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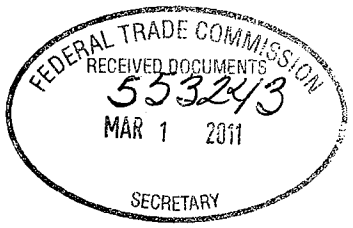

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

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 FOR DISCLOSURE

I.

On February 18, 2011, Respondent filed an Application for Review of a Ruling Denying Respondent's Motion for Disclosure ("Application"). Complaint Counsel filed an Opposition to the Application on February 24, 2011 ("Opposition").

Having fully considered all arguments in the Motion and Opposition, and as further discussed below, because Respondent has failed to meet 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)

Pursuant to Commission Rule 3.23(b), Respondent filed an application seeking interlocutory appeal of an Order dated February 14, 2011. Commission Rule 3.23(b) 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 February 14, 2011, Respondent's Motion for Disclosure was denied ("February 14, 2011 Order"). Respondent's Motion for Disclosure sought an order requiring Complaint Counsel to provide Respondent the following information (the "Information Requested"):

1) Clarification of the duties, responsibilities and authority of Complaint Counsel William Lanning;
2) Clarification of the duties, responsibilities and authority of Complaint Counsel Richard Dagen;
3) The jurisdiction of licensure of each of the individual attorneys designated as Complaint Counsel in this case, and identification of which jurisdiction's ethics rules apply to each such attorney;
4) Clarification of the authority of Complaint Counsel Michael J. Bloom, in his capacity as Complaint Counsel and as Assistant Director, Office of Policy Coordination, and the jurisdiction where he is licensed to practice law; and
5) Clarification of the authority of Erika Meyers "in the capacity of either Complaint Counsel or as an official of the Commission" and the jurisdiction where she is licensed to practice law.

The February 14, 2011 Order denied Respondent's Motion for Disclosure on the grounds that the motion was not authorized or appropriate under the Commission's Rules of Practice and held:

> Respondent's Motion is without merit. First, other than the general motions authority under Commission Rule 3.22(a), 16 C.F.R. § 3.22(a), Respondent, although having the burden of persuasion as movant, cites no legal authority permitting one party in litigation to obtain information from the opposing party by way of a "Motion for Disclosure." In contrast, Rule 3.31 clearly contemplates particular methods for a party in litigation to obtain information, i.e., discovery, from the opposing party, including depositions; interrogatories, document requests, and requests for admission. 16 C.F.R. § 3.31(a). Except for information purportedly encompassed by Respondent's Interrogatory 8, it does not appear, and Respondent does not contend, that Respondent attempted to use any discovery method to obtain the Information Requested.
>
> In addition, even with respect to information allegedly lacking in

Complaint Counsel's answer to Interrogatory 8, a self-styled "Motion for Disclosure" is not an appropriate vehicle for obtaining relief. Rather, Respondent was required to file a motion to compel under Rule 3.38. However, neither Respondent's previously filed Motion to Compel, submitted January 11, 2011, nor Respondent's Supplemental Statement regarding the January 11, 2011 Motion to Compel, submitted January 18, 2011, made any reference to any deficiency in Complaint Counsel's answer to Interrogatory 8.

Furthermore, Respondent does not offer any factual, legal, or equitable basis for treating its "Motion for Disclosure" as a Motion to Compel an answer to Interrogatory 8. In fact, the timeliness and practicality of such a motion at this stage of the proceedings would be questionable, given that Complaint Counsel's answers to interrogatories were served on Respondent on November 18, 2010, the fact-discovery deadline passed November 23, 2010, and the hearing in this matter is scheduled to begin on February 17, 2011. In addition, other procedural requirements of a Motion to Compel are lacking. *See* 16 C.F.R. § 3.38.

Because there is no pending discovery request or Motion to Compel regarding the Information Requested, the issue of whether the Information Requested is subject to discovery by Respondent under the Commission's Rules is not presented, and thus need not, and will not, be addressed.

February 14, 2011 Order at 2-3.

III.

A. The February 14, 2011 Order does not involve a controlling question of law or policy

The first prong of the three-prong test set forth in Rule 3.23(b) requires a movant to show that the ruling for which review is sought involves a controlling question of law or policy. Respondent argues that the February 14, 2011 Order involves the controlling question of law of whether or not Respondent is entitled to file a Motion for Disclosure under the FTC's Rules. Application at 2.

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 Hoechst Marion Roussel, Inc.*, 2000 FTC LEXIS 155, *19 (Oct. 17, 2000) ("discovery ruling does not involve a controlling question of law or policy"); *In re Exxon Corp.*, 1981 FTC LEXIS 112, *1-2 (Feb. 13, 1981) (finding a refusal of discovery did not control the case).

Not only has Respondent failed to show that allowing an appeal from the February 14, 2011 Order would contribute to the determination of a wide spectrum of cases, Respondent has not even demonstrated that allowing such appeal would be determinative of the instant case. The February 14, 2011 Order was a procedural ruling, relating to whether or not Respondent was entitled to the Information Requested under the methods of discovery and motions authorized by the Commission's Rules of Practice. As a procedural ruling on a motion seeking information that is clearly not determinative of the case, the February 14, 2011 Order does not present a controlling question of law or policy.

B. The February 14, 2011 Order does not involve an issue as to which there is substantial ground for difference of opinion

The second prong of the three-prong test set forth in Rule 3.23(b) requires a movant to show that the ruling for which review is sought involves a question as to which there is substantial ground for difference of opinion. Respondent asserts that "[t]here is substantial ground for difference of opinion as to the [February 14, 2011 Order] because the Ruling assumes that the lack of a specific provision for a motion for disclosure indicates that the Rules do not allow such a motion." Application at 2. Respondent states that the FTC Rules do not anywhere state that a motion for disclosure is not allowed; that while Rule 3.31 lists a number of discovery methods, it does not state that these are the only appropriate methods; and that the Rules do not limit Respondent to a motion to compel. *Id.*

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'"). 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.")). Respondent has not shown that the decision to deny Respondent the Information Requested involved a novel question or unsettled authority and has not demonstrated a likelihood of success on the merits.

Respondent acknowledges that "the ALJ has the authority to allow any discovery he sees fit to grant." Application at 2. 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[1] 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) (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"). "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).

The February 14, 2011 Order was a procedural ruling that related to whether or not Respondent was entitled to the Information Requested under the methods of discovery and motions authorized by the Commission's Rules of Practice. A ruling on a motion seeking information is within the discretion of the ALJ and does not qualify as an issue as to which there is substantial ground for difference of opinion.

C. An immediate appeal from the February 14, 2011 Order would not materially advance the ultimate termination of the litigation and subsequent review would not be an inadequate remedy

The third prong of the three-prong test set forth in Rule 3.23(b) requires a movant to show that an immediate appeal from the ruling may materially advance the ultimate termination of the litigation or subsequent review will be an inadequate remedy. Respondent argues that it has been prejudiced by the denial of the information requested and that if Respondent's Application is not heard immediately on appeal, then the hearing, which commenced on February 17, 2011, will proceed with those prejudices intact. Application at 4.

Respondent has not shown that an immediate appeal of the ruling, which according to Respondent, deprived Respondent of information, would materially advance the ultimate termination of the litigation or that subsequent review would not be an adequate remedy. An appeal of a discovery ruling or a procedural ruling relating to the Requested Information would not materially advance the ultimate termination of the litigation. *See In re Hoechst Marion Roussel, Inc.*, 2000 FTC LEXIS 155, *20. "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.'" *Id.*; *see also 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.

[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 argument, that being deprived of the Requested Information has prejudiced it in this proceeding, does not provide a basis for interlocutory appeal. *See In re Exxon Corp.*, 1981 FTC LEXIS 112, *4-5 (Feb. 13, 1981) (finding respondents failed to show how an immediate appeal of an order denying discovery withheld on privilege grounds would "materially advance termination of th[e] case or render inadequate subsequent review"); *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 February 14, 2011 Order would materially advance the ultimate termination of the litigation or that subsequent review would be an inadequate remedy.

IV.

Commission Rule 3.23(b) requires a movant to demonstrate that all three of the requirements set forth in that rule have been met. Respondent has failed to do so. Accordingly, 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: March 1, 2011