ORIGINAL

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Jon Leibowitz, Chairman**
J. Thomas Rosch
Edith Ramirez
Julie Brill

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

RESPONDENT'S REPLY BRIEF

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STATEMENT OF THE CASE

The State Board **is a state agency**; it is not a public/private hybrid such as the Virginia State Bar.[1] The notion of a hybrid is a convenient construct, but unsupported by the record and explicitly contrary to state statute. See, N.C. GEN. STAT. § 90-22(a), (b); N.C. GEN. STAT. § 93B-16(b); N.C. Constitution art. I, § 34. Complaint Counsel ("CC") and the Federal Trade Commission ("FTC" or "Commission") have referred to the State Board as such numerous times in the pleadings and Orders in this case. See, for example, Complaint at 1; Commission's Opinion at 4; Initial Decision ("ALJID") at 9; Joint Stipulation, Mar. 30, 2011 at 1. Its staff and members are public officials and state employees entitled by statute to sovereign immunity. N.C. GEN. STAT. § 93B-16(b).

STATEMENT OF FACTS

As a preliminary matter, the Commission must disregard any CC request for additional findings beyond those in the ALJ's Initial Decision. CC had an opportunity under Rule 3.52(b) of the Commission's Rules for Adjudicative Proceedings to appeal any portion of the Initial Decision that it did not agree with. There was no appeal. CC's requests for new findings are tantamount to an appeal in violation of the Rules of Procedure.[2]

Given the need for brevity in this Reply Brief, the State Board offers these select rebuttals of the misinformation contained in CC's Statement of Facts.

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[1] This is a reference to the case primarily relied upon by the Commission in its state action opinion, Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975). Although the Virginia State Bar does have the ability to regulate the ethical conduct of Virginia attorneys, it has no authority to discipline the license of Virginia attorneys or prosecute the unauthorized practice of law in the Commonwealth of Virginia.

[2] See CCAB at pages 4, 17-19 and 21-23, where CC requests additional findings re: economic theory and studies supporting the harm to competition by the State Board's actions and an evaluation of the evidence regarding health and safety issues associated with non-dentist teeth whitening.

A. North Carolina Statutes Unambiguously Prohibit Non-Licensees from Removing Stains from Teeth and Mandate that the State Board, Whose Members and Staff Are State Officials with Sovereign Immunity, Enforce the Statutes.

The removal of stains from human teeth is the practice of dentistry in North Carolina. N.C. GEN. STAT. § 90-29(b)(2). Advertisement of the ability or qualification to remove stains from human teeth is the practice of dentistry in North Carolina. N.C. GEN. STAT. § 90-29(b)(13). The ownership, management, supervision, or control of an enterprise where the removal of stains from human teeth is performed, attempted to be performed, or represented to be performed is the practice of dentistry in North Carolina. N.C. GEN. STAT. § 90-29(b)(11). No one may practice dentistry in North Carolina, or offer or attempt to practice dentistry in North Carolina unless that person holds a valid license issued by the State Board, N.C. Gen. Stat. § 90-29(a), or is a dental hygienist under the direct supervision of a licensed dentist, N.C. Gen. Stat. § 90-233(a).

The fact that the particular statutory provision governing the removal of stains from human teeth has not been amended since the 1930s is no more relevant that the fact that pertinent language of the Federal Trade Commission Act ("FTC Act") and the Sherman Act have not changed. Although different methods of dental stain removal may have been developed over time, non-dentists in North Carolina nevertheless own, manage, supervise, or control enterprises where stain removal services are performed, attempted to be performed, or represented to be performed. Numerous advertisements for non-dentist teeth whitening in cases investigated by the State Board tout the removal of stains.[3] Further, CC's own industry witness, George Nelson, testified at trial that "the

[3] See, e.g., RX4 at 30 (brochure: "removes stains from coffee, tea, wine, tobacco, etc."); RX8 at 14 (brochure: "tooth discoloration from years of staining foods, coffee, tobacco, cola, and red wine are eliminated"); RX15 at 13 (brochure: "The stains that you eliminate will not reappear."); RX19 at 7 (flyer:

only thing that teeth whitening is -- and that's just a marketing term -- is actually stain removal, but the dentist created the term for marketing purposes." Nelson, Tr. 818. CC witness Bryan Wyant, who operated a mall kiosk teeth whitening business, testified that the WhiteScience product he used was designed to remove stains. Wyant, Tr. 906.

B. There Is No Evidence that Unlicensed Businesses Lawfully Compete with Licensed Dentists in Any Relevant Market, Nor Do Dentist Board Members Have a Material Financial Interest.

