NJ-6264
Washington, D.C. 20580
rdagen@ftc.gov

Michael D. Bergman
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Room H-582
Washington, D.C. 20580
mbergman@ftc.gov

Laurel Price
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Room NJ-6264
Washington, DC 20580
lprice@ftc.gov

Geoffrey Green
Federal Trade Commission
601 New Jersey Avenue, N.W.
Washington, DC 20001
ggreen@ftc.gov

Michael Turner
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Room NJ-6264
Washington, DC 20580
mturner@ftc.gov

I also certify that and electronic copy of the document was served and two spiral bound copies of the document will be delivered to:

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue N.W.
Room H-110
Washington, D.C. 20580
oalj@ftc.gov

This the 5th day of May, 2011.

/s/ Noel L. Allen
Noel L. Allen

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 1995 U.S. DIST. LEXIS 21376

ANTOINE NASSIMOS, et al., Plaintiffs, v. BOARD OF EXAMINERS OF MASTER PLUMBERS, THOMAS BIONDI, Defendants.

CIVIL ACTION NO. 94-1319 (MLP)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

1995 U.S. Dist. LEXIS 21376; 1996-1 Trade Cas. (CCH) P71,372

March 31, 1995, Decided
March 31, 1995, FILED; April 4, 1995, ENTERED

NOTICE: [*1] NOT FOR PUBLICATION

DISPOSITION: Motion for summary judgment by defendants New Jersey Board of Examiners of Master Plumbers, Thomas Biondi, Alan Feid and Robert Muller GRANTED; motion to dismiss by defendants New Jersey Association of Plumbing-Heating-Cooling Contractors, Inc. and Bayshore Association of Plumbing, Heating and Cooling Contractors GRANTED; and application by plaintiffs for a preliminary injunction DENIED.

COUNSEL: For ANTOINE NASSIMOS, plaintiff: JOEL N. KREIZMAN, EVANS, BURGESS, OSBORNE & KREIZMAN, ESQS., LITTLE SILVER, NJ. For JOSEPH FICHNER, JR., plaintiff: JOEL N. KREIZMAN, (See above). For MICHAEL CONROY, plaintiff: JOEL N. KREIZMAN, (See above). For ANTHONY ROSSI, plaintiff: JOEL N. KREIZMAN, (See above). For DANIEL W. WELTMAN, plaintiff: JOEL N. KREIZMAN, (See above). For GEORGE STEINER, plaintiff: JOEL N. KREIZMAN, (See above). For WILLIAM A. MOORE, plaintiff: JOEL N. KREIZMAN, (See above). For WILLIAM TEDESCO, plaintiff: JOEL N. KREIZMAN, (See above). For MICHAEL IGNOZZI, plaintiff: JOEL N. KREIZMAN, (See above). For ALAN HANZO, plaintiff: JOEL N. KREIZMAN, (See above).

For THE NEW JERSEY BOARD OF EXAMINERS OF MASTER PLUMBERS, defendant: BERTRAM P. GOLTZ, JR., OFFICE [*2] OF THE NEW JERSEY ATTORNEY GENERAL, DIVISION OF LAW, NEWARK, NJ. For NEW JERSEY ASSOCIATION OF PLUMBING, HEATING AND COOLING CONTRACTORS, INC., defendant: DAVID I FOX, FOX AND FOX, LIVINGSTON, NJ. For BAYSHORE ASSOCIATION OF PLUMBING, HEATING AND COOLING CONTRACTORS, defendant: DAVID I FOX, (See above). For ROBERT MULLER, INDIVIDUALLY AND IN HIS CAPACITY AS AN OFFICER OF THE NEW JERSEY ASSOCIATION OF PLUMBING, HEATING AND COOLING CONTRACTORS, defendant: BERTRAM P. GOLTZ, JR., (See above). For THOMAS BIONDI, defendant: BERTRAM P. GOLTZ, JR., OFFICE OF THE NEW JERSEY ATTORNEY GENERAL, DIVISION OF LAW, NEWARK, NJ. For ALAN FEID, defendant: BERTRAM P. GOLTZ, JR., (See above).

JUDGES: MARY LITTLE PARELL, United States District Judge

OPINION BY: MARY LITTLE PARELL

OPINION

MEMORANDUM AND ORDER

PARELL, District Judge

This matter is before the Court on motion for summary judgment by defendants New Jersey Board of Examiners of Master Plumbers, Thomas Biondi, Alan Feid and Robert Muller, on motion to dismiss by defendants New Jersey Association of Plumbing-Heating-Cooling Contractors, Inc. and Bayshore Association of Plumbing, Heating and Cooling Contractors, and on application by plaintiffs [*3] for a preliminary injunction. For the following reasons, defendants' motions are granted and plaintiffs' application is denied.

