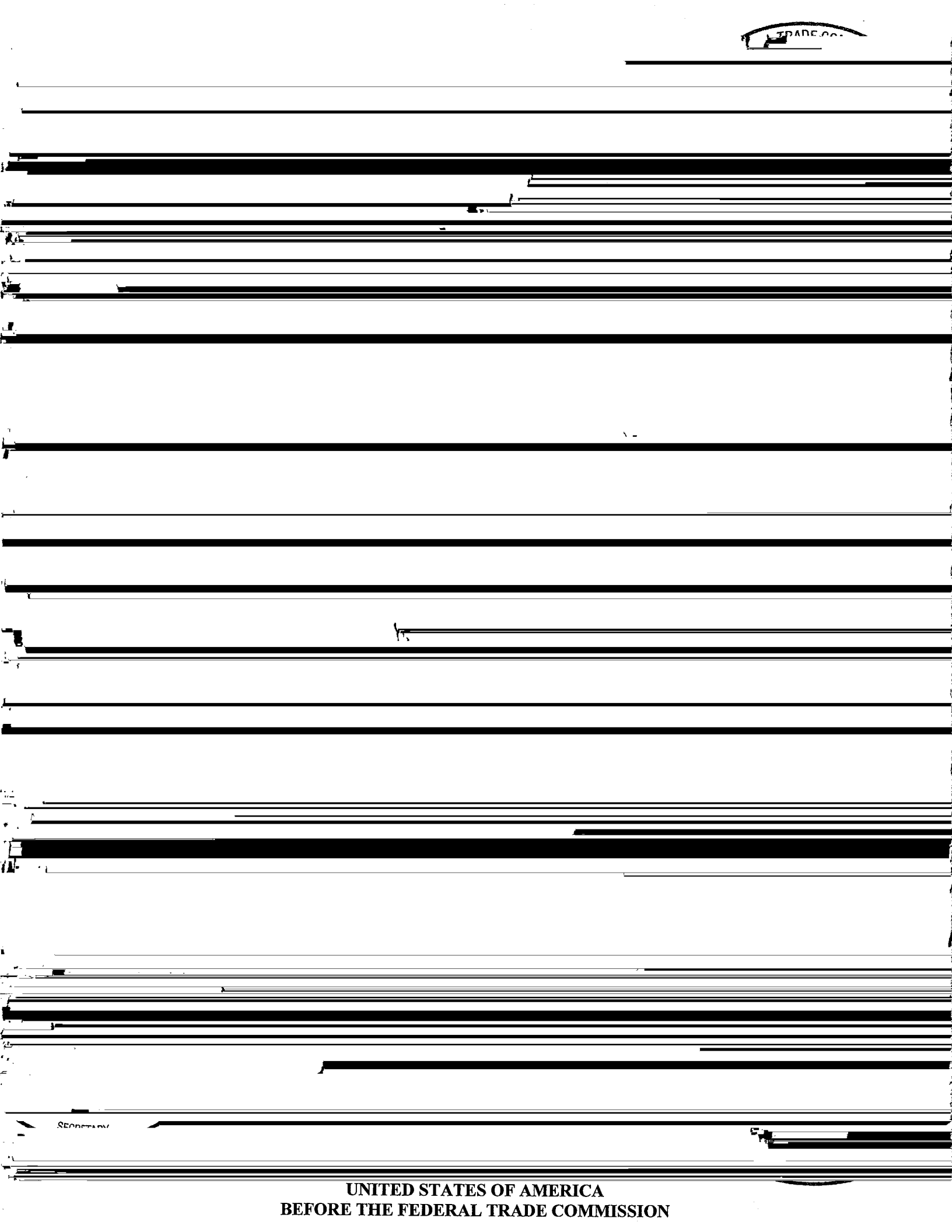

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

RECORD REFERENCES

References to the record are made using the following citation forms and abbreviations:

RB - Respondent's Appeal Brief

ID - Initial Decision

IDF - Initial Decision Findings of Fact

IDCL - Initial Decision Conclusions of Law

SAO - Opinion of the Commission Rejecting the Board's State Action Defense

CCPFF - Complaint Counsel's Proposed Findings of Fact

[redacted]

TABLE OF AUTHORITIES

CASES

COMMISSION AND ALJ INTERLOCUTORY ORDERS AND OPINIONS

STATUTES AND REGULATIONS

I. STATEMENT OF THE CASE

Respondent North Carolina State Board of Dental Examiners ("Board") is dominated by

assurance'" that the conduct of the Board promotes state policy, rather than merely serving the interests of the state's licensed dentists. *SAO* at 11. Consequently, the Commission determined that the antitrust state action exemption is inapplicable; that is, when regulating dentists and their non-dentist competitors, the Board is obliged to act in conformity with the antitrust laws. *Id.* at 13. The Commission previously held that the Board failed to comply with this requirement.

