

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



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

**SUPPLEMENTAL STATEMENT TO RESPONDENT'S
MOTION FOR AN ORDER COMPELLING DISCOVERY**

NOW COMES Respondent North Carolina State Board of Dental Examiners ("State Board"), by and through the undersigned attorneys and pursuant to Rule 3.22(g) of the Rules of the Federal Trade Commission ("Commission"), and provides the following Supplemental Statement.

Counsel for the Respondent State Board represents that they have conferred with opposing counsel in good faith in an effort to resolve by agreement the issues raised by Respondent's Motion for an Order Compelling Discovery and have been unable to reach such an agreement. The attached chart, incorporated herein by reference as Exhibit 1, provides a summary of the date, time, and place of each conference and/or communication between Counsel for the State Board and Complaint Counsel, and the names of all parties involved in each such communication, all relative to the good faith efforts to resolve by agreement the issues raised by the State Board's Motion for an Order Compelling Discovery.

Counsel for Respondent on January 5, 2011 provided a demand to Complaint Counsel indicating a number of issues with Complaint Counsel's responses to

Respondent's Discovery Requests that are the subject of Respondent's Motion, and gave Complaint Counsel until noon on January 7, 2011 to negotiate in good faith. On January 8, 2011, Complaint Counsel declined to meet this deadline, and Respondent agreed to waive that deadline until January 11, 2011 at 10:00 am, at which time the parties agreed to conduct a conference call regarding Complaint Counsel's insufficient discovery responses.

In addition, between January 5 and January 10, Counsel for Respondent made numerous attempts to negotiate in good faith with Complaint Counsel. Many of Respondent Counsel's emails regarding discovery issues were not returned (*see* Exhibit 1), and other emails were received from Complaint Counsel demanding that Counsel for Respondent participate in the call based on Respondent's agreement to waive its rights to seek a determination from the Administrative Law Judge or to file a motion to compel, or mainly addressing Complaint Counsel's requests for discovery.

As counsel approached the January 11 conference call, twelve hours before the call on January 10 at 9:30 pm, Complaint Counsel confirmed that their participation in good faith negotiations was expressly conditioned upon Respondent waiving its rights to seek a determination from the Administrative Law Judge or file a motion to compel.

Having received Complaint Counsel's demands relating to Complaint Counsel's discovery requests on January 7, 8, and 10; having had numerous emails to Complaint Counsel on January 7, 8 and 9 go unreturned; and, together with Complaint Counsel's non-negotiable demand to enter into such an agreement on January 10, Counsel for Respondent determined that such conduct constituted a failure to proceed in good faith. Counsel for Respondent further determined based upon Complaint Counsel's

communications, or failure to communicate, of January 8, 9, 10, and 11 that the parties were at an impasse, and declared such an impasse at 9:49 am on January 11, 2011. Respondent Counsel's Declaration of Impasse to Complaint Counsel is attached hereto as Exhibit 2.

The filing of this Supplemental Statement at this time is occasioned by efforts on the part of Counsel for Respondent to continue good faith negotiations with Complaint Counsel following the Declaration of Impasse, in its continuing efforts to resolve the issues raised by the Motion, all as set forth in Exhibit 1. Further, Counsel for the Respondent is currently on record with a standing offer to Complaint Counsel to enter into "Alternating Discussions" with respect to Respondent's Discovery Requests of Complaint Counsel and Complaint Counsel's Discovery Requests of Respondent; and, in the event such alternating discussions are unacceptable to Complaint Counsel, Respondent is on record with a standing offer to enter into discussions of Complaint Counsel's Discovery Requests of Respondent.

This the 14th day of January, 2011.

ALLEN AND PINNIX, P.A.

/s/ Alfred P. Carlton, Jr.

