



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 STATE BOARD OF) PUBLIC
DENTAL EXAMINERS,) Docket No. 9343
)
Respondent.)
_____)

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

The Board’s present application to the Commission was filed on March 2, 2011, one day after Judge Chappell’s Order of March 1, 2011, determined that the issues raised in this appeal were not qualified for interlocutory appeal pursuant to Rule 3.23(b).¹ This application follows exactly one month after Respondent filed a similarly frivolous application for interlocutory appeal.²

¹ The Board filed its disclosure motion on January 25, 2011. Complaint Counsel filed its opposition on January 28, 2011, and the ALJ entered his order on February 14, 2011, denying the Board’s disclosure motion. The Board filed its Rule 3.23(b) application on February 18, 2011, and Complaint Counsel filed its opposition on February 24, 2011, on the ground that the application did not satisfy any of the criteria for an interlocutory appeal specified by Rule 3.23(b). Judge Chappell timely denied that application by his Order of March 1, 2011, Exhibit B to the Board’s Application.

² See Order Denying (1) Respondent’s Motion for Reconsideration of the Order Denying Expedited Motion for A Later Hearing Date, and (2) Respondent’s Application for Review of the ALJ’S Order Denying Respondent’s Motion to Compel at 2, Docket No. 9343 (Feb. 9, 2011)

The Board might have credibly pled ignorance of the stringent standards for an interlocutory appeal pursuant to Commission Rule 3.23(b) when it filed its first application for interlocutory appeal on February 2, 2011. The Commission's Order of February 9, 2011, however, clearly instructed the Board regarding the plain meaning of Rule 3.23(b). Disregarding the Commission's Order, the Board once again falls far short of establishing any of the elements. Accordingly, the present application should be summarily 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: March 4, 2011

("In this case, the ALJ denied Respondent's application to take an interlocutory appeal on a timely basis [under Rule 3.23(b)]. No interlocutory appeal therefore may be taken.")

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NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS,)	Docket No. 9343
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**[PROPOSED ORDER] DENYING RESPONDENT’S APPLICATION FOR
REVIEW TO THE COMMISSION OF THE ADMINISTRATIVE LAW JUDGE’S
ORDER DENYING RESPONDENT’S MOTION FOR DISCLOSURE**

The Board’s application for interlocutory Commission review of Judge Chappell’s denial of its disclosure motion on February 14, 2011, was filed on March 2, 2011, one day after Judge Chappell’s order of March 1, 2011, denying that Respondent’s disclosure 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 March 4, 2011, on the grounds that the Board’s application is contrary to Rule 3.23 and the Commission Order of February 9, 2001, in this matter.

Our Rules of Practice vest the administrative law judge (“ALJ”) with broad discretion to insure that administrative trials do not become bogged down with dilatory motions and premature applications for Commission review. 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 rulings in 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, and, thus, the Board’s application was improvidently filed.

Accordingly, **IT IS ORDERED THAT** the Board’s application for interlocutory Commission review of the denial of its disclosure motion be, and it hereby is, **DENIED**.

By the Commission, Commissioner Brill recused.

Donald S. Clark
Secretary

SEAL.
ISSUED:

CERTIFICATE OF SERVICE

I hereby certify that on March 4, 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.

March 4, 2011

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