

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



In the Matter of )  
THE NORTH CAROLINA [STATE] BOARD ) PUBLIC  
OF DENTAL EXAMINERS, ) DOCKET NO. 9343  
Respondent. )  
)

**RESPONDENT'S MOTION FOR AN ORDER COMPELLING DISCOVERY**

NOW COMES Respondent North Carolina State Board of Dental Examiners (“State Board”), by and through the undersigned attorneys, and moves unto the Administrative Law Judge (“ALJ”) pursuant to Rule 3.38(a) of the Rules of the Federal Trade Commission (“Commission”) for an order compelling Complaint Counsel to supplement its general discovery responses to the State Board’s First Set of Requests for Admissions (“Requests for Admission”), First Set of Interrogatories (“Interrogatories”), and First Set of Requests for Production of Documents (“Requests for Production”) (collectively, the “Discovery Requests”). In support hereof, Respondent states unto the Administrative Law Judge as follows:

**INTRODUCTION**

On October 12, 2010, Respondent properly requested that Complaint Counsel respond to the State Board’s Discovery Requests consistent with Commission Rules 16 C.F.R. §§ 3.31, 3.32, 3.35, and 3.37. *See* Requests for Admission (true and correct copy attached hereto as Exhibit A); Interrogatories (true and correct copy attached hereto as Exhibit B); and Requests for Production (true and correct copy attached hereto as

Exhibit C). *See also* Complaint Counsel’s Response to Requests for Admission (true and correct copy attached hereto as Exhibit D); Complaint Counsel’s Response to Interrogatories (true and correct copy attached hereto as Exhibit E); Complaint Counsel’s Response to Requests for Production (true and correct copy attached hereto as Exhibit F).

Complaint Counsel has failed to comply with the State Board’s Discovery Requests. It has provided responses that generally fail to meet its obligations under the Commission Rules, and in many of its responses Complaint Counsel flatly refuses to respond to the State Board’s Requests. Complaint Counsel’s Responses are thus generally insufficient for the reasons set forth below.

**GOOD FAITH ATTEMPT BY COUNSEL  
TO RESOLVE DISCOVERY MATTERS IN DISPUTE**

Respondent’s counsel and Complaint Counsel have negotiated in good faith to resolve the matters in dispute addressed by this Motion and have failed to resolve their dispute. As detailed below, Respondent is entitled to its requested discovery.

**I. Justification and Basis: General Insufficiency of Discovery Responses**

Due to the inordinately large number of specific discovery items that are the subject of Respondent’s Motion to Compel, Respondent wishes to first set forth the justifications and bases for seeking an order compelling disclosure for each separate form of Discovery Request. These justifications and bases will then be referenced with the specific discovery items for which an order is sought compelling their disclosure. *See* “Specific Discovery Requests that Are Subjects of This Motion,” below.

**A. The State Board’s Requests for Admissions: General Insufficiency**

In responding to the State Board’s Requests for Admissions, Complaint Counsel improperly refuses to answer numerous Requests made by the State Board, in many

instances merely by stating that no response is required because the request “calls for a legal conclusion.” Rule 3.32(b) clearly states that this alone is an inadequate basis for not responding to a request for admission. *See* 16 C.F.R. § 3.32(b) (“A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; the party may deny the matter or set forth reasons why the party cannot admit or deny it”).

Complaint Counsel’s responses are also insufficient for the following reasons:

- In a number of responses, Complaint Counsel refuses to respond to numerous Requests because they deem the matters requested “irrelevant” and “beyond the scope” of Rule 3.32, but do not assert any basis for this claim.
- In a number of responses Complaint Counsel fail to set forth “in detail” why they cannot truthfully admit or deny certain matters, as called for by Rule 3.32(b). In fact, in their responses regarding three of the State Board members in Request for Admission No. 14, Complaint Counsel make no attempt at all to state why they cannot truthfully admit or deny the matter requested.

## **B. The State Board’s Interrogatories: General Insufficiency**

Complaint Counsel’s response to the State Board’s Interrogatories is generally insufficient in that, in opting to cite to responsive records pursuant to Rule 3.35(c), only general categories of documents are cited. This fails the requirement of Rule 3.35(c), which states that “[t]he specification shall include sufficient detail to permit the

interrogating party to identify readily the **individual documents** from which the answer may be ascertained.” § 3.35(c) (emphasis added).

