UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

COMPLAINT COUNSEL•S OPPOSITION TO RESPONDENT•S MOTION FOR AN ORDER COMPELLING DISCOVERY

I. Respondent•s Motion to Compel Is So Far Beyond Any Reasonable Deadline for Filing Such Motions That It Must Be Denied.[1]

Although the Complaint was issued June 17, 2010, Respondent delayed serving its first discovery request until October 12th, nearly four months into the discovery period. Complaint Counsel (CC) responded in a timely manner: to Respondent s First Set of Requests for

[1] Respondent has not complied with the spirit or the letter of Rule 3.22(g) s signed-statement requirement. There have been no meetings to discuss substantive discovery issues. Respondent cancelled the only scheduled meeting 11 minutes before it was to begin by declaring impasse without cause. A complete statement of those events, including the fact that Complaint Counsel never sought a waiver of Respondent s right to petition the court for discovery relief as a condition for negotiating discovery issues, can be found in the attached Declaration of William Lanning (Dec. Lanning). Dec. Lanning ¶ 20.

Paragraph 7 of the Scheduling Order requires impasse before a motion to compel is filed. Respondent s declaration of impasse in advance of the first scheduled negotiation is devoid of candor. Peremptory impasse declarations are not a substitute for impasse that arises from failed negotiations or an actual refusal to negotiate. This motion is premature and unauthorized; it should be summarily dismissed for failure to comply with Rule 3.22(g) and the terms of the Scheduling Order. Respondent s belated filing of a deceptive separate statement satisfies neither the Rule nor the Order. Further, Respondent s evasion of the 2,500-word limit on memoranda by moving most of its arguments to the motion is unauthorized.

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[2] *See Daniel Chapter One*, Docket No. 9329, Interlocutory Order (Feb. 11, 2009) (Chappell, ALJ) (granting motion to compel because Respondents waived objections by untimely assertion).

[3] *North Texas Specialty Physicians*, 2005 FTC LEXIS 150, (May 19, 2005) (denied motion filed 35 days after deadline); *Int'l Tel. & Tel. Corp.* 97 F.T.C. 202 (Mar. 13, 1981) (denied motion for compliance costs filed afer compliance rather than before or during compliance).

[4] *Polypore Internat'l, Inc.*, 2009 FTC LEXIS 182 (Sep. 23, 2009) (Chappell, Chief ALJ) (denied third-party motion to supplement record filed 78 days after record closed); *Basic Res., LLC*, 2005 FTC LEXIS 158 (Dec. 7, 2005) (McGuire, Chief ALJ) (denied motion filed 293 days late); *Basic Res., LLC*, 2004 FTC LEXIS 247 (Dec. 29, 2004) (McGuire, Chief ALJ) (refused to consider motion opposition filed 1 day late without leave); *North Texas Specialty Physicians*, 2004 FTC LEXIS 122 (Jul. 20, 2004) (Chappell, ALJ) (denied motion to exclude

dismissed with prejudice.

II. CC Reasonably Complied With Respondent•s Discovery Requests.[5]

CC complied with Respondent s discovery demands.

A. Respondent•s General Discovery Objections.

Rule 3.31(b) limits CC s search obligation to materials that are in the possession, custody or control of the Bureaus or Offices of the Commission that investigated the matter. . . . Respondent s argument that the scope of proper discovery exceeds CC s duty to search is contrary to the Rule and baseless. Respondent s RFP 18 seeks records of investigations in other jurisdictions, and CC provided all such records it had gathered in this matter. Respondent s RFP 9 requested materials from other Commission matters without seeking court authorization as required by Rule 3.31(c)(2). Respondent now raises discovery disputes to expand the scope of discovery instead of complying with the rules this should not be allowed.

Respondent s objections to assertions of privilege are baseless. CC only withheld information based on privilege on 31 items listed in its November 18, 2010 Privilege Log, Ex.2.

