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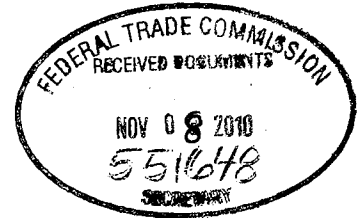
UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

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DOCKET NO. 9343

PUBLIC VERSION

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IN THE MATTER OF

THE NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS

---

COMPLAINT COUNSEL'S MOTION FOR PARTIAL SUMMARY DECISION,  
MEMORANDUM OF LAW IN SUPPORT,  
AND SEPARATE STATEMENT OF MATERIAL FACTS  
AS TO WHICH THERE IS NO GENUINE ISSUE

Richard A. Feinstein  
*Director*

Pete Levitas  
*Deputy Director*

Melanie Sabo  
*Assistant Director*

Geoffrey Green  
*Deputy Assistant Director*

Bureau of Competition

Richard B. Dagen  
William L. Lanning  
Melissa Westman-Cherry  
Tejasvi Srimushnam  
Steven J. Osnowitz

*Counsel Supporting the Complaint*

Michael J. Bloom  
*Assistant Director*  
Office of Policy & Coordination

Erika Meyers  
Office of Policy & Coordination

Dated: November 8, 2010

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**UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION**

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**DOCKET NO. 9343**

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**IN THE MATTER OF  
THE NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS**

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**DECLARATION OF RICHARD B. DAGEN  
AND SUPPORTING EXHIBITS**

**(VOLUME I)**

Richard A. Feinstein  
*Director*

Pete Levitas  
*Deputy Director*

Melanie Sabo  
*Assistant Director*

Geoffrey Green  
*Deputy Assistant Director*

Bureau of Competition

Richard B. Dagen  
William L. Lanning  
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Tejasvi Srimushnam  
Steven J. Osnowitz

*Counsel Supporting the Complaint*

Michael J. Bloom  
*Assistant Director*  
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**IN THE MATTER OF  
THE NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS**

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**SUPPORTING EXHIBITS**

**(VOLUME II)**

Richard A. Feinstein  
*Director*

Pete Levitas  
*Deputy Director*

Melanie Sabo  
*Assistant Director*

Geoffrey Green  
*Deputy Assistant Director*

Bureau of Competition

Richard B. Dagen  
William L. Lanning  
Melissa Westman-Cherry  
Tejasvi Srimushnam  
Steven J. Osnowitz

*Counsel Supporting the Complaint*

Michael J. Bloom  
*Assistant Director*  
Office of Policy & Coordination

Erika Meyers  
Office of Policy & Coordination

Dated: November 8, 2010

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UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

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DOCKET NO. 9343

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IN THE MATTER OF  
THE NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS

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SUPPORTING EXHIBITS

(VOLUME III)

Richard A. Feinstein  
*Director*

Pete Levitas  
*Deputy Director*

Melanie Sabo  
*Assistant Director*

Geoffrey Green  
*Deputy Assistant Director*

Bureau of Competition

Richard B. Dagen  
William L. Lanning  
Melissa Westman-Cherry  
Tejasvi Srimushnam  
Steven J. Osnowitz

*Counsel Supporting the Complaint*

Michael J. Bloom  
*Assistant Director*  
Office of Policy & Coordination

Erika Meyers  
Office of Policy & Coordination

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UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

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DOCKET NO. 9343

PUBLIC VERSION

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IN THE MATTER OF  
THE NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS

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SUPPORTING EXHIBITS

(VOLUME IV)

Richard A. Feinstein  
*Director*

Pete Levitas  
*Deputy Director*

Melanie Sabo  
*Assistant Director*

Geoffrey Green  
*Deputy Assistant Director*

Bureau of Competition

Richard B. Dagen  
William L. Lanning  
Melissa Westman-Cherry  
Tejasvi Srimushnam  
Steven J. Osnowitz

*Counsel Supporting the Complaint*

Michael J. Bloom  
*Assistant Director*  
Office of Policy & Coordination

Erika Meyers  
Office of Policy & Coordination

Dated: November 8, 2010

**UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION**

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**PUBLIC**

DOCKET NO. 9343

NORTH CAROLINA STATE BOARD OF )

DENTAL EXAMINERS, )

Respondent. )  
\_\_\_\_\_)

**COMPLAINT COUNSEL’S MOTION FOR PARTIAL SUMMARY DECISION AND  
[PROPOSED] ORDER**

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

Please take notice that, pursuant to Commission Rule 3.24, Complaint Counsel hereby respectfully moves for a partial summary decision in this action. For the reasons set forth in the accompanying memorandum, this motion should be granted.

By this motion, Complaint Counsel seeks a partial summary decision in its favor dismissing the Respondent North Carolina State Board of Dental Examiners’ (the “Board’s”) affirmative defense under the “State Action Doctrine” before trial, so that the proceeding may focus efficiently on those issues as to which there is a bona fide factual controversy. The Board is a combination of dentists that has excluded competition from non-dentists in the provision of teeth whitening services. Specifically, the Board has repeatedly ordered non-dentist competitors to cease and desist from whitening teeth, and has taken other actions that deprive non-dentists of the means to provide teeth whitening services. As a consequence, non-dentists have exited the market. The Board contends that even if its actions result in substantial injury to consumers, the

Board “is immune from the Federal Trade Commission Act pursuant to the State Action Doctrine.” This claim to an antitrust exemption is without merit. The undisputed facts show that the requirements of the state action defense are not satisfied.

The State Action Doctrine recognizes that the federal antitrust laws do not necessarily apply to the anticompetitive conduct of the states, and that states may effectuate their policy commercial goals, even if anticompetitive, through the acts of private parties. But a state may not simply confer regulatory authority upon a professional guild, and then turn away. Private conduct is exempt from the antitrust laws only if both prongs of the exacting two-part *Midcal*<sup>1</sup> test are satisfied. First, a state wishing to shield anticompetitive private conduct from the antitrust laws must clearly articulate a policy to displace those laws with a regulatory regime (prong 1). Second, to assure that the challenged restraint truly embodies state policy, the state must actively supervise the conduct in question (prong 2).

Neither *Midcal* requirement is satisfied here. The Board is created by, and derives its authority from, the Dental Practice Act (“Dental Act”).<sup>2</sup> This statute does not authorize the Board to order non-dentist teeth whitening providers to cease operating. Indeed, individual Board members acknowledge that the Board has no such authority - that the legislature never contemplated that the Board would issue Cease and Desist Orders of its own accord. Rather, the Dental Act authorizes the Board to petition the courts for relief relating to the alleged unlawful practice of dentistry. Instead of following this procedure, the Board has acted unilaterally to exclude its rivals - circumventing the courts, and thus restraining competition in a manner that

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<sup>1</sup>*California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980).

<sup>2</sup>N.C. Gen. Stat. § 90-20 *et seq.*

the North Carolina legislature did not intend or foresee. Prong 1 of *Midcal* is not satisfied.

In addition, the Board is not actively supervised by the state. Although the Board files annual reports with some government officials, these officials do not “have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy.” *Patrick v. Burget*, 486 U.S. 94, 100-01 (1988). No governmental entity provides any meaningful supervision of the Board’s campaign against non-dentists.

The Board contends that it is a public (not a private) actor, and that it is exempt from the antitrust laws whether or not the state actively supervises the Board’s anticompetitive conduct. The Board is composed of dentists and is elected by dentists, and here it is determining that dentists will not face competition from non-dentists. For state action purposes, these are the essential attributes of private action. As a matter of law, an industry-dominated board is not permitted to restrain competition in that industry without active supervision. *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975); Einer Elhauge, *The Scope of Antitrust Process*, 104 Harv. L. Rev. 668, 683 (1991) (“*Antitrust Process*”); Areeda & Hovenkamp, *Antitrust Law*, ¶227b at 501. Accordingly, prong 2 of the *Midcal* test - active supervision - is fully applicable in this matter, and the test is not met.

As a Board dominated by members of the profession it regulates, the Board must meet both the clear articulation prong *and* the active supervision prong of the Supreme Court’s test under *California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), when it seeks the state action exemption. The Board has not satisfied its burden on either prong. Accordingly, the state action exemption is unavailable to the Board as a matter of law.

For the reasons set forth in the accompanying memorandum, partial summary decision in Complaint Counsel’s favor should be entered. This motion is supported by the accompanying



memorandum and the authorities cited therein; the witness testimony and documents attached to the Declaration of Richard B. Dagen, and the accompanying separate statement of material facts as to which there is no genuine issue.

Respectfully submitted,

/s/ Richard B. Dagen

Richard A. Feinstein , Director  
Pete Levitas, Deputy Director  
Melanie Sabo, Assistant Director  
Geoffrey M. Green, Deputy Assistant Director  
  
Bureau of Competition

Richard B. Dagen  
601 New Jersey Ave, NW  
Washington, D.C.  
(202) 326-2628  
(202) 326-3496 Facsimile  
rdagen@ftc.gov

William L. Lanning  
Melissa Westman-Cherry  
Steven Osnowitz  
Tejasvi Srimushnam

Counsel Supporting Complaint

Michael J. Bloom, Assistant Director  
Erica Meyers  
Office of Policy & Coordination

Dated: November 8, 2010

**UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION**

In the Matter of	)	
	)	
NORTH CAROLINA STATE BOARD OF	)	DOCKET NO. 9343
DENTAL EXAMINERS,	)	
	)	
Respondent.	)	
	)	

**[PROPOSED] ORDER**

Having carefully considered Complaint Counsel's Motion, the Board's Opposition thereto, and Complaint Counsel's Reply, and all supporting and opposing declarations and other evidence, and the applicable law, it is hereby ORDERED AND ADJUDGED, that Complaint Counsel's Motion for Partial Summary Decision to dismiss Respondent's state action defense is hereby GRANTED and Respondent's state action defense is DISMISSED.

ORDERED:

By the Commission.

Donald S. Clark  
Secretary

SEAL

ISSUED:

**CERTIFICATE OF SERVICE**

I hereby certify that on November 8, 2010, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

Donald S. Clark  
Secretary  
Federal Trade Commission  
600 Pennsylvania Ave., NW, Rm. H-159  
Washington, DC 20580

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

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

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

Noel Allen  
Allen & Pinnix, P.A.  
333 Fayetteville Street  
Suite 1200  
Raleigh, NC 27602  
nla@Allen-Pinnix.com

*Counsel for Respondent  
North Carolina State Board of Dental Examiners*

**CERTIFICATE FOR ELECTRONIC FILING**

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

November 8, 2010

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



**UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION**

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In the Matter of )

**PUBLIC**

NORTH CAROLINA STATE BOARD OF )  
DENTAL EXAMINERS, )

DOCKET NO. 9343

Respondent. )  
\_\_\_\_\_ )

**COMPLAINT COUNSEL'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR  
PARTIAL SUMMARY DECISION**

Richard A. Feinstein  
Director

Richard B. Dagen  
William L. Lanning  
Melissa Westman-Cherry  
Steven Osnowitz  
Tejasvi Srimushnam

Pete Levitas  
Deputy Director

Melanie Sabo  
Assistant Director

601 New Jersey Ave, NW  
Washington, D.C.  
(202) 326-2628  
(202) 326-3496 Facsimile  
rdagen@ftc.gov

Geoffrey Green  
Deputy Assistant Director

Bureau of Competition

Michael J. Bloom, Assistant Director  
Erika Meyers  
Office of Policy & Coordination

Counsel Supporting Complaint

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Respondent. )  
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DOCKET NO. 9343

**COMPLAINT COUNSEL'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR  
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## I. INTRODUCTION

Respondent North Carolina State Board of Dental Examiners (the “Board”) is a combination of dentists that has excluded competition from non-dentists in the provision of teeth whitening services. Specifically, the Board has repeatedly ordered non-dentist competitors to cease and desist from whitening teeth; as a consequence, non-dentists have exited the market. The Board contends that even if its actions result in substantial injury to consumers, the Board “is immune from the Federal Trade Commission Act pursuant to the State Action Doctrine.”<sup>1</sup> This claim to an antitrust exemption is without merit. The undisputed facts show that the requirements of the state action defense are not satisfied.

Complaint Counsel therefore move for partial summary decision dismissing the state action defense. The Commission should dismiss this affirmative defense before trial, so that the proceeding may focus efficiently on those issues as to which there is a bona fide factual controversy.

The state action doctrine recognizes that the federal antitrust laws do not necessarily apply to the anticompetitive conduct of the states, and that states may effectuate their policy commercial goals, even if anticompetitive, through the acts of private parties. But a state may not simply confer regulatory authority upon a professional guild, and then turn away. Private conduct is exempt from the antitrust laws only if both prongs of the exacting two-part *Midcal*<sup>2</sup> test are satisfied. First, a state wishing to shield anticompetitive private conduct from the antitrust laws must clearly articulate a policy to displace those laws with a regulatory regime (prong 1). Second, to assure that the challenged restraint truly embodies state policy, the state

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<sup>1</sup>Tab2, 20 (Response to Complaint). Citations in the form “TabX, Y” refer to Page Y of the Tab X attachment to the Declaration of Richard Dagen.

<sup>2</sup>*California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980).

must actively supervise the conduct in question (prong 2).

Neither *Midcal* requirement is satisfied here. The Board is created by, and derives its authority from, the Dental Practice Act (“Dental Act”).<sup>3</sup> This statute does not authorize the Board to order non-dentist teeth whitening providers to cease operating. Indeed, individual Board members acknowledge that the Board has no such authority - that the legislature never contemplated that the Board would issue Cease and Desist Orders of its own accord. Rather, the Dental Act authorizes the Board to petition the courts for relief relating to the alleged unlawful practice of dentistry.<sup>4</sup> Instead of following this procedure, the Board has acted unilaterally to exclude its rivals - circumventing the courts, and thus restraining competition in a manner that the North Carolina legislature did not intend or foresee. Prong 1 of *Midcal* is not satisfied.

In addition, the Board is not actively supervised by the state. Although the Board files annual reports with some government officials, these officials do not “have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy.” *Patrick v. Burget*, 486 U.S. 94, 101 (1988). No government entity (*e.g.*, state courts, Governor, Secretary of State, North Carolina Ethics Commission) provides any meaningful supervision of the Board’s campaign against non-dentists.

The Board contends that it is a public (not a private) actor, and that it is exempt from the antitrust laws whether or not the state actively supervises the Board’s anticompetitive conduct. It is, of course, the case that some state agencies need not show active supervision by the state. But state action doctrine properly views with suspicion restraints imposed by actors with a

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<sup>3</sup>Tab4, Dental Practice Act, N.C. Gen. Stat. §90-20 *et seq.* (“Dental Act”).

<sup>4</sup>Although the Board may deny that it has issued Cease and Desist Orders, the contemporaneous documents show otherwise. *See infra* at pp. 11, 32.

financial incentive to eliminate their rivals.

The Board is composed of dentists and is elected by dentists, and here it is determining that dentists will not face competition from non-dentists. For state action purposes, these are the essential attributes of private action. As a matter of law, an industry-dominated board is not permitted to restrain competition in that industry without active supervision. *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975); Einer Elhauge, *The Scope of Antitrust Process*, 104 Harv. L. Rev. 668, 683 (1991) (“*Antitrust Process*”); Areeda & Hovenkamp, *Antitrust Law*, ¶227b at 501. Accordingly, prong 2 of the *Midcal* test - active supervision - is fully applicable in this matter, and the test is not met.

At this stage, “the violation issue is separate and distinct from the exemption issue.” *Cnty. Communications Co. v. Boulder*, 455 U.S. 40, 58 (1982). That is, for purposes of this motion, the antitrust violation is deemed established. Furthermore, it is not relevant whether teeth whitening by non-dentists constitutes the unlawful practice of dentistry under state law, or whether this service is as safe and effective as dentist-provided teeth whitening. This motion does not seek a determination that the Board has violated the antitrust laws. Complaint Counsel requests only a ruling that if a violation is ultimately proven, then the Board is not exempt from liability under the state action doctrine.

## II. STATEMENT OF FACTS

### A. **The North Carolina Dental Board Is Controlled By Dentists, And Its Authority Under State Law Is Limited To Petitioning The Courts To Enjoin Or Sanction The Unauthorized Practice Of Dentistry In North Carolina**

The Board is created by the Dental Act to regulate dentists and hygienists. The Board consists of six dentists, one hygienist, and one consumer representative. Only the consumer representative is selected by an elected official (the Governor). The dentist Board members, who must be licensed dentists, are elected by other licensed dentists for a term of three years. Members are eligible for re-election, and some dentist members have served two or more terms.<sup>5</sup>

The Dental Act authorizes the Board to address suspected instances of the unlicensed practice of dentistry in either of two ways: the Board may petition a state court for an injunction, or it may request that the district attorney initiate a criminal prosecution.<sup>6</sup> Pursuant to this authority, the Board has on occasion sought civil as well as criminal relief in the North Carolina courts.<sup>7</sup> We do not challenge those actions. On the other hand, the detailed provisions of the Dental Act do not provide the Board with the authority, on its own, to order an alleged violator to cease and desist from the unlicensed practice of dentistry. This case challenges those actions, as well as other naked efforts to exclude competitors of dentists from providing teeth whitening services.

North Carolina law establishes no mechanism for any person or entity to review a Board

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<sup>5</sup>Tab4, §90-22; Tab76, 9-10 (Morgan Dep.).

<sup>6</sup>Tab4, §90-40-40.1.

<sup>7</sup>Tab5, 003 (criminal); Tab15, 004 (criminal); Tab 21 (civil). All were resolved without judgment on the merits.

decision to issue a cease and desist order to a non-dentist before the order is issued (or even thereafter). The Board does annually file audited financial statements with the Secretary of State,<sup>8</sup> as well as an Annual Report to the Governor, Secretary of State, Attorney General, and Joint Legislative Administrative Oversight Committee, and individual Board members file Statements of Economic Interest with the State Ethics Commission.<sup>9</sup> These reports/statements contain no information regarding the Board's enforcement or other actions against non-dentist teeth whitening, and do not enable any governmental entity to examine Board decisions before or near the time that the Board acts. In short, no independent governmental entity engages in any review.

**B. Absent Intervention By The Board, Teeth Whitening Services Would Be Offered In North Carolina By Both Dentists And Non-Dentists**

In-office teeth whitening is a potentially lucrative business opportunity for both dentists and non-dentists. Dentists perform in-office teeth whitening treatments using hydrogen peroxide or carbamide peroxide.<sup>10</sup> Because in-office procedures use high concentrations of peroxide, before applying the peroxide solution, the dentist takes steps to protect the gums from burning. Then the peroxide solution is painted on the teeth. Around 1991, dentists began to direct a light source at the teeth, which according to some studies helps to "activate" the whitener. The entire

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<sup>8</sup>Tab 45.

<sup>9</sup>Tab 6 (Annual Report).

<sup>10</sup>Originally, hydrogen peroxide was used as a periodontal treatment to help heal diseased gums; as a result, the substance gained quick acceptance as a safe and effective means to whiten teeth. *See* Tab59, 53.

procedure generally takes place in one sitting and has immediate whitening results.<sup>11</sup> A dentist's in-office procedure typically costs \$300 to \$500, and sometimes more.<sup>12</sup>

Beginning in 1989, numerous companies began making products for dentists to dispense for at home teeth whitening, which is implemented using a custom tray placed in the consumer's mouth. In addition to the tray, dentists send patients home with a supply of hydrogen or carbamide peroxide solution. The take-home kits can be used either as a follow-up to the in-office treatment, or as the sole whitening service. Used alone, a take-home kit can take many days to whiten the teeth. The take-home kits, including a custom tray, may cost the consumer hundreds of dollars.<sup>13</sup>

Teeth whitening or bleaching is the number one requested cosmetic dentistry procedure.<sup>14</sup> In 2007, the American Academy of Cosmetic Dentistry ("AACD") reported that dental teeth whitening procedures increased more than 300% over the previous five years.<sup>15</sup> A dentist may earn tens of thousands of dollars per year by whitening teeth.<sup>16</sup> For 2006, AACD dentists reported performing an average of 70 teeth whitening procedures, garnering average revenues of

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<sup>11</sup>Tab 63, 026 (two hours); Tab 54 (1-3 hours); Tab 36, NCBoard4949 ("Advantages of in-office whitening include . . . rapid results").

<sup>12</sup>See, e.g., Tab 78, 183 (Feingold Dep.); Tab 13.

<sup>13</sup>Tab 85, 27 (Wester Dep.).

<sup>14</sup>Cosmetic dentistry consists of optional services. See generally Tab 383 (American Academy of Cosmetic Dentistry ("AACD")).

<sup>15</sup>Tab 93.

<sup>16</sup>Tab 55.



\$25,000 (total of \$138.8 million).<sup>17</sup> This figure is consistent with reports from North Carolina dentists.<sup>18</sup> Procter & Gamble states that with proper marketing, dentists can earn \$100,000 to \$200,000 per year by performing teeth whitening services: “Your esthetic practice could explode overnight.”<sup>19</sup>

In 2000, the efficacy of whitening “strips” was shown, and Procter & Gamble introduced Crest White Strips: clear, thin, flexible pieces of plastic (polyethylene) that have been coated on one side with a thin film of hydrogen peroxide bleaching agent. These and similar over-the-counter (“OTC”) strips and gels use substantially less peroxide than dentists use in-office, and typically require more time to work.<sup>20</sup> Whitening strips cost in the \$15-\$75 range, depending on brand, quantity, and peroxide concentration.<sup>21</sup>

Mall kiosks and salons as a venue for teeth whitening began to appear around 2004-05. Typically, a non-dentist operator will explain the procedure to the customer, provide the customer with literature, sometimes including a consent form, and answer questions before the procedure begins. The operator will don sanitary gloves, take a tray filled with carbamide peroxide from a sealed package and hand it to the customer, who places the tray into his or her mouth. A light “activator” is then put in place by either the customer or the operator. The process lasts around 30-45 minutes, after which the customer returns the tray to the operator for

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<sup>17</sup>Tab 55 (AACD).

<sup>18</sup>*See, e.g.,* Tabs 64–67 (subpoena returns).

<sup>19</sup>Tab 51.

<sup>20</sup>Tab 16 (“16 days of strip applications”); Tab 44, 4979 (different OTC brands requiring 14 days).

<sup>21</sup>Tab 51; Tab 52; Tab 56; Tab 57.

disposal.<sup>22</sup> The operator does not touch the customer's mouth. These operations seek to provide immediate results. Non-dentist teeth whitening typically costs in the \$79-\$150 range.<sup>23</sup>

In general, anyone who wants very quick results must go to the dentist or to the mall/salon.<sup>24</sup> Both dentist and non-dentist teeth whitening use higher peroxide concentration than typical OTC products, and also differ from most do-it-yourself strips in terms of the services provided, including instruction, provision of a tray, loading of the peroxide, convenience, and use of a light activator. It is clear that both dentists and non-dentist providers of teeth whitening believe that they compete with one another; non-dentist teeth whitening operators compare their services to dentists, and dentists urge patients to use a dentist rather than a non-dental teeth operator.<sup>25</sup>

**C. The Board Is Excluding Competition From Non-Dentists, And Is Acting Independent Of The Courts**

The Board has received inquiries and complaints from dentists about non-dentist providers of teeth whitening services. Although the Board has expressed concern about the safety of these operations, the President of the North Carolina Dental Society testified that for

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<sup>22</sup>See, e.g., Tab 10 (White Smile Training Manual); Tab11 (Bleach Brite); Tab87 (Bright White).

<sup>23</sup>Tab 32; Tab 58.

<sup>24</sup>Tab7 8, 184 (Feingold Dep.) REDACTED

<sup>25</sup>Documents from the American Dental Association ("ADA") and other sources discuss marketing advantages to lure customers from the non-dentist providers. See, e.g., Tab 68 REDACTED

Tab 31 REDACTED  
; Tab 10; Tab 11; Tab 29; Tab 35; Tab 62.

REDACTED of consumers using such services, the outcome is safe and favorable. Of the remaining REDACTED some would experience transient gum/tooth sensitivity, lasting at most one or two days.<sup>26</sup> Less than REDACTED would experience a serious side-effect, such as an allergic reaction, which could also result from a teeth whitening procedure that takes place in a dentist's office. The Board has not urged the Department of Health or other state regulatory authorities to take action with respect to non-dental teeth whitening.<sup>27</sup>

At the same time that non-dentist whitening operations were proliferating, the Board learned that jewelry stores were fabricating "grills" - cosmetic crowns (*e.g.*, gold, "bling," fangs) that are worn temporarily for decorative purposes. The Board challenged one jewelry store in court alleging the unauthorized practice of dentistry because the store took impressions of teeth.<sup>28</sup> REDACTED

Similarly, with respect to teeth whitening, the Board has issued Cease and Desist Orders to short-cut the need for evidence. As discussed previously, this action is beyond the Board's

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<sup>26</sup>Tab 80, 191-94 (Parker Dep.). *See also* Tab 88, 005 (ADA Q&A states: REDACTED

<sup>27</sup>Tab 83, 89-90 (Bakewell Dep.); Tab 85, 121-22 (Wester Dep.).

<sup>28</sup>Tab 30 (March 16, 2005) (judgment in *NCBDE v. Brunson Jewelry*); Tab 73, 133 (Allen Dep.).

<sup>29</sup>Tab 23, 002 (Dempsey) (September 30, 2005) REDACTED

*See also* Tab 73, 133 (Allen Dep.).

statutory authority. Yet the Board sometimes issued these Cease and Desist Orders without any evidence that the non-dentist provider was doing anything unlawful. Instead, the Board on occasion issued these Cease and Desist orders as a *substitute* for the process of gathering evidence and going to court. This practice raised concerns even among members of the Board, and one Board member expressed his desire to use an REDACTED

Over the past seven years, the Board has sent numerous cease and desist orders to non-dentist teeth whitening operators. Most often, these documents commence with a bold, all capitals heading: “**NOTICE AND ORDER TO CEASE AND DESIST**” or “**NOTICE TO CEASE AND DESIST.**” The body of the Orders vary to some degree. For example, in December 2007, after learning that White Science, was “assisting clients to accelerate the whitening process with an LED light,” the Board sent a letter with the latter heading. The document continued: “The Board hereby directs your company to cease its activities unless they

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<sup>30</sup>Tab 20 (Holland).

<sup>31</sup>Tab 20 (Friddle).

<sup>32</sup>Tab 20 (Friddle).

are performed or supervised by a properly licensed North Carolina dentist.”<sup>33</sup> Other Orders reference a possible Board investigation, but reiterate the message of the bold heading: “You are hereby ordered to CEASE AND DESIST any and all activity constituting the practice of dentistry or dental hygiene as defined by North Carolina General Statutes § 90-29 and § 90-233 and the Dental Board Rules promulgated thereunder.”<sup>34</sup>

Contemporaneous documents confirm that the letters are intended, and understood by recipients, as Orders from a state agency to stop teeth whitening activities.<sup>35</sup> As acknowledged by the Board’s in-house counsel, the Board “has recently issued cease and desist orders to an out of state company that has been providing bleaching services in a number of malls in the state.”<sup>36</sup>

The Board acted in other extra-judicial ways to stop non-dentist teeth whitening operations. For example, the Board sent cease and desist letters to suppliers, cutting actual and prospective non-dentist teeth whiteners off from the means of doing business in North Carolina.<sup>37</sup> The Board applied this same strategy in sending letters to managers of malls stating that teeth whitening by non-dentists is unlawful, and asked that the malls not lease to these businesses.<sup>38</sup> As a result, some operators of commercial properties concluded that they should

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<sup>33</sup>Tab 62 (December 2007).

<sup>34</sup>Tab 62 (compilation of C&D Orders).

<sup>35</sup>Recipients: Tab 89; Tab162, 347, Board: Tab 41; Tab 42; Tab91; Tab9, NCBoard52-54.

<sup>36</sup>Tab 41; Tab 9, NCBoard 52-54.

<sup>37</sup>Tab 62 (CX100).

<sup>38</sup>Tab 7 (CX203) (to mall: “It is our information that the teeth whitening services offered at these kiosks are not supervised by a licensed North Carolina dentist. Consequently, this activity is illegal”); Tab 7 (CX204); Tab 7 (CX205).

terminate and cease entering into leases with non-dentists intent on operating teeth whitening facilities in malls. The Board has acknowledged that it did not believe that commercial property owners would be violating the law by leasing space to non-dentist teeth whiteners.<sup>39</sup> Rather, the Board's effort was, again, part of an extra-judicial campaign to deny actual and potential non-dentist teeth whiteners the means to conduct their businesses.

In addition, the Board contacted the North Carolina Cosmetology Board to enlist its assistance in stamping out this competition. REDACTED

This action also resulted in the closure of non-dentist operations.<sup>41</sup>

The views of the Board and Board members on what constitutes unlawful teeth whitening have varied among members and over time.<sup>42</sup> At its strictest, the Board may seek to prevent teeth whitening done almost exclusively by the customer; for example, even offering instructions on how to use an OTC product is sufficient to draw a Cease and Desist Letter from

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<sup>39</sup>Tab 83, 262 (Bakewell Dep.).

<sup>40</sup>Tab 62 (CX50, CX56); Tab 18.

<sup>41</sup>Tab 62 (CX50) REDACTED

<sup>42</sup>See, e.g., Tab 73, 89-90 REDACTED

the Board.<sup>43</sup>

Non-dentist operations have closed as a result of the Board's conduct. Furthermore, mall operators are now reluctant to lease space to teeth whitening operations, limiting the growth of this industry. As a result, consumers are deprived of a less expensive alternative to dentist-provided teeth whitening, and other benefits that would accrue from competition between dentist and non-dentist providers.

### III. STANDARD FOR PARTIAL SUMMARY DECISION

Commission Rule 3.24 provides that "any party ... may move ... for a summary decision in the party's favor upon all or any part of the issues being adjudicated." 16 C.F.R. § 3.24(a)(1). Rule 3.24 further provides that if the Commission determines that there is no genuine issue as to any material fact regarding liability or relief, it shall issue a final decision and order. 16 C.F.R. § 3.24(a)(2).

When a motion for summary decision is made and adequately supported, "a party opposing the motion may not rest upon the mere allegations or denials of his or her pleading; the response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue of fact for trial." 16 C.F.R. §3.24(a)(3). While "reasonable" inferences are drawn in favor of the non-moving party, the party opposing summary decision is required to raise more than "some metaphysical doubt." *Realcomp II Ltd*, No. 9320, 2007 FTC LEXIS 67, at \*11 (May 21, 2007) (citation omitted). The Commission has explained that "[t]he

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<sup>43</sup>Tab3 (Admissions 9-10).

mere existence of a factual dispute will not in and of itself defeat an otherwise properly supported motion for summary judgment. A *material* fact is a fact which might affect the outcome of a suit because of its legal import.” *Trans Union Corp.*, 118 F.T.C. 821, 839 (1994) (citations omitted). Partial summary judgment with respect to an affirmative defense, such as the state action defense, is governed by the same standard. *Hizel v. Browning & Ferris Indus.*, 600 F. Supp.161, 164 (D. Co. 1985) (granting “plaintiffs’ motion for partial summary judgment on the issue of the *Parker* state action exemption”). If the non-moving party fails to produce the requisite evidence, the rule “mandates the entry” of an order. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

Because the state action doctrine provides an exemption from the antitrust laws, it is disfavored. *FTC v. Ticor Title Insurance Co.*, 504 U.S. 621, 636 (1992). Like other exceptions to the antitrust laws, the state action defense must be narrowly construed. *City of Lafayette v. Louisiana P&L Co.*, 435 U.S. 389, 398 (1978). Complaint Counsel’s motion is “accompanied by a separate and concise statement of the material facts as to which [Complaint Counsel] contends there is no genuine issue for trial.” *See* 16 C.F.R. §3.24(a)(1). On these facts which are not reasonably contestable, as a matter of law, the state action doctrine does not exempt the Board’s exclusionary conduct. Accordingly, Complaint Counsel is entitled to summary decision dismissing the Board’s state action affirmative defense.