CC's own expert economist witness, Dr. Kwoka, stated that "the existence of a financial interest of dentists in the exclusion of kiosks/spa operators does not require that dentists be the only substitutes for kiosk/spa operators. … It requires only that they compete with each other **to a significant degree**." Complaint Counsel's Proposed Findings of Fact ("CCPFF") 157 (quoting Kwoka's Report, CX654 at 9 (emphasis added)). This is such an important point for CC that they use it to initiate their discussion on the financial interest of dentists, including dentist board members, in teeth whitening. CCAB at 11. However, there is no substantial evidence to support a finding of a "significant degree" of competition. In fact, removal of stains comprised less than a percent revenues earned by the dentist members of the State Board;[4] further, reported revenues earned by some Board members are revenues of the entire practice – not their

"stain molecules will attach themselves to foam strips and be removed"); (RX25 at 15 (investigative report: spa employee polished customers' teeth prior to whitening "to loosen up any stains or bacteria"); RX26 at 9 (website: "you remove the stains when you remove the pads"); RX26 at 13 (brochure: "stain removal in record time"); RX30 at 5 (flyer: special whitening gel "is the most effective material for removing the internal stains. … With the stains removed[,] the teeth appear whiter and brighter.").

[4] The same can be said for the revenues cited by CC for dentists who complained to the State Board. See CX599 at 3.

individual earnings.[5] Some dentist Board members did not perform any teeth whitening at all. See detailed discussion in Respondent's Appeal Brief ("RAB") at 13-15.

Contrast the revenues cited in CC's Answering Brief for North Carolina dentists who perform teeth whitening ("tens of thousands of dollars" **a year**) with that revealed in trial testimony by CC's teeth whitening industry witnesses. WhiteSmile revenues for 2008 averaged $2,000 **a day** for a typical store; for a good store, $3,500 - $4,000 **per day**; for all stores, best-day revenues were $248,000 "**in a single day**." Valentine, Tr. 549 (emphasis added). For the year 2010, WhiteSmile's gross sales were at least $8 million. Valentine, Tr. 581-82. WhiteScience's total sales at their peak were over $5 million **per year** (Nelson, Tr. 733); top sales in North Carolina were approaching $200,000 **per month** (Nelson, Tr. 734). The revenues earned by North Carolina dentists whose practices generated the most income from all forms of teeth whitening pales in comparison with the revenues of the non-dentist teeth whitening industry.

The report of the American Academy of Cosmetic Dentistry cited by CC illustrates that although Academy members averaged $25,000 in revenue in 2006 from teeth whitening, the bulk of their revenues were derived from other procedures. CX383 at 2. These cosmetic dentists reported an average of 1,325 other procedures performed in 2006, for $483,000. CX383 at 2. Even among these cosmetic dentistry specialists, the percentage of their 2006 teeth whitening revenues was roughly 4.8%. CX383 at 2. There is no evidence that any, much less a majority of the licensee Board members, practice "cosmetic dentistry."

[5] Also, like the dentist Board members, the revenues reported by the majority of these dentists were actually the revenues of the entire practice. See CX599 at 1 (2 dentists); CX616 at 25 (2 dentists); CX602 at 1 (2 dentists); CX600 at 1 (3 dentists); CX603 at 1 (2 dentists).

C. Cease and Desist Letters Sent by the State Board Were Sent When There Was Credible Evidence of the Unauthorized Practice of Dentistry, Did Not Mention "Teeth Whitening," and Did Not Force Anyone to Cease Lawful Activities.

CC claims that the cease and desist letters began to be utilized in 2006 when the State Board became concerned that North Carolina courts would not rule in their favor. To the contrary, Mr. White, the State Board's COO, testified that the State Board did not decide to use cease and desist letters rather than go to the court system in teeth whitening cases because of the Board's lack of success in court. White, Tr. 2338. This is plainly evidenced by the fact that the State Board brought two civil actions against non-dentist stain removers over twenty months and almost three years later, respectively, after the March 7, 2005 verdict referenced by CC in footnote 7 of its Answering Brief. See RX25 at 9-14, Complaint for Declaratory and Injunctive Relief, filed Nov. 21, 2006; RX8 at 1-8, Complaint for Declaratory and Injunctive Relief, filed Jan. 22, 2008. Further, in the absence of an in-person investigation, cease and desist letters were sent based upon credible evidence of a violation, usually advertising, or on the face of the complaint. RX56 (Feingold, Dep. at 267-277); RX58 (Friddle, IHT at 51-52, 53-54).

Contrary to CC's assertions, no kiosk, spa, or other non-dentist provider of teeth whitening services ever was or could be forced to stop operations unless the State Board obtained either a court order or the cooperation of a district attorney in a criminal conviction and a court judgment. Owens, Tr. 1450-1451; Hardesty, Tr. 2774. Indeed, CC has cited no legal authority that a cease and desist letter that orders people to stop violating the Dental Practice Act is an *ultra vires* act of the State Board, a violation of any antitrust statute or, for that matter, a violation of any state or federal law. Nor has CC presented evidence that any cease and desist letter restrained any lawful activity.