Noel L. Allen
M. Jackson Nichols
Alfred P. Carlton, Jr.
Attorneys for Respondent
Post Office Drawer 1270
Raleigh, North Carolina 27602
Telephone: 919-755-0505
Facsimile: 919-829-8098
Email: acarlton@allen-pinnix.com

CERTIFICATE OF SERVICE

I hereby certify that on January 14, 2011, I electronically filed the foregoing with the Federal Trade Commission using the FTC E-file system, which will send notification of such filing to the following:

Donald S. Clark, Secretary
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Room H-159
Washington, D.C. 20580

I hereby certify that the undersigned has this date served copies of the foregoing upon all parties to this cause by electronic mail as follows:

William L. Lanning
Bureau of Competition
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Room NJ-6264
Washington, D.C. 20580
wlanning@ftc.gov

Melissa Westman-Cherry
Bureau of Competition
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
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westman@ftc.gov

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Richard B. Dagen
Bureau of Competition
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Room H-374
Washington, D.C. 20580
rdagen@ftc.gov

I also certify that I have sent courtesy copies of the document via Federal Express and electronic mail to:

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue N.W.
Room H-113
Washington, D.C. 20580
oalj@ftc.gov

This the 14th day of January, 2011.

/s/ Alfred P. Carlton, Jr.
Alfred P. Carlton, Jr.

CERTIFICATION FOR ELECTRONIC FILING

I further 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 by the adjudicator.

/s/ Alfred P. Carlton, Jr.
Alfred P. Carlton, Jr.



**Good Faith Communications Between Counsel
Regarding Discovery Issues**

Date	Time	Place	Sender	Other Communicants	Type of Conference	Description
1/5/11	11:34am	n/a	A.P. Carlton; Kathy Gloden	Bill Lanning; Richard Dagen; Noel Allen; Jack Nichols; Jackson Nichols	Email	Respondent demand for sufficient discovery responses
1/6/11	10:30am	n/a	Bill Lanning	A.P. Carlton	Telephone	Response to discovery demand; proposal for conference call
1/6/11	9:30pm	n/a	A.P. Carlton	Noel Allen; Jack Nichols; Kathy Gloden	Telephone	Discussion re Lanning response to discovery demand
1/7/11	6:14pm	n/a	Michael Bloom; Bill Lanning	A.P. Carlton; Richard Dagen; Noel Allen; Jack Nichols	Email	Proposal to discuss new Complaint Counsel demand for additional discovery responses during conference call
1/7/11	8:14pm	n/a	A.P. Carlton	Bill Lanning; Noel Allen; Jack Nichols; Michael Bloom; Richard Dagen	Email	Clarification re scope of conference call
1/8/11	10:06am	n/a	A.P Carlton	Bill Lanning	Email (no response)	Discussion re trial stipulation
1/8/11	11:25am	n/a	A.P. Carlton	Bill Lanning	Email (no response)	Preparation for call
1/8/11	1:46pm	n/a	A.P Carlton	Bill Lanning	Email (no response)	Discussion re expert witness transcripts
1/8/11	10:21pm	n/a	A.P. Carlton	Bill Lanning; Noel Allen; Mary Hulett	Email (no response)	Discussion re Perry Newson declarations
1/9/11	11:13am	n/a	A.P. Carlton	Bill Lanning	Email (no response)	"Confidential: Reply Requested"
1/9/11	11:37am	n/a	A.P. Carlton	Bill Lanning	Email (no response)	"Response Please-Good Faith Negotiation"
1/9/11	2:11pm	n/a	A.P. Carlton	Bill Lanning; Noel Allen; Jack Nichols; Kathy Gloden	Email (no response)	"Urgent: 10am Tuesday call-in"
1/9/11	8:44pm	n/a	A.P. Carlton	Bill Lanning; Noel Allen; Jack Nichols; Kathy Gloden	Email (no response)	"ALJ Conference -Your Call"

