UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of	)	**PUBLIC**
NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS,	)	**Docket No. 9343**
Respondent.	)	

COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENT'S MOTION FOR AN ORDER COMPELLING DISCOVERY

I. Respondent's Motion to Compel Is So Far Beyond Any Reasonable Deadline for Filing Such Motions That It Must Be Denied.[1]

Although the Complaint was issued June 17, 2010, Respondent delayed serving its first discovery request until October 12th, nearly four months into the discovery period. Complaint Counsel ("CC") responded in a timely manner: to Respondent's First Set of Requests for

[1] Respondent has not complied with the spirit or the letter of Rule 3.22(g)'s signed-statement requirement. There have been no meetings to discuss substantive discovery issues. Respondent cancelled the only scheduled meeting 11 minutes before it was to begin by declaring impasse without cause. A complete statement of those events, including the fact that Complaint Counsel never sought a waiver of Respondent's right to petition the court for discovery relief as a condition for negotiating discovery issues, can be found in the attached Declaration of William Lanning ("Dec. Lanning"). Dec. Lanning ¶ 20.

Paragraph 7 of the Scheduling Order requires impasse before a motion to compel is filed. Respondent's declaration of impasse in advance of the first scheduled negotiation is devoid of candor. Peremptory impasse declarations are not a substitute for impasse that arises from failed negotiations or an actual refusal to negotiate. This motion is premature and unauthorized; it should be summarily dismissed for failure to comply with Rule 3.22(g) and the terms of the Scheduling Order. Respondent's belated filing of a deceptive separate statement satisfies neither the Rule nor the Order. Further, Respondent's evasion of the 2,500-word limit on memoranda by moving most of its arguments to the motion is unauthorized.

Admission ("RFA") on October 22nd and to Interrogatories and the Document Request on November 18th. Fact discovery cut-off was November 18, 2010. Scheduling Order at 2. Respondent waited until January 11th to file its motion to compel, the fourth business day after Respondent first advised CC of its discovery issues. Dec. Lanning ¶ 5. Respondent filed this motion over 80 days after CC's RFA responses, almost 50 days after discovery cut-off, and only 43 days before trial. This delay is wholly unjustified - Respondent did not even proffer one - and the Motion to Compel should be denied as untimely.

Paragraph 7 of the Scheduling Order requires that motions to compel be filed within 5 days of impasse. This provision, in conjunction with the discovery deadline, is intended to put discovery quickly to rest to facilitate trial preparation. *See Home Shopping Network, Inc.*, 1996 FTC LEXIS 90, (Mar. 14, 1996) (Timony, ALJ) (Virtually "all of this discovery would be due after the date for termination of discovery set in the scheduling order. . . . The discovery at issue on this motion was filed less than 30 days before the end of discovery . . . , a busy time of preparation for commencement of the trial . . ., [and] is untimely."). Paragraph 7 should eliminate, not promote, laying-in-wait gamesmanship.

Absent extraordinary circumstances, no motion to compel should be permitted after the discovery cut-off date, or under some circumstances, a reasonable time thereafter. *See Hoechst Marion Roussel, Inc.*, 2000 FTC LEXIS 135, *2 (Aug. 23, 2000) (Chappell, ALJ) ("The Scheduling Order requires the parties to file motions to compel . . . within 5 days of impasse and 20 days after service of the responses and/or objections. . . ."). The absence of the *Hoechst* provision in the Scheduling Order here does not excuse Respondent's delay. Using *Hoechst* as a guide, the motion to compel deadlines were November 18 for the RFAs and December 8 for

Interrogatories and Document Request. Respondent did not come close to either date.

These unexplained delays in objecting and filing both constitute a waiver,[2] and vitiate the Scheduling Order's intent. The Scheduling Order provides a time for fact discovery, a time for expert discovery, and a time for trial preparation. Respondent's unjustified delay has interfered with Complaint Counsel's preparation for expert discovery and trial. The Scheduling Order exists to preclude such prejudice, particularly because of the expedited nature of the proceeding. Further, "[a] scheduling order is not a frivolous piece of paper, idly entered, which can be cavalierly disregarded by counsel without peril. . . . Disregard of the order would undermine the court's ability to control its docket, disrupt the agreed-upon course of the litigation, and reward the indolent and the cavalier." *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 610 (9th Cir. 1992) (internal quotations and citations omitted).