Complaint Counsel’s response is also generally insufficient for the following reasons:

- Complaint Counsel generally assert that they are not obligated to review certain records because the requests are beyond the scope of Rule 3.35, but do not explain why the requests fall outside of the Rule nor do they specify which records this argument addresses.
- By way of example, Complaint Counsel improperly refuse to respond to Interrogatory No. 9, stating only that it is not reasonably calculated to lead to admissible evidence.
- Complaint Counsel fail to adequately respond to certain Interrogatories that ask for “*all sources, data, documents, expert opinion, and any other information, including dates*” related to each request. The responses are incomplete as to the information requested because they only cite certain exemplary documents responsive to each request, but do not state whether the response addresses all such documents or whether there are other responsive documents.

### **C. The State Board’s Requests for Production: General Insufficiency**

Complaint Counsel’s responses to the State Board’s Requests for Production are generally improper and insufficient because they plainly and openly seek to shift the burden of proof in this proceeding from the Commission to Respondent. With respect to numerous requests, Complaint Counsel merely asserts that the State Board already has

the documents corresponding to those requests and that no further response is required. However, Complaint Counsel fails in nearly every response to specify which documents are responsive to each individual request for production as required by the Commission Rules. *See* § 3.37(a) (“If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts.”).

Complaint Counsel’s responses are also insufficient for the following reasons:

- Complaint Counsel improperly and overbroadly assert a number of privileges as a basis for not producing certain documents, including the government deliberative process privilege, the work product doctrine, the law enforcement investigatory privilege, and the government informer privilege.
- Complaint Counsel’s privilege log improperly redacts the recipients, authors, and/or subject lines of certain documents/communications, and further fails to provide a sufficient description of the items for which privilege has been claimed, thereby impairing Respondent and the Court’s ability to evaluate any claims of privilege.
- Furthermore, Complaint Counsel improperly refuses to produce certain documents, and merely states that the corresponding requests are “argumentative” and/or call upon Complaint Counsel to “interpret legal theories or draw legal conclusions.” Under 16 C.F.R. § 3.32(b), this explanation also does not constitute a meaningful objection.

## **II. Specific Discovery Requests That Are Subjects of This Motion**

The following are the specific references to the items and discovery requests of Discovery Requests for which this Motion requests an order compelling disclosure.

### **A. Failure to Sufficiently Respond to Requests for Admission: Specific Requests**

#### **1. Refusal to Answer Requests “Calling for a Legal Conclusion”**

Complaint Counsel’s Responses to the Requests for Admissions numbered 1, 11, 12, 13, 18, 19, 20, 21, 22, and 23 refuse to provide a response merely on the basis that each of these requests “calls for a legal conclusion.” Rule 3.32(b) clearly states that this alone is an inadequate basis for not responding to a request for admission. *See* 16 C.F.R. § 3.32(b) (“A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; the party may deny the matter or set forth reasons why the party cannot admit or deny it.”). Respondent respectfully requests that the ALJ, pursuant to his authority under 16 C.F.R. § 3.38, either rule that Complaint Counsel’s response be amended to comply with these requests, or that the admissions requested be deemed admitted.

#### **2. Refusal to Answer Requests Because They Are “Irrelevant” and “Beyond the Scope” of Rule 3.32**

In Complaint Counsel’s Responses to the Requests for Admissions numbered 9, 10, and 24, Complaint Counsel refuses to respond because they deem the matters requested “irrelevant” and “beyond the scope” of Rule 3.32, but do not assert any basis for this claim. For Complaint Counsel to properly object, Rule 3.32 requires that “the reasons therefor shall be stated,” and further that the response “shall specifically deny the

matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter.” § 3.32(b).

Complaint Counsel’s responses to the above numbered Requests provide only the bare assertion that the above numbered Requests are “irrelevant” and “beyond the scope” without providing any reason for the assertion and fail to provide even the semblance of detail regarding this assertion. This is clearly an insufficient response under the clear language of Rule 3.32. Respondent respectfully requests that the ALJ, pursuant to his authority under 16 C.F.R. § 3.38, either rule that Complaint Counsel’s response be amended to comply with these requests, or that the admissions requested be deemed admitted.