**IV. THE REQUIREMENTS OF THE STATE ACTION DEFENSE DEPEND UPON THE IDENTITY OF THE DECISION-MAKER; THE TWO-PRONG *MIDCAL* STANDARD IS APPLICABLE TO A FINANCIALLY INTERESTED STATE BOARD**

- A. The State Action Doctrine Provides For Three Modes Of Review; Private Anticompetitive Activity Is Shielded From Liability Only When The Restraint Is Both Sufficiently (i) Authorized and (ii) Supervised By The State**



The state action doctrine limits the reach of the antitrust laws, in order to safeguard the traditional role of the states in regulating commerce “in the interest of the safety, health, and well-being of local communities.”<sup>44</sup> There are three distinct modes of state action review, depending upon the identity of the decision-maker. Supreme Court cases distinguish among: (i) the decisions of the state as sovereign, (ii) the decisions of “public” actors that are subordinate to and take their orders directly from the highest levels of state government, and (iii) the decisions of “private” actors, a term which, as discussed *infra*, includes a state board consisting of and representing financially interested persons.

The state action doctrine originated with the Supreme Court's decision in *Parker v. Brown*, 317 U.S. 341 (1943). In that case, the Supreme Court upheld California's Agricultural Prorate Act against a Sherman Act challenge, although the legislation clearly restricted competition among agricultural commodity growers. The Court examined the Sherman Act and its legislative history, and held that when an anticompetitive restraint is deemed a direct act of the state as sovereign, it is per se exempt from antitrust scrutiny.<sup>45</sup> The case law is quite clear that the actions of a state legislature and of a state's highest court are those of the state acting as sovereign, and are covered by the state action doctrine without need for further inquiry.<sup>46</sup>

The second category of review applies to public entities that are subordinate to the top levels of state government, such as municipalities and state agencies. Restraints imposed by these bodies are not deemed to be the acts of the state as sovereign, and thus do not receive an

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<sup>44</sup>See *Parker*, 317 U.S. at 362.

<sup>45</sup>*Id.* at 352.

<sup>46</sup>*Id.* at 350-52; *Bates v. State Bar of Arizona*, 433 U.S. 350, 359-60 (1977).

absolute antitrust exemption. Instead, the decisions of these public entities are generally exempt from antitrust liability if and only if the entity acts pursuant to a clearly articulated and affirmatively expressed state policy to displace competition with regulation.<sup>47</sup> The state's authorizing statute need not explicitly provide for the displacement of competition. However, the displacement must be, at least, “the ‘foreseeable result’ of what the statute authorizes.” *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 373 (1991) (quoting *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 42 (1985)). That is, the state must “clearly contemplate” the anticompetitive conduct.<sup>48</sup> What is contemplated here is an antitrust exemption for municipalities and other neutral decision-makers, as opposed to private, self-interested decision-makers, such as a trade association or industry cartel.

Finally, in a series of cases culminating in *Midcal*, the Court instructed that the state action doctrine may also shield the conduct of private parties, but under more stringent conditions. Under *Midcal*, the anticompetitive conduct of private parties is exempt from the antitrust laws only if (1) the parties are acting pursuant to a “clearly articulated and affirmatively expressed” state policy to displace competition, and (2) the conduct is “‘actively supervised’ by the State itself.”<sup>49</sup>

As the Court instructed in *Parker*: “a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring their action is lawful.”<sup>50</sup>

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<sup>47</sup>*Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 40, 45 (1985).

<sup>48</sup>*Id.* at 42.

<sup>49</sup>*Midcal*, 445 U.S. 97, 105 (quoting *Lafayette*, 435 U.S. at 389).

<sup>50</sup>371 U.S. at 351.

Instead, as the Court explained in *Ticor*, “while a State may not confer antitrust immunity on private persons by fiat, it may displace competition with active supervision if the displacement is both intended by the State and implemented in its specific details.”<sup>51</sup> Thus, the *Midcal* test is “directed at ensuring that particular anticompetitive mechanisms operate because of a deliberate and intended state policy.”<sup>52</sup>

*Midcal*’s active supervision test “stems from the recognition that ‘[w]here a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State.’”<sup>53</sup> The Supreme Court has made clear that the standard for active supervision is a rigorous one. Active supervision “requires that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy.”<sup>54</sup>

The Supreme Court has not expressly delineated the dividing line, for state action purposes, between private actors (requiring both authorization and supervision) and public actors (authorization required but not supervision). In order properly to characterize an antitrust defendant, it is necessary to examine the factors and criteria that the Supreme Court has relied upon in its state action decisions.

**B. A Financially Interested State Board Is Properly Considered A Private Actor Under The State Action Doctrine, And Its Restraints Must Be Actively Supervised By The State**

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<sup>51</sup>504 U.S. at 633.

<sup>52</sup>*Id.* at 636.

<sup>53</sup>*Patrick*, 486 U.S. at 100 (quoting *Town of Hallie*, 471 U.S. at 47).

<sup>54</sup>*Patrick*, 486 U.S. at 101.

The Supreme Court distinguishes public actors from private actors based upon the decision-making incentives of the actor. A private actor is one that has, or represents those who have, a financial interest to restrain competition. The private actor is not fully trusted to promote the policies of the state; thus, supervision is required. “Where a private party is engaging in anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State.”<sup>55</sup>

In particular, Supreme Court precedent teaches that for state action purposes, a state agency is considered a private actor - in need of independent state supervision - when the agency or its controlling members have a financial interest in the market that is being restrained. For example, *Goldfarb* was an antitrust suit against the Virginia State Bar Association (a combination of attorneys) for issuing an ethical opinion requiring attorneys to adhere to a minimum fee schedule. The Bar was a statutorily designated state agency granted authority by the state to issue ethical opinions (prong 1 was satisfied). Still, the Court held the state action exemption inapplicable. It reasoned: “The fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members.”<sup>56</sup> The Court indicated that the Bar's anticompetitive price restraint would have been immune if it had been approved by the Virginia Supreme Court (prong 2).<sup>57</sup>

The Court had previously recognized the need for independent supervision of a

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<sup>55</sup>*Hallie*, 471 U.S. at 47.

<sup>56</sup>*Goldfarb*, 421 U.S. at 791.

<sup>57</sup>*Id.* at 790-91.

financially interested governmental actor in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962). The defendant was a corporation appointed as an agent of the Canadian government, and delegated authority to purchase and allocate vanadium products to Canadian industries (prong 1). The Court reversed the lower court holding that defendant's exercise of its governmental authority to exclude competitors from selling vanadium was outside the reach of the Sherman Act. The exercise of governmental authority by a firm to exclude its own competitors was judged to be "private commercial activity."<sup>58</sup> The Court explained that defendant's efforts to monopolize the production and sale of vanadium would have been immune if they had been approved by the Canadian Government (prong 2).<sup>59</sup>

In two subsequent decisions, *Bates v. Arizona* and *Hoover v. Ronwin*, 466 U.S. 588 (1984), the Court ruled in accordance with this approach. In both cases the Arizona State Supreme Court supplied the disinterested oversight that was lacking in *Goldfarb* and *Continental Ore*. And in both these cases, the state action defense was upheld.

In *Bates*, the plaintiff challenged ethics rules against lawyer advertising that the plaintiff attributed to the state bar. Significantly, no sanction could be imposed without prior review and approval by the Arizona Supreme Court. 433 U.S. at 361. This oversight by a disinterested state actor was sufficient to establish the state action defense. *See id.* at 362 ("Our concern that federal policy is being unnecessarily and inappropriately subordinated to state policy is reduced

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<sup>58</sup>370 U.S. at 706-07.

<sup>59</sup>*Id.* at 706. *Cf. Parker*, 317 U.S. at 347 (program administration "subject to the approval of the Director of Agriculture"); *Southern Motor Carriers Rate Conference, Inc. v. U.S.*, 471 U.S. 48, 62 (1985) ("State Public Service Commissions actively supervise the collective ratemaking activities"); *Ticor*, 504 U.S. at 628 (State Insurance Departments can supply active supervision).

in such a situation; we deem it significant that the state policy is so clearly and affirmatively expressed and that the State's supervision is so active.”); *Lafayette*, 435 U.S. at 410 (explaining that in *Bates* “the State's policy was actively supervised by the State Supreme Court as the policymaker”).

In *Ronwin*, plaintiff challenged the Bar's decision to deny him a license to practice law in Arizona. The Court found that, as in *Bates*, the Arizona Supreme Court was ultimately responsible for the alleged anticompetitive conduct. The Court explained that “*Goldfarb* involved procedures that were not approved by the State Supreme Court or the state legislature. In contrast, petitioners here performed functions required by the Supreme Court Rules and that are not effective unless approved by the court itself.”<sup>60</sup>

Thus, the Supreme Court has extended state action exemption to financially interested actors only where the restraint is (i) authorized by the state as sovereign, and (ii) actively supervised by an independent, disinterested state actor. The Board's rebuttal – the claim that prong 2 is always inapplicable to a state agency is contrary to *Goldfarb* and other Supreme Court decisions discussed previously, and premised on a brief footnote in *Town of Hallie*, 471 U.S. at 46 n.10. This is a feeble foundation; indeed, the *text* of *Hallie* actually supports Complaint Counsel's analysis.

The central question in *Hallie* was whether active supervision is required when the actor asserting the state action defense is a municipality. The Court analyzed this question by assessing the incentives faced by a municipality, and hence the risk that the municipality would act in contravention of state policy. The Court concluded that active supervision by the state is

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<sup>60</sup>466 U.S. at 572 n.20.

generally not required where the actor is a municipality – for the reason that a municipality (unlike a private actor) can be presumed to operate in the public interest.

Where a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State. Where the actor is a municipality, there is little or no danger that it is involved in a private price-fixing arrangement. The only real danger is that it will seek to further purely parochial public interests at the expense of more overriding state goals. This danger is minimal, however, because of the requirement that the municipality act pursuant to a clearly articulated state policy. Once it is clear that state authorization exists, there is no need to require the State to supervise actively the municipality's execution of what is a properly delegated function.<sup>61</sup>

What underlies the Court's judgment that the municipality can be trusted to act in the public interest is not its governmental status per se, but rather the fact that once it is given clear direction by the state, the municipality is institutionally constructed so as to follow that direction; it has no conflicting economic incentives that might undermine or limit its willingness or ability to carry out the state's mandate. Such confidence cannot be vested in a commercial participant in the market because a commercial participant has conflicting financial interests. Confirming this point in a subsequent case, the Court offered this qualification to the rule of *Hallie*: "immunity does not necessarily obtain" when the city "acts ... as a commercial participant in a given market."<sup>62</sup> Here again, the lesson is that financially interested actors are apt to pursue their private interests, and hence the antitrust laws will require active supervision.

Unable to distinguish this case from the holding or logic of *Hallie* and other Supreme Court state action cases, Respondent relies upon this footnote in *Hallie*: "In cases in which the

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<sup>61</sup>471 U.S. at 47.

<sup>62</sup>*Omni*, 499 U.S. at 374.

actor is a state agency, it is likely that active state supervision would also not be required, although we do not here decide that issue.”<sup>63</sup> In the Board’s view, this means that even an industry-dominated state agency is free from the active supervision requirement. This interpretation runs directly contrary to the incentives-based analysis in *Hallie*. Equally important, it ignores language in the opinion clarifying the intended meaning of the term “state agency.” In the paragraph immediately preceding footnote 10, the *Hallie* Court discusses *Goldfarb* (where the Court had denied exemption to a bar association/state agency). The *Hallie* Court states, “*Cantor*<sup>64</sup> and *Goldfarb* concerned private parties – not municipalities – claiming the state action exemption. This fact distinguishes those cases because a municipality is an arm of the State.”<sup>65</sup> Thus, the Court characterized the *Goldfarb* state agency, which was dominated by competing attorneys, as a “private party.” The “state agency” reference in the succeeding footnote could not have included *Goldfarb-like* entities.

Of course, the vast majority of state agencies are comprised of members with little or no financial interest in the outcome of their decisions, and who are accountable to the public at large, not the regulated. It was these disinterested entities to which the Supreme Court was referring in footnote 10.<sup>66</sup> Thus, Respondent's effort to invoke *Hallie* fails.

Professor Elhauge reviews the Supreme Court state action case law, and concludes that

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<sup>63</sup>*Id.* at 46 n.10; *South Carolina State Board of Dentistry*, 136 F.T.C. 229, 248 (2004).

<sup>64</sup>*Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976).

<sup>65</sup>*Hallie*, 471 U.S. at 45.

<sup>66</sup>*Cf. Patrick*, 486 U.S. at 99 n.4 (post *Hallie*, Court declined to find that conduct before a state Board of Medical Examiners was entitled to state action exemption).



“financially interested action is always ‘private action’ subject to antitrust review.”<sup>67</sup> Where a governmental entity consists of financially interested actors, the state action defense is available only where active supervision is demonstrated.

The financial interest test explains every Supreme Court antitrust case that has struggled with the distinction between state and private action. In each of the cases finding antitrust immunity, a financially disinterested, politically accountable actor controlled and made a substantive decision in favor of the terms of the restraint before it was imposed on the market. In each of the cases rejecting antitrust immunity, the decision was made by a financially interested actor.<sup>68</sup>

The leading antitrust treatise, Areeda & Hovenkamp’s *Antitrust Law*, reaches the same conclusion: “Without reasonable assurances that the body is far more broadly based than the very persons who are to be regulated, outside supervision seems required.”<sup>69</sup> The treatise advances the following recommendation: “We would presumably classify as ‘private’ any organization in which a decisive coalition (usually a majority) is made up of participants in the regulated market .... [T]he presumption should become virtually conclusive where the organization’s members making the challenged decision are in direct competition with the plaintiff and stand to gain from the plaintiffs discipline or exclusion.”<sup>70</sup>

Several lower court cases also require financially interested governmental actors to satisfy prong 2 in order to succeed with a state action defense. In *Washington State Electrical Contractors Ass’n, Inc. v. Forrest*, 930 F.2d 736, 737 (9th Cir. 1991), the Ninth Circuit

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<sup>67</sup> *Antitrust Process* at 689.

<sup>68</sup> *Antitrust Process* at 746.

<sup>69</sup> *Antitrust Law*, ¶227a at 500.

<sup>70</sup> *Antitrust Law*, ¶227b at 501.

concluded that the Washington Apprenticeship and Training Council “may not qualify as a state agency” because it “has both public and private members, and the private members have their own agenda which may or may not be responsive to state labor policy.” Then Judge Breyer held that active supervision was required where the “‘anticompetitive’ Board activities are ‘essentially’ those of private parties . . . [which] depends upon how the Board functions in practice, and perhaps upon the role played by its members who are private pharmacists.” *FTC v. Monahan*, 832 F.2d 688, 690 (1st Cir. 1987). *Cf. Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 501-02 (1988) (under the closely related *Noerr-Pennington* doctrine, factors showing a private, rather than public, restraint include that: “the restraint is imposed by persons unaccountable to the public ... many of whom have personal financial interests in restraining competition”).

Decisions of the Fourth Circuit, where the Board is located, likewise support the need for active supervision where those who are being regulated are also doing the regulating. *See Asheville Tobacco Board of Trade v. FTC*, 263 F.2d 502, 510 (4th Cir. 1959) (financially interested Tobacco Board not entitled to state action defense). The Fourth Circuit adhered to its *Asheville* decision when, 15 years later, it decided *Goldfarb v. Virginia State Bar*, 497 F.2d 1, 11 (4th Cir. 1974) (“State Bar, which is designated by statute as the controlling state agency, is composed of those to be regulated. It is doubtful that the State Bar, standing alone, could be viewed as the type of independent regulatory agency called for in *Parker*”), *rev'd on other grounds*, 421 U.S. 773 (1975). The Fourth Circuit *Goldfarb* decision explained that “*Asheville* said that a state could allow those persons subject to controls to participate in the regulation,

provided their activity is adequately supervised by independent state officials.”<sup>71</sup>

We acknowledge that the lower courts are not uniform in their treatment of antitrust claims against state agencies. Some courts have concluded that whether, for state action purposes, a state board should be considered a private entity or a public entity depends upon a laundry list of factors “such as the establishment of the entity to serve a governmental purpose, tax exemption, bond authority, power of eminent domain, nonprofit status, and public visibility.” FTC Office of Policy Planning, Report of the State Action Task Force 15-19, 37-40 (Sept. 2003) (“FTC Staff Report”).<sup>72</sup> In this regard, these cases are poorly reasoned. The litany of factors is not present in Supreme Court precedent and is inconsistent with the underlying rationale for the state action defense. These factors “are not necessarily probative of whether there is a danger that private actors/members will pursue their own economic interests rather than the state's policies.” FTC Staff Report at 38. For example, relying in part on the *Hallie* footnote, *Hass v. Oregon State Bar*, 883 F.2d 1453 (9th Cir. 1989), held that factors such as openness, public notice and ethical requirements “leave no doubt that the Bar is a public body, akin to a municipality for the purposes of the state action exemption.”<sup>73</sup> On this basis, the court concluded that there was no need for the bar to satisfy the active supervision requirement to

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<sup>71</sup>497 F.2d at 11.

<sup>72</sup>See, e.g., *Hass v. Oregon State Bar*, 883 F.2d 1453 (9th Cir. 1989); *Earles v. State Board of Certified Public Accountants of Louisiana*, 139 F.3d 1033, 1041 (5th Cir. 1998); *Bankers Insurance Co. v. Florida Residential Property & Casualty Joint Underwriting Ass'n*, 137 F.3d 1293 (11th Cir. 1998); *Gambrel v. Kentucky Board of Dentistry*, 689 F.2d 612 (6th Cir. 1982); *Brazil v. Arkansas Board of Dental Examiners*, 593 F. Supp. 1354, *aff'd*, 759 F.2d 674 (1985).

<sup>73</sup>883 F.2d at 1460.

qualify under the state action exemption.<sup>74</sup> But the *Hass* factors ignore the analysis that animates the *Hallie* decision and offer little assurance that the defendant's interests are sufficiently aligned with those of the state that it might be trusted to act to further state policy. Thus, while the *Hass* factors may signal a similarity to a municipality in certain procedural respects, they do not confer governmental status for purposes of the state action doctrine. Accordingly Professor Hovenkamp properly favors the dissent's analysis in *Hass* over the majority opinion:

In effect, the dissenter saw a legally approved cartel of lawyers, rather than a state agency acting in the public interest. Far from demonstrating responsiveness to the public interest, the three non-lawyer members of the Board highlighted the potential domination of the Board by 12 lawyers. The bar is, at least in part, a trade association controlled by its members who are not indifferent to their own well-being. By contrast, most state agencies are not immediately controlled by persons currently engaged in the activities being regulated, and city councils consist of elected officials who are directly responsible to the voters. We are therefore inclined to agree with the dissent.<sup>75</sup>

In short, "antitrust law embraces the principle that financially interested parties cannot be trusted to restrain trade in ways that further the public interest."<sup>76</sup> Open meetings, written decisions, and ethical rules are not a sufficient check on abuse.<sup>77</sup> Where the decision makers are interested parties, the conduct must be actively supervised by the state – or the state action defense fails.

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<sup>74</sup>*Id.* at 1461.

<sup>75</sup>*Antitrust Law*, ¶227a. Other circuit court decisions (*supra*) use reasoning similar to the *Hass* majority; as a result, Professor Hovenkamp's critique applies equally to those cases.

<sup>76</sup>*Antitrust Process* at 696.

<sup>77</sup>Interestingly, the relevant Board decisions are made outside the public eye. Tab 3 (Admission 44).

**V. THE BOARD IS A PRIVATE ACTOR BECAUSE ITS MEMBERS HAVE A FINANCIAL INTEREST IN EXCLUDING NON-DENTISTS AND RESTRAINING COMPETITION**

Is teeth whitening the exclusive domain of licensed dentists in North Carolina, or may non-dentists also offer this service? Dentists, and ergo the Board, have an obvious and undeniable financial interest in how this question is resolved. As discussed above, teeth whitening is a lucrative market for dentists, and its full potential has not yet been realized. Some North Carolina dentists are already earning substantial revenues by whitening teeth,<sup>78</sup> others are potential entrants. Elementary economics – and common sense – tell the Commission that for dentists, the exclusion of non-dentist competitors may result in the Board’s constituents obtaining higher prices, a greater volume of teeth whitening procedures, and perhaps a greater volume of other dental procedures as well.<sup>79</sup> The Board is controlled by dentists and elected by dentists. Accordingly, the Board has a financial interest in the exclusion of non-dentists, similar to the combination of lawyers in *Goldfarb*, 421 U.S. at 791 (Bar has incentive to “foster anticompetitive practices for the benefit of its members”), and similar to the combination of

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<sup>78</sup> REDACTED

<sup>79</sup>*FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 456 (1986):

The Commission’s finding that “[in] the absence of ... concerted behavior, individual dentists would have been subject to market forces of competition, creating incentives for them to ... comply with the requests of patients’ third party insurers,” 101 F.T.C. at 173, finds support not only in common sense and economic theory, upon both of which the FTC may rely, but also in record documents, including newsletters circulated among Indiana dentists, revealing that Indiana dentists themselves perceived that unrestrained competition tended to lead their colleagues to comply with the insurers’ requests for x-rays.

electrical contractors in *Forrest*, 930 F.2d at 737.<sup>80</sup>

The fact that the Board is composed of professionals is no defense to antitrust liability, nor is it reason to trust the motivations of the Board. This is widely understood and woven into antitrust case law. The Supreme Court invariably and without preamble recognizes that professional associations are economic actors who protect their own financial interest given the opportunity. See *Goldfarb and FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990), with respect to lawyers, *National Society of Professional Engineers v. U.S.*, 435 U.S. 679 (1978), with respect to engineers, *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 350-351 (1982), with respect to physicians, *Gibson v. Berryhill*, 411 U.S. 564 (1973), with respect to optometrists, and, of particular interest here, *IFD* with respect to dentists. Appellate courts, as well as the Commission, have consistently recognized the same simple truth - that the rules of competition affect the financial interests of professionals.<sup>81</sup>

Dentists, like all professions, have a stake in protecting their stream of income. Notwithstanding continued claims for a “learned professions” exception to the antitrust laws, the courts have recognized that professionals routinely act in their own self-interest. This understanding is well-founded; antitrust jurisprudence is replete with cases in which professionals act in concert to alter the terms of competition, while professing concern only for

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<sup>80</sup>As *Goldberg* indicates, the fact that recent Board members themselves have slight direct financial interest in teeth whitening is of little moment.

<sup>81</sup>Appellate court cases include *Kreuzer v. American Academy of Periodontology*, 735 F.2d 1479 (D.C. Cir. 1984); *Wilk v. AMA*, 719 F.2d 207 (7<sup>th</sup> Cir. 1983) (doctors), and *Monahan* (pharmacists). Commission cases include *Massachusetts Board of Registration in Optometry*, 110 F.T.C. 549 (1988) and *South Carolina State Board of Dentistry*, as well as numerous doctor boycott cases.

the public. The courts have declined to create an exception for professionals engaging in anticompetitive activity.

Here, the Dental Board is acting in an arena in which dentists have a financial interest, and the antitrust laws must and do apply to the Board's actions.

**VI. THE BOARD'S STATE ACTION DEFENSE IS WITHOUT MERIT AND SHOULD BE DISMISSED**

**A. The State Of North Carolina Has Not Clearly Articulated A Policy Of Permitting The Board To Exclude Non-Dentists**

The Board's issuance of Cease and Desist Orders to non-dentists alleged to be engaged in the unlawful practice of dentistry is not the "foreseeable result" of a state decision to displace competition, but rather is inconsistent with the statutory scheme created by the North Carolina legislature. Therefore, the *Midcal* prong 1 requirement is not satisfied.

The Commission's decision in *South Carolina State Board of Dentistry* reviews the case law defining the prong 1, clear articulation test. While "express authorization" for each anticompetitive action is not required, the *post-Midcal* cases insist that the "anticompetitive action ... have a significant nexus to, or degree of 'foreseeability' stemming from, an identifiable state policy." An anticompetitive action is not "foreseeable" unless it would "'ordinarily or routinely result' from the authorizing legislation in order to ensure that there was a deliberate and intended state policy." 138 F.T.C. at 251-52 (quoting FTC Staff Report at 33-34). In cases "involving interested decision makers, the antitrust court rightfully insists on clarity of intent to displace the antitrust laws, with ambiguities resolved against displacement." *Antitrust Law*, ¶225b6.

The Board's claim that its anticompetitive actions meet the foreseeability test fails for

one simple reason. The requisite legislative intent that the Board itself displace competition between dentists and non-dentists through its own decision-making process is plainly absent. The Dental Act does not grant the Board the right to determine whether or when someone is engaged in the unauthorized practice of dentistry; instead, that power is left to the courts. The Board has been granted only the authority to petition the courts to address this issue. Thus, pursuing potentially unauthorized practitioners through the courts would be an ordinary consequence of the Dental Act, and would satisfy prong one of *Midcal*. The legislative scheme affords anyone accused of the unauthorized practice of dentistry with due process and other attendant guarantees of fairness before an unbiased decision-maker. The court would determine whether any teeth whitening practitioner is violating the Dental Act.

However, the Board's actions go far beyond appropriately petitioning the courts, and far beyond its authority. The statute does not contemplate that the Board will itself police or exclude unauthorized practitioners. The statute does not authorize the Board to issue Cease and Desist orders or otherwise to direct a non-dentist to exit the market. In fact, the Board admits that the statute does not provide this authority; in its Response (¶9), the Board acknowledges it must obtain "either a court order or the cooperation of a district attorney in a criminal conviction and a court judgment" and, in fact, the Board has initiated both civil and criminal prosecutions.

The Board does not even claim that the statute *implicitly* endows the Board with the power to issue cease and desist orders. Every recent Board member admitted that the Board lacks authority to order an unlicensed dentist to cease performing teeth whitening.<sup>82</sup> Nor does

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<sup>82</sup>See, e.g., REDACTED



the Board have the authority to encourage persons who provide facilities and supplies to refuse to deal with non-dentist teeth whiteners, or to enlist other agencies. such as the Board of Cosmetology, to facilitate the Board's campaign of exclusion. Rather, the Board's cease and desist orders and other exclusionary tactics are its own innovation. Such *ultra vires* actions are not foreseeable; the legislature would not "ordinarily" expect a state board to so blatantly exceed its authority. The legislature would not "ordinarily" expect a state board to arrogate to itself authority that the legislature has vested with the courts.

The Board may claim that there is a factual dispute about whether its letters constitute Orders by the Board. However, the evidence on this point is sufficient to support the grant of summary decision. These documents speak for themselves, and a trial is not necessary to ascertain their meaning. The documents state that they are "Cease and Desist Orders," the body of the letters orders the recipients to cease and desist, and the Board essentially admitted as much when REDACTED

The Supreme Court has recognized that contemporaneous documents such as the letters have more probative value than post-hoc testimony: "[T]he witnesses denied that they . . . had agreed to do the things which in fact were done. Where such testimony is in conflict with contemporaneous documents we can give it little weight . . ." *United States v.*

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<sup>83</sup>Tab 41 (Counsel Bakewell); Tab9, NCBoard52 (Executive Director Bobby White). *See also* Tab 42, 002 REDACTED Tab91(CX347) (recipient viewed as Order).

*United States Gypsum Co.*, 333 U.S. 364, 394-96 (1948). After the fact statements by Board members that are inconsistent with the contemporaneous evidence are not material; at most, such statements raise a “metaphysical doubt.” The Commission need not wait for “credibility” findings to conclude that the documents are not suggestions, requests or notices, but rather they are as they appear: Orders to Cease and Desist.

In summary, because the Board has a financial interest in impeding competition, prong 1 of the state action doctrine requires that the Board’s authority to engage in anticompetitive conduct must be particularly clear. The legislature vested this authority with the courts, not the Board, and the Board went beyond its grant of authority by issuing cease and desist orders and engaging in other anticompetitive conduct directed against non-dentist teeth whitening operators. Thus, the Board is unable to meet prong one of the *Midcal* test.

**B. The State Of North Carolina Does Not Actively Supervise The Exclusionary Conduct Engaged In By The Board**

Active supervision requires “government review of specific decisions of private parties on their substantive merits, not merely on their procedural adequacy.”<sup>84</sup> There must be a “pointed re-examination” of the conduct.<sup>85</sup> As the *Patrick* Court held, “[t]he mere presence of some state involvement or monitoring does not suffice. [State officials must] have and *exercise* power to review *particular* anticompetitive acts of private parties and disapprove those that fail to accord with state policy.”<sup>86</sup> Under this standard, the Board is not actively supervised.

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<sup>84</sup>*Areeda & Hovenkamp*, Antitrust Law, ¶226a.

<sup>85</sup>*Midcal*, 445 U.S. at 106.

<sup>86</sup>486 U.S. at 101 (emphasis added).

The Board acting alone conceived of an extra-judicial strategy to exclude non-dentists; acting alone it identified the alleged violators; and acting alone it implemented the strategy. The Board issued Cease and Desist letters, and engaged in a range of other exclusionary conduct, entirely independently: without the approval of, without review by, and without consultation with any other governmental entity. As to all these points, there is no factual dispute.

The relevant issue is not whether the Board is in some abstract sense subject to independent governmental oversight. What is required is actual, active supervision by a financially disinterested state actor of the restraints challenged in the Complaint. The reality is that no government body provides any supervision, let alone a prior “pointed reexamination” of the Board’s decisions. The requirement that the Board submit annual reports to the Secretary of State, the Attorney General and the Joint Legislative Administrative Oversight Committee falls woefully short in terms of substance and timing.<sup>87</sup> The Ethics Commission does not have any authority to review decisions - it checks for financial conflicts, but not the type at issue here.<sup>88</sup>

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<sup>87</sup>See, e.g., N.C. Gen. Stat. §93B-2;§120-70.101; see, e.g., Tab 6 (CX85 (2005 Annual Report), CX86 (2006); CX88 (2007); CX91 (2009)). The report includes information about the Dental Board’s its meetings, examinations, hearings, investigations, and accomplishments. Tab6 (CX90) (February 2010 letter to North Carolina Governor). The report provides no information about actions against non-dentist teeth whiteners. Similarly, the audited financial statement that the Board files with the Secretary of State, which reports the Board’s balance sheet, cash flow statement, and key changes in general fixed assets, provides no information about actions against non-dentist teeth whiteners. Tab45 (report for year ending December 31, 2009). See also Tab83, 90 (former Board Counsel Bakewell Dep.) REDACTED

As a result, none of these entities provide any supervision, let alone a prior pointed reexamination, of Dental Board decisions or how to apply the Dental Act.

