UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

ORIGINAL

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

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

RESPONDENT'S APPLICATION FOR STAY OF ORDER PENDING REVIEW BY U.S. COURT OF APPEALS

Pursuant to Rule 3.56(d) of the Commission's Rules of Practice for Adjudicative Proceedings, Respondent North Carolina State Board of Dental Examiners hereby applies to the Federal Trade Commission for Stay of its Final Order entered on December 2, 2011 pending judicial review by the U.S. Court of Appeals for the Fourth Circuit.

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I. INTRODUCTION

On December 2, 2011, the Federal Trade Commission ("Commission") issued its Opinion and Final Order ("Order") against the North Carolina State Board of Dental Examiners ("State Board"). The Commission's Opinion ("Opinion") misinterpreted and misapplied the applicable law. As a result, it promulgated its Order that effectively prohibits the State Board from doing what it is statutorily required to do—enforcing the Dental Practice Act to protect the citizens of North Carolina. Thus, the Order is unwarranted and will impose substantial hardship on the State Board, leading to decreased public protection. Moreover, the Order would impermissibly interfere with the lawful enforcement activities of a sovereign state entity. This is a blatant infringement upon a state's constitutional rights and is beyond any authority granted to the Commission. For these reasons, the State Board will petition for review in the Fourth Circuit Court of Appeals. The Commission should not, without the benefit of judicial review, force its administrative will to nullify clearly-articulated state statutes regarding public protection since the state has a "compelling interest in the practice of professions within its boundaries." Locke v. Shore, 634 F.3d 1185, 1196 (11th Cir. 2011) (quoting Goldfarb v. Va. State Bar, 421 U.S. 773 (1975)). Any enforcement prior to, or during, the State Board's well-grounded appeal will irreparably harm the State Board, state agencies generally, citizens of North Carolina, and the public interest. Therefore, the Commission should stay its Order pending judicial review.

II. ARGUMENT

Pursuant to Rule 3.56(b), "(a)ny party subject to a cease and desist order under section 5 of the FTC Act . . . may apply to the Commission for a stay of that order pending judicial review." FTC Rules of Practice for Adjudicative Proceedings ("Rules").

The State Board will petition for review by filing a notice of appeal in the Fourth Circuit Court of Appeals. Under Rule 3.56(c), an applicant for a stay must address: (l) the likelihood of the applicant's success on appeal; (2) whether the applicant will suffer irreparable harm if a stay is not granted; (3) the degree of injury to other parties if a stay is granted; and (4) why the stay is in the public interest. These four stay factors are to be balanced with one another and "cannot be reduced to a set of rigid rules." Hilton v. Braunskil, 481 U.S. 770, 777 (l987); CityFed Fin. Corp. v. Office of Thrift Supervision, 58 F.3d 738, 746 (D.C. Cir. 1995) (strength of one factor may outweigh "rather weak" arguments in other areas); see also Wash. Metro. Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843-45 (D.C. Cir. 1977) (granting stay despite the applicant's inability to prevail on one factor). Significantly, an applicant's burden to establish a likelihood of success on appeal does not require that the applicant prove that its success is more likely than not. Holiday Tours, 559 F.2d at 843 (providing that likelihood of success is not a mathematical probability requiring proof of fifty percent or more).

A. Respondent Has Established the Necessary Likelihood of Success on Appeal.

To meet the requirement of demonstrating the likelihood of success on appeal, the State Board need only show that its appeal involves serious and substantial questions going to the merits of the Commission's decision. Six Clinics Holding Corp., II v. Cafcomp Sys., 119 F.3d 393, 402 (6th Cir. 1997). On appeal, the State Board will challenge several aspects of the Commission's case which present serious constitutional conflicts and which are contrary to existing federal and state law, and case law. It is the position of the State Board that North Carolina state law prohibits non-dentists from providing teeth whitening services. N.C. Gen. Stat. § 90-29(b)(1)(2) (restricting the

removal of stains from teeth to licensed dentists). However, the Commission's Order requires the State Board to cease and desist from directing non-dentists from providing teeth whitening services, or in any way discouraging non-dentists from providing these services. Order at II(A) and (B). The Order also restricts the State Board from informing persons that teeth whitening by non-licensed persons violates the North Carolina Dental Practice Act. Order at II(C)-(F).

Neither the Commission's authorizing statute, the U.S. Constitution, nor the several decades of relevant case law permit this sort of ban on enforcement of a clearly-articulated state law. This ban is therefore an unconstitutional and illegal attempt by the Commission to extend its jurisdiction over majority-licensee state regulatory agencies. The Commission has held that a stay pending appeal may be appropriate when a case involves a difficult legal question; that is the exact situation in this case. In the Matter of Novartis Corp., 128 F.T.C. 233, 234 (1999); In the Matter of Toys "R" Us, Inc., 126 F.T.C. 695, 697 (1998). This is especially important to this case, where the Commission is contravening decades of case law to claim that a state agency must be "actively supervised" in order to enforce a clearly-articulated state law.

According to the Commission (but contrary to every single one of the numerous federal courts that have examined this issue), the long-standing grant of immunity from federal antitrust law to state agencies acting pursuant to a "clearly articulated and affirmatively expressed" state law should not exist. Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, 445 U.S. 97, 106 (1980). Instead, state agencies should be subject to the requirement that they show "active supervision" by the state. This "active supervision" requirement has to date only been required of private organizations and

businesses, *e.g.*, an association of liquor retailers in Midcal. See, e.g., Town of Hallie v. City of Eau Claire, 471 U.S. 34, 46 (1985); see also Pope v. Miss. Real Estate Comm'n, 695 F. Supp. 253, 280 (N.D. Miss. 1988); see also Nassimos v. N.J. Bd. of Examiners of Master Plumbers, No. 94-1319, 1995 U.S. Dist. LEXIS 21376, at *10 (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. Or. State Bar, 883 F.2d 1453, 1461 (9th Cir. 1989); see also Earles v. State Bd. of Certified Public Accountants of La., 139 F.3d 1033, 1041 (5th Cir. 1998); see also Brazil v. Ark. Bd. of Dental Examiners, 593 F. Supp. 1354, 1362 (E.D. Ark. 1984), aff'd, 759 F.2d 674 (8th Cir. 1985); see also Flav-O-Rich, Inc. v. N.C. Milk Comm'n, 593 F. Supp. 13 (E.D.N.C. 1983). The Commission need not "harbor doubt about its decision in order to grant the stay." Toys "R" Us, 126 F.T.C. at 697, quoting In re Cal. Dental Ass'n, 1996 FTC LEXIS 277. It is enough that the State Board can make a substantial showing on the merits. Novartis Corp., 128 F.T.C. at 234; see also Toys "R" Us, Inc., 126 F.T.C. at 697.

It is true that the State Board has already raised many of the arguments to be presented on appeal in its proceedings before the Commission to date. But, the fact that these arguments have already been raised does not in any way diminish the State Board's right to a stay in this matter. Novartis Corp., 128 F.T.C. 233, 233-344, 236-37 (1999); see also Toys "R" Us, 126 F.T.C. 695, 697, 701 (1998) (in both of which the Commission granted a stay or a partial stay, despite observing that the respondent's arguments for a stay were based on arguments already decided against the respondent by the Commission). Further, the questions presented on appeal, such as whether state laws are immune from executive branch antitrust jurisdiction, are questions that are properly before a federal court and not the federal agency that is attempting to engage in the

jurisdictional expansion. Federal courts have often found that the Commission exceeded its statutory bounds by attempting to meddle in state law; such a decision is properly before the federal courts, which are likely to find in the respondent's favor. See e.g., Cal. State Bd. of Optometry v. Fed. Trade Comm'n, 910 F.2d 976 (D.C. Cir. 1990), reh'g denied, 924 F.2d 243 (D.C. Cir. 1991). Therefore, the State Board has demonstrated that it is likely to succeed in its well-grounded appeal.

B. Respondent Will Suffer Irreparable Harm if a Stay Is Not Granted.

To succeed on a motion for stay, the respondent must demonstrate a probability of success on appeal that is inversely proportional to the irreparable injury suffered without a stay. In the Matter of N. Tex. Specialty Physicians, No. 9312, 2006 FTC LEXIS 10, at *3 (2006) (internal citation omitted). In the instant case, the State Board can demonstrate both grave injury absent the motion to stay, as well as a strong likelihood of success. See supra, Section A, for a discussion of the likelihood of success on the merits.

It is well established that a breach of constitutional rights may constitute irreparable harm. See, e.g. A.A. v. Needville Indep. School Dist., 701 F. Supp. 2d 863 (S.D. Tex 2009) (violation of plaintiff's constitutional rights to free exercise, freedom of speech, and due process constituted irreparable harm); see, e.g. Ginorio v. Gomez, 301 F. Supp. 2d 122, 133-34 (S.D. Tex. 2009) (violation of plaintiff's due process rights constituted irreparable harm). The State Board's federal claim against the Commission is based on allegations that the Commission violated the State Board's Constitutional rights under Article I, Section 8 (the "Commerce Clause") and the Tenth Amendment of the U.S. Constitution; as well as and Sections 4 and 5 of the FTC Act (15 U.S.C. §§ 44-45). If the Commission is permitted to proceed with these violations, the State Board—and,

therefore, North Carolina's consuming public—will suffer immediate, permanent, and irreparable harm.

The State Board's ability to enforce the North Carolina statutes regulating the practice of dentistry will also be impaired significantly. See N.C. State Bd. of Registration for Prof'l Eng'rs & Land Surveyors v. Fed. Trade Comm'n, 615 F. Supp. 1155, 1162 n.7 (E.D.N.C. 1985) (recognizing that the State Board, "and indeed our constitutional system of government" would be particularly susceptible to immediate injury by the Commission's unlawful actions). The Commission is denying the State Board the right to investigate and to warn violators of a potential violation of applicable state statutes, and ultimately denying the State Board its ability to enforce the North Carolina Dental Practice Act—which is preventing the State Board from fulfilling the statutory purpose of its creation. Exhibit 1.

The Commission's Order obligates the Board to expend state funds to complete various mandatory activities. See, e.g., Order at 4-6 (requiring the State Board to submit reports and written notice to various parties). However, those expenditures are not authorized by North Carolina state law, which naturally does not envision the regulation of citizens' public health and safety to be managed by the Commission. N.C. Gen. Stat. § 90-43 only authorizes the Board to "expend from funds ... as it may determine necessary in the administration and enforcement of this Article." See also Exhibit 1.

Yet another consequence of the immediate enforcement of the Order and Opinion is that incompetent licensees, unqualified applicants, and unlicensed practitioners will interpret the enforcement as permission to engage in the unauthorized practice of dentistry, to the detriment of the health, welfare and safety of North Carolina citizens.

Further, the Commission's Order would have (and has already had) a chilling effect on the public's willingness to seek relief from illegal activities by petitioning the State Board for redress of grievances by filing complaints with the State Board.

Even as the Order and Opinion would open the door for increased violations of the N.C. Dental Practice Act, the Order would force the Members of the State Board to take actions (and fail to take actions) in direct contravention of state statutes. As discussed, N.C. General Statute 90-29(b)(1)(2) restricts the provision of teeth whitening services to persons supervised by licensed dentists. Related to this, N.C. General Statute 90-40.1(a) requires that "the practice of dentistry by any person who has not been duly licensed so as to practice or whose license has been suspended or revoked, or the doing, committing or continuing of any of the acts prohibited by this Article by any person or persons, whether licensed dentists or not, is hereby declared to be inimical to public health and welfare and to constitute a public nuisance." The Commission's Order and Opinion would paralyze the State Board in its enforcement of state law restricting the practice of dentistry to licensed persons. See Exhibit 1.

The Commission's attack on the very composition of the State Board has also created fundamental uncertainty and insecurity among State Board members and State Board staff as the question of their legitimacy, and the State Board's organizational structure is thrown into doubt. Based on the dangers of confusion that the Commission Order and Opinion would create, the chilling effect on state agency investigative and enforcement efforts, and the Commission's continued exercise of extra-judicial lawmaking power against the State Board and other agencies, the Commission's Order against the State Board should immediately stayed pending judicial review.

C. A Stay Would Serve the Public Interest and Would Result in No Significant Harm to Any Party.

Finally, the third and fourth factors are considered together in a case where Complaint Counsel is the adversary of the applicant. See Novartis Corp., 1999 FTC LEXIS 211, at *7. The grant of a stay in this instance will not impose significant harm on any party and, accordingly, the balance of equities tips heavily in favor of maintaining the status quo and counsels in favor of granting the stay. Complaint Counsel may argue that the Commission would be impaired because it would be prohibited from protecting consumers and competition until such stay is terminated. This argument is without merit as the Order would cause harm, not protection, for consumers of teeth whitening services in North Carolina (as described above). Furthermore, staying the enforcement of the Commission's Order does not interfere with the Commission's ability to see that lawful competition is enabled.

There is no evidence that the State Board has taken any action over the last two years regarding the illegal, non-dentist-supervised teeth whitening business which would constitute a restraint of trade. Over the past two years, the State Board has sent no letters stating North Carolina law to non-dentist providers or to their commercial real estate landlords. In fact, Complaint Counsel can point to no authority or evidence that supports an argument that staying its Order would cause the Commission or competition substantial harm. Thus, granting a stay and waiting until all appeals in this case have been resolved poses no threat to the Commission or competition.

The public interest, on the other hand, is dramatically harmed when a state agency is inhibited in its mission to vigorously protect the interest of citizens. Section II of the Order prohibits the State Board from enforcing the Dental Practice Act. Specifically, it

prohibits the State Board from "[d]irecting a non-dentist provider to cease providing teeth whitening goods or teeth whitening services" and "[c]ommunicating to a non-dentist provider that . . . the provision of teeth whitening goods or teeth whitening services by a non-dentist provider is a violation of the Dental Practice Act. Order at 3. Such prohibitions bely the Commission's rhetoric that "nothing in this Order prohibits the Board from investing a non-dentist provider for suspected violations of the Dental Practice Act" or "communicating to a third party notice of its belief or opinion regarding whether a particular method of providing teeth whitening goods or teeth whitening services may violate the Dental Practice Act." Order at 4; see also Exhibit 1.

The State Board's actions in enforcing the Dental Practice Act are taken pursuant to state law to ensure that when a consumers seek out services to have stains removed from their teeth, such services will performed by a licensed professional who is trained to provide such services. There is no evidence in the record that indicates that members of the State Board conspired to exclude non-dentist teeth whitening services from the market. To the contrary, members of the State Board carried out their charged duty to protect the public by applying the plain language of the Dental Practice Act and determining that teeth whitening constitutes stain removal. Protecting the public pursuant to clearly-articulated state law far outweighs any arguments against granting a stay.

III. CONCLUSION

For all the foregoing reasons, the Commission should stay the effect and enforcement of its Order pending final disposition of the State Board's appeals.

This the 13th day of January, 2012.

Respectfully submitted,

ALLEN, PINNIX & NICHOLS, P.A.

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CERTIFICATE OF SERVICE

I hereby certify that on January 13, 2012, 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
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Room H-113
Washington, D.C. 20580

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 the 13th day of January, 2012.

/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

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.	)	

[PROPOSED] ORDER GRANTING RESPONDENT'S APPLICATION FOR STAY PENDING REVIEW BY U.S. COURT OF APPEALS

Upon consideration of Respondent North Carolina State Board of Dental Examiners' application to stay enforcement of the Commission's Order, issued December 2, 2011,

IT IS ORDERED that enforcement of the Commission's Final Order of December 2, 2011 be stayed upon the filing of a timely petition for review of the Order in an appropriate court of appeals pursuant to 15 U.S.C. § 45(c). This stay shall remain effective until the expiration of all periods for petitions for rehearing, rehearing en banc or certiorari, or until final disposition of all such petitions and any proceedings initiated by a grant of such a petition.

ORDERED: _____

ISSUED: _____, 2012

EXHIBIT 1

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.	)	

DECLARATION OF BOBBY D. WHITE IN SUPPORT OF RESPONDENT'S APPLICATION FOR STAY OF ORDER PENDING REVIEW BY U.S. COURT OF APPEALS

I, Bobby D. White, do hereby declare that:

1. I serve as the Chief Operating Officer of the North Carolina State Board of Dental Examiners ("State Board") and have served in this capacity since the commencement of my employment with the State Board in 2004. As a result of my job responsibilities, I have extensive experience with the operations of the State Board and its duties. I am also familiar with the North Carolina statutes that govern the State Board.

2. I am providing this declaration to the Federal Trade Commission in support of State Board's Motion for Stay of the Final Order in this matter pending appeal. I have personal knowledge of the facts set forth in this declaration.

3. I have reviewed the Commission's December 2, 2011 Final Order. Based on my knowledge and experience, the Order is likely to give rise to significant irreparable harm to the State Board and the consuming public which the Board is sworn to protect. If

the Order is enforced, the State Board's ability to protect the public from the illegal practice of dentistry by enforcing the North Carolina Dental Practice Act will be jeopardized.