BACKGROUND

Plaintiffs here are master plumbers who are licensed by the New Jersey Board of Examiners of Master Plumbers (the "Board"), a licensing agency for the State of New Jersey, and who conduct business in the state of New Jersey. [1] Plaintiffs allege that defendants [2] conspired to fix prices in violation of *Section 1* of the Sherman Antitrust Act, *15 U.S.C. § 1.* [3] Plaintiffs assert that the Board, in conspiracy with the other defendants, has enforced N.J.A.C. § 13:32-1.12, which prohibits a licensee of the Board from charging "an excessive price for services," in a manner which effectively fixes the prices which may be charged by master plumbers for their services.

1 Two of the named plaintiffs are not licensed master plumbers but rather allege that they are currently in the process of obtaining such licensure. The Court notes that these two plaintiffs may not have standing to assert the claims in this action; however, since the issue of standing has not been raised by any of the defendants and since the issue is not material to the resolution of this litigation, the Court does not address it.

[*4]

2 Defendants here are the New Jersey Board of Examiners of Master Plumbers (the "Board"), the New Jersey Association of Plumbing-Heating-Cooling Contractors, Inc. ("NJAPHCC"), the Bayshore Association of Plumbing, Heating and Cooling Contractors ("Bayshore"), Thomas Biondi, Alan Feid and Robert Muller.

NJAPHCC and Bayshore are both trade associations. Thomas Biondi and Alan Feid are individuals who have both served as the Chairman of the New Jersey Board of Examiners of Master Plumbers. Robert Muller is an individual who has served as an officer of NJAPHCC and who testified on behalf of the State at a disciplinary hearing against plaintiff Joseph Fichner.

3 *Section 1* of the Sherman Antitrust Act provides that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce" is illegal. *15 U.S.C. § 1.*

N.J.A.C. § 13:32-1.12 provides:

(a) A licensee of the Board of Examiners of Master Plumbers shall not charge an excessive price for services. A price is excessive when, after review of the facts, a licensee of ordinary prudence would [*5] be left with a definite and firm conviction that the price is so high as to be manifestly unconscionable or overreaching under the circumstances.

(b) Factors which may be considered in determining whether a price is excessive include, but are not limited to, the following:

1. The time and effort required;

2. The novelty or difficulty of the job;

3. The skill required to perform the job properly;

4. Any special conditions placed upon the performance of the job by the person or entity for which the work is being performed;

5. The experience, reputation and ability of the licensee to perform the services; and

6. The price customarily charged in the locality for similar services.

(c) Charging an excessive price shall constitute occupational misconduct within the meaning of *N.J.S.A. 45:1-21(e)* and may subject the licensee to disciplinary action.

N.J.A.C. § 13:32-1.12.

Specifically, in Count One of the Amended Complaint, plaintiffs allege that the Board has accepted and enforced, as "the price customarily charged in the locality for similar services," the price established by defendants and members of the defendant trade associations. (*See* Am. Compl. [*6] at 4-6.) Plaintiffs further allege that they have been forced to charge the fixed prices in order to avoid disciplinary action under N.J.A.C. § 13:32-1.12(c).

The claim of price fixing set forth in Count Two is premised on allegations related to a disciplinary proceeding previously instituted by the Attorney General for the State of New Jersey against plaintiff Joseph Fichner. (*See* Am. Compl. at 6-8.) This Court is familiar with this disciplinary proceeding. [4]

4 On October 6, 1993, Joseph Fichner filed a complaint with this Court, *Fichner v. Board of Examiners of Master Plumbers*, Civil Action No. 93-4597 (MLP), challenging the constitutionality of N.J.A.C. § 13:32-1.12, which is the same rule challenged by plaintiffs in the instant action, as this rule was applied against Fichner in the disciplinary proceeding. By Memorandum and Order dated September 27, 1994, this Court granted the defendants' motion to abstain in *Fichner v. Board of Examiners of Master Plumbers*, Civ. Action No. 93-4597 (MLP).

