UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

COMPLAINT COUNSEL'S RESPONSE TO RESPONDENT'S MOTION TO CHANGE HEARING LOCATION

I. INTRODUCTION

Nearly seven months after learning that the hearing in this matter was scheduled to take place in Washington, DC, and with only one month remaining before trial, Respondent filed its motion to change the hearing location to Raleigh, North Carolina. Respondent's motion should be denied. Taking into account the delay in the request, the imminence of the hearing date, the actual convenience of the parties and witnesses, and the applicable Commission and federal law precedent, the circumstances clearly weigh against a change of the hearing location. Respondent's motion was made far too late in the proceedings and far too close to the trial to be anything but an attempt to materially inconvenience Complaint Counsel's trial preparations.

II. BOTH LEGAL AND EQUITABLE PRINCIPLES MILITATE AGAINST MOVING THE HEARING LOCATION

The FTC Act grants the Commission the authority to set the time and place of the hearing when it issues the administrative complaint. 15 U.S.C. 45(b). A Commission Administrative Law Judge is authorized to change the hearing location pursuant to Federal Trade Commission

Rule of Practice 3.41(b). The ALJ makes the decision to change the hearing location "after balancing the interests of all the parties" in the proceeding.[1] "In choosing a hearing site, the ALJ [is] obligated to consider the convenience of the agency in addition to the convenience of respondents because the term 'parties' . . . includes agency parties."[2] The mere expense of attending trial in Washington, DC is not sufficient reason to change the hearing location, as "[e]very trial involves expenses which the parties would prefer not to incur."[3]

A. Respondent's Motion Should Be Denied Because Respondent Unaccountably Dithered in Filing the Motion, Complaint Counsel's Trial Preparation Will Be Disrupted, and the Alternative Location Is Inadequate

Respondent has known since issuance of the Complaint, on June 17, 2010, that trial was planned for Washington, DC. If Respondent wanted to address "undue hardships that Respondent may suffer" (Respondent's Motion to Change Hearing Location ¶ 1), Respondent could easily have raised the question of trial location as early as the initial pre-hearing conference. Respondent knew from the outset of this matter, given the prior Part 2 investigation, the Complaint, the Board's location, and its contemplated defenses, that many, if not most, witnesses would reside in North Carolina. Yet at the pre-hearing conference, Respondent did not even as hint at any possible interest in relocation of the trial from Washington, DC. In fact, the only mention by Respondent of anything having to do with the entire subject prior to mid

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[1] *In re Automotive Breakthrough Sciences, Inc.*, Nos. 9275-77, 1996 FTC LEXIS 336 (July 15, 1996) (Parker, ALJ) (Interlocutory Order); *see* Administrative Procedure Act, 5 U.S.C. § 554(b) ("In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.").

[2] *In re Porter & Dietsch, Inc.*, 90 F.T.C. 770, 1977 FTC LEXIS 11, at *212 n.37 (Commission Opinion).

[3] *In re Automotive Breakthrough Sciences, Inc.*, Nos. 9275-77, 1996 FTC LEXIS 336 (Parker, ALJ).

January was in a July 2010 telephone conversation with Complaint Counsel in which Respondent indicated only that a Board conference room was available in North Carolina should the parties want to conduct the hearing there. After that discussion, nothing was mentioned about changing the location until the day before Respondent filed its motion on January 14, 2011.

Respondent states in its motion that the original location of the hearing in Washington, DC was improper because, "[a]t the time that this location was selected, the witnesses to be called at trial had not been identified."[4] This is disingenuous. Respondent unquestionably knew from the moment it first considered the Commission's Complaint that the Board members and employees, and the persons excluded from the marketplace by Respondent's misconduct, would constitute many if not most of the witnesses at trial, and that all of them resided in North Carolina.[5] But even were that not so, Respondent has unaccountably delayed bringing this motion despite knowing exactly who those witnesses would be for almost five months. The initial exchange of proposed witness lists which Respondent received on August 24, 2010 verified that many or most witnesses would reside in North Carolina, but the Board did nothing to assert an interest in relocation of the trial. Complaint Counsel served its revised witness list on October 12, but still Respondent failed to do so much as signal any intent to seek to change the location of the hearing. Not even when Complaint Counsel served its final proposed witness list, on December 7, did Respondent raise the issue of changing trial location. From its late July

[4] (Respondent's Motion to Change Hearing Location ¶ 1)

[5] Indeed, to be solicitous of Respondent, Board members, employees and other persons located in North Carolina, Complaint Counsel held 28 of its 29 depositions in the Raleigh area. And yet, Respondent waited well-beyond even the close of discovery to bring its motion. Now, Respondent's motion comes far too late for its request to be practicably accommodated.

passing reference to the middle of January, Respondent did nothing at all, instead waiting until now when trial is a month away.