### **3. Responses That Fail to Set Forth “in Detail” Why Complaint Counsel Cannot Truthfully Admit or Deny Certain Matters**

In Complaint Counsel’s Responses to the Requests for Admissions numbered 1, 9, 10, 11, 12, 13, 14, 18, 19, 20, 21, 22, 23 and 24, Complaint Counsel fail to set forth “in detail” why they cannot truthfully admit or deny certain matters. For Complaint Counsel to properly object to a Request, Rule 3.32 requires that “the reasons therefor shall be stated,” and further that the response “shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter.” § 3.32(b).

Complaint Counsel’s responses to the above numbered Requests are insufficient because they do not provide adequate detail to allow Respondent or the ALJ to evaluate the substance of Complaint Counsel’s objection. By way of example, in its response to Request No. 14, Complaint Counsel merely states that it “cannot truthfully admit or deny this Request” with respect to three of the State Board members, and provides no reason at

all for this assertion, let alone any detailed explanation for refusing to answer. The responses to the rest of the above-numbered Requests are similarly deficient.

This is clearly an insufficient response under the clear language of Rule 3.32. Respondent respectfully requests that the ALJ, pursuant to his authority under 16 C.F.R. § 3.38, either rule that Complaint Counsel's response be amended to comply with these requests, or that the admissions requested be deemed admitted.

## **B. Failure to Sufficiently Respond to Interrogatories: Specific Requests**

### **1. Failure to Identify Specific Individual Documents**

Complaint Counsel's responses to all of the State Board's Interrogatories are generally deficient in that, in opting to cite to responsive records pursuant to Rule 3.35(c), only general categories of documents are cited. This fails the requirements of Rule 3.35(c), which states that “[t]he specification shall include sufficient detail to permit the interrogating party to identify readily the individual documents from which the answer may be ascertained.” § 3.35(c) (emphasis added). This deficiency applies generally to all of Complaint Counsel's responses to the State Board's Interrogatories. By way of example, in its Response to Interrogatory No. 2, Complaint Counsel states broadly that information responsive to the request may be found in documents provided by a number of companies in this litigation, but fails to mention which documents contain the responsive information. As detailed above, if Complaint Counsel opts to comply with the Interrogatory pursuant to § 3.35(c), then it must identify the “individual documents from which the answer may be ascertained.”

These generally deficient responses are also characteristic of the attempts by Complaint Counsel to shift its burden of proof regarding its claims in this action to

Respondent. Complaint Counsel has the burden of proving its case, and it must provide such information to Respondent as requested in accordance with the basic tenets of discovery.

In this respect, all of Complaint Counsel's responses to the State Board's Interrogatories are insufficient under the clear language of Rule 3.35. Respondent respectfully requests that the ALJ, pursuant to his authority under 16 C.F.R. § 3.38, either rule that Complaint Counsel's response be amended to comply with these requests, or that Complaint Counsel may not introduce into evidence or otherwise rely, in support of any claim or defense, upon testimony by such party, officer, agent, expert, or fact witness, or the documents or other evidence, or upon any other improperly withheld or undisclosed materials, information, witnesses, or other discovery related to the subject matter of the State Board's Interrogatories, or grant such other relief as the ALJ deems necessary within his power under § 3.38.

## **2. Refusal to Answer Interrogatories Because They Are “Irrelevant” and “Beyond the Scope” of Rule 3.35**

Complaint Counsel generally assert that they are not obligated to review certain records because the requests are beyond the scope of Rule 3.35, but do not explain why the requests fall outside of the Rule nor do they specify which records this argument addresses. This assertion is made as a “general objection,” but fails to articulate any reason why Respondent's Interrogatories fall outside the scope of Rule 3.35. Moreover, the objection is improper because it is not made with respect to any particular interrogatory. Complaint Counsel cannot refuse to answer any of Respondent's Interrogatories on the general basis that all of them fall outside the scope of the rule.

Such an objection is unintelligible and provides no substantive basis for either the ALJ or Respondent to evaluate Complaint Counsel's objection.

Respondent respectfully requests that the ALJ, pursuant to his authority under 16 C.F.R. § 3.38, either rule that Complaint Counsel's response be amended to comply with these requests, or that Complaint Counsel may not introduce into evidence or otherwise rely, in support of any claim or defense, upon testimony by such party, officer, agent, expert, or fact witness, or the documents or other evidence, or upon any other improperly withheld or undisclosed materials, information, witnesses, or other discovery related to the subject matter of the State Board's Interrogatories, or grant such other relief as the ALJ deems necessary within his power under § 3.38.