[*7] Based on consumer complaints, the Attorney General for the State of New Jersey filed a disciplinary complaint with the Board on July 30, 1992, [5] alleging that, in seven different consumer transactions for plumbing services between October 6, 1988 and July 2, 1991, Joseph Fichner charged prices which exceeded the usual and customary charges for such work. Hearings were held on the complaint on December 17, 1992, January 14, 1993, February 9, 1993, March 16, 1993 and April 28, 1993. Defendant Thomas Biondi was Chairman of the Board on these dates and presided over the hearings. Defendant Robert Muller testified on behalf of the State as to usual and customary prices charged by plumbers in the relevant locality. Mr. Fichner presented the testimony of Richard DiToma on the issue of pricing. By Final Decision and Order filed August 20, 1993, the Board determined that Fichner had "engaged in unconscionable overpricing of plumbing work performed for seven consumers by charging six consumers more than double the usual and customary rate for such services, and charging the seventh approximately $ 200.00 in excess of the usual and customary rate." (Ex. B. attached to Compl. filed in Civil [*8] Action No. 93-4597 (MLP).)

5 This was apparently the second disciplinary complaint filed against Joseph Fichner. A previous complaint had been filed in 1988 which resulted in a reprimand and an order to pay restitution.

DISCUSSION

I. *Motion for Summary Judgment*

The Board, Thomas Biondi, Alan Feid and Robert Muller move for summary judgment on the basis that these defendants are state actors and thus fall within the "state-action exemption" to the federal antitrust laws.

A court shall enter summary judgment under *Federal Rule of Civil Procedure 56(c)* when the moving party demonstrates that there is no genuine issue of material fact and the evidence establishes the moving party's entitlement to judgment as a matter of law. *Celotex Corp. v. Catrett, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)*. In order to defeat a motion for summary judgment, the opposing party must establish that a genuine issue of material fact exists. *Jersey Cent. Power & Light Co. v. Lacey Township,* [*9] *772 F.2d 1103, 1109 (3d Cir. 1985), cert. denied, 475 U.S. 1013, 89 L. Ed. 2d 305, 106 S. Ct. 1190 (1986)*. A nonmoving party may not rely on mere allegations; it must present actual evidence that creates a genuine issue of material fact. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)* (citing *First Nat'l Bank of Arizona v. Cities Service Co., 391 U.S. 253, 290, 20 L. Ed. 2d 569, 88 S. Ct. 1575 (1968)*); *Schoch v. First Fidelity Bancorporation, 912 F.2d 654, 657 (3d Cir. 1990)*. Issues of fact are genuine only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc., 477 U.S. at 248*. Moreover, "allegations of restraint of trade must be supported by 'significant probative evidence' to overcome a motion for summary judgment." *Bushie v. Stenocord Corp., 460 F.2d 116, 120 (9th Cir. 1972)* (quoting *First National Bank v. Cities Service, Inc., 391 U.S. 253, 20 L. Ed. 2d 569, 88 S. Ct. 1575 (1968)*).

The Supreme Court held in *Parker v. Brown, 317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307 (1943)* that the Sherman Act was not intended to apply to certain [*10] types of governmental action by the states. Thus, the *Parker* court first established the well-settled "state-action exemption" to the federal antitrust laws. The exercise of traditional regulatory functions by the states, including regulation of the practice of licensed professions, e.g., medicine, law, accounting, engineering, architecture, plumbing, etc., is governmental action which qualifies as a "state-action exemption" to the federal antitrust laws. *See Bates v. Arizona State Bar, 433 U.S. 350, 359-63, 53 L. Ed. 2d 810, 97 S. Ct. 2691* and 360 n.11 (1977) (state authority to regulate licensed professions should not be diminished by application of the Sherman Act); *California State Bd. of Optometry v. F.T.C., 285 U.S. App. D.C. 476, 910 F.2d 976, 982 (D.C. Cir. 1990)*; *Healey v. Bendick, 628 F. Supp. 681, 689 (D.R.I. 1986)*.

Where an entity is designated to serve as the state's administrative adjunct for purposes of regulating a licensed profession, the entity is considered a state agency for purposes of the "state-action exemption" to the federal antitrust laws. *Brazil v. Arkansas Bd. of Dental Examiners, 593 F. Supp. 1354, 1362-63 (E.D. Ark. 1984), aff'd,* [*11] *759 F.2d 674 (8th Cir. 1985)* (citing *Gambrel v. Kentucky Board of Dentistry, 689 F.2d 612, 618 n. 2 (6th Cir. 1982), cert. denied, 459 U.S. 1208, 75 L. Ed. 2d 441, 103 S. Ct. 1198 (1983)*). A state agency is presumed to act in the public interest and, in order to come within the "state action exemption," it need only

establish that its action is taken pursuant to a clearly articulated and affirmatively expressed state policy. *See Hallie v. Eau Claire, 471 U.S. 34, 45-47, 85 L. Ed. 2d 24, 105 S. Ct. 1713 (1985)*; *Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48, 64, 85 L. Ed. 2d 36, 105 S. Ct. 1721 (1985).*

