



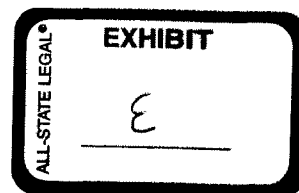
UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION  
OFFICE OF ADMINISTRATIVE LAW JUDGES

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

**RESPONDENT'S MOTION FOR AN ORDER COMPELLING DISCOVERY**

**EXHIBITS E - G**

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



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

**COMPLAINT COUNSEL’S RESPONSE AND OBJECTIONS TO RESPONDENT’S  
FIRST SET OF INTERROGATORIES**

Pursuant to Rule 3.35(b) of the Federal Trade Commission’s Rules of Practice, Complaint Counsel hereby respond to Respondent North Carolina State Board of Dental Examiners’ (“Respondent”) First Set of Interrogatories. Complaint Counsel have endeavored to offer a good faith response to each of Respondent’s First Set of Interrogatories. Yet many of the Respondent’s Interrogatories are improper, overbroad, vague, or otherwise unanswerable. Respondent has yet to certify compliance with Complaint Counsel’s First Request for Production served on June 29, 2010 and may produce additional documents, the review of which may require Complaint Counsel to amend or supplement their responses to these Interrogatories.

Complaint Counsel have already provided a great deal of information to Respondent. The Complaint is detailed in its allegations. Most of the significant documents, and all of the documents cited herein, are already in the possession of Respondent, including without limitation the transcripts of depositions and investigational hearings that address these issues. Complaint Counsel have repeatedly discussed the allegations included in the Complaint with counsel for Respondent, both in the course of the pre-complaint investigation and subsequently. Moreover, between the time Respondent posed these interrogatories and the date of the response, Complaint Counsel filed their Motion for Partial Summary Decision, which provides responses in great

detail to many of the questions propounded in these interrogatories, rendering much of this objectionable as duplicative.

### **General Objections and Reservations**

The following General Objections and Reservations apply to all of Respondent's Interrogatories and are hereby incorporated by reference into each of the following responses. The assertion of the same, similar, or additional objections or the provision of partial answers in response to an individual interrogatory does not waive any of Complaint Counsels' general objections as to the other interrogatories.

1. Complaint Counsel object to Respondent's interrogatories to the extent they prematurely seek discovery of expert testimony. Pursuant to the Scheduling Order in this case, the initial Complaint Counsel expert reports are due November 26, reply reports on December 10, and expert depositions may continue through December 30, 2010.
2. Complaint Counsel object to Respondent's interrogatories to the extent they are overly broad, and unduly burdensome.
3. Complaint Counsel object to Respondent's interrogatories to the extent that they are not reasonably calculated to lead to the discovery of admissible evidence.
4. Complaint Counsel object to Respondent's interrogatories to the extent that they seek documents protected by a claim of privilege, including without limitation deliberative process privilege, law enforcement investigative privilege, informant's privilege or the attorney work product doctrine.
5. Complaint Counsel object to Respondent's interrogatories on the grounds that they seek information and materials from sources and persons within the Commission that are

beyond the scope of the records search that Complaint Counsel are required to undertake pursuant to Rule 3.31(c)(2), and/or are expressly excluded from interrogatory responses by Rule 3.35(a)(1).

Complaint Counsel reserve all evidentiary or other objections to the introduction or use of any response to these interrogatories that they might make at the hearing in this action and do not, by any response to any interrogatory, waive any such objections to that interrogatory.

Complaint Counsel's discovery and investigation in this matter is continuing. Complaint Counsel reserve the right to amend or supplement these objections to Respondent's First Set of Interrogatories, and to amend or supplement their responses as necessary after the close of discovery.

Subject to the foregoing, Complaint Counsel provide the following responses to Respondent's First Set of Interrogatories:

**Interrogatory No. 1**

*Identify every act, omission, practice, instance, document, or communication relating to the grounds for each allegation asserted in your Complaint.*

Response to Interrogatory No. 1

Complaint Counsel specifically object to this interrogatory because it seeks to compel Complaint Counsel to undertake investigation, discovery, and analysis on behalf of Respondent.

Complaint counsel further object to this interrogatory because it is overbroad and unduly burdensome in that it asks for every fact related to each and every allegation in the Complaint, including every act, omission, practice, instance, document, or communication that may relate to the Complaint regardless of whether it will be relied upon at trial. Further, the Complaint lists numerous allegations, each requiring an independent inquiry and discrete response, and each

allegation may in turn relate to numerous acts, omissions, practices, documents, and communications. Therefore, this interrogatory inappropriately attempts to mask multiple separate interrogatories within one question. If each allegation were treated as a separate interrogatory, it would amount to substantially more than the 25 interrogatories permitted by Commission Rule 3.35.

The purpose of an interrogatory is to narrow and clarify the issues and disputes to be addressed at trial. A general interrogatory asking for all conceivably relevant facts fails to narrow the issues and is impermissible. Therefore, no response is required to this interrogatory.

**Interrogatory No. 2**

*What was the total dollar volume of retail sales of over-the-counter teeth-whitening products each of the years 2000 through 2009 in the United States?*

Response to Interrogatory No. 2

Complaint Counsel specifically object to this interrogatory because it is overbroad, and unduly burdensome. Complaint Counsel further object because Respondent seeks to compel Complaint Counsel to undertake investigation, discovery, and analysis on behalf of Respondent.

Subject to the foregoing objections, Complaint Counsel respond as follows:

Complaint Counsel do not possess all the relevant information needed to determine the total dollar volume of retail sales of over-the-counter (“OTC”) teeth whitening products in the United States. Complaint Counsel received documents from companies that manufacture and sell OTC and dentist provided teeth whitening products, including Dentovations, Discus, Dentsply, DentAmerica, Heraeus Kulzer and Proctor & Gamble, which may contain information relevant to answering this interrogatory. Complaint Counsel provided those documents to Respondent in the

same form as they were received by Complaint Counsel, pursuant to Paragraph 11 of the Additional Provisions in Judge Chappell's Scheduling Order in this matter. Because these documents are third party documents already in the possession of the Respondent, the burden of deriving the requested answer would be the same on Respondent as it would be on Complaint Counsel, and no further answer is required.

**Interrogatory No. 3**

*What was the total dollar volume of retail sales of over-the-counter teeth-whitening products each of the years 2000 through 2009 in North Carolina?*

Response to Interrogatory No. 3

Complaint Counsel specifically object to this interrogatory because it is overbroad, and unduly burdensome. Complaint Counsel further object because Respondent seeks to compel Complaint Counsel to undertake investigation, discovery, and analysis on behalf of Respondent.

Subject to the foregoing objections, Complaint Counsel respond as follows:

Complaint Counsel do not possess all the relevant information needed to determine the total dollar volume of retail sales of OTC teeth whitening products in North Carolina. Complaint Counsel received documents from companies that manufacture and sell OTC and dentist provided teeth whitening products, including Dentovations, Discus, Dentsply, DentAmerica, Heraeus Kulzer and Proctor & Gamble, which may contain information relevant to answering this interrogatory. Complaint Counsel provided those documents to Respondent in the same form as they were received by Complaint Counsel, pursuant to Paragraph 11 of the Additional Provisions in Judge Chappell's Scheduling Order in this matter. Because these documents are third party documents already in the possession of the Respondent, the burden of deriving the requested

answer would be the same on Respondent as it would be on Complaint Counsel, and no further answer is required.

**Interrogatory No. 4**

*What was the total dollar volume of retail sales of teeth-whitening services provided by persons other than dentists or persons working under the direct supervision of a dentist for each of the years 2000 through 2009 in the United States?*

Response to Interrogatory No. 4

Complaint Counsel specifically object to this interrogatory because it is overbroad, and unduly burdensome. Complaint Counsel further object because Respondent seeks to compel Complaint Counsel to undertake investigation, discovery, and analysis on behalf of Respondent.

Subject to the foregoing objections, Complaint Counsel respond as follows:

Complaint Counsel do not possess all the relevant information needed to determine the total dollar volume of retail sales of teeth-whitening services provided by persons other than dentists or persons working under the direct supervision of a dentist in the United States. Complaint Counsel received documents from companies that manufacture and sell *products* used by persons other than dentists or persons working under the direct supervision of a dentist, including BEKS, Beyond Dental and Health, WhiteSmile USA, Bleach Bright, Whiter Image and White Science, which may contain information relevant to answering this interrogatory. Those documents were produced to Respondent pursuant to Respondent's First Set of Requests for Production of Documents and Paragraph 11 of the Additional Provisions in Judge Chappell's Scheduling Order in this matter. Because these documents are third party documents already in the possession of the Respondent, the burden of deriving the requested answer would be the same on Respondent as it would be on Complaint Counsel, and no further answer is required.

**Interrogatory No. 5**

*What was the total dollar volume of retail sales of teeth-whitening services provided by persons other than dentists or persons working under the direct supervision of a dentist for each of the years 2000 through 2009 in North Carolina?*

Response to Interrogatory No. 5

Complaint Counsel specifically object to this interrogatory because it is overbroad, and unduly burdensome. Complaint Counsel further object because Respondent seeks to compel Complaint Counsel to undertake investigation, discovery, and analysis on behalf of Respondent

Subject to the foregoing objections, Complaint Counsel respond as follows:

Complaint Counsel do not possess all the relevant information needed to determine the total dollar volume of retail sales of teeth-whitening services provided by persons other than dentists or persons working under the direct supervision of a dentist in North Carolina.

Complaint Counsel received documents from companies that manufacture and sell *products* used by persons other than dentists or persons working under the direct supervision of a dentist, including BEKS, Beyond Dental and Health, WhiteSmile USA, Bleach Bright, Whiter Image and White Science, which may contain information relevant to answering this interrogatory.

Complaint Counsel provided those documents to Respondent in the same form as they were received pursuant to Respondent's First Set of Requests for Production of Documents and Paragraph 11 of the Additional Provisions in Judge Chappell's Scheduling Order in this matter. Because these documents are third party documents already in the possession of the Respondent, the burden of deriving the requested answer would be the same on Respondent as it would be on Complaint Counsel, and no further answer is required.



**Interrogatory No. 6**

*Identify all of your sources for your answers to question 2 – 5, above.*

Response to Interrogatory No. 6

Subject to the general objections stated above, Complaint Counsel respond as follows:

Complaint Counsel’s response to this interrogatory is incorporated into its responses to interrogatories 2 through 5.

