

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



In the Matter of)
)
LABORATORY CORPORATION)
OF AMERICA)
)
and)
)
LABORATORY CORPORATION)
OF AMERICA HOLDINGS,)
Respondents.)

DOCKET NO. 9345

**ORDER GRANTING RESPONDENTS' MOTION
TO WITHDRAW DEEMED ADMISSIONS AND FOR
EXTENSION OF TIME TO FILE OBJECTIONS AND ANSWERS
TO COMPLAINT COUNSEL'S FIRST SET OF REQUESTS FOR ADMISSION**

I.

On January 24, 2011, Respondents filed a Motion to Withdraw and Amend Deemed Admissions, or in the Alternative for Extension of Time to Respond to Complaint Counsel's First Set of Requests for Admission (1-38) ("Motion"), which attached proposed Objections and Answers to the Requests for Admission as Exhibit A to the Motion. On February 1, 2011, Complaint Counsel filed a response to the Motion, which expressly took no position on the Motion.

As more fully set forth below, the Motion is GRANTED.

II.

As grounds for the Motion, Respondents state that counsel received Complaint Counsel's First Set of Requests for Admission ("Requests for Admission") by e-mail on the evening of January 10, 2011. According to Respondents, several of their attorneys were travelling to California in connection with a related federal lawsuit,¹ and Respondents' attorney with primary responsibility for discovery matters overlooked the e-mail transmitting Complaint Counsel's Requests for Admission, until Friday, January

¹ See *Federal Trade Commission v. Laboratory Corporation of America*, No. 8:10-cv1873 (C.D. Cal., Southern Division).

21, 2011. Respondents further state that their lead counsel, although having timely received and reviewed the Requests for Admission, incorrectly assumed that responses were due in 30 days, rather than within 10 days, as provided under Rule 3.22(b).

Upon realizing this error, Respondents assert, on January 21, 2011, Respondents' counsel contacted Complaint Counsel requesting agreement to a short extension of time to serve objections and answers to the Requests for Admission, but Complaint Counsel declined to agree. According to the Motion, Respondents then prepared Objections and Answers to the Requests for Admission (hereafter, "Responses") and served them on Complaint Counsel on Monday, January 24, 2011.

Respondents request an Order allowing them to file the Responses late, pursuant to Commission Rule 3.32(c), 16 C.F.R. § 3.32(c), and permitting those Responses to substitute for the "deemed admissions" resulting under Rule 3.32(b) from Respondents' failure to respond to the Requests for Admission within 10 days. Respondents argue that allowing the late-filed Responses, rather than allowing the deemed admissions to stand, will subserve the presentation of the merits of this proceeding and, further, that allowing the Responses will not prejudice Complaint Counsel.

Complaint Counsel's response to the Motion states in pertinent part: "Having reviewed Respondents Motion . . . and the proposed Objections and Answers . . . Complaint Counsel takes no position with respect to Respondents' Motion . . ."

III.

Under Rule 3.32(b), requests for admission are deemed "admitted, unless, within ten (10) days after service of the request, or within such shorter or longer time as the Administrative Law Judge may allow, the party to whom the request is directed serves upon the party requesting the admission, . . . a sworn written answer or objection addressed to the matter." 16 C.F.R. § 3.32(b). In addition, Rule 3.32(c) states in pertinent part:

Any matter admitted under this rule is conclusively established unless the Administrative Law Judge on motion permits withdrawal or amendment of the admission. The Administrative Law Judge may permit withdrawal or amendment when the presentation of the merits of the proceeding will be subserved thereby and the party who obtained the admission fails to satisfy the Administrative Law Judge that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits.

