UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

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

COMPLAINT COUNSEL'S MEMORANDUM IN OPPOSITION TO RESPONDENT'S MOTION FOR RECONSIDERATION OF THE ORDER DENYING EXPEDITED MOTION FOR A LATER HEARING DATE

I. INTRODUCTION

On January 24, 2011, Respondent continued its recent deluge of motions by filing a motion for Reconsideration of the Commission's Order denying Respondent's motion for a new hearing date. In keeping with its recent tactic, Respondent points to the pendency of its various prior motions as the primary justification for reconsideration and grant of its motion to change the hearing date. However, Respondent has neither articulated nor met the appropriate standard for a motion for reconsideration, and cannot point to any new law, fact, or omission that would justify reconsideration of its Expedited Motion for a Later Hearing Date. Accordingly, Respondent's Motion for Reconsideration of the Order Denying Expedited Motion for a Later Hearing Date ("Motion for Reconsideration") should be denied.

II. RESPONDENT FAILED TO DEMONSTRATE THAT RECONSIDERATION IS WARRANTED

"Motions for reconsideration should be granted only sparingly."[1] Respondent failed to acknowledge, let alone meet, the substantial burden on a movant for reconsideration. As the Commission explains in connection with final decisions, reconsideration motions will be "confined to new questions . . . upon which the petitioner had no opportunity to argue before the Commission." *Cf.* Rule 3.55. "Reconsideration motions are not intended to be opportunities 'to take a second bite at the apple' and relitigate previously decided matters,"[2] and "may not be used to rehash rejected arguments."[3]

In order to meet its "heavy burden,"[4] Respondent must show (1) a material difference in fact or law from that presented to the court before such decision, that in the exercise of reasonable diligence could not have been known to the moving party; (2) the emergence of new material facts or a change of law occurring after the time of such decision; or (3) a manifest showing of a failure to consider material facts presented to the court before such decision.[5]

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[1] *In re Basic Research*, No. 9318, 2006 FTC LEXIS 7, at *6 (Feb. 21, 2006).

[2] *In re Intel Corp.*, No. 9341, 2010 FTC LEXIS 47, at *4 (May 28, 2010) (citing *In re Daniel Chapter One*, No. 9329, 2009 WL 569722, at *2 (Feb. 23, 2009); *In re Rambus Inc.*, No. 9302, 2003 FTC LEXIS 49, at *12 (Mar. 26, 2003)).

[3] *In re Intel Corp.*, 2010 FTC LEXIS 47, at *5 *(citing In re Daniel Chapter One*, 2009 WL 569722, at *2; *LeClerc v. Webb*, 419 F.3d 405, 412 n.13 (5th Cir. 2005); *Caisse Nationale de Credit Agricole v. CBI Indus.*, 90 F.3d 1264, 1270 (7th Cir. 1996)).

[4] *In re Basic Research*, 2006 FTC LEXIS 7, at *6.

[5] *In re Intel Corp.*, 2010 FTC LEXIS 47, at *4; *In re Daniel Chapter One*, 2009 WL 569722, at *1-2; *In re Int'l Ass'n of Conference Interpreters*, No. 9270, 1996 FTC LEXIS 126, at *1 (Apr. 12, 1996); *In re Champion Spark Plug Co.*, No. 9141, 1981 FTC LEXIS 119, at *1 (Nov. 18, 1981). Citing the federal standard, some ALJ decisions have held that a motion for reconsideration should only be granted where "(1) there has been an intervening change in controlling law; (2) new evidence is available; or (3) there is a need to correct clear error or

Respondent advances two grounds for reconsideration: (1) the Commission's "manifest failure to consider material facts," that is presumably the Commission's failure to understand the facts previously presented to it; and (2) the "emergence of new material facts." These claims are contrived and false.

A. Respondent Has Not Shown that the Commission Manifestly Failed to Consider Material Facts

In its Order denying Respondent's motion for a later hearing date, the Commission stated that "Respondent has not given the Commission any reason to depart from our preference to move Part 3 matters expeditiously."[6] Despite this plain statement, Respondent asserts that the Commission failed to take into account every "new" fact that Respondent listed in its memorandum, namely: (1) Respondent's "pending" motion to amend the scheduling order;[7] (2) Respondent's "pending" motion to change the hearing location and the uncertainty and expense it was presenting to party witnesses;[8] (3) the pending dispositive motions before the Commission; (4) the "fact" that discovery was still ongoing; (5) Respondent's motion to compel discovery, denied by the ALJ the day before the Commission's Order; and (6) the ongoing discovery disputes between Respondent and Complaint Counsel.[9]

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manifest injustice." *In re Rambus Inc.*, No. 9302, 2003 FTC LEXIS 78, at *2 (May 29, 2003); *see also In re Basic Research*, No. 9318, 2006 FTC LEXIS 18, at *10-11 (Feb. 21, 2006); *In re Evanston Northwestern Healthcare Corp.*, No. 9315, 2005 FTC LEXIS 177, at *3 (May 10, 2005).