**Interrogatory No. 7**

*Identify each dental practice expert you have contacted, interviewed or consulted regarding the teeth-whitening products or services.*

Response to Interrogatory No. 7

Complaint Counsel specifically object to this interrogatory because it seeks impermissible expert discovery. Rule 3.31A(d) provides that a “party . . . may not discover facts known or opinions held by an expert who has been retained . . . in anticipation of litigation or preparation for hearing and who is not listed as a witness for the evidentiary hearing.” To the extent that this interrogatory seeks to obtain the names of expert witnesses Complaint Counsel intends to call to testify at trial, that information was provided to Respondents through Complaint Counsel’s Expert Witness List on November 5, 2010. The identified expert was Dr. Martin Giniger.

**Interrogatory No. 8**

*Which jurisdiction’s bar ethics rules are binding upon the Commission’s legal staff including Complaint Counsel?*

Response to Interrogatory No. 8

Complaint Counsel specifically object to this interrogatory on the ground that it is

irrelevant. However, subject to the foregoing objection, Complaint Counsel respond as follows:

Pursuant to Rule 4.1(e), “[a]ll attorneys practicing before the Commission shall conform to the standards of ethical conduct required by the bars of which the attorneys are members.” As Complaint Counsel, FTC attorneys are considered “attorneys practicing before the Commission.” At this time, attorneys working on this matter are admitted to the bars of the following jurisdictions: New Jersey, Virginia, Pennsylvania, Maryland, California, New York, Georgia and the District of Columbia.

**Interrogatory No. 9**

*Identify each person service with a subpoena duces tecum by you in this matter and each of your attorneys who spoke to each such person.*

Response to Interrogatory No. 9

Complaint Counsel specifically object to this interrogatory because it is vague and ambiguous. Complaint Counsel further object to the interrogatory because it seeks irrelevant information. Complaint Counsel also specifically object to this interrogatory because it seeks information already provided to Respondent by Complaint Counsel.

It is unclear what “person *service* with a *subpoena duces tecum*” means or what information Respondent seeks to elicit through its use. To the extent that this interrogatory seeks identification of all individuals and companies served with subpoenas in this matter, Complaint Counsel already timely provided Respondent with copies of all *subpoena duces tecum* and *subpoena ad testificandum* issued by the Commission in this matter. The identity of Commission attorneys who spoke to individual recipients of subpoenas or a recipient’s agents is not reasonably calculated to lead to the discovery of admissible evidence. Accordingly, no further response is

required to this interrogatory.

**Interrogatory No. 10**

*What is the basis in law and fact for your position that the Respondent is not an official or agency of the state of North Carolina?*

Response to Interrogatory No. 10

Complaint Counsel specifically object to this interrogatory because it is based on a misstatement, misunderstanding, or mischaracterization of the allegations of the Complaint.

Subject to the foregoing objection, Complaint Counsel respond as follows:

Complaint Counsel do not contend that the “Respondent is not an . . . agency of the state of North Carolina.” In fact, paragraph one of the Complaint states, “The Dental Board is an agency of the State of North Carolina . . . .” Complaint Counsel do contend that Respondent is not entitled to any protection against antitrust liability under the state action defense. Respondent is distinguishable from governmental entities that may enjoy state action protection for the reasons set forth in detail in the Memorandum in Support of Partial Summary Decision, and the supporting exhibits, served on Respondent on November 3, 2010, at pages 14-27, which are hereby incorporated by reference.

**Interrogatory No. 11**

*Identify each instance in which the Board’s actions deterred persons from other states from providing teeth whitening services in North Carolina.*

Response to Interrogatory No. 11

Complaint Counsel object to this interrogatory because Respondent seeks to compel Complaint Counsel to undertake investigation, discovery, and analysis on behalf of Respondent.

Complaint Counsel further object to this interrogatory because it is overbroad and unduly burdensome.

Subject to the foregoing objections, Complaint Counsel respond as follows:

Complaint Counsel do not possess all the relevant information needed to identify each and every instance in which Respondent engaged in anticompetitive actions that deterred persons from other states from providing teeth whitening services in North Carolina.

Respondent's files contain documents which may contain information relevant to answering this interrogatory. *See e.g.*, documents relating to Joyce Osborn/BEKS International of Jasper, AL; Peggy Grater/Grater Whiter Smiles of Fond du Lac, WI; Hull Storey Retail Group of Augusta, Georgia; Jim Valentine/WhiteSmileUSA of Atlanta GA; BleachBright, LLC of Kenner, LA; General Growth Properties of Chicago, IL; CBL & Associates Properties, Inc., of Chattanooga, TN; and Hendon Properties of Atlanta, GA. Because these documents are Respondent's own documents and are already in the possession of the Respondent, the burden of deriving the requested answer on Respondent would be the same, or less than, the burden on Complaint Counsel. Therefore no further answer is required.

#### **Interrogatory No. 12**

*Identify all sources, data, documents, expert opinion, and any other information, including dates, upon which you based your assertion in your Complaint that "Teeth whitening services performed by non-dentists are much less expensive than those performed by dentists. A non-dentist typically charges \$100 to \$200 per session, whereas dentists typically charge \$300 to \$700, with some procedures costing as much as \$1,000."*

#### **Response to Interrogatory No. 12**

Complaint Counsel specifically object to this interrogatory because Respondent already possesses the requested information in the form of depositions, Complaint Counsel's Statement of

Uncontested Facts, and other discovery sources.

Subject to the foregoing objection, Complaint Counsel respond as follows:

Complaint Counsel contend that non-dentist teeth whitening services are less expensive than when the same services are provided by a dentist. Dentists typically charge \$300 or more for tooth whitening procedures, as confirmed by a number of different sources, including current and former Dental Board members' own testimony. *See e.g.*, Owens IH, 30:09 (charges \$495 for in-office teeth whitening procedures); Feingold Dep., 183:15 (charges \$500); Holland Dep. 58:11 (charges \$175 per arch). Other sources corroborate this contention. *See e.g.*, Oyster Dep., 29:03 (\$150 per arch, ); CX0053-001-002 (Frequently Asked Questions for Professional Teeth Whitening, dentist teeth whitening can cost \$400); CX0108-008 (White Science training manual for non-dentist teeth whitening system, "The major drawbacks of 'in-office' whitening are price (\$400-\$900)"); CX0096 (advertisement from SheShe studio spa, teeth whitening in dentist offices cost \$400-\$600). Non-dentist teeth whitening services typically cost between \$100 and \$200, as evidenced by Dental Board documents. *See e.g.*, CX0054 (Signature Spa of Hickory charging \$199.99); CX0043 (Bleach Bright advertising for \$99); CX0198 (Movie Star Smile charging \$99); CX0365 (e-mail from dentist about a non-dentist teeth whitening salon) ("They charge \$100!").

In addition, Board documents show that non-dentist teeth whitening service providers promote their services as cheaper than those of dentists in much of their advertising. *See e.g.*, CX0096 (advertisement from SheShe studio spa, "Teeth whitening has also always been offered in dental offices . . . and delivers the same results that we offer at a fraction of the cost."); CX0103 (BriteWhite advertisement stating that "as with more expensive dental office procedures, it is recommended that you have a session every six months to keep your smile bright and new"); CX0043 (Bleach Bright advertisement, \$99 side-by-side with "Dentists \$350-\$500"). In addition,

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

**Interrogatory No. 13**

*Identify all sources, data, documents, expert opinion, and any other information, including dates, upon which you based your assertion in your Complaint that “Teeth whitening products (such as toothpaste and OTC whitening strips) are generally viewed by consumers as inadequate substitutes for teeth whitening services, due to differences in the nature of the product, quality, cost, and convenience.”*

Response to Interrogatory No.13

Complaint Counsel specifically object to this interrogatory because Respondent seeks to compel Complaint Counsel to undertake investigation, discovery, and analysis on behalf of Respondent. Complaint Counsel further object to this interrogatory to the extent it calls for the premature discovery of expert testimony. Complaint Counsel also specifically object to this interrogatory to the extent that it seeks the identities of informants or experts who are not going to testify at trial.

Subject to the foregoing objections, Complaint Counsel respond as follows:

Teeth whitening products such as toothpaste and OTC whitening strips are generally viewed by consumers as inadequate substitutes for teeth whitening services provided by both dentists and non-dentists, due to differences in the nature of the products, quality, cost, and convenience. Support for this is already in the possession of Respondent in Respondent’s own files. Documents and testimony show that teeth whitening services, as distinguished from OTC

products, are more convenient (CX0108 (White Science training manual) (“What can be more convenient than getting your teeth whitening at your local salon or spa? While getting your haircut, highlights, or nails painted, you now have the option to whiten your teeth”)), provide immediate results (CX0054 (Signature Spa of Hickory - teeth whitening in 20 minutes); CX0108 (White Science claims its products “provide dramatic results in just 12, 24, or 36 minutes”), Feingold Dep., 184:09-20 (“for the next-day whitening you have basically two choices[,] . . . go to a dentist for a treatment like Zoom or to go to a kiosk or a salon for a treatment.”); KAM-FTC-000028- 29 (service takes “just about one hour”); AAED 161 (“Talking With Patients, Tooth Whitening: Why, Who, What, Where and How”) (“In-office whiteners usually take about 1-3 hours; the advantage is that the result is immediate, but, they are often more expensive”); NCBoard4949 (American Academy of Pediatric Dentistry, “Policy on the Use of Dental Bleaching for Child and Adolescent Patients”) (“Advantages of in-office whitening include . . . rapid results.”); CX0308 (salon advertising “whiter teeth in 30 minutes or less guaranteed!”); CX0043 (Bleach Bright advertises “cosmetic teeth whitening at the speed of light in just 20 minutes!”); CX0078 (salon advertises teeth whitening in 40-60 minutes); CX0073 (Dempsey Aff. ¶ 11, North Carolina State Board of Dental Examiners v. Carmel Day Spa & Salon (Jan. 11, 2008)) (employee of Carmel Day spa informed Dempsey that teeth whitening service would take one hour); CX0108 (WhiteSmile claims its products “provide dramatic results in just 12, 24, or 36 minutes”); CX0054 (Signature Spa of Hickory advertises teeth whitening in 20 minutes); CX0103 (BriteWhite pamphlet states treatment “can take up to one hour if required”); NCBOARD4979 (Ichel Goldberg et al., Tooth Bleaching Treatments, A Review (2007)) (listing different brands of OTC strips products, each requiring twice a day treatment over 14 days); NCBOARD987 (Question and Answer article with Dr. Van Haywood (2008)) (six shade change could be obtained with “16 days

of strip applications”); NCBOARD3888 (web page from www.teethwhiteningreviews.com, “Teeth Whitening: What Works and What Doesn’t,” Jan. 2, 2006) (“You’ll wear the trays, strips, or painted-on bleach for up to 60 minutes a day (in two or more individual applications) and for the suggested period of time: 1-2 weeks depending on the product.”); CX0380 (web page from Crest, www.3dwhite.com, “Crest 3D White Whitestrips Professional Effects Teeth Whitening System”) (consumer must wear Crest White strips once a day for thirty minutes for 20 days); CX0043 (Bleach Bright advertisement states that “Whitening Strips take 5 times longer”).

