

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

COMMISSIONERS: **Jon Leibowitz, Chairman**
 William E. Kovacic
 J. Thomas Rosch
 Edith Ramirez
 Julie Brill [Recused]

In the Matter of)	PUBLIC	
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THE NORTH CAROLINA [STATE] BOARD)	DOCKET NO. 9343	
OF DENTAL EXAMINERS)		
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**COMPLAINT COUNSEL’S OPPOSITION TO RESPONDENT’S MOTION FOR
EXTENSION OF TIME AND [PROPOSED] ORDER**

Pursuant to Commission Rules of Practice 3.22, 3.24 and 4.3, Complaint Counsel hereby respectfully submits this opposition to Respondent’s request for an extension of time to respond to Complaint Counsel’s Motion for Partial Summary Decision. If, however, the Commission grants Respondent’s motion, Complaint Counsel would request a ten day extension from that date, until December 20, 2010, to file a reply.

1. On November 15, 2010, the Commission granted a joint request for an extension of time with respect to two pending motions, ordering that Respondent must file its response to Complaint Counsel’s Motion for Partial Summary Decision, and Complaint Counsel must file its response to Respondent’s Motion to Dismiss, on or before November 30, 2010. The Commission further ordered that replies to those motions would be due on or before December 10, 2010.

2. Also on November 15, 2010, the Commission denied the Motion for Stay of the Proceedings in this matter, filed by Respondent on November 3, 2010, citing a desire to “move Part 3 matters expeditiously.”¹
3. On November 29, 2010, Respondent filed a motion requesting an additional extension of time. Respondent proposes moving the deadline for its response an additional ten days to December 10, 2010.
4. The Commission has determined that the trial of this matter will commence on February 17, 2010. *See* Commission Order Denying Motion for Stay of the Proceeding (Nov. 15, 2010). Accordingly, both parties are under significant time constraints. While the current briefing schedule on Complaint Counsel’s motion is rapid, it should be maintained for several reasons – it is a reasonable schedule, it is the schedule to which both parties have previously agreed, and it is the schedule upon which Complaint Counsel has now reasonably relied.
5. The changes to the briefing schedule proposed by Respondent would arbitrarily, unfairly, and significantly prejudice Complaint Counsel in its efforts to prepare for trial. Prejudice to the opposing party is an appropriate basis for denying a motion for extension of time.²
6. Complaint Counsel served and filed its Motion For Partial Summary Decision on November 2, 2010. Thereafter, the parties agreed to request extensions to the briefing

¹In addition, both parties have requested a ruling on the state action issue prior to trial so that the trial may move forward efficiently and expeditiously. The Board’s proposed revisions to the schedule would make it less likely that the Commission could fully consider the arguments of both parties and rule on the dispositive motions in a timely manner.

²*See e.g., Kuczynski v. United States*, 1996 U.S. Dist. LEXIS 8219, *3 (E.D. Pa. 1996) (“court will grant the extension only in the absence of bad faith or prejudice to the other party”); 4b Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1165 (3d ed. 2002).

schedule so that the Board's response would be due on November 30.³ Also, the parties agreed that Complaint Counsel would have the period from December 1 to December 10 to prepare its reply. The Commission adopted this schedule on November 15, 2010. In reliance on this ruling, Complaint Counsel developed a plan and put in place the resources to comply with this schedule.

7. With little notice, the Board proposes to alter the agreed-upon briefing schedule. The Board's proposal extends the due date for the Board's response from November 30 to December 10. Per this proposed schedule, Complaint Counsel would, presumably, have the period from December 11 to December 20 to prepare its reply.⁴
8. Any such extension will prejudice Complaint Counsel because it will increase the difficulty in preparing for trial. Complaint Counsel has numerous other tasks and responsibilities that need to be performed between December 11 and December 20, including filing final witness and exhibit lists, producing deposition designations, and expert discovery including the preparation of rebuttal expert reports and the taking of expert depositions, as well as preparing a response to Respondent's opposition. Resources have been allocated to these tasks based upon the jointly agreed upon schedule, and in order to meet these various deadlines it is essential that Complaint Counsel be permitted to utilize its resources as planned. These deadlines cannot be

³Commission rules provide for 14 days to respond to a motion for summary decision. The schedule negotiated by the parties affords the Board 28 days.