[6] Order Denying Expedited Motion for a Later Hearing Date, No. 9343, at 2 (Jan. 21, 2011) (Commission Interlocutory Order).

[7] This motion was subsequently denied by the ALJ. *See* Order Denying Respondent's Expedited Motion to Amend the Scheduling Order, No. 9343 (Jan. 25, 2011).

[8] This motion was subsequently denied by the ALJ. *See* Order Denying Respondent's Motion to Change Hearing Location, No. 9343 (Jan. 25, 2011).

[9] Respondent's Memorandum in Support of Its Motion for Reconsideration, at 2-5.

Respondent's argument is unpersuasive. First, in its Order the Commission directly addressed Respondent's arguments regarding the pending dispositive motions, the motion to compel, and the ongoing discovery disputes.[10] Far from "manifestly failing to consider material facts," the Commission stated that "none of these circumstances provides any support for the requisite showing of good cause."[11] A motion for reconsideration is not intended to be used to "request that a court rethink a decision already made,"[12] and yet that is exactly what Respondent has done.

Second, Respondent appears to confuse the Commission's lack of discussion of some of Respondent's arguments with a "manifest failure to consider" those arguments. Although the Commission did not directly address Respondent's arguments regarding the (then) pending motion to amend the Scheduling Order and the (then) pending motion to change the hearing location, the Commission clearly stated that "Respondent has not given the Commission any reason to depart from our preference to move Part 3 matters expeditiously." Respondent has cited no precedent mandating that the Commission recount in precise detail all the reasons that it has decided to deny a motion, or address every argument that Respondent made, even those the Commission considers frivolous. Under the Rules of Practice, the Commission has the discretion to change the hearing date from that set in the Complaint upon a showing of good cause, Rules 3.21(c)(1), 3.41(b), but good cause was not established by Respondent.

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[10] Order Denying Expedited Motion for a Later Hearing Date, No. 9343, at 2 (Jan. 21, 2011) (Commission Order).

[11] *Id.*

[12] *In re Blood Reagents Antitrust Litig.*, No. 09-2081, 2010 U.S. Dist. LEXIS, at *3-4 (E.D. Pa. Dec. 14, 2010) ("It is improper on a motion for reconsideration to ask the Court to rethink what it had already thought through — rightly or wrongly.") (*citing Glendon Energy Co. v. Borough of Glendon*, 836 F. Supp, 1109, 1122 (E.D. Pa. 1993)).

Third, Respondent simply has not demonstrated that the Commission displayed a "manifest failure" to consider any law or fact in its Order, such as where "the Court has patently misunderstood a party, or has made a decision outside the adversarial issues presented to the Court by the parties, or has made an error not of reasoning but of apprehension."[13] Thus, a court will deny reconsideration where the alleged manifest failure is that the ALJ did not specifically address the issues raised by the movant in the court's original order.[14] Similarly, a reconsideration motion will be denied where the court's purported error involves condensing discussion and rejecting the movant's "material" facts in a footnote.[15] The Commission's Order closely resembles both these examples, and has no resemblance to situations where courts grant reconsideration motions.[16] The Commission identified the correct standard – good cause – and held that the standard was not met by "any" of Respondent's arguments. Respondent has not

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[13] *Brambles USA, Inc. v. Blocker*, 735 F. Supp. 1239, 1241 (D. Del. 1990) (citation omitted). Reconsideration under this rule may be appropriate where "the court mistakenly overlooked facts or precedent which, had they been considered, might reasonably have altered the result, or where reconsideration is necessary to remedy a clear error or to prevent manifest injustice." *In re Daniel Chapter One*, 2009 WL 569722, at *2. *Cf. Payne v. DeLuca*, No. 2:02-cv-1927, 2006 U.S. Dist. LEXIS 89251, at *6 (W.D. Pa. Dec. 11, 2006) ("Where the moving party argues that the court overlooked certain evidence or controlling decisions of law which were previously presented, a court should grant a motion for reconsideration only if the matters overlooked might reasonably have resulted in a different conclusion.")

[14] *In re Daniel Chapter One*, 2009 WL 569722, at *2-4 ("[A]n order's mere silence on a contention cannot reasonably be equated with a 'manifest failure' to consider facts or precedent.").