In addition, non-dentist teeth whitening providers state that their services provide results that are similar to those provided by dentists. (CX0108 (White Science claims its products are “very similar to BriteSmile and Zoom . . . but there are a few key differences including . . . most importantly, price”); CX0372 (dentist complaint about a non-dentist teeth whitening manufacturer distributing brochures in the area where the dentist provides teeth whitening, Jan. 25, 2007) (“From their website, the procedure is very similar or identical to the system we use in our office.”)).

#### **Interrogatory No. 14**

*Identify all sources, data, documents, expert opinion, and any other information, including dates, upon which you based your assertion in your Complaint that “The Dental Board's exclusion of the provision of teeth whitening services by non-dentists does not qualify for a state action defense nor is it reasonably related to any efficiencies or other benefits sufficient to justify its harmful effect on competition.”*

#### **Response to Interrogatory No. 14**

Complaint Counsel specifically object to this interrogatory because Respondent seeks to compel Complaint Counsel to undertake investigation, discovery, and analysis on behalf of Respondent. Complaint Counsel further object to this interrogatory to the extent it calls for the



premature discovery of expert testimony.

Subject to the foregoing objections, Complaint Counsel respond as follows:

The entirety of the Memorandum in Support of Partial Summary Decision, and the supporting Separate Statement of Material Facts to Which There is No Genuine Issue and its exhibits, served on Respondent on November 3, 2010, which are hereby incorporated by reference, provide detailed support for Complaint's Counsel's contention that Respondent is ineligible for the state action defense.

Cognizable benefits and justifications under the antitrust laws include results such as increases in output, decreases in price, and improvements in quality. Under *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978), a combination of private persons – including trade associations, as in that case, and financially interested state boards, as here – may not take anticompetitive actions and claim that doing so is necessary because the competition itself would have been harmful to the public. Furthermore, a “generalized concern for the health, safety and welfare of members of the public as to whom a medical doctor has assumed no specific professional responsibility, however genuine and well-informed such a concern may be, affords no legal justification for economic measures to diminish competition . . . .” *Wilk v. Am. Med. Ass’n*, 719 F.2d 207, 228 (7th Cir. 1983). Such concerns about potential public health and safety are left to state legislatures, courts, and other entities not financially interested in excluding rivals from competing in a given market.

However, even if the asserted justification in this case– health and safety– is considered, the elimination of non-dentist teeth whitening establishments is not the least restrictive means of dealing with any legitimate concerns. An alleged procompetitive justification fails if “the challenged restraint is not reasonably necessary to achieve the defendant’s procompetitive

justifications, or [if] those objectives may be achieved in a manner less restrictive of free competition.” *United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 238 (2d Cir. 2003).

As an initial matter, the basis for Respondent’s purported justification – concern regarding health and safety – is overblown. First, there is ample evidence that the side effects of peroxide based teeth whitening are minor and rare. *See e.g.*, Allen Dep., 95:24-96:07 (unaware of any “nontransient harm” from non-dentist teeth whitening; unaware of any literature establishing that “people have been subjected to nontransient harm from non-dentist tooth whiteners”); Parker Dep., 191:22-194:01); Wester Dep., 124:4-12 (dentists cannot predetermine teeth sensitivity to whitening); NCDS004951-5 (article by ADA, Frequently Asked Questions on Tooth Whitening Safety, July 2010) (“Whether tooth whitening is performed under the care and supervision of a dentist, self-applied at home or in a non-dental setting, whitening materials are generally well-tolerated when used appropriately and according to directions. Tooth sensitivity is not unusual but it normally is self-limiting and resolves.). The incidence of non-transient harm from non-dentist teeth whitening are rare. *See e.g.*, Respondent’s Response to Complaint Counsel’s First Set of Requests for Admissions (“RFA”) No. 18 (“Respondent admits that only three investigations it opened included a report of harm or injury to an individual”); RFA No. 21 (“Respondent admits that it is not aware of studies comparing the safety of teeth whitening services as performed by dentists” versus non-dentists); RFA No. 38 (Board not aware of “studies comparing the ‘patient health issues’ that might arise from teeth whitening services as performed by dentists” and non-dentists).

Second, the Food and Drug Administration (“FDA”) classifies hydrogen peroxide used in teeth-whitening as a cosmetic and not a drug, and classifies the LED lights used in teeth whitening outside of dental offices as Class I devices which require no license or prescription for use. Third,

there are states that explicitly allow non-dentists to provide teeth whitening services. *See e.g.*, FTCP-NCDB-000519 (Ohio), 225 ILCS 25/17(11) (Illinois), GWS-FTC-12-15(Wisconsin), FTCP-NCDB-701-703 (Florida), FTCP-NCDB-000675 (Michigan). In other states such as California, Texas, and Virginia, non-dentists provide teeth whitening services without any interference by any dental board or any state authority. Thus, the exclusion of a class of competitors is not reasonably necessary to insure safe teeth whitening provided by non-dentists. In addition, other less restrictive alternatives exist to address the purported justification. For example, in several states, a non-dentist can provide teeth whitening services as long as providers do not touch a customer's mouth. Other regulations short of totally excluding competition could be promulgated setting standards and other requirements.

Finally, the statute itself provides the appropriate means for Respondent to seek to prevent the unauthorized practice of dentistry - going to court, rather than deciding on its to take the unauthorized act of issuing cease and desist orders to prevent a class of competitors from competing. Respondent's Chief Operating Officer has testified that altering the language of the letter to eliminate the references to "Order" would not affect the Board's ability to fulfill its statutory obligation. White Dep., 27:11-25 (Rough).

Because Respondent's actions are neither reasonably necessary nor narrowly tailored to combat the alleged health risks, especially where, as here, those risks are minimal, Respondent's exclusion of the provision of teeth whitening services by non-dentists is not reasonably related to any efficiencies or other benefits sufficient to justify its adverse effect on competition. thereto.

I state under penalty of perjury that the above Complaint Counsel's Response and Objections to Respondent's First Set of Interrogatories was prepared and assembled under my supervision, and that the information contained herein is, to the best of my knowledge, true and correct.

Respectfully submitted,

s/Melissa Westman-Cherry  
Richard B. Dagen  
William L. Lanning  
Melissa Westman-Cherry  
Counsel Supporting the Complaint

Dated: November 18, 2010

**CERTIFICATE OF SERVICE**

I certify that I served via electronic mail delivery a copy of Complaint Counsel's Response and Objections to Respondent's First Set of Interrogatories to:

Noel Allen  
Allen & Pinnix, P.A.  
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Suite 1200  
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nla@Allen-Pinnix.com

*Counsel for Respondent  
North Carolina Board of Dental Examiners*

By: s/ Richard B. Dagen  
Richard B. Dagen  
Federal Trade Commission  
Bureau of Competition

UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION



In the Matter of )  
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 )  
THE NORTH CAROLINA BOARD OF ) Docket No. 9343  
DENTAL EXAMINERS, Docket No. )  
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**COMPLAINT COUNSEL’S RESPONSES AND OBJECTIONS TO RESPONDENT’S  
FIRST SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS**

Pursuant to the Federal Trade Commission’s Rules of Practice § 3.37, Complaint Counsel files its Responses and Objections to Respondent’s First Set of Requests for Production of Documents (“Requests”). Complaint Counsel has produced or will produce relevant, non-privileged documents responsive to Respondent’s First Set of Requests for Production of Documents in the electronic format in which it is normally maintained. With regard to tangible things (e.g. teeth whitening kits or products) that cannot be produced electronically, Complaint Counsel will make such items available for inspection during normal business hours at the Commission offices in Washington, D.C. at a mutually agreed upon time and date.

To date, Complaint Counsel has produced Investigational Hearing transcripts from the FTC investigation of the North Carolina Board of Dental Examiners (“Board”) and documents relating to the FTC investigation of the Board. In addition, Complaint Counsel has produced all responsive, non-privileged Third Party documents obtained in response to subpoenas *duces tecum* issued during Part III discovery as set forth in Judge Chappell’s Scheduling Order. Production of documents by Complaint Counsel has been ongoing since June 18, 2010.

Complaint Counsel will produce and is producing responsive, non-privileged documents

requested by Respondent to the extent that the Requests seek discoverable material under the Commission's Rules of Practice. Many of Respondent's Requests, however, seek material beyond the scope of discovery pursuant to Rules 3.31 and 3.36. Respondent's Requests also seek the production of documents that are protected by well-established privileges. In addition, Respondent's Requests are so broadly defined that they are unreasonably broad, burdensome, and otherwise facially objectionable because they are not limited to any time period and, as written, the Requests would require searches for responsive material from Commission files dating to the inception of the Commission. These and other general as well as specific objections to Respondent's Requests are discussed more fully below.

Complaint Counsel reserves the right to update its responses to Respondent's Requests.

### **GENERAL RESPONSES**

1. Complaint Counsel's Responses herein are not intended to, nor do they, constitute a waiver of the following rights, and are in fact intended to preserve and do preserve the following:
  - a. the right to object to the admissibility of any document produced pursuant to the Requests on the grounds of authenticity, foundation, relevance, materiality, privilege, or any other objection that exists or may arise in this action;
  - b. the right to object to Respondent's use of any document produced pursuant to the Requests, including pursuant to the terms of the Protective Order that was entered in this case on June 18, 2010;
  - c. the right to update this response pursuant to Rule 3.31(e)(2) of the Federal Trade Commission's Rules of Practice; and

- d. the right to amend this response in the event documents are unintentionally omitted from the production, or Complaint Counsel learns about information that is inconsistent with this response.
2. Nothing contained in these Responses or provided pursuant to the Requests is, or should be construed as, an admission about the existence or nonexistence of any alleged fact or information referenced in any Requests, or that Complaint Counsel agrees with Respondent's characterization of said facts. By indicating that Complaint Counsel will produce relevant documents, Complaint Counsel does not represent that such documents exist or are in its possession, custody, or control, but merely that it will conduct the searches described for the documents sought.
3. Consistent with its obligations under the Federal Trade Commission Rules of Practice, Complaint Counsel will make reasonable efforts to respond to each Request, provided no objection is made, as Complaint Counsel understands and interprets each Request. If Respondent later asserts an interpretation that in any way differs from Complaint Counsel's interpretation, Complaint Counsel reserves the right to supplement its objections, Responses, and production.
4. Pursuant to Rule 3.31(g), the inadvertent production of any privileged information shall not constitute a waiver of the applicable privilege.
5. Each response to a specific Request is made subject to and without waiving General Objections or other objections or claims of privilege.

