02 08 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**
	)	
NORTH CAROLINA BOARD OF DENTAL EXAMINERS,	)	**Docket No. 9343**
	)	
Respondent.	)	

COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENT'S APPLICATION FOR REVIEW TO THE COMMISSION OF THE ADMINISTRATIVE LAW JUDGE'S ORDER DENYING RESPONDENT'S MOTION TO COMPEL DISCOVERY

The Board's present application to the Commission was filed on February 2, 2011, one day after Judge Chappell's order of February 1, 2011, determined that the issues raised in this appeal were not qualified for interlocutory appeal pursuant to Rule 3.23(b).[1] But no Commission rule permits the Board to file an interlocutory appeal after the ALJ has found that the issues fail to satisfy one, let alone all three, of the requirements specified by Rule 3.23(b), 16 C.F.R. § 3.23(b) ("A party may request the Administrative Law Judge to determine that a ruling involves

[1] The Board filed its motion to compel discovery on January 11, 2011, and filed its Rule 3.22(g) statement separately on January 18, 2011. On that same date, January 18, 2011, Complaint Counsel filed its opposition to this discovery motion on the untimeliness of the motion and other grounds. On January 20, 2011, Judge Chappell entered an order denying the Board's discovery mo

a controlling issue of law or policy as to which there is substantial ground for difference of opinion and that an immediate appeal from the ruling may materially advance the ultimate termination of the litigation or subsequent review will be inadequate. . . . The party may file an application for review with the Commission within 1 day after notice that the Administrative Law Judge *has issued the requested determination* or 1 day after the deadline has passed for the Administrative Law Judge to issue a ruling on the request for determination and the Administrative Law Judge has not issued his or her ruling.") (emphasis added).

The Board flouts the Commission's rules and makes a mockery of the Commission's interlocutory appeal rule. The rules clearly do not permit an interlocutory appeal unless the ALJ concurs or the ALJ misses the deadline to issue an opinion. Neither of these events occurred.

Judge Chappell's Orders of January 20 and February 1, 2011, correctly held respectively that the motion to compel and application for interlocutory review were without merit. *See* Complaint Counsel's Opposition to Respondent's Motion for An Order Compelling Discovery (Jan. 18, 2011);[2] Complaint Counsel's Answer to Application for Review of Ruling Denying Respondent's Motion to Compel Discovery (Jan. 27, 2011).[3] Thus, even if Respondent could unilaterally change the Commission's rules to permit its current motion, the motion would fail on the merits.

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[2] Copy attached as Attachment A, also available at: http://www.ftc.gov/os/adjpro/d9343/110118nckwokacmpt.pdf.

[3] Copy attached as Attachment B, also available at: http://www.ftc.gov/os/adjpro/d9343/110127ccanswertoapp.pdf.

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
Richard B. Dagen
William L. Lanning
Michael J. Bloom
Melissa Westman-Cherry

Counsel Supporting the Complaint
Bureau of Competition
Federal Trade Commission
601 New Jersey Avenue, NW
Washington, DC 20580

Dated: February 8, 2011

Attachment A

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] request untRjEMC /TD /MCIcT6CID 23 cEMC9/P pan witt was spiriMfL15RUleL15RUleL1MCIcT6

Admission ("RFA") on October 22nd

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. *Basic 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.

Respondent's Catch-All Category. Request 14 is the only remaining Request that needs to be addressed; the others included by Respondent for insufficient detail have been addressed above. This Request is a prime example of Respondent's overreaching. Request 14 asks CC to:

> Admit that no current member of the Dental Board has teeth whitening business amounting to more than 5% of their business revenues.

CC admitted that this was true with respect to Board members Owens, Holland, Wester, and Morgan, the only members for whom CC had information, and could not admit or deny with

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[6] For example, Respondent's first RFA asks CC to admit Respondent's interpretation o
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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

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[8] from information derived from identified third party documents and files produced by Respondent. 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

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

[PROPOSED] ORDER DENYING RESPONDENT'S MOTION FOR AN ORDER COMPELLING DISCOVERY

I.

On January 11, 2011, Respondent, North Carolina Board of Dental Examiners ("Board" or "Respondent"), filed a Motion for an Order Compelling Discovery. On January 18, 2011, Complaint Counsel filed their Opposition to Respondent's Motion for an Order Compelling Discovery, containing two grounds: (1) the Motion was filed out of time, and (2) Complaint Counsel had adequately responded to Respondent's discovery demands.