4. The Order will limit or prohibit the State Board from interpreting the Dental Practice Act's mandate that stain removal may only be performed by a licensed dentist or a licensed dental hygienist under the supervision of a licensed dentist (N.C. Gen. Stat. § 90-29).

5. The Order will impede the State Board's ability to communicate to non-licensees that removing stains from teeth without a license violates the Dental Practice Act. In particular, the Order would require the State Board to obtain judicial relief in every instance of a violation without recourse to less litigative measures.

6. The Order will prevent the State Board from enforcing N.C. Gen. Stat. § 90-40.1(a), providing that the unlicensed practice of dentistry is "inimical to public health and welfare, and constitutes a public nuisance."

7. The Order will necessitate substantial additional expenditures of public funds to attempt to comply with its terms. This requirement would run afoul of N.C. Gen. Stat. § 90-43, limiting the State Board's expenses to administering and enforcing the Dental Practice Act.

8. The Order calls for procedural steps that are not permitted by North Carolina's Administrative Procedure Act. For example, the Order mandates that the State Board provide administrative hearings to non-licensees.

9. In many respects the Order does not even make legal or practical sense. It purports to allow the State Board to enforce the laws regarding stain removal while

restricting enforcement regarding the business of teeth whitening, yet fails to decide whether teeth whitening is stain removal. In that regard I note that none of the Cease and Desist Letters which the State Board previously sent to illegal practitioners made any reference to "teeth whitening."

10. I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed this 13th day of January, 2012, at Raleigh, North Carolina.

Respectfully submitted,

Bobby D. White

Sworn to and subscribed before me this the 13th day of January 2012.

Dena Jordan Brown
Notary Public
My Commission Expires
May 15, 2016

DENA JORDAN BROWN
NOTARY
PUBLIC
WAKE COUNTY, N.C.

EXHIBIT 2

In the Matter of
THE NORTH CAROLINA BOARD OF DENTAL EXAMINERS
Docket No. 9343

Opinion of the Commission

By ROSCH, Commissioner, For A Unanimous Commission:[1]

I. INTRODUCTION[2]

This case involves the efforts of the North Carolina State Board of Dental Examiners ("Respondent" or the "Board") to prevent non-dentists from providing teeth whitening services in North Carolina. The Board is an agency of the State of North Carolina and is charged with regulating the practice of dentistry in the state. By law, six of the eight members of the Board must be practicing dentists.

In the early 1990s, dentists in North Carolina and elsewhere began offering teeth whitening services through the use of various forms of peroxide. Since then, teeth whitening has become one of the most popular cosmetic dentistry procedures and is now offered by most dentists either as an in-office procedure or as a custom-made take-home kit.

In response to the popularity of teeth whitening, non-dentists began offering teeth whitening services at locations such as mall kiosks, spas, retail stores, and salons in North Carolina in approximately 2003. These providers use techniques similar to those used by dentists to whiten teeth and, like dentists, can whiten teeth in a single session. However, non-dentist providers charge significantly less than dentists for the procedure and often offer greater convenience.

Dentists who performed teeth whitening services soon began complaining to the Board about the provision of teeth whitening services by non-dentists. These complaints often noted that these new providers charged less than dentists but rarely mentioned any public health or safety concerns. In response to these complaints, the Board issued dozens of cease and desist letters to non-dentist teeth whitening service providers and distributors of teeth whitening products and equipment. In addition, the Board sent

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[1] Commissioner Julie Brill has not participated in this matter.

[2] This opinion uses the following abbreviations for citations to the record:

Initial Decision	ID
ALJ Findings of Fact	IDF
Respondent's Appeal Brief	RAB
Complaint Counsel's Answering Brief on Appeal	CCAB
Respondent's Reply Brief on Appeal	RRB
Complaint Counsel's Exhibit	CX
Respondent's Exhibit	RX
Trial Transcript	Tr.

letters to mall owners and operators urging them not to lease space to non-dentist teeth whitening providers. The Board had no authority to issue cease and desist orders under its enabling statute.

As a result of the Board's actions, many non-dentists stopped providing teeth whitening services and several marketers of teeth whitening systems stopped selling their products and equipment in North Carolina. In addition, several mall operators refused to lease space to, or cancelled existing leases with, non-dentist teeth whitening providers.

Based on our *de novo* review of the facts and law in this matter, we conclude that the Board sought to, and did, exclude non-dentist providers from the market for teeth whitening services in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. We agree with Chief Administrative Law Judge D. Michael Chappell (the "ALJ") that Respondent's conduct constituted concerted action, that Respondent's conduct had a tendency to harm competition and in fact did harm competition, and that Respondent has failed to advance a legitimate procompetitive justification. We find liability under an abbreviated, or quick look, approach as well as under a full rule of reason analysis. We agree with the ALJ that the appropriate remedy is to prohibit the Board from directing non-dentist teeth whitening providers to cease providing their teeth whitening products or services, and we adopt (with minor changes) the Order entered below.

II. FACTUAL BACKGROUND

The following is a summary of the findings of fact of the ALJ. Except as noted, Respondent does not challenge the ALJ's findings. We adopt the ALJ's findings of fact to the extent that they are not inconsistent with this opinion.

The Board

The North Carolina State Board of Dental Examiners is an agency of the State of North Carolina and is charged with regulating the practice of dentistry in the interest of public health, safety, and welfare of the citizens of North Carolina. (IDF 1, 33, 87.) The Board has the authority to issue and renew licenses and to take disciplinary action against dentists practicing in North Carolina. (IDF 35.) The Board is funded by dues and fees paid by licensed dentists and dental hygienists in North Carolina. (IDF 13-14.)

The Board consists of eight members: six licensed dentists, one licensed dental hygienist, and one consumer member, who is neither a dentist nor a dental hygienist. (IDF 2.) Each dentist elected to the Board must be licensed and actively engaged in the practice of dentistry while serving on the Board. (IDF 6-8.) The six dentist members of the Board are elected to the Board by other licensed dentists in North Carolina and, if an election is contested, a candidate may describe his or her positions on issues that may come before the Board. (IDF 15-23.) Many Board members have provided teeth whitening services through their private practices and derived income from those services while serving on the Board. (IDF 9-12.)

The Dental Practice Act provides that it is unlawful for an individual to practice dentistry in North Carolina without a license from the Board. *See* N.C. General Statutes § 90-29(a); IDF 41. Under the Dental Practice Act, a person "shall be deemed to be practicing dentistry" if that person "[r]emoves stains, accretions or deposits from the human teeth." N.C. General Statutes § 90-29(b)(2); IDF 42. In the event of a suspected unlicensed practice of dentistry, the Board may bring an action to enjoin the practice in North Carolina Superior Court or may refer the matter to the District Attorney for criminal prosecution. *See* N.C. General Statutes § 90-40.1; IDF 43, 44, 190; Response to Complaint ¶ 19; RAB at 2-3; RRB at 5. The Board does not have the authority to discipline unlicensed individuals or to order non-dentists to stop violating the Dental Practice Act. *See* N.C. General Statutes §§ 90-27, -29, -40, -40.1; IDF 45-49.

Teeth Whitening Services

There are four categories of teeth whitening products or services available in North Carolina: dentist in-office services, dentist-provided take-home kits, services provided by a non-dentist, and over-the-counter (OTC) products.[3] (IDF 105.) All four methods involve the application of some form of peroxide to the teeth using a gel or strip. (IDF 106, 151.) All four methods trigger a chemical reaction that results in whiter teeth. (IDF 106.)

Despite their similar characteristics, the four techniques vary in terms of immediacy of results, ease of use, provider support, and price. (IDF 107.) Dentist in-office services are quick, effective, and provided by a professional, but are costly compared to the other methods and require making an appointment. (IDF 108-20.) Take-home kits provided by dentists are effective and somewhat less expensive than in-office services but require the user to apply the product at home a number of times and usually require at least two trips to the dentist. (IDF 121-28.) Non-dentist services (like dentist in-office services) are quick and effective but are typically priced below dentist services and may not require an appointment.[4] (IDF 137-50.) OTC products are low cost and convenient but require diligent and repeated application by the consumer. (IDF 129-36.) Consumers' preferences with respect to efficacy, cost, and convenience vary (IDF 169, 172, 174), and there is competition among providers offering the different methods

[3] At pages 16 and 17 of Respondent's appeal brief, Respondent objects to Finding 100, which identifies various techniques to whiten teeth, because the ALJ's use of the phrase "through dental stain removal" could be interpreted—despite the ALJ's statements to the contrary (*see, e.g.*, ID at 82, 109)—as a reference to the Dental Practice Act's definition of the practice of dentistry as a person that "removes stains." N.C. General Statutes § 90-29(b)(2). Respondent's interpretation of Finding 100 is questionable, but, for clarity, we strike the phrase "through dental stain removal" from Finding 100 and otherwise affirm that finding.

[4] Respondent argues that Findings 140 and 141 are flawed because Complaint Counsel's expert, Dr. Martin Giniger, lacked foundation for his testimony concerning the bleaching process used by non-dentist teeth whitening systems. (RAB at 17.) These findings are not material to the Commission's resolution of this matter and, in any event, Dr. Giniger had an adequate foundation for this testimony. Dr. Giniger has published numerous articles in peer-reviewed publications on teeth whitening (Giniger, Tr. 88-91; CX653 at 56-59), has taught dental students about teeth whitening (Giniger, Tr. 93-94), holds nine patents related to teeth whitening (Giniger, Tr. 95; CX653 at 55), has provided consulting services to several companies making teeth whitening products including those marketed to non-dentist providers (Giniger, Tr. 98; CX653 at 2; IDF 81), and reviewed the manuals for two companies offering non-dentist teeth whitening systems (CX653 at 22).

of teeth whitening (IDF 157, 158), including through the use of comparative advertising (IDF 163-68).

The Board's Cease and Desist Letters

The Board conducts investigations of allegations that persons are engaged in the unauthorized practice of dentistry. (IDF 175.) Complaints to the Board regarding the unauthorized practice of dentistry are handled by an investigative panel consisting of a case officer, the Deputy Operations Officer, an Investigator, and sometimes the Board's legal counsel. (IDF 181-83.) The case officer, who must be one of the dentists serving on the Board, directs the investigation and is authorized by the Board to make enforcement decisions. (IDF 184-91.) The consumer member of the Board and the hygienist member of the Board did not participate in teeth whitening investigations, notwithstanding their authority to do so under the Dental Practice Act. (IDF 38-40, 59-60, 184, 192-93.)

Starting in or around 2003, the Board began receiving complaints from dentists about non-dentist providers of teeth whitening services. (IDF 194-95.) Almost all of these complaints came from licensed dentists (IDF 227, 229-30), many of whom derived income from teeth whitening services (IDF 233). Many of these complaints noted that these non-dentist providers offered low prices (IDF 196, 232); only on rare occasion did they indicate possible consumer harm (IDF 228, 231).

The Board discussed the increasing number of complaints regarding non-dentist teeth whitening services in its meetings. (IDF 198, 206.) On several occasions, Board members informed practicing dentists that the Board was investigating complaints about non-dentist teeth whiteners and was attempting to shut down these providers.[5] (IDF 201, 205.)

Since 2006, the Board has sent at least 47 cease and desist letters to 29 non-dentist teeth whitening manufacturers and providers. (IDF 208-09, 216-18, 230, 262-83.) Starting in 2007 and at the direction of the Board's President, the Board began issuing cease and desist letters on the basis of a complaint, without any investigation. (IDF 210-15.) These letters were sent on the official letterhead of the Board and stated in capitalized lettering at the top: "NOTICE AND ORDER TO CEASE AND DESIST," "NOTICE TO CEASE AND DESIST," "CEASE AND DESIST NOTICE," or "NOTICE OF APPARENT VIOLATION AND DEMAND TO CEASE AND DESIST." (IDF 219, 220, 222, 223.) The letters go on to order the provider to cease and desist from "all activity constituting the practice of dentistry." (IDF 221-23.) Some of the letters stated that the sale or use of non-dentist teeth whitening products constituted a misdemeanor. (IDF 265-66, 280.) The Board's goal in sending these letters was to stop non-dentists from providing teeth whitening services. (IDF 234-45, 286-87.)

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[5] Respondent disputes Finding 205, which states that members of the Board told dentists attending a conference that the Board was investigating complaints about non-dentist teeth whiteners. (RAB at 18.) Respondent is correct that there was conflicting testimony on this point, but the weight of evidence—[**provisionally redacted**]—supports this finding. (CX565 at 67 (Hardesty Dep. at 259-61); **[provisionally redacted]**.)

The Board's cease and desist letters were effective in causing non-dentists to stop providing teeth whitening services in North Carolina. (IDF 247-56.) This was due in part to the perception of some recipients that the letters carried the force of law. (IDF 246.) The Board's letters were also effective in causing manufacturers and distributors of teeth whitening products used by non-dentist providers to exit or delay entering the North Carolina market.[6] (IDF 70-72, 267-70, 272, 277-79, 281-83.)

The Board's Letters to Mall Operators and the Cosmetology Board

In November 2007, the Board sent eleven letters to mall operators warning them that kiosk teeth whiteners were violating the Dental Practice Act and requesting that they not lease space to these operators. (IDF 97, 288-93.) As a result, some mall operators refused to lease space to non-dentist teeth whiteners or cancelled existing leases. (IDF 98, 294-313.)

Based on its understanding that many of the non-dentist teeth whitening providers were salons and spas regulated by the North Carolina Board of Cosmetic Art Examiners ("cosmetology board"), the Board sought to enlist the aid of the cosmetology board in discouraging its licensees from providing teeth whitening services. (IDF 314-23.) In February 2007, the cosmetology board posted a notice on its website that was prepared by the Board suggesting that teeth whitening "constitutes the practice of dentistry" and that the "unlicensed practice of dentistry in our state is a misdemeanor." (IDF 320, 322.) As a result of the cosmetology board's posting, some cosmetologists stopped providing teeth whitening services. (IDF 324-27.)

III. PROCEDURAL HISTORY

A. PLEADINGS AND PRE-TRIAL MOTIONS

On June 17, 2010, the Commission issued a single-count Complaint in this matter against the Board. The Complaint alleged that the Board classified teeth whitening as the practice of dentistry and violated Section 5 of the FTC Act by enforcing this determination through cease and desist orders that were neither authorized nor supervised by the State, and that were designed to, and did, drive non-dentist teeth whiteners out of North Carolina.

The Complaint alleged that the Board, reacting to the competitive threat posed by non-dentist providers, sought to exclude, and did exclude, non-dentists from the market for teeth whitening services in North Carolina. (Compl. ¶¶ 13-23.) According to the Complaint, the Board sent dozens of cease and desist letters to non-dentist teeth whitening providers and distributors, discouraged prospective non-dentist providers from

[6] Respondent asserts that Finding 268, which states that WhiteScience lost all of its sales in North Carolina as a result of the Board's actions, is inconsistent with testimony of the President of WhiteScience that his company continued to do business in North Carolina. (RAB at 17-18.) In fact, WhiteScience's President testified that the company did lose all of its sales in the state in response to the Board's actions but later reentered the state after learning that the Board would handle allegations of unauthorized practice of dentistry on a case-by-case basis. (Nelson, Tr. 735-36, 785-89, 800-01, 809-11; *see also* IDF 263-70, 278.)

opening teeth whitening businesses, and sent letters to owners and operators of shopping malls to discourage their leasing space to non-dentist teeth whitening businesses. (*Id.* ¶¶ 20-22.) These actions were allegedly not authorized by statute and did not involve any oversight by the State. (*Id.* ¶ 19.) The Complaint did not challenge any attempts by the Board to commence civil or criminal proceedings against alleged violators of the North Carolina Dental Practice Act, N.C. General Statutes § 90-22 *et seq*.

The Complaint alleged that the Board's actions have had the effect of restraining competition unreasonably and injuring consumers in North Carolina by preventing and deterring non-dentists from providing teeth whitening services; depriving consumers of the benefits of price competition; and reducing consumer choice for the provision of teeth whitening services. (*Id.* ¶¶ 24-25.) The Complaint further alleged that the Board's actions do not qualify for the state action defense and are not reasonably related to any efficiencies or other benefits sufficient to justify their harmful effect on competition. (*Id.* ¶ 23.) The Notice of Contemplated Relief attached to the Complaint seeks an order that would require Respondent to discontinue the challenged conduct.

The Board filed a Response to Complaint dated July 6, 2010. The Response admitted that the Board had sent letters to non-dentists offering teeth whitening services with the caption: "Notice and Order to Cease and Desist." (Response ¶ 20; *see also id.* ¶ 19 (acknowledging that the Board had sent "cease and desist letters").) The letters "inform[ed] the recipient of the investigation, quote[d] the applicable statute, and demand[ed] that the recipient stop violating that statute." (*Id.* ¶ 20.) The Response further admitted that the Board's staff had sent letters to mall owners and property management companies requesting their "assistance in preventing *unlawful* activity on their premises," namely, "teeth whitening services by non-dentists." (*Id.* ¶ 22 (emphasis in original).) Respondent also admitted that Board staff had informed non-dentists who were considering opening teeth whitening businesses that such services could be performed only by a licensed dentist. (*Id.* ¶ 21.)