Date	Time	Place	Sender	Other Communicants	Type of Conference	Description
1/9/11	9:16pm	n/a	Bill Lanning	A.P. Carlton; Noel Allen; Jack Nichols; Richard Dagen; Michael Bloom; Melissa Westman-Cherry	Email	Disagreement re scope of conference call
1/9/11	9:21pm	n/a	A.P. Carlton	Bill Lanning	Email (no response)	Balmer Depositions; offer to discuss scope of conference call by phone
1/9/11	10:20pm	n/a	A.P. Carlton	Bill Lanning; Richard Dagen; Michael Bloom; Melissa Westman-Cherry; Noel Allen; Jack Nichols	Email (no response)	Clarification re scope of conference call
1/9/11	10:25pm	n/a	A.P. Carlton	Bill Lanning	Email (no response)	Further offer to discuss scope of conference call by phone
1/10/11	8:18am	n/a	A.P. Carlton	Bill Lanning; Noel Allen; Jack Nichols	Email (no response)	Request by Respondent for responses to previous emails sent to Complaint Counsel
1/10/11	10:00am	n/a	A.P. Carlton	Bill Lanning; Richard Dagen; Noel Allen; Jack Nichols; Jackson Nichols; Brie Allen; Catherine Lee	Email (no response)	FTC technical difficulties; prompt response requested
1/10/11	1:48pm	n/a	A.P. Carlton	Bill Lanning; Richard Dagen; Noel Allen; Jack Nichols	Email	Response to Complaint Counsel discovery demand
1/10/11	3:28pm	n/a	A.P. Carlton	Bill Lanning; Richard Dagen; Melissa Westman-Cherry; Michael Bloom; Noel Allen; Jack Nichols; Jackson Nichols; Kathy Gloden	Email	Scope of conference call

Date	Time	Place	Sender	Other Communicants	Type of Conference	Description
1/10/11	6:08pm	n/a	A.P. Carlton	Bill Lanning; Richard Dagen; Michael Bloom; Melissa Westman-Cherry; Noel Allen; Jack Nichols; Jackson Nichols; Catherine Lee; Brie Allen	Email	List of attorneys on conference call
1/10/11	8:20pm	n/a	Michael Bloom	A.P. Carlton; Noel Allen; Jack Nichols; Melissa Westman-Cherry; Bill Lanning; Richard Dagen	Email	Complaint Counsel demand for agreement as pre-condition to conference call
1/10/11	9:28pm	n/a	A.P. Carlton	Bill Lanning; Richard Dagen; Michael Bloom; Melissa Westman-Cherry; Noel Allen; Jack Nichols	Email	Clarification re demand for agreement as pre- condition to conference call
1/10/11	9:30pm	n/a	Richard Dagen	A.P. Carlton; Bill Lanning; Noel Allen; Jack Nichols; Melissa Westman-Cherry; Michael Bloom	Email	Confirmation that demand for agreement is pre-condition to conference call
1/11/11	8:11am	n/a	Bill Lanning	A.P. Carlton	Email	Baumer Transcripts
1/11/11	8:33am	n/a	A.P. Carlton	Bill Lanning	Email	Responding to 8/11/11 call
1/11/11	9:37am	n/a	A.P. Carlton	Bill Lanning; Richard Dagen; Noel Allen; Jack Nichols	Email	Operational status of FTC email
1/11/11	9:49am	n/a	A.P. Carlton	Richard Dagen; Bill Lanning; Melissa Westman-Cherry; Michael Bloom; Noel Allen; Jack Nichols; Catherine E. Lee; Brie Allen; Jackson Nichols; Kathy Gloden	Email	Declaration of impasse due to demand for agreement as pre- condition to conference call

Date	Time	Place	Sender	Other Communicants	Type of Conference	Description
1/11/11	9:58am	n/a	A.P. Carlton	Bill Lanning; Richard Dagen	Email	No longer need conference call; other topics need to be discussed
1/11/11	10:22am	n/a	Bill Lanning	Richard Dagen; Bill Lanning; Melissa Westman-Cherry; Michael Bloom; Noel Allen; Jack Nichols; Catherine E. Lee; Brie Allen; Jackson Nichols; Kathy Gloden	Email	Discussion re impasse
1/11/11	10:30am	n/a	A.P. Carlton	Richard Dagen; Bill Lanning; Melissa Westman-Cherry; Michael Bloom; Noel Allen; Jack Nichols; Catherine E. Lee; Brie Allen; Jackson Nichols; Kathy Gloden	Email	Discussion re impasse
1/11/11	10:43am	n/a	Bill Lanning	A.P. Carlton; Noel Allen; Jack Nichols; Catherine E. Lee; Brie Allen; Jackson Nichols; Kathy Gloden; Richard Dagen; Melissa Westman-Cherry; Michael Bloom	Email	Discussion re impasse
1/11/11	11:02am	n/a	A.P. Carlton	Richard Dagen; Bill Lanning; Melissa Westman-Cherry; Michael Bloom; Noel Allen; Jack Nichols; Catherine E. Lee; Brie Allen; Jackson Nichols; Kathy Gloden	Email	Discussion re impasse