B. Specific Claims: RFP.

In response to the RFP, CC produced over 17,000 pages of the materials in the custody and control of the Bureaus and Offices subject to discovery, Dec. Lanning ¶ 3. Rule 3.31(b). CC served Respondent with every subpoena issued, and provided materials produced in response

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Tobacco Co., 1998 FTC LEXIS 179 (Sep. 24, 1985) (Timony, ALJ) (denied motion to certify issue to Commission on the alternative ground that it was untimely); *Robert G. Koski, D.O.*, 113 F.T.C. 130, 135 (Jan. 25, 1990) (Parker, ALJ) (denied motion for costs and fees filed 4 days out of time).

[5] Requests for Admission and Requests for Production are respectively referred to as RFA and RFP.

to subpoenas within three days. Dec. Lanning ¶ 3.

Respondent objects that CC did not specify which documents correspond to RFP 2-19, Motion at 12-13; however, Respondent s RFPs did not specify such categorization, and Rule 3.37(a) permits either categorization as maintained or corresponding to request categories. CC opted for the former over the latter. Respondent s new demand for inspection under Rule 3.37(b) is improper.

Respondent claims CC s privilege log is incomplete because the recipients, authors and/or subject lines of certain communications were redacted under the government informer privilege. Mot at 16, Mem. at 5, 13-16. CC s redactions were proper, and well supported by the case law.*Harper & Row, Publishers, Inc.*, 1990 FTC LEXIS 213 *8-11, 13 n. 10 (June 27, 1990);*see also In re Aspen Tech.*, 2003 FTC LEXIS 195 *2-3 (Dec. 23, 2003).

Finally, CC produced documents responsive to RFP 12 and 19, and did not withhold documents on the grounds they were argumentative and call[] for a legal conclusion.

C. Specific Claims: RFA•s

Respondent•s Admissions Position Is Frivolous. Rule 3.32(b) does not require additional detail for not admitting or denying a Request that calls for a legal conclusion or is irrelevant and beyond the scope for admissions. Rule 3.32(b) provides in part: The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter.

Legal Conclusion. CC was not required to admit or deny Requests 1, 11, 12, 13, 18, 19, 20, 21, 22, and 23 because each calls for a legal conclusion. Rule 3.32(b) does not state that a detailed response is required where a legal conclusion is requested. *Boise Research* holds that

requests for admission should not be employed to establish facts which are obviously in dispute or *answer questions of law*. *Basic Research*, 2004 FTC LEXIS 225, *2 (Nov. 30, 2004) (quoting *Kosta v. Connolly,* 709 F. Supp. 592, 594 (E.D. Pa. 1989)) (emphasis added). These Requests unquestionably call for legal conclusions,[6] and must be denied.

Irrelevant and beyond the scope. Requests 9, 10, and 24 seek admissions that are irrelevant and beyond the scope of proper of RFAs under Rule 3.32(b). *Basic Research* holds that [a] purpose of requests for admission is to narrow the issues for trial by relieving the parties of the need to prove facts that will not be disputed at trial . *Basic Research*, 2004 FTC LEXIS 225 at *2. Properly used, requests for admission serve the expedient purpose of eliminating the necessity of proving essentially undisputed and peripheral issues of fact. Because these particular requests do not serve either of these purposes, the responses were proper.

[6] For example, Respondent s first RFA asks CC to admit Respondent s interpretation o fhow the Supreme Court has applied the active supervision requirement to state agencies.

regard to Board members Sadler, Howdy, and Sheppard, for whom it had no information. Respondent knew these facts, and yet propounded the Request, and compounded its discovery abuse by filing its untimely Motion to Compel on this ground; and it should be denied.

D. Specific Claims: Interrogatories.

Respondent objects to interrogatory responses 1-6, 9, 11-14 on spurious grounds.

All Evidence for Every Complaint Allegation. CC s first interrogatory asks: Identify every act . . relating to each allegation in the Complaint. A general interrogatory that seeks the detailed factual basis for [CC s] case . . . is overbroad and burdensome; it is not well-tailored and fails to narrow the issues *Aspen Tech., Inc.*, 2003 FTC LEXIS 195 (Dec. 23, 2003) (McGuire, Chief ALJ) (denying motion to compel and citing additional authority). This is a blatant attempt to evade the 25-interrogatory limit.

