

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



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

**COMPLAINT COUNSEL’S OPPOSITION TO RESPONDENT’S MOTION
TO PREVENT PUBLIC POSTING OF COMPLAINT COUNSEL’S
POST-TRIAL BRIEF AND PROPOSED FINDINGS OF FACT**

The Board’s instant motion appears to be the product either of a substantial disregard for the Commission’s rules of practice and the Court’s orders or of substantial confusion on the part of the Board’s counsel regarding the relationship between confidential material protected by the Protective Order (Jun. 18, 2010) and *in camera* treatment of trial exhibits and evidence under Rule 3.45(b). Regardless of the cause, Complaint Counsel’s Post-Trial Brief and Proposed Findings of Fact and Conclusions of Law do not contain any *in camera* materials. Accordingly, the Board’s request that Complaint Counsel file “a confidential version of said documents,” Board’s Motion at 1, is meaningless and without merit. Furthermore, the Board’s claim that certain of Complaint Counsel’s documents contain Sensitive Personal Information within the meaning of the Protective Order or Rule 3.45(b) is simply untrue.¹

¹ Rule 3.45(b) defines the phrase “sensitive personal information” to “include, but shall not be limited to, an individual’s Social Security number, taxpayer identification number, financial account number, credit card or debit card number, driver’s license number, state-issued identification number, passport number, date of birth (other than year), and any sensitive health information identifiable by individual, such as an individual’s medical records. For material

The Commission's rules are quite clear that trial exhibits and evidence are protected from public disclosure only when a "party or third party [obtains] in camera treatment for material, or portions thereof, offered into evidence" upon a motion granted by the Administrative Law Judge. Rule 3.45(b), 16 C.F.R. § 3.45(b) ("A party or third party may obtain in camera treatment for material, or portions thereof, offered into evidence only by motion to the Administrative Law Judge. . . . No material, or portion thereof, offered into evidence, whether admitted or rejected, may be withheld from the public record unless it falls within the scope of an order issued in accordance with this section.").

Both the Scheduling Order of July 15, 2010, and the Protective Order are consistent with the clear directive of Rule 3.45(b). Complaint Counsel provided the Board with the notice required by Rule 3.45(b) of its intention to offer confidential evidence at trial unless Respondent moved for *in camera* treatment of such material. The Scheduling Order further provided that the deadline "for filing motions for *in camera* treatment of proposed trial exhibits" was set at January 7, 2011. Protective Order at 3. Paragraph 6 of the Scheduling Order specified that *in camera* treatment of trial exhibits and evidence would only be granted to materials that met the strict standards of Rule 3.45(b).

Respondent's reliance on the Protective Order is likewise flawed. Paragraph 10 of that Order expressly provides that: "Except when such an [*in camera*] order is granted, all documents and transcripts [introduced into evidence] shall be part of the public record."

other than sensitive personal information, a finding that public disclosure will likely result in a clearly defined, serious injury shall be based on the standard articulated in *H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1188 (1961). . . ."

The Board Counsel's motion, once again, seeks to escape its own blame for failing to, in timely manner, seek or to protect the Board's allegedly confidential information. Board Counsel have demonstrated a cavalier disregard for the purported confidentiality of the Board's records and materials, and have consistently relied on Complaint Counsel to fix the mistakes of the Board's Counsel. No doubt the Board will also claim that Complaint Counsel should correct the Board Counsel's latest "oversight" – the May 5, 2011, filing of the Board's own response to Complaint Counsel's Proposed Findings of Fact and Conclusions of Law, repeating everything Complaint Counsel stated in the original document, prominently labeled on its face page **"PUBLIC."**

Complaint Counsel's exhibits have been well known to the Board at all material times. As required, Complaint Counsel provided copies of all of its trial exhibits as well as its Rule 3.45 notice in December 2010. The Board did not move for *in camera* treatment of any of Complaint Counsel's exhibits or its own by the January 7, 2011, deadline. In addition, the parties exchanged their respective objections to trial exhibits on January 26, 2011, and the Board, again, failed to raise any issues of confidentiality with regard to any trial exhibits. Indeed, Complaint Counsel and Respondent's Counsel jointly moved each other's exhibits into evidence with the clear understanding that *in camera* treatment had not been sought. Indeed, the only time Respondent sought to have evidence treated as *in camera* was with respect to testimony regarding the medical condition of Mr. Runsick, and, even then, only prior to the time when Mr. Runsick affirmatively waived confidentiality as to that evidence. Scouring the record for any instance when counsel for the Board tried to move the hearing into *in camera* session because exhibits or testimony would address any of the "confidential" evidence that is the subject of the instant motion, will yield a null set.

As the Court will recall, this issue has arisen previously. At the final prehearing conference, it became clear that the Board neglected to delete any purported PII information. Understanding the importance of protecting PII even where Opposing Counsel fails to, Complaint Counsel, on its own, sought to redact potential PII from the Board's exhibits as it had from its own CX exhibits. Complaint Counsel, with little assistance from Board Counsel, endeavored to ensure that all PII or SHI was removed from the record.