### **3. Improper Refusal to Respond to Interrogatory No. 9**

Complaint Counsel improperly refuses to fully respond to Interrogatory No. 9, stating only that the Interrogatory is not reasonably calculated to lead to admissible evidence. The Interrogatory asks Complaint Counsel to “[i]dentify each person serv[ed] with a *subpoena duces tecum* . . . in this matter and [the] attorneys who spoke to each such person.” Complaint Counsel refuses to provide the name of these attorneys. This information is clearly related to this matter, and the request is reasonably calculated to lead to admissible evidence because it “may be reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent.” 16 C.F.R. § 3.31. Complaint Counsel served deposition notices and subpoenas on numerous persons in connection with this matter. Respondent is without knowledge as to all of those served and which FTC representative spoke with each person served, and Complaint Counsel is obligated to provide this information to Respondent.

Furthermore, Complaint Counsel asserts no specific claim of privilege in connection with this Interrogatory.

Accordingly, Complaint Counsel's response to Interrogatory No. 9 is insufficient. Respondent respectfully requests that the ALJ, pursuant to his authority under 16 C.F.R. § 3.38, rule that Complaint Counsel's response be amended to comply with this request, or grant such other relief as the ALJ deems necessary within his power under § 3.38.

#### **4. Failure to Fully Respond to Interrogatories 12-14**

Complaint Counsel fails to adequately respond to Interrogatories 12, 13 and 14, which ask for “*all sources, data, documents, expert opinion, and any other information, including dates*” related to each request. The responses are incomplete as to the information requested because they only cite certain exemplary documents responsive to the requests, but do not state whether the response addresses all such documents or whether there are other responsive documents. Although Complaint Counsel does provide some relevant information related to these Interrogatories, it does so in apparent summary fashion, and cites documents as mere examples of the type of documents sought. Respondent's Interrogatory requested “all” such information.

Complaint Counsel's objection that this request “seeks to compel Complaint Counsel to undertake investigation, discovery, and analysis on behalf of Respondent” is not a proper basis for an objection here. Complaint Counsel has the burden of proof on this issue and cannot unjustifiably shift that burden to Respondent merely by making this objection. Regardless, Respondent's Interrogatory is proper because it “may be reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent.” 16 C.F.R. § 3.31. Further, this

objection does not entitle Complaint Counsel to only provide some of the requested information requested but not all of it.

Respondent respectfully requests that the ALJ, pursuant to his authority under 16 C.F.R. § 3.38, either rule that Complaint Counsel's response be amended to comply with these requests, or that Complaint Counsel may not introduce into evidence or otherwise rely, in support of any claim or defense, upon testimony by such party, officer, agent, expert, or fact witness, or the documents or other evidence, or upon any other improperly withheld or undisclosed materials, information, witnesses, or other discovery related to the subject matter of Interrogatories No. 12-14, or grant such other relief as the ALJ deems necessary within his power under § 3.38.

**C. Failure to Sufficiently Respond to Requests for Production:  
Specific Requests**

**1. Failure to Identify Specific Individual Documents**

Complaint Counsel's responses to all of the State Board's Requests for Production are generally improper and insufficient because they plainly and openly seek to shift the burden of proof in this proceeding from the Commission to Respondent. With respect to Requests numbered 2, 3, 4, 5, 6, 7, 8, 11, 12, 17, 18, and 19, Complaint Counsel merely asserts that the State Board already has the documents corresponding to those requests and that no further response is required. However, Complaint Counsel fails to specify which documents are responsive to the individual request for production as required by the Commission Rules. *See* § 3.37(b) ("If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts"). It is impossible for either the ALJ or Respondent to evaluate what documents are responsive to its Requests when Complaint Counsel makes no effort to identify the

documents that are responsive and have been produced, the documents that are responsive and will be produced, and the documents that are subject to a claim of privilege or other objection that form the basis for which Complaint Counsel seeks to have such documents excluded.

Respondent respectfully requests that the ALJ, pursuant to his authority under 16 C.F.R. § 3.38, either rule that Complaint Counsel's response be amended to comply with these requests, or that Complaint Counsel may not introduce into evidence or otherwise rely, in support of any claim or defense, upon testimony by such party, officer, agent, expert, or fact witness, or the documents or other evidence, or upon any other improperly withheld or undisclosed materials, information, witnesses, or other discovery related to the subject matter of the State Board's Requests for Production, or grant such other relief as the ALJ deems necessary within his power under § 3.38.

