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

Opinion of the Commission

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

I. INTRODUCTION[2]

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

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

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

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

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

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

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

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

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

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

Teeth Whitening Services

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

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

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

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

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

The Board's Cease and Desist Letters

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

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

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

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

[5] Respondent disputes Finding 205, which states that members of the Board told dentists attending a conference that the Board was investigating complaints about non-dentist teeth whiteners. (RAB at 18.)

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

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

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

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

III. PROCEDURAL HISTORY

A. PLEADINGS AND PRE-TRIAL MOTIONS

On June 17, 2010, the Commission issued a single-count Complaint in this m]TJ 5 -2.8On JuL6l the

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

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

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

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

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

Prior to the start of the

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

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

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

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

As a remedy, the ALJ ordered the Board to cease and desist from directing a non-dentist to stop providing teeth whitening services or produc

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

V. LEGAL FRAMEWORK

Although the reach of Section 5 of the FTC Act extends beyond that of Section 1 of the Sherman Act, seeFTC v. Sperry & Hutchinson Co

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

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

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

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

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

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

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

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

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

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

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

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

In this Opinion, we analyze Respondent's conduct under the three modes of analysis endorsed in Indiana Federation of Dentists. It is important to note, however, that we could have selected just one of thes

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

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

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

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

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

Holland, Morgan, Owens, and Wester) provided teeth whitening services in their private practices. (IDF at 6-9; see alsdDF 32 (identifying Board members).) For example, during their tenures on the Board, one Board member earned over $75,000 from teeth whitening services, while another earned over $40,000.[11]

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

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

In a similar case, the board of directors of a nationwide moving company adopted

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

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

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

- At the Board's February 2007 meeting, the Board discussed the increase in complaints involving spas offering teeth whitening procedures and voted to send a letter to the cosmetology board with the goal of discouraging this practice. (IDF 317-18, 321, 323.) The Board's then-Secretary and Treasurer testified that there was "consensus" on the Board to send the letter and that "nobody had any objections." (CX565 at 62 (Hardesty Dep. at 240).)

- At its August 2007 Board meeting, the Board directed its staff to send letters to two teeth whitening manufacturers with the intention of discouraging or preventing the companies from providing products and equipment to non-dentist teeth whitening service providers in North Carolina. (IDF 264, 276, 286.)

- In late 2007 the Board unanimously voted to send letters to mall operators to dissuade them from leasing space to non-dentist teeth whiteners. (IDF 289, 292.)

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

We agree with the ALJ that the consistency and frequency of the Board's message regarding non-dentist teeth whitening, over the course of several years and across the tenures of varying Board members (IDF 32), constitute probative circumstantial evidence of an agreement among Board members. (ID at 78.) We also find significant that on at least three occasions, members of the Board or Board counsel informed third parties that the Board was taking action against non-dentist teeth whitening kiosks. (IDF 201, 205; CX254 at 1; see also CX369 (noting that the Board had a "strategy" for addressing teeth whitening kiosks).) For example, after receiving an inquiry from a dentist about a teeth whitening kiosk in 2008, the Board's Chief Operations Officer responded that "we are

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

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

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

a. The Board's Conduct is Inherently Suspect

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

The challenged conduct is, at its core, concerted action excluding a lower-cost and popular group of competitors. The Board not

locations. (IDF 137-38.) These providers charged significantly less than dentists despite

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

In Fashion Originators' Guild of America, Inc. v. FTC, 312 U.S. 457 (1941), manufacturers of women's garments, working through an industry association, boycotted retailers that sold copies of their original designs. The Supreme Court affirmed the FTC's conclusion that this scheme was an unfair method of competition, notwithstanding the organization's claim that the copying of garment designs was a tortious act. The Court explained that the association's policy "has both as its necessary tendency and as its purpose and effect the direct suppression of competition." Id. at 465. The Court was

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

Similarly, in American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp., 456 U.S. 556 (1982), the dominant fuel cutoff manufacturer used its influence in ASME, a standards organization, to prevent the organization from approving a rival's alternative design. ASME's standards were so influential that, according to the Court, it was "in reality an extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce." Id. at 570 (quoting Fashion Originators' Guild,

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

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

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

b. The Board's Proffered Justifications

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

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

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

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

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

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

Respondent offers three justifications for its conduct, all of which were rejected by the ALJ.