### **GENERAL OBJECTIONS**

The following General Objections apply to all of Respondent's Requests and are



incorporated by reference into each Response below. Particular Responses to an individual Request does not waive any of Complaint Counsel's general objection.

1. Complaint Counsel objects to Respondent's Requests, definitions, and instructions to the extent they seek to impose obligations or requirements beyond those required or authorized by the Federal Trade Commission's Rules of Practice.
2. Complaint Counsel objects to Respondent's Requests, definitions, and instructions to the extent they may require disclosure of information protected from disclosure by privilege, including but not limited to, (a) the work product doctrine, (b) common interest privilege, (c) government deliberative process privilege, (d) government informer privilege, (e) law enforcement investigatory privilege, or (f) any other applicable privilege. These objections include but are not limited to the following:
  - a. On the basis of the work product doctrine, Complaint Counsel objects to the Requests to the extent they call for the production of (i) information derived from internal communications or analyses of FTC attorneys and staff or (ii) call for the discovery of testifying experts prior to the time for such discovery pursuant to the scheduling order;
  - b. On the basis of the work product doctrine, attorney-client privilege, and government deliberative process privilege, Complaint Counsel objects to the Requests to the extent they call for the information derived from any communications, memoranda, or documents (i) between FTC attorneys or staff or (ii) between FTC attorneys or staff and FTC Commissioners or their staff;
  - c. On the basis of the government informer privilege, Complaint Counsel objects to the Requests to the extent that they call for information associated with

- complaints or documents received from confidential government informers; and
- d. On the basis of the law enforcement investigatory privilege, Complaint Counsel objects to the Requests to the extent they call for information associated with law enforcement techniques and procedures, the confidentiality of sources, or effect the privacy of individuals involved in the investigation.
3. Complaint Counsel objects to Respondent's Requests to the extent they are vague, ambiguous, unduly burdensome, overly broad or require unreasonable efforts or expense on behalf of Complaint Counsel.
  4. Complaint Counsel objects to the Requests to the extent that they are argumentative and/or call upon Complaint Counsel to interpret legal theories or draw legal conclusions.
  5. Complaint Counsel objects to Respondent's Requests to the extent that (a) responsive documents are contained in or can be derived from Respondent's own documents and data and the burden and expense of deriving or ascertaining such information is substantially the same for Respondent as it is for Complaint Counsel and (b) responsive documents are contained in or can be derived from material that Complaint Counsel expects Respondent to produce to Complaint Counsel in the current proceeding.
  6. Complaint Counsel objects to Respondent's Requests to the extent that they may not reasonably be expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of the Respondent.
  7. Complaint Counsel's answers to these Respondent's Requests are given without prejudice to Complaint Counsel's right to produce evidence of any subsequently discovered facts. The failure of Complaint Counsel to object to any Request on a particular ground may not be construed as a waiver of its right to object on any additional

ground(s).

8. Pursuant to Rule 3.31(g), the inadvertent production of any privileged information shall not constitute a waiver of the applicable privilege.

### **OBJECTIONS AND RESPONSES TO SPECIFIC REQUESTS**

Complaint Counsel responds and objects to Respondent's Requests as follows:

***Request No. 1:*** All documents relating to any internal Commission communications relating to any Relevant Product or Relevant Service.

***Response to Request No. 1:***

Complaint Counsel incorporates by reference its General Objections. Complaint Counsel specifically objects to this Request to the extent that it seeks documents beyond the scope of discovery set forth in Rules 3.31 and 3.36. This request also seeks only privileged documents relating to internal Commission communications that are protected by the government deliberative process privilege, work product doctrine, law enforcement investigatory privilege, government informer privilege, and other applicable privileges.

Complaint Counsel further objects to this request to the extent that it is overly broad, unduly burdensome, unreasonably cumulative and duplicative, requires unreasonable efforts or expense on behalf of Complaint Counsel, and the burden of the Request outweighs the relative benefit of the documents sought. In addition, Complaint Counsel objects to the extent that the Request may not reasonably be expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of the Respondent.

***Request No. 2:*** All documents relating to any communications between or among the Commission and any Person employed by, or unit of, the State of North Carolina, its counties, municipalities, or other political subdivisions, relating to any Relevant Product or Relevant Service.

***Response to Request No. 2***

Complaint Counsel incorporates by reference its General Objections. Complaint Counsel

specifically objects to this Request to the extent that it seeks documents beyond the scope of discovery set forth in Rules 3.31 and 3.36.

Subject to and without waiving any of its objections, and to the extent that relevant documents are not protected by the government deliberative process privilege, work product doctrine, law enforcement investigatory privilege, government informer privilege, or any other applicable privilege, Complaint Counsel will or has already provided documents in its possession relating to this Request in its Response to Request No. 3 because “any person” referenced in Request No. 2 is a subset and duplicative of “any Third Party or Person” in Request No. 3.

***Request No. 3:*** All documents relating to any communications between or among the Commission and any Third Party or Person relating to any Relevant Product or Relevant Service.

***Response to Request No. 3***

Complaint Counsel incorporates by reference its General Objections. Complaint Counsel specifically objects to this Request to the extent that it seeks documents beyond the scope of discovery set forth in Rules 3.31 and 3.36. As such, Complaint Counsel objects to this Request to the extent that it is overly broad, unduly burdensome, unreasonably cumulative and duplicative, requires unreasonable efforts or expense on behalf of Complaint Counsel, and the burden of the Request outweighs the relative benefit of the documents sought. In particular, this Request seeks documents without any time limitation. Complaint Counsel also objects to the extent that the Request may not reasonably be expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of the Respondent.

Subject to and without waiving any of its objections, and to the extent that relevant documents are not protected by the government deliberative process privilege, work product

doctrine, law enforcement investigatory privilege, government informer privilege, or any other applicable privilege, Complaint Counsel will or has already provided documents in its possession relating to this Request.

***Request No. 4:*** All documents relating to any Commission investigations or proceedings that relate to any Relevant Product or Relevant Service including without limitation all minutes, agendas, presentations, calendars, recordings, notes, and drafts of, and comments pertaining to, any such document.

***Response to Request No. 4***

Complaint Counsel incorporates by reference its General Objections. Complaint Counsel specifically objects to this Request to the extent that it seeks documents beyond the scope of discovery set forth in Rules 3.31 and 3.36. Complaint Counsel also objects to this Request to the extent that it is overly broad, unduly burdensome, unreasonably cumulative and duplicative, requires unreasonable efforts or expense on behalf of Complaint Counsel, and the burden of the Request outweighs the relative benefit of the documents sought. In particular, this Request seeks documents without any time limitation. In addition, Complaint Counsel objects to the extent that the Request may not reasonably be expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of the Respondent.

Subject to and without waiving any of its objections, and to the extent that relevant documents are not protected by the government deliberative process privilege, work product doctrine, law enforcement investigatory privilege, government informer privilege, or any other applicable privilege, Complaint Counsel will or has already provided documents in its possession relating this Request.

***Request No. 5:*** All documents relating to the effects or potential effects of the marketing and sale by non-dentists of the Relevant Product or Relevant Service on the marketing and sale by dentists of any Relevant Product or Relevant Service, or any other product or service provided by dentists, including, but not limited to, the effects or potential effects on the variables identified in items (a) through (f) below. Such documents shall include, but are not limited to,

forecasts, surveys, studies and analyses, including without limitation analyses and comparisons of markets before and after entry or exit of non-dentist providers of the Relevant Product or Relevant Service, and analyses and comparisons of markets in which non-dentists do or do not provide the Relevant Product or Relevant Service.

- a. Customer perception of the absolute or relative quality of the provision by dentists of the Relevant Product or Relevant Service or any other product or service;
- b. customer perception of the absolute or relative value of the provision by dentists of the Relevant Product or Relevant Service or any other product or service;
- c. the amount, value, kind, or content of advertising by dentists of the provision of the Relevant Product or Relevant Service or any other product or service;
- d. the prices dentists charge for the Relevant Product or Relevant Service or any other product or service;
- e. the demand for the provision by dentists of the Relevant Product or Relevant Service, including, but not limited to dollar sales and number of patients treated;
- f. the demand for the provision by dentists of products and services other than the Relevant Product and Relevant Service, including but not limited to dollar sales.

***Response to Request No. 5***

Complaint Counsel incorporates by reference its General Objections. Complaint Counsel specifically objects to this Request to the extent that materials sought are subject to limitations concerning experts discovery and material prepared for hearings. In addition, Complaint Counsel objects to this request to the extent that the material requested is readily obtainable from public sources and, as such, Respondent could readily obtain such information at substantially less cost than the cost incurred by Complaint Counsel to identify the material and produce it to Respondent. Complaint Counsel further objects to Respondent's Requests to the extent that responsive documents are contained in or can be derived from Respondent's own documents and the burden and expense of deriving or ascertaining such information is substantially the same for Respondent as it is for Complaint Counsel.

Subject to and without waiving any of its objections, and to the extent that relevant

documents are not protected by the government deliberative process privilege, work product doctrine, law enforcement investigatory privilege, government informer privilege, or any other applicable privilege, Complaint Counsel will or has already provided documents in its possession relating this Request.

***Request No. 6:*** All documents relating to the health effects, safety or efficacy of any Relevant Product or Relevant Service and any other Over the Counter Dental Product available to consumers.

***Response to Request No. 6***

Complaint Counsel incorporates by reference its General Objections. Complaint Counsel objects to this Request to the extent that materials sought are subject to limitations concerning expert discovery and material prepared for hearings. In addition, Complaint Counsel objects to this request to the extent that the material requested is readily obtainable from public sources and, as such, Respondent could readily obtain such information at substantially less cost than the cost incurred by Complaint Counsel to identify the material and produce it to Respondent. Complaint Counsel further objects to Respondent's Requests to the extent that responsive documents are contained in or can be derived from Respondent's own documents and data and the burden and expense of deriving or ascertaining such information is substantially the same for Respondent as it is for Complaint Counsel.

Subject to and without waiving any of its objections, and to the extent that relevant documents are not protected by the government deliberative process privilege, work product doctrine, law enforcement investigatory privilege, government informer privilege, or any other applicable privilege, Complaint Counsel will or has already provided documents in its possession relating this Request.