<sup>88</sup>Tab86 (Declaration of Perry Newson, Executive Director of the North Carolina State Ethics Commission).

There exists no mechanism where the state can “play a substantial role in determining the specifics of the economic policy.”<sup>89</sup> This case presents even less favorable facts for the Board than those in *Ticor* or the Commission’s decision in *Kentucky Household Goods Carrier Ass’n*, 139 F.T.C. 404 (2005): unlike in those cases, here there is not even an apparatus in place that could provide active supervision.

The lack of real-time supervision by the state dooms Respondent’s effort to claim the state action defense. But even assuming *arguendo* that the legislature on occasion reviewed a Board decision and had the power to reverse it, after-the-fact oversight is not active supervision, and potential action by the legislature after competition has been harmed is not sufficient. As discussed in *Lafayette*, “Mulcted consumers and unfairly displaced competitors may always seek redress through the political process. In enacting the Sherman Act, however, Congress mandated competition . . . . It did not leave this fundamental national policy to the vagaries of the political process . . . .” 435 U.S. at 406. *See also 324 Liquor Corp. v. Duffy*, 479 U.S. 335 (1987) (that the legislature frequently considered amending statute authorizing vertical price restraints does not constitute active supervision).

“State review should immunize a restraint only when the review is disinterested, substantive, and provided before the restraint becomes effective.” *Antitrust Process* at 716. Each *individual* decision must be reviewed by a state agency, which must have the authority to overrule a *specific* decision. *Antitrust Law* ¶226a. Nothing approaching this occurs with respect to Board decisions.

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<sup>89</sup>*Ticor*, 504 U.S. at 635.

**VII. CONCLUSION**

The Commission should enter an order dismissing the Board's state action defense.

Respectfully submitted,

s/ Richard B. Dagen

Richard B. Dagen  
601 New Jersey Ave, NW  
Washington, D.C.  
(202) 326-2628  
rdagen@ftc.gov

*Counsel Supporting the Complaint*

November 8, 2010

**CERTIFICATE OF SERVICE**

I hereby certify that on November 8, 2010, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

Donald S. Clark  
Secretary  
Federal Trade Commission  
600 Pennsylvania Ave., NW, Rm. H-159  
Washington, DC 20580

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

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

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

Noel Allen  
Allen & Pinnix, P.A.  
333 Fayetteville Street  
Suite 1200  
Raleigh, NC 27602  
nla@Allen-Pinnix.com

*Counsel for Respondent  
North Carolina State Board of Dental Examiners*

**CERTIFICATE FOR ELECTRONIC FILING**

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

November 8, 2010

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



**UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION**

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In the Matter of )

NORTH CAROLINA STATE BOARD OF )  
DENTAL EXAMINERS, )

Respondent. )

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**PUBLIC**

DOCKET NO. 9343

**COMPLAINT COUNSEL'S RULE 3.24 SEPARATE STATEMENT OF MATERIAL  
FACTS TO WHICH THERE IS NO GENUINE ISSUE**



Pursuant to Rule of Practice 3.24, and in support of its motion for summary decision, Complaint Counsel submits this statement of material facts as to which there is no genuine dispute.

**A. The North Carolina State Board of Dental Examiners**

1. The North Carolina State Board of Dental Examiners (“Board”) consists of six practicing dentists, a hygienist, and a consumer representative. Dagen Decl. Tab 4, §90-22(b) (“Dental Act”).<sup>1</sup>

2. Of the eight Board members, only the consumer representative is selected by North Carolina public officials. *Id.*; see also Tab 72, REDACTED

3. The dentist Board members are not elected by the citizens of North Carolina, they are elected by other dentists licensed in North Carolina. Tab 4, §90-22(c)(2) (Dental Act).

4. The dentist members of the Board are elected for three year terms and can run for reelection. Several Board members have served two or more terms. *See, e.g.*, Tab 73, { REDAC  
TED  
; Tab 75,  
REDACTED Tab 76, REDACTED

5. Elections can be contested. *See* Tab 4, §90-22© (Dental Act); *see also* Tab 74, REDACTED Tab 73, REDACTED

6. When this occurs, candidates may distribute letters and make speeches discussing their desire to serve North Carolina dentists. Candidates may also announce positions

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<sup>1</sup> “Dagen Decl.” refers to the separately the filed Declaration of Richard B. Dagen, to which all exhibits referred to herein are attached.

on issues that may come before the Board. *See, e.g.*, Tab 73 REDACTED

Tab 74,{ REDACTED

7. The operating budget for the Board comes from license fees paid by North Carolina dentists. *See* Tab 4, §90-30.9 (Dental Act) (Board “is authorized to charge and collect fees established by its rules.”); Tab 73, REDACTED Tab 85, REDACTED

**B. The Dental Act**

8. The Board election criteria and scope of authority is set forth in the Dental Practices Act. Tab 4, §90-22© (Dental Act).

9. Under the Dental Act, the Board has the authority to license and take disciplinary actions against dentists practicing in North Carolina. *Id* at §§ 90-30, 31, 34, 40, 41.

10. The Dental Act also provides the Board with the authority to petition a North Carolina court, either on its own or with the assistance of a District Attorney, to stop violations of the Dental Act, including the unlicensed practice of dentistry. *Id.* at §90-40.1(a); Tab 2, ¶19 (Board Response, filed July 7, 2010).

11. Under the Dental Act, the Board’s only recourse against the unlawful practice of dentistry is to seek relief in a North Carolina court. Tab 4, Chapter 90, Article 2, (Dental Act).

12. The Board has sought civil and criminal relief in North Carolina courts under the Dental Act. *See, e.g.*, Tab 21, CX0073-004 (complaint for declaratory judgment and

injunctive relief against Carmel Day Spa & Salon, filed Jan. 18, 2008); Tab 5 REDACTED

**C. Teeth Whitening Products Available in North Carolina**

13. Hydrogen or carbamide peroxide is the primary whitening agent used in the whitening of teeth. *See* Tab 24, CX0392-002 (American Dental Association (“ADA”) article “Tooth Whitening/Bleaching: Treatment Considerations for Dentists and their Patients,” September 2009). In a water based solution, carbamide peroxide breaks down into hydrogen peroxide and urea, with hydrogen peroxide being the active bleaching agent. Carbamide peroxide contains 35% hydrogen peroxide. Tab 61, ADA54 (Y. Li., Biological Properties of Peroxide Containing Teeth Whiteners, 34 Food and Chem. Tech. 887 (1996)).

14. Hydrogen and carbamide peroxide have used been as mouth-rinses to reduce plaque in individuals with gingivitis and for treatment of periodontal diseases. *Id.* at ADA53.

15. A survey conducted by Discus Dental, a manufacturer of dentist teeth whitening products, revealed that 85% of dental patients want “whiter, brighter smiles.” Tab 4, AAED121 (Discus Dental advertisement, included in a program from the Sixth World Congress of the International Federation of Esthetic Dentistry, hosted by the American Academy of Aesthetic Dentistry (“AAED”), Aug. 2-5, 2009). A study by the American Academy of Cosmetic Dentistry (“AACD”) found that 99.7% adult American respondents believed that a smile is an important social asset, and 74% believed an unattractive smile could hurt a person’s chances for career success. Tab 55, CX0385-003 (AACD Press Release, “Consumer Studies, Can a new smile make you appear more successful and intelligent?”)

16. Currently, there are four broad categories of teeth whitening services available in North Carolina: (1) dentist in-office teeth whitening services; (2) dentist take-home teeth

whitening products; (3) non-dentist teeth whitening services in salons, retail stores, and mall kiosks; and (4) over-the-counter (“OTC”) teeth whitening products.

### 1. Dentist Teeth Whitening

17. Dentist in-office teeth whitening products use a relatively high concentration of hydrogen peroxide, between 15%-50%. *See, e.g.* Tab 10, CX0108-009 (White Science training manual for non-dentist teeth whitening system) (“In-office procedures such as BriteSmile and Zoom use a high percentage of peroxide (up to 40%), which can cause severe tooth sensitivity (zingers).”); Tab 46, NCBOARD7301 (Web page titled, “Tooth Whitening – How Does Bleaching Work and What Does it Cost?,” <http://www.yourdentistryguide.com/teeth-whitening/>) (for in-office treatments, hydrogen peroxide concentration can range from 9-40%); Tab 54, AAED161 (Linda C. Neissen, DMD, Talking with Patients, Tooth Whitening: Why, Who, Where, What, and How, 13-1 Journal of Esthetic and Restorative Dentistry, 80-81 (2001)) (“In-office whiteners use high concentration (15-50% hydrogen peroxide) agents”). Because of this high concentration, dentists usually first apply an isolation dam to the gums to prevent burning. Tab 80, REDACTED *see also* Tab 85, REDACTED The peroxide solution is thereafter painted directly on the teeth, and a curing light is often placed in front of the teeth to activate the bleaching gel or expedite the whitening effect. Tab 80, REDACTED ; *see also* Tab 61 (Sevil Gurgan et al., Different light-activated in-office bleaching systems: a clinical evaluation, 25-6 Lasers in Med. Sci. 817-822 (2009)).

18. Dentist in-office teeth whitening provides results in one to three hours. Tab 63, REDACTED ; Tab 54, AAED 161 (“Talking With Patients, Tooth Whitening: Why, Who, What, Where and How”) (“In-office whiteners usually take about 1-3 hours; the advantage is that the result is immediate,

but, they are often more expensive”); Tab 36, NCBoard4949 (American Academy of Pediatric Dentistry, “Policy on the Use of Dental Bleaching for Child and Adolescent Patients” (revised 2009)) (“Advantages of in-office whitening include . . . rapid results.”).

19. Dentist teeth whitening costs \$300 or more. Tab 78, REDACTED

; Tab 79, REDACTED ; see

also Tab 13, CX53-001-002 (Frequently Asked Questions for Professional Teeth Whitening) (dentist teeth whitening can cost \$400); Tab10, CX0108-008 (White Science training manual for non-dentist teeth whitening system) (“The major drawbacks of ‘in-office’ whitening are price (\$400-\$900”); Tab 62, CX0096-0004 (advertisement from SheShe studio spa).

20. Two of the more popular in-office products are Zoom and Bright Smile, both made by Discus.

## 2. Dentist Take-Home Kits

21. Take-home kits provided by dentists can either be used as a follow-up to the in-office treatment or as the sole whitening service. Tab 54, AAED 161 (“Talking With Patients, Tooth Whitening: Why, Who, What, Where and How”). When used by themselves, take-home products can take days to whiten teeth, and requires the consumer to repeatedly apply peroxide on the teeth. *Id.* (dental take-home kits “will show results after 5-7 days and are recommended for use for two weeks”); *id.* (requires patient to use a “mouth guard which the patient wears at home for several hours each day.”); Tab 13, CX53-002 ( Frequently Asked Questions for Professional Teeth Whitening) (“The only con with custom mouthpieces, is that you have to wear the trays initially for 5 to 10 nights”); Tab 73, REDACTED

22. Take-home kits typically cost hundreds of dollars in part because the dentist

charges to fabricate the custom tray, provide instruction on use, and supply the whitening product and kit. *See* Tab 85, REDACTED ; Tab 81, REDACTED ; Tab 82, REDACTED

### 3. Non-Dentist Teeth Whitening

23. Entrepreneurs offer teeth whitening services in salons, retail stores, and mall kiosks. Typically a non-dentist provider will follow a protocol provided by a teeth whitening manufacturer or distributor. While each protocol is slightly different, all require the operator to provide the customer with literature and answer questions before the procedure begins. *See* Tab 10, CX0108-009 (White Science training manual for non-dentist teeth whitening system); Tab 87, CX0049-056-067 (BriteWhite training manual for non-dentist teeth whitening system). Some non-dentist teeth whiteners will have the customer sign a consent form. Tab 87, CX0049-0053 (consent form). The provider will thereafter: (1) place a bib around the client's neck; (2) don protective gloves; (3) take a tray from a sealed package, which is either pre-filled with peroxide solution or which the operator fills with the peroxide solution, and hand it to the customer, who places the tray into his or her mouth; (4) have the client sit in a "comfortable chair"; (5) adjust the whitening light; and (6) start the timer. At the end of the procedure, the customer will remove the tray and hand to the provider, who disposes it. *See* Tab 10, CX0108-010-012 (White Science application instructions); Tab 87, CX0049-056-067 (Britesmile teeth whitening protocol); *see also* Tab 11, CX0043-002 (Bleach Bright advertisement: "We use our BB Plus blue light emission LED light which is calibrated at the perfect wavelength to activate our BleachBright whitening products").

24. Non-dentist teeth whitening provides the consumer results in one hour or less. *See* Tab 12, REDACTED (salon advertising "whiter teeth in 30 minutes or less guaranteed!");

Tab 11, REDACTED (Bleach Bright salon: “cosmetic teeth whitening at the speed of light in just 20 minutes!”); Tab 22, REDACTED (salon advertisement: teeth whitening in 40-60 minutes); Tab 21, CX0073-009-010 (Dempsey Aff. ¶ 11, North Carolina State Board of Dental Examiners v. Carmel Day Spa & Salon (Jan. 11, 2008)) (employee of Carmel Day spa informed Dempsey that teeth whitening service would take one hour); Tab 10, CX0108-008 (WhiteSmile claims its products “provide dramatic results in just 12, 24, or 36 minutes”); Tab 14, REDACTED; Tab 29, CX103-009<sup>D</sup> (BriteWhite pamphlet: treatment “can take up to one hour if required”).

25. Non-dentist teeth whitening costs substantially less than dentist teeth whitening. See Tab 14, REDACTED Tab 11, REDACTED Tab 32, CX0198-002 (Movie Star Smile salon: \$99); Tab 58, REDACTED Tab 75, REDACTED

26. Products sold by non-dentists fall under many brand names, including White Smile USA, Brite White, Beyond White Spa, Beyond Dental & Health, Brite White, SpaWhite.

#### 4. OTC Products

27. Available OTC products include gels, rinses, chewing gums, trays, and strips. See Tab 24, CX0392-002 (“Tooth Whitening/Bleaching: Treatment Considerations for Dentists and their Patients,” September 2009). In a 2006 report, NBC’s Today show correspondent Janice Liberman reported that in 2005, the U.S. market for OTC products was \$1.4 billion. See <http://today.msnbc.msn.com/id/15520798> (last visited November 1, 2010).

28. OTC strips take many days to whiten the teeth, and requires the consumer to use the product on a daily basis. Tab 44, NCBOARD4979 (Ichel Goldberg et al., Tooth Bleaching Treatments, A Review (2007)) (listing different brands of OTC strips products, each requiring twice a day treatment over 14 days); Tab 16, NCBOARD987 (Question and Answer article with Dr. Van Haywood (2008)) (six shade change could be obtained with “16 days of strip applications”); Tab 33, NCBOARD3888 (web page from [www.teethwhiteningreviews.com](http://www.teethwhiteningreviews.com), “Teeth Whitening: What Works and What Doesn’t,” Jan. 2, 2006) (“You’ll wear the trays, strips, or painted-on bleach for up to 60 minutes a day (in two or more individual applications) and for the suggested period of time: 1-2 weeks depending on the product.”); Tab 50, CX0380 (web page from Crest, [www.3dwhite.com](http://www.3dwhite.com), “Crest 3D White Whitestrips Professional Effects Teeth Whitening System”) (consumer must wear Crest White strips once a day for thirty minutes for 20 days). This is because OTC products use less peroxide than dentist or non-dentist teeth whitening products. See Tab 13, CX53-001 (Frequently Asked Questions for Professional Teeth Whitening) (CrestWhite Strips contains 8% hydrogen peroxide); Tab 10, CX0108-009 (White Science training manual) (OTC product have a “lower concentration of peroxide that is placed on your teeth for an extended period of time, usually once a day for up to 4 weeks (product procedures vary)”).

29. OTC strips or trays typically can cost between \$15-\$75, depending on the brand, quantity, and concentration. See Tab 51, CX0381 (Crest web site, [www.dentalcare.com](http://www.dentalcare.com), “Practice Management Toolkit”) (strips for \$65); Tab 52, CX0382 (page from WalMart’s web site, [www.walmart.com](http://www.walmart.com), “Crest 3D White Whitestrips with Advanced Seal Professional Effects Teeth Whitening Kit, 20 ct.”) (\$43.97); Tab 57, CX0394 (a web page from



www.Walgreens.com, “Aquafresh WHITE TRAYS Kit.”) (14 count, \$26.99).

**D. Dentist Teeth Whitening Services Compete with Non-Dentist Teeth Whitening Services**

30. Non-dentist teeth whiteners in North Carolina advertise themselves as a lower cost substitute for dentist teeth whitening. *See, e.g.*, Tab 62, CX0096-0004 (advertisement from SheShe studio spa) (“Teeth whitening has also always been offered in dental offices . . . and delivers the same results that we offer at a fraction of the cost.”); Tab 29, CX103-015 (BriteWhite advertisement stating that “as with more expensive dental office procedures, it is recommended that you have a session every six months to keep your smile bright and new”); Tab11, REDACTED

31. Non-dentist teeth whiteners also distinguish themselves in terms of time and convenience. *See, e.g.*, Tab 10, CX0108-009 (White Science training manual) (“What can be more convenient than getting your teeth whitening at your local salon or spa? While getting your haircut, highlights, or nails painted, you now have the option to whiten your teeth”); Tab 14, REDACTED ; Tab 10, CX0108-009 (White Science claims its products “provide dramatic results in just 12, 24, or 36 minutes”).

32. Manufacturers and distributors of non-dentist teeth whitening kits promote their products to salons, retail stores, and mall kiosks, by claiming the same, or nearly the same results as dentist teeth whitening products for a lower cost. *See, e.g.*, Tab 10, CX0108-009 (White Science claims its products are “very similar to BriteSmile and Zoom . . . but there are a few key differences including . . . most importantly, price”).

33. Dentists differentiate themselves from non-dentist teeth whiteners in terms of training, privacy, and professional ethics. See Tab 68, REDACTED

Tab 31, REDACTED

34. Dentist and non-dentist teeth whitening services provide near immediate results, whereas OTC products can take days or weeks to whiten teeth. Compare supra ¶¶ 18 (dentist teeth whitening takes one to three hours), 24 (non-dentist teeth whitening takes one hour or less) with ¶ 28 (OTC can take several days to whiten); see also Tab 78, REDACTED

35. In-office dentist and non-dentist teeth whitening services are more convenient than OTC products because results can usually be achieved in a single session. Compare supra ¶¶ 18, 24 with ¶ 28; see also Tab 11, REDACTED

36. Dentist and non-dentist services provide a chair, operators to provide instruction, awareness of risks and potential results, screening (e.g., no children and pregnant women), assistance in getting the peroxide to the teeth, disposing of the products, and often use of a light. See supra ¶ 23; Tab 34, REDACTED

REDACTED

; *see also* Tab 61, ADA000462 (Sevil Gurgan et al., Different light-activated in-office bleaching systems: a clinical evaluation, 25-6 Lasers in Med. Sci. 817-822 (2009)) (“The main advantages of an in-office whitening procedure over an at-home bleaching system include dentist control, reduced total treatment time, and greater potential for immediate results that may enhance patient satisfaction and motivation.”).

**E. Dentists Have a Financial Interest in Eliminating Non-Dentist Teeth Whiteners**

37. Teeth whitening or bleaching is the number one requested cosmetic dentistry procedure, and has become a lucrative market for dentists. Tab 93, CX0397-001 (AACD Press Release, “First it was Atkins, then it was South Beach, now it’s the White Smile Diet.”); *see also* Tab 24, CX0392-001 (“Tooth Whitening/Bleaching: Treatment Considerations for Dentists and their Patients”) (“Over the past two decades, tooth whitening or bleaching has become one of the most popular esthetic dental treatments.”).

38. In 2007, the AACD reported that dentist teeth whitening procedures had increased more than 300% in the previous 5 years. Tab 93, CX0397-001.

39. For 2006, AACD dentists reported performing an average of 70 teeth whitening procedures and revenues were \$25,000 on average (total of \$138.8 million). Tab 55, CX0385-003 (AACD Press Release, “Consumer Studies, Can a new smile make you appear more successful and intelligent?”). Procter & Gamble states that with proper marketing, dentists can earn \$100,000 to \$200,000 per year by performing teeth whitening services: “Your esthetic practice could explode overnight.” Tab 51, CX0381 (“Practice Management Toolkit”).

40. Some of the dentists who complained about non-dentist teeth whitening in North Carolina earned substantial revenues from teeth whitening. *See, e.g.*, Tab 64, REDACTED

REDACTED

Tab 66, REDACTED ; Tab 67, REDACTED

41. Non-dentist teeth whitening services have quickly grown in popularity in North Carolina since 2005. *See* Tab 37, REDACTED

; Tab 26, CX92-001 (e-mail

from Casie Goode, Board investigator, Mar. 4, 2008) (acknowledging that there are “teeth whitening companies all over the state” of North Carolina); Tab 9, REDACTED

**F. The Board Exercised Substantial Discretion in Determining What Constitutes Unlawful Teeth Whitening**

42. The definition of what constitutes unlawful teeth whitening varied over time and among Board members. *See* Tab 3 (Respondent’s Objections and Responses to Complaint Counsel’s First Set of Requests for Admissions, Oct. 27, 2010) (“Response to RFA No.”), Nos. 9-10 (currently, unlawful to read instructions or provide “services and or advice attendant to the sale of a teeth whitening product”); Tab 73, REDACTED

Tab 62,

CX65-001 (Cease and Desist order, July 2007) (unlawful if employee is “assisting clients to apply whitening gel and/or accelerate the process with a UV light”); Tab 28, REDACTED

Tab 40, REDACTED

REDACTED

; Tab

48, REDACTED

; Tab 85, REDACTED

; Tab 73, REDACTED

43. Instead, the Board has chosen to “investigate[] these [non-dentist teeth whitening] matters on a case-by-case basis.” Tab 25, CX0302-001 (e-mail from Terry Friddle to complaining dentist, Jan. 21, 2009); Tab 38, REDACTED

**G. Safety Concerns About Non-Dentist Teeth Whitening Are Overblown**

44. The Board expressed specific concerns about the safety of non-dentist teeth whitening as compared to dentist teeth whitening and OTC teeth whitening, but has not provided evidence to support these claims. *See* Tab 3, Response to RFA No. 18 (“Respondent admits that only three investigations it opened included a report of harm or injury to an individual”); No. 21 (“respondent admits that it is not aware of studies comparing the safety of teeth whitening services as performed by dentists” versus non-dentists); No. 38 (Board not aware of “studies

comparing the ‘patient health issues’ that might arise from teeth whitening services as performed by dentists” and non-dentists); Nos. 23-28 (Board admits that it is unaware of any harm caused by employees referenced in ¶18 of the Board’s Response); Tab 73, REDACTED

45. Non-dentist teeth whitening services are safe for 90% of users. While the remaining 10% may experience some sensitivity, less than 1% would experience a serious side-effect, such as an allergic reaction. Such a reaction could also occur during an in-office dentist teeth whitening. Tab 80, REDACTED ; Tab 85, REDACTED  
*see also* Tab 88,

REDACTED

46. The Board did not bring the public safety issue regarding non-dentist teeth whitening before any regulatory authority in North Carolina. *See* Tab 83, REDACTED  
Tab 85, REDACTED

**H. The Dental Board's Actions Against Non-Dentist Teeth Whiteners**

**1. Cease and Desist Orders Sent To Avoid Risk of Loss and Without Investigations**

47. In or around 2004, the Board began receiving complaints from dentists and hygienists (who work for dentists and may perform teeth whitening under the supervision of a dentist) about non-dentist teeth whitening providers. *See, e.g.*, Tab 5, REDACTED REDACTED ; Tab 9, REDACTED Tab 43, REDACTED

48. Dentists are eligible voters in Board elections. Tab 20, §90-22(c)(2) (Dental Act).

49. In January 2005, the District Attorney entered into a plea bargain with a salon owner that permitted her to continue whitening teeth. Tab 15, CX0040 (North Carolina v. Brandi Temple, 04-CF-62182, dismissal February 2005); *see also* Tab 73, REDACTED The Board viewed this dismissal as evidence that the District Attorney believed that “whitening in and of itself wasn’t violating the Dental Practice Act.” Tab 73, REDACTED In March 2005, the Board received an adverse ruling involving another section of the Dental Act. Tab 30, CX0159 (Order and Judgment in North Carolina Board of Dental Examiners vs. Rodriguez Brunson, March 31, 2005). As a result, the Board believed that courts would be “narrowly interpreting the Dental Act for noninvasive techniques such as teeth whitening.” Tab 73, REDACTED

50. To avoid issues where the Board lacks “sufficient evidence,” a Board investigator suggested that the Board use cease and desist orders to “modify” the behavior of nonlicensed persons suspect of violating the Dental Act. Tab 23, REDACTED

REDACTED

51. The Board could have drafted an administrative rule with respect to non-dentist teeth whitening, but this would have brought it under the purview of the North Carolina Rules Review Commission. Tab 78, REDACTED Tab 85, REDACTED

52. The Board believed there was a “risk” associated with proposing such a rule change because the Legislature could alter the scope of the Board’s authority. Tab 78, REDACTED

53. The Board never proposed a rule to the North Carolina Legislature about the unauthorized practice of dentistry. Tab 78, REDACTED ; Tab 25, CX0302 (email from Friddle to complaining dentist, Jan. 26, 2009) (“At this point, the Board has not passed any new rules regarding teeth whitening kiosks.”).

54. The Board has issued cease and desist orders as a first step against parties suspected of engaging in the unlawful practice of dentistry. See Tab 84, REDACTED

; Tab 20, REDACTED

*id.* REDACTED

*see also id.* REDACTED



REF ID: A and Tab 62, CX0069 (cease and desist order sent to Body, Mind & Spirit Day Spa., Mar. 29, 2007); Tab 58, REDACTED

; Tab 49, REDACTED

Tab 27, REDACTED

## 2. Cease and Desist Orders to Non-Dentist Teeth Whiteners and Manufacturers

55. The Board has sent at least 40 cease and desist orders to non-dentist teeth whiteners. Most orders have a bold, all capitals heading: “**NOTICE AND ORDER TO CEASE AND DESIST**” or “**NOTICE TO CEASE AND DESIST.**” Tab 62 (collecting orders).

56. After learning that Georgia-based White Science, a manufacturer of non-dentist teeth whitening kits, was “assisting clients to accelerate the whitening process with an LED,” the Board sent an order with the cease and desist heading. The order continued: “The Board hereby directs your company to cease its activities unless they are performed or supervised by a properly licensed North Carolina dentist.” Tab 62, CX100 (Dec. 4, 2007).

57. Testimony of Board members and Board staff confirm that these cease and desist orders were intended as orders from a state agency to stop teeth whitening activities. Tab 85, REDACTED

Tab 73,

REDACTED

; *id* at REDACTED

REDACTED

58. Recipients of the cease and desist orders also believed it was an order from a state agency to stop teeth whitening activities. The owner of Modern Enhancement salon stated that she would “no longer perform this service as per your order to stop and will no longer perform teeth whitening services unless told otherwise by the NC Board of Dental Examiners.” Tab 90, REDACTED

59. REDACTED, owner of Amazing Grace Spa, received a cease and desist order that was sent on March 21, 2007. See Tab 91, REDACTED

On March 27, 2007, REDACTED responded stating that she had received the order and “immediately removed it [teeth whitening machine] from the salon where I rent and have not used it since that time.” Tab 89, REDACTED

60. Contemporaneous emails, letters, and reports drafted by Board members and Board staff confirm that the documents sent were cease and desist orders. Tab 41, REDACTED

; see also Tab 91, REDACTED

; Tab 42, REDACTED

REDACTED

; Tab 9, REDACTED

### 3. Cease and Desist Orders to Mall Operators

61. The Board sent orders to mall operators stating that non-dentist teeth whitening was unlawful, and asked them not to lease space to these businesses. Tab 7 (collecting orders).

62. The Board has acknowledged that it did not believe that commercial property owners would be violating the law by leasing space to non-dentist teeth whiteners. Tab 85, REDACTED

63. Mall operators were reluctant to lease space to non-dentist teeth whitening operations. Tab 17, REDACTED

Tab 19, REDACTED

### 4. Board Convinces North Carolina Cosmetology Board to Declare Non-Dentist Teeth Whitening Unlawful

64. The Board also contacted the North Carolina Cosmetology Board to enlist its assistance. Respondent informed the Cosmetology Board that non-dentist teeth whitening was unlawful. At the Respondent's request, the Cosmetology Board posted a statement in its newsletter and on its website that non-dentist teeth whitening was unlawful. See Tab 18, REDACTED

; Tab 92, REDACTED

REDACTED

Tab 83,  
REDACTED  
ED

65. The Cosmetology Board also informed cosmetologists that they were not permitted to practice teeth whitening because of the Respondent's position. *See* Tab 89, REDACTED

*and* Tab 91, REDACTED

66. Consumers were deprived of a less expensive alternative to dentist teeth whitening, as well as competition between the two means of service.

**I. No Clearly Articulated State Policy in the Dental Act Justifies the Board's Conduct**

67. The Dental Act grants the Board authority to address non-dentist teeth whitening only through petitioning the courts. Tab 20, §90-40.1.

68. The North Carolina legislature sought to provide anyone accused of the unlawful practice of dentistry with due process and other attendant guarantees of fairness by an unbiased court. *See id.* at §§ 90-40 (penalty for unauthorized practice of dentistry a misdemeanor); 90-40.1 (mechanism for enjoining the unlawful practice of dentistry).

69. Neither the Dental Act nor the Board's rules reference authority to issue cease and desist orders. *See id.*; Tab 69, 21 N.C.A.C. 16 *et seq.*

70. The Board admits in its Response that it lacks authority to order someone to

cease the unlicensed practice of dentistry. Tab 2, ¶19 (Board Response, filed July 7, 2010) (“[N]o kiosk, spa or other provider of teeth whitening services by a nondentist 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.”).

71. Individual Board members acknowledge that the North Carolina Legislature never contemplated that the Board would issue cease and desist orders of its own accord. See Tab 73, REDACTED

; *id.* at REDACTED

; *id.* at REDACTED

; Tab 77, REDACTED

Tab 79, REDACTED

**J. The Board is not Actively Supervised**

72. The Board claims it is supervised by the North Carolina Governor, Secretary of State, Attorney General and Ethics Commission, and the courts. Tab 2, ¶19 (Board Response). As shown below, none of these entities actively supervises the Board.

73. The Board files audited financial statements with the Secretary of State. *See* Tab 45, NCBOARD4365-75 (Financial Statements for the year ending December 31, 2009). The statement includes an auditor's report, balance sheet, cash flow statement, and notes about key changes to the Board's profile such as changes in general fixed assets. This report provides no information about actions against non-dentist teeth whiteners. As a result, the Secretary of State does not provide any supervision, let alone a prior pointed reexamination, of Board decisions or how to apply the Dental Act.