The Board's Response further admitted that "[a]ny enforcement actions by the Board against non-licensees who are providing teeth whitening services, whether civil or criminal, may only be pursued in the state's courts." (*Id.* ¶ 19; *see also id.* ("[N]o kiosk, spa or other provider of teeth whitening services by a non-dentist could actually be forced to stop operations unless the Board obtained either a court order or the cooperation of a district attorney in a criminal conviction and a court judgment.")) The Response otherwise denied the allegations of the Complaint, including the alleged product market, that concerted activity had occurred, that the cease and desist letters were orders, and that the Board's actions had caused anticompetitive effects in the purported relevant market.

As affirmative defenses, the Response asserted, among other things, that the Board is immune from suit under the state action doctrine, possesses sovereign immunity under the Eleventh Amendment, and is protected by the Tenth Amendment; that the Commission lacks subject matter jurisdiction; that the Board's actions had no substantial effect on U.S. commerce; and that the requested relief was not in the public interest. (*Id.* at 20-21.)

Prior to the start of the trial before the ALJ, Complaint Counsel and Respondent filed cross motions on the issue of the applicability of the state action doctrine to the Board's conduct. In an Opinion and Order dated February 3, 2011, the Commission rejected the Board's invocation of the state action doctrine as a basis for exempting its challenged conduct from the FTC Act. *See North Carolina Board of Dental Examiners*, 151 F.T.C. 607, 615-33 (2011). The Commission explained that because the Board is controlled by practicing dentists, the Board's challenged conduct must be actively supervised by the State for it to claim state action exemption from the antitrust laws. *Id.* at 617-28. Because the undisputed facts showed that there was no such supervision, the antitrust laws applied to the Board's conduct. *Id.* at 628-33. The Commission also concluded that it has jurisdiction over the Board because states and their regulatory bodies constitute "persons" under the FTC Act. *Id.* at 614-15.

On January 14, 2011, Respondent filed a motion to disqualify the Commission, asserting that the Commission lacks the constitutional authority to decide whether it has jurisdiction over the Board and had prejudged the issues in the proceeding. In a February 16, 2011 Opinion, the Commission denied Respondent's motion. *See North Carolina Board of Dental Examiners*, 151 F.T.C. 644 (2011). The Opinion concluded that the Commission has jurisdiction to decide whether the Board can avail itself of the state action exemption and that the Board had presented no evidence of prejudgment.

On February 1, 2011, Respondent filed a complaint for declaratory judgment and injunctive relief in the United States District Court for the Eastern District of North Carolina. The complaint alleged that the FTC lacked jurisdiction over the Board and that these proceedings violated various constitutional rights of the Board. On May 3, 2011, the District Court dismissed the action for lack of subject matter jurisdiction, explaining that "the appropriate forum for plaintiff's arguments is in the administrative proceedings, followed by a potential appeal to the Fourth Circuit Court of Appeals." *North Carolina State Board of Dental Examiners v. FTC*, 768 F. Supp. 2d 818, 822 (E.D.N.C. 2011). Appeal of the dismissal is pending before the Fourth Circuit.

During the trial, which began on February 17, 2011 and concluded on March 16, 2011, the ALJ heard testimony from twelve fact and four expert witnesses and admitted more than eight hundred exhibits into evidence. The ALJ closed the hearing record on March 30, 2011. Complaint Counsel and the Board filed concurrent post-trial briefs and proposed findings on April 25, 2011 and filed replies on May 5, 2011. The ALJ heard closing arguments on May 11, 2011.

B. INITIAL DECISION

The ALJ issued an Initial Decision ("ID") on July 14, 2011, finding that the Board's concerted action to exclude non-dentists from the market for teeth whitening services in North Carolina constituted an unreasonable restraint of trade and an unfair method of competition in violation of Section 5 of the FTC Act. In particular, the ALJ found that dentist members of the Board had a common scheme or design, and hence an agreement, to exclude non-dentists from the market for teeth whitening services and to deter potential providers of teeth whitening services from entering the market. To

achieve this objective, dentist members of the Board caused the Board to (a) send letters to non-dentist teeth whitening providers ordering them to cease and desist from offering these services, (b) send letters to manufacturers of equipment used by non-dentist providers ordering them to cease and desist from assisting clients offering teeth whitening services, (c) send letters to dissuade persons considering opening non-dentist teeth whitening businesses, (d) send letters to owners or operators of malls to dissuade them from leasing space to non-dentist providers of teeth whitening services, and (e) elicit the help of the cosmetology board to dissuade its licensees from providing teeth whitening services. The ALJ concluded that these actions, by their nature, had the tendency to harm competition.

The ALJ found that the relevant market consists of teeth whitening services provided by dentists and non-dentists, but determined that the relevant market did not include self-administered teeth whitening products. The ALJ concluded that the Board had market power in the relevant market, as demonstrated by its ability to exclude non-dentist providers from the relevant market.

The ALJ found that the Board's concerted actions were effective in causing non-dentist teeth whitening providers to exit the relevant market, manufacturers to reduce the availability of their teeth whitening products to non-dentist providers, and mall owners and operators to stop leasing space to non-dentist providers.

The ALJ rejected the Board's proffered procompetitive justifications. The ALJ concluded that the antitrust laws do not permit a defense based on social welfare or public safety concerns, as asserted by the Board. In addition, the ALJ rejected Respondent's argument that teeth whitening services should be offered at a cost that reflects the skills of dentists as inimical to the basic policy of the antitrust laws. The ALJ also rejected Respondent's proffered justification that the Board's actions had the benefit of promoting legal competition. Finally, the ALJ observed that the Board's remaining justifications were essentially a reiteration of its state action argument, which had been rejected by the Commission.

As a remedy, the ALJ ordered the Board to cease and desist from directing a non-dentist to stop providing teeth whitening services or products, as well as from prohibiting or discouraging the provision of these goods and services. The ALJ's Order also requires the Board to cease and desist from communicating to certain third parties that non-dentist teeth whitening goods or services violate the Dental Practice Act. The ALJ's Order does not prohibit the Board from investigating, filing a court or administrative action, or communicating notice of its intent to file a court or administrative action against a non-dentist provider for an alleged violation of the Dental Practice Act.

C. APPEAL

Respondent timely filed a Notice of Appeal on July 28, 2011. Complaint Counsel did not file an appeal from the Initial Decision. The Commission heard oral argument on October 28, 2011.[7]

Respondent makes three principal claims on appeal. Respondent first argues that no contract, combination, or conspiracy to restrain trade existed. In particular, Respondent asserts that the Board is not capable of engaging in concerted action because it does not consist of independent economic actors with distinct economic interests. (RAB at 11-15, 25-26.) In addition, Respondent argues that even if the members of the Board were capable of concerted action, there was no evidence to support a finding that they did so in this case.

Respondent's second principal claim on appeal is that several procompetitive justifications outweigh any harm to competition. (RAB at 7-10, 29-34.) Respondent asserts that the ALJ failed to consider that the Board's actions were those of a state agency that intended to and did promote the public welfare and thus enhanced legal competition.

Respondent's third principal claim on appeal is that the ALJ's proposed remedy is overbroad and will prevent the Board from investigating or challenging violations of the North Carolina Dental Practice Act. (RAB at 37.) Respondent also asserts that the proposed remedy violates the Commerce Clause of and Tenth Amendment to the United States Constitution. (RAB at 39-46.)

In addition, Respondent seeks to relitigate two issues resolved in the Commission's February 3, 2011 Opinion and Order, namely the Commission's jurisdiction to hear this case and the applicability of the state action defense. (RAB at 22-24, 29-31.) We note, as an initial matter, that an appeal from an ALJ's Initial Decision is not the proper means by which to seek reconsideration of a Commission decision. In any event, Respondent has failed to identify any change in controlling law, new evidence, or a need to correct a clear error or manifest injustice that would warrant reconsidering our prior decision on either of these issues.[8]

IV. STANDARD OF REVIEW

The Commission reviews the ALJ's findings of facts and conclusions of law *de novo*, considering "such parts of the record as are cited or as may be necessary to resolve

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[7] Complaint Counsel submitted a packet of materials to the Commission a few hours before oral argument. (Oral Argument Tr. 4-5, 37-38.) In light of Respondent's inability to meaningfully review or object to these materials in advance of oral argument, the Commission has given no consideration to the packet in reaching its decision.

[8] *See also* note 20, *infra* (addressing whether the Board is a "person" under the FTC Act).

the issues presented." The Commission may "exercise all the powers which it could have exercised if it had made the initial decision."[9] Commission Rule 3.54, 16 C.F.R. § 3.54.

V. LEGAL FRAMEWORK

Although the reach of Section 5 of the FTC Act extends beyond that of Section 1 of the Sherman Act, *see FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 239 (1972), in this case we follow the standards of Section 1 to assess whether the challenged actions of the Board violate Section 5. *See California Dental Ass'n v. FTC,* 526 U.S. 756, 762 & n.3 (1999); *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 451-55 (1986); *FTC v. Cement Institute*, 333 U.S. 683, 694 (1948); *Fashion Originators' Guild of America, Inc. v. FTC*, 312 U.S. 457, 463-64 & n.4 (1941); *Realcomp II, Ltd. v. FTC,* 635 F.3d 815, 824 (6th Cir. 2011); *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 32 (D.C. Cir. 2005).

Section 1 of the Sherman Act prohibits "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States." 15 U.S.C. § 1. Despite its broad language, the ban on contracts in restraint of trade extends only to unreasonable restraints of trade, *i.e.*, restraints that impair competition. *State Oil Co. v. Khan,* 522 U.S. 3, 10 (1997). Thus, a violation of Section 1 requires proof of two elements: "(1) a contract, combination, or conspiracy; (2) that imposed an unreasonable restraint of trade." *Valuepest.com of Charlotte, Inc. v. Bayer Corp.*, 561 F.3d 282, 286 (4th Cir. 2009) (quoting *Dickson v. Microsoft Corp.*, 309 F.3d 193, 202 (4th Cir. 2002)).

The first element requires proof of some kind of agreement because "[i]ndependent action is not proscribed." *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 761 (1984). To demonstrate an agreement, a plaintiff must show that the parties "had a conscious commitment to a common scheme designed to achieve an unlawful objective." *Id.* at 768. This may be proved through "direct or circumstantial evidence." *Id.* In addition, the agreement must "deprive[] the marketplace of independent centers of decisionmaking" in order to raise Section 1 concerns. *American Needle, Inc. v. NFL*, 130 S. Ct. 2201, 2212 (2010) (quoting *Copperweld Corp v. Independence Tube Corp.*, 467 U.S. 752, 769 (1984)).

With respect to the second element, the Supreme Court has explained that "a restraint may be adjudged unreasonable either because it fits within a class of restraints that has been held to be 'per se' unreasonable, or because it violates what has come to be known as the 'Rule of Reason.'" *Indiana Federation of Dentists*, 476 U.S. at 457-58. Under per se analysis, "certain agreements or practices are so 'plainly anticompetitive,' . . . and so often 'lack . . . any redeeming virtue,' . . . that they are conclusively presumed illegal without further examination." *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 8 (1979) (citations omitted). "A court need not then inquire whether the restraint's authors actually possess the power to inflict public injury . . ., nor

[9] The *de novo* standard of review is required by the Administrative Procedure Act, 5 U.S.C. § 557(b), and the FTC Act, 15 U.S.C. § 45(b), (c), and applies to both findings of fact and inferences drawn from those facts. *See Realcomp II, Ltd.*, No. 9320, 2009 FTC LEXIS 250, *37 n.11 (2009), *aff'd*, *Realcomp II, Ltd. v. FTC*, 635 F.3d 815 (6th Cir. 2011).

will the court accept argument that the restraint in the circumstances is justified by any procompetitive purpose or effect." *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1362 (5th Cir. 1980) (citations omitted).

Complaint Counsel does not contend that the challenged conduct of the Board is unreasonable per se and instead challenges the Board's conduct under the rule of reason. When evaluating conduct under the rule of reason, the Supreme Court has called for "an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint," with the aim of reaching "a confident conclusion about the principal tendency of a restriction." *California Dental*, 526 U.S. at 781.

In *Indiana Federation of Dentists*, the Court outlined three alternative modes of analysis under the rule of reason. That case concerned a group of dentists who agreed to withhold x-rays from dental insurance companies that requested their use in benefits determination. The Court applied a rule of reason analysis and affirmed the Commission's finding that the practice violated Section 1 of the Sherman Act. In applying the rule of reason, the Court condemned the practice on two alternative grounds and endorsed the existence of a third possible route to condemnation under the rule of reason (albeit one not applicable to the facts it confronted).

First, the Court held that it was faced with a type of restraint that, by its very nature, required justification even in the absence of a showing of market power. 476 U.S. at 459-60. According to the Court, because the practice was "a horizontal agreement among the participating dentists to withhold from their customers a particular service that they desire," then "no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement." *Id.* at 459 (quoting *National Society of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978)). Accordingly, the practice "require[d] some competitive justification even in the absence of a detailed market analysis." *Id.* at 460 (quoting *NCAA v. Board of Regents*, 468 U.S. 85, 109-10 (1984)). We have previously condemned several types of restraints under this "inherently suspect" form of analysis.[10] *See, e.g.*, *Realcomp II, Ltd.*, No. 9320, 2009 FTC LEXIS 250 (2009), *aff'd on other grounds*, *Realcomp II, Ltd. v. FTC*, 635 F.3d 815 (6th Cir. 2011); *North Texas Specialty Physicians*, 140 F.T.C. 715 (2005), *aff'd*, *North Texas Specialty Physicians v. FTC*, 528 F.3d 346 (5th Cir. 2008); *Polygram Holding, Inc.*, 136 F.T.C. 310 (2003), *aff'd*, *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 32 (D.C. Cir. 2005).

Second, the Court held that even if the restriction in question was "not sufficiently 'naked' to call this principle into play, the Commission's failure to engage in detailed market analysis [was] not fatal to its finding of a violation of the Rule of Reason," because the record contained direct evidence of anticompetitive effects. 476 U.S. at 460. The Court reasoned that "[s]ince the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine

[10] Antitrust tribunals have used a variety of terms to address this approach, including "abbreviated," "truncated," or "quick look" analysis. *See California Dental*, 526 U.S. at 770-71 (collecting cases). For simplicity, we adhere to the "inherently suspect" terminology we used in *Polygram*.

adverse effects on competition, 'proof of actual detrimental effects, such as a reduction of output,' can obviate the need for an inquiry into market power, which is but a 'surrogate for detrimental effects.'" *Id.* at 460-61 (quoting 7 Areeda, *Antitrust Law* ¶ 1511, at 429 (1986)); *see also Realcomp*, 635 F.3d at 827 ("If adverse effects are clear, inquiry into market power is unnecessary.").

Third, the Court's discussion of the "proof of actual detrimental effects" prong of the analysis made clear that the traditional mode of analysis—inquiring into market definition and market power—was still available, although not applicable to the case before it because the Commission had not attempted to prove market power. Although the Court did not explore this mode of analysis in detail, it observed that "the purpose of the inquiries into market definition and market power is to determine whether an arrangement *has the potential* for genuine adverse effects on competition." *Id.* at 460 (emphasis added). Numerous lower courts have confirmed that the Court's conclusion in *Indiana Federation of Dentists* that market power is "a surrogate for detrimental effects" logically compels the result that, if the tribunal finds that the defendants had market power and that their conduct tended to reduce competition, it is unnecessary to demonstrate directly that their practices had adverse effects on competition. *See, e.g.*, *Realcomp*, 635 F.3d at 827-31; *United States v. Brown University*, 5 F.3d 658, 668-69 (3d Cir. 1993); *Flegel v. Christian Hospital*, 4 F.3d 682, 688 (8th Cir. 1993); *Gordon v. Lewistown Hospital*, 423 F.3d 184, 210 (3d Cir. 2005); *Law v. NCAA*, 134 F.3d 1010, 1019 (10th Cir. 1998); *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928, 937 (7th Cir. 2000).

The Supreme Court addressed the role of abbreviated rule of reason analysis again in *California Dental*. That case concerned a professional association's ethical canon that effectively prohibited members from advertising price discounts in most cases and entirely precluded advertising regarding the quality of services. The FTC and the Ninth Circuit had concluded that the restrictions resulting from this rule were tantamount to naked restrictions on price competition and output, 526 U.S. at 762-64, and therefore applied an "abbreviated, or 'quick look,' rule of reason analysis," and found them unlawful without a "full-blown rule of reason inquiry" or an "elaborate industry analysis." *Id.* at 763 (citing *NCAA*, 468 U.S. at 109-10 & n.39).