D. The State Board's Contacts with the Cosmetology Board (also a State Agency) and Shopping Mall Managers Was the Communication of Truthful Information.

CC's recitation of the State Board's activities in regard to enlisting the assistance of the North Carolina Board of Cosmetic Art Examiners ("Cosmetology Board") and management of North Carolina shopping malls by sending informational letters about the unauthorized practice of dentistry ignores the obvious. **All** of the information communicated to the licensed cosmetologists and shopping mall managers **was true**. Only a licensed dentist or a dental hygienist acting under the supervision of a licensed dentist may provide stain removal services, and the unlicensed practice of dentistry in North Carolina is a misdemeanor. Joint Stipulations ¶ 33; Hardesty, Tr. 2861-2862; RX50 (Bakewell, Dep. at 309-310. Further, regarding the Cosmetology Board, cooperation between state agencies with overlapping authority is not uncommon. CX645 at 1; see, e.g., RX44 at 7. The letters sent to mall management are also not unique; comparable informational letters have been sent by the North Carolina Board of Massage & Bodywork Therapy to all major shopping malls and all major airports in the state apprizing them of the requirement that persons providing massage and bodywork therapy in those locations be licensed. RX35 at 1; RX36 at 3.

E. The State Board Was Acting Upon Credible Evidence of Actual Harm from Illegal Stain Removal.

Incredibly, CC totally ignores the testimony of a North Carolina consumer who was injured as the result of a teeth whitening session conducted by a non-dentist. See Respondent's Proposed Findings of Fact ("RPFF") 460-512. CC also ignores the complaints filed by three other North Carolina consumers who reported injuries to the State Board. RPFF 513-531. CC's expert industry witness characterized such evidence

as "anecdotal" evidence of harm to consumers. Giniger, Tr. 461-466. This evidence of harm from illegal stain removal was also recognized by Dr. Haywood, the State Board's expert dentistry witness, who characterized it as "not as high a level as a scientific article, but it's sometimes all you've got." Haywood, Tr. 2519. And yet, CC asked the Commission to make findings about the safety of non-dentist teeth whitening and credibility of witnesses in this regard.

CC places great emphasis in its Statement of Facts on the lack of studies or reports regarding the safety of non-dentist teeth whitening. First, it is not the role of the Board to second-guess the legislature's independent determination that in order to protect the public, stain removal must be done by dentists. Further, in his testimony, Dr. Haywood offered several reasons why such reports and studies do not currently exist. Non-dentist teeth whitening is a relatively new phenomenon, and there has not been time to conduct a scientific study on the potential harms of the practice. Haywood, Tr. 2518-2519. It would be difficult for companies to perform an ethical study because study participants cannot receive a dental exam prior to undergoing the whitening process. Haywood, Tr. 2526-2527. Finally, scientific journals do not normally conduct studies of illegal practices. Haywood, Tr. 2538-2539.

F. Unlike Complaint Counsel's Expert Witness Who Had More Interest in Teeth Whitening Business than All State Board Members Combined, Dr. Haywood Has No Direct Financial Interest in Teeth Whitening Be Disregarded.

CC denigrates Dr. Haywood's opinions provided in his expert witness report and urges that his testimony be disregarded. If CC has such a low opinion of Dr. Haywood's expertise, why then did CC attempt -- not once, but twice -- to secure Dr. Haywood's services as their industry expert witness in this matter before settling for Dr. Giniger's

services? Haywood, Tr. 2459. CC's characterization of Dr. Haywood as having "positional bias" and framing his testimony as "untrustworthy" is especially ironic since Dr. Giniger has spent much of his career developing and promoting teeth whitening products for retail over-the-counter and professional dentist use. Giniger, Tr. 96-98

ARGUMENT

A. The Board's Actions Were Quintessentially Sovereign, Not Taken as a "Person" Under the Antitrust Laws.

As CC states, the Commission has jurisdiction over "persons, partnerships, or corporations" using "unfair methods of competition in or affecting commerce." CCAB at 25; 15 U.S.C. § 45(a)(2). The ALJ decided that the State Board is a "person" and thus subject to Commission jurisdiction; CC agreed. This is incorrect. The State Board is an agency of the state; this means that it is not a "person" and thus is not subject to Commission jurisdiction. See ALJID at 59 (citing an FTC case which calls a state board an "agent of the state" and then claim that agents of the state are persons); but see Parker v. Brown, 317 U.S. 341, 350-51 (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") (emphasis added). As the Supreme Court observed, "in common usage, the term 'person' does not include the sovereign, [and] statutes employing the [word] are ordinarily construed to exclude it." Will v. Mich. Dep't of State Police, 491 U.S. 58, 64 (1989) (quoting United States v. Cooper Corp., 312 U.S. 600, 604 (1941)). Since the State Board is an agent of state, it is not a "person" and is not subject to federal antitrust law.[6]

[6] See, also, argument F, *infra*.