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

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

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

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

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

Respondent contends that the preceding lin

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

To the extent that Respondent's claims are premised on principles of federalism and a concern with state prerogatives, the Supreme Court has already defined the contours for such a defense. See Parker v. Brown, 317 U.S. 341 (1943). Almost 70 years ago, the Supreme Court created the state action defense for state or private actors acting pursuant to a state regulatory program. As we conc

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

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

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

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

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

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

In contrast, there was a wealth of evidence presented at trial suggesting that non-dentist provided teeth whitening is a safe cosmetic procedure. (Giniger, Tr. 121-24, 134-

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In addition to increasing prices, the Board's conduct deprived consumers of choice. Realcomp, 2009 FTC LEXIS 250, at *111 (liability under rule of reason appropriate if respondent's practices "narrow consumer choice or hinder the competitive process"). The Board deprived consumers of the option of going to a mall, salon, or spa for teeth whitening services. In addition, consumers can no longer obtain same-day teeth whitening services (unless their local dentist provides walk-in teeth whitening service). The courts recognize that the elimination of products desired by consumers reduces consumer welfare. Indiana Federation of Dentists, 476 U.S. at 459 (absent a procompetitive virtue, "an agreement limiting consumer choice . . . cannot be sustained

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

VII. REMEDY

To remedy Respondent's violation of Section 5, the ALJ issued an Order prohibiting the Board from directing non-dentists to cease providing teeth whitening products and services. (ID at 110-17, 123-30.) The Order also requires the Board not to communicate to any current or prospective non-dentist provider, lessor of commercial property, or actual or prospective distributor of teeth

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

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

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

To ensure the Board cannot indirectly accomplish what it has been barred from doing directly, Section II.G of the Final Order also prohibits the Board from inducing or assisting any other person in discouraging the provision of teeth whitening by non-dentist providers. This type of prohibition is well within the authority of the Commission. *See Ruberoid*, 343 U.S. at 473 (FTC orders need not be restricted to the "narrow lane" of the respondent's violation, but rather may "close all roads to the prohibited goal, so that its order may not be by-passed with impunity"); *Toys "R" Us*, 221 F.3d at 940 ("[T]he FTC

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

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

Section III of the Final Order requires the Board to send notices and other disclosures to parties affected by the Final Order. Such notices are within the Commission's remedial authority. See Realcomp II, 2009 FTC LEXIS 250, at *129

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

Respondent argues first that the "Order clearly restricts the State Board's ability to conduct a bona fide investigation into possible violations of the North Carolina Dental Practice Act, as it renders useless the State Board's ability to prevent unlicensed teeth whitening services." (RAB at 40.) To the contrary, as discussed above, the Final Order is much more limited and specifically states that "nothing in this Order prohibits the Board from . . . investigating a Non-Dentist Provider for suspected violations of the Dental Practice Act." (Final Order § II.) The Final Order explicitly permits the Board to bring (or cause to be brought) judicial proceedings against non-dentist providers, to bring administrative proceedings against dentists, and to send bona fide litigation warning letters to targets of investigations. (Id.) Since the Board's authority to enforce the Dental Practice Act against non-dentists is limited to seeking recourse from the North Carolina courts or referring a matter to a District Attorney (N.C. General Statutes § 90-40.1; IDF 43, 44, 190; Response to Complaint ¶ 19; RAB at 2-3; RRB at 5), the Final Order will not prevent or impede the Board from carrying out its enforcement duties. Indeed, the Board's Chief Operating Officer testified that the Board's ability to enforce the Act would not be affected if it sent litigation warning letters instead of cease and desist letters. (IDF 258;

to stretch that case to include activity that is outside the scope of the regulatory scheme of the Dental Practice Act. In California State Board of Optometry, the D.C. Circuit reviewed an FTC trade regulation rule, passed pursuant to the Magnuson-Moss Amendments to the FTC Act, declaring that certain state laws restricting the practice of optometry constituted unfair acts or practices. The court held that state regulation of the practice of optometry is a quintessentially sovereign act and therefore rejected the rule as an improper attempt to regulate state action. In contrast, this case does not involve a challenge to a state law or regulation, but rather a challenge to conduct by the Board that went beyond its statutory mandate. Furtherm