Litigation deadlines are taken seriously by both the Commission[3] and its Administrative Law Judges.[4] The Board flaunts the Scheduling Order, without explanation; its motion should be

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[2] *See Daniel Chapter One*, Docket No. 9329, Interlocutory Order (Feb. 11, 2009) (Chappell, ALJ) (granting motion to compel because Respondents waived objections by untimely assertion).

[3] *North Texas Specialty Physicians*, 2005 FTC LEXIS 150, (May 19, 2005) (denied motion filed 35 days after deadline); *Internat'l Tel. & Tel. Corp.* 97 F.T.C. 202 (Mar. 13, 1981) (denied motion for compliance costs filed afer compliance rather than before or during compliance).

[4] *Polypore Internat'l, Inc.*, 2009 FTC LEXIS 182 (Sep. 23, 2009) (Chappell, Chief ALJ) (denied third-party motion to supplement record filed 78 days after record closed); *Basic Res., LLC*, 2005 FTC LEXIS 158 (Dec. 7, 2005) (McGuire, Chief ALJ) (denied *in limine* motion filed 293 days late); *Basic Res., LLC*, 2004 FTC LEXIS 247 (Dec. 29, 2004) (McGuire, Chief ALJ) (refused to consider motion opposition filed 1 day late without leave); *North Texas Specialty Physicians*, 2004 FTC LEXIS 122 (Jul. 20, 2004) (Chappell, ALJ) (denied motion to exclude evidence admitted in evidence 61 days earlier and 89 days after date specified in the Scheduling Order); *Chicago Bridge & Iron Co.*, 2002 FTC LEXIS 65 (Oct. 15, 2002) (Chappell, ALJ) (denied motion to compel filed 29 days after date set by the Scheduling Order); *R. J. Reynolds*

dismissed with prejudice.

II. CC Reasonably Complied With Respondent's Discovery Requests.[5]

CC complied with Respondent's discovery demands.

A. Respondent's General Discovery Objections.

Rule 3.31(b) limits CC's search obligation to materials "that are in the possession, custody or control of the Bureaus or Offices of the Commission that investigated the matter. . . ." Respondent's argument that the "scope of proper discovery" exceeds CC's duty to search is contrary to the Rule and baseless. Respondent's RFP 18 seeks records of investigations in other jurisdictions, and CC provided all such records it had gathered in this matter. Respondent's RFP 9 requested materials from other Commission matters without seeking court authorization as required by Rule 3.31(c)(2). Respondent now raises discovery "disputes" to expand the scope of discovery instead of complying with the rules this should not be allowed.

Respondent's objections to assertions of privilege are baseless. CC only withheld information based on privilege on 31 items listed in its November 18, 2010 Privilege Log, Ex.2.

B. Specific Claims: RFP.

In response to the RFP, CC produced over 17,000 pages of the materials in the custody and control of the Bureaus and Offices subject to discovery, Dec. Lanning ¶ 3. Rule 3.31(b). CC served Respondent with every subpoena issued, and provided materials produced in response

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Tobacco Co., 1998 FTC LEXIS 179 (Sep. 24, 1985) (Timony, ALJ) (denied motion to certify issue to Commission on the alternative ground that it was untimely); *Robert G. Koski, D.O.*, 113 F.T.C. 130, 135 (Jan. 25, 1990) (Parker, ALJ) (denied motion for costs and fees filed 4 days out of time).

[5] Requests for Admission and Requests for Production are respectively referred to as "RFA" and "RFP."

to subpoenas within three days. Dec. Lanning ¶ 3.

Respondent objects that CC did not specify which documents correspond to RFP 2-19, Motion at 12-13; however, Respondent's RFPs did not specify such categorization, and Rule 3.37(a) permits either categorization as maintained or corresponding to request categories. CC opted for the former over the latter. Respondent's new demand for inspection under Rule 3.37(b) is improper.