Respondent's decision to bring this motion at this time "all but ensured that their objection to the trial location would not be entertained until such time as a change in trial locations would be rendered extremely inconvenient and expensive to the government."[6] With respect to trial location, there is only one thing that is materially different now from 20 weeks ago, when initial witness lists were exchanged. The difference is the amount of disruption Respondent's motion would cause, to Complaint Counsel's trial preparations, to the administration of the Commission's affairs, and to Your Honor's pre-hearing and hearing schedule. Respondent's motion could have, and should have, been brought far earlier in this proceeding, at a time when Complaint Counsel and the Court would have had an orderly ability to assess the practicability of a move and plan for relocation of the trial from Washington, DC. Instead, Respondent brings its motion, without notable prior discussion, just over four weeks before the Hearing is to begin. This has to be understood for what it is: one in a series of last minute tactical efforts by Respondent to disrupt Complaint Counsel's trial preparations and this proceeding more generally.[7]

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[6] *In re Market Dev. Corp.*, 95 F.T.C. 100, 1980 FTC LEXIS 162, at *230-31 & n.13 (Commission Decision) (upholding a denial to change the trial location where the motion was brought within a month of trial); *see also In re Polypore Int. Inc.*, No. 9327 (F.T.C. March 24, 2009) (Chappell, ALJ) (Interlocutory Order) (denying Respondent's motion to change hearing location that was made only two months before trial and without the consent of Complaint Counsel), *available at* http://www.ftc.gov/os/adjpro/d9327/090324aljorddentrespmochangehearing.pdf

[7] *Cf. In re Home Shopping Network, Inc.*, No. 9272, 1996 FTC LEXIS 90 (Mar. 14, 1996) (Timony, ALJ) (Interlocutory Order) (noting that the period after discovery has ended is busy with preparation for trial and should not be interruption with a dilatory motion).

Respondent glibly indicates to Your Honor, without any elaboration, that "[t]here is sufficient courtroom space within which the hearing of this matter may be conducted in Raleigh, NC." (Respondent's Motion to Change Hearing Location ¶ 11) How reassuring. But this statement does nothing to inform Your Honor about the adequacy of the courtroom space its size, location, accessability, security, cost, whether it contains state-of-the-art trial technology comparable to the Commission courtroom, and so on.[8]

In addition, to move this proceeding to a location other than Washington, DC entails more than an abstract assertion that there is adequate courtroom space available. Complaint Counsel would have to locate and obtain secure, electronically inter-connected, and otherwise adequate trial preparation space, equipment, and material; locate and book extended-stay hotel space for its trial and support staff; relocate its staff; and perform myriad other transition tasks while simultaneously conducting crucial and time-consuming trial preparation activities. Respondent has had some seven months to accomplish similar preparations for trial in Washington, DC, and given that Washington, DC has at all times since issuance of the complaint been the designated trial location, Respondent either has prepared, or has been grossly remiss in failing to prepare, for trial in Washington, DC. Complaint Counsel has had no comparable reason or opportunity to prepare for trial in any location other than Washington, DC, the longstanding and only designated trial locale. And Your Honor would have to accomplish similar and other tasks in the under four weeks remaining until trial. The accomplishment of

[8] Even if Respondent was able to procure an acceptable courtroom it would still not justify a change in location. In *Polypore*, the ALJ rejected Respondent's motion to change the hearing location even though Respondent revealed the exact place and location of the courthouse, and boasted that it was "a $148 million dollar facility with high-tech courtrooms." Respondent's Motion to Set Hearing Location ¶ 13, *In re Polypore Int. Inc.*, No. 9327 (F.T.C. Mar. 13, 2009).

these tasks might well have been practicable had Respondent earlier initiated discussions and brought its motion within a reasonable period after it was able to assess its interest and that of others in relocating the trial. But it no longer is practicable.

Respondent has acted for tactical gain; not for any other reason. The incremental convenience to some witnesses cannot overcome the extreme prejudice to Complaint Counsel that relocation of the trial would now cause, nor can it make practicable making relocation arrangements with just a few weeks remaining before trial.[9] Had Respondent been moved by concern for "fairness" or "convenience," it would have acted months ago, as it surely could have. Respondent waited far too long, the relief it seeks now is impracticable, and any effort to impose it would be greatly prejudicial to Complaint Counsel and would compromise the orderly administration of justice. Because moving the trial at this late hour would severely prejudice Complaint Counsel, we respectfully urge that Respondent's motion be denied.

