



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**
))
NORTH CAROLINA BOARD OF)) **Docket No. 9343**
DENTAL EXAMINERS,))
))
Respondent.))
_____)

**COMPLAINT COUNSEL’S OPPOSITION TO RESPONDENT’S APPLICATION FOR
REVIEW TO THE COMMISSION OF THE ADMINISTRATIVE LAW JUDGE’S
ORDER DENYING RESPONDENT’S MOTION TO COMPEL DISCOVERY**

The Board’s present application to the Commission was filed on February 2, 2011, one day after Judge Chappell’s order of February 1, 2011, determined that the issues raised in this appeal were not qualified for interlocutory appeal pursuant to Rule 3.23(b).¹ But no Commission rule permits the Board to file an interlocutory appeal after the ALJ has found that the issues fail to satisfy one, let alone all three, of the requirements specified by Rule 3.23(b), 16 C.F.R. § 3.23(b) (“A party may request the Administrative Law Judge to determine that a ruling involves

¹ The Board filed its motion to compel discovery on January 11, 2011, and filed its Rule 3.22(g) statement separately on January 18, 2011. On that same date, January 18, 2011, Complaint Counsel filed its opposition to this discovery motion on the untimeliness of the motion and other grounds. On January 20, 2011, Judge Chappell entered an order denying the Board’s discovery motion because of the Board’s failure to comply with Rule 3.22(g). On January 24, 2011, the Board filed its application pursuant to Rule 3.23(b) for the findings required by that Rule in order to authorize the Board to seek interlocutory Commission review of the denial of the Board’s discovery motion.

a controlling issue 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 inadequate. . . . The party may file an application for review with the Commission within 1 day after notice that the Administrative Law Judge *has issued the requested determination* or 1 day after the deadline has passed for the Administrative Law Judge to issue a ruling on the request for determination and the Administrative Law Judge has not issued his or her ruling.”) (emphasis added).

The Board flouts the Commission’s rules and makes a mockery of the Commission’s interlocutory appeal rule. The rules clearly do not permit an interlocutory appeal unless the ALJ concurs or the ALJ misses the deadline to issue an opinion. Neither of these events occurred.

Judge Chappell’s Orders of January 20 and February 1, 2011, correctly held respectively that the motion to compel and application for interlocutory review were without merit. *See* Complaint Counsel’s Opposition to Respondent’s Motion for An Order Compelling Discovery (Jan. 18, 2011);² Complaint Counsel’s Answer to Application for Review of Ruling Denying Respondent’s Motion to Compel Discovery (Jan. 27, 2011).³ Thus, even if Respondent could unilaterally change the Commission’s rules to permit its current motion, the motion would fail on the merits.

² Copy attached as Attachment A, also available at: <http://www.ftc.gov/os/adjpro/d9343/110118nckwokacmpt.pdf>.

³ Copy attached as Attachment B, also available at: <http://www.ftc.gov/os/adjpro/d9343/110127ccanswertoapp.pdf>.

For all of the foregoing reasons, Respondent's application for an interlocutory appeal does not satisfy Rule 3.23(b), and its motion should be denied.

Respectfully submitted,

s/Richard B. Dagen
Richard B. Dagen
William L. Lanning
Michael J. Bloom
Melissa Westman-Cherry

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Dated: February 8, 2011

Attachment A

**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 Commission³ and its Administrative Law Judges.⁴ The Board flaunts the Scheduling Order, without explanation; its motion should be

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 after 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

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 of how 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 part⁸ 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.

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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William L. Lanning
Michael J. Bloom
Melissa Westman-Cherry
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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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*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.

January 18, 2011

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

Attachment B

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

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

**COMPLAINT COUNSEL’S ANSWER TO RESPONDENT’S APPLICATION
FOR REVIEW OF A RULING DENYING RESPONDENT’S
MOTION TO COMPEL DISCOVERY**

“Interlocutory appeals in general are disfavored, as intrusions on the orderly and expeditious conduct of the adjudicative process. Interlocutory appeals from discovery rulings merit a particularly skeptical reception because they are particularly suited for resolution by the Administrative Law Judge on the scene and particularly conducive to repetitive delay.” *Schering-Plough Corp.*, 2002 WL 31433937, at *8 (F.T.C. Feb. 12, 2002) (quoting the Commission’s interlocutory order in *Bristol Myers Co.*, 90 F.T.C. 273, 273 (Oct. 7, 1977)).