In 1968, the New Jersey Legislature enacted the State Plumbing License Law, *N.J. Stat. Ann. § 45:14C-1, et seq.*, which provides the Board with broad supervisory powers over the practice of plumbing. In order to carry out the responsibilities inherent in this broad vest of supervisory power, the Board is authorized to "adopt, amend and promulgate such rules and regulations which may be necessary to carry out the provisions of [this Act]." *N.J. Stat. Ann. § 45:14C-7.* The purpose of N.J.A.C. § 13:32-1.12, the rule promulgated by the [*12] Board and challenged by plaintiffs, is to protect consumers from being charged unconscionable prices by licensed plumbers and is reflective of the clearly articulated and affirmatively expressed state policy aimed at preventing such wrongful activity by licensed professionals. *See New Jersey Guild of Hearing Aid Dispensers v. Long, 75 N.J. 544, 565-66, 384 A.2d 795 (1978)*; *see also American Trial Lawyers Assoc. v. New Jersey Supreme Court, 66 N.J. 258, 265, 330 A.2d 350 (1974)*; *see generally Kugler v. Romain, 58 N.J. 522, 279 A.2d 640 (1971).* Thus, in enforcing the requirement that licensed master plumbers not charge excessive prices, the Board is acting pursuant to a clearly articulated and affirmatively expressed state policy.

Accordingly, it is clear that the Board, Thomas Biondi, Alan Feid and Robert Muller, [6] should be exempt from this suit which is based on an alleged violation of the Sherman Act, and the motion for summary judgment by these defendants shall be granted on this basis. *See Bates v. Arizona State Bar, 433 U.S. at 361-63.*

> 6 Defendants Thomas Biondi and Alan Feid are defendants here on the basis that they have both served as Chairman of the New Jersey Board of Examiners of Master Plumbers. Thus, these defendants are sued here only in their capacity as state officials. Robert Muller is a defendant here on the basis that he testified on behalf of the State at the hearings held on the disciplinary complaint filed against plaintiff Joseph Fichner. Thus, for purposes of the "state-action exemption" analysis here, defendant Muller was a state actor when he provided testimony at the request of the State.

[*13] **II. *Motion to Dismiss***

Defendant trade associations, NJAPHCC and Bayshore, move to dismiss plaintiffs' complaint against them. A court may dismiss a complaint pursuant to *Rule 12(b)(6)* "only if, accepting all well pleaded facts as true, the plaintiff is not entitled to relief." *Bartholomew v. Fischl, 782 F.2d 1148, 1152 (3d Cir. 1986).* Additionally, all reasonable inferences from plaintiff's allegations "must be accepted as true and viewed in the light most favorable to the non-moving party." *Sturm v. Clark, 835 F.2d 1009, 1011 (3d Cir. 1987).* This Court may not dismiss a complaint unless plaintiff can prove no set of facts which would entitle him to relief. *Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957).* "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Scheuer v. Rhodes, 416 U.S. 232, 236, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974).*

The crux of plaintiffs' complaint is that the Board, in conspiracy with the defendant trade associations, Biondi, Feid and Muller, has enforced N.J.A.C. § 13:32-1.12 in such a manner as to effectively force plumbers [*14] to charge a fixed price for services. The assertion that the rule prohibiting master plumbers from charging excessive and unconscionable prices results in a situation where only "fixed prices" can be charged for plumbing services in order to avoid the threat of disciplinary action by the Board is without merit. There is simply no support for plaintiffs' assertion that the Board's enforcement of the requirement that plumbers not charge unconscionably excessive prices has effectively "fixed" the price which a licensed plumber may charge for plumbing services. Indeed, evidence of the price customarily charged in the locality for similar services is only one of six factors which may be considered in determining whether a price charged is excessive within the meaning of the rule. Plaintiffs' theory of a conspiracy to fix prices rests on the allegation that the Board is wrongfully enforcing N.J.A.C. § 13:32-1.12 and since this allegation is without merit, plaintiffs' assertion of an antitrust violation fails as to defendants NJAPHCC and Bayshore as well. Accordingly, the motion to dismiss by defendants NJAPHCC and Bayshore shall be granted. [7]