B. The Challenged Actions of the State Board Do Not Constitute Concerted Action.

1. Complaint Counsel's Continuing Conspiracy Theory Is Untimely and Flawed.

As an initial matter, CC failed to file a notice of appeal within five days after service of the State Board's notice of appeal, as required by Rule 3.52(b) of the Commission's Rules of Adjudicative Proceedings. As a result, CC now may use its Answering Brief only to respond to the objections filed by the State Board in its Appeal Brief, as set forth in Rule 3.52(a)(1). Any arguments challenging the ALJ's decision on other grounds have been waived.

Despite these procedural limitations, CC has attempted to use its Answering Brief to untimely appeal certain conclusions reached by the ALJ in his Initial Decision. Specifically, CC now urges the Commission to accept arguments that the ALJ rightfully rejected—that the State Board is a "continuing" or *ipso facto* conspiracy because the conduct of the individual State Board members is attributable to the Board and that no evidence showing that the State Board members had entered into an agreement to exclude non-dentist teeth whitening services is necessary to establish concerted action.

In the event that the Commission chooses to revisit CC's arguments in support of a "continuing" or *ipso facto* conspiracy—despite the procedural rules prohibiting such consideration—the State Board urges the Commission to uphold the ALJ's conclusions on this point. As the ALJ concluded, CC's interpretation of American Needle, Inc. v. NFL, 130 S. Ct. 2201 (2010) is flawed; that case only held that the defendant was **capable** of engaging in unlawful concerted action and not that the defendant in fact had engaged in unlawful concerted action by virtue of its composition. Indeed, federal courts

consistently have rejected this "continuing" or *ipso facto* conspiracy. See, e.g., Viazis v. Amer. Asss'n of Orthodontists, 314 F.3d 758, 764-65 (5th Cir. 2002) (affirming that trade association did not engage in conspiracy by suspending plaintiff for violation of ethics rules when plaintiff could not show that the proceedings were a sham or that the standards applied were pretextual). "Despite the fact that a trade association by its nature involves collective action by competitors, **it is not by its nature a 'walking conspiracy,'** its every denial of some benefit amounting to an unreasonable restraint of trade." Id. at 764 (internal citation omitted and emphasis added). Thus, CC cannot establish that the State Board is a "continuing" or *ipso facto* conspiracy, based only on its composition.

2. The State Board Is Not Capable of Engaging in Concerted Action.

CC's arguments that the State Board is capable of engaging in concerted actions are undercut by factual inconsistencies. On the one hand, CC argues that "[t]here is no evidence in the record that, contrary to Board policy, Board members were acting on their own, or without authority from the Board." CCAB at 17. On the other hand, CC argues that the challenged actions of State Board members were "not the sort of 'routine, internal business decisions' of a single firm that are indicative of individual action." CCAB at 26-27.

CC's summary of the evidence does not support the conclusions urged upon the Commission. Indeed, there is no evidence that the State Board, through its members, undertook any activity that was contrary to the explicit authority vested in the State Board by the Dental Practice Act. As an entity, the State Board possessed and demonstrated a unitary decision-making center to prevent the unauthorized practice of dentistry. Furthermore, at all times, the State Board did nothing that violated its own enabling

statutes and regulations. In order to sustain the alleged violation, the Commission would have to nullify the state statute.

The ALJ ultimately concluded that the State Board is capable of concerted action because of the speculative assumption that the State Board members could enhance their incomes and the income of other dentists through their Board activities. The ALJ refused to consider that North Carolina law prohibits Board members from promoting their own financial interests. CC presented no evidence that Board members, in fact, had done so. As a matter of fact and law, there was no illegal concerted action.

3. The State Board's Challenged Activities Do Not Constitute Concerted Anticompetitive Action.

Based on all of the evidence, every relevant statute, and the Commission's own Complaint, the State Board is a single state agency. Thus, to the extent that this is a concerted action case, the State Board's challenged activities cannot and do not constitute concerted action. As correctly recognized by the ALJ, CC has predicated its trial arguments on the theory that the State Board conspired with itself, and not with any third party, in violation of the Federal Trade Commission Act ("FTC Act"). See ALJID at 76-77, fn.10 ("Complaint Counsel contends that the Board **itself** conspired to remove non-dentist teeth whitening service providers from the market, not that the Board conspired with other persons or entities."). However, the ALJ wrongly held that CC had met its burden of proof in establishing that the State Board reached "a common scheme or design, and therefore an agreement, to prevent or eliminate non-dentist teeth whitening services in North Carolina." Id. (emphasis in original).

First, as set forth above, the evidence presented at trial establishes that the State Board acted as a single agency while taking the challenged activity. At no time did the

State Board engage in competition and collude, or act in concert with any other entity. As such, the notion that a single agency, acting pursuant to a state statute, can conspire with itself is contrary to the basic tenants of antitrust law.