In this case, the ALJ’s disposition of Respondent’s discovery motion was entirely proper. Respondent failed to comply with a deadline, and like all litigants must live with the consequences. The application for interlocutory review by the Commission should be denied.

I. Respondent’s Campaign to Delay the Trial Continues.

Respondent’s original discovery motion was untimely, filed almost 7 weeks after the discovery cut-off. The A. P. Carleton, Jr. Declaration “accompanying” Respondent’s application for interlocutory review fails in 14+ pages to explain Respondent’s extraordinary delay in first

surfacing its objections to Complaint Counsel's ("CC") responses to discovery. Paragraphs 10 and 11 of the Carlton Declaration represent that this delay was invited by the omission from the Scheduling Order of a specific cut-off date for discovery motions – in effect, Respondent argues that the Court's silence licensed Respondent to delay resolution of discovery issues beyond all reason.¹ The Court has granted no such license. Respondent's failure to object to CC's discovery responses within a reasonable time after the discovery cut-off (generally 20 days²) waived its objections.

Further, these delays – and the Board's filing of a meritless application for review of the Court's denial of its motion – are part and parcel of Respondent's continuing arguments for a delay of the trial: Respondent claims that its own pending motions are causing uncertainty that impedes trial preparation. Such self-justifying motion practice should not be rewarded.

II. The Court Correctly Interpreted Rule 3.22(g) In Denying Respondent's Motion to Compel.

The Court correctly denied Respondent's motion because the Board simply failed to comply with Rule 3.22(g), which requires that the motion and separate statement accompany one another, that is, be filed together. Order Denying Respondent's Motion to Compel (Jan. 20, 2011). The filing date of Respondent's Motion was January 11, 2001, and the filing date of the Supplemental Statement was January 18, 2001.³ Respondent's fragmentary definition of the

¹ The logic of Respondent's argument has no limiting principle; it could extend discovery disputes well into the trial – indeed, until the record is closed.

² 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. . .").

³ Rule 4.3(d) ("Documents 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

word “accompany,” “to be in association with,” Resp. Appl. at 3, does not withstand even casual scrutiny. Compare Respondent’s claim, on the left side of the following table, with the definitions provided on the right-hand side:

<p>“‘Accompany’ is not defined anywhere in the FTC Rules nor does it appear in any editions of <i>Black’s Law Dictionary</i> consulted by Respondent’s Counsel. However, the word ‘accompany’ is not commonly defined in terms of simultaneity or immediacy.” Resp. Appl. at 3.</p>	<p>“accompany, <i>vb.</i> To go along with (another); to attend.</p> <ul style="list-style-type: none"> ● In automobile-accident cases, an unlicensed driver is not accompanied by a licensed driver unless the latter is close enough to supervise and help the former.” BLACK’S LAW DICTIONARY 17 (8th ed. 2004). <p>“accompany <i>vb</i> to go or be together with <accompanied his wife to the theater> . . . chaperon, companion . . . escort.” MERRIAM-WEBSTER’S COLLEGIATE THESAURUS 8 (1988).</p>
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Indeed, examination of the complete definitions for “accompany” found in each of the dictionaries cited by Respondent, Resp. Appl. at 3, when fairly read, supports CC and shows that “simultaneity or immediacy” is the central idea conveyed by the term “accompany.”⁴

the agency after 5:00 p.m. will be deemed filed the following business day.”). January 18th was the following business day for Friday, January 14th, because Monday, January 17th, was a federal holiday.

⁴ For example, Respondent cites www.thefreedictionary.com for a definition of “accompany.” Resp. Appl. at 3 (“To add to; supplement”). The cited web source contains several complete definitions of “accompany” from identified sources; the following is one such: “accompany” *verb* 1. go with, lead, partner, protect, guide, attend, conduct, escort, shepherd, convoy, usher, chaperon[;] Ken agreed to accompany me on a trip to Africa.[;] 2. occur with, belong to, come with, supplement, coincide with, join with, coexist with, go together with, follow, go cheek by jowl with[;] This volume of essays was designed to accompany an exhibition.[;] 3. back, support, play for, play with, back up[;] He accompanies her on all but one song. Collins Thesaurus of the English Language – Complete and Unabridged 2nd Edition. 2002.© HarperCollins Publishers 1995, 2002.” This cite was last visited on Jan. 27, 2011.