> 7 Plaintiffs have applied to the Court for a preliminary injunction (a) prohibiting the Board from relying upon information provided by the defendant trade associations in determining the reasonableness of fees and (b) prohibiting the Board from enforcing the judgment issued against plaintiff Joseph Fichner. Since this Court herein has resolved the issues set forth in plaintiffs' complaint in favor of defendants, there is no basis upon which to grant plaintiffs' request for injunctive relief. *See Opticians Ass'n of America v. Independent Opticians of America, 920 F.2d 187, 191-92 (3d Cir. 1990)*; *Hoxworth v. Blinder,*

Robinson & Co., Inc., 903 F.2d 186, 197-98 (3d Cir. 1990); In re Arthur Treacher's Franchisee Litigation, 689 F.2d 1137, 1143 (3d Cir. 1982). Accordingly, the application for a preliminary injunction shall be denied.

[*15] **IT IS** therefore on this *31st* day of March, 1995, **ORDERED** that the motion for summary judgment by defendants New Jersey Board of Examiners of Master Plumbers, Thomas Biondi, Alan Feid and Robert Muller is hereby **GRANTED;**

IT IS FURTHER ORDERED that the motion to dismiss by defendants New Jersey Association of Plumbing-Heating-Cooling Contractors, Inc. and Bayshore Association of Plumbing, Heating and Cooling Contractors is hereby **GRANTED**; and

IT IS FURTHER ORDERED that the application by plaintiffs for a preliminary injunction is hereby **DENIED.**

MARY LITTLE PARELL

United States District Judge

LEXSEE 2003 OKLA. AG LEXIS 13

OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF OKLAHOMA

Attorney General Opinion 03-13

2003 Okla. AG LEXIS 13

March 26, 2003

REQUESTBY:

[*1]
Executive Director Linda Campbell
Oklahoma Board of Dentistry
201 N.E. 38th Terrace, # 2
Oklahoma City, Oklahoma 73105

OPINIONBY:

W.A. DREW EDMONDSON, ATTORNEY GENERAL OF OKLAHOMA; DEBRA SCHWARTZ, ASSISTANT ATTORNEY GENERAL

OPINION:

This office has received your request for an official Attorney General Opinion in which you ask, in effect, the following question:

> **Based upon *59 O.S. 2001, § 328.19(A)(11)*, (13) is teeth bleaching the practice of dentistry when a person or entity which is neither licensed nor authorized under the State Dental Act makes impressions of a consumer's teeth and produces a custom tray which is provided to the consumer at the time of purchase?**

The State Dental Act ("Act"), *59 O.S. 2001, §§ 328.1 -- 328.51a*, governs dentistry in Oklahoma. The Legislature has declared that because the practice of dentistry affects the public health, safety and general welfare, the regulation and control of the profession is in the public's best interest. *Id.* § 328.2. The Legislature further intends that only properly qualified dentists be permitted to practice dentistry, and that all provisions [*2] of the Act related to the practice of dentistry be liberally construed to carry out the Act's purposes. *Id.*

Acts which constitute the practice of dentistry in Oklahoma are defined by statute at *59 O.S. 2001, § 328.19*. The subsections of that statute relevant to your question read as follows:

> A. The following acts by any person shall be regarded as practicing dentistry within the meaning of the State Dental Act:
>
> ...

> 11. Offering or undertaking, by any means or methods, to remove stains, discolorations, or concretions from the teeth;
>
> ...
>
> 13. Taking impressions of the teeth and jaws[.]

Id.

No one may practice dentistry in Oklahoma without first obtaining the proper license (for dentists) or certificate (for dental hygienists) from the State Board of Dentistry. *Id.* § 328.21. Practicing or attempting to practice dentistry without proper authorization from the Board is a misdemeanor, and carries criminal and civil penalties. *Id.* § 328.49(C), (D).

According to the legislative declaration in Section 328.2 cited above, we are to liberally construe the Act in carrying out its purposes of protecting the public [*3] health, safety and welfare from unqualified dental practitioners. *Id.* The language of Section 328.19(A)(11), (13) is clear that offering to remove, or actually removing, by any means, stains and discolorations from the teeth, and taking impressions of the teeth, constitutes the practice of dentistry. When statutory language is plain and its meaning clear, its evident meaning must be accepted. *Jackson v. Indep. Sch. Dist. No. 16, 648 P.2d 26, 29 (Okla. 1982).*