Second, as noted in the State Board's Appeal Brief, the ALJ's conclusions of law regarding concerted action rely primarily on his findings of fact regarding the nature of the various "cease and desist" letters. This evidence, along with the additional findings of fact noted in CC's Answering Brief, is insufficient to support a conclusion that can "exclude the possibility that the alleged conspirators acted independently." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588 (1986).

Significantly, in finding concerted action, the ALJ gave no credence to the total absence of evidence that the State Board engaged in the challenged activity for any reason **other** than to protect the health, safety, and welfare of North Carolinians. "That the challenged conduct ... is consistent with legitimate activities also weighs against inferring a conspiracy." Oksanen v. Page Mem. Hosp., 945 F.2d 696, 706 (4th Cir. 1991) (internal citation omitted) (noting that "[m]any professions have long placed considerable faith in self-regulation, and it would be a blow to public confidence in these professions if the utility of these measures was impaired by an unjustifiably expansive reading of the antitrust laws with their concomitant burdens of discovery"). Clearly, health and safety concerns are relevant to the State Board's motivations throughout the course of the challenged activity and significantly undercut any finding that the State Board had a "**conscious commitment** to a common scheme designed to achieve an unlawful objective." Monsanto v. Spray-Rite Serv. Corp., 465 U.S. 752, 764 (1984) (emphasis added).

Furthermore, the ALJ gave no weight to the fact that the State Board approached its investigations into allegations of unlawful teeth whitening in the same manner that it approached other investigations into the unauthorized practice of dentistry. This evidence supports an inference of independent conduct, rather than conspiracy. Merck-Medco Managed Care, LLC v. Rite Aid Corp., No. 98-2847, 1999 U.S. App. LEXIS 21489, at **25-27, 30 (4th Cir. Sept. 7, 1999) (*per curium*). As such, the ALJ erred in concluding that the State Board engaged in concerted action.

C. The ALJ's Refusal to Consider a Public Protection Justification Combined with Complaint Counsel's Argument That a Relevant Market Is Unnecessary Renders a Statutory Definition of a Profession Irrefutably Illegal.

The ALJ defined the relevant market in this case to include non-dentist-supervised (*i.e.*, illegal) teeth whitening services and dentist-supervised (*i.e.*, legal) teeth whitening services. ALJID at 63 *et seq*. The ALJ excluded dentist-provided teeth whitening kits from the market definition. This definition is critical to the outcome of the instant case because it was the basis for the ALJ's truncated rule of reason analysis, and therefore the basis for his conclusion that the State Board had the market power to exclude competitors from the teeth whitening services industry. Id. at 95. But, as explained in the State Board's Appeal Brief and below, this definition is flawed. As a result, the ALJ's rule of reason analysis is fundamentally in error as well.

CC disputes the State Board's explanation of the flaws in the ALJ's relevant market definition. CCAB at 31-33. Perhaps recognizing the mistake in the ALJ's definition, CC also argues that market definition is not necessary for a rule of reason analysis. Id. at 33-34. CC is wrong on these points. The State Board has put forth a clear explanation of the fatal flaw in the ALJ's market definition. Market definition is

key to the rule of reason analysis in this case; with a flawed market definition the ALJ's rule of reason analysis fails.

The ALJ's relevant market -- non-dentist-supervised and dentist-supervised teeth whitening services -- is flawed because there is *de minimus* data available on dentists' participation in dentist-supervised teeth whitening services. The data collected on North Carolina dentists' teeth whitening activities generally **combined both teeth whitening services and products**. It is therefore impossible to prove that the teeth whitening services market is "composed of products [or services] that have reasonable interchangeability for the purposes for which they are produced -- price, use and qualities considered." ALJID at 64 (citing United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 404 (1956); Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 481-82 (1992)). For example, the ALJ concluded that dentists "earned thousands of dollars annually in revenues" from teeth whitening services based on CC's revenue figures, labeled "TOTAL TOOTH WHITENING PRODUCT AND SERVICE REVENUES." There is no specification of what percentage of these revenues is attributable to teeth whitening services, take-home kits, or over-the-counter products. RAB at 12. At trial, numerous dentists testified that take-home kits are generally the preferred method of teeth whitening delivery, with in-office services rarely used. Id. at 12-14.