74. The Board also files an Annual Report to the Governor, Secretary of State, Attorney General, and Joint Legislative Administrative Oversight Committee. Tab 70, N.C. Gen. Stat. §93B-2; Tab 6, CX0091 (2009 annual report), CX0089 (2008 annual report) CX0088 (2007 annual report); CX0086 (2006 annual report); CX0085 (2005 annual report). The report includes information about the Board's meetings, examinations, hearings, investigations, and accomplishments. *See* Tab 6, REDACTED However, the report provides no information about actions against non-dentist teeth whiteners. As a result, these entities do not provide any supervision, let alone a prior pointed reexamination, of Board decisions or how to apply the Dental Act.

75. Board members file statements of economics interest ("SEIs") with the North Carolina State Ethics Commission ("N.C. Ethics Commission"). *See* Tab 71, NCBOARD3788-3813, N.C.G.S. §138A-10 *et seq.*; *see also* Tab 60, REDACTED

76. The Board claims that the N.C. Ethics Commission has “direct oversight” over the Board. Tab 3, Response to RFA No. 13. Perry Newson, Executive Director of the N.C. Ethics Commission, declares this position “too broad.” Tab 86, NewsonDecl. ¶ 15. The Ethics Act regulates conduct related to the Ethics Act and Lobbying Law, and does not cover substantive acts taken by the Board. *Id.* The Act does not even require members of the Board to identify income from dentist teeth whitening services. *Id.* at ¶ 13; *see also* Tab 3, Response to RFA No. 4 (“[I]t is admitted that the Ethics Commission does not require occupational licensing boards members who are members of the profession that the Board regulates to itemize or categorize the income that they derive from the various professional services they perform.”). As a result, the N.C. Ethics Commission does not provide any supervision, let alone a prior pointed reexamination, of Board decisions or how to apply the Dental Act.

77. The Board also claims it is actively supervised because notes or minutes about “enforcement actions” are publicly available. Tab 2, ¶19 (Board Response). However, by the Board’s own admission, “enforcement actions regarding the unauthorized practice of dentistry are . . . addressed by the Board in closed session.” Tab 3, Response to RFA No. 44. Accordingly, the Open Records Act does not provide a mechanism by which any entity can provide supervision, let alone a prior pointed reexamination, of Board decisions or how to apply the Dental Act.

78. Former Board Counsel Bakewell explained in her deposition that the Joint Legislative Administrative Oversight Committee REDACTED

Tab 83,  
REDACTED  
D

79. Neither the Governor’s office nor the Attorney General’s office provides

supervision of Board decisions or how to apply the Dental Act. Tab 83, REDACTED

Tab 83, REDACTED

80. As a result, there is currently no mechanism to review Board decisions to issue cease and desist orders to non-dentist teeth whitening operators before or after they are issued. Tab 78, REDACTED

*id.* at REDACTED

Respectfully submitted,

s/ Richard B. Dagen

Richard B. Dagen  
601 New Jersey Ave, NW  
Washington, D.C.  
(202) 326-2628  
rdagen@ftc.gov

*Counsel Supporting the Complaint*

November 8, 2010



**CERTIFICATE OF SERVICE**

I hereby certify that on November 8, 2010, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

Donald S. Clark  
Secretary  
Federal Trade Commission  
600 Pennsylvania Ave., NW, Rm. H-159  
Washington, DC 20580

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

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

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

Noel Allen  
Allen & Pinnix, P.A.  
333 Fayetteville Street  
Suite 1200  
Raleigh, NC 27602  
nla@Allen-Pinnix.com

*Counsel for Respondent  
North Carolina State Board of Dental Examiners*

**CERTIFICATE FOR ELECTRONIC FILING**

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

November 8, 2010

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

# Tab 1

UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

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

In the Matter of

THE NORTH CAROLINA BOARD OF  
DENTAL EXAMINERS

DOCKET NO. 9343

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission ("Commission"), having reason to believe that the Respondent, North Carolina Board of Dental Examiners, has violated the provisions of said Act, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues this Complaint stating its charges as follows:

**NATURE OF THE CASE**

Dentists in North Carolina, acting through the instrument of the North Carolina Board of Dental Examiners ("Dental Board"), are colluding to exclude non-dentists from competing with dentists in the provision of teeth whitening services. The actions of the Dental Board prevent and deter non-dentists from providing or expanding teeth whitening services, increase prices and reduce consumer choice without any legitimate justification or defense, including the "state action" defense. The actions of the Dental Board unreasonably restrain competition and violate Section 5 of the Federal Trade Commission Act.

**RESPONDENT**

1. The Dental Board is an agency of the State of North Carolina, and is charged with regulating the practice of dentistry in the interest of the public health, safety, and welfare of the citizens of North Carolina. The Dental Board is organized, exists, and transacts business under and by virtue of the laws of the State of North Carolina, with its principal office and place of business located at 507 Airport Blvd., Suite 105, Morrisville, NC 27560.
2. The Dental Board consists of six licensed dentists, one licensed hygienist, and one "consumer member," who is neither a dentist nor a hygienist. Each dentist member is

elected to this position by the licensed dentists of North Carolina, and serves a three-year term. Collectively, the six dentist members can and do control the operation of the Dental Board. Each dentist member is financially interested in decisions reached by the Dental Board because, while serving on the Dental Board, each dentist member continues to engage in the for-profit business of providing dental services.

3. The conduct of the Dental Board constitutes concerted action by its members and the dentists of North Carolina.
4. The Dental Board is the sole licensing authority for dentists in North Carolina. It is unlawful for an individual to practice dentistry in North Carolina without holding a current license to practice issued by the Dental Board. The Dental Board is also tasked with policing instances of unauthorized practice of dentistry ("UPD") as defined by and pursuant to the North Carolina dental statute.

### **JURISDICTION**

5. The Dental Board is a "person" within the meaning of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.
6. The acts and practices of the Dental Board, including the acts and practices alleged herein, are in commerce or affect commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44. In particular, dentists and non-dentist providers of teeth whitening services in North Carolina purchase and receive products and equipment that are shipped across state lines by manufacturers and suppliers located out of state, and transfer money across state lines in payment for these products and equipment. Further, the actions alleged herein deter persons from other states from providing teeth whitening services in North Carolina.

### **THE RELEVANT MARKET**

7. The relevant market in which to evaluate the conduct of the Dental Board is the provision of teeth whitening services in North Carolina. Teeth whitening services are offered by dentists and non-dentists.
8. Many dentists offer patients both in-office teeth whitening services and take-home teeth whitening kits. The most common in-office procedure consists of covering the gums with a protective material, applying to the teeth a hydrogen peroxide solution in the 20-35 percent range, and then exposing the teeth to a light source. Take home kits include a custom-made whitening tray, and a whitening gel that is generally a 15-20 percent carbamide peroxide solution. The consumer self-applies the gel in essentially the same manner as when using an over-the counter ("OTC") teeth whitening product purchased at, for example, a pharmacy.
9. During the last several years, in much of the United States, there has been an expansion of teeth whitening operations by non-dentists. Entrepreneurs have begun offering teeth-whitening services in salons, retail stores, and mall kiosks.

10. Typically, a non-dentist provider operates in the following way. The provider hands a strip or tray containing peroxide to the customer, who applies it to his or her own teeth. The customer's teeth are then exposed to a light-emitting diode ("LED") light source for 15 to 30 minutes. The amount of hydrogen peroxide applied to the teeth at non-dentist outlets generally falls into the 10-15 percent range. This is a greater concentration than OTC products (usually 10 percent or less), but less than the concentration employed in dentist-applied products (approximately 20-35 percent). The non-dentist provider generally does not touch the customer's mouth.
11. Teeth whitening services performed by non-dentists are much less expensive than those performed by dentists. A non-dentist typically charges \$100 to \$200 per session, whereas dentists typically charge \$300 to \$700, with some procedures costing as much as \$1,000.
12. Teeth whitening products (such as toothpaste and OTC whitening strips) are generally viewed by consumers as inadequate substitutes for teeth whitening services, due to differences in the nature of the product, quality, cost, and convenience.
13. Except to the extent that competition has been restrained as alleged below, and depending upon their geographic location, the dentist members of the Dental Board and the dentists of North Carolina compete with each other, and also compete with non-dentist providers of teeth whitening services.
14. The Dental Board has and exercises the power to exclude dentists and non-dentists from competing in the relevant market.

#### **THE DENTAL BOARD IS ACTING TO SUPPRESS COMPETITION**

15. The North Carolina dental statute does not expressly address whether, or under what circumstances, a non-dentist may engage in teeth whitening.
16. The Dental Board has decided that the provision of teeth whitening services by non-dentists constitutes UPD. As detailed herein, the Dental Board has acted in various ways to eliminate the provision of teeth whitening services by non-dentists.
17. The Dental Board interprets the North Carolina dental statute as permitting non-dentists to engage in the retail sale of teeth whitening products for use at home. However, the Dental Board has determined that any service provided along with a teeth whitening product, including advice, guidance, providing a customer with a personal tray, whitening solution, mouth piece and/or LED light, or providing a location to use the whitening product, constitutes the practice of dentistry.
18. The Dental Board has engaged in several types of activities aimed at preventing non-dentists from providing teeth whitening services in North Carolina.

19. In particular, the Dental Board has engaged in extra-judicial activities aimed at preventing non-dentists from providing teeth whitening services in North Carolina. These activities are not authorized by statute and circumvent any review or oversight by the State.
20. On 42 occasions, the Dental Board transmitted letters to non-dentist teeth whitening providers, communicating to the recipients that they were illegally practicing dentistry without a license and ordering the recipients to cease and desist from providing teeth whitening services.
21. On at least six occasions, agents of the Dental Board also threatened and discouraged non-dentists who were considering opening teeth whitening businesses by communicating to them that teeth whitening services could be provided only under the direct supervision of a dentist.
22. Furthermore, the Dental Board issued at least 11 letters to third parties, including mall owners and property management companies, with interests in approximately 27 malls, stating that teeth whitening services offered at mall kiosks are illegal. The purpose of these letters was to block the expansion of teeth whitening kiosks in shopping malls.
23. The Dental Board's exclusion of the provision of teeth whitening services by non-dentists does not qualify for a state action defense nor is it reasonably related to any efficiencies or other benefits sufficient to justify its harmful effect on competition.

#### **ANTICOMPETITIVE EFFECTS OF THE DENTAL BOARD'S ACTIONS**

24. The exclusionary course of conduct of the Dental Board as alleged in Paragraphs 18-22 of the Complaint may be expected to continue in the absence of effective relief. As a consequence of the challenged actions and course of conduct of the Dental Board, the availability of non-dentist teeth whitening services in North Carolina has been and will be significantly diminished. Numerous businesses have closed down entirely or have ceased to sell teeth whitening products and/or services. Additional teeth whitening businesses have curtailed their advertising or are unable to provide the types of services desired by customers. Several malls in North Carolina have declined to permit the operation therein of non-dentist teeth whitening businesses.
25. The challenged actions and course of conduct of the Dental Board have had and will have the effect of restraining competition unreasonably and injuring consumers in the following ways, among others:
  - a. preventing and deterring non-dentists from providing teeth whitening services in North Carolina;
  - b. depriving consumers of the benefits of price competition; and
  - c. reducing consumer choice in North Carolina for the provision of teeth whitening services.

## VIOLATIONS ALLEGED

26. The combination, conspiracy, acts and practices described above, constitute anticompetitive and unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45. Such combination, conspiracy, acts and practices, or the effects thereof, are continuing and will continue or recur in the absence of appropriate relief.

### Notice

Notice is hereby given to the respondent that the seventeenth day of February, 2011, at 10:00 a.m., is hereby fixed as the time and Federal Trade Commission offices, 600 Pennsylvania Avenue, NW, Washington D.C. 20580, as the place when and where a hearing will be had before an Administrative Law Judge of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under the Federal Trade Commission Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in the complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the fourteenth (14<sup>th</sup>) day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted.

If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material allegations to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint and, together with the complaint, will provide a record basis on which the Commission shall issue a final decision containing appropriate findings and conclusions and a final order disposing of the proceeding. In such answer, you may, however, reserve the right to submit proposed findings of fact and conclusions of law under § 3.46 of said Rules.

Failure to file an answer within the time above provided shall be deemed to constitute a waiver of your right to appear and to contest the allegations of the complaint, and shall authorize the Commission, without further notice to you, to find the facts to be as alleged in the complaint and to enter a final decision containing appropriate findings and conclusions and a final order disposing of the proceeding.

The Administrative Law Judge shall hold a prehearing scheduling conference not later than ten (10) days after an answer is filed by the respondent. Unless otherwise directed by the Administrative Law Judge, the scheduling conference and further proceedings will take place at the Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington DC 20580. Rule 3.21(a) requires a meeting of the parties' counsel as early as practicable before the prehearing scheduling conference, and Rule 3.31(b) obligates counsel for each party, within five days of receiving respondent's answer, to make certain initial disclosures without awaiting a formal discovery request.

### Notice of Contemplated Relief

Should the Commission conclude from the record developed in any adjudicative proceedings in this matter that respondent's conduct violated Section 5 of the Federal Trade Commission Act as alleged in the complaint, the Commission may order such relief as is supported by the record and is necessary and appropriate, including but not limited to:

1. Requiring respondent to provide appropriate notification to an independent state authority of any proposed or contemplated action of the Dental Board that may, if implemented by the Dental Board, restrain the provision of teeth whitening services by non-dentist providers.
2. Requiring respondent to secure the prior and appropriate approval of an independent state authority before taking any action that may restrain the provision of teeth whitening services by non-dentist providers.
3. Requiring respondent to cease and desist from directing any non-dentist provider of teeth whitening services to cease providing teeth whitening services.
4. Requiring respondent to cease and desist communicating to any non-dentist provider of teeth whitening services that: (i) such non-dentist provider is violating, has violated, or may be violating the North Carolina Dental Practice Act by providing teeth whitening services; or (ii) the provision of teeth whitening services by a non-dentist provider is a violation of the North Carolina Dental Practice Act.
5. Requiring respondent to include in all correspondence with any non-dentist provider of teeth whitening services, including any threat to file a law suit, that the Board does not have the authority to determine whether the law has been violated, and that only a court can make that determination and then assess penalties, if judged appropriate.
6. Requiring respondent to cease and desist communicating to a lessor of commercial property or other third party that (i) the provision of teeth whitening services by a non-dentist provider is a violation of the North Carolina Dental Practice Act, or (ii) that any non-dentist provider of teeth whitening services is violating, has violated, or may be violating the North Carolina Dental Practice Act by providing teeth whitening services.
7. Requiring respondent to distribute a copy of the Commission's order to each and every current and future Dental Board member; officer, manager, representative, agent, and employee of the Dental Board.
8. Such additional relief as is necessary to correct or remedy the violations alleged in the complaint.



**WHEREFORE, THE PREMISES CONSIDERED,** the Federal Trade Commission on this seventeenth day of June, 2010, issues its complaint against the Dental Board.

By the Commission, Commissioner Brill recused.

Richard C. Donohue  
Acting Secretary

SEAL:

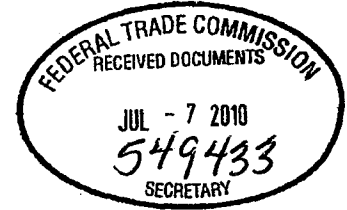
# Tab 2

# ORIGINAL

PUBLIC DOCUMENT

UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

0810137



\_\_\_\_\_  
In the Matter of )  
 )  
 )

THE NORTH CAROLINA [STATE] BOARD )  
OF DENTAL EXAMINERS, )  
 )

Respondent. )  
\_\_\_\_\_)

DOCKET NO. 9343

## RESPONSE TO COMPLAINT

NOW COMES Respondent, The North Carolina State Board of Dental Examiners ("Dental Board" or "Board"), by and through the undersigned, and answers and otherwise responds to the Complaint of the Federal Trade Commission ("FTC"). Because the FTC complaint asserts that the Board and its members (and, apparently, all the licensed dentists in North Carolina) are engaged in an illegal "conspiracy," the Board submits this more detailed response to refute not only a baseless complaint but also misleading characterizations made in the press release that the FTC issued before the Complaint was officially served.

## THE TRUE NATURE OF THE CASE

The "Nature of the Case" section at the beginning of the Complaint alleges that "[d]entists in North Carolina, acting through the instrument of the North Carolina [sic] Board of Dental Examiners ('Dental Board'), are colluding to exclude non-dentists from competing with dentists in the provision of teeth whitening services." However, the Dental Board is a state agency, not a private trade association, and the Complaint's description of the respondent in Paragraph 1 of the Complaint acknowledges this fact ("The Dental Board is an agency of the State of North Carolina"). There is no collusion, no conspiracy, no agreement, and not one shred of evidence even hinting at such. A substantial number of complaints initiating cases came from dental school educators and non-dentists (some of whom were harmed by spa or kiosk whitening operators).

The true nature of this case concerns the plain and unequivocal meaning of "removal of stains." A North Carolina statute (not a rule, a policy or an interpretation, but a *statute*) makes it illegal for non-dentists to provide the service of "removal of stains" from the teeth. The Board narrowly applies this statutory prohibition to rendering of teeth whitening services rather than the over-the-counter (OTC) sale of teeth whitening kits. The complaint alleges that the statute "does not expressly address whether, or under what

circumstances, a non-dentist may engage in teeth whitening.” If the service of teeth whitening does involve the removal of stains from teeth, then the Complaint has mislabeled as “collusion” and “conspiracy” the actions of a state agency and its sworn officers’ presumptively good faith efforts to enforce a state public protection statute. No one other than, apparently, the Commission, sees a difference between stain removal services and teeth whitening services –

- not at least twenty other states that have similar laws;
- not the numerous members of the public actually harmed by illegal stain removal/teeth whitening;
- not the local and national media who have carried reports of public harm caused by unlicensed stain removal/teeth whitening services;
- not the U.S. Food and Drug Administration (FDA), which has reported on the health risks associated with the stronger chemicals and equipment used by illegal practitioners;
- not the state courts in civil and criminal court cases brought by the Board in enforcing the statute;
- not the Alabama Supreme Court and other states’ attorneys general who have ruled that the public must be protected from illegal stain removal/teeth whitening service providers;
- not dental school faculty who have studied the risks of nonprofessionals rendering stain removal/teeth whitening services with the strength of chemicals and equipment they use;
- not the teeth whitening product manufacturers who market their products as stain removers; and
- not even unlicensed teeth whitening businesses whose marketing materials use the terms “teeth whitening” and “stain removal” interchangeably.

The allegation that the N.C. Dental Practice Act “does not expressly address whether, or under what circumstances, a non-dentist may engage in teeth whitening” defies the gravity of law and common sense. N.C. Gen. Stat. § 90-29(b) expressly provides that the doing, undertaking, attempting to do, or claiming the ability to remove stains from human teeth is the practice of dentistry. If teeth whitening does not mean the removal of stains from teeth, then the FTC would need to proceed against the teeth whitening businesses for falsely claiming that their services “remove stains from teeth.”

Despite repeated requests, the Complaint has presented no authority for its interpretation of North Carolina’s unambiguous statute or for a direct attack on a state statute, nor presented any evidence to rebut the presumption that the Board members are acting in good faith. And, despite ample evidence of actual public harm caused by the illegal practice of dentistry by unlicensed teeth whitening service purveyors, the Complaint has embarked upon a direct attack upon the plain meaning of a state statute, a state’s ability to protect its citizens, and a state board’s sworn duty to enforce the statute.

On May 20, 2009, the President of the United States issued a Memorandum to all Executive Departments and Agencies instructing them “that preemption of State law by

executive departments and agencies should be undertaken only with full consideration of the legitimate prerogatives of the States and with a sufficient legal basis for preemption." Despite that memo, as the Board shows more fully herein, the Commission's Complaint signals an aggressive campaign to preempt the enforcement of unambiguous state consumer protection statutes.

## RESPONDENT

Except to the extent specifically admitted herein, Respondent denies each and every allegation contained in the Commission's Complaint, including all allegations contained in headings or otherwise not contained in one of the Complaint's 26 numbered paragraphs. Specifically, Respondent denies that it has engaged in conduct that violates Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and denies that this proceeding is in any way in the public interest.

1. Respondent admits that it is an agency of the State of North Carolina established by statute to protect the public by enforcing the Dental Practice Act. It is also admitted that the Board is organized, exists, and transacts business under and by virtue of the laws of the State of North Carolina, with its principal office and place of business located at 507 Airport Blvd., Suite 105, Morrisville, NC 27560. The FTC so thoroughly misses the status of the Board and its members that it misnamed the Board in its Complaint, ironically omitting the word "State" from the statutory name of the agency. Thus, the correct name of Respondent is The North Carolina *State* Board of Dental Examiners.

2. It is admitted that the majority of members of state boards of dentistry in all states are licensed dentists. Per N.C. Gen. Stat. § 90-22, all Board members who are dentists must be licensed and actively engaged in the practice of dentistry in North Carolina. Board members are required by law to protect the public and base their decisions solely on whether there was a violation of the North Carolina Dental Practice Act. Being that service on the Board involves considerable financial sacrifice by its members, it is highly unlikely that their reasons for serving on the Board involve financial gain. Instead, each Board member is a sworn officer of the State.

Otherwise, the allegations of paragraph 2 are denied. There is no precedent for the notion that an occupational licensing board constituted of members of the regulated profession is a *per se* violation of antitrust laws. Involving licensees in the selection of members of occupational licensing boards is a routine practice in North Carolina and elsewhere. For instance, the seven physician members of the North Carolina Medical Board are nominated by a Review Panel and appointed by the Governor. N.C. Gen. Stat. §§ 90-2(a)(1), 90-3(c). With the exception of one public member, each member of the Review Panel is a physician, a physician assistant, or a nurse practitioner. N.C. Gen. Stat. § 90-3(a). In addition, the attorney members of the North Carolina State Bar Council (the governing body of the North Carolina State Bar) are elected by the North Carolina judicial district bars, whose membership consists exclusively of attorneys. See N.C. Gen. Stat. §§ 84-16, 84-18(b). All members of the Medical Board and the State Bar Council continue to practice their professions while serving on their respective Boards. Like

dentistry, law and medicine have long been recognized as self-regulating professions, hence the need for licensees to be involved in the board member selection process. We are aware of no case precedent holding that having a majority of licensing board members as active members of the profession violates the antitrust laws, and the FTC has not cited any such caselaw. In fact, this is typically seen as a vital element to fair and healthy regulatory practices.

Further, any perceived bias inherent in this selection procedure is counterbalanced by the fact that North Carolina's State Government Ethics Act bans conflicts of interest on the part of elected and appointed state officials. N.C. Gen. Stat. § 138A-2. The Act requires a conflict of interest/board member bias statement to be read at the beginning of every Board meeting. N.C. Gen. Stat. § 138A-15(e). The Dental Board's President reads a conflict of interest statement at the beginning of every meeting of the Board, including those in which enforcement actions are considered. The N.C. Ethics in Government Act also requires the Board's members, as public servants, to file an annual economic interest statement with the N.C. State Ethics Commission. N.C. Gen. Stat. § 138A-22(a).

The U.S. Supreme Court in *Withrow v. Larkin*, 421 U.S. 35 (1975), held that courts are to defer to licensing boards in the interpretation of their statutes and most importantly, the good faith of board members is to be presumed. In that case, the Court said that "state administrators 'are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances.'" *Id.* at 55, quoting *United States v. Morgan*, 313 U.S. 409, 421 (1941). The Supreme Court also observed that those who would allege bias on the part of decision makers such as the courts or administrative agencies "must overcome a presumption of honesty and integrity in those serving as adjudicators; and it must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented." 421 U.S. at 47. It is a presumption that has also served the FTC itself, and should not be back-handed without clear evidence. See, e.g., *FTC v. Cement Institute*, 333 U.S. 683 (1948).

As to the financial interest of the Board members in teeth whitening, according to the testimony of the two Board members deposed in this investigation, teeth whitening constituted a miniscule portion of their annual income. Indeed, one of the deposed dentists has discontinued offering in-office whitening partly due to a lack of demand for the service, but primarily because he found in-office whitening to be no more effective than the custom-made take-home bleaching trays. Both dentists testified that the portion of their practices devoted to teeth whitening services was small, in one case amounting to no more than about one percent of the services offered to patients

3. Respondent denies the allegations of paragraph 3. Each Board member is an officer of the State and is obliged under oath to uphold the laws of this state. Indeed, failure to fulfill the duties of office is a crime. See, e.g., N.C. Gen. Stat. §14-230. Board

members also swear to uphold the N.C. Constitution, Article I, Section 34 of which poses a filter through which each statute, rule, and agency action must pass.

4. Respondent admits that it is the licensing authority for dentists in the state of North Carolina and that the unauthorized practice of dentistry is prohibited. The further allegations of paragraph 4 are denied. It is unlawful for anyone to practice regulated professional without being duly licensed by their respective state board. The activities of the Dental Board as described in paragraph 4 of the Complaint constitute "state action" pursuant to statutory authority. The Board cannot "police" the unauthorized practice of dentistry on its own; it is aided in its statutory obligations to enforce the North Carolina Dental Practice Act by the North Carolina court system and law enforcement agencies.

**THE FTC DOES NOT HAVE THE AUTHORITY OR JURISDICTION  
TO FORCE THE BOARD AS A STATE AGENCY  
TO ABROGATE A STATE STATUTE**

5. The allegations of paragraph 5 are denied. The Board is immune from 15 U.S.C. Section 45 pursuant to the state action doctrine pronounced by the United States Supreme Court. Because the Board is immune under the state action doctrine, the FTC has failed to state a claim upon which relief can be granted, and therefore the FTC lacks the jurisdiction to force the Board to abrogate a state statute. Fed. Rule of Civ. Proc. 12(b)(6) See also *Hoover v. Ronwin*, 466 U.S. 558, 566 (1984); *Ronwin v. State Bar of Arizona*, 686 F.2d 692, 694, n.1 (9th Cir. 1982), *cert. denied*, 461 U.S. 983 (1983) (upholding the District Court's dismissal of the case for failure to state a claim upon which relief can be granted, based on the application of the state action doctrine); *Earles v. State Bd. of Certified Public Accountants*, 139 F.3d 1033, 1040 (5th Cir. 1998) (dismissing a suit against the Louisiana State Board of Certified Public Accountants for failure to state a claim upon which relief can be granted, based on the application of the state action doctrine); *Parker v. Brown*, 317 U.S. 341 (1943).

Alternatively, because of the Board's immunity under the state action doctrine, the FTC also lacks subject matter jurisdiction to force the Board to abrogate a state statute. Fed. Rule of Civ. Proc. 12(b)(1); see also *Griffith v. Health Care Authority*, 705 F. Supp. 1489, 1497, 1507 (1989) (dismissing defendants' motion to dismiss based on lack of subject matter jurisdiction, as a result of the application of the state action doctrine).

6. Respondent denies the allegations of paragraph 6. The acts and practices of the Dental Board, like the actions of any state regulatory authority, may have an incidental effect on commerce. However, North Carolina law prohibits out-of-state and in-state persons from providing any services that constitute the practice of dentistry unless they are licensed to do so by the state of North Carolina. The teeth whitening services, themselves, are purely local. Pursuant to N.C. Gen. Stat. § 90-29(a), "[n]o person shall engage in the practice of dentistry in this State, or offer or attempt to do so, unless such person is the holder of a valid license or certificate of renewal of license duly issued by the North Carolina State Board of Dental Examiners." (emphasis added).

**THE REAL COMPETITION FOR UNLICENSED TEETH WHITENING COMES  
FROM OTC SALES OF TEETH WHITENING KITS WHICH ARE NOT  
REGULATED BY THE BOARD.**

7. Respondent denies the allegations of paragraph 7. In its definition of the relevant market, the FTC excludes from consideration the OTC teeth whitening factor. There is no evidence that the market supports the FTC's distinction.

8. Respondent admits, upon information and belief, that some dentists offer take-home whitening kits to their patients. Respondent is without sufficient information to admit or deny the remainder of the allegations in paragraph 8. The Board does not object to the sale of take-home whitening kits -- whether purchased by the consumer at a pharmacy, salon, or mall kiosk -- since under North Carolina law, sales of take-home kits are not the practice of dentistry. In some instances, the strength of the whitening agents offered by unlicensed providers are a bit stronger than those provided in the take-home kits available at a pharmacy, and a whitening light is sometimes used as part of the whitening process. However, it is not clear what value is added if untrained sales clerks subject to no sanitation restrictions (but sometimes passing themselves off as medical personnel) hand the consumer the bleaching trays.

9. Respondent is without sufficient information about the allegations in paragraph 9, and therefore, denies the allegations. If there has been an expansion of teeth whitening operations by non-dentists in salons, retail stores and mall kiosks, where is the evidence that the alleged illegal restraint is working? Also, along with the expansion of teeth whitening operations by non-dentists, there have been increased efforts in other states to prevent these operations from engaging in the unlicensed practice of dentistry. For example, several teeth whitening kiosks voluntarily shut down in Oklahoma after that state's dental board filed an injunction against them, and the West Virginia board obtained a temporary injunction against the operator of a mall teeth whitening kiosk. And, as mentioned elsewhere in this response, the Alabama Supreme Court has ruled that teeth whitening constitutes the practice of dentistry. Also, legislation is pending in three states (Hawaii, Minnesota, and New Hampshire) that would include teeth whitening services in the definition of the practice of dentistry, and rules and policy statements on teeth whitening were recently proposed in two other states (Pennsylvania and Montana).

10. Respondent is without sufficient information to admit or deny the allegations in paragraph 10, but denies the allegation that the non-dentist provider generally does not touch the consumer's mouth. By using the word "generally," the FTC is conceding that the non-dentist provider may on occasion touch the customer's mouth or in other ways assist in the administration of tooth stain removing products which would constitute the practice of dentistry under North Carolina law. Actually, there is evidence of non-dentist providers of teeth whitening services not operating in the "typical" manner described in the Complaint (for example, taking impressions, polishing teeth, applying agents, etc.) and also direct evidence of public harm.



11. Respondent is without sufficient information to admit or deny what dentists typically charge for teeth whitening. Respondent admits that some non-dentists have advertised charges in the price range alleged in paragraph 11, but the Board, itself, does not collect price information regarding licensees or non-licensees. Indeed, the Board is informed and believes that most members of the Board engaged in little or no teeth whitening business. However, it seems reasonable to assume that licensed dentists who have training, education, tight safety regulations, office expenses, and liability insurance might charge more than an unlicensed, untrained teeth whitening kiosk operator who does not even have running water. The Board denies that there is any credible evidence that dentists have done anything other than independently base their fees upon factors such as their overhead and training. The Board suggests that the real competition for teeth whitening services offered by mall kiosks and salons is the OTC kits, which appear to be sold at a fraction of the price apparently charged by kiosks and the like.