B. Respondent's Statements that North Carolina Is a More Appropriate Forum Are Unsupported and Inapplicable

Respondent made two other desultory arguments about why North Carolina is a more appropriate forum for this hearing. The first is that Respondent is a state agency of North Carolina. Respondent provides no reason why this should impact the location of the hearing,

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[9] Respondent points to the fact that 27 out of 37 witnesses are from North Carolina. Yet what Respondent fails to mention is that the 25 of 37 witnesses are not located in Raleigh, their proposed hearing location; all but 12 witnesses will have to travel to testify no matter where the hearing is located. Of those 12 witnesses, all but three are party witnesses. Respondent also asserts that Washington, DC is more expensive than Raleigh, and witnesses will have to pay more to testify if the hearing location is not moved. This is clearly nonsense; the parties bear the expense of transportation and housing, not the witnesses. The primary cost to witnesses is travel time and lost work, which may be similar for all non-party witnesses no matter where the hearing is located. Despite Respondent's protestations of witness inconvenience, all of Respondent's proposed witnesses apparently are planning to attend the hearing, and likely all have been planning to come to Washington, DC.

and for good reason: there is none. Second, Respondent points out that all the events being litigated occurred in North Carolina. But this is not about "contacts with the forum state." Because all documentary and testimonial evidence can readily be made available evidence in the Commission's Hearing Room in Washington, DC, that Hearing Room is a perfectly appropriate trial location. Respondent's argument is simply irrelevant.

Had Respondent's made this motion at the appropriate time Complaint Counsel would have been willing to consider a hearing location in Raleigh. As it stands, the great prejudice to Complaint Counsel of moving the hearing at this time far outweighs any gain in convenience for North Carolina based witnesses.

C. Respondent's Reliance on 28 U.S.C. § 1404 Is Incorrect Because the Statute Is Inapplicable to Commission Proceedings

Respondent cites two cases in its motion papers, apparently in an attempt to enlighten Your Honor as to the possible consequences of denying their motion.[10] There are at least three reasons why these cases are not applicable. First, both cases were based on 28 U.S.C. § 1404, which by its own terms is restricted to the federal "district courts."[11] Any precedent or legal theory based on that statute is simply not controlling for Commission hearings. Second, in both cases where the Fourth Circuit found an abuse of discretion for a refusal to transfer the case to another venue, all of the fact witnesses were based near or in the city to which removal was

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[10] Respondent, citing the two cases, warned that "a denial of a request to change the location of the proceedings under circumstances similar to those presented here [was considered an] abuse of discretion." (Respondent's Motion to Change Hearing Location ¶ 10.)

[11] 28 U.S.C. § 1404(a) ("For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.") (emphasis added)

sought.[12] This is a far cry from the present case, where the majority of witnesses are not based in Raleigh, and most live hours from that location. Last, a 1404 motion transfers a matter from one fully operational system to another the trier as well as the site of trial is changed; a 1404 transfer does not require a sitting judge to arrange for appropriate courtrooms, chambers, and other facilities in a distant locale, uproot together with books, gear, and clerks, and hear trial in an unfamiliar community, with minimal support, while living out of a suitcase. Because the cases cited by Respondent are neither legally or factually applicable, Complaint Counsel respectfully urges Your Honor to disregard them.

III. CONCLUSION

For the foregoing reasons, Complaint Counsel respectfully requests that Respondent's Motion to Change Hearing Location be denied.

Respectfully submitted,

s/ Richard B. Dagen
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Dated: January 19, 2011

[12] *See Akers v. Norfolk & W.R. Co.*, 378 F.2d 78, 79 (4th Cir. 1967) (stating that "all of the persons who witnessed the events of the plaintiff's injury reside within" a city near the court where removal was sought, approximately 15 miles away according to a Google search); *Southern Ry. Co v. Madden*, 235 F.2d 198, 200-01 (4th Cir. 1956) (emphasizing that "all of the witnesses [except one] to the occurrence and to the treatment of plaintiff in a Charlotte hospital following his injury live" in the city where removal was sought).

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[PROPOSED] ORDER DENYING RESPONDENT'S MOTION TO CHANGE HEARING LOCATION

On January 14, 2011, Respondent submitted a Motion to Change Hearing Location. Respondent seeks to set the location of the hearing in Raleigh, North Carolina.

On January 19, 2011, Complaint Counsel submitted its Response to Respondent's Motion to Change Hearing Location. Complaint Counsel opposes Respondent's request to move the hearing from the Federal Trade Commission in Washington, DC.

Upon consideration of the points raised in the motion and the opposition thereto, Respondent's motion is DENIED. The hearing in this matter will commence on February 17, 2011, in room 532, Federal Trade Commission Building, 600 Pennsylvania, Avenue, NW, Washington, DC 20580.

ORDERED:

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D. Michael Chappell
Administrative Law Judge

Date:

CERTIFICATE OF SERVICE

I hereby certify that on January 19, 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-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
Washington, DC 20580

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

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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.

Dated: January 19, 2011

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