⁴If the Commission does decide to extend the date for the filing of the Board's response to Complaint Counsel's Motion For Partial Summary Decision, we request that Complaint Counsel's reply on the summary judgment motion and the Board's reply on the motion to dismiss both be due 10 days following the filing of the Board's response.

pushed back because there are not ten unscheduled days between today and the trial. The upcoming holiday period further complicates any potential rescheduling of deadlines.

9. Counsel for the Board complain of the burdens involved in complying with the present schedule. Some complaints are contrived, and the remainder are the ordinary and foreseeable difficulties involved in responding to a motion for summary decision. In any event, these obligations were foreseeable on November 2 when counsel for the Board agreed to the current schedule. Counsel for the Board blame Complaint Counsel for its woes. This is both inaccurate and irrelevant. We offer the following brief response.
10. As an initial matter, the fact that personal service of the Motion for Partial Summary Decision was one day later than electronic service is irrelevant. Respondent and Complaint Counsel have agreed to electronic service, and that service was timely. Further, as a practical matter the one-day delay in personal service did not prejudice Respondent, because the Motion was already served electronically.
11. In addition, Respondent complains that Complaint Counsel's Motion for Partial Summary Decision is too long to respond to in a timely manner. This, of course, is nonsense; Complaint Counsel's Motion is in accordance with Commission rules, and Respondent was aware of the length of the Motion when it agreed that the initial extension would be sufficient. That extension, which was almost two weeks, almost doubled the amount of time allowed for a response. It was clear at the time that this extension would push the response date until after Thanksgiving, and Respondent had an obligation to prepare accordingly.⁵

⁵In connection with Complaint Counsel's service of expert reports on Friday November 26, Respondent's counsel informed us that its office would be closed that day.

12. Respondent further claims that the timing of two depositions taken by Complaint Counsel - the Board's Chief Operating Officer and a Board member - has impeded their ability to prepare their case. This claim has no merit. Respondent has known for months that Complaint Counsel was interested in taking these depositions, and it could have obtained declarations from those witnesses at any time. The fact that Respondent has lagged in conducting its own discovery is not the fault of Complaint Counsel, nor is it a sufficient reason to alter the agreed-upon schedule.
13. In addition, Respondent makes the unsupportable claim that it was somehow prejudiced by Complaint Counsel's *timely* response to Respondent's Requests for Documents and Requests for Interrogatory Responses on November 18, 2010. This date was mutually agreed upon.⁶ In fact, Complaint Counsel has met all of its discovery deadlines. Complaint Counsel timely complied with the Request for Admission on October 22, 2010 as set forth in the Commission's Rules and Judge Chappell's Scheduling Order; in contrast, Respondent sought and was granted an extension until October 27, 2010 to Respond to Complaint Counsel's First Set of Requests for Admission. Moreover, Complaint Counsel routinely produced documents to Respondent obtained through subpoena *duces tecum* within three days of receipt, as set forth in Judge Chappell's Scheduling Order, from July through November of 2010. The fact that Complaint

⁶In fact, Respondent controlled the timing for the response by waiting until October 12, 2010, the last possible date under the Scheduling Order, to issue its First Set of Requests for Production, First Set of Interrogatories, and First Set of Requests for Admission. Respondent's compliance with its discovery obligations has been halting and inadequate. Complaint Counsel served its first Request for Production on June 29, 2010. Until the close of the discovery on November 18, Respondent sent piecemeal productions of documents. In addition, Respondent asserted privilege on hundreds of documents that were clearly business records and included Public Minutes of the Board. Respondent still has not certified compliance with the request.