The Supreme Court agreed that restrictions with obvious anticompetitive effects, such as those in *Professional Engineers*, *NCAA*, and *Indiana Federation of Dentists*, do not require a "detailed market analysis" and may be held unlawful under a rule of reason framework unless the defendants proffer some acceptable "competitive justification" for the practice. Such analysis is appropriate if "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets." *California Dental*, 526 U.S. at 769, 770. The Court found, however, that the particular advertising rules under review in that case might plausibly "have a procompetitive effect by preventing misleading or false claims that distort the market," particularly given the "disparities between the information available to the professional and the patient" and the "inherent asymmetry of knowledge" about the service. *Id.* at 771-72, 778 (quotation omitted). Thus, while "it is also . . . possible that the restrictions might in the final analysis be anticompetitive[,] . . .

[t]he obvious anticompetitive effect that triggers abbreviated analysis has not been shown." *Id.* at 778.

While the Court accordingly called, in that case, for a "more sedulous" market analysis, *id.* at 781, it took pains to add that its ruling did "not, of course, necessarily . . . call for the fullest market analysis. . . . [I]t does not follow that every case attacking a less obviously anticompetitive restraint (like this one) is a candidate for plenary market examination." *Id.* at 779. Rather, the Court stated, "[w]hat is required . . . is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint." *Id.* at 781.

In this Opinion, we analyze Respondent's conduct under the three modes of analysis endorsed in *Indiana Federation of Dentists*. It is important to note, however, that we could have selected just one of these modes of analysis and, if this approach had supported a finding that the Board's conduct is unlawful, it would have been unnecessary to engage in any further analysis. The fact that all three modes of inquiry under *Indiana Federation of Dentists* lead to the same result reinforces our conclusion that the conduct at issue is anticompetitive.

VI. ANALYSIS

A. CONCERTED ACTION

The ALJ concluded that "the Board had a common scheme or design, and therefore an agreement, to prevent or eliminate non-dentist teeth whitening services in North Carolina." (ID at 77-79.) The ALJ concluded that this agreement could be inferred from the Board's course of conduct in issuing cease and desist letters and other communications designed to discourage non-dentist teeth whitening. (ID at 78-79.) In addition, the ALJ concluded that even though the Board was a single legal entity, it was legally capable of concerted action because it was controlled by dentists with competing economic interests. (ID at 71-76.)

Respondent argues that the concerted action required by Section 1 of the Sherman Act has not been shown because the Board's members are not separate economic actors capable of a conspiracy. Respondent further argues that there is no evidence that members of the Board in fact engaged in concerted action. We find both of these arguments to be without merit.

Section 1 of the Sherman Act requires a "contract, combination . . . or conspiracy" that unreasonably restrains trade. 15 U.S.C. § 1. "Independent action is not proscribed." *Monsanto Co. v. Spray-Rite Service Co.*, 465 U.S. 752, 761 (1984); *see also Copperweld*, 467 U.S. at 767-68 ("Section 1 . . . does not reach conduct that is wholly unilateral" (quotation omitted)); *Virginia Vermiculite, Ltd. v. Historic Green Springs, Inc.*, 307 F.3d 277, 280 (4th Cir. 2002) ("It is incontestable that 'concerted action' in restraint of trade lies at the heart of a Sherman Act section 1 violation.").

In its recent *American Needle* decision, the Supreme Court explained that "concerted action under § 1 does not turn simply on whether the parties involved are

legally distinct entities." *American Needle, Inc. v. NFL*, 130 S. Ct. 2201, 2209 (2010); *see also id.* at 2211 ("the question is not whether the defendant is a legally single entity or has a single name"). Instead, the "relevant inquiry . . . is whether there is a 'contract, combination . . . or conspiracy' amongst separate economic actors pursuing separate economic interests, such that the agreement deprives the marketplace of independent centers of decisionmaking, and therefore of diversity of entrepreneurial interests, and thus of actual or potential competition." *Id.* at 2212 (quotations and citations omitted).

For example, a parent corporation and its wholly-owned subsidiary "are incapable of conspiring with each other for purposes of § 1 of the Sherman Act." *Copperweld*, 467 U.S. at 777. Although a parent corporation and its wholly-owned subsidiary are legally separate entities, they lack "independent centers of decisionmaking" necessary to raise Section 1 concerns. *Id.* at 769. Likewise, "an internal agreement to implement a single, unitary firm's policies does not raise the antitrust dangers that § 1 was designed to police." *Id.* Nevertheless, the Court has "repeatedly found instances in which members of a legally single entity violated § 1 when the entity was controlled by a group of competitors and served, in essence, as a vehicle for ongoing concerted activity." *American Needle*, 130 S. Ct. at 2209 (listing cases).

The Fourth Circuit has similarly recognized that corporate agents are capable of a Section 1 conspiracy when they have independent personal stakes in the object of the conspiracy. *See American Chiropractic v. Trigon Healthcare*, 367 F.3d 212, 224 (4th Cir. 2004) ("We have continued to recognize . . . the independent personal stake exception."); *Greenville Publishing Co. v. Daily Reflector, Inc.*, 496 F.2d 391, 399-400 (4th Cir. 1974) (corporation found capable of conspiring with president of corporation because the officer had "an independent personal stake in achieving the corporation's illegal objective"). The "personal stake" principle is relevant only where the officers with the independent interests exercise some degree of control over the firm's decisionmaking process. *See Oksanen v. Page Memorial Hospital*, 945 F.2d 696, 705 (4th Cir. 1991) (en banc) ("If the officer cannot cause a restraint to be imposed and his firm would have taken the action anyway, then any independent interest is largely irrelevant to antitrust analysis.").

In the instant case, the ALJ correctly found that Board members were capable of conspiring because they are actual or potential competitors. As required by Section 90-22(b) of the Dental Practice Act, dentist Board members continued to operate separate dental practices while serving on the Board (IDF 6-8), giving them distinct and potentially competing economic interests. *Cf. American Needle*, 130 S. Ct. at 2213 (NFL teams are "potentially competing suppliers"). At oral argument, Respondent appeared to acknowledge that members of the Board are potential competitors. (Oral Argument Tr. 9-10 ("they are potential competitors").)

In addition, Board members had a personal financial interest in excluding non-dentist teeth whitening services. *Id.* at 2215 ("Agreements made within a firm can constitute concerted action covered by § 1 when the parties to the agreement act on interests separate from those of the firm itself . . . ."). At least eight of the ten dentist Board members serving from 2005 to 2010 (Drs. Allen, Burnham, Feingold, Hardesty,

Holland, Morgan, Owens, and Wester) provided teeth whitening services in their private practices. (IDF at 6-9; *see also* IDF 32 (identifying Board members).) For example, during their tenures on the Board, one Board member earned over **[provisionally redacted]** from teeth whitening services, while another earned over **[provisionally redacted]**.[11] (IDF 10-11, 32.) The dentist members of the Board therefore stood to benefit financially from the challenged restrictions. (Baumer, Tr. 1856; *see also* IDF 102 (noting growth in dentist-provided teeth whitening).) In addition, all dentist Board members were elected to the Board by other licensed dentists, many of whom also have a financial interest in limiting the practice of teeth whitening to dentists. (IDF 15-23.) Thus, as the ALJ concluded, "Board members have a significant, nontrivial financial interest in the business of their profession, including teeth whitening." (IDF 12.)

Respondent's economic expert acknowledged that Board members have a financial interest in the challenged restrictions.[12] Respondent's economist testified that state regulatory boards can be, and have been, used to exclude competition and augment the income of licensed practitioners. (Baumer, Tr. 1763 (referring to CX822 at 19), 1848-50, 1855-56, 1884, 1896-98, 1901-03, 1911-13, 1915; RX078 at 8.) He also acknowledged that the Board's decision to ban non-dentist teeth whitening may have been "influenced by the impact on the bottom line." (Baumer, Tr. 1859-62; *see also* Baumer, Tr. 1781 (similar).)

Our finding that Board members have a capacity to conspire is buttressed by the significant degree of control exercised by dentist members of the Board with respect to the challenged restraints. A majority of the members of the Board had a personal financial interest in excluding non-dentist teeth whitening. (IDF 2, 6-11.) Furthermore, all of the key decisionmakers in teeth whitening matters had a personal stake in the conspiracy because dentists were the only Board members involved in teeth whitening investigations (the consumer and dental hygienist Board members were excluded). (IDF 40, 59-60, 184, 192-93.)

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[11] Respondent asserts that Findings 9, 10, 11, 104, and 233 exaggerate the financial interest of the Board and other dentists in teeth whitening by including income from forms of teeth whitening services outside the ALJ's relevant market. (RAB at 11-15.) In light of our conclusion that the relevant market is broader than that found by the ALJ (*see* Section VI.B.2.a, *infra*), Respondent's objections to these findings are moot. Respondent also objects to a citation to Dr. Baumer's testimony in Finding 12 but not the finding itself. (RAB at 15-16.) Even without the disputed citation, we would affirm Finding 12 based on the other evidence cited by the ALJ.

[12] The following exchange with Respondent's economist, Dr. Baumer, occurred at page 1856 of the trial transcript:

> Q. Now . . . you believe that the board, the North Carolina State Board of Dental Examiners, is concerned about the financial interest of dentists in North Carolina; correct?
>
> A. Yes. I think they are.
>
> Q. And you believe that dentists in North Carolina do have a financial interest in excluding non-dentist teeth whitening; correct?
>
> A. There is a financial aspect to that. Correct.
>
> Q. And that they have a financial interest in excluding the non-dentist teeth whiteners; correct?
>
> A. Yes.

Respondent nevertheless argues that dentist board members lack a financial interest in the challenged restraints because there is not a "significant degree" of competition between dentist-provided teeth whitening and non-dentist provided teeth whitening. (RRB at 3-4.) This assertion is contradicted not only by the testimony of Respondent's own economic expert, who stated that there is a high cross-elasticity between these two forms of teeth whitening (Baumer, Tr. 1842-45), but also by Respondent's acknowledgement that these two services are in the same relevant market (RAB at 10-11, 27; *see also* Baumer, Tr. 1711; *cf.* Kwoka, Tr. 994-1002 (testimony of Complaint Counsel's expert)).

Thus, despite the general principle that joint action by corporate officers is usually "not the sort of 'combination' that § 1 is intended to cover," *American Needle*, 130 S. Ct. at 2212, here the evidence shows that the dentist members of the Board were separate economic actors pursuing separate economic interests whose joint decisions could deprive the marketplace of actual or potential competition. Because their agreement joined together "independent centers of decisionmaking" *id.* at 2209, 2211, 2212, 2213, 2214 (quoting *Copperweld*, 467 U.S. at 769), the Board members were capable of conspiring under Section 1.

In a similar case, the board of directors of a nationwide moving company adopted a policy restricting its local affiliates' ability to offer interstate carriage. The Court of Appeals for the D.C. Circuit concluded that the directors had formed a Section 1 conspiracy because nine of the eleven board members were "actual or potential competitors" and stood to personally benefit from the challenged restriction. *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 215 (D.C. Cir. 1986).

Our conclusion is also consistent with our disposition of the *Massachusetts Board* case. That matter involved a challenge to a state agency's restrictions on the use of truthful advertising by its optometrist licensees. We concluded that the members of the optometry board were separate legal entities capable of conspiring in restraint of trade because each optometrist on the board was engaged in the private practice of optometry and stood to benefit from the restraints in question. *See Massachusetts Board of Registration in Optometry*, 110 F.T.C. 549, 610-11 (1988).

We turn next to the issue of whether the element of concerted action has been satisfied. *See Oksanen*, 945 F.2d at 706 (even if there is a "capacity to conspire," a court must determine whether a conspiracy actually exists).

A plaintiff alleging conspiracy must demonstrate that the parties "had a conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto*, 465 U.S. at 768; *Thompson Everett, Inc. v. National Cable Advertising, L.P.*, 57 F.3d 1317, 1324 (4th Cir. 1995) (same). *Monsanto* requires "something more" than independent action, and must rise to the level of "a unity of purpose or a common design and understanding, or a meeting of minds." *Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, Inc.*, 878 F.2d 801, 805 (4th Cir. 1989).

A plaintiff may demonstrate an agreement by "direct or circumstantial evidence." *Monsanto*, 465 U.S. at 768; *see also American Chiropractic*, 367 F.3d at 225-26 ("A plaintiff can offer direct or circumstantial evidence to prove concerted action."); *Laurel Sand & Gravel, Inc. v. CSX Transp., Inc.*, 924 F.2d 539, 542 (4th Cir. 1991) ("An agreement to restrain trade may be inferred from other conduct."). But care must be taken with respect to inferences drawn from circumstantial evidence because "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986). For example, "mere contacts and communications, or the mere opportunity to conspire . . . is insufficient evidence from which to infer an antitrust conspiracy." *Oksanen*, 945 F.2d at 706 (quoting *Cooper v. Forsyth County Hospital Authority*, 789 F.2d 278, 281 (4th Cir. 1986)).

The concerted action requirement can be satisfied even where one or more of the co-conspirators had differing motives or goals or "acted unwillingly, reluctantly, or only in response to coercion"; it is sufficient to show that the co-conspirators "acquiesced in an illegal scheme." *Dickson*, 309 F.3d at 205 (quotation and citation omitted); *see also Virginia Vermiculite*, 156 F.3d at 541 ("[I]t is not necessary that HGSI have shared Grace's alleged anticompetitive motive in entering into a proscribed restraint; it is sufficient that HGSI, regardless of its own motive, merely acquiesced in the restraint with the knowledge that it would have anticompetitive effects."); *Duplan Corp. v. Deering Milliken Inc.*, 594 F.2d 979, 982 (4th Cir. 1979) ("Where, as here, the [defendants] were knowing participants in a scheme whose effect was to restrain trade, the fact that their motives were different from or even in conflict with those of the other conspirators is immaterial.").

Here, there is direct evidence demonstrating that the dentist members of the Board had a common plan to exclude non-dentist teeth whitening providers from the market. On several occasions, the Board discussed teeth whitening services provided by non-dentists and then voted to take action to restrict these services. (IDF 264, 276, 289, 317, 318, 321.) For example: **[provisionally redacted]**

There is also a wealth of circumstantial evidence tending to show that the members of the Board had a common scheme to exclude non-dentist teeth whiteners. In particular, members of the Board engaged in a consistent practice of discouraging non-dentist teeth whitening services by sending dozens of cease and desist letters and other communications to providers of these services (IDF 207-45), manufacturers and distributors (IDF 261-80), mall owners and operators (IDF 288-93), the cosmetology board (IDF 317-22), and potential entrants (IDF 284). These communications were similar, regardless of the recipient (IDF 208-26, 262, 288, 320), and they had a common objective of discouraging non-dentist teeth whitening (IDF 234-45, 286-87, 293, 323). These cease and desist letters were on Board letterhead, indicated that the directives came from the Board, and stated that responses should be directed to the Board. (IDF 219 (listing exhibits).) Respondent acknowledged that the Board's case officers, all of whom were dentist Board members (IDF 184), were acting within their delegated authority when they sent the cease and desist letters. (Oral Argument Tr. 11-12.) The Board never took any steps to repudiate the actions of its case officers.

We agree with the ALJ that the consistency and frequency of the Board's message regarding non-dentist teeth whitening, over the course of several years and across the tenures of varying Board members (IDF 32), constitute probative circumstantial evidence of an agreement among Board members. (ID at 78.) We also find significant that on at least three occasions, members of the Board or Board counsel informed third parties that the Board was taking action against non-dentist teeth whitening kiosks. (IDF 201, 205; CX254 at 1; *see also* CX369 (noting that the Board had a "strategy" for addressing teeth whitening kiosks).) For example, after receiving an inquiry from a dentist about a teeth whitening kiosk in 2008, the Board's Chief Operations Officer responded that "we are currently going forth to do battle" with "bleaching kiosks" and that "[w]e've sent out numerous cease and desist orders throughout the state." (IDF 201; CX404 at 1-2.)

Respondent argues that the Board's use of multiple case officers and case-specific recommendations when investigating teeth whitening complaints demonstrates that Board members were acting independently when they sent the cease and desist letters. (RAB at 26.) To the contrary, the fact that multiple agents of the Board delivered a consistent message over a period of several years to numerous and various types of third parties with no repudiation by the Board tends to negate the possibility that they were acting independently and reinforces our conclusion that the Board's representatives were acting pursuant to the Board's agreement and plan to exclude non-dentist teeth whiteners.

B. RESTRAINT OF TRADE

In this Section, we review the challenged conduct of the Board under the rule of reason using the three alternative modes of analysis described in *Indiana Federation of Dentists*. We find that the inherently suspect nature of the conduct, the indirect evidence, and the direct evidence all indicate that the Board's concerted action is anticompetitive.

We also find that Respondent has failed to advance a legitimate procompetitive justification for its conduct.