## **2. Improper, Overbroad, and/or Inapplicable Assertion of Privileges**

Complaint Counsel improperly and overbroadly assert a number of privileges as a basis for not producing certain documents, including the government deliberative process privilege, the law enforcement investigatory privilege, the work product doctrine, and the government informer privilege. These privileges are discussed individually below, and in greater detail in Respondent's Memorandum in Support of Its Motion for an Order Compelling Discovery ("Memorandum in Support").

### **a. Government Deliberative Process Privilege**

Complaint Counsel asserts that it is entitled to the government deliberative process privilege with respect to Requests numbered 1-7, 9, 10, 12, 13, 17, 18 and 19. This privilege is completely inapplicable here. *See NLRB v. Sears, Roebuck & Co.*,

421 U.S. 132, 150 (1975) (privilege merely protects “decision-making processes of government agencies,” namely such documents as “advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated”). By contrast, the Commission’s role here is merely that of an investigative and enforcement agency. Further, the privilege does not serve to prevent the disclosure of any actual facts. *See, e.g., Playboy Enter. v. Dep’t of Justice*, 677 F.2d 931, 935 (D.C. Cir. 1982) (holding that fact report was not within privilege because compilers’ mission was simply “to investigate the facts,” and because report was not “intertwined with the policy-making process”).

Even if the privilege was applicable, Complaint Counsel has failed to carry its burden of establishing the privilege because they have made no specific showing that the record protected by the privilege is both (1) deliberative, *i.e.*, part of the decision-making process, and (2) predecisional, *i.e.*, “prepared in order to assist an agency decision-maker in arriving at his decision.” *See Renegotiation Bd. v. Grumman Aircraft Eng’g Corp.*, 421 U.S. 168, 184 (1975).

Accordingly, the government deliberative process privilege does not apply here.

#### **b. Law Enforcement Investigatory Privilege**

Complaint Counsel asserts the law enforcement investigatory privilege with respect to Requests numbered 1-7, 9, 10, 12, 17, 18, and 19, but provides no justification for this assertion of privilege.

The law enforcement investigatory privilege is a “limited, federal common law of privilege which protects criminal investigatory files.” *Lykken v. Brady*, No. 07-4020-KES, 2008 WL 2077937, at \*5 (D.S.D. May 14, 2008) (citations omitted). It does not

apply “where the enforcement action has already been taken,” and even then there must be a showing that the “disclosure . . . would interfere with enforcement proceedings.” *Id.* (citing *Campbell v. Dept. of Health & Human Services*, 682 F.2d 256 (D.D.C.1982) (J. Ginsburg)). It does not apply here because there is no ongoing investigation: the Commission has already proceeded to an enforcement action. Further, as discussed in greater detail in Respondent’s Memorandum in Support, Complaint Counsel has not made a sufficient showing to meet its burden in properly establishing the existence of a privilege. Thus the privilege has no basis in this context.

**c. Work Product Doctrine**

Complaint Counsel asserts that it is entitled to the protection afforded by the work product doctrine to justify non-cooperation with respect to Requests numbered 1-7, 9, 10, 12, 13, 17, 18 and 19. However no specific showing has been made with respect to the documents subject to this claim. Neither Respondent nor the ALJ can evaluate Complaint Counsel’s claim without a more specific and detailed description of what type of documents and other information is subject to the work product doctrine privilege claimed by Complaint Counsel.

**d. Government Informer Privilege**

Complaint Counsel asserts the government informer privilege with respect to Requests numbered 1-7, 9, 10, 12, 17, 18, and 19, but provides no justification for this assertion of privilege. The government informer privilege is defined as “the Government’s privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law.” *Roviaro v. U.S.*, 353 U.S. 53, 59 (1957). But Complaint Counsel’s assertion of the

government informer privilege overlooks the reality that the present matter does not concern “*violations of law*” of either the criminal or civil variety. Rather, it concerns the Commission’s disagreement with a state agency over its interpretation and enforcement of existing law. The persons whose identity Complaint Counsel seeks to protect thus are not proper informants as contemplated by *Roviaro*, *i.e.*, “persons who furnish information of violations of law.” Further, the privilege is not absolute: it does not apply where disclosure “is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause.” *Id.* at 60-61.