Date	Time	Place	Sender	Other Communicants	Type of Conference	Description
1/11/11	11:15am	n/a	n/a	A.P. Carlton; Jack Nichols; Bill Lanning; Michael Bloom	Telephone	Discussion re motion to compel and Respondent's offer to conduct alternate discussions
1/11/11	12:23pm	n/a	A.P. Carlton	Richard Dagen; Bill Lanning; Melissa Westman-Cherry; Michael Bloom; Noel Allen; Jack Nichols; Catherine E. Lee; Brie Allen; Jackson Nichols; Kathy Gloden	Email	Follow-up re motion to compel and Respondent's offer to conduct alternate discussions
1/11/11	1:10pm	n/a	Bill Lanning	Richard Dagen; Bill Lanning; Melissa Westman-Cherry; Michael Bloom; Noel Allen; Jack Nichols; Catherine E. Lee; Brie Allen; Jackson Nichols; Kathy Gloden	Email	Discussion re impasse
1/12/11	6:47am	n/a	A.P. Carlton	Richard Dagen; Bill Lanning; Melissa Westman-Cherry; Michael Bloom; Noel Allen; Jack Nichols; Catherine E. Lee; Brie Allen; Jackson Nichols; Kathy Gloden	Email	Discussion re impasse and alternative discussions
1/12/11	9:03am	n/a	A.P. Carlton	Richard Dagen; Bill Lanning; Melissa Westman-Cherry; Michael Bloom; Noel Allen; Jack Nichols; Catherine E. Lee; Brie Allen; Jackson Nichols; Kathy Gloden	Email	Discussion re impasse and offer of alternative discussions

Date	Time	Place	Sender	Other Communicants	Type of Conference	Description
1/12/11	11:00am	n/a	A.P. Carlton	Richard Dagen; Bill Lanning; Melissa Westman-Cherry; Michael Bloom; Noel Allen; Jack Nichols; Catherine E. Lee; Brie Allen; Jackson Nichols; Kathy Gloden	Email	Discussion re impasse and offer of alternative discussions
1/12/11	4:13pm	n/a	Bill Lanning	Richard Dagen; Bill Lanning; Melissa Westman-Cherry; Michael Bloom; Noel Allen; Jack Nichols; Kathy Gloden	Email	Rejection of Respondent offer to engage in alternative discussions
1/13/11	11:02am	n/a	A.P. Carlton	Richard Dagen; Bill Lanning; Melissa Westman-Cherry; Michael Bloom; Noel Allen; Jack Nichols; Catherine E. Lee; Brie Allen; Jackson Nichols; Kathy Gloden	Email	Discussion re impasse and reiteration of offer to engage in alternative discussions



-----Original Message-----

From: AP Carlton
Sent: Tuesday, January 11, 2011 9:49 AM
To: 'RDAGEN@ftc.gov'; 'wlanning@ftc.gov'
Cc: Noel Allen; Jack Nichols; 'MWESTMAN@ftc.gov'; 'mjbloom@ftc.gov'; Catherine E. Lee; Brie Allen; 'jackson.nichols@gmail.com'; Kathy Gloden
Subject: FTC Docket #9343: Declaration of Impasse

Gentlemen:

Based on the failure of Complaint Counsel to negotiate our Discovery Requests in good faith, we hereby declare an impasse.

In response to your email of last evening (see below), we can only say that we have continued to be available to negotiate in good faith and have actually been engaged in negotiating in good faith since making our Requests for Discovery on January 5, at all times leaving both parties unhampered by any restrictions on their respective rights to seek redress in appropriate circumstances.

Our declaration of impasse is based upon several indicators of Complaint Counsel's failure to negotiate in good faith. However, holding negotiations hostage to "such an agreement" as proposed by Complaint Counsel below is not negotiating in good faith in and of itself.

If you have any questions regarding these matters, I am available to discuss them with you.

There is no response necessary. However, due to recent FTC computer difficulties, we request that you do acknowledge receipt of this message.