***Request No. 7:*** All communications between and among the Commission and anyone identified by the Commission in its initial and supplemental disclosures re: the Relevant Product

and Service.

***Response to Request No. 7***

Complaint Counsel incorporates by reference its General Objections. Complaint Counsel specifically objects to this Request to the extent that it seeks documents beyond the scope of discovery set forth in Rules 3.31 and 3.36. Complaint Counsel also objects to the extent that the Request calls for information that is protected by the work product doctrine, the government deliberative process privilege, government informer privilege, law enforcement investigator privilege, common interest privilege, or any other applicable privilege. Complaint Counsel also objects to the extent the documents requested are in the possession of Respondent because they were initially produced by Respondent.

Subject to and without waiving any of its objections, and to the extent that relevant documents are not protected by the government deliberative process privilege, work product doctrine, law enforcement investigatory privilege, government informer privilege, or any other applicable privilege, Complaint Counsel will or has already provided documents in its possession relating this Request in its Response to Request No. 3 because “anyone identified by the Commission in its initial and supplemental disclosures” referenced in Request 7 is a subset and duplicative of “any Third Party or Person” in Request No. 3.

***Request No. 8:*** All communications between and among the Commission and the media regarding the Relevant Product and Service.

***Response to Request No. 8***

Complaint Counsel incorporates by reference its General Objections. Complaint Counsel specifically objects to this Request to the extent that it seeks documents beyond the scope of discovery set forth in Rules 3.31 and 3.36. Complaint Counsel further specifically objects to this request because “media” is not a defined term, and the common definitions of the term “media”



render this Request unintelligible.

Subject to and without waiving any of its objections, Complaint Counsel will or has already provided documents in its possession relating to this Request in its Response to Request No. 3 to the extent that the term “media” includes “persons” or “Third Parties” as defined in Respondent’s Requests.

**Request No. 9:** All documents relating to consumer protection cases and investigations initiated by the Commission and pertaining to the Relevant Product or Service, including but not limited to *In the Matter of the Proctor & Gamble Company and the Gillette Company*, File No. 0510115, Docket No. C-4151; *Federal Trade Commission v. Conversion Marketing, Inc.*, FTC File No. 042-3079, Civil Action No. SACV 04-1264; and *In the Matter of Johnson & Johnson and Pfizer, Inc.*, File No. 061 0220, Docket No. C-4180.

***Response to Request No. 9***

Complaint Counsel incorporates by reference its General Objections. Complaint Counsel specifically objects to this Request to the extent that it seeks documents beyond the scope of discovery set forth in Rules 3.31 and 3.36. Complaint Counsel also objects to the extent that the Request calls for information that is protected by the work product doctrine, the government deliberative process privilege, government informer privilege, law enforcement investigator privilege, common interest privilege, or any other applicable privilege. Complaint Counsel further objects to this Request to the extent that it is overly broad, unduly burdensome, unreasonably cumulative and duplicative, requires unreasonable efforts or expense on behalf of Complaint Counsel, and the burden of the Request outweighs the relative benefit of the documents sought. In particular, this Request seeks documents without any time limitation. In addition, Complaint Counsel objects to this request to the extent that the material requested is readily obtainable from public sources and, as such, Respondent could obtain such information at substantially less cost than the cost incurred by Complaint Counsel to identify the material and produce it to Respondent. Complaint Counsel also objects to the extent that the Request may not

reasonably be expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of the Respondent.

**Request No. 10:** All documents relating to merger or competition cases and investigations initiated by the Commission and pertaining to the Relevant Product or Service, including but not limited to *In the Matter of the Proctor & Gamble Company and the Gillette Company*, File No. 0510115, Docket No. C-4151; *Federal Trade Commission v. Conversion Marketing, Inc.*, FTC File No. 042-3079, Civil Action No. SACV 04-1264; and *In the Matter of Johnson & Johnson and Pfizer, Inc.*, File No. 061 0220, Docket No. C-4180.

**Response to Request No. 10**

Complaint Counsel incorporates by reference its General Objections. Complaint Counsel specifically objects to this Request to the extent that it seeks documents beyond the scope of discovery set forth in Rules 3.31 and 3.36. Complaint Counsel also objects to the extent that the Request calls for information that is protected by the work product doctrine, the government deliberative process privilege, government informer privilege, law enforcement investigator privilege, common interest privilege, or any other applicable privilege. Complaint Counsel objects to this Request to the extent that it is overly broad, unduly burdensome, unreasonably cumulative and duplicative, requires unreasonable efforts or expense on behalf of Complaint Counsel, and the burden of the Request outweighs the relative benefit of the documents sought. In particular, this Request seeks documents without any time limitation. In addition, Complaint Counsel objects to this request to the extent that the material requested is readily obtainable from public sources and, as such, Respondent could readily obtain such information at substantially less cost than the cost incurred by Complaint Counsel to identify the material and produce it to Respondent. Complaint Counsel also objects to the extent that the Request may not reasonably be expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of the Respondent.

***Request No. 11:*** All communications between and among the Commission and any present or former members or staff of the Board.

***Response to Request No. 11***

Complaint Counsel incorporates by reference its General Objections. Complaint Counsel specifically objects to this Request to the extent that it seeks documents beyond the scope of discovery set forth in Rules 3.31 and 3.36. Complaint Counsel further objects to this Request to the extent that it is overly broad, unduly burdensome, unreasonably cumulative and duplicative, requires unreasonable efforts or expense on behalf of Complaint Counsel, and the burden of the Request outweighs the relative benefit of the documents sought. In particular, this Request seeks documents without any time limitation or subject matter limitation.

Subject to and without waiving any of its objections, Complaint Counsel will or has already provided responsive documents relating to this Request to the extent that it relates to this proceeding. To the extent that the Request calls for material already in Respondent's possession, it will not be produced again.

***Request No. 12:*** All documents in the Commission's possession prior to June 17, 2010 that evidenced a collusion to restrain trade or an illegal conspiracy participated in or committed by any dentist formerly or currently licensed in North Carolina relative to the Relevant Product or Service.

***Response to Request No. 12***

Complaint Counsel incorporates by reference its General Objections. Complaint Counsel specifically objects to this Request because it is argumentative and/or calls upon Complaint Counsel to interpret legal theories or draw legal conclusions. Complaint Counsel also objects to this Request to the extent that it seeks documents beyond the scope of discovery set forth in Rule 3.31 specifically relating to anticompetitive conduct engaged in by "any dentist formerly or currently licensed in North Carolina" rather than anticompetitive conduct engaged in by licensed

dentists on the Board. Complaint Counsel further objects to this request to the extent that documents relating to the Board's anticompetitive acts or conduct are contained in the Board's documents. To the extent that the Board has produced some of this material, it is already in the possession of the Board and thus will not be reproduced to the Board. To the extent that the Board has withheld documents relating to the Board's anticompetitive acts or conduct or has claimed privilege on documents relating to the Board's anticompetitive acts or conduct, such documents are in the Board's possession and not in the possession of Complaint Counsel.

Subject to and without waiving any of its objections, and to the extent that responsive documents are not protected by the government deliberative process privilege, work product doctrine, law enforcement investigatory privilege, government informer privilege, common interest privilege, or any other applicable privilege, Complaint Counsel will or has already provided documents in its possession relating to this Request.

***Request No. 13:*** All internal communications of the Commission relating to former Commissioner Pamela Jones Harbour's role in managing the investigation of this case prior to the service of the Complaint.

***Response to Request No. 13***

Complaint Counsel incorporates by reference its General Objections. Complaint Counsel specifically objects to this Request because it seeks documents beyond the scope of discovery set forth in Rules 3.31 and 3.36. In addition, Complaint Counsel objects to the Request to the extent that such documents are protected by the government deliberative process privilege and work product doctrine.

***Request No. 14:*** All Commission records relating to former Commissioner Harbour's recusal in *In the Matter of The Procter and Gamble Co.*, Docket No. C-4151.

***Response to Request No. 14***

Complaint Counsel incorporates by reference its General Objections. Complaint Counsel

specifically objects to this Request because it seeks documents beyond the scope of discovery set forth in Rules 3.31 and 3.36. Complaint Counsel also objects to the extent that the Request may not reasonably be expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of the Respondent.

***Request No. 15:*** All documents relating to Commissioner Harbour's recusal from participation in any investigation or proceeding regarding the Relevant Products or Services.

***Response to Request No. 15***

Complaint Counsel incorporates by reference its General Objections. Complaint Counsel specifically objects to this Request because it seeks documents beyond the scope of discovery set forth in Rules 3.31 and 3.36. Complaint Counsel also objects to the extent that the Request may not reasonably be expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of the Respondent.

***Request No. 16:*** All Commission records relating to Commissioner Brill's recusal in this matter.

***Response to Request No. 16***

Complaint Counsel incorporates by reference its General Objections. Complaint Counsel specifically objects to this Request because it seeks documents beyond the scope of discovery set forth in Rules 3.31 and 3.36. Complaint Counsel also objects to the extent that the Request may not reasonably be expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of the Respondent.

***Request No. 17:*** All communications between and among the Commission and any Third Parties with claimed expertise in the Relevant Product or Service.

***Response to Request No. 17***

Complaint Counsel incorporates by reference its General Objections. Complaint Counsel specifically objects to this Request because it seeks documents beyond the scope of discovery set

forth in Rules 3.31 and 3.36. Complaint Counsel further objects to this Request to the extent that materials sought are subject to limitations concerning expert discovery and material prepared for hearings. Complaint Counsel further objects to this Request because the phrase “claimed expertise” is not defined in the Requests. As such, the phrase “any Third Parties with claimed expertise” does not provide sufficient information to distinguish between a “Third Party” and “any Third Parties with claimed expertise.”

Subject to and without waiving any of its objections below, and to the extent that relevant documents are not protected by the government deliberative process privilege, work product doctrine, law enforcement investigatory privilege, government informer privilege, or any other applicable privilege, Complaint Counsel will or has already provided documents in its possession relating this Request in its Response to Request No. 3 because “any Third Parties with claimed expertise” referenced in Request 17 is a subset and duplicative of “any Third Party or Person” in Request No. 3.

***Request No. 18:*** All records relating to investigations into regulation of the Relevant Product or Service in any other U.S. jurisdiction or any other country.

***Response to Request No. 18***

Complaint Counsel incorporates by reference its General Objections. Complaint Counsel specifically objects to this Request because it seeks documents beyond the scope of discovery set forth in Rules 3.31 and 3.36. Complaint Counsel also objects to this Request to the extent that it is overly broad, unduly burdensome, unreasonably cumulative and duplicative, and that it requires unreasonable efforts or expense on behalf of Complaint Counsel, and the burden of the Request outweighs the relative benefit of the documents sought. In addition, Complaint Counsel further objects to this Request to the extent that it calls for information that is protected by the work product doctrine, the government deliberative process privilege, government informer

privilege, law enforcement investigator privilege, or any other applicable privilege. Complaint Counsel also objects to the extent that the Request may not reasonably be expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of the Respondent.

