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

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

COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENT'S MOTION TO STRIKE AFFIDAVITS

I. Introduction

Respondent asks the Court to strike the affidavits of Mr. Bloom and Mr. Srimushnam that relate solely to Respondent's proposed findings concerning Respondent's hypothetical future Equal Access for Justice Act claim. Respondent does not claim that its proposed findings have any purpose relating to the substantive allegations in this matter. As such, no discovery was taken on the issue. Moreover, Respondent's proposed findings rely in part upon a declaration that was not admitted into evidence. Notwithstanding the irrelevance of this issue to this proceeding, Respondent included proposed findings. These findings (and the unadmitted declaration cited in support thereof) contained several inaccuracies. Complaint Counsel submits that the affidavits at issue should only be considered for the limited purpose of demonstrating the inaccuracy of the proposed and irrelevant findings, and as such, Respondent's motion should be

denied.[1] Alternatively, Complaint Counsel urges the Court to consider striking Respondent's findings and the affidavits at issue as irrelevant to the instant proceeding.[2]

II. Respondent's Submission of Irrelevant, Inadmissible, and Unadmitted Evidence Was the Impetus for Complaint Counsel's Affidavits

Respondent's motion to strike implies that Complaint Counsel's affidavits were an attempt to undermine admitted evidence relevant to the case with the personal knowledge of attorneys working on behalf of Complaint Counsel. This is not so. In fact, the affidavits were submitted as a proffer of evidence in response to Respondent's submission of irrelevant and extra-record evidence. If Your Honor allows Respondent to submit such evidence after the record has closed, Complaint Counsel respectfully requests the same treatment.

First, the subject matter of Respondent's Proposed Findings of Fact (RPFF) ¶¶ 532-536 and 539, the findings that Complaint Counsel's affidavits refer to, is irrelevant to the subject matter of the case and was improperly included in Respondent's proposed findings of fact. Respondent's Counsel stated that the entire line of questioning of Mr. Runsick that forms the basis for RPFF ¶¶ 532-536 and 539 relates solely to Respondent's intention to file an Equal Access to Justice Act (EAJA) claim under Commission Rule 3.81(d).[3] Under that rule, a

---

[1] *Cf. In re Chicago Bridge & Iron Co.*, No. 9200, 2002 FTC LEXIS 64, at *4-5 (Oct. 23, 2002) (Chappell, ALJ) (allowing one party to extend a deadline for a filing because the late filing was caused and necessitated by the opposing party's own deadline violation).

[2] During the meet-and-confer conversation between Complaint Counsel and Respondent regarding Respondent's motion to strike, Complaint Counsel offered to withdraw the affidavits of Mr. Bloom and Mr. Srimushnam if Respondent withdrew the proposed findings of fact to which the affidavits responded.

[3] "MR. M. NICHOLS: Rule 3.81(d) allows for recovery of costs if we're a prevailing party, and we're laying the foundation for the recovery of costs with this witness." "JUDGE CHAPPELL: Well, it's not automatic. It allows you to proceed to attempt to recover costs, if I'm correct." "MR. M. NICHOLS: Yes, sir. But what I'm trying to do is, as long as the witness

prevailing party to a Commission adversarial proceeding can in some circumstances recover attorneys' and other costs. *See* Commission Rule 3.81(a). The Court allowed Mr. Runsick's testimony for the sole purpose of laying a foundation for recovery of costs, but none of this testimony is relevant to the issue in this case: namely, whether the North Carolina State Board of Dental Examiners has violated § 5 of the F.T.C. Act. Accordingly, RPFF ¶¶ 532-536 and 539 are completely irrelevant to any issue in this proceeding and should be disregarded.

In addition, not only are RPFF ¶¶ 532-536 and 539 irrelevant to this proceeding, but they are also largely irrelevant to an EAJA claim as well. EAJA allows parties to recover attorneys' and other costs incident to litigation. Mr. Runsick is not a party and was not represented by Respondent's counsel at his deposition. (Tr. 2130). Further, Mr. Runsick's travel costs were paid by Complaint Counsel. Although Respondent might claim it incurred costs to attend the Runsick deposition, Mr. Runsick's testimony at trial does not address this issue. Therefore, RPFF ¶¶ 532-536 and 539 are irrelevant to any future EAJA claim in addition to any issue currently before the Court.

Finally, RX00047 was never admitted into evidence.[4] Nevertheless, Respondent cites RX00047, a document that contains factual assertions not addressed by Mr. Runsick's trial testimony. The references to this exhibit in RPFF ¶¶ 532-536 and 539 were therefore improper

---

is here, have that evidence in the record so that in the event, in the event, in the event." (Tr. 2127-2128). By Respondent Counsel's own admission this testimony is not relevant to any issue in these proceedings and was only to be used "in the event" of an EAJA action.