Respondent claims CC's privilege log is incomplete because the "recipients, authors and/or subject lines of certain communications" were redacted under the government informer privilege. Mot at 16, Mem. at 5, 13-16. CC's redactions were proper, and well supported by the case law. *Harper & Row, Publishers, Inc.,* 1990 FTC LEXIS 213 *8-11, 13 n. 10 (June 27, 1990); *see also In re Aspen Tech.*, 2003 FTC LEXIS 195 *2-3 (Dec. 23, 2003).

Finally, CC produced documents responsive to RFP 12 and 19, and did not withhold documents on the grounds they were "argumentative" and "call[] for a legal conclusion."

C. Specific Claims: RFA's

Respondent's Admissions Position Is Frivolous. Rule 3.32(b) does not require additional detail for not admitting or denying a Request that calls for a legal conclusion or is irrelevant and beyond the scope for admissions. Rule 3.32(b) provides in part: "The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter."

Legal Conclusion. CC was not required to admit or deny Requests 1, 11, 12, 13, 18, 19, 20, 21, 22, and 23 because each "calls for a legal conclusion." Rule 3.32(b) does not state that a detailed response is required where a legal conclusion is requested. *Basic Research* holds that

requests for admission should not be employed "to establish facts which are obviously in dispute or *answer questions of law*." *Basic Research*, 2004 FTC LEXIS 225, *2 (Nov. 30, 2004) (quoting *Kosta v. Connolly,* 709 F. Supp. 592, 594 (E.D. Pa. 1989)) (emphasis added). These Requests unquestionably call for legal conclusions,[6] and must be denied.

Irrelevant and beyond the scope. Requests 9, 10, and 24 seek admissions that are "irrelevant and beyond the scope of proper of RFAs under Rule 3.32(b). *Basic Research* holds that "[a] purpose of requests for admission is to narrow the issues for trial by relieving the parties of the need to prove facts that will not be disputed at trial . . . ." *Basic Research*, 2004 FTC LEXIS 225 at *2. Properly used, requests for admission serve the expedient purpose of eliminating 'the necessity of proving essentially undisputed and peripheral issues of fact." Because these particular requests do not serve either of these purposes, the responses were proper.

Respondent's Catch-All Category. Request 14 is the only remaining Request that needs to be addressed; the others included by Respondent for insufficient detail have been addressed above. This Request is a prime example of Respondent's overreaching. Request 14 asks CC to:

> Admit that no current member of the Dental Board has teeth whitening business amounting to more than 5% of their business revenues.

CC admitted that this was true with respect to Board members Owens, Holland, Wester, and Morgan, the only members for whom CC had information, and could not admit or deny with

[6] For example, Respondent's first RFA asks CC to admit Respondent's interpretation o fhow the Supreme Court has applied the active supervision requirement to state agencies.

regard to Board members Sadler, Howdy, and Sheppard, for whom it had no information. Respondent knew these facts, and yet propounded the Request, and compounded its discovery abuse by filing its untimely Motion to Compel on this ground; and it should be denied.

D. Specific Claims: Interrogatories.

Respondent objects to interrogatory responses 1-6, 9, 11-14 on spurious grounds.

All Evidence for Every Complaint Allegation. CC's first interrogatory asks: "Identify every act . . relating to" each allegation in the Complaint. A "general interrogatory that seeks the detailed factual basis for [CC's] case . . . is overbroad and burdensome; it is not well-tailored and fails to narrow the issues." *Aspen Tech., Inc.*, 2003 FTC LEXIS 195 (Dec. 23, 2003) (McGuire, Chief ALJ) (denying motion to compel and citing additional authority). This is a blatant attempt to evade the 25-interrogatory limit.

Irrelevant and Burdensome. Interrogatory 9 vaguely asked for the identity of "each person service [*sic*] with a subpoena duces tecum" and each attorneys who spoke to each. CC served a copy of every subpoena on Respondent at the time of issuance. Dec. Lanning ¶ 3. The identity of CC's attorneys is irrelevant and protected under Rule 3.31(c)(2)(i-iii) & (d). Requesting "the names of [every] person who worked upon [an aspect of] the case . . . is the work product of the lawyers," and to permit a "shot-gun interrogatory" to "provide the names . . . of all investigators and informants is improper." *United States v. Loew's Inc.*, 23 F.R.D. 178, 1809 (S.D. NY 1959). Respondent has copies of all the subpoenas, and has made no showing of need for discovery from counsel.