Upon learning that a person may be engaging in the unauthorized practice of dentistry, the Dental Act authorizes the Board to respond in one of two ways: the Board may bring a civil action in state court requesting that the court enjoin the alleged violation, or the Board may request that the district attorney commence a criminal prosecution. Seeking injunctive

against non-dentists was viewed by the Board as too risky; the courts might not support the

The Board's arguments in this appeal are the very same arguments that populated the Board's state action brief. The Board claims that NDTW is illegal under North Carolina law, and that the Board is authorized by state law to drive these "illegal competitors" from the marketplace. Re-packaged as a defense under the rule of reason, the Board's arguments continue to be deficient. The Board's claims with regard to state law are inaccurate.[1] But more important, the rule of reason focuses upon the effects that a restraint has upon competitive conditions. The Board's arguments skew off in other directions, ignoring competition and the welfare of consumers. The Board simply ignores the Supreme Court case law, including the

his Order as the Order of this Commission.

II. STATEMENT OF FACTS

A. Introduction

The ALJ's findings are supported by the evidence and should be adopted by the Commission. In addition, we urge the Commission to make findings covering two additional areas. First, the ALJ properly found that the Board's conduct has the obvious tendency to harm competition; however, we urge the Commission to make additional findings that the economic theory and studies support the inherently suspect analysis. CCPFF 418-715 (discussed *infra* at 17, 19).

Second, the ALJ correctly found that the Board's claim that NDTW may injure the public health and safety is not a cognizable antitrust defense and therefore declined to evaluate the evidence regarding health and safety issues. We urge the Commission to find that, even if cognizable, this defense fails as a matter of fact. CCPFF 716-1196 (discussed *infra* at 21-23).

As the record demonstrates, the Board's claims are vacuous. There are no scientific studies showing any systematic (or other) harms associated with NDTW. And the absence of such evidence is striking given the millions and millions of times that non-dentists teeth whitening has occurred. In fact, the only credible evidence on health and safety showed that any such concerns were unfounded.

Adopting these findings now will serve at least two purposes. First, such findings will

B. The Board Is Controlled By Market Participants

The Board is created by the Dental Act to regulate dentists and hygienists. IDF 1, 33, 35.

The Board consists of six actively practicing dentists and [illegible]

D. Teeth Whitening Can Be Provided By Dentists Or Non-Dentists Or Self

[redacted]

1. **Four Broad Categories of Teeth Whitening**

There are four principal categories of modern teeth whitening products and services currently available in North Carolina and around the country: (i) dentist in-office teeth whitening services; (ii) NDTW services available in venues such as salons, warehouse clubs, and mall kiosks; (iii) dentist take-home teeth-whitening products; and (iv) over-the-counter ("OTC") teeth

Sam's Clubs around the country, and provided over 100,000 bleachings since 2007. IDF 72; *see also* CCPFF 1275.

Trial witnesses demonstrated the typical NDTW procedure. IDF 142-144; CCPFF 457-459. A non-dentist operator explains the process to the customer, provides the customer with literature, sometimes including a consent form, and answers any questions before the procedure begins. IDF 142. The operator dons sanitary gloves and hands a sealed package containing a tray filled with carbamide peroxide to the customer, who places the tray into his or her mouth. IDF 143. No protection for the gums is necessary at these concentration levels. IDF 141. A

consumer using OTC products. IDF 82. Dr. Giniger is a licensed dentist, having obtained a doctor of dental medicine with honors in 1984. Dr. Giniger also has an MsD in Oral Medicine (1993), and a PhD in Biomedical Science (1993), with a specialization in oral biology. IDF 80; CCPFF 777-779. On the subject of teeth whitening, he has taught at prestigious dental schools, published in peer reviewed journals, conducted clinical studies, received prestigious awards and grants, received numerous patents, and consulted with major manufacturers such as Proctor & Gamble, Johnson & Johnson, and Discus Dental, helping to develop extremely successful products. IDF 80-81; CCPFF 781-791.

Dr. Giniger explained that over the last 20 years, millions of consumer have safely bleached their teeth without dentist involvement and there is not a single study demonstrating

monopolizing "lucrative cosmetic services than with access to care issues." CCPFF 1241.

There is a high cross-elasticity between dentist and NDTW. IDF 154-155; Tr.1842; CCPFF 521.

3. Dentists, Including Dentist Board Members, Have a Financial Interest

[redacted]

"[T]he existence of a financial interest of dentists in the exclusion of kiosk/spa operators [redacted] does *not* require that dentists be the only substitutes for kiosk/spa operators . . . . It requires only that they compete with each other to a significant degree." CCPFF 157 (quoting Kwoka Expert Report, CX0654 at 009). As discussed in the prior section, dentists and non-dentists do compete to provide teeth whitening services.

In terms of financial interest, teeth whitening is the number one requested cosmetic dentistry procedure. IDF 102. The American Academy of Cosmetic Dentistry ("AACD")

IDF 104, 233.[6]

Several Board members have earned tens of thousands of dollars annually from teeth whitening. IDF 8-11. The Board member with the highest practice revenues from teeth whitening, primarily in-office, was assigned – often on his initiative – most of the Board's NDTW investigations. IDF 10.

[redacted]

[redacted]

and desist order).

F The Board's Letters To Teeth Whitening Operators Purport To Be Orders From A State Agency

Over the past five years, more than 45 cease and desist orders were issued by various members of the Board, using virtually identical language. *See* IDF 208-209, 216-25 (providers); 261-262, 264-65, 274, 286 (manufacturers). The record before the Commission at the summary decision stage, as well as testimony at trial and additional contemporaneous documents, all confirm that the letters were orders from a state agency to stop teeth whitening activities. IDF 234-245; *SAO* at 5.[8]

prevent further entry. IDF 322-327.

2. Manufacturers, Mall Operators, and Potential Entrants

The Board's concerted exclusionary campaign extended beyond targeting existing non-dentist operators. The Board also contacted manufacturers of teeth whitening products (IDF 261-266, 274-276, 280), potential entrants, and mall owners and operators. IDF 284-293. The Board communicated the message that NDTW is unlawful unless performed under the supervision of a dentist. IDF 264, 274-276, 280, 284-293. For example, the Board unanimously approved sending letters to eleven malls stating in relevant part:

> 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.
>
> The Dental Board would be most grateful if your company would assist us in ensuring that the 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.

IDF 288-289. The purpose and effect of these additional letters and communications was to impede entry by non-dentists. IDF 292-293.

H. Dentist Board Members Engaged In Concerted Action

Each action challenged in this matter was undertaken with either the express or implicit

241, 263. See also IDF 201 ("we are currently going forth to do battle"); IDF 264, 276 (Board minutes "staff directed to respond" that teeth whitening must be done by dentists). The Board

[redacted]

circulated a statement setting out the Board's teeth whitening policy—the Board members

[redacted]

exclusion are, as Professor Baumer acknowledged, "straightforward" "Econ 101." CCPFF 559-560, 562. The Board represents the interests of dentists and has the power and ability to

[redacted]

operations closed; others pared back operations and advertising. IDF 246-257. The Board's other extra-judicial conduct also resulted in reduced output. For example, the Board's letters to the malls had their desired effect. As a result of these letters, operators of at least seven malls in North Carolina either terminated or refused to lease space to non-dentists intent on operating teeth whitening facilities. IDF 294-313. And sales into North Carolina of teeth bleaching

[redacted]

decreased substantially. IDF 261-287 (covering undisputed testimony of three manufacturers).

[redacted]

b. Consumers were harmed

J. No Offsetting Efficiencies Exist

Judge Chappell rejected the Board's safety justification for its anticompetitive conduct because such a defense is not cognizable under the antitrust law. ID 108. Having so held, Judge Chappell saw no need to make Findings of Fact regarding the safety of NDTW, and did not do

Giniger debunked claims by Board members and Dr. Haywood by walking the court through the scientific literature critically analyzed at length in his expert report. CCPFF 716-724, 931-945,

951, 952-960, 963-971, 1008-1045, 1077, 1313-1323; CX0653. Dr. Giniger testified that scientific studies relevant to NDTW were indicative of its safety. See, *e.g.*, CCPFF 716, 717, 725, 727, 728, 786, 798, 896, 946, 967-971. He spoke to the composition and characteristics of NDTW products (see, *e.g.*, CCPFF 725-732, 931-938, 953-955, 963-971) and the methods and

opinions concerning the dangers posed by these interlopers. In addition, Dr. Haywood admittedly offers a theory of harm that, even if false, cannot be disproven. CCPFF 1003. This is an indicium of "junk science" (See *Daubert*). And Dr. Haywood's reliance upon it as the

III. ARGUMENT

Congress empowered the Commission to prevent "persons, partnerships, or corporations" from using "unfair methods of competition in or affecting commerce." 15 U.S.C. § 45(a)(2).

The ALJ improperly determined that the Board is a "person" subject to the Commission's

product of an agreement among members of the Board. As discussed below, the Board's arguments are without merit.

Board decision-making is dominated by six independent dentists, each with an independent economic interest. Consequently, the members of the Board are capable of concerted action within the meaning of the antitrust laws.

Whether the Board is properly characterized as a "contract, combination . . . or conspiracy" of its members, or instead as a single enterprise, requires a "functional consideration of how the parties involved in the alleged anticompetitive conduct actually operate." *Am. Needle, Inc. v. NFL*, 130 S. Ct. 2201, 2208-10 (2010) (holding that the licensing activities of the National Football League constitute concerted action). In this regard, it is undisputed that the dentist members of the Board operate separate dental practices, and that their economic interests

indicative of individual action.[19] Instead, this is precisely the type of conduct that Section 1 is

intended to cover. *See SAO* at 14 (the challenged conduct – efforts by incumbent dentists' to preclude their competitors "lies at the heart of the federal antitrust laws").[20] Finally, it is only

rather an agent of the continuing conspiracy.

The continuing conspiracy concept is also employed in *American Needle*. The 32 teams in the National Football League employed a single corporate agent, NFLP, for purposes of marketing their intellectual property (name, logos, trade marks). NFLP granted a license to

correct without regard to how the market is defined. Thus, the Board's claims regarding market definition are not only wrong, but also irrelevant.

[redacted]

choose among four alternatives: (i) dentist teeth whitening services; (ii) NDTW services; (iii)

dentist supplied take-home kits; and (iv) OTC products. What differentiates chairside whitening (i, ii) in the eyes of consumers, is that superior teeth whitening results are achieved in a single session. Experts for both Complaint Counsel and the Board testified that the cross-elasticity

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seemingly simple assertion. First, the ALJ did not in fact rely on the survey data when defining the market. ID at 70-71 (defining relevant market by reference to *Brown Shoe*[26] factors). Second, the Board does not explain how dentist revenue data, whether accurate or inaccurate, relates to the contours of the market. In fact it does not. Revenue data tells us nothing about substitutability or consumer preferences, the determinants of market definition.

Third, the Board has not shown that the subpoena data was actually misread by the ALJ. Judge Chappell interpreted the survey data as showing that dentist Board members earn revenues from the provision of in-office tooth whitening services. ID at 75. This is substantially identical

[redacted]

to the interpretation advanced by the Board, which admits that "the majority of the dentists who responded to the subpoenas" use Zoom!, which "includes both in-office and take-home kit components as part of the procedure." RB 28 (emphasis added). These dentists provide an in-

[redacted]

NDTW is prima facie anticompetitive is not reliant upon any particular market definition. *See* ID 81-104 (ALJ's competitive effects analysis).

The Commission has previously concluded that the dentist members of the Board have a private interest in the regulation of dentists and NDTW operations, regardless of whether any individual member currently performs teeth whitening. *SAO* at 13-14. The Board has not shown that the personal financial income of individual Board members is relevant to market definition or to any other issue in this litigation.

The ALJ's discussion of market definition does contain one misstatement of law. For the benefit of future cases, we respectfully urge the Commission to correct this error. *Cf. In re Matter of Kentucky Household Goods Carriers Ass'n*, 139 F.T.C. 404, 433 (2005) (correcting misstatement in Initial Decision to the effect that a relevant market must be defined in even a per se case).

