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

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

RESPONDENT'S APPLICATION FOR REVIEW OF AN ORDER DENYING RESPONDENT'S MOTION TO CHANGE HEARING LOCATION

Respondent, the North Carolina State Board of Dental Examiners (the "State Board"), hereby files this Application for Review pursuant to FTC Rule 3.23(b) and 3.41 and in connection with the Order of the Administrative Law Judge ("ALJ") ("Order," attached hereto as Exhibit A denying Respondent's Motion to Change Hearing Location ("Motion"). Respondent files this Application because the Order involves 1) a controlling question of law; 2) as to which there is substantial ground for difference of opinion; and 3) a subsequent review of the Order will be an inadequate remedy.

Due to the fact that the hearing date in this matter is scheduled for less than three weeks from the filing date of this Application for Review, the State Board respectfully requests expedited consideration of this application.

I. Controlling Question of Law as to Which There Is Substantial Ground for Difference of Opinion: Rule 3.41.

There is substantial ground for difference of opinion as to the ALJ's application of Rule 3.41, which clearly is the controlling question of law in connection with Respondent's Motion. Rule 3.41 states "[h]earings shall proceed with all reasonable expedition, and, **insofar as practicable**, shall be held at one place . . . ." (emphasis added). Respondent's Motion argued that Raleigh, North Carolina ("Raleigh") was a more practicable and appropriate location for the hearing than Washington, D.C. ("D.C."). Respondent respectfully disagrees with the ALJ's consideration of factors affecting the practicability of the hearing taking place in D.C. as opposed to Raleigh because the Order did not give sufficient consideration to the hardship imposed upon (1) Respondent, its counsel and its witnesses, (2) non-party witnesses involved in the matter, and further, (3) because the Order unduly casts doubt on the adequacy of federal courthouse facilities in Raleigh.

Respondent's Motion described how (1) it was not aware of the witnesses that Complaint Counsel intended to call in this matter until Complaint Counsel's Final Proposed Witness List was submitted December 7, 2010;[1] (2) the Scheduling Order failed to consider the hardships imposed on Respondent, its party witnesses, and non-party witnesses in traveling to D.C. for the hearing; (3) the D.C. forum is unnecessary and the Commission has the discretion to change the location of the hearing (and, as noted by the

[1] Complaint Counsel wish to impose the burden of prescient ability on the State Board in asserting that "Respondent **knew** from the outset of this matter . . .that many, if not most, witnesses would reside in North Carolina." Opposition at 2 (emphasis added). This is a ludicrous assertion, since Respondent could not possibly have known all of the witnesses Complaint Counsel would call in this matter and how many of them were located in North Carolina until Complaint Counsel submitted their Final Proposed Witness List on December 7, 2010. In fact, a few of Complaint Counsel's witnesses **are not** located in North Carolina.

Order, has done so before); (4) the State Board is a state board based in Morrisville, North Carolina (adjacent to Raleigh); (5) the matter concerns conduct arising in North Carolina and affects North Carolina citizens; (6) all but 20 witnesses identified by Respondent reside or are based in North Carolina and would be more inconvenienced by traveling to D.C.; (7) none of Complaint Counsel's witnesses are located in D.C., and 14 are located in North Carolina; (8) Respondent's two experts reside in North Carolina and Georgia; (9) none of Complaint Counsel's witnesses reside in D.C.; and (10) there is sufficient courtroom space in Raleigh. Because of the number of factors in favor of Raleigh as a more practicable location than D.C. for the hearing, Respondent requested that the ALJ consider Raleigh as a more appropriate forum for the hearing in this matter.