12. The allegations of paragraph 12 are denied. There is no evidence that OTC teeth whitening products are generally viewed by consumers as "inadequate substitutes" for teeth whitening services. In fact, published data on total sales suggests otherwise. Additionally, studies identified by the FDA suggest otherwise. More likely, the principal factor distorting public perceptions is the misleading marketing by kiosks. For example, Board investigations have found that kiosk teeth whitening operators have attempted to create the impression that they have medical training by wearing lab coats, by requiring customers to sign health care disclosure forms, and by making exaggerated claims comparing their services to dentists in an effort to justify the difference between their prices and the price of OTC kits.

13. The allegations of paragraph 13 are denied. There is no evidence to suggest that the Board is acting as a competitor in the teeth whitening market. The more likely competitive reality is that teeth whitening service providers are misrepresenting their product and services because they must rationalize the price differential between their products and the OTC sales of teeth whitening kits. To justify prices of four to five times the cost of teeth whitening kits (which the Board does not regulate), teeth whitening kiosks have attempted to mislead the public. Some of the advertising materials disseminated by non-dentist teeth whitening service providers deceptively claim that the services are provided by "professionals." Indeed, the FTC itself considers that an advertisement may be deceptive, even if literally true, if it has the capacity or tendency to deceive. *Goodman v. FTC*, 244 F.2d 584, 604 (9th Cir. 1957). The FTC has applied this standard to determine whether an act or practice is deceptive under 15 U.S.C. § 45(a)(1). *See Exposition Press, Inc. v. FTC*, 295 F.2d 869, 873 (2nd Cir. 1961), *cert. denied*, 370 U.S. 917 (1962) (FTC may consider an advertisement from point of view of least sophisticated reader).

An example of misleading advertising may be found in a brochure entitled "What Does Your Smile Say About You?" which was disseminated by a North Carolina salon and referred to nonexistent FDA legislation re-defining the teeth whitening services offered as cosmetic. [NCBOARD298-299] It also represented that the teeth whitening system "lightens [teeth] from the inside out." ... The gel [used in the whitening process] will

“penetrate all three layers of the teeth; the dentin, pulp, and enamel,” which, if true, means the whitening product penetrates the hardest substance in the human body and delivers carbamide peroxide to the living center of the tooth. Another salon advertised “professional teeth whitening treatment” and stated that the teeth whitening system was “the same technology used in dental offices for Power Whitening, and the results are comparable.” An overt misrepresentation of yet another whitening salon stated that once treated, the stains would never reappear.

14. The allegations of paragraph 14 are denied. It is well-settled that a state in the exercise of its general police powers may prescribe the qualifications for obtaining a license to practice a profession and exclude from the profession those who do not possess such qualifications. *See Dent v. West Virginia*, 129 U.S. 114, 124 (1889) (a West Virginia statute that required persons to obtain a certificate from the State Board of Health before engaging in the practice of medicine did not violate the due process rights of a physician who did not possess the prescribed qualifications for licensure where the prescribed qualifications were appropriate to the profession and attainable by reasonable study or application).

The Board derives and exercises its powers pursuant to the mandates of the N.C. General Assembly. According to the 2003 Report of the FTC’s State Action Task Force “special purpose instrumentalities” such as state regulatory boards “lack independent sovereign status.” Office of Policy Planning, FTC, Report of the State Action Task Force (Sept. 2003), available at <http://www.ftc.gov/os/2003/09/stateactionreport.pdf>, at 7. However, the report noted a way for such instrumentalities to show clear articulation. “What is needed is a clearly articulated and affirmatively expressed state policy to displace competition. The critical question is whether ‘the State as sovereign *clearly* intends to displace competition in a particular field with a regulatory structure.’ The clear articulation must come from the state as sovereign.” FTC Report, at 9. Here, the North Carolina General Assembly has clearly articulated a policy forbidding unlicensed persons to practice dentistry and including the removal of “stains, accretions or deposits from the human teeth” in the practice of dentistry. N.C. Gen. Stat. § 90-29. Thus, there is a clear intent by the North Carolina legislature to displace competition in the field of teeth whitening in the interest of the public’s health and safety.

**THE DENTAL BOARD IS ACTING TO PROTECT THE PUBLIC,  
NOT TO SUPPRESS COMPETITION**

15. The allegations of paragraph 15 are denied. The plain language of N.C. Gen. Stat. § 90-29(b) states that:

A person shall be deemed to be practicing dentistry in this State who does, undertakes or attempts to do, or claims the ability to do any one or more of the following acts or things which, for the purposes of this Article, constitute the practice of dentistry ... (2) [r]emoves stains, accretions or deposits from the human teeth.

Therefore, the Board has explicit statutory authority over non-dentists who perform, undertake, attempt to undertake, or claim the ability to whiten human teeth, since such activities remove stains from teeth and by statute constitute the practice of dentistry.

16. The allegations of paragraph 16 are denied. Pursuant to N.C. Gen. Stat. § 90-29(b)(2), the removal of stains from teeth constitutes the practice of dentistry. It is the state legislature, not the Dental Board, which has made this determination. Furthermore, other authorities have agreed that teeth whitening services constitute the practice of dentistry. The Supreme Court of Alabama recently held that teeth whitening is "the practice of dentistry." See *White Smile USA, Inc. v. Board of Dental Examiners of Alabama*, No. 1080780, 2009 Ala. LEXIS 242 (Ala. Oct. 16, 2009). The Attorney General of Oklahoma, ruling upon a statute similar to North Carolina's statute, stated that offering or undertaking to remove stains from teeth constitutes the practice of dentistry. See Okla. Op. Att'y Gen. No. 03-13 (Mar. 26, 2003), 2003 Okla. AG LEXIS 13, at \*7-8. By law, Missouri also defines teeth whitening services as the practice of dentistry. Mo. Ann. Stat. § 332.366. In a 2008 decision, the Attorney General of Kansas granted that state's dental board the authority to adopt a regulation defining the application of teeth whitening products as the practice of dentistry. Kan. Op. Att'y Gen. No. 2008-13 (June 3, 2008), 2008 Kan. AG LEXIS 13, at \*8.

17. The allegations of paragraph 17 are denied. The Board enforces that statute as written, to wit, the prohibition of offering or rendering the service of removing stains from teeth by non-licensed persons. The meaning of the statute is plain and unambiguous as more fully described below.

No more precise definition of stains or accretions is necessary or provided in the North Carolina Dental Practice Act or the regulations promulgated thereunder. However, N.C. Gen. Stat. § 90-22(a) states that:

The practice of dentistry in the State of North Carolina is hereby declared to affect the public health, safety and welfare and to be subject to regulation and control in the public interest. It is further declared to be a matter of public interest and concern that the dental profession merit and receive the confidence of the public and that only qualified persons be permitted to practice dentistry in the State of North Carolina. This Article shall be liberally construed to carry out these objects and purposes. [emphasis added]

The Board's past-president was asked in his investigational hearing what the definition of a stain was in the "context of the statute." He replied that "[a] stain could be either extrinsic or intrinsic in a tooth. Could be something like [an] external stain, debris left from coffee, tea, red wine, food; or it could be intrinsic staining such as fluorosis staining, tetracycline stain, discolored stain, [or a] necrotic stain." His interpretation of "a stain," as well as the interpretations of his fellow Board members, was not arrived at arbitrarily. Rather, it was the result of many years of experience and education in the field of dentistry.

Reasonable interpretations of a regulatory statute should be accorded great weight when adopted by an agency charged with enforcing the statute. *Clarke v. Securities Industry Assn.*, 479 U.S. 388, 403-404 (1987), quoting *Investment Co. Institute v. Camp*, 401 U.S. 617, 626-627 (1971). The U.S. Supreme Court has held on numerous occasions that courts are to defer to boards' interpretations of their enabling statutes. "The Due Process Clause imposes only broad limits, ... on the exercise by a State of its authority to regulate its economic life, and particularly the conduct of the professions." *Friedman v. Rogers*, 440 U.S. 1, 18 n. 19 (1979); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978); *North Dakota Pharmacy Board v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 164-167 (1973); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487-488 (1955).

Furthermore, the Board's interpretation of its authorizing statute is both reasonable and far from unique. In fact, the Board's interpretation conforms to that of a number of other state dental boards and attorneys general who have interpreted similar statutes. As previously noted, the Alabama Supreme Court, in *White Smile USA*, reached a similar interpretation regarding an analogous statute, holding that the sale of Lightwhite at a salon was a dental service within the meaning of the Alabama statute. 2009 Ala. LEXIS 242, at \*14. Although the teeth whitening product was self-administered by the customer, the salon's employees provided instructions about the product's application, answered questions, and handled many of the materials while wearing protective gloves. *Id.* at \*13-14. Also, the lower courts in North Carolina have agreed with the Board's interpretation and enforced the plain language of the statute. See consent orders in *North Carolina State Board of Dental Examiners v. Carmel Day Spa & Salon*, No. 08CVS1542 (Mecklenburg County Super. Ct. July 9, 2008) [NCBOARD1874 - 1876] and *North Carolina State Board of Dental Examiners v. Signature Spas of Hickory, Inc.*, No. 06CVS3843 (Catawba County Super. Ct. Oct. 31, 2008) [NCBOARD2067 - 2069], and arrest warrants in *State v. Temple*, No. 04CR62182 (Davidson County Dist. Ct. Jan. 4, 2005) [NCBOARD289-290] and *State v. Angelette*, No. 04CR54519 (Cabarrus County Dist. Ct. Oct. 27, 2004) [NCBOARD240].

18. Respondent admits having enforced statutes to protect the public by prohibiting the unlicensed offering or rendering services in the practice of dentistry. Any enforcement actions undertaken by the Board through its staff are pursuant to its statutory duty to protect the citizens of North Carolina. This motivation can be illustrated by examining the relevant cases that the Board pursued in either civil or criminal court pursuant to the authority granted them under N.C. Gen. Stat. § 90-29. The teeth whitening activities of the persons and business establishments involved in each of these cases were particularly egregious.

- A salon makeup artist was making impressions of teeth in violation of N.C. Gen. Stat. § 90-29(b)(7). She was not wearing gloves or following any sterilization procedures, and she had a poison ivy rash on her hands.
- A salon brochure claimed that the teeth whitening solution penetrated to the interior of the teeth and that the stains would not reappear. The proprietor was

making impressions of her clients' teeth in violation of N.C. Gen. Stat. § 90-29(b)(7).

- The whitening in another case was chiefly performed by an employee who formerly worked as a dental assistant, and who should have been aware that teeth whitening required the supervision of a dentist under North Carolina law. The whitening process was particularly involved, with the direct application of a hydrogen peroxide gel by the spa's employees and the shining of an LED light on the teeth. In some instances, the teeth were also polished by the spa employees to loosen stains or bacteria prior to the whitening procedure.
- When the Board's investigator first visited a salon, he was falsely informed by the owner that a licensed dentist performed the teeth whitening procedures, but the owner was unable to provide the name of the dentist. After receipt of a cease and desist letter from the Board, a representative of the spa advised the Board that whitening procedures were no longer being performed. However, on a follow-up visit to the spa, the Board's investigator was told that the spa did indeed provide teeth whitening services, in the form of a whitening substance being painted on the customer's teeth and activated by a light.

The Board's concerns regarding the dangers of teeth whitening services provided by non-dentists were recently echoed by the American Dental Association (ADA). In its petition to the FDA on November 20, 2009, the ADA requested the establishment of classifications for teeth whitening chemicals. According to the ADA's press release, the petition also referenced "[t]he tremendous expansion of products available directly to consumers and application of products in venues such as shopping malls, cruise ships, and salons," which concerned the ADA because consumers of those services "have little or no assurance regarding the safety of product ingredients, doses, or the professional qualification of individuals employed in these non-dental settings." A frequent claim/defense offered by companies and individuals supplying chemicals for or engaged in non-professional teeth whitening is that the bleaching materials have received FDA approval or sanction. This is simply not the case. The concerns expressed by the ADA echo those of the Board.

These concerns have also been voiced by the regulatory agencies of other countries, including the United Kingdom and other members of the European Union. The British government has banned the provision of teeth whitening services by non-dentists, and has investigated alleged incidents of the provision of such services by non-dentists. BBC, "*Illegal*" Teeth Whitening Warning (Sept. 26, 2007), available at <http://news.bbc.co.uk/2/hi/health/7014615.stm>. The European Union has issued an advisory opinion limiting certain teeth whitening practices to licensed dentists. European Commission Health & Consumer Protection Directorate-General, Scientific Committee on Consumer Products, Document No. SCCP/1129/07, *Opinion on hydrogen peroxide, in its free form or when released, in oral hygiene products and tooth whitening products*, available at [http://ec.europa.eu/health/ph\\_risk/committees/04\\_sccp/docs/sccp\\_o\\_122.pdf](http://ec.europa.eu/health/ph_risk/committees/04_sccp/docs/sccp_o_122.pdf).

19. The allegations of paragraph 19 are denied. Regarding the supposed “extra-judicial activities,” no 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. Any party receiving a cease and desist letter could simply ignore the letter and assert as a defense to the Dental Board’s request for an injunction their contention that their activities do not constitute the practice of dentistry or seek a declaratory ruling or judgment on the issue of whether their activities constitute the practice of dentistry. See N.C. Gen. Stat. § 150B-4.

Although the Board is an independent state agency, it is not without direct state supervision. *Hass v. Oregon State Bar*, 883 F.2d 1453 (9th Cir. 1989), *cert. denied*, 494 U.S. 1081 (1990), provides authority for showing that the Board is under the direct supervision of N.C. state officials. The 9th Circuit examined the qualities of the Oregon State Bar that would not necessitate a showing of an active supervision for purposes of determining whether the Bar was protected by the state action exemption. The Bar was a state agency that regulated the practice of law for the benefit of the public. The Bar’s records were open to public inspection. The Bar’s accounts and financial records were audited by the State Auditor. The Bar’s Board of Governors was required to give public notice of its meetings. Members of the Board of Governors were public officials subject to a code of ethics enacted by the state legislature. “These requirements leave no doubt that the Bar is a public body, akin to a municipality for the purposes of the state action exemption.” *Hass*, 883 F.2d at 1460. Because the Oregon Bar was shown to be a state agency acting pursuant to a “clearly articulated and affirmatively expressed state policy,” there was no need to satisfy the active supervision requirement in order to qualify under the state action exemption. *Id.* at 1461.

All of the qualities ascribed to the Oregon State Bar by the 9th Circuit in *Hass* are equally applicable to the North Carolina State Board of Dental Examiners. As an occupational licensing entity, the Board is subject to North Carolina’s Administrative Procedure Act (APA), N.C. Gen. Stat. § 150B-1 *et seq.* This Act “establishes a uniform system of administrative rule making and adjudicatory procedures for agencies. The procedures ensure that the functions of rule making, investigation, advocacy, and adjudication are not all performed by the same person in the administrative process. N.C. Gen. Stat. § 150B-1(a). Any of the foregoing activities undertaken by the Board must comply with the APA. For example, any rules promulgated by the Board must go through a rule making process that includes an opportunity for legislative override via the Joint Legislative Administrative Procedure Oversight Committee. N.C. Gen. Stat. § 150B-21.16. If any of the non-licensed teeth whitening service providers had requested a declaratory ruling from the Board, the declaratory ruling process would have had to comply with N.C. Gen. Stat. § 150B-4.

The Board is subject to the direct supervision of the state of North Carolina pursuant to the provisions of N.C. Gen. Stat. Chapter 93B, which governs occupational licensing boards. Every board must file an annual report with the Secretary of State containing information set out in N.C. Gen. Stat. § 93B-2(a). A financial report must also be filed. N.C. Gen. Stat. § 93B-2(b). The books, records, and operations of each board are subject

to the oversight of the State Auditor pursuant to Article 5A of Chapter 147 of the General Statutes. N.C. Gen. Stat. § 93B-4. Certain restrictions on the use of occupational licensing boards' funds are also found in Chapter 93B, including the purposes for which the interest from the State Treasurer's Investment Program may be used (N.C. Gen. Stat. § 93B-11) and a prohibition against the expenditure of Board funds for lobbying purposes (N.C. Gen. Stat. § 93B-6).

The Board is also under the direct supervision of the Governor of North Carolina pursuant to the N.C. Dental Practice Act. The Board must file an annual report with the Governor on its proceedings, "showing therein the examinations given, the fees received, the expenses incurred, the hearings conducted and the result thereof." N.C. Gen. Stat. § 90-44.

Any of the Board's meetings, including those in which enforcement actions may be discussed, are subject to statutes governing the conduct of state government, such as North Carolina's Open Meetings Act, N.C. Gen. Stat. § 143-318.9 *et seq.* and the Public Records Act, N.C. Gen. Stat. Chapter 132. The State Government Ethics Act, N.C. Gen. Stat. Chapter 138A also bans conflicts of interest on the part of public officials such as the Board's members. As public officials, Board members are sworn to uphold the N.C. Dental Practice Act as well as the state and federal constitutions. In particular, Board members must comply with the N.C. Constitution regarding monopolies. N.C. Constitution Article I § 34.

State courts also provide direct supervision to the Board. The Board requires the involvement of a state court in order to undertake any action beyond the issuance of a warning letter against a non-licensee who is in violation of the N.C. Dental Practice Act. It should be noted that the cease and desist letters in the instant situation were exactly this – letters, not orders. Any 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. If a non-licensee providing teeth whitening services is prosecuted criminally for violation of N.C. Gen. Stat. § 90-40, the action is brought in the name of the state, not the Board. N.C. Gen. Stat. § 1-5. In addition, the warrant initiating the action must be signed by a magistrate or other judicial official and supported by a finding of probable cause. N.C. Gen. Stat. §§ 15A-301(a)(2), 15A-304(d). Furthermore, the local district attorney, rather than a private attorney employed or retained by the Board, prosecutes the action in District Court. There, a judge sits as trier of fact and is required to find guilt beyond a reasonable doubt before entering a judgment of conviction. N.C. Gen. Stat. §§ 7A-61, 7A-196(b), 7A-272(a).

Unlike criminal prosecutions, the Board may bring a civil action for injunctive relief in its own name. N.C. Gen. Stat. § 90-40.1(a). N.C. Gen. Stat. § 90-40.1(a) states in part that "[t]he 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" [emphasis added]. Although the burden of proof is lower than in criminal cases, only the court can grant the relief requested. N.C. Gen. Stat. § 90-

40.1(c). Even in those cases in which the defendant consents to the imposition of the requested relief, the presiding judge must approve and sign the consent judgment. In addition, only the court has the power to enforce the injunction by holding anyone who violates it in contempt of court. N.C. Gen. Stat. § 5A-15. Moreover, even disciplinary cases against licensees and declaratory rulings are subject to judicial review although they fall within the Board's administrative jurisdiction. N.C. Gen. Stat. §§ 150B-4(a), 150B-43. In short, the judiciary, as an independent branch of government is heavily involved in the Board's proceedings, whether civil, criminal or administrative; this fact also belies any assertion that the Board's enforcement actions are not subject to direct supervision.

20. Respondent denies the allegations of paragraph 20, but admits that the Board, through its staff, has sent truthful letters to persons when the Board had evidence that they were offering or rendering dental services in violation of the law. The letters sent by Board staff to persons or establishments reported to be engaged in unlicensed teeth whitening services were captioned "Notice and Order to Cease and Desist." The letters, which have not been sent out by the Board for over two years, were more in the nature of a notice rather than an order, and were similar to the cease and desist letters that other state and federal agencies (including the FTC) routinely send. The Board's Executive Officer, Bobby White, testified that the letters were sent to "people who are not our licensees who it appears are engaged in the unauthorized practice of dentistry." Testimony of Bobby White, p. 111, lines 15-17 (July 6, 2009). As for the purpose behind the letters, the following exchange occurred:

Q. And in sending a cease and desist letter, is it the desire of the Board that the person simply stop doing the activity that they are doing?

A. Well, again, it would be if they are violating the Dental Practice Act, yes, it would be the Board's desire that they stop the unauthorized practice of dentistry. And if not, tell us why they are not engaged in the unauthorized practice of dentistry.

Testimony of Bobby White, p. 162, lines 16-23 (July 6, 2009). Mr. White has also characterized the cease and desist orders as "warning letters asking them to stop any questionable practices." Parker, *State Lets Whitening Kiosks Be*, Raleigh News & Observer, Mar. 18, 2008, available at <http://www.ultrabrightusa.com/images/Newsobserver.pdf>. Just as legal counsel for non-dentist teeth whitening service providers should recognize the difference between providing teeth whitening services and selling teeth whitening kits, legal counsel should also recognize the difference between the Board's letter and a court order.

Due to the potential for confusion on this matter, it is important to note that there are major differences between Board letters and FTC cease and desist orders. The FTC is authorized to issue cease and desist orders to prevent persons and other entities from engaging in unfair competition or unfair or deceptive acts or practices. 15 U.S.C. § 45(b). Cease and desist orders issued by the FTC have the force of law; the civil penalty for violation of a cease and desist order is not more than \$10,000 for each violation. 15



U.S.C. § 45(l). Contrast the FTC's reach and power regarding their cease and desist orders with that of the Board. The reality is that if a mall kiosk or salon refuses to comply or even respond to a cease and desist letter, the Board has to proceed in court on the merits and cannot seek sanctions for the mere failure to comply with such a letter. Before compliance can be enforced, the courts – a direct arm of the state – must provide due process, reviewing the evidence and applicable law. As explained more fully below, the cease and desist letters, are facially truthful. The letters inform the recipient of the investigation, quote the applicable statute, and demand that the recipient stop violating that statute. If the service of teeth whitening is, as the Supreme Court of Alabama and state attorneys general have held, the removal of stains from teeth and thus a violation of a North Carolina statute making it illegal for a non-dentist to offer or perform such services, the letter is accurate and appropriate. The FTC has offered no authority to the contrary and did not intervene in the Alabama case. On the other hand, without an "independent review," the FTC, at the behest of one or more teeth whitening businesses attempting to illegally practice dentistry, seeks to force North Carolina to "cease and desist" enforcing its public protection statutes.

21. Respondent admits that on occasion the Board, through its staff, informed non-dentists of the provisions of the North Carolina Dental Practice Act, including the statute making it illegal to offer or render the service of removing stains from teeth without a dental license. Regarding communication with non-dentists who were considering opening teeth whitening businesses, Board staff correctly informed anyone about the applicable statutes which require that only a licensed dentist may provide the service of removing stains from teeth.

22. Respondent admits that the Board's staff sent some letters to mall owners and property management companies reciting the statute which makes offering and rendering teeth whitening services by non-dentists illegal. Respondent denies that the purpose of the letters was anything other than in furtherance of the Board's sworn duty to protect N.C. citizens and enforce the statutes. The bulk of these letters sent by Board staff to the property management companies of various shopping malls in North Carolina were dated November 21, 2007. The content of the letters was not threatening, nor were the letters enforceable orders. The letters merely requested mall management's assistance in preventing *unlawful* activity on their premises that could endanger the public. In her testimony before the FTC in July 2009, the Board's Deputy Operations Officer explained that the Board's purpose in sending the letters was primarily informational.

I believe that the purpose was informational for the owners of the mall to let them know what we believed the practice of dentistry encompassed and just informational for them; that if this was going on at these kiosks, that they could possibly help us in making sure that illegal activity was not occurring.

Testimony of Terry W. Friddle, pp. 75-76, lines 23-25 & 1-3 (July 7, 2009). Beyond sending the letters, the Board did not take any actions against the property management companies. Testimony of Terry W. Friddle, pp. 72-73, lines 23-25 & 1-5 (July 7, 2009).

Furthermore, each of the statements contained in the letters is truthful, as illustrated:

1. "The N.C. State Board of Dental Examiners is the agency created by the North Carolina legislature to enforce the dental laws in this state." This statement is correct, pursuant to N.C. Gen. Stat. § 90-22.
2. "The Dental Board has learned that an out of state company has leased kiosks in a number of shopping malls in North Carolina for the purpose of offering tooth whitening services to the public." This statement is correct, and note that the operative word is "services." Teeth whitening services were being provided, in contrast with the legal sale of teeth whitening kits. To the Board's knowledge, there is no evidence that the letter itself stopped anyone who was only selling teeth whitening kits and not providing services that constitute the practice of dentistry. Non-dentist providers of teeth whitening services have access to legal counsel, either directly or through their supplier. Legal counsel should know the difference between the sale of products (teeth whitening kits) and the provision of teeth whitening services.
3. "North Carolina law specifically provides that the removal of stains from human teeth constitutes the practice of dentistry. See N.C. Gen. Stat. 90-29(b)(2)." The statute speaks for itself.
4. "The unauthorized practice of dentistry is a misdemeanor. See N.C. Gen. Stat. 90-40." Again, the statute speaks for itself.
5. "It is our information that the teeth whitening services offered at these kiosks are not supervised by a licensed North Carolina dentist." This statement is correct, and once again the operative word is "services."
6. "The Dental Board would be most grateful if your company would assist us in ensuring that property owned or managed by your company is not being used for improper activity that could create a risk to the public health and safety." This statement is correct, and it should also be noted that it emphasizes the Board's concern for public protection is its primary motivation in addressing such services.

Regardless, such letters had limited effect on the property management companies that received them. In her testimony, Terry Friddle reported that she did not recall receiving any phone calls from people who were planning to open a teeth whitening business and were having difficulty leasing retail space. Testimony of Terry W. Friddle, p. 78, lines 19 – 24 (July 7, 2009). However, there was at least one instance where a property management company contacted the Board as the result of receiving a letter. In that instance, the management company had been "repeatedly informed" by someone seeking to lease kiosk space that the Board had reviewed their particular teeth whitening process and actually approved it.

23. The allegations of paragraph 23 are denied. As stated previously, the Dental Board is a state agency, not a private trade association, and it is the state legislature, not the Dental Board, which has decided that the removal of stains from human teeth constitutes the practice of dentistry. Furthermore, the danger to the public more than outweighs any harmful effects on competition. Two Dental Board members testified at the FTC's investigatory hearings about the many health concerns associated with the removal of stains from teeth by non-qualified persons. In addition, a Board investigator also testified regarding the unsanitary conditions she found at one teeth whitening salon. See Testimony of Terry Friddle, p. 96, lines 10 - 22 (July 7, 2009). The Board has also received several complaints from consumers who reported they were injured by non-dentists providing teeth whitening services.

The Board's enforcement of the Dental Practice Act vis-à-vis teeth whitening businesses is not based upon a Board rule, but upon a state statute making it illegal for non-licensees to provide services to remove stains from teeth. Given the explicit statutory language and high degree of direct state supervision (although arguably not necessary to be shown in this case), this matter is squarely within the scope of the state action doctrine.

As with *Hass*, the case of *Staker v. Board of Regents of the State University of N.Y.*, 1977-2 Trade Cas. (CCH) ¶ 61,703, 1977 U.S. Dist. LEXIS 14024 (E.D.N.Y. 1977), typifies courts' application of the *Parker* test to facts such as those presented here. In *Staker*, the New York State Board for Dentistry was alleged to have committed antitrust violations. The Board of Regents, the dental board, and the individual members of both boards were under scrutiny for the promulgation of certain advertising regulations. The plaintiff also sought a declaratory judgment that a statute barring certain advertising practices was in violation of antitrust laws. The court held that the action would not lie against the two boards and their members in their official capacities. 1977 U.S. Dist. LEXIS 14024, at \*10. The court further explained that,

[t]o the extent that they acted, they were acting under an explicit power delegated to the Board of Regents by the legislature. ... Their action was, whether found mistaken or not in some final analysis, well within the scope of their delegated authority, and, to the extent that they acted, their action was not out of keeping with the considered judgment of the time in which they acted.

*Id.* at \*11. Also see *Brazil v. Arkansas State Bd. of Dental Examiners*, 759 F.2d 674 (8th Cir. 1985) (state action doctrine applied to the Arkansas dental board, which had promulgated a rule prohibiting the making of dentures without a prescription or work order signed by a dentist); *Llewellyn v. Crothers*, 765 F.2d 769, 773 (9th Cir. 1985) (where the restraint in question is, first, clearly articulated and affirmatively expressed as a matter of state policy, and, second, subject to the active supervision of the state itself, the *Parker* defense is applicable).

**THE BOARD'S ENFORCEMENT OF THE STATE STATUTE SOLELY  
PROTECTS THE PUBLIC AND HAS NO ADVERSE EFFECTS ON  
LAWFUL COMPETITION**

24. The allegations of paragraph 24 are denied. As to any alleged exclusionary course of conduct by the Board, there is no desire on the Board's part to diminish the number of salons, retail stores, kiosks, etc. or impede their sales as long as they obey the laws of North Carolina as enacted by the General Assembly and that the Board members have sworn an oath to uphold. There is no evidence that the competitive sales of OTC kits has lessened. Indeed, market reports indicate that such sales are increasing. It is true that the Board, by executing its statutory mandate, has decreased the likelihood that non-licensed kiosk workers will endanger the health, safety, and welfare of the public.

25. The allegations of paragraph 25 are denied. As to the Board's alleged actions and course of conduct restraining competition and injuring consumers, non-dentists are prohibited by N.C. law from providing services that constitute the practice of dentistry. The Board is one of the agencies designed to enforce the statute enacted by the General Assembly. If price is the primary concern for some consumers, they may freely avail themselves of numerous OTC teeth whitening kits. Any consumer in North Carolina can get OTC teeth whitening without impediment and without paying for the illusion of receiving a professional teeth whitening service from untrained and unsanitary kiosk workers.

**THE BOARD'S EFFORTS TO PROTECT THE PUBLIC  
DO NOT CONSTITUTE VIOLATIONS OF THE ANTITRUST LAWS**

26. The allegations of paragraph 26 are denied. There is no contract, combination or conspiracy, nor a sliver of evidence even hinting of such. Board members' good faith is presumed as a matter of law and alleged "collusion" cannot be inferred from the mere fact that, as required by statute, they are dentists. The North Carolina General Assembly adopted an explicit prohibition against unlicensed persons providing teeth stain removal services to the public. In fact, the financial interest of the dentist members is nominal at best, whereas the least expensive alternatives, OTC kits, are not regulated by the Board.

**THE FTC'S CONTEMPLATED RELIEF EXCEEDS THE FTC'S AUTHORITY  
AND WOULD UNCONSTITUTIONALLY IMPAIR THE ABILITY OF THE  
STATE OF NORTH CAROLINA TO PROTECT ITS CITIZENS UNDER THE  
TENTH AND ELEVENTH AMENDMENTS TO THE CONSTITUTION**

Respondent denies that any of the relief set forth in the Complaint's Notice of Contemplated Relief, or the subparts thereto, is justified by fact or law, or in equity. The relief the FTC seeks belies a fundamental disregard for the prerogative of a state to protect its citizens by statute. Over all, the relief would require the Board and Board members to violate the clear and unambiguous language of a state statute.