As discussed in greater detail in Respondent’s Memorandum in Support, the government informer privilege does not apply here.

### **3. Incomplete Privilege Log**

Complaint Counsel’s privilege log improperly redacts the recipients, authors, and/or subject lines of certain communications. Such redactions impair the ability of both Respondent and the ALJ to evaluate Complaint Counsel’s claims of privilege. Complaint Counsel also fails to provide a sufficient description of the documents listed on the privilege log for either Respondent or the Court to evaluate Complaint Counsel’s claims of privilege. Respondent respectfully requests that the ALJ, pursuant to his authority under 16 C.F.R. § 3.38, rule that Complaint Counsel’s response be amended to provide a full and proper privilege log that includes this above-described redacted information and sufficient descriptions of the documents for which privilege has been claimed.

#### **4. Refusal to Answer Requests Because They Are “Beyond the Scope” of Discovery**

In Complaint Counsel’s Responses to the Requests for Production numbered 1, 2, 3, 4, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, and 18, Complaint Counsel refuse to respond because they deem the matters requested “beyond the scope” of Rules 3.31 and Rule 3.36, but do not assert any basis for this claim. Rule 3.31 provides that the information requested be reasonably calculated to lead to admissible evidence, while Rule 3.36 is inapplicable to Respondent’s Request for Production. In connection with a document request under Rule 3.37, Rule 3.36 addresses only documents “in the possession, custody, or control of the Commissioners, the General Counsel, any Bureau or Office not involved in the matter . . . ” The Rule does not address documents that are in the possession, custody, or control of the Bureau of Competition, to which Complaint Counsel belongs, when they are involved in the matter. Thus Rule 3.36 does not apply here, where Respondent seeks documents and other information in the possession, custody, or control of Complaint Counsel.

Further, in order for Complaint Counsel to form a proper objection to these requests, Rule 3.37 requires that “the reasons for the objection shall be stated.” 16 C.F.R. § 3.37(b). Complaint Counsel’s responses to the above numbered Requests provide only the bare assertion that the above numbered Requests are “beyond the scope” of discovery without providing any reason for the assertion and fail to provide even the semblance of detail regarding this assertion. This is clearly an insufficient response under the language of Rule 3.37.

Respondent respectfully requests that the ALJ, pursuant to his authority under 16 C.F.R. § 3.38, either rule that Complaint Counsel’s response be amended to comply

with these requests, or that Complaint Counsel may not introduce into evidence or otherwise rely in support of any claim or defense, upon testimony by such party, officer, agent, expert, or fact witness, or the documents or other evidence, or upon any other improperly withheld or undisclosed materials, information, witnesses, or other discovery related to the subject matter of the State Board’s Requests for Production, or grant such other relief as the ALJ deems necessary within his power under § 3.38.

##### **5. Refusal to Answer Requests “Calling for a Legal Conclusion”**

Complaint Counsel’s Responses to the Requests for Production numbered 12 and 19 refuse to provide a response merely on the basis that each of these requests is “argumentative” and “calls for a legal conclusion.” This is not a meaningful objection under Rule 3.37, and is irrelevant to Complaint Counsel’s obligation to search for documents responsive to Respondent’s Requests for Production.

Respondent respectfully requests that the ALJ, pursuant to his authority under 16 C.F.R. § 3.38, either rules that Complaint Counsel’s response be amended to comply with these requests, or that Complaint Counsel may not introduce into evidence or otherwise rely, in support of any claim or defense, upon testimony by such party, officer, agent, expert, or fact witness, or the documents or other evidence, or upon any other improperly withheld or undisclosed materials, information, witnesses, or other discovery related to the subject matter of the State Board’s Requests for Production, or grant such other relief as the ALJ deems necessary within his power under § 3.38.

## **CONCLUSION**

Thus, Complaint Counsel has wrongfully failed to respond to Respondent's Discovery Requests and has done so without justification. Respondent is therefore entitled to the relief herein requested.