We note that your question does not address situations in which consumers apply whitening products to, or make impressions of, their own teeth. While these actions are literally the "practice of dentistry" under Section 328.19(A)(11), (13), saying that such consumers are subject to regulation under the Act would be absurd and cannot have been the Legislature's intention, nor would it fulfill the legislative purpose of protecting the public from unqualified dental practitioners. "The Legislature will not be presumed to have intended an absurd result, and a statute should be given a sensible construction, bearing in mind the evils intended to be avoided ...." *AMF Tubescope Co. v. Hatchel, 547 P.2d 374, 379 (Okla. 1976).*
[*4]
In the situation you describe, a person or entity offers to whiten consumers' teeth by making impressions of their teeth and creating custom mouthpieces, called "trays." The custom trays are filled with a whitening product, also provided by the person or entity, and worn by the consumer for designated periods each day over some specified duration. The person or entity is therefore offering or undertaking to remove stains and discolorations from the teeth, as well as taking impressions of the teeth, acts which constitute the practice of dentistry under the Act, *59 O.S. 2001, § 328.19(A)(11)*, (13), and which require authorization by the Board.

Creating custom trays implicates another section of the Act, which governs the manufacture by both dentists and non-dentists of devices to be worn in the mouth. *Id.* § 328.36(A), (C). Pursuant to Section § 328.36(A), you cite health and safety concerns over who regulates the facility in which the trays are made and whether infectious disease control practices are used in manufacturing and handling the trays.

The Act requires that custom trays be made in a dental laboratory by a dental laboratory [*5] technician pursuant to a dentist's prescription; further, this service must be rendered only to the prescribing dentist, not to the public:

> 9. "Dental laboratory" means a location, whether in a dental office or not, where a dentist or a dental laboratory technician performs dental laboratory technology;
>
> 10. "Dental laboratory technician" means an individual whose name is duly filed in the official records of the Board [of Dentistry], which authorizes the technician, upon the laboratory prescription of a dentist, to perform dental laboratory technology, which services must be rendered only to the prescribing dentist and not to the public;

11. "Dental laboratory technology" means using materials and mechanical devices for the construction, reproduction or repair of dental restorations, appliances or other devices to be worn in a human mouth[.]

59 O.S. 2001, § 328.3.

Although the Act does not define "custom tray," a tray which has been created from an impression of an individual's teeth, and which is intended to be filled with a whitening agent and worn against the teeth, would qualify under subsection 328.3(11) as an "appliance[] [*6] or other device[] to be worn in a human mouth." Creating a custom tray thus involves "dental laboratory technology" as defined by the Act. The Act requires that any person, firm, corporation, partnership or other legal entity which wishes to operate a dental laboratory in Oklahoma must apply for a permit to do so from the Board of Dentistry, which will evaluate the applicant's qualifications. *Id.* § 328.36(A).

The Act has been interpreted, in situations similar to the one you describe, by both the Oklahoma Court of Criminal Appeals and the Oklahoma Supreme Court. The courts have applied the Act to denturists, who also make impressions of the teeth and construct devices to be worn in the mouth. *Cryan v. State, 583 P.2d 1122 (Okla. Crim. 1978); Butler v. Bd. of Governors of Registered Dentists, 619 P.2d 1262 (Okla. 1980).* In *Cryan,* the court held that denturists come under the definition of "dental laboratory technician" and that because Cryan had failed to file his name with the Board of Dentistry, made a dental prosthesis without a dental prescription, and supplied it directly to a consumer rather than to a licensed [*7] dentist, he was guilty of a misdemeanor. *Cryan, 583 P.2d at 1123-24.*

Similarly, in *Butler,* the court upheld an injunction preventing Butler from making impressions of consumers' teeth and supplying them with structures to be worn in the mouth. *Butler, 619 P.2d. at 1264.* In both cases, the courts found that making impressions of the teeth and creating devices to be worn in the mouth constituted the practice of dentistry under the Act.

Applying these cases to the situation about which you ask, we conclude that a person or entity which offers to make, or makes, custom trays for consumers for use in conjunction with teeth whitening products engages in the practice of dentistry as defined in the Act, and such practice must be authorized by the Board of Dentistry.