1. Regarding a requirement for the Board to notify an independent state authority of any proposed or contemplated action to restrain non-dentist providers from offering teeth whitening services, this proposed relief arises from the FTC's fundamental misunderstanding of the way state boards operate in North Carolina. North Carolina occupational licensing boards are independent state agencies. They operate as independent quasi-judicial Boards as provided in the state Constitution. The independent body is the Board itself. However, aside from Board oversight regarding enforcement practices, the Board cannot lawfully actually force a kiosk operator to stop providing dental services without either a court order or, in the instance of a criminal prosecution, the cooperation of a local district attorney. The Board cannot convict anyone of the crime of unauthorized practice of dentistry without the decision of a court (in North Carolina, our district attorneys and our courts are "independent").
2. Regarding a requirement for the Board to secure the "prior and appropriate approval" of an independent state authority before taking any action that may restrain the provision of teeth whitening services by non-dentist providers, see the response to paragraph 1 above.
3. As to the requirement that the Board cease and desist from directing any non-dentist provider of teeth whitening services to cease providing those services, the Notice and Order to Cease and Desist has not been sent in the last two years. However, the cease and desist letter is substantively similar to letters sent by many other state and federal agencies and indeed the FTC itself.
4. As to the requirement that the Board cease and desist communicating to any non-dentist provider of teeth whitening services that: (i) such non-dentist provider is violating, has violated, or may be violating the North Carolina Dental Practice Act by providing teeth whitening services, or (ii) the provision of teeth whitening services by a non-dentist provider is a violation of the North Carolina Dental Practice Act, it is the Board's statutory duty to enforce the North Carolina Dental Practice Act - especially when the perceived conduct might be a criminal violation. If indeed the conduct is blatant, the agency can go further and should. Such kiosk operators always have within their reach legal counsel, and indeed if it is a criminal action they have a right to a court-appointed attorney. It should be noted that in the instances discussed above, where the Board sought criminal prosecution there was a defense, but the defense did not challenge the Board's authority to send the letter. In the civil matters, the courts sustained the Board's prerogative.
5. As to the requirement that the Board include in all correspondence with any non-dentist provider of teeth whitening services a statement that the Board does not have the authority to determine whether the law has been violated, and that only a court can make that determination and then assess penalties, if judged appropriate, it is clearly the Board's statutory prerogative to initiate civil suits and to seek criminal prosecution. The Board cannot and should not unilaterally agree to another arrangement that has not been statutorily authorized. Again, the FTC seems to think that North Carolina boards can assert jurisdiction over and force unlicensed kiosk operators into hearings before their

Board similar to the way the FTC operates. There are far greater assurances of due process in the way the Dental Board must proceed.

6. As to the requirement that the Board cease and desist communicating to a lessor of commercial property that (i) the provision of teeth whitening services by a non-dentist provider is a violation of the North Carolina Dental Practice Act, or (ii) that any non-dentist provider of teeth whitening services is violating, has violated, or may be violating the North Carolina Dental Practice Act by providing teeth whitening services, the Board has not done so for over two years. Nevertheless, the Board has an obligation to inform third parties who might act in reliance upon the illegal conduct of kiosk operators to clearly and accurately inform them of the Board's position and the statutes implicated.

7. As to the requirement that the Board distribute a copy of the Commission's order to each and every current and future Dental Board member; officer, manager, representative, agent, and employee of the Dental Board, the Board will provide a copy of this response to any such person.

8. The Board shall seek reimbursement of costs of this proceeding.

#### **FURTHER DEFENSES**

The inclusion of any defense within this section does not constitute an admission that Respondent bears the burden of proof on each or any of the issues, nor does it excuse complaint counsel from establishing each element of its purported claim for relief.

##### **First Defense**

The Complaint fails to state a claim upon which relief can be granted under Section Five of the Federal Trade Commission Act, 15 U.S.C. § 45.

##### **Second Defense**

The Respondent Board is immune from the Federal Trade Commission Act pursuant to the State Action Doctrine as pronounced the U.S. Supreme Court.

##### **Third Defense**

The Respondent Board, as an agency of the state of North Carolina, possesses sovereign immunity under the 11th Amendment to the U.S. Constitution.

##### **Fourth Defense**

The actions of the Respondent Board are protected by the 10th Amendment to the U.S. Constitution, which reserves the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, to the States.

#### **Fifth Defense**

The Commission lacks subject matter jurisdiction to force the Respondent Board to abrogate a state statute.

#### **Sixth Defense**

Pursuant to 15 U.S.C. § 45(a)(3), the Commission lacks jurisdiction over conduct that does not have a direct, substantial, and reasonable foreseeable effect on U.S. commerce.

#### **Seventh Defense**

The relief sought in the Complaint is not in the public interest because it would, among other things, endanger the health, safety, and welfare of the citizens of North Carolina.

#### **Eighth Defense**

Respondent reserves the right to assert additional defenses as this matter proceeds.

#### **CONCLUSION**

Counsel for the Board has asked repeatedly for citation to a single authority for the FTC's position. None has been provided because none exists. This is an unprecedented frontal attack on a clear state statute and on a sovereign state's right to protect its citizens. Without evidence or precedent, and despite contrary court precedence directly on point, the Complaint has charged that the Board, by merely by enforcing the law as required by state statutes, was *ipso facto* "conspiring" in violation of the antitrust laws.

The "removal of stains" includes teeth whitening services in North Carolina's definition of the practice of dentistry. Even if a sliver of ambiguity could be found in North Carolina's statute, the U.S. Supreme Court has repeatedly held that the courts are to defer to state licensing boards in the interpretation of state enabling statutes.

The Commission cannot premise its theory of collusion or conspiracy upon the mere fact that the majority of the Board are practicing dentists. Furthermore, the U.S. Supreme Court has repeatedly held that the good faith of licensing board members is to be presumed.

This the 6th day of July, 2010.

ALLEN AND PINNIX, P.A.

/s/ Noel L. Allen

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Noel L. Allen  
Attorney for Respondent  
Post Office Drawer 1270  
Raleigh, North Carolina 27602  
Telephone: 919-755-0505  
Facsimile: 919-829-8098  
Email: [nallen@allen-pinnix.com](mailto:nallen@allen-pinnix.com)



## CERTIFICATE OF SERVICE

I hereby certify that on July 6, 2010, 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:

Richard C. Donohue  
Acting Secretary  
Federal Trade Commission  
600 Pennsylvania Avenue, N.W.  
Room H-159  
Washington, D.C. 20580

I also certify that the undersigned has this date served copies of the foregoing upon all parties to this cause by depositing copies hereof, postage prepaid, in the United States Mail, addressed as follows:

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

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

Michael J. Bloom  
Bureau of Competition  
Federal Trade Commission  
600 Pennsylvania Avenue, N.W.  
Room H-374  
Washington, D.C. 20580  
[mjbloom@ftc.gov](mailto:mjbloom@ftc.gov)

Geoffrey Green  
Bureau of Competition  
Federal Trade Commission  
600 Pennsylvania Avenue, N.W.  
Room NJ-6264  
Washington, D.C. 20580  
[ggreen@ftc.gov](mailto:ggreen@ftc.gov)

Stephanie Langley  
Bureau of Competition  
Federal Trade Commission  
600 Pennsylvania Avenue, N.W.  
Room NJ-6264  
Washington, D.C. 20580  
[slangley@ftc.gov](mailto:slangley@ftc.gov)

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

The Honorable D. Michael Chappell  
Administrative Law Judge  
Federal Trade Commission  
600 Pennsylvania Avenue N.W.  
Room H-113  
Washington, D.C. 20580  
[oalj@ftc.gov](mailto:oalj@ftc.gov)

/s/ Noel L. Allen

#### **CERTIFICATION FOR ELECTRONIC FILING**

I further certify that the electronic copy sent to the Acting 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

# Tab 3

**UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION**

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

**RESPONDENT'S OBJECTIONS AND RESPONSES TO COMPLAINT  
COUNSEL'S FIRST SET OF REQUESTS FOR ADMISSION**

Pursuant to Rule 3.32 of the Federal Trade Commission's Rules of Practice, Respondent North Carolina State Board of Dental Examiners ("Board") hereby submits its objections and responses to Complaint Counsel's First Set of Requests for Admission.

**General Objections**

1. Respondent objects to each and every Request for Admissions to the extent it requires Respondent to respond by disclosing his attorneys' or any other representatives' mental impressions, conclusions, opinions, computations, calculations, projections, reasons, legal theories, other work product, or the like, on the ground that said Request for Admissions exceeds the permissible scope of discovery under the Rule 3.32. In this regard, Respondent notes, in particular, that Complaint Counsel has objected and refused to answer to several of Respondent's Requests on such grounds.
  
2. Respondent objects to each and every Request for Admissions to the extent it, whether standing alone or taken in conjunction with any and all other Requests for Admissions is calculated, or would operate, to annoy, embarrass, oppress, unduly burden or unduly cause expense to Respondent, or would be unduly vexatious or burdensome to respond to, on the ground that said Request for Admissions exceeds the permissible scope of discovery under the Rule 3.32.
  
3. Respondent objects to each and every Request for Admissions to the extent it requires Respondent to respond by acquiring or providing information that would be irrelevant to the claims or defenses of any party to this action, on the ground that said Request for Admissions exceeds the permissible scope of discovery under the Rule 3.32.
  
4. Respondent objects to each and every Request for Admissions to the extent it requires the Respondent to respond by waiving its attorney-client privilege, on the ground that said Request for Admissions exceeds the permissible scope of discovery under the Rule 3.32.

5. Without waiving or prejudicing its rights to assert these General Objections or any other objections which may be set forth herein, and in a good faith effort to provide the information available to Respondent at this stage of the discovery and investigative process in this litigation, Respondent will provide responsive and non-objectionable information now available with regard to certain of the Requests for Admissions.
6. Respondent objects to Complaint Counsel's Requests for Admission to the extent that they seek information related to issues that may be the subject of expert testimony in this case.
7. Respondent objects to Complaint Counsel's Requests for Admission to the extent that they are unduly burdensome, oppressive, and are not reasonably calculated to lead to the discovery of admissible evidence.
8. Respondent objects to Complaint Counsel's Requests for Admission to the extent that they call for information previously provided to Complaint Counsel or information that may be less onerously obtained through other means.
9. Respondent objects to Complaint Counsel's Requests for Admission to the extent that they seek information protected by deliberative process privilege, law enforcement investigative privilege, informant's privilege, or attorney work product doctrine.
10. Respondent objects to Complaint Counsel's Requests for Admission to the extent that they do not relate to statements or opinions of fact or of the application of law to fact, and thereby exceed the scope of Rule 3.32.
11. Respondent objects to Complaint Counsel's Requests for Admission to the extent that any Request quotes from a document or references a statement and solicits an admission that the quote or statement is evidence of the truth of the matter asserted.
12. Respondent reserves all of its evidentiary objections or other objections to the introduction or use of any response at the hearing in this action and does not, by any response to any request for information, waive any objection to that request for admission, stated or unstated.
13. Respondent does not, by any response to any request, admit to the validity of any legal or factual contention asserted to or assumed in the text for any request for admission.
14. Respondent's discovery and investigation in this matter are continuing. Respondent reserves the right to assert additional objections to Complaint Counsel's First Set of Requests for Admission, and to amend or supplement these objections and its responses as necessary.

15. Respondent objects to the term “unlicensed practice of dentistry,” which is nowhere used in the North Carolina Dental Practice Act, but which is utilized repeatedly in Complaint Counsel’s Requests for Admission.

### Responses

The General Objections as stated above are incorporated into each of Respondent’s Specific Objections below.

1. Admit that the Dental Board is a legal entity and is not a bank, savings and loans institution, common carrier, air carrier, or agricultural cooperative.

Respondent incorporates its General Objections into its response to this Request for Admission.

Respondent specifically objects to the use of the undefined phrase “legal entity” as vague and ambiguous.

Subject to these objections and qualifications, it is admitted that the Board is an agency of the State of North Carolina established by statute to enforce the Dental Practice Act. It is further admitted that the Board is not a bank, savings and loans institution, common carrier, air carrier, or agricultural cooperative. It is also admitted that Respondent is not a legal entity such as a private trade association or other entity that has any “proximate relation to lucre” whatsoever. Respondent is solely a creature of statute and as only an agency of the state, is not a “legal entity” separate from the State, itself.

2. Admit that a relevant market in which to assess the competitive effects of the Dental Board’s conduct with respect to the provision of teeth whitening services by non-dentists is North Carolina or smaller communities therein.

Respondent incorporates its General Objections into its response to this Request for Admission.

Respondent specifically objects to the use of the undefined phrase “relevant market” as vague and ambiguous.

Subject to these objections and qualifications, Respondent denies this request. The State of North Carolina has evidenced a clear intent to displace competition in the field of teeth whitening services by the enactment of N.C. Gen. Stat. § 90-29, which prohibits unlicensed persons from practicing dentistry, including the removal of “stains, accretions or deposits from the human teeth.” Further, the Commission’s proposed definition of relevant market attempts to include illegal services which, as a matter of law, should not be included in a relevant market definition.

3. Admit that the relevant market in which to assess the competitive effects of the Dental Board's conduct with respect to the provision of teeth whitening services by non-dentists includes dentists that provide teeth whitening services.

Respondent incorporates its General Objections into its response to this Request for Admission.

Respondent specifically objects to the use of the undefined phrase "relevant market" as vague and ambiguous.

Subject to these objections and qualifications, Respondent denies this request. The State of North Carolina has evidenced a clear intent to displace competition in the field of teeth whitening services by the enactment of N.C. Gen. Stat. § 90-29, which forbids unlicensed persons from practicing dentistry, including the removal of "stains, accretions or deposits from the human teeth." Further, the Commission's proposed definition of relevant market attempts to include illegal services which, as a matter of law, should not be included in a relevant market definition.

4. Admit that a Dental Board member is not obligated to disclose to the North Carolina State Ethics Commission whether that member derives income from providing teeth whitening services, and that no Dental Board member has made any such disclosure.

Respondent incorporates its General Objections into its response to this Request for Admission.

Subject to these objections and qualifications, it is admitted that the Ethics Commission does not require occupational licensing board members who are members of the profession that the Board regulates to itemize or categorize the income that they derive from the various professional services that they perform. To the extent that members of the Board are not required pursuant to statute or regulation to disclose such information, they have not done so. However, prior to each meeting of the Board a conflict of interest statement is read. As the Ethics Commission has previously ruled, the mere fact that a member of a state board is a practicing member of the profession regulated by that board is not in and of itself a conflict of interest. Further, as shown in responses to the Commission's subpoenas, current and past members of Respondent generally have an immaterial amount from zero to less than 5% of their business as teeth-whitening services.

5. Admit that no member of the Dental Board has ever been recused from an investigation or adjudication of a non-dentist providing teeth whitening services on the basis that that Dental Board member derives income from providing teeth whitening services.

Respondent incorporates its General Objections into its response to this Request for Admission.

Respondent specifically objects to the use of the undefined phrase “been recused” as vague and ambiguous. Subject to these objections and qualifications, it is admitted that no Board member has ever recused himself or herself from an investigation or adjudication of the provision of teeth whitening services as the unauthorized practice of dentistry and that, pursuant to N.C. Gen. Stat. § 138A-38(a)(1) and a formal advisory opinion issued by the State Ethics Commission on May 22, 2008 (AO-E-08-0002), a member of a state occupational licensing board may participate in an official action if “the only interest or reasonably foreseeable benefit or detriment that accrues to the covered person ... is no greater than that which could reasonably be foreseen to accrue to all members of that profession, occupation, or general class.”

6. Admit that the Dental Board has closed one or more investigations relating to the unlicensed practice of dentistry involving non-dentists providing teeth whitening services because the Dental Board concluded that the non-dentist(s) neither made an impression of customers’ teeth or gums nor touched customers’ mouth, teeth, or gums.

Respondent incorporates its General Objections into its response to this Request for Admission.

Respondent specifically objects to the undefined phrase “the Dental Board concluded” as vague and ambiguous. Subject to these objections and qualifications, Respondent denies this request. It is admitted, however, that those factors may have been considered as a part of a determination to continue the investigation or to close an investigation where there was an investigation into the unauthorized practice of dentistry in the form of teeth whitening.

7. Admit that one or more members of the Dental Board have, at some time during his or her Dental Board tenure, believed that the provision of teeth whitening services by nondentists did not constitute the unlicensed practice of dentistry unless the non-dentist either made an impression of customers’ teeth or gums or touched the customers’ mouth, teeth, or gums.

Respondent incorporates its General Objections into its response to this Request for Admission.

Respondent specifically objects to this request as irrelevant to the enforcement of North Carolina’s Dental Practice Act as it relates to the unauthorized practice of dentistry in general and in particular, teeth whitening by non-dentists. Respondent denies this request inasmuch as members of the State Board cannot make such determinations individually. Such determinations, if ever, made, would be made as provided by statute by the State Board’s majority. Upon information and belief, this request is therefore denied.



8. Admit that a non-dentist selling teeth whitening product(s) for use in that non-dentist's commercial establishment, without more, does not constitute the unlawful practice of dentistry in North Carolina.

Respondent incorporates its General Objections into its response to this Request for Admission.

Subject to these objections, to the extent that the non-dentist does not provide any services or assist or instruct the customer in any manner regarding the use of the product, this request is admitted. Further, Respondent denies this request to the extent that North Carolina law allows nondentists such as hygienists to provide such services if under the direct supervision of a dentist.

9. Admit that a non-dentist selling teeth whitening product(s) for use in that non-dentist's commercial establishment, and reading to a consumer the pre-packed instructions for the teeth whitening product(s), without more, does not constitute the unlawful practice of dentistry in North Carolina.

Respondent incorporates its General Objections into its response to this Request for Admission.

Subject to these objections, to the extent that a non-dentist assists a customer with any services and or advice attendant to the sale of a teeth whitening product, this request is denied.

10. Admit that a non-dentist selling teeth whitening product(s) for use in that non-dentist's commercial establishment, reading to a consumer the pre-packed instructions for the teeth whitening product(s), and applying carbamide peroxide or hydrogen peroxide to a pre-fabricated mouthpiece that the consumer removes from the package and then inserts into his or her mouth, without more, does not constitute the unlawful practice of dentistry in North Carolina.

Respondent incorporates its General Objections into its response to this Request for Admission.

Subject to these objections, to the extent that a non-dentist assists a customer with any services and or advice attendant to the sale of a teeth whitening product, this request is denied.

11. Admit that a non-dentist selling teeth whitening product(s) for use in that non-dentist's commercial establishment, and answering questions about teeth whitening

product(s) and its use, without more, does not constitute the unlawful practice of dentistry in North Carolina.

Respondent incorporates its General Objections into its response to this Request for Admission.

Subject to these objections, to the extent that a non-dentist assists a customer with any services and or advice attendant to the sale of a teeth whitening product, this request is denied.

12. Admit that the Dental Board has not considered or proposed adopting a regulation that in North Carolina, teeth whitening services can only be performed by a licensed dentist, or persons under the direct supervision of a licensed dentist.

Respondent incorporates its General Objections into its response to this Request for Admission.

Subject to these objections, Respondent denies this request. N.C. Gen. Stat. § 90-29 and 90-40 already prohibit unlicensed persons from engaging in the unauthorized practice of dentistry, including the removal of “stains, accretions or deposits from the human teeth.”

13. Admit that no official or agency of the state of North Carolina, including the Legislature or Executive, has overruled, countermanded, or amended a decision by the Dental Board with respect to the unauthorized practice of dentistry.

Respondent incorporates its General Objections into its response to this Request for Admission.

Respondent specifically objects to the use of the undefined phrases “overruled, countermanded, or amended a decision” and “no official or agency of the state of North Carolina, including the Legislature or Executive” as vague and ambiguous. Subject to these objections and qualifications, Respondent denies this request to the extent that as a state agency it is subject to direct oversight from the N.C. State Ethics Commission (executive branch), state courts, the Rules Review Commission, and the legislature through committees.

14. Admit that no official or agency of the state of North Carolina, including the Legislature or Executive, has sought information about a decision by the Dental Board with respect to the provision of teeth whitening services.

Respondent incorporates its General Objections into its response to this Request for Admission.

Respondent specifically objects to the use of the undefined phrases “sought information about a decision” and “no official or agency of the state of North Carolina, including the Legislature or Executive” as vague and ambiguous. Subject to these objections and qualifications, Respondent denies this request to the extent that as a state agency it is subject to direct oversight from the N.C. State Ethics Commission (executive branch), state courts, the Rules Review Commission, and the legislature through committees.

15. Admit that no official or agency of the state of North Carolina, including the Legislature or Executive, has and exercises power to review and disapprove of particular decisions of the Dental Board with respect to who is engaged in the unlawful practice of dentistry through the provision of teeth whitening services.

Respondent incorporates its General Objections into its response to this Request for Admission.

Respondent specifically objects to the use of the undefined phrases “sought information about a decision” and “no official or agency of the state of North Carolina, including the Legislature or Executive” as vague and ambiguous. Subject to these objections and qualifications, Respondent denies this request to the extent that as a state agency it is subject to direct oversight from the N.C. State Ethics Commission (executive branch), state courts, the Rules Review Commission, and the legislature through committees.

16. Admit that with respect to the Dental Board’s actions concerning the provision of nondental teeth whitening services, no outside North Carolina state official or agency has ascertained the relevant facts, examined the substantive merits of a Dental Board’s action, and assessed whether the Dental Board’s action comports with the underlying statutory criteria established by the North Carolina Legislature in a way sufficient to establish the challenged conduct is a product of deliberate state intervention rather than private choice.

Respondent incorporates its General Objections into its response to this Request for Admission.

Respondent specifically objects to the use of the undefined phrase “no outside North Carolina state official or agency has ascertained the relevant facts, examined the substantive merits of a Dental Board’s action, and assessed whether the Dental Board’s action comports with the underlying statutory criteria established by the North Carolina Legislature in a way sufficient to establish the challenged conduct is a product of deliberate state intervention rather than private choice.” Subject to these objections and qualifications, Respondent denies this request to the extent that as a state agency it is subject to direct oversight from the N.C. State Ethics Commission (executive branch), state courts, the Rules Review Commission, and the legislature through committees.

17. Admit that the actions of the Dental Board have prevented or deterred non-dentists from providing or expanding teeth whitening services in North Carolina.

Respondent incorporates its General Objections into its response to this Request for Admission.

Subject to these objections, Respondent admits that the unauthorized practice of dentistry is a violation of North Carolina law. Respondent further admits that the Board is authorized by the N.C. Dental Practice Act to enforce violations of the unauthorized practice of dentistry.

18. Admit that the Dental Board initiated no more than three investigations with respect to the provision of non-dental teeth whitening services based on complaints of actual consumer harm.

Respondent incorporates its General Objections into its response to this Request for Admission.

Respondent specifically objects to this request because the N.C. Dental Practice Act does not require that an injury be suffered before a complaint is made to the Board. Subject to these objections and qualifications, Respondent admits that only three investigations it opened included a report of harm or injury to an individual. Respondent further admits that numerous investigations have included reports of potential violations of the N.C. Dental Practice Act as to the unauthorized practice of dentistry.

19. Admit that the subpoena returns provided in response to subpoenas from Complaint Counsel in this matter fairly and accurately summarize the revenues these dentists obtained from the provision of teeth whitening services, the number of patients obtaining teeth whitening services, and the total number of their patients over the reporting period.

Respondent incorporates its General Objections into its response to this Request for Admission.

Subject to these objections, Respondent is without specific knowledge of each of the dentists' practices to verify the accuracy of the revenues and numbers of patients served by the subpoena respondents; however, Respondent admits that it is of the belief that the subpoena respondents have responded to the subpoenas and provided that information to the best of their ability.

20. Admit that the Dental Board learned in 2008 that the Attorney General of North Carolina did not believe that the provision of teeth whitening services by non-dentists constituted the unlawful practice of dentistry.

Respondent incorporates its General Objections into its response to this Request for Admission.

Subject to these objections, this request is denied.

21. Admit that the Dental Board is not aware of any study showing that dental teeth whitening is safer than teeth whitening provided at a mall or salon.

Respondent incorporates its General Objections into its response to this Request for Admission.

Respondent specifically objects to this request because it is irrelevant to the issue of the unlawful and unauthorized provision of teeth whitening services by non-dentists. Subject to these objections and qualifications, Respondent admits that it is not aware of studies comparing the safety of teeth whitening services as performed by dentists versus unauthorized providers.

22. Admit that there has been no decision on the merits in a North Carolina court relating to the Dental Board's enforcement of the Dental Practices Act with respect to non-dental teeth whitening.

Respondent incorporates its General Objections into its response to this Request for Admission.

Respondent specifically objects to this request because it is irrelevant to the clear prohibition against the offering and provision of teeth whitening services by unauthorized non-dentist providers in the N.C. Dental Practice Act. Subject to these objections and qualifications, it is admitted that there has been no such decision on the merits in a North Carolina court; however, there has been such a decision by the Supreme Court of Alabama.

23. Admit that the Dental Board is not aware of any consumer harm caused by the "salon make up artist" who made "impressions of teeth in violation of N.C. Gen. Stat. §90- 29(b)(7)" as referenced paragraph 18 of the Dental Board's Response.

Respondent incorporates its General Objections into its response to this Request for Admission.

Respondent specifically objects to this request because the undefined phrase "consumer harm" is ambiguous and vague. Respondent further objects to this request because the N.C. Dental Practice Act does not require that an injury be suffered before a complaint is made to the Board. Subject to these objections and qualifications, Respondent admits

that it is not aware of any harm caused by said make up artist to consumers; however, this does not mean that no harm was caused by the make up artist's unauthorized practice of dentistry.

24. Admit that the Dental Board is not aware of any consumer harm caused by the "salon brochure" that "claimed that the teeth whitening solution penetrated to the interior of the teeth and that the stains would not reappear" as referenced paragraph 18 of the Dental Board's Response.

Respondent incorporates its General Objections into its response to this Request for Admission.

Respondent specifically objects to this request because the undefined phrase "consumer harm" is ambiguous and vague. Respondent further objects to this request because the N.C. Dental Practice Act does not require that an injury be suffered before a complaint is made to the Board. Subject to these objections and qualifications, Respondent admits that it is not aware of any harm caused by the distribution of the said salon brochure to consumers and potential consumers; however, this does not mean that no harm was caused by the misrepresentations contained in the salon brochure.

25. Admit that the Dental Board is not aware of any consumer harm caused by the provision of teeth whitening services from the "employee who formerly worked as a dental assistant" as referenced paragraph 18 of the Dental Board's Response.

Respondent incorporates its General Objections into its response to this Request for Admission.

Respondent specifically objects to this request because the undefined phrase "consumer harm" is ambiguous and vague. Respondent further objects to this request because the N.C. Dental Practice Act does not require that an injury be suffered before a complaint is made to the Board. Subject to these objections and qualifications, Respondent admits that it is not aware of any harm caused by said employee to consumers; however, this does not mean that no harm was caused by the employee's unauthorized practice of dentistry.

26. Admit that the Dental Board is not aware of any consumer harm caused by the "spa employees" who directly applied hydrogen peroxide gel and shined an LED light on the consumer's teeth as referenced paragraph 18 of the Dental Board's Response.

Respondent incorporates its General Objections into its response to this Request for Admission.

Respondent specifically objects to this request because the undefined phrase "consumer harm" is ambiguous and vague. Respondent further objects to this request because the N.C. Dental Practice Act does not require that an injury be suffered before a complaint is made to the Board. Subject to these objections and qualifications, Respondent admits that it is not aware of any harm caused by said spa employees to consumers; however, this does not mean that no harm was caused by the employees' unauthorized practice of dentistry.

27. Admit that the Dental Board is not aware of any consumer harm caused by the "spa employees" that "loosen stains or bacteria prior to the whitening procedure" as referenced paragraph 18 of the Dental Board's Response.

Respondent incorporates its General Objections into its response to this Request for Admission.

Respondent specifically objects to this request because the undefined phrase "consumer harm" is ambiguous and vague. Respondent further objects to this request because the N.C. Dental Practice Act does not require that an injury be suffered before a complaint is made to the Board. Subject to these objections and qualifications, Respondent admits that it is not aware of any harm caused by said spa employees to consumers; however, this does not mean that no harm was caused by the employees' unauthorized practice of dentistry.

28. Admit that the Dental Board is not aware of any consumer harm caused by the salon operator that provided teeth whitening services, "in the form of whitening substance being painted on the customer's teeth and activated by a light," as referenced paragraph 18 of the Dental Board's Response.

Respondent incorporates its General Objections into its response to this Request for Admission.

Respondent specifically objects to this request because the undefined phrase "consumer harm" is ambiguous and vague. Respondent further objects to this request because the N.C. Dental Practice Act does not require that an injury be suffered before a complaint is made to the Board. Subject to these objections and qualifications, Respondent admits that it is not aware of any harm caused by said salon operator to consumers; however, this does not mean that no harm was caused by the salon operator's unauthorized practice of dentistry.

29. Admit that the Dental Board is unaware of any complaint by a consumer of non-dental teeth whitening services to the Dental Board or any other consumer protection agency in North Carolina alleging that he or she believed, or was led to believe, that the services were being provided by a dentist.

Respondent incorporates its General Objections into its response to this Request for Admission.

Subject to these objections and qualifications, Respondent admits that it is not aware of any such reports; however, this does not mean that the impression was not projected by non-dentist providers of teeth whitening services that they were a member of the health care profession, but not specifically a dentist.

30. Admit that consumers of services from dentists licensed in North Carolina who complained to the Dental Board suffered injuries or harm requiring treatment by another dentist licensed in North Carolina.

Respondent incorporates its General Objections into its response to this Request for Admission.

Respondent specifically objects to this request because it is irrelevant to the issue of the unlawful and unauthorized provision of teeth whitening services by non-dentists. Subject to these objections and qualifications, Respondent admits that it has received reports of injuries that have occurred to patients of dentists during treatment. Respondent further admits that it has investigated these matters and has taken appropriate disciplinary action.

31. Admit that consumers of services from dentists licensed in North Carolina who complained to the Dental Board suffered non-transitory injuries to teeth or gums requiring treatment by another dentist licensed in North Carolina. "Non-transitory" as used herein means any injury or harm that did not cease within 48 hours of the act(s) that caused said injury.

Respondent incorporates its General Objections into its response to this Request for Admission.

Respondent specifically objects to this request because it is irrelevant to the issue of the unlawful and unauthorized provision of teeth whitening services by non-dentists. Subject to these objections and qualifications, Respondent admits that dental patients have received non-transitory injuries as a result of their dental treatment and required further treatment by another licensed dentist. Respondent further admits that it has investigated these matters and has taken appropriate disciplinary action.

32. Admit that the Dental Board has received complaints about the unsanitary practices of dentists licensed in North Carolina providing teeth whitening services.

Respondent incorporates its General Objections into its response to this Request for Admission.



Respondent specifically objects to this request because the undefined phrase “unsanitary practices” is ambiguous and vague. Respondent also objects to this request since it is irrelevant to the issue of the unlawful and unauthorized provision of teeth whitening services by non-dentists. Subject to these objections and qualifications, Respondent admits that it has received complaints about unsanitary practices engaged in by dentists during teeth whitening treatments. Respondent further admits that it has investigated these matters and has taken appropriate disciplinary action.

33. Admit that the Dental Board has concluded on multiple occasions that a licensed dentist in North Carolina has used unsanitary practices.

Respondent incorporates its General Objections into its response to this Request for Admission.

Respondent specifically objects to this request because the undefined phrase “unsanitary practices” is ambiguous and vague. Respondent further objects to this request since it is irrelevant to the issue of the unlawful and unauthorized provision of teeth whitening services by non-dentists. Subject to these objections, Respondent admits that investigations have revealed that licensed dentists have on occasion engaged in unsanitary practices. Respondent further admits that it has investigated these matters and has taken appropriate disciplinary action.

34. Admit that consumers of services from dentists licensed in North Carolina have been injured due to that dentist’s inadequate care or failure to use reasonable care.

Respondent incorporates its General Objections into its response to this Request for Admission.

Respondent specifically objects to this request because the undefined phrase “inadequate care or failure to use reasonable care” is ambiguous and vague. Respondent further objects to this request since it is irrelevant to the issue of the unlawful and unauthorized provision of teeth whitening services by non-dentists. Subject to these objections, Respondent admits that it has received and investigated reports of injuries that have occurred to patients of dentists during treatment. Respondent further admits that it has investigated these matters and has taken appropriate disciplinary action.

35. Admit that all Minutes of the meetings of the Dental Board other than Minutes denominated Closed Board Meeting Minutes are or were available to the public without redaction.

Respondent incorporates its General Objections into its response to this Request for Admission.

Respondent specifically objects to this request because the undefined term "available" is ambiguous and vague. Respondent further specifically objects to this request because it is irrelevant and beyond the proper scope of requests for admission in this matter pursuant to Rule 3.32.

36. Admit that with respect to investigations of the provision of teeth whitening services by non-dentists, the case officer acts on behalf of the Dental Board and sending cease and desist letters is within the case officer's authority.

Respondent incorporates its General Objections into its response to this Request for Admission.

Respondent specifically objects to this request because the undefined phrase "acts on behalf of the Dental Board" is ambiguous and vague. Subject to these objections and qualifications, Respondent denies this request. Respondent admits that the case officer oversees the investigation of unauthorized practice of dentistry cases.

37. Admit that with respect to the provision of teeth whitening services by non-dentists, the Dental Board has not asked any official or agency of the state of North Carolina, including the Legislature or Executive, to regulate the strength of the teeth whitening materials, training of the non-dentists, or sanitary conditions under which the services are provided.

Respondent incorporates its General Objections into its response to this Request for Admission.

Respondent specifically objects to this request and states that no response is required because it is irrelevant. Subject to such objections, Respondent admits that the regulation of the strength of teeth whitening materials is within the purview of the U.S. Food and Drug Administration if the agency chooses to so regulate those products. Respondent further admits that the training of non-dentists and regulation of the sanitary conditions under which they operate is irrelevant since their provision of teeth whitening services may constitute the unauthorized practice of dentistry.

38. Admit that the Dental Board is unaware of any empirical data or studies showing that the provision of teeth whitening services by non-dentists is more likely to lead to patient health issues than that provided by dentists.

Respondent incorporates its General Objections into its response to this Request for Admission.

Respondent specifically objects to this request because the undefined phrase “patient health issues” is ambiguous and vague. Respondent further specifically objects to this request because it is irrelevant to the issue of the unlawful and unauthorized provision of teeth whitening services by non-dentists. Subject to these objections, Respondent admits that it is not aware of studies comparing the “patient health issues” that might arise from teeth whitening services as performed by dentists versus those performed by unauthorized providers.

39. Admit that the Board is unaware of any empirical data or studies showing that the provision of teeth whitening services by non-dentists is more likely to lead to public safety issues than that provided by dentists.

Respondent incorporates its General Objections into its response to this Request for Admission.

Respondent specifically objects to this request because it is irrelevant to the issue of the unlawful and unauthorized provision of teeth whitening services by non-dentists. Subject to these objections, Respondent admits that it is not aware of studies comparing the safety of teeth whitening services as performed by dentists versus those performed by unauthorized providers.

40. Admit that some persons who cannot obtain teeth whitening services because mall and salon operations have closed due to Dental Board action will obtain teeth whitening services will seek dental teeth whitening services from licensed North Carolina dentists.

Respondent incorporates its General Objections into its response to this Request for Admission.

Respondent specifically objects to this request because it calls for an assumption on Respondent’s part. Subject to these objections and qualifications, Respondent is without sufficient information to admit or deny this request. However, Respondent admits that such consumers have other teeth whitening options available to them such as over-the-counter teeth whitening products.

41. Admit that some persons who cannot obtain teeth whitening services because mall and salon operations have closed due to Dental Board action will not obtain teeth whitening services.

Respondent incorporates its General Objections into its response to this Request for Admission.

Respondent specifically objects to this request because it calls for an assumption on Respondent’s part. Subject to these objections and qualifications, Respondent is without

sufficient information to admit or deny this request. However, Respondent admits that if price is the primary concern for certain consumers, they may freely avail themselves of numerous over-the-counter teeth whitening products.

42. Admit that the Dental Board will not permit practicing dental hygienists licensed in North Carolina to engage in teeth whitening without the direct supervision of a dentist.

Respondent incorporates its General Objections into its response to this Request for Admission.

Subject to these objections, Respondent admits that pursuant to N.C. Gen. Stat. § 90-233(a), a dental hygienist must practice only under the supervision of one or more licensed dentists.

43. Admit that dental insurance does not cover teeth whitening procedures because the procedure is classified as a cosmetic procedure.

Respondent incorporates its General Objections into its response to this Request for Admission.

Respondent specifically objects to this request because the undefined phrase "cosmetic procedure" is ambiguous and vague. Subject to these objections and qualifications, Respondent is without sufficient information to admit or deny this request.

44. Admit that there has not been any discussion at a public Dental Board meeting as to whether to send a cease and desist order or letter to non-dentists providing teeth whitening services.

Respondent incorporates its General Objections into its response to this Request for Admission.

Subject to these objections, Respondent admits that enforcement actions regarding the unauthorized practice of dentistry are, if necessary, addressed by the Board in closed session.

This the 27th day of October, 2010.

Respectfully submitted,

ALLEN AND PINNIX, P.A.

/s/ Noel L. Allen

---

Noel L. Allen  
Attorney for Respondent  
Post Office Drawer 1270  
Raleigh, North Carolina 27602  
Telephone: 919-755-0505  
Facsimile: 919-829-8098  
Email: [nallen@allen-pinnix.com](mailto:nallen@allen-pinnix.com)

## CERTIFICATION

I state under penalty of perjury that Respondent's Objections and Responses to Complaint Counsel's First Set of Requests for Admission was prepared and assembled under my supervision, and that the information contained therein, to the best of my knowledge and belief, is true and correct.

/s/ A. P. Carlton, Jr.

---

Alfred P. Carlton, Jr.  
Respondent's Counsel  
919-755-0505

## CERTIFICATE OF SERVICE

I hereby certify that on October 27, 2010, 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:

Richard C. Donohue, Acting Secretary  
Federal Trade Commission  
600 Pennsylvania Avenue, N.W.  
Room H-159  
Washington, D.C. 20580

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

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

Melissa Westman-Cherry  
Bureau of Competition  
Federal Trade Commission  
600 Pennsylvania Avenue, N.W.  
Room NJ-6264  
Washington, D.C. 20580  
[westman@ftc.gov](mailto:westman@ftc.gov)

Michael J. Bloom  
Bureau of Competition  
Federal Trade Commission  
600 Pennsylvania Avenue, N.W.  
Room H-374  
Washington, D.C. 20580  
[mjbloom@ftc.gov](mailto:mjbloom@ftc.gov)

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

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

Richard B. Dagen  
Bureau of Competition  
Federal Trade Commission  
600 Pennsylvania Avenue, N.W.  
Room H-374  
Washington, D.C. 20580  
[rdagen@ftc.gov](mailto:rdagen@ftc.gov)

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

The Honorable D. Michael Chappell  
Administrative Law Judge  
Federal Trade Commission  
600 Pennsylvania Avenue N.W.  
Room H-113  
Washington, D.C. 20580  
[oyalj@ftc.gov](mailto:oyalj@ftc.gov)

This the 27th day of October, 2010.

/s/ Noel L. Allen

---

Noel L. Allen

#### **CERTIFICATION FOR ELECTRONIC FILING**

I further certify that the electronic copy sent to the Acting 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



**Tabs 4 – 49**

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to Protective Order**

# Tab 50

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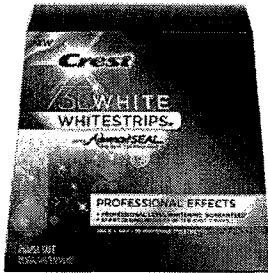
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### Crest 3D White Whitestrips Professional Effects

Why pay \$500 for whitening treatments? Crest 3D White Whitestrips Professional Effects is just as effective.\* Our best teeth whitening system yet gives you professional results and whitening that lasts. Start seeing results at home in just 3 days.

\*vs. more expensive light & laser systems

#### Product Rating

★★★★☆ (4.2 out of 5) 64 reviews

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#### Crest 3D White Whitestrips Professional Effects Information

Get professional-level results without costly whitening treatments. Our best teeth whitening system yet gives you lasting results—not to mention groundbreaking Advanced Seal technology for no-slip whitening.

New Crest 3D White Whitestrips Professional Effects is formulated with the same enamel-safe ingredient dentists use. Apply once a day for 30 minutes. You'll start seeing a whiter smile after 3 days, with full results in 20.

#### Add Crest 3D White Whitestrips Professional Effects to your oral care routine for:

- A whiter smile after just 3 days
- Professional-level results at a fraction of the cost\* *vs. light & laser systems*
- New improved lower strip for more whitening coverage
- Full results in 20 days
- Revolutionary Advanced Seal technology for no-slip whitening

#### Related Reading



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Ready for professional-level results? Buy Crest 3D White Whitestrips Professional Effects online now.

#### You Might Also Like:



**Crest 3D White Advanced Vivid Toothpaste**  
Whiten by removing up to 90% of surface stains in 14 days with our best whitening toothpaste.  
[Buy now](#)



**Crest 3D White Multi-Care Whitening Rinse**  
Whiten by removing surface stains with the same whitening ingredient as Crest 3D White Whitestrips.  
[Buy now](#)



**Oral-B 3D White Advanced Vivid Toothbrush**  
Polish away surface stains on and between teeth with vibrating bristles for a clean you can see and feel.  
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Comprehensive solutions designed to meet your needs **PRO-HEALTH** Plus **SCOPE**



For questions, comments or concerns, call 1-800-395-8423.

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New Crest 3D White teeth whitening systems can give you the whiter teeth you're after.

Learn how each 3D White teeth whitening system works to give you whiter teeth and see which Crest 3D White whitening product is right for you.

# Tab 51

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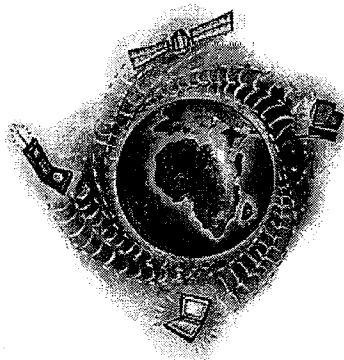
Advisory Board

Site Map

## Practice Management Toolkit

### Taking Advantage of the Information Age

Roger P. Levin, DDS  
CEO Levin Group



Dentistry is often viewed as an isolated profession, both in the eyes of the public as well as dentists. In the past, people went to the dentist simply to have a tooth pulled or filled, and did not expect the dentist to provide any other service. Now, however, patients expect more services than ever before from dental professionals. Esthetic dentistry in particular has opened horizons beyond those ever experienced in dentistry. Patients are seeking to not only save or have their teeth filled, but to have them straightened, whitened, and filled with tooth-colored materials.

In this age of ever-expanding technology, the public has instant access to information on any topic they choose, particularly health care. Although armed with a variety of information, people still seek to verify that information with professionals in the field. In the past, it was sufficient for a dentist to provide adequate dental care and then simply schedule that patient's next hygiene appointment without expecting patients to seek alternatives to care or to ask

questions about their care. Today's patients are information savvy and expect their dental practitioners to be as well.

Because many patients are now seeking esthetic care from their dentists, dentists need to be aware of the technologies and options available. One way of improving the profitability of esthetic dentistry without excessive cost to your practice is to take advantage of the information provided to the public as a result of the varying trends in society.

#### What Information?

In the past, many Americans went to the dentist only "because my tooth hurts." It was Procter & Gamble's advertising campaign for Crest® toothpaste that endorsed the public's awareness of "see your dentist twice a year." Most Americans adopted this standard, and it has allowed the dental profession to provide both preventive- and treatment-oriented services to patients on a regular basis. Now, in an effort to increase awareness of their new product, Crest Whitestrips™, (a "trayless" system that whitens teeth through a small amount of hydrogen peroxide gel on a thin polyethylene strip), Procter & Gamble has committed approximately \$90 million to its advertising campaign, which is a record level of spending on consumer awareness for a tooth-whitening product. The launching of the Whitestrips advertising campaign may make many people begin to think of esthetic dentistry in a new light. This increased awareness of esthetic dentistry can easily translate into increased patient acceptance of the many whitening treatments available in the general dental practice.

Levin Group statistics indicate that pure cosmetic dentistry represents less than 4% of the dentistry provided by more than 90% of dental practices. The low delivery rate of esthetic services is in part the result of cost and perceived need. Many sectors of the population feel they simply cannot afford the fees. Despite the many financing options available to address the monetary issue, many patients still refuse esthetic treatment because of cost. The issue also includes perceived need and personal justification of the purchase. Until now, esthetic dentistry has simply not been a priority for the American public.

Through Procter & Gamble's extensive advertising campaign, an opportunity has been created for general dental practices to expand their number of esthetic dentistry cases and to educate patients about the overall benefits of tooth whitening. There is some truth in advertising, and through increased awareness of tooth whitening, we anticipate that many more patients will be asking their dentists about enhancing their smiles.

#### Take Advantage of Current Trends

When patients come to you for advice on Crest Whitestrips, you may feel that tray whitening is the better choice. I, personally, am puzzled that more tray whitening procedures are not being performed, especially

as the introductory step toward more sophisticated cosmetic procedures. As more patients come to the dentist to ask about tooth whitening and cosmetic dentistry, the amount of whitening performed by dental practices could literally triple. Keep in mind that because of the national advertising campaign, patients will now be presensitized to improving their smiles. This is where the growth in whitening, as well as other esthetic procedures, will emanate.

**Incorporating New Treatments**

When introducing a new product or treatment, the key is to motivate patients. Motivating patients requires excellent verbal skills as well as an ability to educate them. Again, the whitening promotional campaign will be of tremendous importance as a springboard from which you can motivate and educate your patients. This should also indirectly assist the dental team in the case presentation process for tray whitening.

**Financial Analysis**

In addition to the long-term benefits of treating more esthetic dentistry cases, there is also the short-term financial benefit of incorporating tooth whitening into the dental practice. As a result of the advertising campaign, patients will ask about Crest Whitestrips. It is important to understand that the professional-strength Whitestrips product can be profitable to the dental practice, even though the total profit for a Professional Whitestrips kit is less than the tray whitening alternative. However, the increase in volume can make this a profitable and viable service for the dental practice. Furthermore, the time it takes to explain the use of the kit is minimal. Hygienists or assistants can give most of the patient instructions. A projected financial model is shown below.

My estimate is that most practices will be able to charge \$65 or more for using the Crest Professional Whitestrips kit because in comparison to the retail kit, the professional kit has a higher peroxide content, provides more strips, and enhances the overall whitening process.

Crest Professional Whitestrips kit projected fee to patient	<b>\$65.00</b>
Whitestrips kit cost to dentist	<b>- \$26.00</b>
Practice profit	<b>\$39.00</b>

The financial analysis illustrates that the practice would realize a profit of \$39 on each Crest Professional Whitestrips kit, a profit of 150% more than the cost of the actual kit. If the number of patients in a practice is 1,800, using the above \$39 profit per kit, the total profit to the practice will be \$35,100, if half of the patients were to accept the professional kit whitening procedure.

- Average number of patients per practice-1,800
- Potential whitening patients-50%
- Potential whitening patient number-900
- 900 patients 2 \$39 profit = \$35,100

The average practice typically turns over approximately 15% to 20% of its patients annually, which provides an ongoing flow of whitening opportunity for every new patient. Because more new patients will be interested in whitening and esthetic dentistry as a result of the advertising campaign, the dental practice now has a tremendous opportunity to create an expanded profit center.

The addition of tray whitening and other esthetic services that will be of interest to patients could add another \$100,000 to \$150,000 of annual revenue to the practice. If only 100 patients per year accepted an additional \$1,000 of other esthetic services to improve their smiles that is a \$100,000 increase in revenue. If you incorporate Crest Professional Whitestrips into your dental practice, be sure to recall every Whitestrips patient to perform a final cosmetic exam and point out any other areas that can still be improved through other esthetic services. Your esthetic practice could explode overnight.

**Conclusion**

One way of improving a practice's profit margin is by taking advantage of the trends occurring in society. Our economy is based on the concept of capitalism, and being a dental professional does not preclude you from taking advantage of profitable opportunities. Procter & Gamble's advertising campaign may do a great deal to make a beautiful smile important to the American public. An increasing number of patients will therefore begin to ask about improving their smiles.

Our role as dentists and dental team members is to continue to educate our patients and motivate them toward esthetic dentistry, making it as much of a standard as haircare, make-up, and fashion. Take advantage of the current trend toward esthetic dentistry, and propel your practice to the next level of profitability.



Levin Group is the nation's leading dental practice management and marketing consulting firm, building practice profitability through advanced management systems for 15 years. In an effort to address the issues that are important to the dental profession, Dr.

Levin welcomes your practice management questions. Please fax or mail your comments to Dr. Levin at The Compendium (fax 732-656-1148).

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# Tab 52





## Crest 3D White Whitestrips With Advanced Seal Professional Effects Whitening Kit, 20ct

★★★★★ (9 Customer Reviews) [Read reviews or write a review](#) |

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[See estimated arrival date](#)

<p>Online  <b>\$43.<sup>97</sup></b>                  Was: \$49.97                  *Rollback</p>	<p><b>In Stock</b> and available for:  <b>Ship to home</b> (see all options in checkout)  <input type="button" value="Add to Cart"/> <a href="#">Add to:</a> <a href="#">My List</a> <a href="#">My Registry</a></p>
<p><b>In stores</b>                  Price may vary</p>	<p><b>Find in a store near you.</b> <a href="#">Learn more</a>                  Enter ZIP code <input type="button" value="Find"/></p>

### Item Description

Get professional level whitening results that last up to 12 months. Advanced Seal technology allows you to talk, drink water and more while you whiten - the Whitestrips won't slip.

- Start seeing a whiter smile after just 3 days
- Enamel safe. Same whitening ingredient dentists use
- 20-count

### Specifications

Model No.:	3700020178
Shipping Weight (in pounds):	2.1
Product in Inches (L x W x H):	6.0 x 6.0 x 4.0
Assembled in Country of Origin:	USA
Origin of Components:	USA
Wal-Mart No.:	000239791

### Pricing Policy

#### About Our Prices

We strive to provide you with the lowest prices possible on Walmart.com as well as in our stores. However, sometimes a price online does not match the price in a store. Walmart.com's prices may be either higher or lower than local store prices. Prices may also vary between stores. Our local stores do not honor Walmart.com pricing or competitor advertisements from outside of a store's local trade territory.


# Tab 53

SEARCH



## Press

### Press Releases

Find a Cosmetic Dentist  
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#### FOR IMMEDIATE RELEASE

Contact: Michael DiFrisco  
American Academy of Cosmetic Dentistry ©  
402 West Wilson Street  
Madison, WI 53703  
PH: 608.222.8583  
FAX: 608.222.9540  
E-mail: [pr@aacd.com](mailto:pr@aacd.com)  
Web: [www.aacd.com](http://www.aacd.com)

### Cosmetic Dentistry Continues to Surge - Market Estimated at \$2.75 Billion

December 13, 2007 Madison, WI – The cosmetic dental boom is showing no signs of slowing down. American Academy of Cosmetic Dentistry (AACD) member dentists queried about their practice activity in the 2007 AACD State of Cosmetic Dentistry survey revealed that cosmetic dentistry-related revenue climbed to an average of \$495,000 per practice. This projects to \$2.75 billion across all 5,500 practices represented by the survey sample, a 15% increase over 2005.

#### *Who is the typical cosmetic dental patient?*

The total number of patients in 2006, projected to all 5,550 practices represented in the survey sample, is approximately 2.69 million. This represents a 12.8% increase over practice reports of patients in 2005. On average, about two-thirds of cosmetic dentistry patients were female (67%), while one-third were male (33%). Regarding distribution by age, the majority of patients (53%), on average, are between the ages of 41 and 60. About one in six (16%) are 30 or younger, and about one in ten (11%) are over 60.

#### *What is the typical cosmetic dental practice?*

US cosmetic dentistry practices are typically well established in their communities, having been in operation on average for 19 years. About half are located in suburban areas while the other half are about evenly split between urban areas and small towns.

#### *Is cosmetic dentistry really booming?*

The numbers speak for themselves. Practices responding to the survey report 485 patients on average, with 2.69 million total cosmetic dental patients in the U.S. This total represents a 12.8% increase over 2005. In 2007, respondents predict an additional increase of 10.9%.

In terms of total dentistry-related revenue, each practice generated on average \$1.04 million in total dental revenue, projected to a \$5.76 billion total for the 5,500 practices represented in this research.

For specific cosmetic dentistry related revenue: each practice generated on average \$495,000, projected to \$2.75 billion for the cosmetic procedures alone. This average practice revenue represents a 15.0% increase over 2005. In 2007, respondents predict an additional increase of 11.0%.

#### *What are patients spending on cosmetic dentistry?*

The mean amount spent by the average patient in 2006 was \$5,640 and the median was \$3,860. At the high end, 3% of practices indicated an average amount spent per patient of \$20,000 or more. At the other extreme, 2% of practices reported average patient costs of less than \$500. The most often indicated categories were \$5,000 -

\$9,999 (23%) and \$2,500 - \$4,999 (22%).

**Cosmetic Dental Procedures by the Numbers**

Respondents reported on the number of procedures and revenue produced by their practices in 2006. Average practice reports and the total market estimates follow:

**Bleaching/Whitening:**

Number performed in 2006: 70 on average; 389,000 total.  
Revenues in 2006: \$25,000 on average; \$138.8 million total.

**Crown & Bridge Work:**

Number performed in 2006: 333 on average; 1.85 million total.  
Revenues in 2006: \$194,000 on average; \$1.08 billion total.

**Direct Bonding - Posterior:**

Number performed in 2006: 474 on average; 2.63 million total.  
Revenues in 2006: \$69,000 on average; \$383.0 million total.

**Direct Bonding - Anterior:**

Number performed in 2006: 234 on average; 1.30 million total.  
Revenues in 2006: \$43,000 on average; \$238.7 million total.

**Implants:**

Number performed in 2006: 27 on average; 149,900 total.  
Revenues in 2006: \$26,000 on average; \$144.3 million total.

**Inlays/Onlays:**

Number performed in 2006: 84 on average; 466,200 total.  
Revenues in 2006: \$33,000 on average; \$183.2 million total.

**Orthodontics:**

Number performed in 2006: 17 on average; 94,400 total.  
Revenues in 2006: \$11,000 on average; \$61.1 million total.

**Removable Prosthetics:**

Number performed in 2006: 27 on average; 149,900 total.  
Revenues in 2006: \$20,000 on average; \$111.0 million total.

**Veneers:**

Number performed in 2006: 108 on average; 599,400 total.  
Revenues in 2006: \$67,000 on average; \$371.9 million total.

**Other Procedures:**

Number performed in 2006: 21 on average; 116,600 total.  
Revenues in 2006: \$20,000 on average; \$111.0 million total.

**About the Survey**

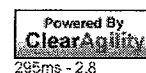
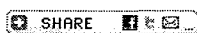
The AACD commissioned Readex Research to conduct and summarize this survey. The resulting 14-page survey report examines market growth, industry trends, patient demographics, and more in-depth data. AACD is the world's largest cosmetic dental organization, representing over 8,000 members in 70 countries worldwide.

To request the complete survey results or to discuss this release contact the AACD at [pr@aacd.com](mailto:pr@aacd.com) or call (800) 543-9220.

###

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**Tab 54**

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# Tab 55

SEARCH

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# Press

## Consumer Studies

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### *Can a new smile make you appear more successful and intelligent?*

Previous consumer studies have proved that a beautiful smile will make you more attractive. But according to research conducted by Beall Research & Training of Chicago, a new smile will make you appear more intelligent, interesting, successful and wealthy to others as well.

Dr. Anne Beall, a social psychologist and market research professional carried out the independent study on behalf of the American Academy of Cosmetic Dentistry (AACD). Pictures of eight individuals were shown to 528 Americans, a statistically valid cross section of the population. The respondents were asked to quickly judge the eight people as to how attractive, intelligent, happy, successful in their career, friendly, interesting, kind, wealthy, popular with the opposite sex, and sensitive to other people they were.

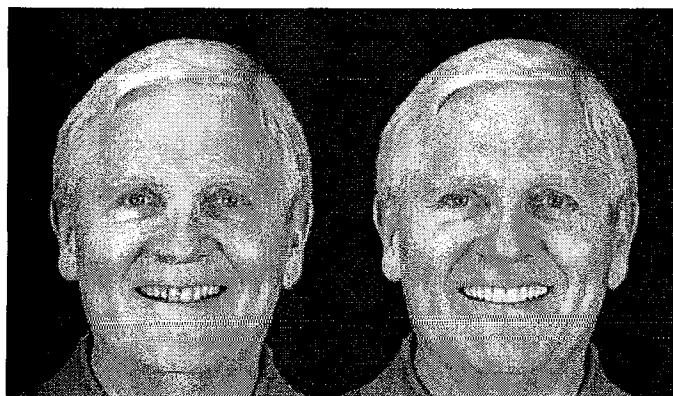
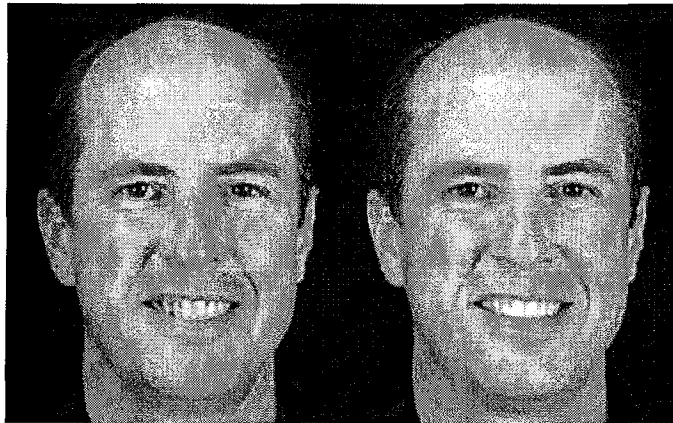
Two sets of photos were created, with each set showing four individuals before undergoing cosmetic dentistry, and four after treatment. Half the respondents viewed set A, the other half set B. The eight subjects viewed by respondents were evenly divided by gender. Two had mild improvements through cosmetic dentistry, two had moderate improvements, and four had major improvements to their smiles, to give a wide range for respondents to view. None, however, had visibly rotten teeth, missing teeth or catastrophically bad dental health in the before shots. Respondents were not told that they were looking at dentistry, but were asked to make snap judgments rating each person for the ten characteristics, on a scale of one to ten, with "one" being "not at all," and "ten" being "extremely."

The results indicated that an attractive smile does have broad ranging benefits:

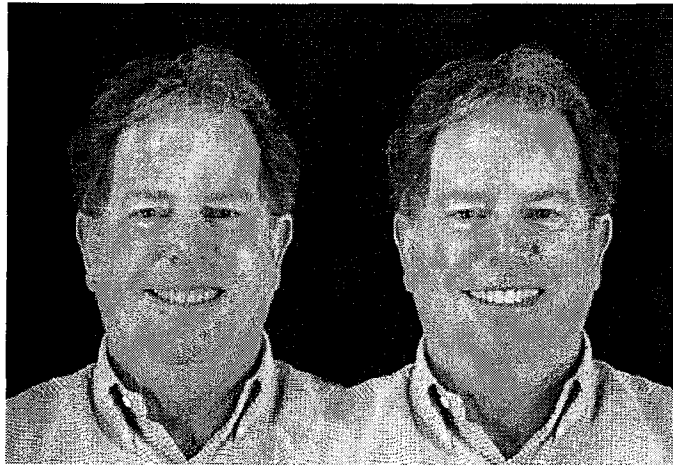
Characteristic	Average	"Before" rating	"After" rating	Increase
Attractive	4.6	4.6	5.9	1.3
Intelligent	5.9	5.9	6.5	.6
Happy	6.2	6.2	6.8	.4
Successful in their career	5.8	5.8	6.7	.9
Friendly	6.3	6.3	6.8	.5
Interesting	5.4	5.4	6.1	.7
Kind	6.0	6.0	6.4	.4
Wealthy	4.9	4.9	5.9	1.0
Popular with the opposite sex	5.0	5.0	6.2	1.2
Sensitive to other people	5.6	5.6	6.1	.5

While the change was most dramatic for Attractive, Popular with the opposite sex, Wealthy and Successful in their career, the change was statically significant in all areas.

Below are some before and after images that were used in the above study.







**In an independent study conducted on behalf of the AACD in 2004, we discovered:**

Virtually all Americans (99.7%) believe a smile is an important social asset.

96% of adults believe an attractive smile makes a person more appealing to members of the opposite sex.

Three-quarters (74%) of adults feels an unattractive smile can hurt a person's chances for career success.

When asked, "What is the first thing you notice in a person's smile?" The most common responses were:

- Straightness
- Whiteness & Color of Teeth
- Cleanliness of Teeth
- Sincerity of Smile
- Any Missing Teeth?
- Sparkle of Smile

And when asked, "What types of things do you consider make a smile unattractive?" The most common responses were:

- Discolored, Yellow, or Stained Teeth
- Missing Teeth
- Crooked Teeth
- Decaying Teeth & Cavities
- Gaps & Spaces in Teeth
- Dirty Teeth

And finally, when respondents were asked, "What would you most like to improve about your smile?" The most common response was:

- Whiter & Brighter Teeth

All stats are based upon a 2004 scientific poll of the American public.

Cosmetic dentistry can provide an answer for anyone looking to improve their smile, their self-confidence, and their prospects for romantic and career success.

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# Tab 56

[Store Locator](#) | [Sears Credit Cards](#) | [Customer Services](#)



**Smart Sense EasyFit® Whitening Trays, 14ct (7 for upper teeth, 7 for lower teeth)**

**NEW Item** | | Kmart Item# 038W022088190001 | Model# 2208819

(Be the first to rate and review this item)

**\$26.99**

Earn at least 270 Reward points with *Shop Your Way Rewards*™. [Find Out how](#)

**Get this product**

Get it Today for store pickup at  
Kmart 8036 Ritchie Highway:  
21122  
[Check other stores](#)

**Now Eligible for shipping from:**

Alaska & Hawaii: [See Pricing](#)



**See all:**

- Smart Sense Toothpaste
- Smart Sense Oral Care
- Smart Sense Health & Wellness

[All Smart Sense](#)

**Product Description**

Pre-filled whitening trays are designed to provide a comfortable fit that allows the whitening gel to completely surround teeth for optimal whitening, even between teeth! Use for 30 minutes only once a day for 7 days for long lasting whitening! Whiter Teeth in as few as 3 days! Once-a-Day Formula, Contoured Design for a Comfortable Fit, Same Enamel-Safe Ingredient Used by Dentists

**SATISFACTION GUARANTEE** Thank you for purchasing this quality product. If you are unsatisfied for any reason, return the unused portion to the store for a full refund or call 1-800-842-7886.

