

02 01 2011

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: Jon Leibowitz, Chairman
William E. Kovacic
J. Thomas Rosch
Edith Ramirez
Julie Brill

In the Matter of)	PUBLIC
THE NORTH CAROLINA BOARD OF DENTAL EXAMINERS,)	DOCKET NO. 9343
Respondent.)	
)	

COMPLAINT COUNSEL S MEMORANDUM IN OPPOSITION TO RESPONDENT S
MOTION FOR RECONSIDERATION OF THE ORDER DENYING EXPEDITED
MOTION FOR A LATER HEARING DATE

I. INTRODUCTION

On January 24, 2011, Respondent continued its recent course by filing a motion for Reconsideration of the Commission s Order denying Respondent s motion for a new hearing date.

II. RESPONDENT FAILED TO DEMONSTRATE THAT RECONSIDERATION IS WARRANTED

Motions for reconsideration should be granted only ¹ if a respondent failed to acknowledge, let alone meet, the substantial burden on a movant for reconsideration. As the Commission explains in connection with final decisions, reconsideration motions will be confined to new questions . . . upon which the petitioner had no opportunity to argue before the Commission. *Cf.* Rule 3.55. Reconsideration motions are not intended to be opportunities to take a second bite at the apple and relitigate previously decided matters, but be used to rehash rejected arguments.³

In order to meet its heavy burden⁴ a respondent must show (1) a material difference in fact or law from that presented to the court before such decision, that in the exercise of reasonable diligence could not have been known to the moving party; (2) the emergence of material facts or a change of law occurring ~~after~~ ^{during the life} of such decision; or (3) a manifest showing of a failure to consider material facts presented to the court before such decision.⁵

¹ *In re Basic Research*, No. 9318, 2006 FTC LEXIS 7, at *6 (Feb. 21, 2006).

² *In re Intel Corp.*, No. 9341, 2010 FTC LEXIS 47, at *4 (May 28, 2010) (citing *Daniel Chapter One*, No. 9329, 2009 WL 569722, at *2 (Feb. 23, 2009); *Briggs Inc.*, No. 9302, 2003 FTC LEXIS 49, at *12 (Mar. 26, 2003)).

³ *In re Intel Corp.*, 2010 FTC LEXIS 47, at *5 (citing *In re Daniel Chapter One*, 2009 WL 569722, at *2; *LeClerc v. Webb*, 419 F.3d 405, 412 n.13 (5th Cir. 2005); *Nationale de Credit Agricole v. CBI Indus.*, 90 F.3d 1264, 1270 (7th Cir. 1996)).

⁴ *In re Basic Research*, 2006 FTC LEXIS 7, at *6.

⁵ *In re Intel Corp.*, 2010 FTC LEXIS 47, at *4; *In re Daniel Chapter One*, 2009 WL

Respondent advances two grounds for reconsideration: (1) the Commission's "manifest failure to consider material facts," that is presumably the Commission's failure to understand the facts previously presented to it; and (2) the "emergence of new material facts." These claims are contrived and false.

A. Respondent Has Not Shown that the Commission Manifestly Failed to Consider Material Facts

In its Order denying Respondent's motion for a later hearing date, the Commission stated that "Respondent has not given the Commission any reason to depart from our preference to move Part 3 matters expeditiously."⁶ Despite this plain statement, Respondent asserts that the Commission failed to take into account every "new" fact that Respondent listed in its memorandum, namely: (1) Respondent's "pending" motion to amend the scheduling order;⁷ (2) Respondent's "pending" motion to change the hearing location and the uncertainty and expense it was presenting to party witnesses;⁸ (3) the pending dispositive motions before the Commission; (4) the "fact" that discovery was still ongoing; (5) Respondent's motion to compel discovery, denied by the ALJ the day before the Commission's Order; and (6) the ongoing discovery disputes between Respondent and Complaint Counsel.⁹

manifest injustice." In re Rambus Inc. No. 9302, 2003 FTC LEXIS 78, at *2 (May 29, 2003); see also In re Basic Research, Inc. No. 9318, 2006 FTC LEXIS 18, at *10-11 (Feb. 21, 2006); In re Evanston Northwestern Healthcare Corp. No. 9315, 2005 FTC LEXIS 177, at *3 (May 10, 2005).

⁶ Order Denying Expedited Motion for a Later Hearing Date, No. 9343, at 2 (Jan. 21, 2011) (Commission Interlocutory Order).

⁷ This motion was subsequently denied by the ALJ. See Order Denying Respondent's

Respondent's argument is unpersuasive. First, in its Order the Commission directly addressed Respondent's arguments regarding the pending dispositive motions, the motion to compel, and the ongoing discovery disputes.

Third, Respondent simply has not demonstrated that the Commission displayed a manifest failure to consider any law or fact in its Order, such as where the Court has partially misunderstood a party, or has made a decision outside the adversarial issues presented to the Court by the parties, or has made an error not of reasoning but of apprehension.

shown the Commission indisputably manifestly failed to take its facts into account, and any case has not shown that any lack of consideration might reasonably have altered the result.¹⁷

Finally, the two motions Respondent states were not directly addressed by the Commission, the (then) pending motion to change the hearing location and the (then) pending motion to modify the Scheduling Order, are no longer pending and thus this argument is moot. The ALJ denied both motions, and Respondent can prepare for the hearing with those facts in mind.

B. Respondent Has Not Identified Any New Material Fact that Affects the Commission's Order

Respondent wrongly argues that the ALJ's denial of Respondent's motion to compel and Respondent's attempts to have that decision reviewed by the Commission justify reconsideration.¹⁸ The fact that Respondent's challenge to the ALJ's decision denying Respondent's motion to compel occurred after the Commission's is irrelevant.

The Commission clearly ruled on this argument when it noted that the fact that discovery was ongoing . . . and [] Respondent's Motion For An Order Compelling Discovery [was] pending [did not] provide support for the requisite showing of good cause.¹⁹ The Commission considered and rejected the pendency of discovery disputes, whatever their procedural status, as good cause for delaying or denying interlocutory review for the exact

¹⁷ *In re Daniel Chapter One*, 2009 WL 569722, at *2.

¹⁸ Respondent's Memorandum in Support of Its Motion for Reconsideration, at 5.

¹⁹ Order Denying Expedited Motion for a Later Hearing Date, No. 9343, at 2 (Jan. 21, 2011) (Commission Order).

²⁰ In its motion for a new hearing date, Respondent clearly articulated its intended response to denial of Respondent's motion to compel or an unsatisfactory outcome to its

same issues still does not constitute good cause to alter the hearing date, and reconsideration will not change that fact.

III. CONCLUSION

Respondent has not demonstrated that the Commission should reconsider its Order. Worse, Respondent has merely rehashed the same arguments that the Commission has already considered and rejected, wasting its time and that of Complaint Counsel rather than preparing for the February 17th trial date. For this reason, as well as for the other reasons set forth in this Memorandum, Respondent's Motion for Reconsideration should be denied.

Respectfully submitted,

s/ Richard B. Dagen
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discovery disputes with Complaint Counsel. The State Board intends to pursue all remedies which it may avail itself so that it will not be prejudiced by Complaint Counsel's inadequate
