

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of)
)
SOUTH CAROLINA STATE BOARD OF DENTISTRY)
)
Respondent.)
_____)

Docket No. 9311

SCHEDULING ORDER

I. PROCEDURAL BACKGROUND

The Complaint in this matter was issued by the Commission on September 12, 2003. In the Complaint, the Commission stated: “[p]ending further order of the Commission, the Commission will retain adjudicative responsibility for this matter.” Complaint at 7. On July 28, 2004, the Commission issued its Order Denying Motion to Dismiss on State Action Grounds, Holding in Abeyance Motion to Dismiss on Mootness Grounds, Retaining Jurisdiction, and Referring Mootness Issues to an Administrative Law Judge. In that Order, the Commission directed “Chief Administrative Law Judge Stephen J. McGuire or his designee to conduct a limited inquiry and the preparation of an initial decision on the issue of whether there is a reasonable likelihood that the conduct challenged by the Complaint will recur.” Order at 1. In the Opinion and Order of the Commission, the Commission “refer[red] this matter to the administrative law judge for limited discovery for ninety (90) days and an initial assessment of the likelihood that the Board may engage in future unlawful conduct under the 2003 statute.” Opinion at 36. The Commission further directed:

In particular, the Commission requests that the administrative law judge make findings of fact and resolve the context and significance of the Board’s March 2003 meeting and the Board’s October 2003 Resolution. We leave to the administrative law judge’s discretion whether to hold a hearing or to request a briefing to assist the Commission in resolving the Board’s mootness defense. Apart from this limited referral, we retain jurisdiction over this matter.

Opinion at 36.

Respondent filed a Petition for Review of the Commission's Order with the United States Court of Appeals for the Fourth Circuit and, subsequently, a Petition for a Writ of Certiorari with the United States Supreme Court. By Order dated August 9, 2006, the Commission ordered that all discovery and other proceedings before the Chief Administrative Law Judge be stayed until the Supreme Court finally disposes of this matter. On January 16, 2007, the Supreme Court denied Respondent's petition for writ of certiorari and on January 23, 2007, Respondent notified the Chief Administrative Law Judge that it does not intend to seek a rehearing of the Supreme Court's denial. Accordingly, this action will now proceed as set forth below.

The parties have now submitted a proposed scheduling order, noting the few instances where they were unable to reach agreement. Based on the Commission's directive and the proposal submitted by the parties, the following schedule and additional provisions are hereby ordered.

II. SCHEDULE

- | | |
|-------------------|---|
| February 21, 2007 | Exchange preliminary affiant lists with description of proposed testimony. |
| April 9, 2007 | Exchange final affiant lists, including rebuttal fact affiants, with description of proposed testimony. |
| April 10, 2007 | Deadline for issuing document requests, requests for admission, interrogatories, and subpoenas, except for discovery for purposes of authenticity and admissibility of exhibits. |
| April 17, 2007 | Status report due and, if requested, conference with Administrative Law Judge. |
| April 30, 2007 | Close of discovery. |
| May 2, 2007 | Deadline for a party to request an evidentiary hearing. If such a request is granted, the parties will submit within five business days of the Administrative Law Judge's determination a proposed revised scheduling order with new provisions to reflect the additional procedures that accompany evidentiary hearings and the need for extending deadlines for submission of briefs and proposed findings of fact. No party may present testimony from any person whose name does not appear on either party's final affiant list due April 9, 2007. |
| June 4, 2007 | Parties shall file briefs, proposed findings of fact, affidavits, and other supporting evidence. The parties shall provide notice to the opposing party and all non-parties of the submission of any confidential and |

restricted confidential information pursuant to 16 C.F.R. § 3.45(b).

June 18, 2007

Parties shall file reply briefs, proposed findings of fact, and supporting evidence. The parties shall provide notice to the opposing party and all non-parties of the submission of any confidential and restricted confidential information pursuant to 16 C.F.R. § 3.45(b). Parties shall advise whether they wish to present oral argument to the Administrative Law Judge.

