

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 STRIKE

This is Respondent’s nineteenth (19th) motion filed in this proceeding since January 11, 2011. After its motion for a stay of this proceeding had been denied by the Commission, Respondent has engaged in a pattern of dilatory filings that has become more harried and shrill as the hearing approached, and then commenced.¹ This motion shares at least two characteristics

¹ The nineteen motions, all of which were decided against Respondent, are listed below:

- 1/11/11 motion to compel discovery;
- 1/13/11 motion to strike expert rebuttal report of Prof. Kwoka;
- 1/13/11 motion for leave to file surrebuttal report and strike portion of Giniger rebuttal report;
- 1/14/11 motion to change hearing location;
- 1/14/11 motion to disqualify the Commission;
- 1/18/11 Supplemental Statement regarding motion to compel;
- 1/19/11 expedited motion for a later hearing date;
- 1/19/11 expedited motion to amend the scheduling order;
- 1/20/11 motion for a hearing on motion to compel;
- 1/20/11 motion for leave to file a surreply;
- 1/24/11 application to ALJ for interlocutory appeal from denial of motion to compel;
- 1/24/11 motion for reconsideration of the denial of motion for later hearing date;
- 1/25/11 motion for disclosure of agency information;
- 1/31/11 application to ALJ for interlocutory review of the denial of motion to change hearing location;
- 2/2/11 application to Commission to review denial of motion to compel;

with the prior eighteen: it is without merit and its primary effect is to impose costs on Complaint Counsel and the Court. This is particularly notable given Respondent's stated intention someday to file yet another motion - to seek to recover its own costs.

Respondent's present motion asks that an order be entered striking "all references to an appearance by Melanie Sabo on behalf of the . . . FTC . . . at the prehearing conference and evidentiary hearing before the ALJ in this matter." Motion at 1. This attempt to strike Ms. Sabo, the Assistant Director of the FTC's Bureau of Competition for the Anticompetitive Practices Division, and direct supervisor of Complaint Counsel, is both untimely² and inexplicable,³ and is, further, otherwise without merit. Ms. Sabo has not appeared in this matter.

2/11/11	motion to stay proceedings pending resolution of suit in District of North Carolina;
2/18/11	application to ALJ for interlocutory review of denial of disclosure motion;
3/2/11	application to Commission for interlocutory review of denial of disclosure motion; and
3/11/11	motion to strike Melanie Sabo from record.

In addition to these motions, Respondent has also filed a collateral attack on this proceeding in federal district court in North Carolina. The district court denied the Board's Motion for a Temporary Restraining Order. Order, North Carolina State Board of Dental Examiners v. FTC, Case Number: 5:11-cv-00049-FL (E.D.N.C. Feb. 9, 2011).

² Mr. Dagen introduced Ms. Sabo to the Court, see, e.g., Transcript 53-54, without comment, much less objection by Respondent's counsel. Mr. Dagen also introduced Ms. Martin, Litigation Support Specialist, also not appearing.

³ It is not improper for an Assistant Director of the Bureau of Competition to sit in the audience at an FTC administrative trial, to confer with Complaint Counsel, or to be introduced to the Court by Complaint Counsel. Further, it would not appear to be improper for a representative of the Board to be present at discussions among counsel outside the presence of the Court; and should likewise be permissible for Ms. Sabo, the supervisor of Complaint Counsel, to be present at such discussions as well. Regardless, Ms. Sabo, other than for the occasional exchange of pleasantries, has not engaged in or been present for discussions with Counsel for Respondent since the Court referenced this subject on February 24, 2011. Finally, if this motion were motivated solely by a concern for the accuracy of the record with regard to "appearances," Respondent would have also moved to strike all the appearances of Jackson S.

It is commonplace for the Assistant Director (and other members of the Bureau of Competition management) to be introduced at the beginning of a hearing. Mistakes in the listing of formal appearances are clerical in nature and easily handled outside of motion practice.

This motion should be denied, and Respondent's, as yet unfiled, but anticipated, application for interlocutory review should also be denied.⁴

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: March 18, 2011

Nichols from the transcript prior to the filing of his Notice of Appearance on March 2, 2011.

⁴ If the Court, nevertheless, feels that Ms. Sabo's introductions to the Court, or the treatment of those introductions in the transcript creates an ambiguity in the record, the Court should either direct the correction of the transcripts or grant leave to Ms. Sabo to file a notice of appearance *nunc pro tunc* as of February 17, 2011, the date of her first introduction to the Court.

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[PROPOSED] ORDER DENYING RESPONDENT’S MOTION TO STRIKE

On March 11, 2011, Respondent, North Carolina State Board of Dental Examiners, filed a motion “to strike all references to an appearance by Melanie Sabo on behalf of the . . . FTC . . . at the prehearing conference and evidentiary hearing before the ALJ in this matter.” On March 18, 2011, Complaint Counsel filed their opposition on grounds that Ms. Sabo has not made an appearance in this matter. Because Ms. Sabo has not filed an appearance herein, Respondent’s motion is DENIED, accordingly.

ORDERED:

D. Michael Chappell
Chief, Administrative Law Judge

Date:

CERTIFICATE OF SERVICE

I hereby certify that on March 18, 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.

March 18, 2011

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