CC incorrectly claims that case law has evolved in favor of ignoring the issue of relevant market and market power in a rule of reason analysis. CCAB at 34. As the ALJ explains, defining the relevant market is the first step to establishing whether a violation of the FTC Act has actually occurred. ALJID at 63 (citing Ark. Carpenters Health &

Welfare Fund v. Bayer AG (In re Ciprojloxacin Hydrochloride Antitrust Litig.), 544 F.3d 1323, 1331-32 (Fed. Cir. 2008). The Commission itself has stated its support for defining the relevant market as a precursor to a rule of reason analysis. FTC, *The Truncated or "Quick Look" Rule of Reason*, available at http://www.ftc.gov/opp/jointvent/3Persepap.shtm. According to the Commission, there is simply a "continuum" of degrees to which market power is considered, varying depending on "the seriousness of the type of restraint involved and with the tribunal's knowledge or reasonable suppositions about that industry." Id. (internal citation omitted). Given the unusual nature of this case, and the lack of non-price-fixing state agency cases to which this case can be analogized (*see infra)*, the ALJ was correct to conduct as thorough a rule of reason analysis as possible. ALJID at 96.

While correct to examine market power, the ALJ's analysis is flawed because he lacked the data to prove that North Carolina dentists provide more than a *de minimus* amount of teeth whitening services. Therefore, the ALJ cannot reasonably conclude that the State Board "had market power and tended to reduce competition" within the teeth whitening services market. ALJID at 97, citing In re Realcomp II Ltd., No. 9320, 2009 FTC LEXIS 250, at *47 (Oct. 30, 2009) (internal citations omitted).

D. Since the Respondent Is a State Agency That Is Prohibited by State Law from Engaging in Competition or Providing Support for Private Individuals, the State Board's Actions Should Have Been Analyzed Under the Traditional Rule of Reason.

To prove a violation of the FTC Act, the ALJ should have shown that the State Board acted in concert to restrain trade in the relevant market, with adverse effects, and with no procompetitive justifications. Varying degrees of scrutiny are required to prove

these facts, based on the circumstances of a defendant: *per se* determinations of whether a violation occurred; a truncated analysis; and the traditional rule of reason analysis.

The ALJ did not consider whether a *per se* rule of reason violation may have occurred. The ALJ concluded that CC did not support a *per se* analysis,[7] and neither did the facts of the case. ALJID at 82. CC does not dispute this decision. Therefore, the choices before the ALJ were whether to apply a truncated or full rule of reason analysis, and whether to find procompetitive violations existed under the appropriate method of analysis to permit the State Board's actions. The ALJ applied a truncated analysis. ALJID at 63 *et seq*. It is the State Board's position that the ALJ's rule of reason analysis amounted to a conclusion that the Board's conduct was a per se violation of the FTC Act. Regardless, the ALJ's truncated analysis was inappropriate in this case, as was his conclusion that no procompetitive justifications existed. Truncated analysis is appropriate only in a limited range of cases, such as producer agreements to limit or cease output, and price-fixing cases. Respondent's Post-Trial Brief at 5 (internal citations omitted). None of these types of limitations exist in the instant case.

The insufficiency of the truncated analysis is demonstrated by comparing this case to two cases mentioned by CC in support of their position on this issue. Both California Dental Ass'n v. FTC and In re Realcomp II, Ltd. were cited by CC in their criticism of the ALJ's decision. CCAB at 34 (citing Cal. Dental Ass'n v. FTC, 526 U.S. 756 (1999) and In re Realcomp II, Ltd., 2009 FTC LEXIS 250 (Oct. 30, 2009)).

[7] CC has wavered between accusing the State Board of a *per se* violation, and attempting to prove a truncated or traditional violation. Opening Argument, Tr. 25 ("We're not saying that the conduct here is *per se* unlawful. We are saying that under a rule of reason analysis, abbreviated under some circumstances, that the conduct is unlawful"); CC's Post-Trial Brief at 74 (the State Board's actions are "*prima facie* anticompetitive under each of three variations of the rule of reason").

However, the courts in both cases found that a full rule-of-reason analysis was applicable and a truncated rule of reason was insufficient.

CC chose to cite the Commission's Realcomp opinion, in which a truncated rule of reason analysis was permitted, without even mentioning that on appeal the Sixth Circuit deemed a "more extended" traditional rule of reason analysis appropriate instead of the Commission's truncated analysis. Realcomp II, Ltd. v. FTC, 635 F.3d 815, 826 (6th Cir. 2011). The Sixth Circuit chose the traditional rule of reason analysis because the issue in Realcomp was not one of the limited issues for which a truncated analysis was appropriate. Id. at 826-27.

The Supreme Court opted for a traditional rule of reason analysis in California Dental Ass'n based on the fact that the Association was a professional organization, not a business: as is true for the State Board, no proximate relation to lucre existed. 526 U.S. at 766. A thorough analysis was necessary to determine whether the Association's internal advertising rules were enacted with the procompetitive justification of protecting the public from false advertising. Id. at 756. The Court concluded that a truncated analysis is inappropriate in cases where restrictions appear "on their face" to be designed to "protect patients." Id.; see also Goldfarb v. Va. State Bar, 421 U.S. 773, 788-89 n.17 (1975) ("The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently"). If a private association's internal rules demand a traditional rule of reason analysis, surely the same degree of deference and thorough review is appropriate for a state agency.