Further, when counsel for the Board brought this latest issue to the attention of Complaint Counsel during pre-motion meet-and-confer discussions, Complaint Counsel took the position that, even though the Board had waived *in camera* treatment of trial exhibits and testimony by its failure to move for *in camera* treatment in a timely manner, Complaint Counsel expressed sympathy for the Board's concerns, and offered to use its best efforts to mitigate any particular problems by filing an amended pleading, provided that the Board's Counsel would identify specific instances where relief might be appropriate. In response, the Board's Counsel maintained that there had been no waiver on the part of the Board, that the Board could not then identify every instance where such references might have occurred, and the Board saw no option than to pursue its motion. Complaint Counsel remain willing to undertake the task of redacting such materials, but only if the Board identifies the specific instances and makes a showing for each instance that its claim meets the requirements of Rule 3.45(b). The Board's moving papers are vague and unhelpful in this regard.

Finally, the Board's claim that Complaint Counsel has disclosed "personally identifiable information" with regard to a recipient of one of the Boards cease and desist letters on page 41 of Complaint Counsel's Proposed Findings of Fact and Conclusions of Law, Board's Motion at 3, is neither true nor relevant to whether *in camera* treatment should be accorded any portions of

Complaint Counsel's Post Trial Brief or Proposed Findings of Fact and Conclusions of Law. Paragraph 278 of Complaint Counsel's Proposed Findings of Fact does list the name and **business** address of a recipient of one of the Board's cease and desist orders, but that does not constitute "sensitive personal information" within the meaning Rule 3.45(b). Note 1, *supra* at 2. Neither Complaint Counsel's Post-Trial Brief nor Proposed Findings of Fact and Conclusions of Law discloses any "sensitive personal information" within the meaning of Rule 3.45(b).

In order to preserve the *status quo ante*, Complaint Counsel and the Board's Counsel jointly requested the Secretary to refrain from posting any of the parties' post trial findings until the Court has had a chance to review and rule on these issues, and the Secretary has agreed to do so.

Respondent has not sought *in camera* treatment for any trial exhibits or testimony as required by the Commission's rules or the Court's orders. Accordingly, there are no *in camera* materials included in Respondent's Post-Trial Brief, Proposed Findings of Fact and Conclusions of Law, nor any of Respondent's responses to the post-trial filings of Complaint Counsel. In light of that Respondent's Post-Trial Brief, Proposed Findings of Fact and Conclusions of Law, as well as Respondent's responsive filings to Complaint Counsel's post-trial filings should be placed on the public record, unless Respondent moves within 5 days of the date of this order to have *in camera* treatment accorded to specifically identified exhibits and testimony in strict accordance with Rule 3.45(b).

Complaint Counsel expresses no opinion regarding whether the Board can identify any trial evidence which warrants *in camera* treatment in accordance with the strict standards of Rule 3.45(b), if the Board's repeated waiver of such protection is disregarded. The Board's instant

motion does not specify with sufficient particularity the evidence or exhibits for which the Board might subsequently seek such protection to permit Complaint Counsel to respond.

However, since Complaint Counsel's Post-Trial Brief and Proposed Findings of Fact and Conclusions of Law do not include any *in camera* materials, including any sensitive personal information, Respondent has not established its entitlement to the relief it seeks, and this motion should be denied.

Respectfully submitted,

s/ Richard B. Dagen

Richard B. Dagen

Laurel A. Price

Counsel Supporting Complaint

Bureau of Competition

Federal Trade Commission

601 New Jersey Avenue, NW

Washington, DC 20580

Dated: May 9, 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 PREVENT
PUBLIC POSTING OF COMPLAINT COUNSEL’S POST-TRIAL BRIEF AND
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW ON THE
FEDERAL TRADE COMMISSION’S WEBSITE**

On April 29, 2011, Respondent filed a motion prevent posting of Complaint Counsel’s Post-Trial Brief and Proposed Findings of Fact and Conclusions of Law of the Commission’s public website because it contained confidential material. On May 9, 2011, Complaint Counsel filed their opposition noting that the entire contents of its post-trial filings contained materials already disclosed on the public record of these proceedings. Complaint Counsel also indicated that all of Respondent’s post-trial filings should be placed on the public record because it contains no *in camera* materials in accordance with the standards and procedures required by Commission Rule 3.45(b). Because neither Complaint Counsel’s Post Trial Brief and Proposed Findings of Fact and Conclusions of Law nor Respondent’s Post-Trial Brief and Proposed Findings of Fact and Conclusions of Law contain any *in camera* materials within the meaning of Commission Rule 3.45(b), 16 C.F.R § 3.45(b), Respondent’s motion is DENIED, and the

Post-Trial Briefs, Proposed Findings of Fact and Conclusions of Law, and respective responses thereto should, except as otherwise provided herein, be placed on the public record.

It is FURTHER ORDERED that, within five days of the date of this Order, Respondent may file a motion for *in camera* treatment of any trial exhibits or testimony in this matter, Respondent's moving papers will be filed in otherwise strict accordance with Commission Rule 3.45(b), and the Court's prior orders regarding seeking *in camera* treatment for trial exhibits and testimony, and shall further identify the specific portions of Complaint Counsel's post-trial filings for which *in camera* treatment is being sought. Neither the Court nor Complaint Counsel should have to speculate or guess regarding the scope of protection that the Board is seeking.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date:

CERTIFICATE OF SERVICE

I hereby certify that on May 9, 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.

May 9, 2011

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