WHEREFORE, Respondent prays that the ALJ enter an Order compelling Complaint Counsel to comply with Respondent's Discovery Requests, as specifically requested and the insufficiency of which is detailed in the List of Specific Discovery Items Requested (attached hereto as Exhibit G), pursuant to his authority under Rule 3.38(b), as set forth below:

If Complaint Counsel or the Commission fail to comply with an Order entered herein, upon motion by the Respondent, the ALJ may take such action in regard thereto as is just, including but not limited to the following:

(1) Order that Complaint Counsel's responses to Respondent's Discovery Requests be amended to comply with the Requests;

(2) Order, with respect to Respondent's Discovery Requests, that the matters be admitted or that the admission, testimony, documents, or other evidence would have been adverse to Complaint Counsel or the Commission be admitted;

(3) Rule that Complaint Counsel may not introduce into evidence or otherwise rely, in support of any claim or defense, upon testimony by such party, officer, agent, expert, or fact witness, or the documents or other evidence, or upon any other improperly withheld or undisclosed materials, information, witnesses, or other discovery; and

(4) Rule that Complaint Counsel may not be heard to object to introduction and use of secondary evidence to show what the withheld admission, testimony, documents, or other evidence would have shown.

This the 11th day of January, 2011.

ALLEN AND PINNIX, P.A.

/s/ Alfred P. Carlton, Jr.

---

Noel L. Allen  
M. Jackson Nichols  
Alfred P. Carlton, Jr.  
Attorneys for Respondent  
Post Office Drawer 1270  
Raleigh, North Carolina 27602  
Telephone: 919-755-0505  
Facsimile: 919-829-8098  
Email: [acarlton@allen-pinnix.com](mailto:acarlton@allen-pinnix.com)

## CERTIFICATE OF SERVICE

I hereby certify that on January 11, 2011, I electronically filed the foregoing with the Federal Trade Commission using the FTC E-file system, which will send notification of such filing to the following:

Donald S. Clark, Secretary  
Federal Trade Commission  
600 Pennsylvania Avenue, N.W.  
Room H-159  
Washington, D.C. 20580

I hereby certify that the undersigned has this date served copies of the foregoing upon all parties to this cause by electronic mail as follows:

William L. Lanning  
Bureau of Competition  
Federal Trade Commission  
600 Pennsylvania Avenue, N.W.  
Room NJ-6264  
Washington, D.C. 20580  
[wllanning@ftc.gov](mailto:wllanning@ftc.gov)

Steven L. Osnowitz  
Bureau of Competition  
Federal Trade Commission  
600 Pennsylvania Avenue, N.W.  
Room NJ-6264  
Washington, D.C. 20580  
[sosnowitz@ftc.gov](mailto:sosnowitz@ftc.gov)

Melissa Westman-Cherry  
Bureau of Competition  
Federal Trade Commission  
600 Pennsylvania Avenue, N.W.  
Room NJ-6264  
Washington, D.C. 20580  
[westman@ftc.gov](mailto:westman@ftc.gov)

Tejasvi Srimushnam  
Bureau of Competition  
Federal Trade Commission  
600 Pennsylvania Avenue, N.W.  
Room NJ-6264  
Washington, D.C. 20580  
[tsrimushnam@ftc.gov](mailto:tsrimushnam@ftc.gov)

Michael J. Bloom  
Bureau of Competition  
Federal Trade Commission  
600 Pennsylvania Avenue, N.W.  
Room H-374  
Washington, D.C. 20580  
[mjbl bloom@ftc.gov](mailto:mjbl bloom@ftc.gov)

Richard B. Dagen  
Bureau of Competition  
Federal Trade Commission  
600 Pennsylvania Avenue, N.W.  
Room H-374  
Washington, D.C. 20580  
[rdagen@ftc.gov](mailto:rdagen@ftc.gov)

I also certify that I have sent courtesy copies of the document via Federal Express and electronic mail to:

The Honorable D. Michael Chappell  
Administrative Law Judge  
Federal Trade Commission  
600 Pennsylvania Avenue N.W.  
Room H-113  
Washington, D.C. 20580  
oalj@ftc.gov

This the 11th day of January, 2011.

/s/ Alfred P. Carlton, Jr.  
Alfred P. Carlton, Jr.

**CERTIFICATION FOR ELECTRONIC FILING**

I further 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 by the adjudicator.

/s/ Alfred P. Carlton, Jr.  
Alfred P. Carlton, Jr.