1. The Board's Conduct under *Polygram*'s "Inherently Suspect" Framework

As discussed in Section V above, "not all trade restraints require the same degree of fact-gathering and analysis." *Polygram*, 136 F.T.C. at 327 (citing *Standard Oil Co. v. United States*, 221 U.S. 1, 65 (1911)); *see also California Dental*, 526 U.S. at 781 ("What is required . . . is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint"). Thus, in *Polygram*, we held that in a limited category of cases—when "the conduct at issue is inherently suspect owing to its likely tendency to suppress competition"—our "scrutiny of the restraint itself . . . without consideration of market power" is sufficient to condemn the restraint, unless the defendant can articulate a legitimate justification for that restraint. 136 F.T.C. at 344; *see also Oksanen*, 945 F.2d at 709 ("a detailed inquiry into a firm's market power is not essential when the anticompetitive effects of its practices are obvious"); *North Texas Specialty Physicians*, 528 F.3d at 362 (physicians group's collective negotiations of fee-for-service contracts "bear a very close resemblance to horizontal price fixing" such that inherently suspect analysis was appropriate); *Realcomp*, 2009 FTC LEXIS 250, at *55-73 (finding that restrictions imposed by real estate multiple listings service were inherently suspect because they "were, in essence, an agreement among horizontal competitors to restrict the availability of information" to consumers and that restricted "the ability of low-cost, limited service" rivals to compete).

a. The Board's Conduct is Inherently Suspect

Applying *Polygram*'s "inherently suspect" framework, we conclude that the challenged conduct of the Board can reasonably be characterized as "giv[ing] rise to an intuitively obvious inference of anticompetitive effect." *California Dental*, 526 U.S. at 781; *see also Continental Airlines, Inc. v. United Airlines, Inc.*, 277 F.3d 499, 509 (4th Cir. 2002) ("the anticompetitive impact . . . is clear from a quick look"). Both accepted economic theory and past judicial experience with analogous conduct support our finding that "the experience of the market has been so clear . . . about the principal tendency" of this conduct so as to enable us to draw "a confident conclusion" that—absent any legitimate justification advanced by Respondent—competition and consumers are harmed by the Board's challenged practices. *California Dental*, 526 U.S. at 781.

The challenged conduct is, at its core, concerted action excluding a lower-cost and popular group of competitors. The Board not only foreclosed non-dentist providers from access to equipment suppliers and customers, but also directly excluded these providers from the market by sending them cease and desist letters.

Teeth whitening is one of the most popular cosmetic dentistry procedures, resulting in significant income to North Carolina dentists, including those on the Board. (IDF 9-12, 104, 233.) In response to the popularity of teeth whitening, non-dentists began offering teeth whitening services in North Carolina at mall kiosks and other

locations. (IDF 137-38.) These providers charged significantly less than dentists despite achieving similar results. (IDF 117, 147, 150)

Dentists soon began complaining to the Board about the lower prices offered by non-dentists for teeth whitening services. (IDF 194-96, 232.) Members of the Board likewise recognized that proliferation of non-dentist teeth whitening operations would adversely affect the income of dentists. (IDF 159-61.)

In response to the complaints, the Board issued dozens of cease and desist letters to non-dentist teeth whitening service providers and distributors of teeth whitening equipment. (IDF 208-09, 216-18, 230, 262-83.) Some of the letters stated that the sale or use of non-dentist teeth whitening products constituted a misdemeanor. (IDF 265-66, 280.) The Board viewed these letters as having the force of law and recipients of these communications had a similar understanding. (IDF 240-46.) In addition, the Board warned potential entrants not to offer teeth whitening services unless supervised by a dentist (IDF 284-85), sent letters to mall owners and operators urging them not to lease space to non-dentist teeth whitening providers (IDF 97, 288-93), and enlisted the assistance of the cosmetology board to warn its licensees that providing teeth whitening services could be a misdemeanor. (IDF 314-23.) The goal and effect of sending these letters and other communications was to stop non-dentists from providing teeth whitening services. (IDF 234-57, 286-87.)

No advanced degree in economics is needed to recognize that exclusion of products from the marketplace that are desired by consumers is likely to harm competition and consumers, absent a compelling justification. Users of the excluded product are made worse off because they must either shift to other, less desirable types of products, or forgo making a purchase entirely. (Kwoka, Tr. 1008-13, 1016; Baumer, Tr. 1720-21, 1724; CX822 at 10.) Consumers of similar non-excluded products are also likely to be harmed because suppliers of those products will face less competition and therefore have a greater ability to raise prices or reduce service. (Kwoka, Tr. 1013-17; Baumer, Tr. 1700, 1763, 1781; CX822 at 10-11.) Excluding a rival product from the marketplace not only eliminates current competition from those providers, but also eliminates prospective competition from future entrants. (Kwoka, Tr. 1017-18; CX822 at 12.) These future competitors could offer additional sources of supply for the product, as well as new product innovations. (Kwoka, Tr. 1011, 1017-18.)

Respondent's economic expert acknowledged that the challenged conduct would tend to restrict supply and cause higher prices. (Baumer, Tr. 1700, 1719-21, 1724, 1726-27 (referring to CX822 at 13), 1763, 1781, 1839-41.) He testified on several occasions that this conclusion was a matter of "Econ 101," meaning that it required no more than a rudimentary level of economic analysis. (Baumer, Tr. 1721, 1724, 1763, 1781, 1840.) He explained that product exclusion would harm competition and consumers in terms of both price and choice.[13] (Baumer, Tr. 1841.)

[13] Dr. Baumer qualified this testimony by noting that consumers might not be harmed by higher prices and fewer competitive options if they "felt like the market was safer" and, as a result, increased their

Agreements to exclude an entire class of competitors from the marketplace by foreclosing access to suppliers, customers, or the market itself have long been treated as per se illegal or presumptively illegal under the antitrust laws. In these cases, the methods of exclusion have varied but the holdings are consistent in condemning such conduct with little, if any, consideration of any purported defenses.

In *Fashion Originators' Guild of America, Inc. v. FTC*, 312 U.S. 457 (1941), manufacturers of women's garments, working through an industry association, boycotted retailers that sold copies of their original designs. The Supreme Court affirmed the FTC's conclusion that this scheme was an unfair method of competition, notwithstanding the organization's claim that the copying of garment designs was a tortious act. The Court explained that the association's policy "has both as its necessary tendency and as its purpose and effect the direct suppression of competition." *Id.* at 465. The Court was particularly concerned that the scheme, if successful, would have eliminated an entire class of competitors—as the Court called it, a "rival method of competition"—from the marketplace. *Id.* at 467. The Court concluded that the manufacturers' prevention-of-torts defense was not cognizable under the antitrust laws: "even if copying were an acknowledged tort under the law of every state, that situation would not justify petitioners in combining together to regulate and restrain interstate commerce in violation of federal law." *Id.* at 468.

The Supreme Court addressed exclusion of a class of competitors again in *United States v. General Motors Corp.*, 384 U.S. 127 (1966). In that case, a group of Chevrolet automobile dealers successfully pressured General Motors not to sell to dealers that resold their inventory through discounters. The conspiring dealers then established a monitoring venture to ensure compliance. The Court found that the "[e]xclusion of traders from the market by means of combination or conspiracy is . . . inconsistent with the free-market principles embodied in the Sherman Act" and per se illegal. *Id.* at 146. The Court was especially troubled that one of the purposes of the concerted effort "was to protect franchised dealers from real or apparent price competition." *Id.* at 147. Consistent with the *Fashion Originators' Guild* case, the Court declined to consider the parties' asserted justification—in this case, that sales to discounters violated the dealers' franchise agreements. *Id.* at 139-40.

The Supreme Court has likewise held that agreements to exclude a single competitor are per se illegal or presumptively illegal. For example, in *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961), a manufacturer alleged that an industry association refused to grant a "seal of approval" to its ceramic gas burner because of the influence of competitors in the association. As a result of the association's action, the manufacturer's burner was "effectively excluded from the market." *Id.* at 658. The Court held that the plaintiff had alleged a per se illegal boycott because of its "monopolistic tendency," notwithstanding that the victim was limited to a single

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consumption of the remaining products in the market. (Baumer, Tr. 1724; *see also id.* at 1727.) However, Dr. Baumer did not offer an opinion, and Respondent has not identified any evidence, that (a) safety concerns currently inhibit some consumers from whitening their teeth or (b) that prohibiting non-dentist teeth whitening would lead to the perception that teeth whitening is a safer practice, thereby increasing overall demand for teeth whitening products.

manufacturer. *Id.* at 660 (quoting *Klor's, Inc. v. Broadway-Hale Stores*, 359 U.S. 207, 213 (1959)).

Similarly, in *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556 (1982), the dominant fuel cutoff manufacturer used its influence in ASME, a standards organization, to prevent the organization from approving a rival's alternative design. ASME's standards were so influential that, according to the Court, it was "in reality an extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce." *Id.* at 570 (quoting *Fashion Originators' Guild*, 312 U.S. at 465). The jury found ASME liable under Section 1, and the Court affirmed. While the issue before the Court was whether a standards organization could be liable for the acts of its agents, the Court nevertheless commented that the "anticompetitive practices of ASME's agents are repugnant to the antitrust laws." *Id.* at 574. Participants in standards organizations have "the power to frustrate competition in the marketplace . . . [and] to harm their employers' competitors through manipulation of [the standards organization's] codes." *Id.* at 571.

In its most recent decision addressing competitor exclusion, the Court, citing to *Fashion Originators' Guild*, *General Motors*, and *Radiant Burners*, held that certain concerted refusals to deal or group boycotts remain per se violations of the Sherman Act. *See Northwest Wholesale Stationers v. Pacific Stationary & Printing Co.*, 472 U.S. 284, 290 (1985); *see also Oksanen*, 945 F.2d at 708 ("Certain forms of agreements, such as varieties of group boycotts, have been classified as per se violations."). Where competitors "cut off access to a supply, facility, or market necessary to enable the boycotted firm to compete," *Northwest Wholesale Stationers*, 472 U.S. at 294, the conduct may be conclusively presumed to be anticompetitive, at least when it does not "enhance overall efficiency and make markets more competitive." *Id.* In contrast, courts apply the rule of reason to competitor exclusions if the restraints are imposed by a joint venture that lacks market power or exclusive access to an element essential to effective competition. *See id.* at 295-96.

Here, the challenged conduct consists of concerted action denying non-dentist teeth whiteners access to both suppliers and customers (by foreclosing access to retail space), as well as to the market itself. As such, the Board's conduct bears a close resemblance to conduct that the Supreme Court has condemned as per se illegal and that the Court continues to treat as conclusively anticompetitive under *Northwest Wholesale Stationers*. *Cf. North Texas Specialty Physicians*, 528 F.3d at 362 (inherently suspect analysis appropriate where restraints "bear a very close resemblance to horizontal price fixing"). Furthermore, as discussed below, this is not a case involving conduct plausibly designed to enhance competition for teeth whitening products or services.

Respondent contends that *Fashion Originators' Guild*, *General Motors*, *Radiant Burners*, *Hydrolevel*, and *Northwest Wholesale Stationers* are inapposite because they involved private organizations, such as professional associations, rather than state licensing boards. (RRB at 16-17.) We disagree. The competitive concern in both of these contexts is that an organization with the power to exclude is used to facilitate or enforce an anticompetitive agreement among private parties. If anything, state agencies,

such as the Board, are likely to have greater ability to enforce restrictions than private organizations. The Court has noted the significant potential for competitive injury stemming from concerted conduct among private parties enforced by state agencies. *See, e.g., Hydrolevel*, 456 U.S. at 570-74 (condemning an agreement among private actors that was enforced by state agencies); *Allied Tube & Conduit Corp. v. Indian Head*, 486 U.S. 492, 500 (1988) (an agreement to manipulate a vote of a standard setting organization whose codes were routinely adopted by state and local governments raises a "serious potential for anticompetitive harm").

Furthermore, as conceded by Respondent's economic expert, state licensing boards, including dental boards, have a history of enforcing restrictions designed to enhance the income of their licensees at the expense of consumers, even though members of these organizations had taken oaths to protect the public health.[14] (Baumer, Tr. 1847-54, 1855 ("self-interest definitely had an impact"), 1884, 1896-1901, 1912-17; CX826 at 11 ("The public lost at the expense of the professional.") (Baumer, Dep. at 36-37)). Some medical boards and other professional healthcare boards continue to engage in these anticompetitive practices. (Baumer, Tr. 1898, 1901-04, 1911-12; CX826 at 12, 36 (Baumer Dep. at 39, 136).) As a result, "when there's licensing taking place, my ears go up, . . . [and] we look very carefully for evidence of anticompetitive behavior." (Baumer, Tr. 1897.) This testimony reinforces our conclusion that a more deferential standard should not be applied to concerted activity enforced through a state agency controlled by financially interested actors than through a private body.

In sum, the challenged conduct—an agreement among competitors to exclude other competitors from the market by preventing their access to suppliers, customers, and the market itself—bears a close resemblance to conduct condemned by the Supreme Court as per se illegal. As conceded by Respondent's economic expert, such conduct has an obvious tendency to suppress competition, increase prices, and harm consumers of teeth whitening products and services. In particular, the restraints alleviate downward price pressure on dentists and eliminate an entire class of product desired by some consumers. We therefore conclude that the challenged conduct is inherently suspect under *Polygram* and thus presumptively unreasonable unless Respondent can produce a legitimate justification.

b. The Board's Proffered Justifications

Although the Board's actions had a clear tendency to suppress competition and harm consumers, the *Polygram* framework requires consideration of whether Respondent can overcome this presumption of unreasonableness by showing that the practice has "some countervailing procompetitive virtue." *Indiana Federation of Dentists*, 476 U.S. at 459; *see also Northwest Wholesale Stationers*, 472 U.S. at 294 (practices can be "justified by plausible arguments that they were intended to enhance overall efficiency and make markets more competitive"); *Continental Airlines*, 277 F.3d at 510 ("even

[14] Respondent's expert acknowledged that some of these concerns are presented by this case. In particular, Dr. Baumer observed that the Board is concerned about the financial interests of North Carolina dentists and that those interests could have affected the Board's decision to exclude non-dentist teeth whitening providers. (Baumer, Tr. 1856-62.)

when a court eschews a full rule-of-reason analysis and so forgoes detailed examination of the relevant market, it must carefully consider a challenged restriction's possible procompetitive justifications").

A cognizable justification is ordinarily one that stems from measures that increase output or improve product quality, service, or innovation. *See Indiana Federation of Dentists*, 476 U.S. at 459 (procompetitive justifications include "creation of efficiencies in the operation of a market or the provision of goods and services"); *Broadcast Music*, 441 U.S. at 19-20 (courts should examine whether the practice will "increase economic efficiency and render markets more, rather than less, competitive" (quotation and citation omitted)); *Paladin Associates v. Montana Power Co.*, 328 F.3d 1145, 1157 (3d Cir. 2003) ("improving customer choice" and reducing costs are procompetitive justifications); *Polygram*, 136 F.T.C. at 345-46.

A plausible justification is one that "cannot be rejected without extensive factual inquiry." *Polygram*, 136 F.T.C. at 347. "The defendant, however, must do more than merely assert that its purported justification benefits consumers . . . [rather,] it must articulate the specific link between the challenged restraint and the purported justification." *Id.*; *see also North Texas Specialty Physicians*, 528 F.3d at 368 ("some facial plausibility" of purported justification insufficient to rebut liability under abbreviated rule of reason analysis).

If a justification is not only cognizable but also plausible, then further examination of the restraint's effect on competition is warranted. Otherwise, "the case is at an end and the practices are condemned." *Polygram*, 136 F.T.C. at 345.

Respondent offers three justifications for its conduct, all of which were rejected by the ALJ.[15] Respondent's first asserted defense is that its actions were intended to promote public health and welfare. Respondent asserts that there are health and safety risks when teeth whitening is performed by a non-dentist and that the ALJ erred by not making any findings as to the safety of non-dentist teeth whitening. (RAB at 7-10, 39.) Similarly, Respondent urges that we recognize a defense, separate and apart from the state action defense, based on a state agency's enforcement of a state statute. (RAB at 29-34, 39.)

Courts have rejected social welfare and public safety concerns as cognizable justifications for restraints on competition. In *Professional Engineers*, the Supreme Court reviewed a trade association ethics rule that effectively prohibited engineers from engaging in competitive bidding. The association asserted as a defense that "awarding engineering contracts to the lowest bidder, regardless of quality, would be dangerous to

[15] Respondent also asserts as a justification that its conduct constituted state action, an argument that the Commission rejected in its February 3, 2011 decision. *See North Carolina Dental*, 151 F.T.C. at 615-33. In the proceedings below, Respondent asserted that permitting non-dentists to perform teeth whitening could result in the production of an inferior service. The ALJ rejected that argument, explaining that such a claim was tantamount to an assertion that competition itself is harmful (ID at 108-09), and Respondent does not contest the ALJ's resolution of that issue here.

public health, safety, and welfare." *Professional Engineers*, 435 U.S. at 685. The Court held that such a defense was not cognizable under the Sherman Act:

> The Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services. . . . The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain—quality, service, safety, and durability—and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers. . . . . The fact that engineers are often involved in large-scale projects significantly affecting the public safety does not alter our analysis. Exceptions to the Sherman Act for potentially dangerous goods and services would be tantamount to a repeal of the statute. In our complex economy, the number of items that may cause serious harm is almost endless . . . .

Id. at 695. The association's defense that competition would lead consumers to choose dangerous and inferior quality services was therefore rejected as a matter of law.