Subject to and without waiving any of its objections, Complaint Counsel will or has already provided all documents in its possession relating to this Request.

***Request No. 19:*** All documents constituting direct evidence that the Board conspired to restrain trade rather than enforce North Carolina's Dental Practice Act.

***Response to Document Request No. 19***

Complaint Counsel incorporates by reference its General Objections. Complaint Counsel specifically objects to this Request because it is argumentative and/or calls upon Complaint Counsel to interpret legal theories or draw legal conclusions. Complaint Counsel also objects to this Request to the extent that documents relating to the Board's anticompetitive acts or conduct are contained in the Board's documents. To the extent that the Board has produced some of this material, it is already in the possession of the Board and thus will not be reproduced by Complaint Counsel to the Board. To the extent that the Board has withheld documents relating to the Board's anticompetitive acts or conduct or has claimed privilege on documents relating to the Board's anticompetitive acts or conduct, such documents are in the Board's possession and control and thus cannot be produced by Complaint Counsel.

Subject to and without waiving any of its objections, and to the extent that relevant documents are not protected by the government deliberative process privilege, work product doctrine, law enforcement investigatory privilege, government informer privilege, common interest privilege, or any other applicable privilege, Complaint Counsel will or has already provided documents in its possession relating to this Request.

Dated: November 18, 2010

Respectfully submitted,

s/ William L. Lanning

Richard B. Dagen

William L. Lanning

Melissa Westman-Cherry

Complaint Counsel

Bureau of Competition

Federal Trade Commission

601 New Jersey Avenue NW

Washington, DC 20580



**PRIVILEGE LOG FOR COMPLAINT COUNSEL PRODUCTION IN  
IN RE THE NORTH CAROLINA BOARD OF DENTAL EXAMINERS, DOCKET NO. 9343  
(As of November 18, 2010)**

Privileged Doc. ID	Type	Date	Title	Author	Recipients	Privilege Grounds
FTC-PRIV-000085	Email containing voicemail	2/29/2008	Message from 9197166011.msg	Sturgis, Kip <Ksturgis@ncdoj.gov>	Westman-Cherry, Melissa <MWESTMAN@ftc.gov>	Law Enforcement, Deliberative Process
FTC-PRIV-000086	.Wav	2/29/2008	VoiceMessage.wav	Sturgis, Kip <Ksturgis@ncdoj.gov>	Westman-Cherry, Melissa <MWESTMAN@ftc.gov>	Law Enforcement, Deliberative Process
FTC-PRIV-000087	Email	3/3/2008	RE: FTC Investigation.htm	Sturgis, Kip <Ksturgis@ncdoj.gov>	Westman-Cherry, Melissa <MWESTMAN@ftc.gov>	Law Enforcement, Deliberative Process
FTC-PRIV-000088	Email	3/3/2008	RE: FTC Investigation.htm	Sturgis, Kip <Ksturgis@ncdoj.gov>	Westman-Cherry, Melissa <MWESTMAN@ftc.gov>	Law Enforcement, Deliberative Process
FTC-PRIV-000089	Email	3/3/2008	RE: FTC Investigation.htm	Sturgis, Kip <Ksturgis@ncdoj.gov>	Westman-Cherry, Melissa <MWESTMAN@ftc.gov>	Law Enforcement, Deliberative Process
FTC-PRIV-000090	Email containing voicemail	3/3/2008	Message from 9197166011.msg	Sturgis, Kip <Ksturgis@ncdoj.gov>	Westman-Cherry, Melissa <MWESTMAN@ftc.gov>	Law Enforcement, Deliberative Process
FTC-PRIV-000091	.Wav	3/3/2008	VoiceMessage.wav	Sturgis, Kip <Ksturgis@ncdoj.gov>	Westman-Cherry, Melissa <MWESTMAN@ftc.gov>	Law Enforcement, Deliberative Process
FTC-PRIV-000092	Email containing voicemail	3/10/2008	Message from 9197166011.msg	Sturgis, Kip <Ksturgis@ncdoj.gov>	Westman-Cherry, Melissa <MWESTMAN@ftc.gov>	Law Enforcement, Deliberative Process
FTC-PRIV-000093	.Wav	3/10/2008	VoiceMessage.wav	Sturgis, Kip <Ksturgis@ncdoj.gov>	Westman-Cherry, Melissa <MWESTMAN@ftc.gov>	Law Enforcement, Deliberative Process

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FTC-PRIV-000094	Email	3/10/2008	ADA.htm	Sturgis, Kip <Ksturgis@ncdoj.gov>	Westman-Cherry, Melissa <MWESTMAN@ftc.gov>	Law Enforcement, Deliberative Process
FTC-PRIV-000095	Email	3/10/2008	ADA #2.htm	Sturgis, Kip <Ksturgis@ncdoj.gov>	Westman-Cherry, Melissa <MWESTMAN@ftc.gov>	Law Enforcement, Deliberative Process
FTC-PRIV-000097	Email containing voicemail	6/29/2010	[REDACTED]	[REDACTED]	Westman-Cherry, Melissa <MWESTMAN@ftc.gov>	Government Informer, Law enforcement
FTC-PRIV-000098	.Wav	6/29/2010	[REDACTED]	[REDACTED]	Westman-Cherry, Melissa <MWESTMAN@ftc.gov>	Government Informer, Law enforcement
FTC-PRIV-000103	Email	8/29/2010	[REDACTED]	[REDACTED]	Lanning, William <WLANNING@ftc.gov>; Westman-Cherry, Melissa <MWESTMAN@ftc.gov>; Bloom, Michael <MJBLOOM@ftc.gov>	Government Informer, Law enforcement
FTC-PRIV-000106	Email containing voicemail	9/7/2010	[REDACTED]	[REDACTED]	Westman-Cherry, Melissa <MWESTMAN@ftc.gov>	Government Informer, Law Enforcement
FTC-PRIV-000107	.Wav	9/7/2010	[REDACTED]	[REDACTED]	Westman-Cherry, Melissa <MWESTMAN@ftc.gov>	Government Informer, Law enforcement
FTC-PRIV-000108	Email containing voicemail	9/7/2010	[REDACTED]	[REDACTED]	Westman-Cherry, Melissa <MWESTMAN@ftc.gov>	Government Informer, Law enforcement
FTC-PRIV-000109	.Wav	9/7/2010	[REDACTED]	[REDACTED]	Westman-Cherry, Melissa <MWESTMAN@ftc.gov>	Government Informer, Law enforcement
FTC-PRIV-000127	.Pdf	N/A	Newson Declaration Draft 101210.pdf	N/A	N/A	Attorney Work Product

Privileged Doc. ID	Type	Date	Title	Author	Recipients	Privilege Grounds
FTC-PRIV-000128	Letter	11/8/09	MWCpp 00.pdf	Mark Moran, Special Assistant Attorney General, Wyoming Attorney General, Human Services Division, Consumer Protection Unit, 123 State Capital, Cheyenne, Wyoming, 82002 (307) 777-7874 (T) or (800) 438-5799 (T)	Westman-Cherry, Melissa	Law Enforcement, Deliberative Process
FTC-PRIV-000140	Letter	11/8/09	DOC.PDF	Mark Moran, Special Assistant Attorney General, Wyoming Attorney General, Human Services Division, Consumer Protection Unit, 123 State Capital, Cheyenne, Wyoming, 82002 (307) 777-7874 (T) or (800) 438-5799 (T)	Westman-Cherry, Melissa	Law Enforcement, Deliberative Process
FTC-PRIV-000149	Email	1/16/2009	North Carolina State Board of Dental Examiners.htm	Osnowitz, Steven J. <sosnowitz@ftcexchange.com>	Sturgis, Kip <KSturgis@NCDOJ.gov>; Westman-Cherry, Melissa <MWESTMAN@ftc.gov>	Law Enforcement, Deliberative Process
FTC-PRIV-000160	Email containing voicemail	6/25/2010	VM: (804) 786-6557.msg	Sarah Allen, Assistant Attorney General, Office of the Virginia Attorney General 900 East Main Street Richmond, VA 23219 (804) 786-2071 (T)	Osnowitz, Steven J. <SOSNOWITZ@ftc.gov>	Law Enforcement, Attorney Work Product, Deliberative Process
FTC-PRIV-000161	.Wav	6/25/2010	Voice_Message_Recording_SI44304_001_gsm.wav	Sarah Allen, Assistant Attorney General, Office of the Virginia Attorney General 900 East Main Street Richmond, VA 23219 (804) 786-2071 (T)		Law Enforcement, Attorney Work Product, Deliberative Process

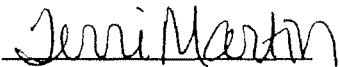
Privileged Doc. ID	Type	Date	Title	Author	Recipients	Privilege Grounds
FTC-PRIV-000163	Email	3/5/2008	RE: FTC Investigation.htm	Westman-Cherry, Melissa <mwestman@ftcexchange.com>	Sturgis, Kip <Ksturgis@ncdoj.gov>	Law Enforcement, Deliberative Process
FTC-PRIV-000164	Email containing voicemail	9/21/2010	VM: (512) 427-9057.msg	Rebecca Fisher, Assistant Attorney General, Office of the Texas Attorney General, 300 W. 15 <sup>th</sup> Street Austin, TX 78701	Westman-Cherry, Melissa <MWESTMAN@ftc.gov>	Law Enforcement, Attorney Work Product, Deliberative Process
FTC-PRIV-000165	.Wav	9/21/2010	VoiceMessage.wav	Rebecca Fisher, Assistant Attorney General, Office of the Texas Attorney General, 300 W. 15 <sup>th</sup> Street Austin, TX 78701	Westman-Cherry, Melissa <MWESTMAN@ftc.gov>	Law Enforcement, Attorney Work Product, Deliberative Process
FTC-PRIV-000167	Email	11/3/2010	RE: Board of Dentistry clip.htm	Lippincott, John <jlippincott@ftcexchange.com>	Maryam, Kassae <maryam.kassae@tm.gov>	Law Enforcement, Attorney Work Product, Deliberative Process
FTC-PRIV-000168	Email	9/24/2010	[REDACTED]	Osnowitz, Steven J. <sosnowitz@ftcexchange.com>	[REDACTED]	Government Informer, Law enforcement
FTC-PRIV-000169	Email	9/27/2010	[REDACTED]	[REDACTED]	Osnowitz, Steven J. <SOSNOWITZ@ftc.gov>	Government Informer, Law enforcement
FTC-PRIV-000174	Email	6/21/2010	NC Board of Dental Examiners.htm	Westman-Cherry, Melissa <mwestman@ftcexchange.com>	Sturgis, Kip <ksturgis@ncdoj.gov>	Law Enforcement, Deliberative Process

