



UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

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

**COMPLAINT COUNSEL’S OPPOSITION TO RESPONDENT’S  
AMENDED MOTION FOR IN CAMERA/PROTECTED TREATMENT OF  
RESPONDENT’S CONFIDENTIAL INFORMATION IN THE RECORD AND  
COMPLAINT COUNSEL’S POST-TRAIL FILINGS**

Respondent’s amended motion for *in camera* treatment again argues that it need only be shown that material was submitted as confidential pursuant to the terms of the protective order. As a result, Respondent once again fails to identify specifically which materials it believes meet the standard for *in camera* treatment. Respondent’s instant motion ignores prior orders of the Court, the Commission rules governing *in camera* treatment, and Commission precedent. As such, Respondent’s motion should be summarily denied.

**I. The Board Continues To Assert Claims The Court Has Rejected**

Incredibly, Respondent continues to argue that it is not even required to make a showing that the materials it seeks to have withheld from the public record meet the standard for *in camera* treatment under Rule 3.45(b), contrary to this Court’s orders, and Commission precedent.<sup>1</sup> Respondent asserts that “the FTC Rules do not require Respondent to meet the

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<sup>1</sup> Respondent requested that the “ALJ permit Respondent to file a motion and make a showing in accordance with the procedures outlined in Rule 3.45(b) as to the specific documents for which Respondent seeks redacted treatment” in its June 6, 2011 Motion For Leave to File for In Camera/Protected Treatment, p. 4. The Court afforded the Respondent the opportunity to do

specific showing under Rule 3.45(b) regarding ‘[i]n camera treatment of material’ in order for Complaint Counsel to be required to redact such information from its Proposed Findings.” (Respondent’s Motion p. 2, ¶ 2). Respondent then seeks to broaden this argument to apply to entire exhibits and portions of public testimony that were received in the public record without objection. (Respondent Motion p. 2, ¶¶ 3, 4). For instance, Respondent asserts that the “Protective Order” is the “Basis for Confidentiality” for each exhibit, each portion of testimony, and each reference to post-trial filings it seeks to have withheld from the public record. (See Respondent’s Motion Exhibit 1 entitled “Schedule of North Carolina State Board’s Confidential Material,” hereinafter Exhibit 1, pp. 5-45).

Respondent is well aware that the Court explicitly rejected these arguments and held that neither Rule 3.45(d)-(e) nor the “protective order” support withholding the evidence at issue from the public record. (ALJ Orders of May 16, 2011, p.3 and June 3, 2011, p. 1). In both Orders, the Court clearly indicated that once materials designated as confidential have been “offered into evidence,” such material may not be withheld from the public record unless they are covered by an order granting *in camera* treatment pursuant to 3.45(b). (ALJ Orders of May 16, 2011, p.3 and June 3, 2011, p. 1). Similarly, the Court specifically held that the identities of complainants and those under investigation by the Board did not constitute “sensitive personal information” as defined in Commission Rule 3.45(b). (ALJ Order of June 3, 2011). Respondent nevertheless continues to assert that such information is sensitive personal information. (Exhibit 1, p. 2,3,5-19, 22, 23, 26, 28, 31-46; Respondent’s Motion Exhibit 3, ¶¶ 10,11, hereinafter Exhibit 3). Respondent, in effect, requests the Court to reconsider the law of the case, the May

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so, but Respondent chose not to make the required showing.

16<sup>th</sup> and June 3<sup>rd</sup> Orders, without even mentioning any “extraordinary circumstances showing that the prior decisions were clearly wrong and would work a manifest injustice.”<sup>2</sup>

## II. Respondent Continues to Ignore The Court’s Orders And Rule 3.45(b)

In its Order Granting Respondent’s Leave to File for In Camera Treatment of June 7, 2011, the Court instructed the Respondent that:

The burden is on Respondent to identify not only the exhibit numbers for which it seeks *in camera* treatment, but also the specific information, with reference to each specific proposed finding of fact, or page in briefs filed by the parties.” (ALJ Order of June 7, 2011, p. 2).