Sincerely,

AP Carlton

----- Original Message -----

From: Dagen, Richard B. <RDAGEN@ftc.gov>
To: AP Carlton; Lanning, William <WLANNING@ftc.gov>
Cc: Noel Allen; Jack Nichols; Westman-Cherry, Melissa <MWESTMAN@ftc.gov>; Bloom, Michael <MJBLOOM@ftc.gov>
Sent: Mon Jan 10 21:30:03 2011
Subject: RE: Meet and Confer

Yes, it is correct.

Rick Dagen

From: AP Carlton [mailto:acarlton@allenpinnix.com]
Sent: Monday, January 10, 2011 9:28 PM

To: Lanning, William; Dagen, Richard B.
Cc: Noel Allen; Jack Nichols; Westman-Cherry, Melissa; Bloom, Michael
Subject: Immediate Response Requested: Re: Meet and Confer

Mr. Lanning and Mr. Dagen:

This inquiry is submitted to you in your capacity as co-lead Complaint Counsel.

Based on Mr. Bloom's email below, we conclude that your proceeding with our call set for tomorrow morning at 10am is expressly conditioned upon the parties reaching "such an agreement" as described by Mr. Bloom in the first paragraph of his email.

Is this conclusion correct?

A prompt response will be appreciated, and we believe, under the circumstances, in order.

AP Carlton

----- Original Message -----

From: Bloom, Michael <MJBLOOM@ftc.gov>

To: AP Carlton

Cc: Noel Allen; Jack Nichols; Westman-Cherry, Melissa <MWESTMAN@ftc.gov>; Lanning, William <WLANNING@ftc.gov>; Dagen, Richard B. <RDAGEN@ftc.gov>

Sent: Mon Jan 10 20:20:00 2011

Subject: Meet and Confer

Mr. Carlton:

I have been asked to reply to your email, below, on behalf of Complaint Counsel. We are generally amenable to the approach you have suggested, provided that it is agreed as follows: Neither party will declare impasse and file a motion to compel with respect to the other party's responses to requests for document production, interrogatories, and requests for admission until we have considered and reached a mutually acceptable agreement to produce or impasse on all of the outstanding discovery issues. Mr. Lanning included the need for such an agreement in his email to you of January 9 at 9:03 p.m. We believe that such an agreement will encourage fairness, flexibility, and speed in the resolution of all of our outstanding discovery issues. In addition, if we do reach an impasse on some of our outstanding discovery issues, it will enable Judge Chappell to make his rulings on any resulting motions with due appreciation for the entirety of the contested issues.

In addition, we must reserve our right to take up our issues in such order as we deem best.

You asked that we provide you with further information regarding the problems we have with your document production, i.e., the redacting and withholding of documents based on improper grounds. Mr. Lanning has discussed these concerns with you and your colleagues on several occasions, including in his letter to Mr. Allen of August 18, 2010, which I incorporate herein by reference. I refer you to that letter's Attachment A for a list of document redactions that we believe are improper. We plan on discussing those redactions with you during our "meet and confer," which will begin tomorrow at 10:00 a.m. Mr. Lanning's letter to Mr. Allen also identified exemplars of documents entirely withheld based on insufficient claims of privilege (see, e.g., notes 6, 9, 10, and 18 of that letter). To provide you with greater detail for our meet and confer, I am appending hereto a list of documents you have withheld entirely based on claims of privilege that we believe inadequate, together with a statement of at least some of the reasons each such claim of privilege is inadequate. In addition, our attachment identifies certain

documents by Bates number that were neither produced, nor identified as privileged in your privilege log, nor accounted for in your production log. We plan on discussing the identified documents that were withheld during our meet and confer, as well.

Last, in my earlier email to you identifying problems we have with respect to your responses to Complaint Counsel's Requests for Admission, I inadvertently left off of the list one item: in addition to the items listed, we plan on discussing your response to RFA 37, which is unresponsive and neither specifically admits, denies nor set forth reasons for the failure to admit or deny.

We look forward to speaking with you and your colleagues tomorrow. Thank you.

Michael Bloom
for Complaint Counsel

Michael Bloom
Assistant Director for Policy & Coordination
Bureau of Competition
Federal Trade Commission