Information Not Requested. CC does not need to provide information not requested by Interrogatories 9, and 12-14. Interrogatory 9 only sought information relating to subpoena duces

tecum recipients. Respondent complains about deposition notices and testimonial subpoenas.[7] CC is under no obligation to respond to questions not asked. Interrogatories 12-14 asked for all the information "upon which you based your assertion in your Complaint that" a fact occurred. These interrogatories only seek pre-complaint information, information that was provided in mandatory disclosures Respondent did not ask CC to identify trial evidence. In spite of that CC identified all of the post-complaint documents that appeared to be responsive to Interrogatories 12-14 in their responses to those Interrogatories.

Misreading Commission Rule 3.35(c). Respondent misreads Rule 3.35(c). The last sentence's requirement that the specification of records must include "sufficient detail to permit [Respondent] to identify individual documents" must be read *in pari materia* with the other sentences of the rule. The last sentence only applies when the burden of deriving the answer is easier for the answering party, in this instance CC. *North Texas Specialty Physicians*, 2004 FTC LEXIS 12 (Jan. 1, 2004) (Chappell, ALJ); *Polypore Intern'l, Inc.*, 2008 FTC LEXIS 155, *3 (Nov. 14, 2008) (Chappell, ALJ).

Interrogatories 2-6 and 11 seek information that can be answered in part[8] from information derived from identified third party documents and files produced by Respondent. CC has no abstracts or summaries that would make it easier for CC to derive the answers. Respondent does not claim that it would be easier for CC to answer the questions, and Respondent is not entitled to relief.

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[7] Nevertheless, all deposition notices and subpoenas issued by CC have been timely served on Respondent. Dec. Lanning ¶ 3.

[8] CC does not possess information sufficient to provide a complete answer to these interrogatories.

III. Conclusion

Respondent's motion should be dismissed with prejudice.

Respectfully submitted,

s/ Richard B. Dagen
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Dated: January 18, 2011

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of	)	**PUBLIC**
NORTH CAROLINA BOARD OF DENTAL EXAMINERS,	)	**Docket No. 9343**
Respondent.	)	

[PROPOSED] ORDER DENYING RESPONDENT'S MOTION FOR AN ORDER COMPELLING DISCOVERY

I.

On January 11, 2011, Respondent, North Carolina Board of Dental Examiners ("Board" or "Respondent"), filed a Motion for an Order Compelling Discovery. On January 18, 2011, Complaint Counsel filed their Opposition to Respondent's Motion for an Order Compelling Discovery, containing two grounds: (1) the Motion was filed out of time, and (2) Complaint Counsel had adequately responded to Respondent's discovery demands.

For the reasons stated below, Respondent's motion is DENIED.

II.

The Scheduling Order set November 18, 2010, as the date by which all fact discovery should have been concluded. Paragraph 7 of the Scheduling Order advised counsel that the Court expected that, in the absence of extraordinary circumstances, all discovery matters, including motions to compel, would have been completed or filed by that date, or within a reasonable time thereafter.

The Scheduling Order did not set a date by which motions to compel should have been filed; however, a reasonable date for such filings would, of necessity, have to consider the fact that the fact discovery cut-off was set 91 days (13 weeks) before the scheduled start of the hearing in this matter. Respondent delayed filing its motion to compel for 54 days (almost 8 weeks), without any explanation regarding the cause or circumstances occasioning this delay. A delay of this length, if tolerated, would effectively render the Scheduling Order a nullity; such an outcome is inconsistent with first principles of good judicial management, and cannot be permitted. "A scheduling order is not a frivolous piece of paper, idly entered, which can be cavalierly disregarded by counsel without peril." *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 606, 610 (9th Cir. 1992). Respondent delayed its filing to its peril; it would be unreasonable to allow untimely motion practice to intrude further on counsel's preparations for trial, especially at this late date.

III.

For the above stated reason, Respondent's motion to compel is DENIED with prejudice.

ORDERED:

_____
D. Michael Chappell
Chief Administrative Law Judge

Date:

CERTIFICATE OF SERVICE

I hereby certify that on January 18, 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:

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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.

January 18, 2011

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