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

In the Matter of	)	
The North Carolina Board of Dental Examiners, Respondent.	)	DOCKET NO. 9343

ORDER DENYING RESPONDENT'S APPLICATION FOR REVIEW OF ORDER DENYING RESPONDENT'S MOTION TO COMPEL DISCOVERY

I.

On January 24, 2011, Respondent filed an Application for Review of a Ruling Denying Respondent's Motion to Compel Discovery ("Application"). Complaint Counsel filed its Opposition to the Application on January 27, 2011 ("Opposition").

Having fully considered all arguments in the Application and Opposition, and as further discussed below, because Respondent has failed to meet any of the requirements of Commission Rule 3.23(b), the Application is DENIED.

II.

A. Standards for allowing application for review under Rule 3.23(b)

Respondent moves for interlocutory review pursuant to Commission Rule 3.23(b). That rule states:

> A party may request the Administrative Law Judge ["ALJ"] to determine that a ruling involves a controlling question of law or policy as to which there is substantial ground for difference of opinion and that an immediate appeal from the ruling may materially advance the ultimate termination of the litigation or subsequent review will be an inadequate remedy.

16 C.F.R. § 3.23(b). Interlocutory appeals are disfavored, as intrusions on the orderly and expeditious conduct of the adjudicative process. *In re Daniel Chapter One,* 2009 FTC LEXIS 111, *1 (May 5, 2009); *In Re Schering-Plough Corp.*, 2002 WL 31433937 (Feb. 12, 2002). Accordingly, the movant must satisfy a very stringent three-prong test by demonstrating that: (1) the ruling involves a controlling question of law or policy; (2) there is substantial ground for difference of opinion as to that controlling issue; *and* (3) immediate appeal from the ruling may materially advance the ultimate termination of the

litigation *or* subsequent review will be an inadequate remedy. 16 C.F.R. § 3.23(b); *In re Daniel Chapter One,* 2009 FTC LEXIS 111, *1-2; *In Re Automotive Breakthrough Sciences, Inc.*, 1996 FTC LEXIS 478, at *1 (Nov. 5, 1996); *In Re BASF Wyandotte Corp.*, 1979 FTC LEXIS 77, at *1 (Nov. 20, 1979).

B. The ruling for which interlocutory review is sought

By Order dated January 20, 2011, Respondent's Motion for an Order Compelling Discovery ("Motion to Compel") was denied ("January 20, 2011 Order"). Respondent's Motion to Compel, which argued that certain of Complaint Counsel's objections and responses to Respondent's discovery requests were insufficient, was filed on January 11, 2011. Respondent filed what it titled a "Supplemental Statement to Motion for an Order Compelling Discovery" ("Supplemental Statement") on January 18, 2011.

The January 20, 2011 Order denied Respondent's Motion to Compel due to Respondent's failure to comply with the express terms of Commission Rule 3.22(g). As stated in the January 20, 2011 Order, Commission Rule 3.22(g) requires:

> [E]ach motion to compel or determine sufficiency pursuant to § 3.38(a) . . . shall be accompanied by a signed statement representing that counsel for the moving party has conferred with opposing counsel in an effort in good faith to resolve by agreement the issues raised by the motion and has been unable to reach such an agreement. . . . The statement shall recite the date, time, and place of each such conference between counsel, and the names of all parties participating in each such conference. Unless otherwise ordered by the Administrative Law Judge, the statement required by this rule must be filed only with the first motion concerning compliance with the discovery demand at issue.

16 C.F.R. § 3.22(g).

The January 20, 2011 Order held:

> Respondent's Motion to Compel was not accompanied by the required signed statement. Instead, several days after submitting the Motion to Compel, Respondent submitted a "Supplemental Statement" attaching a chart summarizing the date, time, and place of communications with Complaint Counsel and the names of the parties involved in each such communication. Rule 3.22(g) is not vague and does not contemplate nor allow a supplement or amendment to an already-filed motion.