It is, therefore, the official Opinion of the Attorney General that:

While consumers may make impressions of their own teeth to create mouthpieces, or "trays," for use with teeth whitening products, a person or entity which offers to make, or makes, custom trays for consumers engages in the practice of dentistry as defined in *59 O.S. 2001, § 328.19(A)(11)* [*8] **, (13), and must be authorized to do so by the State Board of Dentistry. *Id.*** **§ 328.21.**

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsState & Territorial GovernmentsLicenses

LEXSEE 2008 KAN. AG LEXIS 13

OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF KANSAS

Attorney General Opinion No. 2008-13

2008 Kan. AG LEXIS 13

June 3, 2008

SYLLABUS:
[*1]

Re: Public Health--Regulation of Dentists and Dental Hygienists--Persons Deemed to Be Practicing Dentistry; Non-licensed Persons Directly Applying Teeth Whitening or Bleaching Product

Synopsis: Application of teeth whitening or bleaching products could be included in the statutory phrases "dental service of any kind," and treatment of a "physical condition of the human teeth" as used in the definition of the practice of dentistry, and "removal of . . . stains" as used in the definition of the practice of dental hygiene. The Kansas Dental Board has authority to adopt a regulation stating that teeth whitening is a "dental service" to treat a "physical condition of the human teeth" and/or a dental hygiene service to remove stains. However, in the absence of such regulatory specificity, an attempt to initiate either a criminal prosecution or an injunction for unlawful practice may be subject to a due process challenge for vagueness. Cited herein: *K.S.A. 65-1421*; *65-1422*; *65-1423*; *65-1451*; *K.S.A. 2007 Supp. 65-1456* [*2] ; *K.S.A. 74-1407.*

REQUESTBY:

The Honorable Susan Wagle
State Senator, 30th District
4 N. Sagebrush
Wichita, Kansas 67230

OPINIONBY:

Stephen N. Six, Attorney General; Camille Nohe, Assistant Attorney General

OPINION:

As state senator for the 30th district, you pose the following question:

> "Would the direct application of a teeth whitening or bleaching product (*i.e.*, carbamide peroxide) to the teeth by a non-licensed person, not under the direct supervision of a licensed dentist, be considered either the practice of dentistry or dental hygiene under the Dental Practice Act?"

Over the past recent years teeth whitening has become increasingly popular among consumers. We learn from a dental insurance company:

"A child's baby teeth are generally whiter than the adult teeth that follow. Over time, adult teeth often darken due to changes in the mineral structure of the tooth. Tobacco use or drinking coffee, tea and other beverages can cause darkening, and certain medications can discolor teeth. These factors lead many adults to consider teeth bleaching to restore their once brilliant smiles." n1

n1 http://www.deltadental.com/Public/OralHealth/bleachingrisks.jsp (Tooth Whitening: Know the Risks)

[*3]
The American Dental Association explains that:

"'Whitening' is any process that will make teeth appear whiter. This can be achieved in two ways. A product can bleach the tooth, which means that it actually changes the natural tooth color. Bleaching products contain peroxide(s) that help remove deep (intrinsic) and surface (extrinsic) stains. By contrast, non-bleaching products contain agents that work by physical or chemical action to help remove surface stains only.

. . . .

"There are many professionally applied tooth whitening bleach products. These products use hydrogen peroxide in concentrations ranging from 15 percent to 35 percent and are sometimes used together with a light or laser, which the companies state accelerate or activate the whitening process. Prior to application of professional products, gum tissues are isolated either with a rubber dam or a protective gel. Whereas home-use products are intended for use over a two-to-four week period, the professional procedure is usually completed in about an hour.

"As with the 10 percent home-use carbamide peroxide bleach products, the most commonly observed side effects of professionally applied hydrogen peroxide [*4] products are temporary tooth sensitivity and occasional irritation of oral tissues. On rare occasions, irreversible tooth damage has been reported. . . ." n2

n2 http://www.ada.org/prof/resources/positions/statements/whiten2.asp (ADA Statements on the Safety and Effectiveness of Tooth Whitening Products)

We are informed by the Kansas Dental Association that "[m]any non-dental businesses advertise that they apply whitening agents directly to consumers' teeth. . . . These whitening products include the direct application of professional levels of carbamide peroxide as well as whiteners that are applied to the teeth and then activated by a light source delivered at specific wavelengths." n3

n3 Letter from Kansas Dental Association, April 2, 2008.