E. The State Board's Actions Are Legal Because They Are Supported by Procompetitive Justifications; The ALJ Should Have Conducted an Analysis of These Justifications.

Under either the truncated or traditional rule of reason analysis, the State Board's conduct is permitted by a procompetitive justification. The State Board was acting to protect the public by enforcing a clearly articulated state statute outlawing non-dentist supervised stain removal services. CC contends that this is not a legitimate procompetitive justification. CCAB at 38. CC argues that the state law defining the removal of stains from teeth as the practice of dentistry is not a valid justification for the actions of a state agency charged with enforcing that law. The Commission and the ALJ have refused to settle the question of whether a clearly worded, affirmatively expressed state law exists in this matter. But, CC returns to this subject, making several easily dismissed arguments against the validity of the State Board's authorizing statute and the dangers of non-dentist supervised teeth whitening. See RAB at 37 *et seq*.

The ALJ's review of state law outlawing unlicensed stain removal services was so cursory as to downgrade the ALJ's analysis from a truncated rule of reason analysis to essentially just finding a *per se* violation. The Commission, the ALJ, and CC refuse to discuss the fact that the State Board acted as mandated under a state law. The ALJ excluded this aspect of the case from his rule of reason analysis. ALJID at 82. But, state agencies acting pursuant to clearly authorized state law are not found liable of violations of federal antitrust law. Without a discussion of the State Board's obligation to act pursuant to state law, no rational discussion of procompetitive justifications for the State Board's actions may occur.

Instead, the ALJ and CC's rule of reason analysis focus entirely on extra-governmental entities: private organizations, trade associations, and businesses. CCAB at 43 *et seq*. The ALJ and CC ignore the "facts peculiar to the business, the history of the restraint, and the reasons why it was imposed." ALJID at 82 (citing Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679 (1978)). The ALJ and CC do not cite a rule of reason analysis for a non-price-fixing state agency in an opinion handed down since Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985) because no such case exists. Without an analogous rule of reason case to discuss, CC compares the instant facts to cases such as Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85 (1984). The plaintiff in NCAA was the "guardian of an important American tradition" and thus received a full analysis of the motivations and justifications for its actions. Id. at 101 n. 23. The ALJ did not even afford this level of consideration to the State Board's statutory obligations. Without a thorough review of the State Board's clearly authorizing state statute, no true rule of reason analysis can occur.

F. The State Board's Enforcement of a Statute Prohibiting Unlicensed Stain Removal Is Quintessentially Sovereign; the Proposed Order Exceeds the Commission's Authority.

The Commission is not in a position to adjudicate its own violations of the constitutional rights of the State Board. This determination is vested solely in the federal courts. Should the Commission attempt to rule on its own constitutional violations, the State Board describes below the extent to which this action is outside the scope of the Commission's authority and infringes upon the State Board's constitutional rights.

As set forth more fully in the State Board's Appeal Brief, the ALJ incorrectly concluded that Proposed Order does not violate the Tenth Amendment to the U.S. Constitution and the Commerce Clause, U.S. Const. art. I, § 8, cl. 3. The arguments set

forth by CC in its Answering Brief fail to overcome the arguments raised on appeal by the State Board for the reasons set forth below.

As set forth in the Appeal Brief, the Proposed Order compels the State Board to regulate the practice of dentistry in accordance with the FTC's direction, in violation of the Tenth Amendment. In response, CC takes the incredible position that the State Board "is not a sovereign actor." CCAB at 46. Indeed, CC's position is contrary to the allegations made in the first paragraph of its Complaint ("The Dental Board **is an agency of the State of North Carolina**"); its arguments presented during the hearing; and its arguments in its Post-Trial Brief ("The Board does not merely influence government; **it is itself a state actor**.") There is no question that, indeed, the State Board is a *bona fide* agency of the State of North Carolina.

In arguing that the State Board is not a sovereign actor, CC claims that California State Board of Optometry v. FTC, 910 F.2d 976 (D.C. Cir. 1990) "has no bearing" on the State Board's Tenth Amendment arguments. Specifically, CC attempts to distinguish—without explanation—the State Board from the California State Board of Optometry ("California State Board"), which acted in a sovereign capacity when it instituted restrictions on the commercial practice of optometry in favor of traditional optometric practices. However, like the State Board, the majority of Board members on the California State Board were registered optometrists engaged in the practice of optometry at the time the challenged acts were taken. CAL. BUS. & PROF. CODE §§ 3010, 3011 (1961, 1976, 1978, 1982 legislative amendments). In light of these similarities, there is no reason why the State Board should not be afforded the same recognition as the California State Board, with regard to its sovereign powers.