January 20, 2011 Order at 2. In addition, the January 20, 2011 Order noted that Additional Provision 4 of the Scheduling Order in this case requires that:

> Each motion (other than a motion to dismiss or a motion for summary decision) shall be accompanied by a signed statement representing that

> counsel for the moving party has conferred with opposing counsel in an effort in good faith to resolve by agreement the issues raised by the motion and has been unable to reach such an agreement. Motions that fail to include such statement may be denied on that ground.

January 20, 2011 Order at 2.

Thus, the January 20, 2011 Order concluded:

> the parties were on notice that failure to include the required statement with a motion to compel could result in denial of such motion on that basis alone. Respondent failed to comply with the unequivocal requirements of Rule 3.22(g). Accordingly, Respondent's motion is denied and a determination of other issues presented need not and will not be made.

January 20, 2011 Order at 2-3.

III.

A. The January 20, 2011 Order does not involve a controlling question of law or policy as to which there is substantial ground for difference of opinion

Respondent argues that the ruling in the January 20, 2011 Order "that Rule 3.22(g) 'is not vague and does not contemplate nor allow a supplement or amendment to an already-filed motion . . .', reads a simultaneity requirement into the language of Rule 3.22(g), which states that 'each motion to compel or determine sufficiency pursuant to 3.38(a) . . . shall be **accompanied** by a signed statement representing that counsel for the moving party has conferred with opposing counsel . . . ." Application at 2 (quoting January 20, 2011 Order at 2, emphasis in Application). Respondent then argues that the January 20, 2011 Order assumes that "accompany" means "immediately with" or "accompany at the same time." Application at 2-3. Respondent urges that "accompany" has been defined as "to be in association with," which does not suggest simultaneity.

Respondent's assertions in this regard completely ignore the clear and unambiguous language of Rule 3.22(g), that the required signed statement "must be filed only **with** the first motion concerning compliance with the discovery demand at issue." 16 C.F.R. § 3.22(g) (emphasis added). It is undisputed that the Supplemental Statement was not filed "with" the Motion to Compel. Thus, the simultaneity requirement is expressly provided by Rule and the Order required no "interpretation" of the Rule to reach the challenged result.

For further clarification, common definitions of "accompany" are:

> "To go along with (another); to attend." *Black Law's Dictionary* 18 (9th ed. 2009).

> "To go or occur with: attend." *Merriam-Webster's Dictionary & Thesaurus* 8 (2006).
>
> "[To] go somewhere with someone; 2: be present or occur at the same time as." *Pocket Oxford American Dictionary* 5 (2nd ed. 2008).

Under the plain language of the Rule and commonly accepted definitions, the January 20, 2011 Order does not involve a question of law or policy as to which there is substantial ground for difference of opinion. To be sure, Rule 3.22(g) requires the signed statement to be prepared and filed with a motion to compel to ensure that the parties have in fact conferred and negotiated in good faith in an attempt to resolve their discovery dispute before any motion to compel is filed. Good faith negotiations often obviate the need to file such a motion. Applying any other definition of "accompany," however contrived, vitiates the good faith negotiation requirement of the Rule.

Further, to establish substantial ground for difference of opinion, a party seeking certification must show that a controlling legal question involves novel or unsettled authority. *In re Daniel Chapter One,* 2009 FTC LEXIS 111, *2; *Int'l Assoc. of Conf. Interpreters*, 1995 FTC LEXIS 452, at *5. *See also Fed'l Election Comm'n v. Club for Growth, Inc.*, No.: 5-851 (RMU), 2006 U.S. Dist. LEXIS 73933 (D.D.C. Oct. 10, 2006) (stating that "one method for demonstrating a substantial ground for difference of opinion is 'by adducing conflicting and contradictory opinions of courts which have ruled on the issue'"). Based upon a reading of the Rule and the plain language of the above listed, commonly accepted sources, it is clear that the definition of "accompany" does not involve novel or unsettled authority. Instead, it is clear that "accompany" means together or at the same time. Thus, whether or not the required 3.22(g) statement must be filed at or near the same time as the Rule 3.38 motion does not present a question of law or policy as to which there is substantial ground for difference of opinion.