The ALJ disagreed, noting in his Order that the ALJ has discretion in deciding motions under Rule 3.41 and that an "overriding consideration" in exercising that discretion is "whether setting the hearing away from the location set by the Commission in the Complaint will allow the hearing 'to proceed with all reasonable expedition.'" Order at 3, quoting Rule 3.41(b)(1). The Order then concludes that granting Respondent's Motion would require the ALJ to travel to Raleigh and that Respondent's "unsupported statement" that Raleigh has sufficient courtroom space within which the hearing may be conducted "fails to provide sufficient assurance that appropriate facilities are available on such short notice." Order at 3.[2]

[2] Generally, legal practitioners in North Carolina do not openly express or imply contempt regarding the adequacy of the federal courthouse facilities in Raleigh, the state capital, and accordingly Counsel for Respondent did not realize it was necessary to cite such "support" in its Motion. Since both Complaint Counsel and the ALJ appear to have concerns as to whether such facilities are on par with those available at the Federal Trade Commission, Respondent directs the ALJ's attention to a page on the website for the United States District Court for the Eastern District of North Carolina describing the technology available in its courtrooms in Raleigh. *See* http://www.nced.uscourts.gov/html/courtroomtech-ral.htm (providing photographs and describing the availability of such technology as document cameras for presentation of

Further, in connection with considerations of practicality, the ALJ notes Complaint Counsel's claims that "incremental convenience to some witnesses cannot overcome the extreme prejudice to Complaint Counsel that relocation of the trial would cause." The Order also states that such factors as convenience to witnesses have "no bearing" on where to hold an FTC administrative hearing. Essentially, the Order finds the practicability considerations of both Complaint Counsel and the ALJ are more compelling than those of Respondent, its party witnesses, and the non-party witnesses in this matter.

There is substantial ground for a difference of opinion here. Indeed, as noted by Complaint Counsel, under both the Administrative Procedure Act, 5 U.S.C. § 554(b), and FTC case law interpreting the Act, the ALJ must "balanc[e] the interests of all the parties in the proceeding." Opposition at 2. Further, the Administrative Procedure Act makes clear that "[i]n fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties **or their representatives**." 5 U.S.C. § 554(b) (emphasis added). Thus the Order did not give sufficient weight to the numerous factors cited by Respondent detailing the inconvenience to Respondent, its representatives (*i.e.*, the party witnesses), and non-party witnesses in issuing the Order.

Respondent also respectfully disagrees with the Order's refusal to consider the weight of the federal cases cited by Respondent in its Motion detailing how the refusal to grant a request for transfer of forum to where all of the witnesses were located was an abuse of discretion. First, the Order repeats Complaint Counsel's mistaken claim that Respondent "relied upon" 28 U.S.C. § 1404 as authority in its Motion. This is not true.

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evidence, Elo touch screens, high resolution monitors for jurors, and video input devices such as connections for laptops, auxiliary inputs, and DVD/VCR players) (last visited Jan. 28, 2011).

Respondent merely cited two federal cases for their exemplary reasoning in considering such factors as inconvenience to witnesses under a motion to transfer a venue. In fact, there is not a single explicit reference to 28 U.S.C. § 1404 in the Motion.

Second, despite admitting that federal case law may be "useful" as guidance for interpreting the Commission Rules, the Order distinguishes the reasoning in those cases as not controlling. This gives remarkably little weight to two federal cases holding that the refusal to allow a transfer of venue in a situation similar to the present one was so egregious as to be considered an abuse of discretion. Although the cases are not controlling, the ALJ had discretion here to give them some weight, but did not do so.

Further, in distinguishing the reasoning in those cases, the Order cites an FTC case where transfer was allowed because "all the fact witnesses were located in or near [the location sought for transfer], and all parties agreed that it was more practicable to hold the hearing [there]." Although the present case does not involve "all" of the witnesses being located in or near Raleigh, Respondent's Motion clearly notes that the vast majority of them are. And to hold that one factor supporting a transfer is that the parties must agree on the location is absurd, as it does not allow for the weighing of the parties' interests. Such reasoning is tantamount to requiring a joint motion, which the Rule does not contemplate.

Respondent respectfully submits that in deciding on the practicability of the hearing, the Order gives too much deference to the convenience of Complaint Counsel and the ALJ, and not to the numerous factors affecting Respondent, its party witnesses and counsel, and non-party witnesses. Accordingly, there is substantial ground for

difference of opinion as to the Order's application of Rule 3.41 to the factors described above.