In addition, Rule 3.45(b) requires that a motion for *in camera* treatment “must include an attachment containing a copy of each page of the document in question on which *in camera* or otherwise confidential excerpts appear.”

Respondent has not complied with the Court’s June 7, 2011 Order and has not submitted an attachment containing pages of documents where purported confidential or *in camera* excerpts appear. Rather than identify “the specific information” for which it seeks *in camera* treatment in exhibits as the Court instructed, Respondent asserts that all 135 trial exhibits – including 9 of Respondent’s trial exhibits – listed in Exhibit 1 should be withheld from the public record in their *entirety*. Respondent then claims that *in camera* treatment is warranted for every instance where one of these 135 trial exhibits is referenced in a post-trial filing or the trial transcript regardless of the nature of the reference. (Exhibit 1, pp. 5-45). For instance,

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<sup>2</sup> Moore’s Federal Practice § 134.21[1] (citing *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816 (1988); *accord In re Rambus Inc.*, No. 9302, 2003 FTC LEXIS 78 at \*2 (May 29, 2003); *see also In re Basic Research*, 2006 FTC LEXIS 18, at \*10-11 (Feb. 21, 2006); *In re Evanston Northwestern Healthcare Corp.*, No. 9315, 2005 FTC LEXIS 177, at \*3 (May 10, 2005).

Respondents seeks to have the following statements redacted from the trial transcript because they reference one of the 135 exhibits:

- “These are identified as the August 10 and 11, 2007 minutes.” (Transcript at 2792:25 to 2793:01)
- “I direct your attention to CX 106-5. The Subsection B and C indicated that these are agenda items.” (Transcript at 2793:17-19).
- “So this is a complaint referencing a Zoom system, January 12, 2007, and Ms. Friddle states, ‘Thank you again for bringing this to the board’s attention.’” (Transcript at 2272:03-06).

Respondent has similarly identified findings or reply findings by number whenever a finding refers to one of the 135 exhibits the Board claims should be withheld from the public record. Respondent does not specifically identify the *matter within the finding* for which it seeks *in camera* treatment presumably because it has not done so for any of the 135 exhibits it seeks to withhold from the public. For example, Respondent makes numerous references to the “details of open case” or “certain details of an investigation” that should be redacted from a finding, but does not identify the particular “details” it claims warrant *in camera* treatment. (E.g., Exhibit 1. p.7, reference to CCPFF ¶ 278 and CCRFF ¶¶ 227, 229, 230, and 238). The Court’s June 7, 2011, Order clearly stated that it was Respondent’s burden, not Complaint Counsel’s nor, for that matter, the Court’s burden, to designate the specific information Respondent claims should be afforded *in camera* treatment in trial exhibits or the post-trial filings.<sup>3</sup> Respondent’s failure to

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<sup>3</sup> It should be noted that Respondent’s Motion For Leave to File for In Camera/Protected Treatment of June 6, 2011 states that Complaint Counsel would not oppose the motion “provided that Respondent specifically identifies with brackets the material Respondent seeks to have redacted from the record and Complaint Counsel’s Public Post-Trial Filings in any subsequent motion . . . .” (June 6, 2011 Motion, ¶ 3). Complaint Counsel did not oppose Respondent’s June 6<sup>th</sup> motion, but Respondent did not identify with brackets the material at issue in its instant motion.

comply with the requirements of Rule 3.45(b) should alone be a basis for denying its instant motion.