In addition, to establish a "substantial ground" for difference of opinion under Rule 3.23(b), "a party seeking certification must make a showing of a likelihood of success on the merits." *In re Daniel Chapter One,* 2009 FTC LEXIS 111, *6 (citing *Int'l Assoc. of Conf. Interp.*, 1995 FTC LEXIS 452, *4-5 (Feb. 15, 1995); *BASF Wyandotte Corp.*, 1979 FTC LEXIS 77, *3 (Nov. 20, 1979) (stating that the substantial ground for difference of opinion test "has been held to mean that appellant must show a probability of success on appeal of the issue.")). In the face of the unambiguous language of Rule 3.22(g) and the plain meaning of "accompany," Respondent has also not shown a likelihood of success on the merits.

Moreover, the January 20, 2011 Order does not present a "controlling" question of law or policy. A "controlling" question of law or policy has been defined as "'not equivalent to merely a question of law which is determinative of the case at hand. To the contrary, such a question is deemed controlling only if it may contribute to the determination, at an early stage, of a wide spectrum of cases.'"); *In re Hoechst Marion Roussel, Inc.*, 2000 FTC LEXIS 155, *19 (Oct. 17, 2000) (quoting *In re Automotive*

Breakthrough Sciences, Inc., 1996 FTC LEXIS 478, *1 (Nov. 5, 1996)). Procedural disputes and discovery disputes do not amount to controlling questions of law. *In re Suburban Propane Gas Corp.*, 74 F.T.C. 1602, *9; 1968 FTC LEXIS 277 (Sept. 20, 1968) (denying request for interlocutory review concerning prehearing discovery on grounds that appeals concerning "issues relating to procedural details . . . concern prehearing discovery or procedure and thus are subject to the wide discretion of the hearing examiner"[1]); *In re Hoechst Marion Roussel, Inc.*, 2000 FTC LEXIS 155, *19 (Oct. 17, 2000) ("discovery ruling does not involve a controlling question of law or policy"). The January 20, 2011 Order was a procedural ruling, relating to a discovery motion, and therefore does not present a controlling question of law or policy.

Respondent states that the ALJ had discretionary authority to permit the motion and "draws the ALJ's attention to the discretionary language of Rule 3.22(g) and the Scheduling Order." Application at 5. Rule 3.22(g) provides: "[u]nless otherwise ordered by the Administrative Law Judge, the statement required by this rule must be filed only with the first motion concerning compliance with the discovery demand at issue." Respondent argues that the ALJ may exercise his discretion in this matter, and is not obliged to rule against Respondent based on the timeliness requirement. Denying the Motion to Compel was an exercise of the ALJ's discretion.

This exercise of discretion does not provide grounds for interlocutory appeal. Indeed, the Commission, in reviewing issues which "concern[ed] the hearing examiner's prehearing rulings relating to discovery and discovery procedures," held: "[t]he Commission's policy . . . , frequently stated in Commission opinions, is that the hearing examiner has a broad discretion therein and the Commission will not interfere with his rulings short of a showing of an abuse of such discretion." *In re Suburban Propane Gas Corp.*, 74 F.T.C. 1602; 1968 FTC LEXIS 277, *3 (Sept. 20, 1968). "The resolution of discovery issues, as a general matter, should be left to the discretion of the ALJ." *In re Gillette Co.*, 98 F.T.C. 875, 875; 1981 FTC LEXIS 2, *1 (Dec. 1, 1981); *In re Hoechst Marion Roussel, Inc.*, 2000 FTC LEXIS 155, *19 (Oct. 17, 2000).

For the above stated reasons, Respondent has not demonstrated that the January 20, 2011 Order involves a controlling question of law or policy as to which there is substantial ground for difference of opinion.