III. ADDITIONAL PROVISIONS

1. Pursuant to the Commission's Order and Opinion, July 28, 2004, discovery is limited to: "the mootness issues raised by Respondent's Motion to Dismiss" (Order at 2); "the issue of whether there is a reasonable likelihood that the conduct challenged by the Complaint will recur" (Order at 1); "the likelihood that the Respondent may engage in future unlawful conduct under the 2003 South Carolina statute" (Order at 2); and "the context and significance of the Board's March 2003 meeting and the Board's October 2003 Resolution" (Opinion at 36).
2. Pursuant to 16 C.F.R. § 3.21(c)(2), extensions or modifications to deadlines will be made only upon a showing of good cause.
3. For all papers that are required to be filed with the Office of the Secretary, the parties shall serve two courtesy copies on the Administrative Law Judge by hand by 5:00 p.m. on the designated date. For papers that are not required to be filed with the Office of the Secretary (including discovery requests and responses, see 16 C.F.R §§ 3.31(b), 3.35, and 3.37), the parties shall not serve courtesy copies on the Administrative Law Judge, unless specifically requested by the Administrative Law Judge.
4. The parties shall serve each other by electronic mail unless the service cannot be made electronically, in which case service shall be by courier or overnight delivery. Service shall be accomplished by 5:00 p.m. Service accomplished after 5:00 p.m. shall be considered as served the next business day. Service by electronic mail shall be followed promptly by delivery of a courtesy copy through one of the methods in 16 C.F.R. § 4.4(b). Deliveries shall be made as follows:

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5. All pleadings that cite to unpublished opinions or opinions not available on LEXIS or WESTLAW shall include such copies as exhibits.
6. Aside from joint motions, each motion shall be accompanied by a signed statement representing that counsel for the moving party has conferred with opposing counsel in an effort in good faith to resolve by agreement the issues raised by the motion and has been unable to reach such an agreement. Motions that fail to include such statement may be denied on that ground.
7. All motions must attach a draft order containing the proposed relief. All such attachments must be titled "Proposed Order," instead of simply "Order." In no event shall a party file a pleading that is titled "Order."
8. Memoranda in support of, or in opposition to, any non-dispositive motion shall not exceed 10 pages, exclusive of attachments.
9. If papers filed with the Office of the Secretary contain *in camera* or confidential material, the filing party shall mark any such material in the complete version of their submission


with **{bold font and braces}**. 16 C.F.R. § 3.45. Parties shall be aware of the rules for filings containing such information, including 16 C.F.R. § 4.2.

10. Each party is limited to 20 document requests, 20 interrogatories, and 20 requests for admission, except that there shall be no limit on the number of requests for admission for authentication and admissibility of exhibits. There is no limit to the number of sets of discovery requests the parties may issue, so long as the total number of each type of discovery request, including all subparts, does not exceed these limits. Additional discovery may be permitted only for good cause upon application to and approval by the Administrative Law Judge.
11. Responses and objections to document requests and interrogatories shall be due within 20 days of service, unless the parties agree otherwise. Responses and objections to requests for admission shall be due within 10 days of service, unless the parties agree otherwise. Each response and/or objection to each discovery request shall be preceded by the specific discovery request to which the answer pertains.
12. The deposition of any person may be recorded by videotape, provided that the deposing party notifies the deponent and all parties of its intention to record the deposition by videotape at least five days in advance of the deposition.
13. The parties shall serve upon one another, at the time of issuance, copies of all subpoenas *duces tecum* and subpoenas *ad testificandum*. For subpoenas *ad testificandum*, the party seeking the deposition shall consult with the other parties before the deposition date is scheduled.
14. Non-parties shall provide copies or make available for inspection and copying of documents requested by subpoena to the party issuing the subpoena. The party that has requested documents from non-parties shall provide copies of the documents received from non-parties to the opposing party within five business days of receiving the documents. No deposition of a non-party shall be scheduled between the time a non-party provides documents in response to a subpoena *duces tecum* to a party, and three days after the party provides those documents to the other party except by stipulation of the parties, unless a shorter time is required by unforeseen logistical issues in scheduling the deposition, or if a non-party produces those documents at the time of the deposition as agreed to by all parties involved.
15. Any motion to compel responses to discovery requests shall be filed within five days of impasse if the parties are negotiating in good faith and are not able to resolve their dispute.
16. All affiant lists shall represent counsels' good faith designation of all potential affiants from whom counsel reasonably expects it may submit an affidavit in support of its brief

and proposed findings of fact. Affidavits submitted in support of briefs and proposed findings of fact may not include additional affiants not listed in the final affiant lists previously exchanged, unless by order of the Administrative Law Judge upon a showing of good cause, or by agreement of the parties.

17. Affidavits shall set forth such facts as would be admissible into evidence and shall show that affiant is competent to testify to the matters stated therein. 16 C.F.R. § 3.24(a)(3). Proposed findings of fact shall contain references to supporting material.
18. No expert discovery or testimony will be allowed.
19. Complaint Counsel's exhibits shall bear the designation CX and Respondent's exhibits shall bear the designation RX or some other appropriate designation. Both sides shall number the first page of each exhibit with a single series of consecutive numbers. When an exhibit consists of more than one piece of paper, each page of the exhibit must bear a consecutive control number or some other consecutive page number.

ORDERED:


Stephen J. McGuire
Chief Administrative Law Judge

Date: January 30, 2007