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

---

In the Matter of )  
THE NORTH CAROLINA [STATE] BOARD ) DOCKET NO. 9343  
OF DENTAL EXAMINERS, )  
Respondent. )  
\_\_\_\_\_  
)

**[PROPOSED] ORDER GRANTING MOTION TO COMPEL DISCOVERY**

The Scheduling Order in this case set November 18, 2010 as the deadline for Complaint Counsel to fully respond to all discovery. Complaint Counsel have provided an incomplete response to Respondent's Discovery Requests in that:

- (a) Complaint Counsel have not responded and/or have provided insufficient responses with respect to Respondent's First Set of Requests for Admissions;
- (b) Complaint Counsel have not responded and/or have provided insufficiently detailed responses with respect to Respondent's First Set of Interrogatories; and
- (c) Complaint Counsel have provided insufficient responses and/or have made improper and overbroad claims of privilege with respect to Respondent's First Set of Requests for Production of Documents.

Respondent represents that it contacted Complaint Counsel about its failure to comply with Respondent's Discovery Requests and that following good faith negotiations with Complaint Counsel, Complaint Counsel has continued to fail to comply.

Under Rule 3.38(a) of the Commission's Rules of Practice, the Administrative Law Judge ("ALJ") may, upon a showing of good cause, grant a motion to compel discovery. Good cause is found to grant Respondent's Motion for an Order Compelling Discovery.

Accordingly, Respondent's Motion to Compel Discovery is GRANTED. Complaint Counsel shall have until January \_\_\_, 2011 to fully comply with Respondent's First Set of Requests for Admissions, First Set of Interrogatories, and First Set of Requests for Production of Documents. Compliance with Respondent's Discovery Requests shall be consistent with the following:

#### **First Set of Requests for Admissions**

Complaint Counsel's response shall be amended to comply with the Requests for Admissions numbered 1, 9, 10, 11, 12, 13, 14, 18, 19, 20, 21, 22, 23 and 24. If Complaint Counsel cannot respond to any of these requests, then consistent with Rule 3.32(b) "the reasons therefor shall be stated" and Complaint Counsel must either "specifically deny the matter or set forth in detail the reasons why [Complaint Counsel] cannot truthfully admit or deny the matter."

#### **First Set of Interrogatories**

1. Complaint Counsel's response shall be amended to comply with Interrogatory No. 1, to which no response was received by Respondent. If Complaint Counsel's response includes the identification of records from which the information sought may be derived or ascertained, then consistent with Rule 3.35(c), Complaint Counsel's response shall "include sufficient detail to permit the interrogating party to identify readily the individual documents from which the answer may be ascertained."

2. Complaint Counsel's response shall be amended to fully comply with Interrogatory No. 9, and Complaint Counsel shall provide Respondent with the names of all attorneys who spoke with persons served with a subpoena in this matter.

3. Complaint Counsel's response shall be amended to fully comply with Interrogatories numbered 2, 3, 4, 5, 6, and 11. Consistent with Rule 3.35(c), Complaint Counsel's response shall "include sufficient detail to permit the interrogating party to identify readily the **individual documents** from which the answer may be ascertained."

4. Complaint Counsel's response shall be amended to fully comply with Interrogatories numbered 12, 13, and 14. Complaint Counsel's response shall specifically identify "*all sources, data, documents, expert opinion, and any other information, including dates*" related to each Interrogatory.

### **First Set of Requests for Production of Documents**

1. Complaint Counsel's response shall be amended to fully comply with Respondent's First Set of Requests for Production of Documents. Complaint Counsel shall make available for inspection all materials responsive to all of Respondent's Requests.

2. Consistent with Rule 3.37(b), if Complaint Counsel objects to any "part of an item or category, the part shall be specified and inspection permitted of the remaining parts." With respect to Requests for Production numbered 1, 2, 3, 4, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, and 18, Complaint Counsel's response shall be amended to include sufficient detail for Respondent and/or the ALJ to evaluate any objections as to the production of certain parts of the requested production.

3. With respect to the privileges asserted in response to Requests for Production numbered 1, 2, 3, 4, 5, 6, 7, 9, 10, 12, 13, 17, 18, 19, Complaint Counsel's response shall be amended to include a detailed explanation that is sufficient to evaluate each privilege that is claimed, and shall include all responsive documents for which a privilege is claimed in Complaint Counsel's privilege log.

4. Complaint Counsel's privilege log shall be amended to include the redacted recipients, authors and subject lines for all documents listed therein, and shall provide a sufficient description of all documents listed on the privilege log for Respondent and/or the ALJ to evaluate Complaint Counsel's claims of privilege.

ORDERED:

---

D. Michael Chappell  
Chief Administrative Law Judge

Date: January \_\_\_, 2011