Similarly, in *Indiana Federation of Dentists*, the Court held that a health and safety defense was not available for an alleged Sherman Act violation in the dental field. In that case, a group of dentists agreed not to submit x-rays to insurers, asserting that "the provision of x-rays might lead the insurers to make inaccurate determinations of the proper level of care and thus injure the health of the insured patients." 476 U.S. at 452. Accepting this argument, according to the Court, would have been "nothing less than a frontal assault on the basic policy of the Sherman Act." *Id.* at 463 (quoting *Professional Engineers*, 435 U.S. at 695). The Court explained that prevention of "unwise and even dangerous choices" was not a cognizable justification for collusion. *Id.* at 463.

In *Virginia Academy of Clinical Psychologists v. Blue Shield of Virginia*, 624 F.2d 476 (4th Cir. 1980), two health plans controlled by physicians agreed not to pay for services rendered by clinical psychologists unless those services were billed through a physician. The Fourth Circuit, reversing the district court, found that the policy would reduce "consumer and provider alternatives" and increase costs. *Id.* at 486. The court rejected the health plan's argument that physician supervision of psychologists was necessary for optimum health outcomes, explaining that "we are not inclined to condone anticompetitive conduct upon an incantation of 'good medical practice.'" *Id.* at 485; *see also Wilk v. AMA*, 719 F.2d 207, 228 (7th Cir. 1983) ("[A] generalized concern for the health, safety and welfare of members of the public . . ., however genuine and well-informed such a concern may be, affords no legal justification for economic measures to diminish competition with [chiropractors] by [some medical doctors].")

Respondent contends that the preceding line of cases is distinguishable because the cases do not involve a state agency acting pursuant to a state statute. Respondent asserts that a valid defense to a Sherman Act claim exists where a state agency is "promoting the public health and enforcing state law," even where the requirements of

the state action doctrine are not satisfied. (RAB at 32.) Although Respondent asserts that such a defense is consistent with a line of lower court cases allegedly justifying conduct based on "public service or ethical norms" (RAB at 31-32), Respondent does not cite to any cases on point and we are aware of no authority for such a defense.

To the extent that Respondent's claims are premised on principles of federalism and a concern with state prerogatives, the Supreme Court has already defined the contours for such a defense. *See Parker v. Brown*, 317 U.S. 341 (1943). Almost 70 years ago, the Supreme Court created the state action defense for state or private actors acting pursuant to a state regulatory program. As we concluded in our February 3, 2011 decision, that defense requires a showing of both "clear articulation" and "active supervision" for state boards controlled by financially interested members, such as Respondent. *See North Carolina Dental*, 151 F.T.C. at 617-28. Respondent's proposal would substantially weaken these requirements. As we understand Respondent's position, it would only have to show "articulation" to make out a defense, rather than both "clear articulation" and "active supervision." Given that the Supreme Court has already established a defense for Sherman Act claims based on the actions of state officials and that Respondent's proposed "enforcement of state law" defense has the potential to seriously undermine the state action doctrine, we see no reason to recognize Respondent's proposed new defense.

To the extent that Respondent's defense is meant to invoke a competitive analysis, Respondent has failed to explain why the Board's status as a state agency changes the likely competitive impact of its conduct and therefore renders the relevant case law rejecting health and safety defenses inapplicable. There is nothing in those decisions to suggest that they turned on this distinction. To the contrary, the Court rejected the notion of a health or safety defense because it was extraneous to an analysis of competitive effects, not because of the private nature of the actors. *See Professional Engineers*, 435 U.S. at 695; *Indiana Federation of Dentists*, 476 U.S. at 463.

Respondent's public safety defense fails for another reason: the challenged actions of the Board are not consistent with its enforcement mandates under the Dental Practice Act. The Complaint does not challenge the Board's enforcement of the Dental Practice Act against non-dentist teeth whiteners in the state courts, which is the only way the Board is authorized to enforce the Act (other than referring a case to a state prosecutor). *See* N.C. General Statutes § 90-40.1; IDF 43, 44, 190; Response to Complaint ¶ 19; RAB at 2-3; RRB at 5. Rather, this proceeding challenges actions, including sending cease and desist letters to non-dentists, that were not authorized by the Dental Practice Act. *See* N.C. General Statutes §§ 90-27, -29, -40, -40.1; IDF 45-49, 190.

Finally, even if a public safety defense were cognizable under the antitrust laws, we would find that Respondent had failed to introduce sufficient evidence to establish such a justification.[16] Although several Board members identified a number of

[16] Respondent asserts that because Complaint Counsel did not file an appeal from the ALJ's Initial Decision, under FTC Rule of Practice 3.52(b), 16 C.F.R. § 3.52(b), the Commission may not make any new factual findings or legal conclusions requested by Complaint Counsel. (RRB at 1, 9.) Rule 3.52(b)

theoretical risks from non-dentist teeth whitening, none was able to cite to any clinical or empirical evidence validating any of these concerns. (Response to RFA 21, 38, 39; *see also* Hardesty, Tr. 2818, 2829; CX565 at 38 (Hardesty Dep. at 145); CX554 at 26 (Allen Dep. at 95-96); CX555 at 16, 26 (Brown Dep. at 55-56, 97); Wester, Tr. 1313-15, 1402, 1405-06; CX560 at 65-66 (Feingold Dep. at 252-54); CX567 at 37 (Holland Dep. at 138-40); CX564 at 16 (Hall Dep. at 55-56); Owens, Tr. 1664.) Likewise, Respondent's expert witness, Dr. Haywood, testified that he was unaware of any scientific evidence demonstrating any consumer injury from non-dentist teeth whitening.[17] (Haywood, Tr. 2696, 2713-14, 2729; CX402 at 5 ("The effects on pulp have . . . no clinical consequence other than immediate but transient sensitivity."))

Respondent points to four alleged instances of possible consumer injury caused by non-dentist teeth whitening that were brought to the Board's attention. (RAB at 10.) However, we question whether four anecdotal reports of harm over a multi-year period based on products considered safe by the FDA (Giniger, Tr. 155, 250, 256) and used over a million times over the last twenty years (Giniger, Tr. 122, 257) could constitute adequate evidence of a potential health or safety risk. (Kwoka, Tr. 1078.) Compounding this concern is the lack of any investigation or medical documentation with respect to two of the four reports of injury. (RX17 at 1, 2.) In the third case, a dentist's examination revealed that the patient suffered from bone loss and infection unrelated to the teeth whitening procedure and that any discomfort from the teeth whitening procedure would be temporary and treatable. (CX575 at 15-24 (Hasson Dep. at 53-89).) The fourth reported case of harm is somewhat more compelling, but even in this case, the reported injuries do not appear to have been permanent and may have been caused by a preexisting pathology. (Runsick, Tr. 2136; Giniger, Tr. 274-77.)

The lack of contemporaneous evidence that the challenged conduct was motivated by health or safety concerns reinforces our rejection of Respondent's public safety defense on the merits. Respondent has not identified any evidence that the Board concluded prior to embarking on the challenged conduct that non-dentist teeth whitening was an unsafe practice. Indeed, Respondent was unable to point us to any such evidence at oral argument. (Oral Argument Tr. 17-19, 21-22, 33-34.) Moreover, the Board began issuing cease and desist letters two years before it received any reports of consumer injury. (*Compare* CX38 at 1 (first cease and desist letter, dated January 11, 2006), *with* CX476 at 1 (first complaint claiming injury, dated February 20, 2008); *see also* Respondent's Proposed Finding of Fact 459 (acknowledging that the Board received the

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contains no such limitation; furthermore, under Rule 3.54, 16 C.F.R. § 3.54, the Commission can conduct a *de novo* review of the entire record and make factual findings and conclusions of law to the same extent as the ALJ.

[17] Dr. Haywood's principal concern with non-dentist teeth whitening is that it may mask a pathology. (Haywood, Tr. 2950; CX823 at 20 (Haywood Dep. at 70)). However, as Dr. Giniger testified, it is highly unlikely that non-dental teeth bleaching would make a tooth so white as to make a pathology undetectable by a dentist or for a pathology not to present other symptoms such as swelling, purulence, pain, or redness. (Giniger, Tr. 301-20, 356, 437-38). Furthermore, there are no studies or case reports identifying an incident of masked pathology from any form of teeth bleaching (Giniger, Tr. 301-02, 319-20; Haywood, Tr. 2734-35, 2928-32), despite the tens of millions of instances of over-the-counter teeth whitening (CX585 at 9).

first complaint of injury "in or about 2008").) Indeed, with just two possible exceptions—the cease and desist letters to [**provisionally redacted**]—none of the challenged conduct of the Board appears to have been motivated by even the pretext of specific health or safety concerns. (CX59 (cease and desist letter to **[provisionally redacted]**); RX21 at 3-7 (complaint of injury regarding **[provisionally redacted]**); CX388 (cease and desist letter to **[provisionally redacted]**); RX17 at 1, 2 (complaints of injury regarding **[provisionally redacted]**).

In contrast, there was a wealth of evidence presented at trial suggesting that non-dentist provided teeth whitening is a safe cosmetic procedure. (Giniger, Tr. 121-24, 134-35, 145-47, 155-57, 212-30, 239-65, 354-56, 445-47, 453-55; Nelson, Tr. 771; Osborn, Tr. 664-65; Valentine, Tr. 547.) Despite the millions of teeth whitening procedures performed by non-dentists, Respondent points to no studies suggesting any health risks (other than transient sensitivity) from the procedure. (*Cf.* Giniger, Tr. 121-23, 147, 217-19, 257-58, 355-56, 453-55 (asserting that there are no studies indicating a health risk from non-dental teeth whitening).) Consequently, the record as a whole fails to substantiate Respondent's public safety claims.

Respondent's second defense is that its actions were intended to promote "legal competition." (RAB at 20, 31.) As an initial matter, however, North Carolina courts have never concluded that teeth whitening services provided by non-dentists are unlawful. (ID at 8, 109; Oral Argument Tr. 49.) More significantly, the Supreme Court has repeatedly rejected this argument as a matter of antitrust doctrine. In *Indiana Federation of Dentists*, a group of dentists attempted to justify their withholding of x-rays from insurance companies by arguing that an insurance company's review of dental x-rays would constitute the unauthorized practice of dentistry under state law. The Court dismissed this argument: "That a particular practice may be unlawful is not, in itself, a sufficient justification for collusion among competitors to prevent it." 476 U.S. at 465. Likewise, in *Fashion Originators' Guild*, the Court held that even if the sale of the excluded products was tortious, "that situation would not justify petitioners in combining together to regulate and restrain interstate commerce in violation of federal law." 312 U.S. at 468. In both of these cases, the Court found it unnecessary to decide whether the excluded product or practice actually violated state law. Accordingly, we do not credit this defense.

Respondent's third defense is that it acted "in good faith." (RAB at 32.) This is not a valid defense under the antitrust laws. The Supreme Court has held that "good motives will not validate an otherwise anticompetitive practice." *NCAA*, 468 U.S. at 101 n.23; *see also United States v. Griffith*, 334 U.S. 100, 105-06 (1948) (practice may be condemned even if respondent "had no intent or purpose unreasonably to restrain trade"); *Associated Press v. United States*, 326 U.S. 1, 16 n.15 (1945) ("the Sherman Act cannot 'be evaded by good motives. The law . . . cannot be set up against it in a supposed accommodation of its policy with the good intention of parties . . . .'" (quoting *Standard Sanitary Manufacturing Co. v. United States*, 226 U.S. 20, 49 (1912))); *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918) (rejecting notion that "a good intention will save an otherwise objectionable regulation").

Accordingly, under *Polygram*'s "inherently suspect" framework, we conclude that the Board's conduct is unreasonable and violates both Section 1 of the Sherman Act and Section 5 of the FTC Act. We next consider whether a more elaborate rule of reason analysis, encompassing considerations of market power and effects, provides an alternative basis for our conclusion that the Board's conduct is anticompetitive.

2. The Board's Conduct under the Full Rule of Reason

In this section, we evaluate the Board's conduct under a more fulsome rule of reason analysis and again conclude that the Board's conduct violates the antitrust laws. As indicated in Section V, *supra*, a plaintiff can establish an affirmative case in either of two ways. It can do so indirectly by demonstrating the defendant's market power, which, when combined with the anticompetitive nature of the restraints, provides the necessary confidence to predict the likelihood of anticompetitive effects. Or, the plaintiff can provide direct evidence of "actual, sustained adverse effects on competition" in the relevant markets, which would be "legally sufficient to support a finding that the challenged restraint was unreasonable"—whether or not the plaintiff has made any showing regarding market power. *Indiana Federation of Dentists*, 476 U.S. at 461; *see also Realcomp*, 635 F.3d at 825 ("If [Respondent's] challenged policies are shown to have anticompetitive effect, or if [Respondent] is shown to have market power and to have adopted policies *likely* to have an anticompetitive effect, then the burden shifts to [Respondent] to provide procompetitive justifications for the policies."); *Tops Markets, Inc. v. Quality Markets, Inc.*, 142 F.3d 90, 96 (2d Cir. 1998) (plaintiff has "two independent means by which to satisfy the adverse-effect requirement"—direct proof of "actual adverse effect on competition" or "indirectly by establishing . . . sufficient market power to cause an adverse effect on competition"); *Law*, 134 F.3d at 1019 ("plaintiff may establish anticompetitive effect indirectly by proving that the defendant possessed the requisite market power within a defined market or directly by showing actual anticompetitive effects"); *Brown University*, 5 F.3d at 668 (similar).

Under this full rule of reason analysis, we find support in the record for a conclusion that the Board's agreement is anticompetitive, which shifts the burden to Respondent to produce a legitimate countervailing justification in order to avoid condemnation. Since Respondent has failed to assert a legitimate, procompetitive justification, we conclude that the Board's concerted action violates Section 1 of the Sherman Act and Section 5 of the FTC Act.

a. The Board Possesses Market Power in the Market for Teeth Whitening Products and Services

At this stage of the proceeding, the parties do not dispute that the relevant market consists of four types of teeth whitening: dentist in-office services, dentist take-home kits,

non-dentist service providers, and over-the-counter products.[18] (RAB at 10-11, 27; CCAB at 32.) All four of these products perform the same function (teeth whitening) using a similar technique (application of a form of peroxide to the teeth). (IDF 106-50.) *See Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962) (the "boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it"); *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956); *Greenville Publishing Co. v. Daily Reflector, Inc.*, 496 F.2d 391, 399 (4th Cir. 1974) (a relevant market is defined by the scope of "reasonable interchangeability").

The record shows that market participants view themselves as offering comparable services, recognize that substantial price and non-price competition exists between them, and target their advertising toward consumers who may be considering using a different type of teeth whitening service. (IDF 157-69.) Respondent's economic expert testified that the four types of teeth whitening are differentiated products within an overall teeth whitening market. (Baumer, Tr. 1711.) He also testified that there is a high cross-elasticity among the four types of teeth whitening products. (Baumer, Tr. 1842-45.) Complaint Counsel's economic expert, while disclaiming an opinion on the relevant market, did not dispute Respondent's expert in this respect and further testified that "these alternative methods are in fact very much in competition with one another." (Kwoka, Tr. 997-1000.) The parties also agree that the relevant geographic market is North Carolina. (ID at 64.)

The ALJ concluded, and Respondent does not dispute,[19] that the Board has market power based on the Board's power to exclude competition. *See du Pont*, 351 U.S. at 391 ("Monopoly power is the power to control prices or exclude competition."); *Hydrolevel*, 456 U.S. at 570-71 (finding that standard setting organization had market power based on power to exclude). We agree.

The Board, as the agency with power to enforce the Dental Practice Act, has the authority to regulate and discipline dentists in North Carolina. *See* N.C. General Statutes §§ 90-30, -31, -34, -40, -40.1, -41, -42; *cf. Massachusetts Board of Optometry*, 110 F.T.C. at 588 (state optometry board possessed market power on account of its ability to regulate the business of optometry and "to impose sanctions on any optometrist who fails to obey its rules and regulations"). In addition, the Board was able to use its perceived authority to exclude non-dentists from providing teeth whitening services in North Carolina. (IDF 240-56, 324-27). Respondent's expert agreed, noting that the Board has "the power to exclude competition" (CX826 at 36 (Baumer Dep. at 136-37); *see also*

[18] In light of the parties' agreement on the relevant market, we have no need to consider whether same-day teeth whitening services (dentist in-office services and non-dentist providers) constitute an additional relevant market, as found by the ALJ. (ID at 63-71.)

[19] Respondent briefly contests the ALJ's finding of market power in its reply brief (RRB at 15) but failed to address this issue in its opening brief, thereby waiving the argument. Rule 3.52, 16 C.F.R. § 3.52 ("The Commission will not consider new arguments or matters raised in reply briefs that could have been raised earlier in the principal briefs."). As noted in the text, even absent a waiver, we would find that the Board had market power.

