UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of	)	**PUBLIC**
NORTH CAROLINA BOARD OF DENTAL EXAMINERS,	)	**Docket No. 9343**
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 days[2]) 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

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[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:

"'Accompany' is not defined anywhere in the FTC Rules nor does it appear in any editions of *Black's Law Dictionary* consulted by Respondent's Counsel. However, the word 'accompany' is not commonly defined in terms of simultaneity or immediacy." Resp. Appl. at 3.	"**accompany**, *vb*. To go along with (another); to attend. ● 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). "**accompany** *vb* to go or be together with <*accompanied* his wife to the theater> . . . chaperon, companion . . . escort." MERRIAM-WEBSTER'S COLLEGIATE THESAURUS 8 (1988).

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]

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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 refiling 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]

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[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,

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Dated: January 27, 2011

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BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of	)	
NORTH CAROLINA BOARD OF DENTAL EXAMINERS,	)	**Docket No. 9343**
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[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
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I further certify that I delivered via electronic mail a copy of the foregoing document to:

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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