Counsel has met its discovery obligations cannot be a basis for granting Respondent an extension.

14. Respondent's claims that Complaint Counsel is guilty of misconduct because it "failed to or refused to answer" discovery requests is baseless. Respondent's discovery requests were largely directed at material beyond the scope of discovery under Rule 3.31. The Board cannot substantiate its claims of misconduct, nor has it filed a motion to compel further responses. Further, Respondent's discovery requests called for material that could have been sought by motion under Rule 3.36, but Respondent made no effort to file the appropriate motion. Despite Respondent's unfounded allegations, Complaint Counsel has complied with both the letter and the spirit of the Commission's rules governing discovery. Examples of the Board's irrelevant queries and Complaint Counsel responses are found in Attachment A.
15. Ultimately, Respondent's motion is a smoke screen designed to shift burden to Complaint Counsel. Complaint Counsel has filed a Motion for Partial Summary Decision on the state action defense. The alleged failure of Complaint Counsel to comply with discovery is without basis in fact, and in any event has no impact on Respondent's ability or obligation to respond to Complaint Counsel's motion. Evidence regarding clear articulation under prong one of the state action doctrine and active supervision under prong two, should be in Respondent's possession and has been available to them all along. Everything else is an issue for trial, and irrelevant to the current briefing schedule.
16. In summary, Complaint Counsel would be prejudiced by the granting of an extension because of Complaint Counsel's good faith reliance on the current schedule, particularly

in light of the upcoming holidays in December; any additional extensions of time will undoubtedly impact future deadlines, which come in quick succession in December and January; the Commission has expressed an intention to keep the Part 3 proceeding moving forward in a timely manner, both in adopting the amended Part 3 rules and in denying a stay of these proceedings; and pushing back deadlines for submissions related to the state action defense shortens the time that the Commission has to review those submissions prior to trial.

17. Because Respondent has not shown good cause for extending the time allowed for its opposition to Complaint Counsel's Motion for Partial Summary Decision, and because the proposed extension would prejudice Complaint Counsel, Complaint Counsel respectfully requests that the Commission deny Respondent's Motion for Extension of Time.

Richard A. Feinstein , Director
Pete Levitas, Deputy Director
Melanie Sabo, Assistant Director
Geoffrey M. Green, Deputy Assistant Director

Bureau of Competition

Respectfully submitted,

s/ Richard B. Dagen
Richard B. Dagen
601 New Jersey Ave, NW
Washington, D.C.
(202) 326-2628
(202) 326-3496 Facsimile
rdagen@ftc.gov

William L. Lanning
Melissa Westman-Cherry
Steven Osnowitz
Tejasvi Srimushnam

Counsel Supporting Complaint

Michael J. Bloom, Assistant Director
Erica Meyers

Office of Policy & Coordination

Dated: November 30, 2010

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BEFORE THE FEDERAL TRADE COMMISSION**

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

[PROPOSED] ORDER

It is hereby, ORDERED, that Respondent's Motion for Extension of Time is Denied.

ORDERED:

By the Commission.

Donald S. Clark
Secretary

SEAL
ISSUED:

Attachment A

1. Complaint Counsel’s Response and Objections to Respondent’s First Set of Requests for Production of Documents

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.

2. Complaint Counsel’s Response and Objections to Respondent’s First Set of Interrogatories

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.

3. Complaint Counsel's Objections and Responses to Respondent's First Set of Requests for Admission

REQUEST NO. 24: *Admit that the investigation in this matter was managed, supervised or overseen by a Commissioner who had previously been recused from participation in an FTC case involving teeth whitening products or services.*

RESPONSE: Complaint Counsel incorporates its General Objections in its response to this request for Admission.

Complaint Counsel specifically objects to this Request and states that no response is required inasmuch as it is irrelevant and beyond the proper scope of requests for admission in this matter under Rule 3.32.

CERTIFICATE OF SERVICE

I hereby certify that on November 30, 2010, 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-159
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.

November 30, 2010

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