The Court correctly applied Rule 3.22(g) to require the separate statement and motion to be filed together. Respondent could have corrected its error by simply refileing its motion, this time accompanied by the Separate Statement. Respondent failed to comply with the Rule.

III. This Untimely Discovery Dispute Does Not Qualify for Interlocutory Review.

Before certifying an interlocutory appeal, the Administrative Law Judge must first find that the underlying ruling “involves [1] a controlling question of law or policy as to which there is [2] substantial ground for difference of opinion and that an [3] an immediate appeal may materially advance the ultimate termination of the litigation or [4] subsequent review will be an inadequate remedy.” Rule 3.23(b).

The controlling issue of law identified by Respondent is whether Rule 3.22(g) does or does not require the contemporaneous filing of a motion to compel and a signed statement of counsel. This Court answered in that the documents must be filed together, and no further review by the Commission is appropriate.

The Application Raises No Controlling Question of Law or Policy. A question is deemed controlling “only if it may contribute to the determination, at an early stage, of a wide spectrum of cases.” *Rambus, Inc.* 2003 FTC LEXIS 49, at *9 (Mar. 26, 2003) (*citing Automotive Breakthrough Sciences, Inc.*, 1996 FTC LEXIS 478 at *1 (Nov. 5, 1996)). A controlling question of law or policy is “not equivalent to merely a question of law which is determinative of the case at hand.” *Id.* Review of the discovery issues raised by Respondent’s Motion to Compel hardly can contribute to a determination at an early stage of even this case. The denial of such motions is commonplace. *See, e.g., Telebrands Corp.*, 2004 WL 5911685 at *4 (F.T.C. Mar. 25, 2004) (“It is clear that an appeal of the discovery ruling at issue would not materially advance the

ultimate termination of the litigation.”); *Hoechst Marion Roussel, Inc.*, 2000 FTC LEXIS 155, at *18 (Oct. 17, 2000). Commission review certainly will not contribute to the determination of a wide spectrum of other cases. Accordingly, this application should be denied.⁵

The Ruling Does Not Involve An Issue as to Which There Is A Substantial Ground for Difference of Opinion. “Commission precedent also holds that 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.’ *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).” *Telebrands Corp.*, 2004 WL 5911685, at *4 (F.T.C. Mar. 25, 2004). To satisfy this prong of the test, Respondent must show that the controlling question presents a novel or difficult legal issue. *Schering-Plough*, 2002 WL 3143937, *4 (F.T.C. Feb. 12, 2002). Respondent has not made a showing of either a likelihood of success on the merits or a novel or difficult legal issue. Rather, Respondent raises pedestrian discovery issues where the law is well settled; discovery matters are “committed to the sound discretion of the administrative law judge.” *Warner Comm., Inc.*, 1984 WL 251781 at *1 (F.T.C. Sep. 13, 1984); *Telebrands Corp.*, *supra* at *4 (quoting *Exxon Corp.*, 1978 FTC LEXIS 89 at *12 (Nov. 24, 1978) (“This would negate the general policy that rulings on discovery, absent an abuse of discretion, are not appealable to the Commission.”)). Accordingly, this application should be denied.⁶

⁵ Respondent’s due process argument is without merit. *See* Resp. Appl. 3-5. Respondent did not cite a single case holding that due process requires an evidentiary hearing in connection with every discovery motion.

⁶ The Court’s application of the plain meaning of Rule 3.22(g) hardly rises to an abuse of discretion, and it certainly does not amount to arbitrary and capricious action, as alleged by the Respondent without a shred of authority to legitimate its assertion. Resp. Appl. at 6-7.

Review of the Court’s Decision on a Non-Extraordinary Discovery Application Will Hinder the Fair and Efficient Disposition of this Litigation on the Merits. Respondent’s references to now irrelevant differences of interpretation regarding communications among counsel should not divert the Court’s attention from the Board’s failure to comply with the Rules of Practice, and from the February 17th trial date. Delay is the Respondent’s battle plan, and this application is a part of that plan. Accordingly, this application should be denied.⁷

Subsequent Review Will Be Adequate. Even as to privilege issues, interlocutory appeal should be granted only rarely. *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.”). Respondent has made no showing that the issues it raises are exceptional. Indeed, the court did not adjudicate privilege claims and none are immediately before the court in the review application. Accordingly, this application should be denied.

⁷ Complaint Counsel and the Board’s counsel disagree as to the import and characterization of communications leading to the Board’s motion. It is not surprising for counsel to draw conflicting inferences from shared exchanges. It is quite another thing for Board counsel to allege professional misconduct based upon a strained and tortured parsing of emails between attorneys. See, e.g., Carlton Decl. ¶ 5 at 2-3. At a minimum, the Board’s insistence that its reading of these events is the only honest view is both unreasonable and unprofessional.

IV. Conclusion.

For all of the foregoing reasons, Respondent's application for an interlocutory appeal does not satisfy Rule 3.23(b), and its motion should be denied.

Respectfully submitted,

s/ Richard B. Dagen
Richard B. Dagen
William L. Lanning
Michael J. Bloom
Melissa Westman-Cherry
Counsel Supporting Complaint
Bureau of Competition
Federal Trade Commission
601 New Jersey Avenue, NW
Washington, DC 20580

Dated: January 27, 2011

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

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

**[PROPOSED] ORDER DENYING RESPONDENT’S APPLICATION
FOR REVIEW OF A RULING DENYING RESPONDENT’S
MOTION TO COMPEL DISCOVERY**

On January 24, 2011, Respondent, North Carolina Board of Dental Examiners, filed its Application for Review of a Ruling Denying Respondent’s Motion to Compel Discovery. On January 27, 2011, Complaint Counsel filed their Answer to Respondent’s Application, disputing Respondent’s entitlement to the requested order because the discovery issues raised by Respondent do not qualify for interlocutory appeal within the meaning of Rule 3.23(b).

Respondent’s Application does not qualify for interlocutory review under Rule 3.23(b), and it is DENIED.

ORDERED:

D. Michael Chappell
Chief, Administrative Law Judge

Date:

CERTIFICATE OF SERVICE

I hereby certify that on January 27, 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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Allen & Pinnix, P.A.
333 Fayetteville Street
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Raleigh, NC 27602
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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.

January 27, 2011

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

**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)	
)	
NORTH CAROLINA BOARD OF)	Docket No. 9343
DENTAL EXAMINERS,)	
)	
Respondent.)	
)	

**[PROPOSED ORDER] DENYING RESPONDENT’S APPLICATION FOR
REVIEW TO THE COMMISSION OF THE ADMINISTRATIVE LAW JUDGE’S
ORDER DENYING RESPONDENT’S MOTION TO COMPEL DISCOVERY**

The Board’s application for interlocutory Commission review of Judge Chappell’s denial of its discovery order on January 20, 2011, was filed on February 2, 2011, one day after Judge Chappell’s order of February 1, 2011, denying that Respondent’s discovery issues qualified for interlocutory review under Rule 3.23(b), 16 C.F.R. § 3.23(b). Complaint Counsel filed its opposition to this application on February 3, 2011, on the grounds that the Board’s application is contrary to Rule 3.23, and otherwise without merit.

It is clear under our rules that the administrative law judges (“ALJ”) serve as gatekeepers, vested with broad discretion, to insure that administrative trials do not become bogged down with dilatory motion practice and premature appellate reviews by the Commission. Absent a clear abuse of discretion, clearly not the case here, the Commission has a long-established policy of not entertaining interlocutory appeals concerning routine discovery matters or other pretrial housekeeping details with respect to matters pending before our ALJs. *See*

Bristol-Meyers Co., 90 F.T.C. 273, 273 (FTC Oct. 7, 1977) (“Further, any perception on the part of our administrative law judges that the Commission will exercise broadly its undisputed authority to review interlocutory rulings will tend toward the atrophy of their sense of responsibility for the impact of their rulings on the proceedings before them.”). Judge Chappell, in his discretion, denied the Rule 3.23(b) certifications necessary for this interlocutory appeal to the Commission by his order of February 1, 2011. Accordingly, the Commission finds that the Board’s application was improvidently filed.

IT IS ORDERED THAT the Board’s application for interlocutory Commission review of certain discovery matters be, and it hereby is, **DISMISSED**.

By the Commission, Commissioner Brill recused.

Donald S. Clark
Secretary

SEAL.
ISSUED:

CERTIFICATE OF SERVICE

I hereby certify that on February 8, 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

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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.

February 8, 2011

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