II. Subsequent Review Will Be an Inadequate Remedy as Opposed to This Appeal.

If the matters bearing upon this application are not decided here, they will not be decided at all. The hearing in this matter is scheduled to begin in less than three weeks. If Respondent's Motion is not heard immediately on appeal, then the hearing will proceed on February 17, 2011, and the above-described hardships will inevitably be visited upon Respondent, its representatives and counsel, and the non-party witnesses in the case. An immediate appeal is necessary to avoid this result.

WHEREFORE, Respondent requests that the Administrative Law Judge GRANT its Application for Review and certify the denial of Respondent's Motion to Change Hearing Location for an interlocutory appeal.

This the 28th day of January, 2011.

ALLEN AND PINNIX, P.A.

/s/ Alfred P. Carlton, Jr.

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that on January 28, 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:

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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
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oalj@ftc.gov

This the 28th 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
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of	)	
The North Carolina Board of Dental Examiners, Respondent.	)	DOCKET NO. 9343

ORDER DENYING RESPONDENT'S MOTION TO CHANGE HEARING LOCATION

I.

On January 14, 2011, Respondent filed a Motion to Change Hearing Location ("Motion"). Complaint Counsel filed its Response to Respondent's Motion to Change Hearing Location on January 19, 2011. For the reasons set forth below, Respondent's Motion is DENIED.

II.

Respondent seeks an order to change the location of the hearing in the above captioned matter to Raleigh, North Carolina. Respondent asserts that the location of the hearing, in Room 532 of the Federal Trade Commission building in Washington, D.C., was selected by the Commission without discussion among the parties and argues that a Washington, D.C. forum is unnecessary for Complaint Counsel to pursue this action. Respondent further states that instances giving rise to this action all occurred within the State of North Carolina and that 18 of Respondent's 20 fact witnesses and 14 of Complaint Counsel's fact witnesses are located in North Carolina. Thus, Respondent argues, Raleigh, North Carolina would be more convenient than Washington, D.C., for the witnesses in this proceeding.

Respondent argues that the Fourth Circuit Court of Appeals has held that a denial of a request to change the location of the proceedings under circumstances similar to those presented here was an abuse of discretion. Lastly, Respondent states that, "[t]here is sufficient courtroom space within which the hearing of this matter may be conducted in Raleigh, NC."

Complaint Counsel argues that Respondent's Motion, filed nearly seven months after learning that the hearing in this matter was scheduled to take place in Washington,

D.C., and with only one month remaining before the start of trial, is far too late in the proceedings and far too close to trial to be anything other than an attempt to materially inconvenience Complaint Counsel's trial preparations. Complaint Counsel contends that the incremental convenience to some witnesses cannot overcome the extreme prejudice to Complaint Counsel that relocation of the trial would cause, and does not overcome the impracticability of making relocation arrangements just a few weeks before the start of trial. Complaint Counsel also argues that because all the documentary and testimonial evidence can readily be made available in the Commission's Hearing Room in Washington D.C., Washington D.C. is an appropriate trial location.

In addition, Complaint Counsel argues that the authority relied upon by Respondent is not applicable because a motion to transfer a case pursuant to 28 U.S.C. § 1404 ("§ 1404 transfer") transfers a matter from one fully operational system to another – the trier of fact as well as the site of the trial; a §1404 transfer does not require a sitting judge to arrange for appropriate courtrooms, chambers, and other facilities in a distant locale, uproot together with books, technical equipment, and clerks, and conduct a trial in an unfamiliar community, with minimal support, while living out of a suitcase. Complaint Counsel also contends that because "contacts with the forum state," as evaluated under a § 1404 transfer, is not a proper inquiry, whether the events being litigated occurred in North Carolina is immaterial. Finally, Complaint Counsel argues that Respondent's unsupported statement that there is sufficient courtroom space in Raleigh, North Carolina, is not adequate.

III.

Pursuant to the governing Commission Rule, Rule 3.41(b)(1), "[h]earings shall proceed with all reasonable expedition, and, insofar as practicable, shall be held at one place. . . ." 16 C.F.R. § 3.41(b)(1). In addition, "[t]he Administrative Law Judge may order hearings at more than one place. . . ." 16 C.F.R. § 3.41(b)(1). In support of its motion to change the hearing location, Respondent relies on two cases from the Court of Appeals for the Fourth Circuit, which adjudicated the question of transfer under 28 U.S.C. § 1404(a).