The Initial Decision states that a relevant market must be defined to establish liability under the rule of reason. ID 62-64. Given developments in the case law, this is no

appeal, the Board disputes none of this. The Commission should therefore find that the challenged conduct of the Board is prima facie anticompetitive under each of the three variations of the rule of reason identified in the *Realcomp* decision.[30]

Because the Board's conduct is prima facie anticompetitive, the Board has the burden of demonstrating a countervailing efficiency justification for its practices. *CDA*, 526 U.S. at 771;

228 (7th Cir. 1983); *Virginia Academy of Clinical Psychologists v. Blue Shield of Virginia*, 624

F.2d 476, 485 (4th Cir. 1980). The ALJ's legal analysis on this point should be affirmed. In addition, and as discussed above, the Commission should conclude that the Board's health and

Concord v. Boston Edison Co., 915 F.2d 17 (1st Cir. 1990) (price squeeze imposed by regulated

[redacted]

[redacted]

Pa. 2006) (terms of franchise agreement do not establish bounds of the relevant market where

[redacted]

preponderance of the evidence shows as follows: the Dental Act defines dentistry as including the removal of stains from teeth.[33] What is contemplated by the statute is the scraping of stains from the teeth with abrasive instruments, and not the application of bleach (whether self-

administered at home, or assisted application at a spa or salon).[34] Teeth bleaching lightens the appearance of a stain on the teeth, but does not remove the stain. The stain molecules remain in [redacted] [35]

probative of the meaning of the Dental Act. North Carolina courts have never ruled on whether teeth bleaching involves the removal of stains, and North Carolina courts have never ruled that the assistance provided by a non-dentist in connection with teeth bleaching by the consumer

The Board now seeks to re-package its failed state action defense, the contention that it is upholding state law, as a pro-competitive or efficiency defense under the rule of reason. This is not a cognizable defense. The rule of reason "does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason. Instead it focuses directly on the challenged restraint's impact on competitive conditions." *NSPE*, 435 U.S. at 688. "Cognizable justifications ordinarily explain how specific restrictions enable the defendants to increase output or improve quality, service, or innovation." *In re Polygram*

[redacted]

has authorized the Board to eliminate NDTW this fact would not establish that such a policy [redacted]

found – that the financial aid restraint expanded consumer choice (*i.e.*, enhanced consumer

[redacted]

students. Expanding consumer choice is of course a bona fide efficiency defense that is cognizable under the rule of reason. The Board's actions, in contrast, restrict consumer choice

[redacted]

must be accorded a respectful presumption of validity, it is nevertheless well

[redacted]

468 U.S. at 101 n.23. The *NCAA* opinion goes on to cite the long pedigree of cases that support this principle: *United States v. Griffith*, 334 U.S. 100, 105-06 (1948); *Associated Press v. United States*, 326 U.S. 1, 16 n.15 (1945); *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 1918); *Standard Sanitary Mfg. Co. v. United States*, 226 U.S. 20, 49 (1912); *United States*

[redacted]

have a legitimate role to play in protecting the public health. *See Wilk v. American Medical Association*, 719 F.2d 207, 223 (7th Cir. 1983). This responsibility may readily be discharged in

a manner that conforms with the antitrust laws. First, only anticompetitive regulation may contravene the antitrust laws; not all regulation is anticompetitive. Second, and as the

All such defenses were correctly judged to be non-cognizable. This is not, as the Board suggests, a finding of per se illegality.

G. The Terms Of The Proposed Order Do Not Violate The Tenth Amendment Or The Commerce Clause

The Board contends that the proposed Order interferes with the State's ability to sanction unlicensed dentistry, and so would violate the U.S. Constitution. The ALJ properly rejected this claim.

The scope of the proposed Order is entirely reasonable. The Board is enjoined from repeating its violations of the antitrust laws, including engaging in certain extra-judicial efforts to restrict or impede the provision of teeth whitening services by non-dentists. The role assigned to the Board by the Dental Act is expressly preserved: that is, the Board may investigate suspected violations of the Dental Act and file, or cause to be filed, a court action against an alleged violator. *See* IDF 258 (acknowledgment that Board can enforce Dental Act without issuing cease and desist orders).

The Board cites *California State Board of Optometry* for the proposition that the Tenth

[redacted]

Amendment bars the Commission from restricting the manner in which the Board regulates the

IV. CONCLUSION

For the reasons stated above, Complaint Counsel requests that the Commission affirm the

[redacted]

Respectfully submitted,

/s/ Richard B. Dagen
Richard B. Dagen

CERTIFICATE OF SERVICE

I hereby certify that on October 4, 2011, I filed the foregoing document electronically

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