### **III. Respondent Has Failed To Establish In Camera Treatment Is Appropriate**

Commission rules and precedent place the burden on the party seeking protection, in this case Respondent, to establish the basis for *in camera* treatment. *In re H.P. Hood & Sons, Inc.*, 58 F.T.C.1184, 1188 (1961). The Administrative Law Judge may order that material “be placed *in camera* only after a finding that its public disclosure will likely result in a clearly defined, serious injury to the person, partnership or corporation requesting *in camera* treatment or after finding that the material constitutes sensitive personal information.” 16 C.F.R. § 3.45(b); *In re Kaiser Aluminum & Chem. Corp.*, 103 F.T.C. 500 (1984), (quoting *H.P. Hood*, 58 F.T.C. at 1188). If such a showing is made, the importance of the information in explaining the rationale of decisions at the Commission is “the principal countervailing consideration weighing in favor of disclosure.” *In re General Foods Corp.*, 95 F.T.C. 352, 355 (1980).

Respondent has not made the requisite showing under Rule 3.45(b) or Commission precedent that any, much less all, of the material it lists in Exhibit 1 warrant *in camera* treatment. Respondent’s only argument for “protected treatment according to Rule 3.45” is set forth in paragraph six of its motion and the Declaration of Bobby D. White. (Exhibit 3). But Respondent’s justification is nothing more than a restatement of its argument that the “protective order” should provide the basis for an *in camera* determination.<sup>4</sup> (Respondent’s Motion, p. 4).

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<sup>4</sup> The Board’s references that the protection afforded to its “confidential” material will end when the material “is received and admitted into evidence in any hearing before the Board” is misleading. As discussed more fully below, N.C.G.S. 90-41(g) applies to hearings relating to “licensees, provisional licensees, and intern permit holders” rather than non-dentist teeth whiteners. The Board does not conduct hearings relating to the unlicensed practice of dentistry because the authority to adjudicate such claims rests with the North Carolina courts. (N.C.G.S.

Respondent actually argues that everything it deems to be “confidential” should *ipso facto* be granted *in camera* treatment. In short, Respondent seeks to strip the Court of its authority to make the *in camera* determination in this proceeding and substitute its own judgment for that of the Court.

Respondent’s repeated assertion that the material listed in their motion for *in camera* treatment is considered confidential under North Carolina law, specifically Section 90-41 of the Dental Practice Act, is flawed. First, Section 90-41(g) of the Dental Act is only a statutory exception to the general policy for public access to agency records pursuant to North Carolina’s Public Records Law. Second and more importantly, Section 90-41(g) is facially inapplicable to virtually all of the records at issue. The records at issue relate to investigations of non-licensee teeth-whiteners, and Section 90-41(g), by its express terms, grants confidential status to records collected in the course of a “licensing or disciplinary matter.” That statute has no application to investigations of non-licensees. Section 90-41(f) defines “licensee” as including “licensees, provisional licensees and holders of intern permits,” but makes no mention of persons accused of the unlicensed practice of dentistry. Section 90-40.1 – a separate provision – is entitled “Enjoining unlawful acts,” which include “[t]he practice of dentistry by any person who has not been duly licensed so as to practice or whose license has been suspended or revoked.” Section § 90-40.1 governs the investigation and remediation of the unlicensed practice of dentistry. Section 90-40.1 does not include an explicit exception to North Carolina’s Public Records Law. Further, the Board has not cited any legal authority describing an interpretation of Section

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90-40.1). Because the materials relating to the Board’s investigations of non-licensees would not be admitted into evidence in a hearing before the Board, the Board essentially is seeking to withhold such information from the public indefinitely.

90-40.1 or Section 90.41(g) that would allow the Board to keep records of investigations of non-licensurees suspected of engaging in the unlicensed practice of dentistry confidential.<sup>5</sup>

Complaint Counsel has not undertaken a complete review of all of the material for which the Board seeks *in camera* treatment because, as noted above, Respondent failed to identify the material with sufficient specificity. However, references to several of Respondent's claims set forth in Exhibit 1 are instructive.