B. An immediate appeal from the January 20, 2011 Order would not materially advance the ultimate termination of the litigation and subsequent review would not be an inadequate remedy

Respondent also has not demonstrated that immediate appeal from the ruling may materially advance the ultimate termination of the litigation or that subsequent review will be an inadequate remedy. Although the ruling for which Respondent seeks appeal is that Respondent failed to comply with Rule 3.22(g), the underlying motion was

[1] The title of the presiding officer was changed from "Hearing Examiner," to "Administrative Law Judge," in 1970. *In re Adolph Coors Co.*, 83 F.T.C. 32; 1973 FTC LEXIS 226 (July 24, 1973) (citations omitted).

Respondent's Motion to Compel Further Discovery Responses. Even if Respondent had complied with Rule 3.22(g) and Respondent's Motion to Compel had been considered and denied on the merits, a review of such a denial would not materially advance the ultimate termination of the litigation. *See In re Hoechst Marion Roussel, Inc.*, 2000 FTC LEXIS 155, *20 ("It is clear that an appeal of the discovery ruling at issue would not materially advance the ultimate termination of the litigation. Such a construction would make every ruling in every case appealable as to the relevance and propriety of any areas of discovery allowed by an administrative law judge. 'This would negate the general policy that rulings on discovery, absent an abuse of discretion, are not appealable to the Commission.'"); *In re Exxon Corp.*, 1978 FTC LEXIS 89, * 12 (Nov. 24, 1978). Indeed, for that reason, the Commission "generally disfavor[s] interlocutory appeals, particularly those seeking Commission review of an ALJ's discovery rulings." *In re Gillette Co.*, 98 F.T.C. 875, 875; 1981 FTC LEXIS 2, * 1 (Dec. 1, 1981); *In re Hoechst Marion Roussel, Inc.*, 2000 FTC LEXIS 155, *18-19.

Although the January 20, 2011 Order did not decide whether Complaint Counsel's claims of privilege were "dubious," as challenged by Respondent, even if the January 20, 2011 Order had denied Respondent access to documents on the basis that the documents had been properly withheld, such a ruling, even if erroneous, would also fail to provide a basis for interlocutory appeal. In *In re Exxon Corp.*, 1981 FTC LEXIS 112, *4-5 (Feb. 13, 1981), the ALJ held that Respondents failed to show that an immediate ruling allowing discovery of documents withheld on privilege grounds "would materially advance termination of the case or render inadequate subsequent review" because the documents had been listed on a privilege log and preserved, and therefore would be available if, on subsequent review of a final order, a court decided to order the Commission to take additional evidence. *See also Mohawk Indus., Inc. v. Carpenter*, 130 S. Ct. 599, 609 (2009) ("In sum, we conclude that the collateral order doctrine does not extend to disclosure orders adverse to the attorney-client privilege. Effective appellate review can be had by other means.").

For the above stated reasons, Respondent has not demonstrated that an immediate appeal from the January 20, 2011 Order would materially advance the ultimate termination of the litigation or that subsequent review would be an inadequate remedy.

C. Other issues raised by Respondent are not relevant to an application for review

Respondent raises several other arguments which are not relevant to a ruling on an application for interlocutory review under Rule 3.23(b). Those arguments follow in the order in which they were raised.

Respondent states that its Motion to Compel was accompanied by a statement set forth on page two that "counsel for the moving party conferred with opposing counsel in a good faith effort to resolve the issues" and that the pleading containing this statement was signed. The ALJ considered the statement and determined, for the reasons set forth in the January 20, 2011 Order and repeated herein, that that statement was insufficient to

fulfil all the requirements of Rule 3.22(g). The fact that Respondent subsequently filed its "Supplemental Statement," attaching a chart that summarized the date, time, and place of communications with Complaint Counsel and the names of the parties involved in each such communication, indicates that Respondent was aware that the Rule requires more than the statement Respondent included in its Motion to Compel.