[15] *Payne v. DeLuca*, 2006 U.S. Dist. LEXIS 89251, at *7-10, *23-24 (disregarding the movant's argument that such a short discussion betrayed a lack of comprehension of the materiality of the movant's facts).

[16] For example, courts have granted reconsideration for "manifest failures" of apprehension (1) where the judge overlooked precedent – caused by inadequate briefing by the parties – that had the effect of a denial of due process, *Karr v. Castle*, 768 F. Supp. 1087, 1094 (D. Del. 1991), and (2) where the ALJ applied the incorrect criminal law standard for the crime-fraud exception to a privilege claim and where circumstances did not allow the Respondent to reply, *In re Rambus*, 2003 FTC LEXIS 49, at *21-22.

shown the Commission indisputably – manifestly – failed to take its facts into account, and in any case has not shown that any lack of consideration "might reasonably have altered the result."[17]

Finally, the two motions Respondent states were not directly addressed by the Commission, the (then) pending motion to change the hearing location and the (then) pending motion to modify the Scheduling Order, are no longer pending and thus this argument is moot. The ALJ denied both motions, and Respondent can prepare for the hearing with those facts in mind.

B. Respondent Has Not Identified Any New Material Fact that Affects the Commission's Order

Respondent wrongly argues that the ALJ's denial of Respondent's motion to compel and Respondent's attempts to have that decision reviewed by the Commission justify reconsideration.[18] The fact that Respondent's challenge to the ALJ's decision denying Respondent's motion to compel occurred after the Commission's is irrelevant.

The Commission clearly ruled on this argument when it noted that the fact that "discovery was ongoing . . . and [] Respondent's Motion For An Order Compelling Discovery [was] pending . . . . [did not] provide[] any support for the requisite showing of good cause."[19] The Commission considered and rejected the pendency of discovery disputes, whatever their procedural status, as good cause for delaying trial.[20] Seeking interlocutory review for the exact

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[17] *In re Daniel Chapter One*, 2009 WL 569722, at *2.

[18] Respondent's Memorandum in Support of Its Motion for Reconsideration, at 5.

[19] Order Denying Expedited Motion for a Later Hearing Date, No. 9343, at 2 (Jan. 21, 2011) (Commission Order).

[20] In its motion for a new hearing date, Respondent clearly articulated its intended response to denial of Respondent's motion to compel or an unsatisfactory outcome to its

same issues still does not constitute good cause to alter the hearing date, and reconsideration will not change that fact.

III. CONCLUSION

Respondent has not demonstrated that the Commission should reconsider its Order. Worse, Respondent has merely "rehashed" the same arguments that the Commission has already considered and rejected, wasting its time – and that of Complaint Counsel – rather than preparing for the February 17th trial date. For this reason, as well as for the other reasons set forth in this Memorandum, Respondent's Motion for Reconsideration should be denied.

Respectfully submitted,

s/ Richard B. Dagen
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Dated: February 1, 2011

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discovery disputes with Complaint Counsel. "The State Board intends to pursue all remedies to which it may avail itself so that it will not be prejudiced by Complaint Counsel's inadequate discovery responses" and "an appeal to the applicable adjudicating entity may be forthcoming by either party upon a ruling by the ALJ on the State Board's Motion for Order Compelling Discovery." Respondent's Memorandum in Support of Its Expedited Motions for a Later Hearing Date and to Amend the Scheduling Order, at 7. Thus the Commission was able to take this into account in making its ruling.

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THE NORTH CAROLINA BOARD OF DENTAL EXAMINERS,	)	DOCKET NO. 9343
Respondent.	)	

[PROPOSED] ORDER DENYING RESPONDENT'S MOTION FOR RECONSIDERATION OF THE ORDER DENYING EXPEDITED MOTION FOR A LATER HEARING DATE

On January 24, 2011, Respondent submitted its Motion for Reconsideration of the Order Denying Expedited Motion for a Later Hearing Date. On February 1, 2011, Complaint Counsel submitted its Memorandum in Opposition to Respondent's Motion.

Respondent has failed to demonstrate cause for reconsideration of its motion for a later hearing date. Specifically, Respondent has not shown (1) a material difference in fact or law from that presented to the Commission before such decision, that in the exercise of reasonable diligence could not have been known to Respondent; (2) the emergence of new material facts or a change of law occurring after the time of such decision; or (3) a manifest showing of a failure to consider material facts presented to the court before such decision.

Therefore, Respondent's motion is DENIED.

ORDERED:

_____
Donald S. Clark
Secretary

Date:

CERTIFICATE OF SERVICE

I hereby certify that on February 1, 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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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.

February 1, 2011

s/ Richard B. Dagen
Richard B. Dagen