In Kansas it is unlawful for a person to practice dentistry unless licensed as a dentist or a dental [*5] hygienist, or practicing under the direct supervision of a dentist. n4 Practicing dentistry in violation of this statute is a misdemeanor, carrying a penalty of a maximum $ 1000 fine, 12 month imprisonment, or both. Additionally, the Board of Dentistry may seek an injunction against any person the Board believes is practicing dentistry or dental hygiene in violation of the Regulation of Dentists and Dental Hygienists Act (Act). n5

n4 *K.S.A. 65-1421*; *65-1423(8)* and (9).

n5 *K.S.A. 65-1451.*

The practice of dentistry statutorily consists of providing a number of specific services, n6 as well as generally performing a "dental service of any kind" n7 and treating a "physical condition of the human teeth." n8 These latter categories of services are quite broad and conceivably could implicate almost anything considered "dental" or having to do with "human teeth," including a person brushing her [*6] own teeth. Avoiding such an absurd result, former Attorney General Carla J. Stovall opined that a strict literal interpretation would not serve the legislative purpose of protecting the public from the incompetent provision of dental services. n9 Attorney General Stovall thus concluded that the *sale* by unlicensed persons of impression materials for teeth whitening did not constitute the practice of dentistry and that the *sale* of whitening toothpaste or whitening gel did not constitute the treatment of a physical condition of human teeth. n10

n6 *K.S.A. 65-1422.*
n7 *K.S.A. 65-1422(a).*
n8 *K.S.A. 65-1422(f).*
n9 Citing *Winslow v. Homer, 115 Kan. 450,451 (1924)* (practice of dentistry involves public health and is regulated to protect public from ignorance, unskillfulness, unscrupulousness, deception, and fraud); *State v. Creditor 44 Kan. 565, 567 (1890)* (practice of dentistry licensed to aid in exclusion of those unfit to practice due to lack of experience, learning and skill).

[*7]

n10 Attorney General Opinion No. 2000-7.

As with the practice of dentistry, the practice of dental hygiene is also statutorily defined and includes "therapeutic procedures which result in the removal of extraneous deposits, *stains*, and debris from the teeth." n11

n11 *K.S.A. 2007 Supp. 65-1456* (emphasis added).

Your question goes beyond the one addressed in Attorney General Opinion No. 2000-7, to whether a person not licensed as a dentist or hygienist, or under direct supervision of a dentist, may lawfully *apply* whitening products to a consumer's teeth.

The difficulty in resolving this issue lies in the attempt to construe the statutory phrases "dental service of any kind," treatment of a "physical condition of the human teeth" and "removal of . . . stains" in order to determine what is included in and what is excluded from the practice of dentistry and dental hygiene.

The [*8] Kansas Dental Board, n12 the Kansas Dental Association n13 and the Kansas Dental Hygienists Association n14 believe that teeth whitening procedures *should* be included in the statutory phrases that define the practice of dentistry and the practice of dental hygiene. We agree that application of teeth whitening products *could* be included in the statutory phrases "dental service of any kind," treatment of a "physical condition of the human teeth" as used in the definition of the practice of dentistry, and "removal of . . . stains" as used in the definition of the practice of dental hygiene. The Kansas Dental Board has authority to adopt a regulation stating that teeth whitening is a "dental service" to treat a "physical condition of the human teeth," and/or is a dental hygiene service to remove stains. n15 However, in the absence of such regulatory specificity, an attempt to initiate either a criminal prosecution or an injunction may be subject to a due process challenge for vagueness. n16 Therefore, should the Kansas Dental Board require the application of teeth whitening or bleaching products be performed only by licensed dentists, dental hygienists or persons under the direct [*9] supervision of a licensed dentist, the Board should adopt an appropriate regulation.

n12 April 21, 2008 letter from Betty Wright, Executive Director, Kansas Dental Board.
n13 April 2, 2008 letter from Kevin Robertson, Executive Director, Kansas Dental Association.
n14 March 28, 2008 letter from Susan Rodgers, Kansas Dental Hygienists Association.
n15 *K.S.A. 74-1407* (Dental Board has power to adopt regulations to carry out and make effective provisions of act).
n16 Even assuming the statutes regulating the practice of dentistry may be understood as statutes regulating a business, if a statute could subject a person to both criminal and administrative actions, the criminal standard for determining vagueness applies. *Boatright v. Kansas Racing Commission, 251 Kan 240, 243,* citing *Kansas City Millwright Co., Inc. v. Kalb, 221 Kan. 658, 662-63 (1977).* The criminal standard requires a determination of whether the statute's "language conveys a sufficiently definite warning as to the conduct proscribed when measured by common understanding and practice. A statute which either requires or forbids the doing of an act in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application is violative of due process." *251 Kan. at 243,* quoting *Hearn v. City of Overland Park, 244 Kan. 638, 642 (1989).*

[*10]

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureSentencingFinesCriminal Law & ProcedurePostconviction ProceedingsImprisonmentGovernmentsLegislationVagueness