CC's argument that California State Board of Optometry is not applicable because it is "not a Tenth Amendment decision" likewise is without merit. The hallmark of the Tenth Amendment is that state sovereignty must be recognized unless Congress has acted unambiguously to impose limitations on state powers. 910 F.2d at 981. Indeed, in California State Board of Optometry, the D.C. Circuit upheld the principles of federalism and the separation of powers by protecting sovereign states from impermissible interference by the federal government in the absence of express congressional authorization. Id. at 982 ("[S]tate regulation of the practice of optometry is a quintessentially sovereign act.").

After its attempt to escape the ambit of California State Board of Optometry, CC relies on inapposite case law to support its erroneous conclusion that the Tenth Amendment is not implicated. CC looks to Reich v. New York, 3 F.3d 581, 589 (2nd Cir. 1983) to assert that "the Tenth Amendment contains 'no substantive limitation on the power of Congress to regulate commerce.'" CCAB at 46. In Reich, several groups representing employees of the New York State Police Bureau of Criminal Investigation sued the state of New York and the New York State Police for alleged violations of the Fair Labor Standards Act ("FLSA"). The Second Circuit found that the state's Tenth Amendment defense was not applicable because Congress specifically included the activities of state law enforcement agencies in the FLSA.

This case could not be more distinct from the one at bar where the State Board is not seeking protection from express congressional regulation. Rather, it is being subjected to an extra-judicial tribunal of an executive federal agency acting without congressional authorization. Significantly, the Second Circuit, in Reich, stated that

"Congress's intent to apply the [FLSA] to state law enforcement agencies such as the [New York State Police Bureau of Criminal Investigation] is unmistakably clear." 3 F.3d at 590. In essence, Congress expressly and unambiguously included the activities of state law enforcement employees in the FLSA. As discussed previously, Congress has granted no such authority here. Therefore, Reich supports the State Board's position that, where Congress has not expressly acted to regulate, a federal agency cannot engage in rogue, *ultra vires* activities.

South Carolina v. Baker, 485 U.S. 505, 512 (1988), relied upon by CC, is also distinguishable. In Baker, the Supreme Court upheld a federal statute removing a tax exemption for interest earned on unregistered state and local bonds because the Court found extensive evidence of Congress's intent to permit this tax. Id. at 508-09. There is no such evidence in the present case.

It is true, as CC points out in its Answering Brief, that "states must find their protection from congressional regulation through the national political process, not through judicially defined spheres of unregulable state activity." Baker, 485 U.S. at 512 (citing Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985)). Here, however, the ALJ has dismantled the protections afforded to the State Board through the political process by proposing an order that "evades the very procedure for lawmaking on which Garcia relied to protect states' interests." See Cal. State Bd. of Optometry, 910 F.2d at 981 (internal citation omitted). Ultimately, the Commission has acted without express congressional regulation in its violations of the State Board's rights. Therefore, the State Board must be afforded the same Tenth Amendment protections that have been afforded to other similarly-comprised state agencies by the federal courts.

Also, as set forth in the Appeal Brief, the Proposed Order compels the State Board to regulate the practice of dentistry in accordance with the Commission's direction, in violation of the Commerce Clause. The State Board's arguments on this point have been fully briefed in its Post-Trial Brief and its Appeal Brief; the same arguments are re-urged here.

CC's contention that no analysis, explanation, or authority is offered to show the Commerce Clause violation is false. As previously discussed**, the Proposed Order clearly limits the State Board's ability to conduct a *bona fide* investigation into possible violations of the Dental Practice Act**. The State Board's ability to conduct such investigations falls outside the power of federal Commerce Clause regulation, even if such activities affect interstate commerce—and especially as the State Board's activities are in the interest of the safety, health and well-being of North Carolina citizens. As such, the Proposed Order cannot be enforced without violating the State Board's constitutional rights under the Commerce Clause.

CONCLUSION

Complaint Counsel has alleged that a state agency, acting **legally**, enforcing a **state statute** clearly outlawing non-dentist-supervised stain removal services, is engaged in a conspiracy to violate federal antitrust law. Unable to conclude than any such conspiracy occurred, the ALJ decided that a violation of the FTC Act occurred through the State Board's "concerted action" to enforce state law. The ALJ relied on a faulty definition of the relevant market to conduct a legally deficient rule of reason analysis. Applying this faulty definition, the ALJ had no proof that individual Board members could have acted in concert to profit from their enforcement of state statute. The ALJ

refused to even discuss the fact that the State Board was authorized pursuant to state law in discussing procompetitive justifications for the State Board's acts. For these reasons, and others stated above, the ALJ's finding of a violation of the federal antitrust laws must be vacated.

This the 14th day of October, 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 14, 2011, I electronically filed the foregoing with the Federal Trade Commission using the FTC E-file system, which will send notification of such filing to the following:

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I further certify that I sent twelve hard copies of the foregoing for the Commission's use to Secretary Clark at the above address via Federal Express.

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:

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

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This the14th day of October, 2011.

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CERTIFICATION FOR ELECTRONIC FILING

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

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