Added on October 21, 2010

**Customer Ratings And Reviews**

**Video Reviews**

Do you own this product?

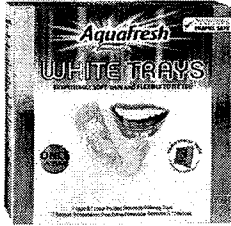
**Written Reviews**

**Customer Ratings And Reviews**

Do you own this product?

# Tab 57

Walgreens



VIEW LARGER



Home > Shop > Personal Care > Dental > Tooth Whitening  
Aquafresh WHITE TRAYS Kit



Read all 30 reviews | Write a review

Overview:

Size/Count 14.0 ea.

- Visibly whiter teeth in just 3 days
- Soft, thin and flexible for a custom fit
- Professionally designed enamel safe

Price: \$32.99

Quantity 1

ADD TO CART

Save to Shopping List

Availability:

- ✓ Online
- FREE shipping eligible
- ✓ In Store
- Find in store

Pricing may vary by location and may not match online pricing.

Save \$20.50 With Walgreens Brand

Ships in 1 to 2 business days

- Description
- Shipping
- Warnings
- Ingredients

Aquafresh White Trays-Whitening That Fits You

Soft, thin and flexible whitening trays designed by cosmetic dentists to fit you. The disposable trays are pre-filled with the same enamel-safe ingredient dentists use. The flexible tray is easy to apply. It molds securely around your teeth allowing the fresh-tasting gel to whiten even between teeth. Use once a day for visibly whiter teeth in just 3 days.

Whiter teeth in just 7 days. Contact us for details.

- Carefully peel back foil and remove tray.
  - Hold the tray so that the open ends of the "U" are pointing towards you.
- Place the trays on your lower, then upper teeth.
  - Gently press tray with fingers to spread the gel onto and around teeth.
  - Keep trays in your mouth for 30-45 minutes.
- After 45 minutes, remove trays from mouth and discard.
  - Rinse mouth with water to remove any gel residue on your teeth.
  - Repeat once daily for 5 days and for even better results, use for up to 7 days.

Related Products



Crest 3D Whitestrips Professional Effects  
40...  
\$47.79  
Reviews



Plus White 5 Minute Speed Whitening  
System  
\$10.99



DenTek Complete White Professional  
Whitening  
\$14.99

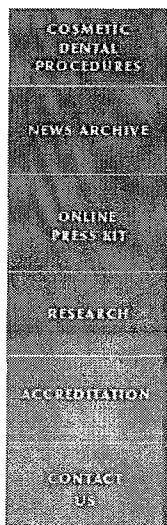
**Tabs 58 – 92**

**Confidential Pursuant  
to Protective Order**


# Tab 93



SEARCH



# Press

Find a Cosmetic Dentist  
Join AACD • Find a Laboratory Technician | 

## Press Releases

### FOR IMMEDIATE RELEASE

Contact: Eric Nelson  
American Academy of Cosmetic Dentistry ©  
5401 World Dairy Drive  
Madison, WI 53718  
PH: 608.222.8583  
Fax: 608.222.9540  
E-mail: [pr@aacd.com](mailto:pr@aacd.com)  
Web: [www.aacd.com](http://www.aacd.com)

#### *First it was Atkins, then it was South Beach, now it's the White Smile Diet*

June 22, 2006 - Madison, WI - The most unattractive thing about a smile are discolored teeth, according to a recent American Academy of Cosmetic Dentistry (AACD) consumer poll. And the numbers prove it! Whitening treatments are the number one requested cosmetic dental procedure and have increased more than 300% since 1996, according to the AACD.

"While daily home care and regular professional cleanings are essential for maintaining healthy teeth and gums, certain foods can help remove stains from your teeth," said AACD President Dr. Marty Zase. "Foods such as apples, pears, celery, carrots, cauliflower, and cucumbers produce saliva which combines with the foods' natural fibers to naturally clean teeth and remove bacteria."

White Smile Diet Foods and Tips include:

- Strawberries will naturally whiten your teeth.
- Avoid drinking coffee, dark syrup sodas, red wine and blueberries. All stain teeth quickly.
- Drink from a straw whenever possible...allows food dyes to bypass teeth altogether.
- Baking soda will help remove stains and build up. Brush it on your teeth twice a month, just as you would toothpaste, and rinse.
- Raw veggies are not only healthy to eat, but they will clean your teeth and remove surface stains.
- The mechanical action of chewing sugarless gum can also stimulate saliva and clean teeth surfaces, though not recommended for patients with TMJ.

#### **Locate an AACD Member Cosmetic Dentist**

The AACD is the world's largest cosmetic dental organization dedicated to advancing excellence in the art and science of cosmetic dentistry. As with any dental procedure, the AACD recommends consumers consult with their dentist before undergoing any cosmetic dental treatment. The public can locate an AACD member cosmetic dentist via AACD's free consumer referral system at [www.aacd.com](http://www.aacd.com) or by calling toll-free: ( 800) 543-9220.

###

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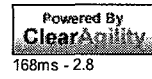
My AACD

twitter

facebook

flickr

YouTube





**UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION**

\_\_\_\_\_ )  
In the Matter of )

NORTH CAROLINA STATE BOARD OF )  
DENTAL EXAMINERS, )

Respondent. )  
\_\_\_\_\_ )

**PUBLIC**

Docket No. 9343

**DECLARATION OF RICHARD B. DAGEN**

1. I have personal knowledge of the facts set forth in this declaration, and if called as a witness I could and would testify competently under oath to such facts.
2. I am an attorney at the Federal Trade Commission and counsel supporting the Complaint in these proceedings. Attached to this declaration are the exhibits submitted in support of Complaint Counsel's Motion for Partial Summary Decision.
3. Tab 1 is a true and correct copy of the Administrative Complaint issued by the Federal Trade Commission in the above captioned matter dated June 17, 2010.
4. Tab 2 is a true and correct copy of the Response to Complaint filed by Respondent, North Carolina State Board of Dental Examiners ("Board") in In the Matter of the North Carolina Board of Dental Examiners dated July 7, 2010.
5. Tab 3 is a true and correct copy of Respondent's Objections and Responses to Complaint Counsel's First Set of Requests for Admission filed by the Board on October 27, 2010.
6. Tab 4 is a true and correct copy of CX0020, N.C. General Statutes, Chapter 90, Article 2, Dentistry, the North Carolina Dental Practices Act.

7. Tab 5 is a true and correct copy of CX0034, an exhibit that includes a correspondence log for Edie's Salon Panache dated October 8, 2004, an e-mail to Terry Friddle from Bobby White dated February 2, 2005, a criminal disposition inquiry for Marcia Angelette dated February 1, 2005, an e-mail to Kathleen Dygert from Terry Friddle dated November 16, 2004, a subpoena for Marcia Angelete issued on November 3, 2004, and a warrant for arrest for Marcia Angelette issued October 27, 2004.
8. Tab 6 is a true and correct copy of five exhibits: CX0085, the Board's 2005 Annual Report for Governor Michael F. Easley; CX0086, the Board's 2006 Annual Report for Governor Michael F. Easley; CX0088, the Board's 2007 Annual Report for Governor Michael F. Easley; CX0089, the Board's 2008 Annual Report for Governor Beverly Purdue; CX0091, the Board's 2009 Annual Report for Governor Beverly Purdue.
9. Tab 7 is a true and correct copy of twelve exhibits: CX0203, a letter to Blue Ridge Mall from Carolin Bakewell dated November 21, 2007; CX0204, a letter to CBL & Associates Properties from Carolin Bakewell dated November 21, 2007; CX0205, Letter to Colonial Mayberry Mall Office from Carolin Bakewell dated November 11, 2007; CX0259, Letter to Cleveland Mall Office from Carolin Bakewell dated November 21, 2007; CX0260, Letter to General Growth Properties from Carolin Bakewell; CX0261, a letter to Hendon Properties from Carolin Bakewell dated November 21, 2007; CX0262, Letter to University Mall Office from Carolin Bakewell dated November 21, 2007; CX0263, Letter to Westfield Eastridge Mall Office from Carolin Bakewell dated November 21, 2007; CX0323, Letter to Boone Mall Management from Carolin Bakewell dated November 21, 2007; CX0324, Letter to Northgate Mall Office from Carolin Bakewell dated November 21, 2007; CX0325, Letter to Randolph Mall Management Office from

Carolyn Bakewell dated November 21, 2007; CX0326, an e-mail to Crabtree Valley Mall from Carolyn Bakewell dated November 21, 2007.

10. Tab 8 is a true and correct copy of CX0039, an undated advertisement for Serenity Day Spa.
11. Tab 9 is a true and correct copy of NCBOARD52-54, an e-mail to REDACTED and Carolyn Bakewell from Bobby White dated February 20, 2008.
12. Tab 10 is a true and correct copy of CX0108, an e-mail to Carolyn Bakewell from Frank Recker dated July 24, 2007.
13. Tab 11 is a true and correct copy of CX0043, a facsimile to Carolyn Bakewell from Dr. REDACTED dated October 27, 2008.
14. Tab 12 is a true and correct copy of CX0308, Memorandum to Terry Friddle from Andrea Smythe dated March 19, 2010.
15. Tab 13 is a true and correct copy of CX0053, Frequently Asked Questions for Professional Teeth Whitening.
16. Tab 14 is a true and correct copy of CX0054, a facsimile to Dr. Stan Hardesty from Terry Friddle dated September 11, 2006.
17. Tab 15 is a true and correct copy of CX0040, a letter to the Clerk of the Superior Court of Davidson County from Terry Friddle dated February 1, 2005.
18. Tab 16 is a true and correct copy of NCBOARD987-989, a Question and Answer article with Dr. Van Haywood from an unidentified web page dated 2008.
19. Tab 17 is a true and correct copy of CX0255, an e-mail to Bobby White from Carolyn Bakewell dated March 24, 2008.

20. Tab 18 is a true and correct copy of CX0067, an e-mail to Douglas Van Essen from Carolin Bakewell dated February 7, 2007.
21. Tab 19 is a true and correct copy of NCBOARD1117, an e-mail to Cathy Mosley from Carolin Bakewell dated March 24, 2008.
22. Tab 20 is a true and correct copy of CX0070, an e-mail to Terry Friddle from Dr. Wayne Holland dated March 22, 2007.
23. Tab 21 is a true and correct copy of CX0073, a letter to Judge Martha Curran from Carolin Bakewell dated January 17, 2008.
24. Tab 22 is a true and correct copy of CX0078, web page for Lash Lady, [www.LashLady.com/services](http://www.LashLady.com/services) dated January 19, 2007.
25. Tab 23 is a true and correct copy of CX0080, an e-mail to Terry Friddle, Line Dempsey and Bobby White from Dr. Benjamin Brown dated November 7, 2005.
26. Tab 24 is a true and correct copy of CX0392, an American Dental Association article titled "Tooth Whitening/Bleaching: Treatment Considerations for Dentists and their Patients" dated September 2009.
27. Tab 25 is a true and correct copy of CX0302, an e-mail to Dr. Horace Harris from Terry Friddle dated January 21, 2009.
28. Tab 26 is a true and correct copy of CX0092, an e-mail to Dr. Michael Treman from Casie Goode dated March 4, 2008.
29. Tab 27 is a true and correct copy of CX0293, an e-mail to Terry Friddle, Carolin Bakewell, and Bobby White from Dr. Stan Hardesty dated January 20, 2007.
30. Tab 28 is a true and correct copy of CX0291, an e-mail to Bobby White and Terry Friddle from Carolin Bakewell dated January 17, 2008.

31. Tab 29 is a true and correct copy of CX0103, an e-mail to Christine Bennett and Carolin Bakewell from Bobby White with attachments dated April 24, 2008.
32. Tab 30 is a true and correct copy of CX0159, an Order and Judgment in North Carolina Board of Dental Examiners vs. Rodriguez Brunson dated March 31, 2005.
33. Tab 31 is a true and correct copy of CX0185, American Dental Association Talking Points regarding Whitening at a Salon or Mall Kiosk by Unlicensed Individuals dated January 2010.
34. Tab 32 is a true and correct copy of CX0198, a facsimile to the Board from Dr. John Davis dated February 6, 2008.
35. Tab 33 is a true and correct copy of NCBOARD3887-3894, a web page from [www.teethwhiteningreviews.com](http://www.teethwhiteningreviews.com), titled "Teeth Whitening: What Works and What Doesn't" dated January 2, 2006.
36. Tab 34 is a true and correct copy of CX0372, an e-mail to Terry Friddle from Dr. Tal Link dated January 25, 2007.
37. Tab 35 is a true and correct copy of CX0035, a facsimile to the Board from Dr. Kelly Kreeb, dated October 15, 2004.
38. Tab 36 is a true and correct copy of NCBOARD4949-4951, an article from the American Academy of Pediatric Dentistry titled "Policy on the Use of Dental Bleaching for Child and Adolescent Patients" revised 2009.
39. Tab 37 is a true and correct copy of CX0231, an e-mail to Dr. Joseph Burnham, Terry Friddle, Bobby White, et al. from Carolin Bakewell dated February 13, 2008.
40. Tab 38 is a true and correct copy of CX0236, an e-mail to Dr. Joseph Burnham, Dr. Ronald Owens, Dr. Stan Hardesty, et al. from Bobby White dated March 17, 2008.



41. Tab 39 is a true and correct copy of CX0250, an e-mail to Sean Kurdys, Terry Friddle, Casie Goode et al. from Dr. Wayne Holland dated February 3, 2009.
42. Tab 40 is a true and correct copy of CX0251, an Investigative Memo to Dr. Wayne Holland and Carolin Bakewell from Sean Kurdys dated February 3, 2009.
43. Tab 41 is a true and correct copy of CX0254, an e-mail to Bobby White from Carolin Bakewell dated November 27, 2007.
44. Tab 42 is a true and correct copy of CX0258, an Investigative Memo to Dr. Stan Hardesty and Carolin Bakewell from Line Dempsey dated January 17, 2008.
45. Tab 43 is a true and correct copy of CX0111, an e-mail to Dr. Wayne Holland from Terry Friddle dated February 18, 2009.
46. Tab 44 is a true and correct copy of NCBOARD4962-5000, an article from the ADF Medical Devices Commission titled "Tooth Bleaching Treatments, a Review" dated 2007.
47. Tab 45 is a true and correct copy of NCBOARD4365-4375, the Board's Financial Statement for the year ending December 31, 2009.
48. Tab 46 is a true and correct copy of NCBOARD7298-7305, a web page from [www.yourdentistryguide.com](http://www.yourdentistryguide.com) titled "Teeth Whitening – How it Works and What it Costs?" dated August 13, 2010.
49. Tab 47 is a true and correct copy of AAED93-160 at 121, a program from the Sixth World Congress of the International Federation of Esthetic Dentistry, hosted by the American Academy of Aesthetic Dentistry, dated August 2-5, 2009.
50. Tab 48 is a true and correct copy of CX0313, an e-mail to Terry Friddle and Bobby White from Dr. Ronald Owens dated April 6, 2010.

51. Tab 49 is a true and correct copy of CX0281, an e-mail to Terry Friddle, Carolin Bakewell, and Bobby White from Dr. Stan Hardesty dated January 20, 2007.
52. Tab 50 is a true and correct copy of CX0380, a page from Crest's web site, [www.3dwhite.com](http://www.3dwhite.com), titled "Crest 3D White Whitestrips Professional Effects Teeth Whitening System."
53. Tab 51 is a true and correct copy of CX0381, pages from Crest's web site, [www.dentalcare.com](http://www.dentalcare.com), titled "Practice Management Toolkit."
54. Tab 52 is a true and correct copy of CX0382, a page from WalMart's web site, [www.walmart.com](http://www.walmart.com), titled "Crest 3D White Whitestrips with Advanced Seal Professional Effects Teeth Whitening Kit, 20 ct."
55. Tab 53 is a true and correct copy of CX0383, a press release from the American Academy of Cosmetic Dentistry, titled "Cosmetic Dentistry Continues to Surge - Market Estimated at \$2.75 Billion."
56. Tab 54 is a true and correct copy of AAED161-2, an article by Linda Neissen titled "Talking With Patients, Tooth Whitening: Why, Who, What, Where and How" dated 2001.
57. Tab 55 is a true and correct copy of CX0385, a press release from the American Academy of Cosmetic Dentistry, titled "Consumer Studies, Can a new smile make you appear more successful and intelligent?"
58. Tab 56 is a true and correct copy of CX0393, a web page from [www.Kmart.com](http://www.Kmart.com), titled "EasyFit® Whitening Tray, 14ct."
59. Tab 57 is a true and correct copy of CX0394, a web page from [www.Walgreens.com](http://www.Walgreens.com), titled "Aquafresh WHITE TRAYS Kit."

60. Tab 58 is a true and correct copy of CX0365, an e-mail to Terry Friddle from Dr. Ronald Owens dated November 20, 2007.
61. Tab 59 is a true and correct copy of ADA000052-69, an article, Y. Li., "Biological Properties of Peroxide Containing Teeth Whiteners," 34 Food and Chem. Tech. 887 (1996).
62. Tab 60 is a true and correct copy of five documents: CX0134, a Letter to Dr. Ronald Owens from Stacey Phipps regarding Dr. Wayne Holland dated July 22, 2009; CX0334, a letter to Dr. Ronald Owens from Stacey Phipps regarding Dr. Brad Morgan dated July 22, 2009; CX0395, a Statement of Economic Interest for Dr. Brad Morgan received April 12, 2010; CX0396, a Statement of Economic Interest for Dr. Wayne Holland received January 21, 2010; NCBOARD4347-4348, a letter from the North Carolina State Ethics Commission acknowledging receipt of Dental Board Member's statement of economic interest dated April 4, 2008.
63. Tab 61 is a true and correct copy of ADA000461-466, an article, Sevil Gurgan et al., "Different light-activated in-office bleaching systems: a clinical evaluation," 25-6 Lasers in Med. Sci. 817-822 (2009).
64. Tab 62 is a true and correct copy of a set of 31 Complaint Counsel Exhibits, including CX0042, which contains the following: NOTICE AND ORDER TO CEASE AND DESIST from the Board to BleachBright/James & Linda Holder dated January 19, 2009; NOTICE AND ORDER TO CEASE AND DESIST from the Board to BleachBright/Skin Sense (Brier Creek Parkway) dated January 19, 2009; NOTICE AND ORDER TO CEASE AND DESIST from the Board to BleachBright/Electric Beach – Pleasant Valley dated January 19, 2009; NOTICE AND ORDER TO CEASE AND DESIST from the

Board to BleachBright/Exotic Tan dated January 19, 2009; NOTICE AND ORDER TO CEASE AND DESIST from the Board to BleachBright/Skin Sense (Apex) dated January 19, 2009; NOTICE AND ORDER TO CEASE AND DESIST from the Board to BleachBright/Chris Scott Hair Studio dated January 19, 2009; NOTICE AND ORDER TO CEASE AND DESIST from the Board to BleachBright/Douglas Carroll Salon dated January 19, 2009; NOTICE AND ORDER TO CEASE AND DESIST from the Board to BleachBright/Electric Beach – Cary dated January 19, 2009; NOTICE AND ORDER TO CEASE AND DESIST from the Board to BleachBright/Electric Beach – Mission Valley dated January 19, 2009; NOTICE AND ORDER TO CEASE AND DESIST from the Board to BleachBright/Electric Beach – North Market Drive dated January 19, 2009; NOTICE AND ORDER TO CEASE AND DESIST from the Board to BleachBright/Cary Massage Therapy Center dated January 19, 2009; NOTICE AND ORDER TO CEASE AND DESIST from the Board to BleachBright/Skin Sense – Falls of Neuse dated January 19, 2009; NOTICE AND ORDER TO CEASE AND DESIST from the Board to BleachBright/Modern Enhancement dated January 19, 2009; NOTICE AND ORDER TO CEASE AND DESIST from the Board to BleachBright/Life’s Little Pleasures dated January 19, 2009; NOTICE AND ORDER TO CEASE AND DESIST from the Board to BleachBright/La Therapie Spa at Preston dated January 19, 2009; NOTICE AND ORDER TO CEASE AND DESIST from the Board to BleachBright/Electric Beach – Six Forks dated January 19, 2009; BleachBright advertisement, handwritten note dated January 16, 2009; NOTICE AND ORDER TO CEASE AND DESIST from the Board to BleachBright/James & Linda Holder dated December 15, 2008; CX0044 an e-mail to Dr. Joseph Burnham, Line Dempsey, et al., from Terry Friddle dated May 15, 2006;

NOTICE AND ORDER TO CEASE AND DESIST from the Board to Stephanie Keith/Star-Bright Whitening Systems, Inc.; an e-mail to Dr. Joseph Burnham from Line Dempsey dated May 12, 2006; CX0050, a letter from Pamela Weaver to Terry Friddle dated March 27, 2007, NOTICE AND ORDER TO CEASE AND DESIST from the Board to Nicole Haynes/Nicole's Hair Salon dated March 21, 2007; CX0058, NOTICE AND ORDER TO CEASE AND DESIST from the Board to Tom Jones Drug dated February 18, 2009; CX0059, NOTICE AND ORDER TO CEASE AND DESIST from the Board to Port City Tanning dated October 7, 2008; CX0065, NOTICE AND ORDER TO CEASE AND DESIST from the Board to Patrice Barragan/Sunsational Tan dated July 3, 2007; CX0069, NOTICE AND ORDER TO CEASE AND DESIST from the Board to Sherry Johnson/Body Mind and Spirit dated March 29, 2007; CX0074, NOTICE AND ORDER TO CEASE AND DESIST from the Board to Christiane Dotson, Sherry Nelson, Heather York/Celebrity Smiles dated November 21, 2007; CX0076, letter from the Board to Champagne Taste dated March 22, 2007; CX0079, NOTICE AND ORDER TO CEASE AND DESIST from the Board to Tim Williams/Movie Star Smile dated January 17, 2008; CX0096, NOTICE AND ORDER TO CEASE AND DESIST from the Board to Margie Hughes/SheShe Studio Spa dated February 23, 2007; CX0097, NOTICE AND ORDER TO CEASE AND DESIST from the Board to Patrice Barragan Sunsational Tan dated September 4, 2007; CX0100, NOTICE TO CEASE AND DESIST from the Board to White Science dated December 4, 2007; CX0110, letter to White Science dated February 13, 2007; CX0112, NOTICE AND ORDER TO CEASE AND DESIST from the Board to Jason & Shanon Rabon dated March 26, 2009; CX0120, NOTICE AND ORDER TO CEASE AND DESIST from the Board to Fantasticians, Inc.,

dated September 24, 2008; CX0122, NOTICE AND ORDER TO CEASE AND DESIST from the Board to Florida White Smile dated October 7, 2008; CX0123, NOTICE AND ORDER TO CEASE AND DESIST from the Board to Joe Willett/iBriteExpress dated September 24, 2008; CX0153, NOTICE OF APPARENT VIOLATION AND DEMAND TO CEASE AND DESIST from the Board to Serenity Total Body Care dated September 22, 2009; CX0155, NOTICE OF APPARENT VIOLATION AND DEMAND TO CEASE AND DESIST from the Board to Heather Wiecek dated December 14, 2009; CX0156, NOTICE OF APPARENT VIOLATION AND DEMAND TO CEASE AND DESIST from the Board to Suave D's – BleachBrite dated December 22, 2009; CX0256, a facsimile to Frank Recker from the Board dated November 20, 2007, NOTICE AND ORDER TO CEASE AND DESIST from the Board to Christiane Dotson, Sherry Nelson, Heather York/Celebrity Smiles dated November 21, 2007; CX0272, NOTICE AND ORDER TO CEASE AND DESIST from the Board to Inspire Skin & Body dated April 3, 2009; CX0279, NOTICE AND ORDER TO CEASE AND DESIST from the Board to Carmel Day Spa/Shoreh Rafie dated October 1, 2007; CX0371, letter to Enhanced Light Technologies dated February 13, 2007; CX0386, NOTICE AND ORDER TO CEASE AND DESIST from the Board to Alan Elrod/Details, Inc. Dated January 31, 2007; CX0387, NOTICE AND ORDER TO CEASE AND DESIST from the Board to Bailey's Lightning Whitening dated July 17, 2008; CX0388, NOTICE AND ORDER TO CEASE AND DESIST from the Board to Lite Brite dated July 17, 2008; CX0389, NOTICE AND ORDER TO CEASE AND DESIST from the Board to Triad Body Secrets dated September 24, 2008; CX0390, NOTICE AND ORDER TO CEASE AND DESIST from the Board to Whitening on Wheels dated November 12, 2008; CX0391, NOTICE AND

ORDER TO CEASE AND DESIST from the Board to The Extra Smile, Inc. Dated December 31, 2008.

65. Tab 63 is a true and correct copy of REDACTED  
REDACTED to the subpoena issued by Complaint Counsel on August 23, 2010.
66. Tab 64 is a true and correct copy of REDACTED  
to the subpoena issued by Complaint Counsel on August 23, 2010.
67. Tab 65 is a true and correct copy of REDACTED  
to the subpoena issued by Complaint Counsel on August 23, 2010.
68. Tab 66 is a true and correct copy of REDACTED  
REDACTED to the subpoena issued by Complaint Counsel on August 23, 2010.
69. Tab 67 is a true and correct copy of REDACTED  
to the subpoena issued by Complaint Counsel on August 23, 2010.
70. Tab 68 is a true and correct copy of ADA2371-5, an e-mail to Grace Ann Pastorelli from James Willey dated May 21, 2008.
71. Tab 69 is a true and correct copy of NCBOARD1372-1450, which is 21 N.C.A.C. 16A et seq.
72. Tab 70 is a true and correct copy of NCBOARD3405-3410 at 3405, which is N.C.G.S. §93B-2.
73. Tab 71 is a true and correct copy of NCBOARD3782-3813 at 3788-3813., and is N.C.G.S. §138A-10 et seq.
74. Tab 72 is a true and correct copy of excerpts from the deposition of Neplus Hall taken on September 1, 2010.

75. Tab 73 is a true and correct copy of excerpts from the deposition of Dr. Stanley Allen taken on September 3, 2010.
76. Tab 74 is a true and correct copy of excerpts from the deposition of Dr. Benjamin Brown taken on September 2, 2010.
77. Tab 75 is a true and correct copy of excerpts from the deposition of Dr. Joseph Burnham taken on October 8, 2010.
78. Tab 76 is a true and correct copy of excerpts from the deposition of Dr. Brad Morgan taken on October 15, 2010.
79. Tab 77 is a true and correct copy of excerpts from the deposition of Zannie Efrid taken on September 1, 2010.
80. Tab 78 is a true and correct copy of excerpts from the deposition of Dr. Clifford Feingold taken on October 5, 2010.
81. Tab 79 is a true and correct copy of excerpts from the deposition of Dr. Wayne Holland taken on September 17, 2010.
82. Tab 80 is a true and correct copy of excerpts from the deposition of Dr. Alec Parker taken on September 23, 2010.
83. Tab 81 is a true and correct copy of excerpts from the deposition of Dr. William Litaker taken on September 24, 2010.
84. Tab 82 is a true and correct copy of excerpts from the deposition of Dr. Gary Oyster taken on September 24, 2010.
85. Tab 83 is a true and correct copy of excerpts from the deposition of Ms. Carolin Bakewell taken on October 13, 2010.



86. Tab 84 is a true and correct copy of excerpts from the deposition of Ms. Terry Friddle taken on October 14, 2010.
87. Tab 85 is a true and correct copy of excerpts from the deposition of Dr. Millard Wester taken on September 3, 2010.
88. Tab 86 is a true and correct copy of the declaration of Perry Newson, Executive Director of the North Carolina Ethics Commission, without the referenced Exhibits 1-3. Exhibit 1 is a copy of NC General Statutes Chapter 138A, which is found at Tab 71 to this declaration. Exhibit 2 is a blank copy of the Statement of Economic Interest ("SEI") required under the N.C. State Government Ethics Act. Exhibit 3 consists of executed copies of the completed SEIs from current and former members of the Board from 2006 to present. Completed SEIs of current Board members Dr. Morgan Dr. Holland are found at Tab 62 to this declaration. Exhibits 1-3, totaling 378 pages, are on file with Complaint Counsel rather than reproduced here. Respondent has been served with Exhibits 1-3 electronically.
89. Tab 87 is a true and correct copy of excerpts from CX0049, which is excerpts from the BriteWhite treatment manual.
90. Tab 88 is a true and correct copy of CX0227, an e-mail to Ronald R. Zentz from Ronald R. Zentz dated July 16, 2010.
91. Tab 89 is a true and correct copy of CX0050, a letter to Terry Friddle from Pamela Weaver dated March 27, 2007.
92. Tab 90 is a true and correct copy of CX0162, a letter to the Board from Tonya Norwood, received in February 2009.

93. Tab 91 is a true and correct copy of CX0347, an email to Line Dempsey, Terry Friddle, Casie Smith, Carolin Bakewell, and Bobby White from Dr. Stan Hardesty dated January 16, 2008.
94. Tab 92 is a true and correct copy of CX0056, minutes from the Board's meeting dated February 9, 2007.
95. Tab 93 is a true and correct copy of CX0397, a press release from the American Academy of Cosmetic Dentistry, titled "First it was Atkins, then it was South Beach, now it's the White Smile Diet."

I declare under the penalty of perjury that foregoing is true and correct. Executed this 8<sup>th</sup> day of November, 2010, at Washington, D.C.

s/ Richard B. Dagen

Richard B. Dagen  
Counsel Supporting Complaint  
601 New Jersey Ave., NW  
Washington, D.C.  
(202) 326-2628  
(202) 326-3496 Facsimile  
[rdagen@ftc.gov](mailto:rdagen@ftc.gov)

**CERTIFICATE OF SERVICE**

I hereby certify that on November 8, 2010, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

Donald S. Clark  
Secretary  
Federal Trade Commission  
600 Pennsylvania Ave., NW, Rm. H-159  
Washington, DC 20580

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

The Honorable D. Michael Chappell  
Administrative Law Judge  
Federal Trade Commission  
600 Pennsylvania Ave., NW, Rm. H-113  
Washington, DC 20580

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

Noel Allen  
Allen & Pinnix, P.A.  
333 Fayetteville Street  
Suite 1200  
Raleigh, NC 27602  
nla@Allen-Pinnix.com

*Counsel for Respondent  
North Carolina State Board of Dental Examiners*

**CERTIFICATE FOR ELECTRONIC FILING**

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

November 8, 2010

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