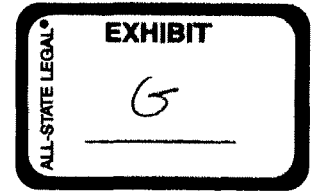
**CERTIFICATE OF SERVICE**

This is to certify that on November 18, 2010, I served via electronic mail delivery a copy of the attached Complaint Counsel's Responses and Objections to Respondent's First Set of Requests for Production of Documents including Complaint Counsel's Privilege Log to:

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

*Counsel for Respondent  
North Carolina Board of Dental Examiners*

By:   
Terri Martin  
Federal Trade Commission  
Bureau of Competition



**SPECIFIC DISCOVERY ITEMS REQUESTED**

January 5, 2011

**Requests for Admission**

<b>Request No.</b>	<b>Action Required</b>	<b>Complaint Counsel Objection(s)</b>	<b>Reason(s) Requested</b>
1	Please respond to this request	Calls for legal conclusion	<b>No response received.</b> Objection is inadequate under clear language of 16 C.F.R. § 3.32(b). <sup>1</sup> Objection is also inadequate under 16 C.F.R. § 3.32(b) because it does not state any reasons for the objection and does not “set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter.”
9	Please respond to this request	“irrelevant” and “beyond the scope” of Rule 3.32	<b>No response received.</b> Objection is inadequate under 16 C.F.R. § 3.32(b) because it does not state any reasons for the objection and does not “set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter.”
10	Please respond to this request	“irrelevant” and “beyond the scope” of Rule 3.32	<b>No response received.</b> Objection is inadequate under 16 C.F.R. § 3.32(b) because it does not state any reasons for the objection and does not “set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter.”
11	Please respond to this request	Calls for legal conclusion	<b>No response received.</b> Objection is inadequate under clear language of 16 C.F.R. § 3.32(b). Objection is also inadequate under 16 C.F.R. § 3.32(b) because it does not state any reasons for the objection and does not “set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter.”

<sup>1</sup> 16 C.F.R. § 3.32(b) states that “[a] party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; the party may deny the matter or set forth reasons why the party cannot admit or deny it.”

<b>Request No.</b>	<b>Action Required</b>	<b>Complaint Counsel Objection(s)</b>	<b>Reason(s) Requested</b>
12	Please respond to this request	Calls for legal conclusion	<b>No response received.</b> Objection is inadequate under clear language of 16 C.F.R. § 3.32(b). Objection is also inadequate under 16 C.F.R. § 3.32(b) because it does not state any reasons for the objection and does not “set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter.”
13	Please respond to this request	Calls for legal conclusion	<b>No response received.</b> Objection is inadequate under clear language of 16 C.F.R. § 3.32(b). Objection is also inadequate under 16 C.F.R. § 3.32(b) because it does not state any reasons for the objection and does not “set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter.”
14	Please respond to this request with respect to Board members Sadler, Howdy & Sheppard	States that Complaint Counsel “cannot truthfully admit or deny this Request” with respect to three of the board members	<b>No response received</b> with respect to Board members Sadler, Howdy and Sheppard. Response is inadequate with respect to these Board members under 16 C.F.R. § 3.32(b) because it does not state any reasons for the objection and does not “set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter.”
18	Please respond to this request	Calls for legal conclusion	<b>No response received.</b> Objection is inadequate under clear language of 16 C.F.R. § 3.32(b). Objection is also inadequate under 16 C.F.R. § 3.32(b) because it does not state any reasons for the objection and does not “set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter.”
19	Please respond to this request	Calls for legal conclusion	<b>No response received.</b> Objection is inadequate under clear language of 16 C.F.R. § 3.32(b). Objection is also inadequate under 16 C.F.R. § 3.32(b) because it does not state any reasons for the objection and does not “set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter.”

<b>Request No.</b>	<b>Action Required</b>	<b>Complaint Counsel Objection(s)</b>	<b>Reason(s) Requested</b>
20	Please respond to this request	Calls for legal conclusion	<b>No response received.</b> Objection is inadequate under clear language of 16 C.F.R. § 3.32(b). Objection is also inadequate under 16 C.F.R. § 3.32(b) because it does not state any reasons for the objection and does not “set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter.”
21	Please respond to this request	Calls for legal conclusion	<b>No response received.</b> Objection is inadequate under clear language of 16 C.F.R. § 3.32(b). Objection is also inadequate under 16 C.F.R. § 3.32(b) because it does not state any reasons for the objection and does not “set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter.”
22	Please respond to this request	Calls for legal conclusion	<b>No response received.</b> Objection is inadequate under clear language of 16 C.F.R. § 3.32(b). Objection is also inadequate under 16 C.F.R. § 3.32(b) because it does not state any reasons for the objection and does not “set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter.”
23	Please respond to this request	Calls for legal conclusion	<b>No response received.</b> Objection is inadequate under clear language of 16 C.F.R. § 3.32(b). Objection is also inadequate under 16 C.F.R. § 3.32(b) because it does not state any reasons for the objection and does not “set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter.”
24	Please respond to this request	“irrelevant” and “beyond the scope” of Rule 3.32	<b>No response received.</b> Objection is inadequate under 16 C.F.R. § 3.32(b) because it does not state any reasons for the objection and does not “set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter.”



**Interrogatories**

<b>Request No.</b>	<b>Action Required</b>	<b>Complaint Counsel Objection(s)</b>	<b>Reason(s) Requested</b>
1	Please respond to this request	Unduly burdensome; Seeks to compel Complaint Counsel to undertake investigation, discovery, and analysis on behalf of Board; Masks multiple interrogatories	<b>No response received.</b> Response is insufficient because it does not even attempt to respond to the Board’s Interrogatory.
2	Please respond to this request with sufficient detail to identify individual documents	Overbroad; Unduly burdensome; Seeks to compel Complaint Counsel to undertake investigation, discovery, and analysis on behalf of Board	<b>Insufficient response.</b> Response is insufficient under 16 C.F.R. § 3.35(c) because it fails to “include sufficient detail to permit the interrogating party to identify readily the <b><u>individual documents</u></b> from which the answer may be ascertained.”
3	Please respond to this request with sufficient detail to identify individual documents	Overbroad; Unduly burdensome; Seeks to compel Complaint Counsel to undertake investigation, discovery, and analysis on behalf of Board	<b>Insufficient response.</b> Response is insufficient under 16 C.F.R. § 3.35(c) because it fails to “include sufficient detail to permit the interrogating party to identify readily the <b><u>individual documents</u></b> from which the answer may be ascertained.”
4	Please respond to this request with sufficient detail to identify individual documents	Overbroad; Unduly burdensome; Seeks to compel Complaint Counsel to undertake investigation, discovery, and analysis on behalf of Board	<b>Insufficient response.</b> Response is insufficient under 16 C.F.R. § 3.35(c) because it fails to “include sufficient detail to permit the interrogating party to identify readily the <b><u>individual documents</u></b> from which the answer may be ascertained.”

<b>Request No.</b>	<b>Action Required</b>	<b>Complaint Counsel Objection(s)</b>	<b>Reason(s) Requested</b>
5	Please respond to this request with sufficient detail to identify individual documents	Overbroad; Unduly burdensome; Seeks to compel Complaint Counsel to undertake investigation, discovery, and analysis on behalf of Board	<b>Insufficient response.</b> Response is insufficient under 16 C.F.R. § 3.35(c) because it fails to “include sufficient detail to permit the interrogating party to identify readily the <b>individual documents</b> from which the answer may be ascertained.”
6	Please respond to this request with sufficient detail to identify individual documents	Overbroad; Unduly burdensome; Seeks to compel Complaint Counsel to undertake investigation, discovery, and analysis on behalf of Board	<b>Insufficient response.</b> Response is insufficient under 16 C.F.R. § 3.35(c) because it fails to “include sufficient detail to permit the interrogating party to identify readily the <b>individual documents</b> from which the answer may be ascertained.”
9	Please respond to this request	Vague and ambiguous; Irrelevant; Duplicative	<b>Insufficient response.</b> Complaint Counsel served deposition notices and subpoenas on numerous persons in connection with this matter, but refuses to provide the names of the attorneys who spoke with each person served. Complaint Counsel is obligated to provide this information to the Board.
11	Please respond to this request with sufficient detail to identify individual documents	Overbroad; Unduly burdensome; Seeks to compel Complaint Counsel to undertake investigation, discovery, and analysis on behalf of Board	<b>Insufficient response.</b> Response is insufficient under 16 C.F.R. § 3.35(c) because it fails to “include sufficient detail to permit the interrogating party to identify readily the <b>individual documents</b> from which the answer may be ascertained.”
12	Please respond fully to this request with sufficient detail, and include <b>all</b> sources, data, documents, etc. responsive to the request	The Board allegedly already has the responsive documents	<b>Insufficient response.</b> Response is insufficient because it only cites certain exemplary documents responsive to the request, but does not state whether the response addresses all such documents or whether there are other responsive documents. The Interrogatory sought “ <i>all sources, data, documents, expert opinion, and any other information, including dates</i> ” related to the request.

<b>Request No.</b>	<b>Action Required</b>	<b>Complaint Counsel Objection(s)</b>	<b>Reason(s) Requested</b>
13	Please respond fully to this request with sufficient detail, and include <b>all</b> sources, data, documents, etc. responsive to the request	The Board allegedly already has the responsive documents	<b>Insufficient response.</b> Response is insufficient because it only cites certain exemplary documents responsive to the request, but does not state whether the response addresses all such documents or whether there are other responsive documents. The Interrogatory sought “ <i>all sources, data, documents, expert opinion, and any other information, including dates</i> ” related to the request.
14	Please respond fully to this request with sufficient detail, and include <b>all</b> sources, data, documents, etc. responsive to the request	The Board allegedly already has the responsive documents	<b>Insufficient response.</b> Response is insufficient because it only cites certain exemplary documents responsive to the request, but does not state whether the response addresses all such documents or whether there are other responsive documents. The Interrogatory sought “ <i>all sources, data, documents, expert opinion, and any other information, including dates</i> ” related to the request.

**Requests for Production**

<b>Request No.</b>	<b>Action Required</b>	<b>Complaint Counsel Objection(s)/ Privileges Claimed</b>	<b>Reason(s) Requested</b>
1	Please make available for inspection all materials responsive to this request	<p>“Beyond the scope” of discovery</p> <p><b>Privileges:</b>            --government deliberative process            --law enforcement investigation            --work product doctrine            --government informer</p>	<p><b>Insufficient response.</b> Response supplies no specific detail in support of objection.</p> <p><b>Improper privilege claim.</b> Complaint Counsel has not made a sufficiently detailed showing to sustain its burden in asserting a privilege with respect to the requested documents, nor has it made any arguments as to why the privilege applies other than conclusory statements. Further, the government deliberative process privilege is completely inapplicable in this context.<sup>2</sup></p>
2	Please make available for inspection all materials responsive to this request	<p>“Beyond the scope” of discovery</p> <p><b>Privileges:</b>            --government deliberative process            --law enforcement investigation            --work product doctrine            --government informer</p>	<p><b>Insufficient response.</b> Response supplies no specific detail in support of objection.</p> <p><b>Improper privilege claim.</b> Complaint Counsel has not made a sufficiently detailed showing to sustain its burden in asserting a privilege with respect to the requested documents, nor has it made any arguments as to why the privilege applies other than conclusory statements. Further, the government deliberative process privilege is completely inapplicable in this context.</p>

<sup>2</sup> “To fall within the deliberative process privilege, materials must bear on the formulation or exercise of agency policy-oriented *judgment*. The deliberative process privilege, we underscore, is essentially concerned with protecting the process by which policy is formulated.” *Petroleum Info. Corp. v. U.S. Dep’t of Interior*, 976 F.2d 1429, 1435 (D.C. Cir. 1992) (internal citations omitted) (emphasis in the original). *See also Playboy Enter. v. Dep’t of Justice*, 677 F.2d 931, 935 (D.C. Cir. 1982) (holding that fact report was not within privilege because compilers’ mission was simply “to investigate the facts,” and because report was not “intertwined with the policy-making process”).

Request No.	Action Required	Complaint Counsel Objection(s)/ Privileges Claimed	Reason(s) Requested
3	Please make available for inspection all materials responsive to this request	<p>“Beyond the scope” of discovery</p> <p><b>Privileges:</b>  --government deliberative process  --law enforcement investigation  --work product doctrine  --government informer</p>	<p><b>Insufficient response.</b> Response supplies no specific detail in support of objection.</p> <p><b>Improper privilege claim.</b> Complaint Counsel has not made a sufficiently detailed showing to sustain its burden in asserting a privilege with respect to the requested documents, nor has it made any arguments as to why the privilege applies other than conclusory statements. Further, the government deliberative process privilege is completely inapplicable in this context.</p>
4	Please make available for inspection all materials responsive to this request	<p>“Beyond the scope” of discovery</p> <p><b>Privileges:</b>  --government deliberative process  --law enforcement investigation  --work product doctrine  --government informer</p>	<p><b>Insufficient response.</b> Response supplies no specific detail in support of objection.</p> <p><b>Improper privilege claim.</b> Complaint Counsel has not made a sufficiently detailed showing to sustain its burden in asserting a privilege with respect to the requested documents, nor has it made any arguments as to why the privilege applies other than conclusory statements. Further, the government deliberative process privilege is completely inapplicable in this context.</p>
5	Please make available for inspection all materials responsive to this request	<p><b>Privileges:</b>  --government deliberative process  --law enforcement investigation  --work product doctrine  --government informer</p>	<p><b>Improper privilege claim.</b> Complaint Counsel has not made a sufficiently detailed showing to sustain its burden in asserting a privilege with respect to the requested documents, nor has it made any arguments as to why the privilege applies other than conclusory statements. Further, the government deliberative process privilege is completely inapplicable in this context.</p>
6	Please make available for inspection all materials responsive to this request	<p><b>Privileges:</b>  --government deliberative process  --law enforcement investigation  --work product doctrine  --government informer</p>	<p><b>Improper privilege claim.</b> Complaint Counsel has not made a sufficiently detailed showing to sustain its burden in asserting a privilege with respect to the requested documents, nor has it made any arguments as to why the privilege applies other than conclusory statements. Further, the government deliberative process privilege is completely inapplicable in this context.</p>

Request No.	Action Required	Complaint Counsel Objection(s)/ Privileges Claimed	Reason(s) Requested
7	Please make available for inspection all materials responsive to this request	<p>“Beyond the scope” of discovery</p> <p><b>Privileges:</b>  --government deliberative process  --law enforcement investigation  --work product doctrine  --government informer</p>	<p><b>Insufficient response.</b> Response supplies no specific detail in support of objection.</p> <p><b>Improper privilege claim.</b> Complaint Counsel has not made a sufficiently detailed showing to sustain its burden in asserting a privilege with respect to the requested documents, nor has it made any arguments as to why the privilege applies other than conclusory statements. Further, the government deliberative process privilege is completely inapplicable in this context.</p>
8	Please make available for inspection all materials responsive to this request	<p>“Beyond the scope” of discovery</p>	<p><b>Insufficient response.</b> Response supplies no specific detail in support of objection.</p>
9	Please make available for inspection all materials responsive to this request	<p>“Beyond the scope” of discovery</p> <p><b>Privileges:</b>  --government deliberative process  --law enforcement investigation  --work product doctrine  --government informer</p>	<p><b>Insufficient response.</b> Response supplies no specific detail in support of objection.</p> <p><b>Improper privilege claim.</b> Complaint Counsel has not made a sufficiently detailed showing to sustain its burden in asserting a privilege with respect to the requested documents, nor has it made any arguments as to why the privilege applies other than conclusory statements. Further, the government deliberative process privilege is completely inapplicable in this context.</p>
10	Please make available for inspection all materials responsive to this request	<p>“Beyond the scope” of discovery</p> <p><b>Privileges:</b>  --government deliberative process  --law enforcement investigation  --work product doctrine  --government informer</p>	<p><b>Insufficient response.</b> Response supplies no specific detail in support of objection.</p> <p><b>Improper privilege claim.</b> Complaint Counsel has not made a sufficiently detailed showing to sustain its burden in asserting a privilege with respect to the requested documents, nor has it made any arguments as to why the privilege applies other than conclusory statements. Further, the government deliberative process privilege is completely inapplicable in this context.</p>

<b>Request No.</b>	<b>Action Required</b>	<b>Complaint Counsel Objection(s)/ Privileges Claimed</b>	<b>Reason(s) Requested</b>
11	Please make available for inspection all materials responsive to this request	"Beyond the scope" of discovery	<b>Insufficient response.</b> Response supplies no specific detail in support of objection.
12	Please make available for inspection all materials responsive to this request	<p>Calls for legal conclusion; "Beyond the scope" of discovery</p> <p><b>Privileges:</b>  --government deliberative process  --law enforcement investigation  --work product doctrine  --government informer</p>	<p><b>Insufficient response.</b> Response supplies no specific detail in support of objection.</p> <p><b>Improper privilege claim.</b> Complaint Counsel has not made a sufficiently detailed showing to sustain its burden in asserting a privilege with respect to the requested documents, nor has it made any arguments as to why the privilege applies other than conclusory statements. Further, the government deliberative process privilege is completely inapplicable in this context.</p>
13	Please make available for inspection all materials responsive to this request	<p>"Beyond the scope" of discovery</p> <p><b>Privileges:</b>  --government deliberative process  --work product doctrine</p>	<p><b>Insufficient response.</b> Response supplies no specific detail in support of objection.</p> <p><b>Improper privilege claim.</b> Complaint Counsel has not made a sufficiently detailed showing to sustain its burden in asserting a privilege with respect to the requested documents, nor has it made any arguments as to why the privilege applies other than conclusory statements. Further, the government deliberative process privilege is completely inapplicable in this context.</p>
14	Please make available for inspection all materials responsive to this request	"Beyond the scope" of discovery	<b>Insufficient response.</b> Response supplies no specific detail in support of objection.
15	Please make available for inspection all materials responsive to this request	"Beyond the scope" of discovery	<b>Insufficient response.</b> Response supplies no specific detail in support of objection.

<b>Request No.</b>	<b>Action Required</b>	<b>Complaint Counsel Objection(s)/ Privileges Claimed</b>	<b>Reason(s) Requested</b>
16	Please make available for inspection all materials responsive to this request	"Beyond the scope" of discovery	<b>Insufficient response.</b> Response supplies no specific detail in support of objection.
17	Please make available for inspection all materials responsive to this request	<p>"Beyond the scope" of discovery</p> <p><b>Privileges:</b>  --government deliberative process  --law enforcement investigation  --work product doctrine  --government informer</p>	<p><b>Insufficient response.</b> Response supplies no specific detail in support of objection.</p> <p><b>Improper privilege claim.</b> Complaint Counsel has not made a sufficiently detailed showing to sustain its burden in asserting a privilege with respect to the requested documents, nor has it made any arguments as to why the privilege applies other than conclusory statements. Further, the government deliberative process privilege is completely inapplicable in this context.</p>
18	Please make available for inspection all materials responsive to this request	<p>"Beyond the scope" of discovery</p> <p><b>Privileges:</b>  --government deliberative process  --law enforcement investigation  --work product doctrine  --government informer</p>	<p><b>Insufficient response.</b> Response supplies no specific detail in support of objection.</p> <p><b>Improper privilege claim.</b> Complaint Counsel has not made a sufficiently detailed showing to sustain its burden in asserting a privilege with respect to the requested documents, nor has it made any arguments as to why the privilege applies other than conclusory statements. Further, the government deliberative process privilege is completely inapplicable in this context.</p>



Request No.	Action Required	Complaint Counsel Objection(s)/ Privileges Claimed	Reason(s) Requested
19	Please make available for inspection all materials responsive to this request	<p>Calls for legal conclusion</p> <p><b>Privileges:</b></p> <ul style="list-style-type: none"> <li>--government deliberative process</li> <li>--law enforcement investigation</li> <li>--work product doctrine</li> <li>--government informer</li> </ul>	<p><b>Insufficient response.</b> Assertion that request “calls for a legal conclusion” is not a meaningful objection under Rule 3.37, and further is irrelevant to Complaint Counsel’s obligation to search for responsive documents.</p> <p><b>Improper privilege claim.</b> Complaint Counsel has not made a sufficiently detailed showing to sustain its burden in asserting a privilege with respect to the requested documents, nor has it made any arguments as to why the privilege applies other than conclusory statements. Further, the government deliberative process privilege is completely inapplicable in this context.</p>