- Respondent claims that a quotation contained in CCPFF ¶ 379 from the Board's Public Minutes of August 10-11, 2007 should be granted *in camera* treatment and removed from the public record. (Exhibit 1, p. 5). However, the quotation in CCPFF ¶ 379 is found in both the "Public Board Minutes" (CX0206) and the "Closed Session Minutes" for the same series of meetings (CX0106).<sup>6</sup>
- Respondent claims that the statement, "*I direct your attention to CX 106-5. The Subsection B and C indicated that these are agenda items*" found in the Trial Transcript at page 2793, line 17-19 should be afforded *in camera* treatment even though it is nothing more than a reference to material contained in both the "Public Board Minutes" (CX0206) and the "Closed Session Minutes" for the same meetings (CX0106). [emphasis added], (Exhibit 1, p.25).

As these references show, at least a portion of Respondent's claim that disclosure will cause a serious injury to the Board is misplaced. Due to Respondent's general failure to specify *in camera* material, and the lack of any colorable basis for confidential treatment, let alone *in camera* treatment, for material that was identified (e.g., transcript quotes), Complaint Counsel

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<sup>5</sup> North Carolina state courts are adjured to "apply the plain meaning of the words, with no need to resort to judicial construction" when "the terms of a statute are clear and unambiguous" when interpreting the Dental Practice Act. *N.C. State Bd. of Dental Examiners v. Woods*, 688 S.E.2d 84, 88 (N.C. Ct. App. 2010).

<sup>6</sup> In several instances such as here, Respondent identified as confidential the Board's "Public Meeting Minutes" as well as "Closed Session Minutes" even though identical material appeared in both.

have not undertaken to determine the conditions under which a proper law enforcement privilege might be available.

For all of the foregoing reasons, Respondent has not established its entitlement to the relief it seeks, and its motion should be denied.

Respectfully submitted,

s/ Richard B. Dagen  
Richard B. Dagen  
William L. Lanning  
Laurel A. Price  
Counsel Supporting Complaint  
Bureau of Competition  
Federal Trade Commission  
601 New Jersey Avenue, N.W.  
Washington, DC 20580

Dated: June 24, 2011

**UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION**

In the Matter of	)	
	)	
<b>NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS,</b>	)	<b>Docket No. 9343</b>
	)	
Respondent.	)	
	)	

**[PROPOSED] ORDER DENYING RESPONDENT’S  
AMENDED MOTION FOR IN CAMERA/PROTECTED TREATMENT OF  
RESPONDENT’S CONFIDENTIAL INFORMATION IN THE RECORD AND  
COMPLAINT COUNSEL’S POST-TRAIL FILINGS**

On June 14, 2011, Respondent filed its Amended Motion for In Camera/Protected Treatment of Respondent’s Confidential Information in the Record and Complaint Counsel’s Post-Trial Filings.

On June 24, 2011, Complaint Counsel filed their opposition, noting that Respondent continues to argue that it is not required to show that the materials it seeks to have withheld from the public record meet the standard for *in camera* treatment under Rule 3.45(b) despite the Court’s Orders of May 16, 2011 and June 3, 2011 to the contrary, and Commission precedent. Complaint Counsel then noted that Respondent failed to comply with the procedural requirements of Rule 3.45(b) and the Court’s Order of June 7, 2011 that instructed Respondent to specifically identify information for which it sought *in camera* treatment. Complaint Counsel further noted that Respondent had not made the requisite showing under Rule 3.45(b) or Commission precedent that any of the material it seeks to have withheld from the public record warrants *in camera* treatment.

Because Respondent has not made the requisite showing pursuant to Rule 3.45 (b) and Commission precedent, and has not complied with the Orders of this Court, Respondent's motion is DENIED, and the Post-Trial Briefs, Proposed Findings of Fact and Conclusions of Law, and respective responses thereto shall be placed on the public record.

ORDERED:

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D. Michael Chappell  
Chief, Administrative Law Judge

Date:

## **CERTIFICATE OF SERVICE**

I hereby certify that on June 24, 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:

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*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.

June 24, 2011

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