Where the Federal Rules of Civil Procedure are similar to the Commission's Rules of Practice, those rules and case law interpreting them may be useful, though not controlling, in adjudicating a dispute. *In re L.G. Balfour Co.*, No. 8435, 61 F.T.C. 1491, 1492, 1962 FTC LEXIS 367, *4 (Oct. 5, 1962); *In re Gemtronics, Inc.*, 2010 FTC LEXIS 40, *10 (April 27, 2010). In this dispute, however, the federal statute controlling change of venue is not similar to the Commission's Rule on hearing location. The federal statute sets forth: "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a). The Commission's headquarters, its Administrative Law Judges, and its usual hearing room are located only in Washington, D.C., and thus Washington, D.C. is the only location in which a Part III complaint "might

have been brought."[1] Thus, the federal statute controlling change of venue and cases interpreting motions to transfer a case from one district court to another are not applicable.

Under the Commission's Rules, the Administrative Law Judge "may order hearings at more than one place" and thus has discretion to hold hearings in a location other than Washington, D.C. Indeed, in *In re North Texas Specialty Physicians*, a change of location was permitted where, unlike the instant case, all counsel were in a location other than Washington, D.C.,[2] all fact witnesses were located in or near Forth Worth, Texas, and all parties agreed that it was more practicable to hold the hearing in Fort Worth, Texas. In addition, unlike Respondent herein, the request was made at the initial scheduling conference, well in advance of trial. Finally, the Administrative Law Judge's obligations in other cases then pending in Part III adjudication permitted such a change in hearing location. Therefore, the hearing, with the exception of closing arguments, was held in Forth Worth, Texas. *In re North Texas Specialty Physicians*, Docket No. 9312, *available at* http://ftc.gov/os/adjpro/d9312/031016aljschedulingorder.pdf (Administrative Law Judge D. Michael Chappell presiding).

The Commission Rule requires that the hearing shall be held at one place, insofar as practicable. An overriding consideration in exercising the discretion granted to the Administrative Law Judge under the Commission Rule is whether setting the hearing away from the location set by the Commission in the Complaint will allow the hearing "to proceed with all reasonable expedition." 16 C.F.R. § 3.41(b)(1). Thus, administrative efficiency must be considered. Changing the hearing location would require the undersigned to travel to Raleigh, North Carolina. In addition, although Respondent stated that "[t]here is sufficient courtroom space within which the hearing of this matter may be conducted in Raleigh, NC," this unsupported statement fails to provide sufficient assurance that appropriate facilities are available on such short notice. Trial in this matter is set to begin on February 17, 2011, less than one month from now. To change the hearing location at this time is not practicable.

Moreover, a change in the location of this hearing, scheduled to begin on February 17, 2011, would require the Administrative Law Judge to spend significant time away from Washington, D.C., at a time when three other pending matters scheduled for trial in May 2011 will require the attention of the Administrative Law Judge. Thus, to

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[1] Some of the factors that district courts consider in determining whether to grant a motion to transfer venue also simply have no bearing on the question of where to hold a Part III administrative hearing. Those factors include: "(1) the plaintiff's choice of forum, (2) the convenience of witnesses, (3) the location of relevant documents and relative ease of access to sources of proof, (4) the convenience of parties, (5) the locus of operative facts, (6) the availability of process to compel the attendance of unwilling witnesses, and (7) the relative means of the parties." *D.H. Blair & Co., v. Gottdiener*, 462 F.3d 95, 106-07 (2nd Cir. 2006) (internal quotation marks and alteration omitted). While a district court considers the locus of operative facts, it will almost always be the case that the material events giving rise to the matters brought by the Federal Trade Commission will occur in locations other than the District of Columbia.

[2] FTC attorneys prosecuting that case were predominantly from the FTC's New York Office.

hold the hearings in Raleigh, North Carolina is not practicable and not in the interest of administrative efficiency.

For the above stated reasons, Respondent's motion is DENIED.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: January 25, 2011