Respondent argues that it was denied its due process right to confront a witness because it was denied the opportunity to respond to claimed misrepresentations and omissions made by Complaint Counsel in Complaint Counsel's description of the parties' negotiations, through either a reply or a hearing. This argument is immaterial because the January 20, 2011 Order did not address or attempt to resolve issues concerning the parties' pre-motion negotiations. More importantly, however, whether or not Respondent was denied the claimed right to rebut Complaint Counsel's representations is immaterial to the determination herein that the Application for Review of the January 20, 2011 Order does not meet the standards for interlocutory review. Accordingly, such arguments are not considered or evaluated.

Respondent contends that the January 20, 2011 Order "mistakenly" asserted that the Supplemental Statement was filed on January 18, 2011, and that it was "timely filed" on January 14, 2011. In support of its argument, Respondent attaches, as Exhibit 2 to its Application, a "Confirmation of E-Filing Submission" ("Confirmation"). The date on which the Confirmation was printed, located on the bottom of the Confirmation, is January 14, 2011. But, the Confirmation itself does not show the time or date on which the Supplemental Statement was received for filing by the Office of the Secretary. In fact, as shown by the attached "Review Filing" (Exhibit 1 to this Order), Respondent's Supplemental Statement was received at 5:33 p.m. on January 14, 2011. Commission Rule 4.3(d) states: "[d]ocuments must be received in the office of the Secretary of the Commission by 5:00 p.m. Eastern time to be deemed filed that day. Any documents received by the agency after 5:00 p.m. will be deemed filed the following business day." 16 C.F.R. § 4.3(d). Consistent with the Rule, Exhibit 1 shows a "Filed Date" for the Supplemental Statement of January 18, 2011. Accordingly, the January 20, 2011 Order did not "mistakenly state that Respondent's Supplemental Statement was filed on January 18, 2011," as Respondent avers. Even if Respondent's Supplemental Statement was deemed filed on January 14, 2011, the Supplemental Statement was not filed with the January 11, 2011 Motion to Compel, as specifically required by Rule 3.22(g).

Respondent also argues that the January 20, 2011 Order was arbitrary and capricious and a violation of fundamental notions of fairness, especially given the ALJ's discretion. Again, whether a decision is arbitrary and capricious is not the correct inquiry in evaluating an application for interlocutory review. As stated above, the ALJ has discretion in discovery matters and the Commission will not interfere with ALJ rulings on discovery short of a showing of an abuse of such discretion. *In re Suburban Propane Gas Corp.*, 74 F.T.C. 1602; 1968 FTC LEXIS 277, *3 (Sept. 20, 1968); *In re Gillette Co.*, 98 F.T.C. 875, 875; 1981 FTC LEXIS 2, *1 (Dec. 1, 1981). In view of the plain language of Rule 3.22(g) and the meaning of the word "accompany," as described above, a ruling that a statement filed several days after the original motion did not comply with Rule

3.22(g) is not an abuse of discretion.

IV.

Respondent has failed to meet any of the requirements of Rule 3.23(b). After full consideration of Respondent's Application and Complaint Counsel's Opposition, and having fully considered all arguments and contentions therein, Respondent's Application is DENIED.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: February 1, 2011

EXHIBIT 1

Review Filing

Filing Details

Docket Number	D09343
Matter Name	The North Carolina Board of Dental Examiners
Submission Number	D09343-a525d553-87fe-4747-ae8c-e1d913ef4596
Received Date	01/14/2011 05:33 PM
Filed Date	01/18/2011
Filer Document Title	Supplemental Statement to Respondent's Motion for an Order Compelling Disc
Relevant Party	Bobby White;N.C. State Board of Dental Examiners;N.C. State Board of Dental Examiners;N.C. State Board of Dental Examiners;N.C. State Board of Dental Examiners
Document Type	
Filer Name	Noel Allen
Remarks	
Status	
Document (Original)	**2011-0114 Supplemental Statement to Respondents Motion for an Order Compelling Discovery_orig.pdf**
Document (Copy)	**2011-0114 Supplemental Statement to Respondents Motion for an Order Compelling Discovery_copy.pdf**

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