Baumer, Tr. 1722 ("The board has the power to exclude.")) and the power to impose entry barriers (Baumer, Tr. 1840).

b. Indirect Evidence of Anticompetitive Effects

The ALJ's uncontested finding of market power, coupled with our earlier determination that the challenged conduct would tend to suppress competition, provides "indirect" evidence that those policies have or likely will have anticompetitive effects. *See Craftsmen Limousine, Inc. v. Ford Motor Co.*, 491 F.3d 380, 388 (8th Cir. 2007); *Law*, 134 F.3d at 1019; *Tops Markets*, 142 F.3d at 96; *Levine v. Central Florida Medical Affiliates, Inc.*, 72 F.3d 1538, 1551 (11th Cir. 1996); *Brown University*, 5 F.3d at 669; *Realcomp*, 2009 FTC LEXIS 250, at *95. As the Sixth Circuit recently explained, "[m]arket power and the anticompetitive nature of the restraint are sufficient to show the potential for anticompetitive effects under a rule-of-reason analysis, and once this showing has been made, [Respondent] must offer procompetitive justifications." *Realcomp*, 635 F.3d at 827; *see also id.* at 827 n.6 (observing that "[o]ther circuits have permitted an inference of adverse effects based on a showing of market power and anticompetitive tendencies.").

In light of the Board's market power and the facially restrictive nature of the policies at issue, no additional analysis is required under the rule of reason to support our conclusion that the Board's restraints are unreasonable because they will predictably result in harm to competition.

c. Direct Evidence of Anticompetitive Effects

The ALJ found, and we agree, that the Board's concerted action resulted in the exclusion of non-dentist providers from the market and the prevention of new entry by potential suppliers, both of which injured competition and consumers. (ID at 97-104.) This finding of actual anticompetitive effects—which Respondent does not dispute in its appeal to the Commission—is by itself sufficient to shift the burden to Respondent to produce a procompetitive justification. *See Realcomp*, 635 F.3d at 827 ("If adverse effects are clear, inquiry into market power is unnecessary."); *Law*, 134 F.3d at 1019 ("showing actual anticompetitive effects" satisfies plaintiff's initial burden); *Brown University*, 5 F.3d at 668 (plaintiff can meet its initial burden under the rule of reason "by proving the existence of actual anticompetitive effects, such as reduction of output, increase in price, or deterioration in quality of goods or services" (citation omitted)).

The undisputed evidence shows that, as a result of the Board's actions—including sending cease and desist letters to providers and manufacturers, sending letters to mall operators, and posting a warning on the cosmetology board's website—numerous non-dentist teeth whitening providers in North Carolina stopped offering teeth whitening services. (IDF 246-56, 324-27; *see also* IDF 284-85 (potential entrants discouraged from entering).) The Board's actions also cut off access to leading suppliers of teeth whitening products and retail space used by non-dentist providers. (IDF 70-72, 98, 267-70, 272, 277-83, 294-313.) Respondent's economic expert acknowledged that "[n]ot surprisingly, the actions of the State Board were effective and many kiosk and spa operator[s] . . .

ceas[ed] their actions." (RX78 at 8; *see also* Baumer, Tr. 1720 ("we know that post-exclusion non-dentist teeth whitening is reduced"); Kwoka, Tr. 1136 ("the letters were effective").)

The parties' experts agreed that the Board's exclusion of non-dentist providers led to higher prices, although they disputed the extent of the price increase. (Kwoka, Tr. 1029-32 (there is "a substantial price effect"); Baumer, Tr. 1732 ("I can't disagree" with the claim that "there's a small impact" on price), 1815 (the Board's actions caused "maybe slightly higher prices"); RX140 at 11). In reaching these conclusions neither party's economic expert prepared a quantitative analysis of the price effects of the Board's restraints.

In light of the restraints' obvious disruption of the "proper functioning of the price-setting mechanism of the market," a precise quantification of the price increase was unnecessary. *Indiana Federation of Dentists*, 476 U.S. at 461-62; *see also United States v. Microsoft Corp.*, 253 F.3d 34, 79 (D.C. Cir. 2001) (when dealing with emerging competition, no showing of actual harm is required; the proper test is whether "the exclusion of nascent threats [would be] . . . reasonably capable of contributing significantly to a defendant's continued monopoly power."); *Realcomp*, 2009 FTC LEXIS 250, at *46 ("elaborate econometric proof that [the restraint] resulted in higher prices" is unnecessary (quotation omitted)). This is particularly true in this case, given the parties' agreement that data were not available to do a study of price effects. (Kwoka, Tr. 1029-39, 1187; Baumer, Tr. 1978-79; CX822 at 15.)

In addition to increasing prices, the Board's conduct deprived consumers of choice. *Realcomp*, 2009 FTC LEXIS 250, at *111 (liability under rule of reason appropriate if respondent's practices "narrow consumer choice or hinder the competitive process"). The Board deprived consumers of the option of going to a mall, salon, or spa for teeth whitening services. In addition, consumers can no longer obtain same-day teeth whitening services (unless their local dentist provides walk-in teeth whitening service). The courts recognize that the elimination of products desired by consumers reduces consumer welfare. *Indiana Federation of Dentists*, 476 U.S. at 459 (absent a procompetitive virtue, "an agreement limiting consumer choice . . . cannot be sustained under the Rule of Reason"); *Conwood Co. v. U.S. Tobacco Co.*, 290 F.3d 768, 789 (6th Cir. 2002) (defendant's "actions caused higher prices and reduced consumer choice, both of which are harmful to competition"). Both parties' experts agree. (Kwoka, Tr. 1031-33, 1102, 1181-82; Baumer, Tr. 1776 (referring to CX822 at 29); 1974-76; CX822 at 16.)

d. Procompetitive Justifications

Notwithstanding our finding that the Board's conduct is anticompetitive under a more fulsome rule of reason analysis, Respondent may be able to defeat a finding of liability if its practices can be "justified by plausible arguments that they were intended to enhance overall efficiency and make markets more competitive." *Northwest Wholesale Stationers*, 472 U.S. at 294.

As discussed at length in Section VI.B.1.b above, however, Respondent's proffered justifications fail to satisfy those standards. Respondent asserts that its effort to exclude non-dentist providers of teeth whitening services would promote public safety and protect "legal competition" for teeth whitening services. Under Supreme Court precedent, these are not valid justifications for anticompetitive conduct. Furthermore, the asserted defenses do not appear to be plausibly related to any goal of the antitrust laws, such as increasing output or innovation. Accordingly, Respondent has failed to overcome the anticompetitive effects of its conduct with any legitimate, procompetitive justifications. We therefore conclude that the Board's actions also violated the antitrust laws under a full rule of reason analysis.

VII. REMEDY

To remedy Respondent's violation of Section 5, the ALJ issued an Order prohibiting the Board from directing non-dentists to cease providing teeth whitening products and services. (ID at 110-17, 123-30.) The Order also requires the Board not to communicate to any current or prospective non-dentist provider, lessor of commercial property, or actual or prospective distributor of teeth whitening products that a non-dentist's teeth whitening products or services violate the Dental Practice Act. (ID at 112, 124.) However, the ALJ's Order expressly carves out certain Board actions from these prohibitions (to which we make one addition). The Order does not prohibit the Board from investigating and prosecuting suspected violations of the Dental Practice Act. Further, the Order permits the Board to communicate its opinion that certain teeth whitening products or services may violate the Dental Practice Act, and its bona fide intention to seek court action or to seek administrative remedies for suspected violations of the Act so long as such communications include a prescribed statement notifying the recipient that the Board cannot make legal determinations or order the recipient to discontinue providing teeth whitening products or services. Finally, the ALJ ordered the Board to send notices to parties affected by the Order, as well as various ancillary relief, including reporting and record keeping requirements to enable the Commission to verify compliance with the Order. (ID at 114-15, 125-27.)

The Commission is "clothed with wide discretion" to determine the type of order necessary to remedy a violation of FTC Act. *Chicago Bridge & Iron Co. v. FTC*, 534 F.3d 410, 441 (5th Cir. 2008); *see also Jacob Siegel Co. v. FTC*, 327 U.S. 608, 611 (1946); *American Medical Association*, 94 F.T.C. 701 (1979). The Commission has wide latitude to extend the order as needed to prevent future violations and remediate past harms. "Having established a violation, the Commission must 'be allowed effectively to close all roads to the prohibited goal, so that the order may not be by-passed with impunity.'" *American Medical Association*, 94 F.T.C. at 1010-11 (citing *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952)). However, the Commission's discretion is not unlimited; its remedy must be reasonably related to the violation. *Ruberoid*, 343 U.S. at 473; *Jacob Siegel*, 327 U.S. at 613.

The Commission has determined to issue a Final Order very similar to the ALJ's proposed remedy. The Final Order is reasonably tailored to remediating the effects of the Board's past violations and preventing future violations. Moreover, it provides an

effective remedy for Respondent's illegal conduct without impeding the Board's ability to fulfill its statutory role in the regulation of dentists and the practice of dentistry in North Carolina.

As discussed above and in the ALJ's opinion, the Board's illegal activity centered on enforcing its determination that non-dentists providing any teeth whitening services violated the Dental Practice Act by sending out various communications, including cease and desist letters, that exceeded its statutory authority. Section II of the Final Order prevents the Board from continuing these unlawful practices. It prohibits the Board from directing a non-dentist provider to stop providing teeth whitening products and services (Final Order § II, ¶ A), or impeding or discouraging non-dentist providers from providing teeth whitening products and services (Final Order § II, ¶ B).

Section II of the Final Order also requires the Board to cease and desist from communicating to any non-dentist provider that it is a violation of the Dental Practice Act for a non-dentist to provide teeth whitening goods and services, or that such provider's provision of teeth whitening products or services violates the Act. (Final Order § II, ¶ C.) The Final Order further prohibits the Board from making similar communications to third parties, including prospective providers of teeth whitening goods and services, current or prospective lessors of commercial property, and manufacturers or distributors of teeth whitening products. (Final Order § II, ¶¶ D-F.) The Final Order thus prohibits the types of communications that the Board used to exclude non-dentist providers from the provision of teeth whitening goods and services. Accordingly, these restrictions are reasonable and necessary to prevent future illegal activity by the Board. Further, the Board can effectively carry out its statutory responsibilities without such communications. Indeed, as the facts illustrate here, communications of the type prohibited by the Final Order may confuse recipients as to the actual role and authority of the Board. (IDF 246.)

To ensure the Board cannot indirectly accomplish what it has been barred from doing directly, Section II.G of the Final Order also prohibits the Board from inducing or assisting any other person in discouraging the provision of teeth whitening by non-dentist providers. This type of prohibition is well within the authority of the Commission. *See Ruberoid*, 343 U.S. at 473 (FTC orders need not be restricted to the "narrow lane" of the respondent's violation, but rather may "close all roads to the prohibited goal, so that its order may not be by-passed with impunity"); *Toys "R" Us*, 221 F.3d at 940 ("[T]he FTC is not limited to restating the law in its remedial orders. Such orders can restrict the options for a company that has violated § 5, to ensure that the violation will cease and competition will be restored."). This prohibition is substantively identical to the analogous provision in the ALJ's Order but incorporates a clarifying edit.

The final portion of Section II of the Final Order ensures that the Board will be able to carry out its legitimate statutory duties by excluding certain acts from the scope of the prohibitions contained in the Section. Specifically, it states that nothing in the Final Order prohibits the investigation and prosecution of non-dentists for alleged violations of the Dental Practice Act. Further, it ensures that the Final Order will not be read to

prevent the Board from communicating its opinion regarding whether a particular method of teeth whitening violates the Dental Practice Act or from providing notice of its bona fide intention to bring a legal proceeding against a person for violating the Dental Practice Act.

We add an additional provision to this portion of the Final Order to make it clear that the Board may also communicate factual information regarding changes to North Carolina statutes or future legal proceedings in North Carolina regarding teeth whitening services provided by non-dentist providers. (Final Order § II, second subsection (ii).) To ensure that these communications are not misleading as to the statutory authority and role of the Board, or otherwise violate the prohibitions contained in Section II, the Final Order requires the Board to include in the communications the disclosure set forth in Appendix A of the Final Order. We also clarify in the first subsection (iii) of Section II of the Final Order that nothing in the Final Order prohibits the use of administrative proceedings against dentists for alleged violations of the Dental Practice Act. This change is necessary because administrative remedies are only available against dentists. (IDF 46, 48.)

Section III of the Final Order requires the Board to send notices and other disclosures to parties affected by the Final Order. Such notices are within the Commission's remedial authority. *See Realcomp*, 2009 FTC LEXIS 250, at *129 (requiring respondent to provide a copy of the Commission's order to affected persons). In particular, Section III requires the Board to send copies of the Complaint and Final Order to all present and future members, employees, and agents of the Board. This will facilitate compliance with the Final Order. Section III also requires the Board to send certain disclosures to each person to whom the Board previously sent a cease and desist letter or similar communication regarding the legality of non-dentist teeth whitening. Such disclosures will help rectify the Board's prior illegal conduct by correcting the impressions created by the Board's communications. *Cf. Novartis Corp. v. FTC*, 223 F.3d 783, 786 (D.C. Cir. 2000) (upholding order requiring corrective advertising); *Southwest Sunsites, Inc. v. FTC*, 785 F.2d 1431, 1439 (9th Cir. 1986) (same).

Finally, the Final Order imposes limited requirements on the Board to facilitate the Commission's ability to monitor the Board's compliance with the terms of the Final Order. The Board is required to provide an initial compliance report, followed by annual reports thereafter, containing specified information and to provide Commission representatives with reasonable access to information and personnel as needed to verify compliance with the Final Order. (Final Order §§ IV-VI.) Such ancillary provisions are common in Commission orders. *See, e.g., Realcomp*, 2009 FTC LEXIS 250, at *130 (requiring compliance reports); *Advocate Health Partners*, No. C-4184, 2007 FTC LEXIS 17, at *26-28 (2007) (requiring compliance reports and reasonable inspection).

Respondent does not appeal any specific provision of the ALJ's Order but argues that the ALJ's Order, taken as a whole, would restrict the Board's ability to conduct bona fide investigations into possible violations of the North Carolina Dental Practice Act, would prevent the Board from enforcing the Act, and would violate the Commerce

Clause of and Tenth Amendment to the U.S. Constitution. We find these arguments to be without merit.

Respondent argues first that the "Order clearly restricts the State Board's ability to conduct a bona fide investigation into possible violations of the North Carolina Dental Practice Act, as it renders useless the State Board's ability to prevent unlicensed teeth whitening services." (RAB at 40.) To the contrary, as discussed above, the Final Order is much more limited and specifically states that "nothing in this Order prohibits the Board from . . . investigating a Non-Dentist Provider for suspected violations of the Dental Practice Act." (Final Order § II.) The Final Order explicitly permits the Board to bring (or cause to be brought) judicial proceedings against non-dentist providers, to bring administrative proceedings against dentists, and to send bona fide litigation warning letters to targets of investigations. (*Id.*) Since the Board's authority to enforce the Dental Practice Act against non-dentists is limited to seeking recourse from the North Carolina courts or referring a matter to a District Attorney (N.C. General Statutes § 90-40.1; IDF 43, 44, 190; Response to Complaint ¶ 19; RAB at 2-3; RRB at 5), the Final Order will not prevent or impede the Board from carrying out its enforcement duties. Indeed, the Board's Chief Operating Officer testified that the Board's ability to enforce the Act would not be affected if it sent litigation warning letters instead of cease and desist letters. (IDF 258; *see also* IDF 259-60 (no cease and desist language in Board letters from 2000 to 2002).)

Respondent also argues that the ALJ's Order would violate the Tenth Amendment to the U.S. Constitution by directing the actions of state officials. Respondent relies on *New York v. United States*, 505 U.S. 144 (1992) and *Printz v. United States*, 521 U.S. 898 (1997). In these cases, the Supreme Court held that Congress may not enact a law that would direct the functioning of the states' executives or legislatures but may enact laws of general applicability that incidentally apply to state governments. *See Printz*, 521 U.S. at 932 ("the incidental application to the States of a federal law of general applicability" is lawful); *New York*, 505 U.S. at 160 (Congress may "subject state governments to generally applicable laws"); *see also Kennedy v. Allera*, 612 F.3d 261, 269 (4th Cir. 2010) ("[T]he Tenth Amendment prohibits the federal government from commandeering state officers by compelling them to enforce a federal regulatory program."). It is undisputed that the FTC Act is a statute of general applicability and is not directed at states or state officials. Accordingly, the Court's line of cases prohibiting the commandeering of state officials is inapplicable.