Irrelevant and Burdensome. Interrogatory 9 vaguely asked for the identity of each person service[*sic*] with a subpoena duces tecum and each attorneys who spoke to each. CC served a copy of every subpoena on Respondent at the time of issuance. Dec. Lanning ¶ 3. The identity of CC s attorneys is irrelevant and protected under Rule 3.31(c)(2)(i-iii) & (d). Requesting the names of [every] person who worked upon [an aspect of] the case . . . is the work product of the lawyers, and to permit a shot-gun interrogatory to provide the names . . . of all investigators and informants is improper *United States v. Loew's Inc.*, 23 F.R.D. 178, 1809 (S.D. NY 1959). Respondent has copies of all the subpoenas, and has made no showing of need for discovery from counsel.

Information Not Requested. CC does not need to provide information not requested by Interrogatories 9, and 12-14. Interrogatory 9 only sought information relating to subpoena duces

tecum recipients. Respondent complains about deposition notices and testimonial subpoenas.[7] CC is under no obligation to respond to questions not asked. Interrogatories 12-14 asked for all the information upon which you based your assertion in your Complaint that a fact occurred. These interrogatories only seek pre-complaint information, information that was provided in mandatory disclosures Respondent did not ask CC to identify trial evidence. In spite of that CC identified all of the post-complaint documents that appeared to be responsive to Interrogatories 12-14 in their responses to those Interrogatories.

Misreading Commission Rule 3.35(c). Respondent misreads Rule 3.35(c). The last sentence s requirement that the specification of records must include sufficient detail to permit [Respondent] to identify individual documents must be read *in pari materia* with the other sentences of the rule. The last sentence only applies when the burden of deriving the answer is easier for the answering party, in this instance CC. *North Texas Specialty Physicians*, 2004 FTC LEXIS 12 (Jan. 1, 2004) (Chappell, ALJ); *Polypore Intern'l, Inc.*, 2008 FTC LEXIS 155, *3 (Nov. 14, 2008) (Chappell, ALJ).

Interrogatories 2-6 and 11 seek information that can be answered in part from information derived from identified third party documents and files produced by Respondent.[8] CC has no abstracts or summaries that would make it easier for CC to derive the answers. Respondent does not claim that it would be easier for CC to answer the questions, and Respondent is not entitled to relief.

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[7] Nevertheless, all deposition notices and subpoenas issued by CC have been timely served on Respondent. Dec. Lanning ¶ 3.

[8] CC does not possess information sufficient to provide a complete answer to these interrogatories.

III. Conclusion

Respondent s motion should be dismissed with prejudice.

Respectfully submitted,

s/ Richard B. Dagen
Richard B. Dagen
William L. Lanning
Michael J. Bloom
Melissa Westman-Cherry
Counsel Supporting Complaint
Bureau of Competition
Federal Trade Commission
601 New Jersey Avenue NW
Washington, DC 20580

Dated: January 18, 2011

The Scheduling Order did not set a date by which motions to compel should have been filed; however, a reasonable date for such filings would, of necessity, have to consider the fact that the fact discovery cut-off was set 91 days (13 weeks) before the scheduled start of the hearing in this matter. Respondent delayed filing its motion to compel for 54 days (almost 8 weeks), without any explanation regarding the cause or circumstances occasioning this delay. A delay of this length, if tolerated, would effectively render the Scheduling Order a nullity; such an outcome is inconsistent with first principles of good judicial management, and cannot be permitted. A scheduling order is not a frivolous piece of paper, idly entered, which can be cavalierly disregarded by counsel without peril. *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 606, 610 (9th Cir. 1992). Respondent delayed its filing to its peril; it would be unreasonable to allow untimely motion practice to intrude further on counsel s preparations for trial, especially at this late date.

CERTIFICATE OF SERVICE

I hereby certify that on January 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:

Noel Allen
Allen & Pinnix, P.A.
333 Fayetteville Street
Suite 1200
Raleigh, NC 27602
nla@Allen-Pinnix.com *FayDci0 (1 2 0 0) 0nuRespondt t*