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UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

COMPLAINT COUNSEL'S ANSWER TO RESPONDENT'S APPLICATION FOR REVIEW OF A RULING DENYING RESPONDENT'S MOTION TO COMPEL DISCOVERY

"Interlocutory appeals in general are disfavored, as intrusions on the orderly and expeditious conduct of the adjudicative process. Interlocutory appeals from discovery rulings merit a particularly skeptical reception because they are particularly suited for resolution by the Administrative Law Judge on the scene and particularly conducive to repetitive delay." *Schering-Plough Corp.*, 2002 WL 31433937, at *8 (F.T.C. Feb. 12, 2002) (quoting the Commission's interlocutory order in *Bristol Myers Co.*, 90 F.T.C. 273, 273 (Oct. 7, 1977).

In this case, the ALJ's disposition of Respondent's discovery motion was entirely proper. Respondent failed to comply with a deadline, and like all litigants must live with the consequences. The application for interlocutory review by the Commission should be denied.

I. Respondent's Campaign to Delay the Trial Continues

Respondent's original discovery motion was untimely, filed almost 7 weeks after the discovery cut-off. The A. P. Carleton, Jr. Declaration "accompanying" Respondent's application for interlocutory review fails in 14+ pages to explain Respondent's extraordinary delay in first

surfacing its objections to Complaint Counsel's ("CC") responses to discovery. Paragraphs 10

The Court correctly applied Rule 3.22(g) to require the separate statement and motion to be filed together. Respondent could have corrected its error by simply refiling its motion, this time accompanied by the Separate Statement. Respondent failed to comply with the Rule.

III. This Interlocutory Appeal Does Not Qualify for Review

Before certifying an interlocutory appeal, the Administrative Law Judge must first find that the underlying ruling "involves [1] a controlling question of law or policy as to which there is [2] substantial ground for difference of opinion and that an [3] an immediate appeal may materially advance the ultimate termination of the litigation or [4] subsequent review will be an inadequate remedy." Rule 3.23(b).

The controlling issue of law identified by Respondent is whether Rule 3.22(g) does or does not require the contemporaneous filing of a motion to compel and a signed statement of counsel. This Court answered in that the documents must be filed together, and no further review by the Commission is appropriate.

The Appeal Raises No Controlling Question of Law or Policy A question is deemed controlling "only if it may contribute to the determination, at an early stage, of a wide spectrum of cases." *Rambus, Inc.*, 2003 FTC LEXIS 49, at *9 (Mar. 26, 2003) (citing *Automotive Breakthrough Sciences, Inc.*, 1996 FTC LEXIS 478 at *1 (Nov. 5, 1996). A controlling question of law or policy is "not equivalent to merely a question of law which is determinative of the case at hand." *Id.* Review of the discovery issues raised by Respondent's Motion to Compel hardly can contribute to a determination at an early stage of even this case. The denial of such motions is commonplace. *See, e.g.*, *Telebrands Corp.*, 2004 WL 5911685 at *4 (F.T.C. Mar. 25, 2004) ("It is clear that an appeal of the discovery ruling at issue would not materially advance the

ultimate termination of the litigation."); Hoechst Marion Roussel, Inc., 2000 FTC LEXIS 155, at *18 (Oct. 17, 2000). Commission review certainly will not contribute to the determination of a wide spectrum of other cases. Accordingly, this application should be denied.[5]

The Ruling Does Not Involve An Issue As To Which There Is A Substantial Ground for Difference of Opinion. "Commission precedent also holds that to establish a 'substantial ground' for difference of opinion under Rule 3.23(b), 'a party seeking certification must make a showing of a likelihood of success on the merits.' Int'l Assoc. of Conf. Interp., 1995 FTC Lexis 452, *4-5 (Feb. 15, 1995); BASF Wyandotte Corp., 1979 FTC LEXIS 77, *3 (Nov. 20, 1979)." Telebrands Corp., 2004 WL 5911685, at *4 (F.T.C. Mar. 25, 2004). To satisfy this prong of the test, Respondent must show that the controlling question presents a novel or difficult legal issue. Schering-Plough, 2002 WL 3143937, *4 (F.T.C. Feb. 12, 2002). Respondent has not made a showing of either a likelihood of success on the merits or a novel or difficult legal issue. Rather, Respondent raises pedestrian discovery issues where the law is well settled; discovery matters are "committed to the sound discretion of the administrative law judge." Warner Comm., Inc., 1984 WL 251781 at *1 (F.T.C. Sep. 13, 1984); Telebrands Corp., supra at *4 (quoting Exxon Corp., 1978 FTC LEXIS 89 at *12 (Nov. 24, 1978) ("This would negate the general policy that rulings on discovery, absent an abuse of discretion, are not appealable to the Commission."). Accordingly, this application should be denied.[6]

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[5] Respondent's due process argument is without merit. See Resp. Appl. 3-5. Respondent did not cite a single case holding that due process requires an evidentiary hearing in connection with every discovery motion.

[6] The Court's application of the plain meaning of Rule 3.22(g) hardly rises to an abuse of discretion, and it certainly does not amount to arbitrary and capricious action, as alleged by the Respondent without a shred of authority to legitimate its assertion. Resp. Appl. at 6-7.

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IV. Conclusion

For all of the foregoing reasons, Respondent's application for an interlocutory appeal does not satisfy Rule 3.23(b), and its motion should be denied.

Respectfully submitted,

s/ Richard B. Dagen
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Dated: January 27, 2011

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