[4] RX00047 was not included on JX0001 and not admitted into evidence at trial. Mr. Nichols maintained that the document would be used to refresh the recollection of the witness. (Tr. 2123-2124).

and should be held inadmissible. *See* Commission Rule 3.46(a) (proposed findings "shall contain adequate references to the record") (emphasis added).

Thus, Complaint Counsel's affidavits were actually submitted to rebut inaccuracies in Respondent's findings that even Respondent admitted were not relevant to these proceedings but might be relevant to a hypothetical EAJA claim that may never be actionable. As such, the inaccurate statements contained in RPFF ¶¶ 532-536 and 539 and in RX00047 are nothing more than an attempt to impugn the integrity of Complaint Counsel and Complaint Counsel should be permitted to rebut these misstatements. Further, Respondent should not be permitted to object to extra-record evidence on the exact subject that Respondent itself first offered such evidence.[5] Finally, any purported prejudice to Respondent might be addressed at such time as Respondent actually files an EAJA claim.

III. Respondent's Motion to Strike Is Untimely

The Court should also deny Respondent's motion to strike as untimely and an undue burden on these proceedings. Respondent's motion to strike filed on June 30, 2011, nearly five weeks after Respondent was obligated to withdraw an essentially identical motion to strike because it failed to conform, yet again, to the terms of Scheduling Order in this proceeding – this time the provision requiring parties to "meet and confer" before filing certain motions. Respondent withdrew the original motion on May 25, 2011, but rather than immediately resubmitting the motion after fulfilling its meet-and-confer obligation, Respondent waited over a month before filing again. Respondent dawdled even knowing that Your Honor would be

[5] *Cf. Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 814-15 (1945) (stating that the doctrine of unclean hands "closes the doors of a court . . . to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief").

working to satisfy the obligation under the FTC Rules to issue an Initial Decision by July 13, 2011. Instead of requesting a meet-and-confer conference within a few days or even a week of withdrawing its original motion to strike, Respondent waited thirty-five days, until June 29th, to meet and confer with Complaint Counsel; this delayed the submission of its motion from May 19 – fifty-six days prior to the date that Your Honor's Initial Decision is due – to June 30 – only fourteen days prior to that due date. Under the circumstances, that delay is unwarranted and an imposition on the Court. It should be declared out of time and dismissed accordingly.

IV. Conclusion

For the foregoing reasons Respondent's Motion to Strike Affidavits should be denied.

Respectfully submitted,

s/ Richard B. Dagen
Richard B. Dagen
Michael J. Turner

Counsel Supporting the Complaint

Bureau of Competition
Federal Trade Commission
601 New Jersey Avenue, NW
Washington, DC 20580

Dated: July 8, 2011

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

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

[PROPOSED] ORDER DENYING RESPONDENT'S MOTION TO STRIKE AFFIDAVITS OF MICHAEL J. BLOOM AND TEJASVI SRIMUSHNAM FROM THE RECORD

On May 19, 2011, Respondent first filed its Motion to Strike Affidavits of Michael J. Bloom and Tejasvi Srimushnam from the Record. On May 25, 2011, Respondent withdrew its motion when it realized it had not fulfilled its obligation under the Scheduling Order in this matter to meet and confer with Complaint Counsel before filing the motion. On June 30, 2011, over a month after withdrawing its original motion, Respondent resubmitted substantially the same motion to strike. On July 08, 2011, Complaint Counsel filed its Opposition to Respondent's motion.

Respondent moves the Court to strike Complaint Counsel's affidavits because they were submitted after the close of the record. Although Complaint Counsel's affidavits were submitted after the close of the record, they were submitted as a proffer in response to Respondent's submission of Proposed Findings of Fact that were not relevant to the issues before the Court and of a document that was never admitted into evidence. Under the circumstances, the principles of fairness dictate allowing Complaint Counsel's proffer to be received and considered with Respondent's Proposed Findings of Fact.

In addition, Respondent' motion, being filed only two weeks before the Initial Decision is due and over four weeks after it was initially withdrawn, is untimely and presents an undue burden to the Court.

Therefore, Respondent's motion is DENIED.

ORDERED:

_____
D. Michael Chappell
Chief Administrative Law Judge

Date:

CERTIFICATE OF SERVICE

I hereby certify that on July 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

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

Noel Allen
Allen & Pinnix, P.A.
333 Fayetteville Street
Suite 1200
Raleigh, NC 27602
nla@Allen-Pinnix.com

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.

July 8, 2011

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