TABLE OF CASES AND AUTHORITIES

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STATEMENT OF THE CASE

The State Board is a state agency; it is not a public/private hybrid such as the Virginia State Bar.[1] The notion of a hybrid is a convenient construct, but unsupported by the record and explicitly contrary to state statute. See, N.C. GEN

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

The removal of stains from human teeth is the practice of dentistry in North Carolina. N.C. GEN. STAT. § 90-29(b)(2). Advertisement of the ability or qualification to remove stains from human teeth is the practice of dentistry in North Carolina. N.C. GEN. STAT. § 90-29(b)(13). The ownership, management, supervision, or control of an enterprise where the removal of stains from human teeth is performed, attempted to be performed, or represented to be performed is the practice of dentistry in North Carolina. N.C. G

individual earnings[5].

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

CC claims that the cease and desist letters began to be utilized in 2006 when the State Board became concerned that North Carolina courts would not rule in their favor. To the contrary, Mr. White, the State Board's COO, testified that the State Board did not decide to use cease and desist letters rather than go to the court system in teeth whitening cases because of the Board's lack of success in court. White, Tr. 2338. This is plainly evidenced by the fact that the State Board brought two civil actions against non-dentist

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

CC's recitation of the State Board's activities in regard to enlisting the assistance of the North Carolina Board of Cosmetic Art Examiners ("Cosmetology Board") and management of North Carolina shopping malls sending informational letters about the unauthorized practice of dentistry ignores the obvious. All of the information communicated to the licensed cosmet

as “anecdotal” evidence of harm to consum

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

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

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

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

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

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

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

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

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

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

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

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

Second, as noted in the State Board's Appeal Brief, the ALJ's conclusions of law regarding concerted action rely primarily on his findings of fact regarding the nature of the various "cease and desist" letters. This evidence, along with the additional findings of fact noted in CC's Answering Brief, is insufficient to support a conclusion that can "exclude the possibility that the alleged conspirators acted independently." Matsushita

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

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

CC incorrectly claims that case law has evolved in favor of ignoring the issue of relevant market and market power in a rule of reason analysis. CCAB at 34. As the ALJ explains, defining the relevant market is the first step to establishing whether a u6sC 1.4 (rredm ma

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

While correct to examine market power, the ALJ's analysis is flawed because he lacked the data to prove that North Carolina dentists provide more than a *de minimis*

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

The ALJ did not consider whether a rule of reason violation may have occurred. The ALJ concluded that CC did not support a analysis,[7] and neither did the facts of the case. ALJID at 82. CC does not dispute this decision. Therefore, the choices before the ALJ were whether to apply a truncated or full rule of reason analysis, and whether to find procompetitive violations existed under the a

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

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

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

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

Under either the truncated or traditional rule of reason analysis, the State Board's conduct is permitted by a procompetitive justification. The State Board was acting to protect the public by enforcing a clearly articulated state statute outlawing non-dentist supervised stain removal services. CC contends that this is not a legitimate procompetitive justification. CCAB at 38. CC argues that the state law defining the removal of stains from teeth as the practice of dentistry is not a valid justification for the

forth by CC in its Answering Brief fail to overcome the arguments raised on appeal by

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

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

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

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

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

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

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

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

CONCLUSION

Complaint Counsel has alleged that a state agency, acting legally and enforcing a state statute clearly outlawing non-dentist-supervised certain removal services, is engaged in a conspiracy to violate federal antitrust law. Unable to conclude than any such

CERTIFICATE OF SERVICE

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

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

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This the14th day of October, 2011.

/s/ Noel L. Allen
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CERTIFICATION FOR ELECTRONIC FILING

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

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