16 C.F.R. § 3.32(c).

Rule 3.32(c) is very similar to Federal Rule of Civil Procedure 36(b).² Accordingly, judicial constructions of the federal rule are useful in interpreting the Commission's Rules. *In re Hoechst Celanese Corp.*, No. 9216, 1990 FTC LEXIS 121, at *3 (May 14, 1990); *In re L.G. Balfour Co.*, No. 8435, 61 F.T.C. 1491, 1492, 1962 FTC LEXIS 367, *4 (Oct. 5, 1962). Federal courts interpreting Fed. R. Civ. P. 36(b) have held that permitting late filing of answers to requests for admission is the equivalent of allowing a party to withdraw admissions made by operation of Rule 36(b) and that, therefore, the applicable test for determining whether to allow late filing of responses is the two-part test for determining whether to permit withdrawal or amendment under Rule 36(b). *E.g.*, *Raiser v. Utah County*, 409 F.3d 1243, 1245-47 (10th Cir. 2005); *Warren v. International Brotherhood of Teamsters*, 544 F.2d 334, 339-40 (8th Cir. 1976). *See Perez v. Miami-Dade County*, 297 F.3d 1255, 1265 (11th Cir. Fla. 2002) (holding that the district court's discretion to allow late filing of responses to requests for admission must be exercised in accordance with the two-part test for withdrawing or amending admissions under Fed. R. Civ. P. 36(b)); 8 Wright, Federal Practice and Procedure § 2257, at 719-20 (1970) (appropriate test for allowing untimely answers is not whether there was excusable neglect, but is the test set forth in Rule 3.36(b)).

Applying the two-part test in Rule 3.32(c), Respondents' late-filed Responses to the Requests for Admission should be permitted if the presentation of the merits of the proceeding will be subserved thereby and if Complaint Counsel has failed to show that the late filing will be prejudicial to the prosecution of the action. 16 C.F.R. § 3.32(c). Regarding the first part of the test, the presentation of the merits of the proceeding will be subserved by having accurate answers become part of the record, rather than potentially inaccurate admissions resulting solely from the operation of Rule 3.32(a). *See Warren*, 544 F.2d 334 (affirming district court's allowance of responses which, due to counsel's misreading of Rule 36(a), were filed 15 days late, and one day after trial had begun); *see also St. Regis Paper Co. v. Upgrade Corp.*, 86 F.R.D. 355, 356-57 (W.D. Mich. 1980) (denying motion for summary judgment and permitting responses filed after 44 days of unexcused delay would facilitate the normal, orderly presentation of the case); *Pleasant Hill Bank v. United States*, 60 F.R.D. 1, 3 (W.D. Mo. 1973) (denying summary judgment and permitting responses filed over three months late). In addition, with regard to the second part of the test, Complaint Counsel does not contend, and thus fails to show, that the late filing will be prejudicial.

Accordingly, Respondents have met the two-part test in Rule 3.32(c), and the Motion is granted.

² Federal Rule 36(b) provides that a matter that is deemed admitted by failure to timely respond to requests for admission under Fed. R. Civ. P. 36(a) "is conclusively established unless the court, on motion, permits the admission to be withdrawn or amended. Subject to Rule 16(e), the court may permit withdrawal or amendment if it would promote the presentation of the merits of the action and if the court is not persuaded that it would prejudice the requesting party in maintaining or defending the action on the merits."

IV.

Upon full consideration of the Motion and Complaint Counsel's response, and for the reasons set forth above, Respondents' Motion to Withdraw and Amend Deemed Admissions, or in the Alternative for Extension of Time to Respond to Complaint Counsel's First Set of Requests for Admission (1-38) is GRANTED, and it is hereby ORDERED that: (1) Respondents may file their Objections and Answers to Complaint Counsel's First Set of Requests for Admission, served on Complaint Counsel and attached to Respondents' Motion as Exhibit A, with the Office of the Secretary of the Commission within three days of the date of this Order; and (2) the filing permitted pursuant to this Order shall thereafter be deemed to constitute Respondents' response to Complaint Counsel's First Set of Requests for Admission (1-38) for purposes of this proceeding.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: February 10, 2011