For the reasons stated below, Respondent's motion is DENIED.

II.

The Scheduling Order set November 18, 2010, as the date by which all fact discovery should have been concluded. Paragraph 7 of the Scheduling Order advised counsel that the Court expected that, in the absence of extraordinary circumstances, all discovery matters, including motions to compel, would have been completed or filed by that date, or within a reasonable time thereafter.

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.

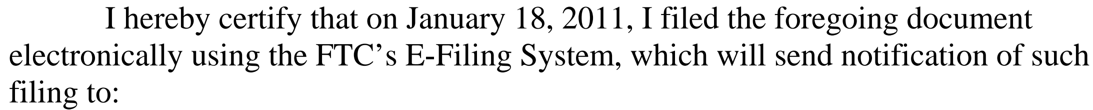
III.

For the above stated reason, Respondent's motion to compel is DENIED with prejudice.

ORDERED: ________________________________

D. Michael Chappell
Chief Administrative Law Judge

Date:



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:

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Allen & Pinnix, P.A.
333 Fayetteville Street
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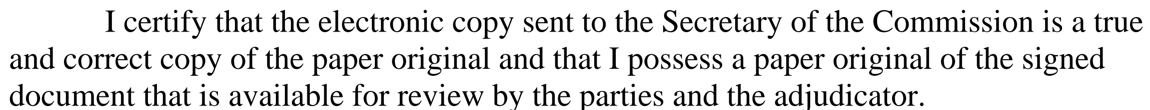
nla@Allen-Pinnix.com

Counsel for Respondent
North Carolina State Board of Dental Examiners



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.

January 18, 2011 By: s/ Richard B. Dagen
Richard B. Dagen

Attachment B

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 Corp2002 WL 31433937, at *8 (F.T.C. Feb. 12, 2002) (quoting the Commission's interlocutory order i Commssio393the Adm Td [(expeditint.)Tj EM failesoitic(i)-1p393civv

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 Untimely Discovery Dispute Does Not Qualify for Interlocutory 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 Application 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.

Review of the Court's Decision on a Non-Extraordinary Discovery Application Will Hinder the Fair and Efficient Disposition of this Litigation on the Merits.

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
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 27, 2011

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

)

In the Matter of

<u>CERTIFICATE OF SERVICE</u>

I hereby certify that on January 27, 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

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.

January 27, 2011 By: ________________

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	)	
	)	
NORTH CAROLINA BOARD OF DENTAL EXAMINERS,	)	**Docket No. 9343**
	)	
Respondent.	)	

[PROPOSED ORDER] DENYING RESPONDENT'S APPLICATION FOR REVIEW TO THE COMMISSION OF THE ADMINISTRATIVE LAW JUDGE'S ORDER DENYING RESPONDENT'S MOTION TO COMPEL DISCOVERY

The Board's application for interlocutory Commission review of Judge Chappell's denial of its discovery order on January 20, 2011, was filed on February 2, 2011, one day after Judge Chappell's order of February 1, 2011, denying that Respondent's discovery issues qualified for interlocutory review under Rule 3.23(b), 16 C.F.R. § 3.23(b). Complaint Counsel filed its opposition to this application on February 3, 2011, on the grounds that the Board's application is contrary to Rule 3.23, and otherwise without merit.

It is clear under our rules that the administrative law judges ("ALJ") serve as gate-keepers, vested with broad discretion, to insure that administrative trials do not become bogged down with dilatory motion practice and premature appellate reviews by the Commission. Absent a clear abuse of discretion, clearly not the case here, the Commission has a long-established policy of not entertaining interlocutory appeals concerning routine discovery matters or other pretrial housekeeping details with respect to matters pending before our ALJs. *See*

Bristol-Meyers Co., 90 F.T.C. 273, 273 (FTC Oct. 7, 1977) ("Further, any perception on the part of our administrative law judges that the Commission will exercise broadly its undisputed authority to review interlocutory rulings will tend toward the atrophy of their sense of responsibility for the impact of their rulings on the proceedings before them."). Judge Chappell, in his discretion, denied the Rule 3.23(b) certifications necessary for this interlocutory appeal to the Commission by his order of February 1, 2011. Accordingly, the Commission finds that the Board's application was improvidently filed.

IT IS ORDERED THAT the Board's application for interlocutory Commission review of certain discovery matters be, and it hereby is, **DISMISSED.**

By the Commission, Commissioner Brill recused.

Donald S. Clark
Secretary

SEAL.
ISSUED: