

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



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

COMPLAINT COUNSEL'S MOTION TO REPLACE
WITNESS WITH AN EQUIVALENT REPRESENTATIVE FROM
THE SAME COMPANY REDACTED

Pursuant to Commission Rule of Practice § 3.22, Complaint Counsel respectfully submits this motion to amend its Final Proposed Witness List.

REDACTED

Therefore, Complaint Counsel respectfully requests leave to amend Complaint Counsel's Final Witness List.

Complaint Counsel has conferred with Respondent in an effort in good faith to resolve the issues raised in this motion by agreement of the parties, and have been unable to reach an

agreement. Respondent has indicated its intention to oppose this motion. *See* attached Statement Accompanying Motion to Substitute Witness Concerning Good Faith Effort to Resolve the Issues Raised in the Motion.

Good cause to modify a party's final witness list is demonstrated if the party seeking to make the amendment demonstrates that the amendment is necessary despite the diligence of the party seeking the amendment. *See, e.g., In re Chicago Bridge and Iron*, 2002 FTC LEXIS 64, *4 (2002). Evidence that the request for the amendment is based on circumstances not attributable to the moving party can support a finding of good cause. *Id.* at *4-5. Pursuant to the July 15, 2010 Scheduling Order in this matter, Complaint Counsel filed its Final Witness List on December 7, 2010.

REDACTED

REDACTED

Respondent will not be prejudiced by the substitution of
Respondent has not sought to take the deposition of
REDACTED

In addition, Respondent has not noticed a single
deposition in this matter. Therefore, Respondent cannot assert that it has been deprived of any
right to conduct discovery with respect to this business or proposed additional witness, and any
attempt by Respondent to engage in discovery as a result of this motion should be denied.

Complaint Counsel has been diligent in maintaining contact with witnesses it intends to
call to testify at the hearing in this matter, and it was that diligence that revealed this unavoidable
change in circumstances at this time. Because unavailability due to
is recent, newly discovered, and completely out of the control of Complaint Counsel,

and because adding _____ to Complaint Counsel's Final Witness List will not prejudice Respondent, Complaint Counsel respectfully requests leave to amend its Final Witness List.

Respectfully submitted,

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

Michael J. Bloom, Assistant Director
Erika Meyers

Office of Policy & Coordination

Dated: February 7, 2011

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

In the Matter of)	
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)	
THE NORTH CAROLINA BOARD OF DENTAL EXAMINERS,)	DOCKET NO. 9343
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**STATEMENT ACCOMPANYING MOTION TO
SUBSTITUTE WITNESS CONCERNING GOOD FAITH EFFORT
TO RESOLVE THE ISSUES RAISED IN THE MOTION**

1. I have personal knowledge of the facts set forth in this statement.
2. I am an attorney at the Federal Trade Commission and Counsel supporting the Complaint in these proceedings.
3. On January 31, 2011, I contacted Respondent's Counsel, A.P. Carlton, requesting an agreement to substitute two witnesses to testify in the adjudicative hearing in this matter with comparable witnesses from the same companies.
4. During the telephone conversation of January 31, 2011, I indicated that Complaint Counsel had recently learned that

REDACTED

REDACTED

5. I then indicated that Mr. John Gibson of Hull Storey Retail Group had scheduled business travel during mid-February on dates when the hearing was scheduled to occur and sought an agreement to substitute Ms. Elkins, the Specialty Leasing Coordinator for Hull Storey Retail Group, for Mr. Gibson. I noted that Ms. Elkins would testify to the same matters that Complaint Counsel set forth for Mr. Gibson on our witness list of December 7, 2011. I also noted that Ms. Elkins, formerly Ms. Mosely, was listed on Complaint Counsel's July 7, 2010 Initial Disclosures.
6. I further requested that Respondent notify Complaint Counsel by 5:00 p.m. on February 2, 2011, whether Respondent would agree to the substitution of the aforementioned witnesses. I further inquired, if Respondent would not agree, whether Respondent intended to oppose a motion filed with the Administrative Law Judge requesting leave to substitute the witnesses. I then confirmed the telephone conversation with an email (Exhibit A).
7. On February 2, 2011, Respondent notified Complaint Counsel that it would not agree to allow Complaint Counsel to substitute _____ or Ms. Elkins for Mr. Gibson unless Complaint Counsel agreed to make _____ and Ms. Elkins available for deposition prior to their appearance as witnesses. In a subsequent telephone conversation, I stated that Complaint Counsel was not going to make either witness available for deposition. I then inquired whether Respondent would agree to the

substitution of _____ alone. Respondent indicated that it would not agree to the substitution of _____ or Ms. Elkins without having the opportunity to depose them before the adjudicative hearing. Respondent also indicated that it would oppose our motion to seek leave of court to substitute _____ or Ms. Elkins for Mr. Gibson (Exhibit A).

8. As a result of the impasse with Respondent, Complaint Counsel filed its public version of the instant motion on February 7, 2011.

Dated: February 7, 2011

s/ William Lanning _____
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EXHIBIT A

{IN CAMERA}

REDACTED
IN ENTIRETY

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

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

[PROPOSED] ORDER

After full consideration of the Motion and Opposition, it is hereby, ORDERED, that Complaint Counsel's Motion to Amend Final Witness List is GRANTED. It is further ORDERED that _____ will be added to Complaint Counsel's Final Proposed Witness List and _____ will be removed from the Witness List.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

DATE:

CERTIFICATE OF SERVICE

I hereby certify that on February 7, 2011, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-113
Washington, DC 20580

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

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

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

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

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

CERTIFICATE FOR ELECTRONIC FILING

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

February 7, 2011

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