Alternatively, Respondent asserts that under *California State Board of Optometry v. FTC*, 910 F.2d 976 (D.C. Cir. 1990), the Tenth Amendment prevents the FTC from imposing restrictions on a state's regulatory scheme.[20] Respondent overreaches by trying

[20] Respondent also asserts that *California State Board of Optometry* held that a state cannot be a "person" for purposes of jurisdiction when it acts in its sovereign capacity. (RAB at 24.) That decision, even under Respondent's reading, is inapposite because the Board is not a sovereign, and the challenged practices exceeded what the North Carolina legislature authorized. In addition, the Commission's jurisdiction to hear this matter was resolved in the Commission's February 3, 2011 decision, and Respondent did not dispute that it is a "person" before the ALJ. (ID at 59.)

to stretch that case to include activity that is outside the scope of the regulatory scheme of the Dental Practice Act. In *California State Board of Optometry*, the D.C. Circuit reviewed an FTC trade regulation rule, passed pursuant to the Magnuson-Moss Amendments to the FTC Act, declaring that certain state laws restricting the practice of optometry constituted unfair acts or practices. The court held that state regulation of the practice of optometry is a quintessentially sovereign act and therefore rejected the rule as an improper attempt to regulate state action. In contrast, this case does not involve a challenge to a state law or regulation, but rather a challenge to conduct by the Board that went beyond its statutory mandate. Furthermore, the Commission has already concluded that the Board's conduct in question does not satisfy the requirements of the state action defense. *See North Carolina Dental*, 151 F.T.C. at 615-33.

Finally, Respondent argues, without citation to any case law, that the ALJ's Order would violate the Commerce Clause of the U.S. Constitution because it regulates the practice of dentistry in North Carolina. To the contrary, however, the Final Order neither regulates the practice of dentistry nor violates the Commerce Clause of the Constitution. The Constitution grants Congress the power to "regulate Commerce . . . among the several states." U.S. Constitution, art. I, § 8, cl. 3. Pursuant to this authority, Congress passed the FTC Act and gave the agency the authority to prevent, *inter alia*, "[u]nfair methods of competition in or affecting commerce." 15 U.S.C. § 45(a). The jurisdictional reach of the Commission extends as far as the Commerce Clause. (ID at 59-62.) The ALJ found, and Respondent does not dispute in this appeal, that the Board's acts have a substantial effect on interstate commerce and are therefore in or affecting commerce. (ID at 62.) Furthermore, as described above, the Final Order does not regulate the practice of dentistry in North Carolina. The Commission has declined to address whether teeth whitening constitutes stain removal under the Dental Practice Act, and the Final Order does not interfere with the ability of the Board to fulfill its statutory obligations. Rather, the Final Order is limited to ensuring that the Board does not violate the antitrust laws through anticompetitive acts and practices that are not authorized or required by the Dental Practice Act.

VIII. CONCLUSION

Based on a *de novo* review of the facts and law in this matter, the Commission concludes that the Board has violated Section 5 of the FTC Act, 15 U.S.C. § 45. The Commission has therefore issued a Final Order to remedy the Board's violations and to prevent their recurrence.

EXHIBIT 3

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

In the Matter of **The North Carolina Board of Dental Examiners**	**Docket No. 9343**

FINAL ORDER

The Commission has heard this matter upon the appeal of Respondent from the Initial Decision, and upon briefs and oral argument in support thereof and in opposition thereto. For the reasons stated in the accompanying Opinion of the Commission, the Commission has determined to sustain the Initial Decision with certain modifications:

IT IS ORDERED that the Initial Decision of the administrative law judge be, and it hereby is, adopted as the Findings of Fact and Conclusions of Law of the Commission, to the extent not inconsistent with the findings of fact and conclusions contained in the accompanying Opinion.

Other findings of fact and conclusions of law of the Commission are contained in the accompanying Opinion.

IT IS FURTHER ORDERED that the following Order to cease and desist be, and it hereby is, entered:

ORDER

I.

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

A. "Board" means the North Carolina State Board of Dental Examiners ("NCSBDE"), its officers, directors, members, employees, agents, attorneys, representatives, successors, and assigns; and the subsidiaries, divisions, groups, and affiliates controlled by it; and the respective officers, directors, members, employees, agents, attorneys, representatives, successors, and assigns of each.

B. "Communicate" or "Communicating" means exchanging, transferring, or disseminating any information, without regard to the manner or means by which it is accomplished.

C. "Communication" means any information exchange, transfer, or dissemination, without regard to the means by which it is accomplished, including, without limitation, oral or written, in any manner, form, or transmission medium.

D. "Dental Practice Act" means any legislation that is administered by the Board, including, North Carolina General Statutes, Chapter 90, Article 2 (Dentistry) (N.C. Gen. Stat. §§ 90-22 - 90-48.3 (2010)) and Article 16 (Dental Hygiene Act) (N.C. Gen. Stat. §§ 90-221 - 90-233.1 (2010)).

E. "Dentist" means any individual holding a license, issued by the Board, to practice dentistry in North Carolina.

F. "Direct" or "Directing" means to order, direct, command or instruct.

G. "Non-Dentist Provider" means any Person other than a Dentist engaged in the provision, distribution or sale of any Teeth Whitening Goods or Teeth Whitening Services.

H. "Person" means both natural persons and artificial persons, including, but not limited to, corporations, and unincorporated entities.

I. "Principal Address" means either (i) primary business address, if there is a business address, or (ii) primary residential address, if there is no business address.

J. "Teeth Whitening Goods" means any formulation containing a peroxide bleaching agent, whether or not used in conjunction with an LED light source, and any other ancillary products used in the provision of Teeth Whitening Services.

K. "Teeth Whitening Services" means whitening teeth through the use of a formulation containing a peroxide bleaching agent, whether or not used in conjunction with an LED light source.

L. "Third Party" means any Person other than NCSBDE.

II.

IT IS FURTHER ORDERED that Respondent, directly or indirectly, or through any corporate or other device, in connection with the provision of Teeth Whitening Services in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, cease and desist from:

A. Directing a Non-Dentist Provider to cease providing Teeth Whitening Goods or Teeth Whitening Services;

B. Prohibiting, restricting, impeding, or discouraging the provision of Teeth Whitening Goods or Teeth Whitening Services by a Non-Dentist Provider;

C. Communicating to a Non-Dentist Provider that: (i) such Non-Dentist Provider is violating, or has violated the Dental Practice Act by providing Teeth Whitening Goods or Teeth Whitening Services; or (ii) the provision of Teeth Whitening Goods or Teeth Whitening Services by a Non-Dentist Provider is a violation of the Dental Practice Act;

D. Communicating to a prospective Non-Dentist Provider that: (i) a Non-Dentist Provider would violate the Dental Practice Act by providing Teeth Whitening Goods or Teeth Whitening Services; or (ii) the provision of Teeth Whitening Goods or Teeth Whitening Services by a Non-Dentist Provider would violate the Dental Practice Act;

E. Communicating to a lessor of commercial property or any other Third Party that (i) the provision of Teeth Whitening Goods or Teeth Whitening Services by a Non-Dentist Provider is a violation of the Dental Practice Act, or (ii) that any Non-Dentist Provider is violating or has violated the Dental Practice Act by providing Teeth Whitening Goods or Teeth Whitening Services;

F. Communicating to an actual or prospective manufacturer, distributor, or seller of Teeth Whitening Goods used by Non-Dentist Providers, or to any other Third Party that (i) the provision of Teeth Whitening Goods or Teeth Whitening Services by a Non-Dentist Provider is a violation of the Dental Practice Act, or (ii) that any Non-Dentist Provider is violating or has violated the Dental Practice Act by providing Teeth Whitening Goods or Teeth Whitening Services; and

G. Inducing, urging, encouraging, assisting or attempting to induce, any Person to engage in any action that would violate Paragraphs II.A through II.F if such action were taken by Respondent;

Provided, however, that nothing in this Order prohibits the Board from:

(i) investigating a Non-Dentist Provider for suspected violations of the Dental Practice Act;

(ii) filing, or causing to be filed, a court action against a Non-Dentist Provider for an alleged violation of the Dental Practice Act pursuant to N.C. Gen. Stat. §§ 90-40, 90-40.1, or 90-233.1; or

(iii) pursuing any administrative remedies against a Dentist pursuant to and in accordance with the North Carolina Annotated Code;

Provided further, that nothing in this Order prohibits the Board from Communicating to a Third Party:

(i) notice of its belief or opinion regarding whether a particular method of providing Teeth Whitening Goods or Teeth Whitening Services may violate the Dental Practice Act;

(ii) factual information regarding legislation and court proceedings concerning Teeth Whitening Goods or Teeth Whitening Services provided by Non-Dentist Providers;

(iii) notice of its bona fide intention to file a court action against that Person for a suspected violation of the Dental Practice Act with regard to Teeth Whitening Goods or Teeth Whitening Services; or

(iii) notice of its bona fide intention to pursue administrative remedies with regard to Teeth Whitening Goods or Teeth Whitening Services,

so long as such Communication includes, with equal prominence, the paragraph included in Appendix A to this Order.

III.

IT IS FURTHER ORDERED that Respondent shall:

A. Within thirty (30) days from the date this Order becomes final, send a copy of this Order and the Complaint by first-class mail with delivery confirmation or electronic mail with return confirmation to:

1. each Board member; and

2. each officer, director, manager, representative, agent, attorney, and employee of the Board;

B. Distribute by first-class mail, return receipt requested, a copy of this Order and the Complaint to each individual who becomes a Board member, or an officer, director, manager, attorney, representative, agent or employee of Board, and who did not previously receive a copy of this Order and the Complaint from Respondent, within ten (10) days of the time that he or she assumes such position;

C. Within thirty (30) days from the date this Order becomes final, send a copy of the letter, on the Board's official letterhead, with the text included in Appendix B to this Order, by first-class mail with delivery confirmation or electronic mail with return confirmation to:

1. each Person, including without limitation actual or prospective Non-Dentist Providers, manufacturers of goods and services used by Non-Dentists Providers, or any other Third Party, to whom the Board Communicated a cease-and-desist order, letter, or other similar Communication;

2. each Person, including without limitation actual or prospective lessors of commercial property or any other Third Party, to whom the Board Communicated (i) that the provision of Teeth Whitening Goods or Teeth Whitening Services by a Non-Dentist Provider is a violation of the Dental Practice Act, or (ii) that any Non-Dentist Provider is violating, has violated, or may be violating the Dental Practice Act by providing Teeth Whitening Goods or Teeth Whitening Services; and

3. any other Third Party to whom, or with whom, the Board Communicated substantially the same information set forth in C.1 and C.2 of this Paragraph III;

D. Within sixty (60) days from the date this Order becomes final, Respondent shall arrange with the North Carolina Board of Cosmetic Art Examiners for the notice included as Appendix C to this Order to appear on the website of that Board for a period of six (6) months;

Provided, however, should Respondent be unable within sixty (60) days to arrange with the North Carolina Board of Cosmetic Art Examiners for such notice to appear on that Board's website, Respondent shall within ninety (90) days from the date this Order becomes final: (1) obtain from the North Carolina Board of Cosmetic Art Examiners its most current list of licensees; and (2) send the Appendix C notification by first-class mail with delivery confirmation or electronic mail with return confirmation to each licensee on that current list;

IV.

IT IS FURTHER ORDERED that Respondent shall file verified written reports within sixty (60) days from the date this Order becomes final, annually thereafter for three (3) years on the anniversary of the date this Order becomes final, and at such other times as the Commission may by written notice require. Each report shall include, among other information that may be necessary:

A. The identity, including address and telephone number, of each Non-Dentist Provider, and any other Third Party, that the Board Communicated with during the relevant reporting period regarding Teeth Whitening Goods or Teeth Whitening Services;

B. Copies of all Communications with any Non-Dentist Provider, and any other Third Party regarding the provision of Teeth Whitening Goods or Teeth Whitening Services;

C. Copies of the delivery confirmations or electronic mail with return confirmations required by Paragraph III. A and B; and

D. A detailed description of the manner and form in which Respondent has complied, and is complying, with this Order.

V.

IT IS FURTHER ORDERED that Respondent shall notify the Commission of any change in its principal address within twenty (20) days of such change in address.

VI.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and upon five (5) days' notice to NCSBDE, that NCSBDE shall, without restraint or interference, permit any duly authorized representative of the Commission:

A. Access, during office hours of NCSBDE and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and all other records and documents in the possession, or under the control, of NCSBDE relating to compliance with this Order, which copying services shall be provided by NCSBDE at its expense; and

B. To interview officers, directors, or employees of NCSBDE, who may have counsel present, regarding such matters.

VII.

IT IS FURTHER ORDERED that this Order shall terminate on December 2, 2031.

Appendix A

The Federal Trade Commission issued a Final Order on December 2, 2011, which requires the Dental Board to provide you with the following Notice. The Dental Board hereby notifies you that the opinion of the Dental Board expressed in this communication is not a legal determination. The Dental Board does not have the authority to order you to discontinue providing Teeth Whitening Goods or Teeth Whitening Services. Only a court may determine that you have violated, or are violating, any law, and, if appropriate, impose a remedy or penalty for such violation.

Further, pursuant to 21 N.C.A.C. 16N .0400 and N.C. Gen. Stat. § 150B-4, you may have the right, prior to the initiation of any court action by the Dental Board, to request a declaratory ruling regarding whether your method of providing teeth whitening goods or services is lawful.

You are further notified that any right to a declaratory ruling from the Dental Board supplements any other legal rights that you may already have to establish the legality of your teeth whitening goods or services. Complete copies of the Federal Trade Commission's Complaint and Final Order are available on the Commission's website at http:\\www.ftc.gov.

Appendix B

(Letterhead of NCSBDE)

(Name and Address of the Recipient)

Dear (Recipient):

As you may know, the Federal Trade Commission issued an Administrative Complaint in 2010 against the Dental Board challenging the legality of the Dental Board's attempts to restrict the provision of teeth whitening services by non-dentists in North Carolina. At the conclusion of that administrative proceeding, the Commission issued a Final Order requiring the Dental Board, among other things, to cease and desist from certain activities involving teeth whitening by non-dentists and to take certain remedial actions, of which this letter is one part. Complete copies of the Federal Trade Commission's Complaint and Final Order are available on the Commission's website at http:\\www.ftc.gov.

You are receiving this letter because you previously received from the Dental Board either: (1) a letter directing or ordering you to cease and desist the unlicensed provision of dental teeth whitening services, or selling dental teeth whitening goods or services to non-dentist teeth whiteners, in violation of the Dental Practice Act, N.C. Gen. Stat. §§ 90-29(b)(2), 90-40, and/or 90-40.1; or (2) a letter advising you (i) that a non-dentist would or might violate the Dental Practice Act by providing teeth whitening goods or services; or (ii) that the provision of teeth whitening goods or services by a non-dentist would or might violate the Dental Practice Act, N.C. Gen. Stat. §§ 90-29(b)(2), 90-40, and/or 90-40.1.

The Dental Board hereby notifies you that the prior letter you received from the Dental Board only expressed the opinion of the Dental Board, and that such opinion is not a legal determination. The Dental Board does not have the authority to order you to discontinue providing Teeth Whitening Goods or Teeth Whitening Services. Only a court may determine that you are violating, or have violated, any law and, if appropriate, impose a remedy or penalty for such violation. Further, you may have the right to request a declaratory ruling from the Dental Board, pursuant to 21 N.C.A.C. 16N .0400 and N.C. Gen. Stat. § 150B-4, regarding whether a particular method of providing teeth whitening goods or services is lawful. You are further notified that any right to a declaratory ruling from the Dental Board supplements any other legal rights that you may already have to establish the legality of any particular method of providing teeth whitening goods or services.

Appendix C

Teeth Whitening Notice

As you may know, the Federal Trade Commission issued an Administrative Complaint in 2010 against the Dental Board challenging the legality of the Dental Board's attempts to restrict the provision of teeth whitening services by non-dentists in North Carolina. At the conclusion of that administrative proceeding, the Commission issued a Final Order requiring the Dental Board, among other things, to cease and desist from certain activities involving teeth whitening by non-dentists and to take certain remedial actions, of which this Notice is one part. Complete copies of the Federal Trade Commission's Complaint and Final Order are available on the Commission's website at http://www.ftc.gov.

In 2007, the Cosmetology Board, at the request of the Dental Board, displayed a "Teeth Whitening Bulletin" on the Cosmetology Board's website advising cosmetologists and estheticians "that any process that 'removes stains, accretions or deposits from human teeth' constitutes the practice of dentistry . . . . Taking impressions for bleaching trays also constitutes the practice of dentistry . . . ." That Bulletin further advised that it was a misdemeanor for anyone other than a licensed dentist to provide those services.

The Dental Board hereby notifies you that the prior Bulletin, described above, only expressed the opinion of the Dental Board, and that such opinion is not a legal determination. The Dental Board does not have the authority to order you to discontinue providing Teeth Whitening Goods or Teeth Whitening Services. Only a court may determine that you have violated, or are violating, any law and, if appropriate, to impose a remedy or penalty for such violation. Further, you may have the right to request a declaratory ruling from the Dental Board, pursuant to 21 N.C.A.C. 16N .0400 and N.C. Gen. Stat. § 150B-4, regarding whether a particular method of providing teeth whitening goods or services is lawful. You are further notified that any right to a declaratory ruling from the Dental Board supplements any other legal rights that you may already have to establish the legality of any particular method of providing teeth whitening goods or services.

By the Commission, Commissioner Brill recused.

Donald S. Clark
Secretary

ISSUED: December 2, 2011